

THE SUPPRESSION OF ILLICIT DRUGS THROUGH INTERNATIONAL LAW

VOLUME TWO

By Neil Brett Boister, BA, LLB, LLM.



Thesis submitted to the University of Nottingham for the degree of Doctor of
Philosophy, October 1998.

CHAPTER FIVE: ENFORCEMENT

5.1 Introduction

This chapter, the second dealing with procedural aspects of the international illicit drug control system, focuses on its enforcement provisions, that is, those dealing with the policing and prosecuting of drug offenders. It deals both with enforcement that remains purely domestic and the extension of enforcement action beyond national boundaries.

Territorial enforcement, although legally uncomplicated as it is an exercise of domestic sovereign power, is an area of international concern because at the national level drugs policing not only suffers from a lack of co-ordination, it suffers from all the problems of modern policing. Disorganised, poorly trained, poorly paid and poorly motivated enforcement officers are no match for the well organised, often well rewarded, highly motivated and corruptive illicit traffic. International intervention to reorganise national policing focuses on training and organisation, attempting to centralise or co-ordinate internal enforcement organs and provide national police forces with the expertise to deal with their own drug problems. The thrust of international intervention is, however, to enable national police forces to co-operate internationally through the creation of a uniform approach domestically to drugs policing.

Extraterritorial enforcement presents the international drug control system with its biggest problem. To be effective in pursuit of a policy of supply reduction in a system where policing is national, international enforcement of drug law encroaches upon state sovereignty because it involves extraterritorial action. A state exerting extraterritorial jurisdiction, for instance, faces serious evidentiary problems since the witnesses and the evidence necessary to establish the offence committed in another state is likely to be in the other state's territorial jurisdiction. As Nadelmann puts it:

A state can claim extraterritorial effect for its criminal laws, but it is hard-pressed to directly enforce those laws beyond its borders. The sovereign power of states generally forecloses police action by one state in the territory of another.¹

¹ Nadelmann EA *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (1993) at 5.

From a jurisdictional point of view, in the absence of consent no state may directly enforce its law within the territory of another state. Unilateral enforcement action by one state in the territory of another is a violation of territorial sovereignty and of customary international law.² This principle is clearly articulated in article 2 of the 1988 Convention, which asserts the principle of non-intervention in the domestic affairs of other states in article 2(2), and continues by prohibiting in article 2(3) any party from undertaking

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.

Thus international law enforcement requires international co-operation. Interpol stated before the 1961 Convention that the essentials of effective international drug enforcement co-operation are: co-ordination of preventive action at the national level, direct co-operation between the agencies responsible for co-ordination, and the speediest possible transmittal of legal papers required for prosecuting offenders.³

At the international level, enforcement co-operation is difficult to both agree upon in principle and difficult to implement.⁴ State practice has varied. At the tactical level enforcement methods preferred by some - recruitment of informants and plea-bargaining for information - are frowned upon by others.⁵ At the strategic level, those states heavily committed to supply reduction have reached beyond their boundaries and outside international law to enforce their laws. They have cajoled those with little interest in supply reduction to join in, but have struggled with states that have provided national sanctuaries for the production of drugs, for the investment of illicitly gained funds and for the refuge of wanted offenders.⁶ They have had to face the problem of obtaining information and evidence extraterritorially, whether for the purpose of

² Gilmore WC 'Introduction' in Gilmore WC (ed) *Mutual Assistance in Criminal and Business Regulatory Matters* (1995) xi at xii.

³ UN Doc. E/CONF.34/1 ad draft article 44 of the 1961 Convention comparing it unfavourably with the 1936 Convention.

⁴ See, for example, Benyon J, Turnbull, L, Willis A, Woodward, R 'Understanding police co-operation in Europe: setting a framework for analysis' in Anderson M and Den Boer M (eds) *Policing Across National Boundaries* (1994) 46 at 49.

⁵ Nadelmann EA 'The role of the United States in the international enforcement of criminal law' (1990) 31 *Harvard ILJ* 37 at 49 referring to US versus civil law state practice.

identifying a particular substance through analysis, or using joint operations to discover the *modus operandi* and identity of traffickers through controlled deliveries, or the location of assets and their confiscation - just some of the aspects of modern international drugs policing.⁷ Police forces do co-operate. They do exchange useful information, such as information from witnesses, directly. Direct co-operation is seen as a useful method to avoid the political hurdles mostly related to sovereignty that must be negotiated by diplomats and politicians, but not necessarily by policemen. As Nadelmann comments:

The common sentiment that a cop is a cop no matter whose badge he or she wears, and that a criminal is a criminal no matter what his or her citizenship is or where the crime was committed, serves as a kind of transgovernmental value system overriding political conflicts between governments. It provides, in many ways, the oil and the glue of international law enforcement.⁸

But it is not easy to formalise informality, and such direct contact bypasses traditionally powerful figures in criminal justice and government bureaucracies, causing resentment at loss of control. Problems are also created by national differences. Normally foreign police are able to obtain and transfer only as much evidence as a local police agency may obtain, that is, only as much evidence as the holder is willing and able to surrender. Couple this with the absence of a duty to co-operate, and police forces wishing to gather evidence abroad have a problem that cannot be solved by contacting witnesses and document holders directly as they are under no obligation to help. Imposition of a legal obligation in the information and evidence gathering process abroad relies usually on strict legal formality. Thus the co-operation obtained and the method by which it is obtained depends upon the organisation requesting assistance and the phase of the criminal process which is involved. If it is the police or customs or a similar agency requiring operational assistance, that is, some form of non-compulsory assistance, then the assistance is usually obtained by operational networking. But if it is the executive or judicial branches requiring formal mutual assistance, that is, some form of compulsory power to be exercised by the requested state, then formal requests for assistance are

⁶ See Bruun K, Pan C, Rexed I *The Gentlemen's Club* (1975) at 276.

⁷ McClean D *International Judicial Assistance* (1992) at 174.

required.⁹ Thus in practice, there has been a split in the mechanisms used for operational policing co-operation and more formal legal assistance mechanisms both at the bilateral and multilateral levels. Judicial orders, search and seizure orders, service of process and arrests of suspects have all required a high degree of formality to overcome the problems associated with applying the criminal law of one state in another. Letters rogatory involve a judicial officer in one state making a request to a judicial officer in another state to supply public/private records and/or actual testimony within the territory or control of the second state. They suffer from being time consuming because they must be issued by judicial authorities and because of they must be transmitted through diplomatic channels. They must also satisfy exacting foreign legal requirements, viz.: they may not be available in respect of a particular offence; the issuing agency may not be recognised (prosecuting authorities in common law states are not recognised as having sufficient authority by civil law states which insist such letters have judicial approval); and they may not overcome bank secrecy or similar restrictions on the production of evidence.¹⁰ Letters rogatory have proved inadequate to the demands of extraterritorial law enforcement against drug traffickers by the United States, and are fast giving way to the more informal more expeditious purely administrative requests sanctioned by Mutual Legal Assistance Treaties (MLATs).¹¹ The idea is to expedite the process of investigation and prosecution, and MLATs have been concluded to encourage international co-operation in respect of all the facets of enforcement work. MLATs overcome the problem of non-recognition in civil law states of requests made by prosecutors in common law states through letters rogatory by resorting to central authority mechanisms that play a substantive role in making, receiving and executing

⁸ Nadelmann *op cit* (1993) at 201.

⁹ Gilmore *op cit* (1995) at xiv.

¹⁰ See Knapp J 'Mutual legal assistance treaties as a way to pierce bank secrecy' (1988) 20 *Case Western Reserve ILJ* 405 at 409-410.

¹¹ See generally Coggins P, Roberts WA 'Extraterritorial jurisdiction: an untamed adolescent' (1991) 17 *CLB* 1391 at 1401-1402. 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 at 74-79 points out further weaknesses of using letters rogatory including their cost and the fact that some states would not allow them to be used for police investigations. Because of the inefficiency of letters rogatory the US resorted to unilaterally i) compelling defendants in drug trafficking cases to sign a consent form releasing foreign banks from secrecy obligations, and ii) enforcing court subpoenas on foreign banks with local branches to provide the required information. Obviously from the point of view of international relations, neither method is desirable, and Gilmore WC 'International action against drug trafficking: trends in United Kingdom law and practice through the 1980's' (1991) 17 *CLB* 287 at 295 notes that many states considered such unilateral actions by the US as violations of international law.

requests. Moreover, MLATs have the advantage of being treaty based rather than relying on comity.

This chapter examines the provisions in the international drug control conventions that try to address some of these problems with enforcement. It looks first at the convention provisions for enforcement co-operation both in a general sense and in the sense of mutual legal assistance,¹² then it goes on to look at the provisions for more specific enforcement methods.

5.2 Drug enforcement co-operation in international law

5.2.1 Introduction

This section examines the provisions in the drug conventions for enforcement co-operation within and among Parties. These provisions have been generated by the perception that efforts to suppress drug trafficking are weakened by both the independence of different enforcement organs within states and the independence of the enforcement organs of different states. Co-ordination of enforcement organs at the national level and co-operation of enforcement organs at the international level are regarded as the principal methods for enhancing the effectiveness of drug enforcement. Centralisation of control at the national level is considered the best method to achieve national co-ordination and international co-operation.¹³ This implies centralisation of supervision over investigations and prosecutions, and centralisation of all information relating to the suppression of drug trafficking. An efficient information network coupled with centralised enforcement control, makes international enforcement co-operation possible.

¹² Many of these provisions could well be categorised with the procedural provisions discussed in chapter four, but as investigation, prosecution and adjudication are so entwined in enforcement co-operation they have been dealt with here.

¹³ *1961 Commentary* at 415.

5.2.2 Enforcement co-operation in the 1961 Convention

5.2.2.1 The nature of the obligation in article 35

In order to make it more acceptable than the 1936 Convention,¹⁴ the drafters of the 1961 Convention diluted the provisions for operational co-operation in article 35, entitled 'Action Against the Illicit Traffic'. Article 35 is qualified by its introductory paragraph which reads:

Having due regard to their constitutional, legal and administrative systems the parties shall,

Chatterjee submits that this means a Party is not under an obligation to implement the provisions of article 35 if they are incompatible with its constitutional, legal and/or administrative system.¹⁵ However, the *1961 Commentary*, pointing to the difference between 'having due regard' used here, and 'subject to', used in the qualification of article 36 paragraphs 1 and 2, submits that the introductory paragraph of article 35 was not intended to free Parties from article 35's obligations but that it is intended to indicate 'the freedom of Parties to choose for the execution of the provisions of article 35 such administrative arrangements, procedures and methods as are in conformity with their constitutional, legal or administrative systems, that is, having 'due regard' to these systems.'¹⁶ The *1961 Commentary's* submission is supported by the wording of the provision and by the fact that such clauses which serve to inter alia protect federal constitutional arrangements must leave the essence of the obligation intact. But, as Chatterjee points out, constitutional, legal and administrative compatibility is in any event secondary to the practical capacity of national enforcement systems to implement the obligations in article 35.¹⁷

¹⁴ Article 44(1) and (2) make the more exacting provisions of the 1936 Convention available should a Party so choose.

¹⁵ Chatterjee SK *Legal Aspects of International Drug Control* (1981) at 444. It was felt necessary to mention 'administrative systems' because paragraphs (b) and (c) of draft article 44 dealt with criminal justice administration - see *1961 Records* vol.II at 259 generally.

¹⁶ At 416-7.

¹⁷ *Op cit* at 444.

5.2.2.2 National enforcement co-ordination in the 1961 Convention

Article 35(a) provides that the Parties shall:

...

(a) Make arrangements at the national level for co-ordination of preventive and repressive action against the illicit traffic; to this end they may usefully designate an appropriate agency responsible for such co-ordination;... .

Article 35(a) obliges Parties to provide for national co-ordination of 'preventive and repressive action'. 'Preventive action' is limited to measures concerned directly with the illicit traffic,¹⁸ but compared with 'repressive action', such action must include policing of drugs in the widest sense and drug research. The action envisaged includes continuous co-operation and exchange of information in order to deal effectively with illicit trafficking. The *1961 Commentary* gives as examples of such action

the maintenance of lists of suspected traffickers, the communication of information regarding the methods used by traffickers to conceal and to transport drugs, the purchase of police equipment needed for the campaign against the illicit traffic, arrangements to facilitate the common use of such equipment by different police units and the training of enforcement officers.¹⁹

Alternative measures such as treatment of abusers are part of the repressive process, and it is submitted that these measures would have to be included in the actions to be co-ordinated.²⁰ The use of the terms 'preventive and repressive' implies that the activities of these agencies must not be purely administrative, they must have an enforcement aspect.²¹

Article 35(a) is not specific about the organs whose actions are to be co-ordinated nationally because of their dissimilarity from Party to Party and the different constitutional, legal and administrative systems prevailing within Parties. Clearly, however, the object of this provision is the co-ordination of drugs policing within states,

¹⁸ *1961 Commentary* at 418-9.

¹⁹ *1961 Commentary* at 418.

²⁰ But *contra* see the *1961 Commentary* at 418.

²¹ See the comments of the Interpol representative - *1961 Records* vol.II at 255.

especially in situations where there is no national police force and policing is the function of sub-national entities, but also where a national police force does exist but sub-national police forces are not subject to its authority.²² Thus the organs co-ordinated may include specialised drug enforcement agencies, the national police, the local police, the excise authorities and personnel not directly involved in enforcement such as scientists specialising in drugs,²³ as well as therapists in drug usage treatment programmes.

The nature of the mechanism used to co-ordinate is prescribed by article 35(a) only to the extent that it must be 'appropriate' to the purpose of 'preventive and repressive action against the illicit traffic'. Thus it must have enforcement functions, but may have other functions.²⁴ The nature of the co-ordinating mechanism will also depend on the particular Party's constitutional, legal and administrative system. It may take various forms. It may be a system of liaison among enforcement and other concerned organs, or a periodic joint meeting of governmental departments responsible for such organs, or a permanent inter-ministerial committee, or a special organ charged solely with co-ordination.²⁵ Through the terms 'may usefully', article 35(a) leaves it to the discretion of the Parties as to whether or not to designate an 'agency' with the task of co-ordination. Such an 'agency' need not be created specifically for co-ordination; it need only be 'appropriate' and may thus be constituted, as is common practice, by an existing government department or by an interdepartmental committee. The *1961 Commentary* suggests that a 'central office' along the lines of that set out in the 1936 Convention would most usefully acquit this task.²⁶ Article 35(a)'s special provision for an agency for co-ordinating enforcement action must be seen against article 17's general obligation that:

²² *1961 Commentary* at 417.

²³ See Chatterjee *op cit* at 434.

²⁴ For this reason the 1961 Conference used the term 'appropriate agency' in preference to 'enforcement agency' - see *1961 Records* vol.II at 41. As an example, Pakistan's Narcotics Control Board (PNCB), created in 1973, is a department of Pakistan's Ministry of the Interior. As the primary federal drug agency in Pakistan, it is involved in all aspects of drug control, including law enforcement, crop substitution, and treatment and rehabilitation of addicts. It is also the co-ordinating mechanism for UN drug related aid programmes - see generally Murphy JW 'Implementation of international narcotics control: the struggle against opium cultivation in Pakistan' (1983) 6 *Boston College Int. and Comp. LR* 199 at 228-229.

²⁵ *1961 Commentary* at 418.

²⁶ *1961 Commentary* at 418 referring to articles 11 and 12 of the 1936 Convention.

The Parties shall maintain a special administration for the purpose of applying the provisions of the Convention.

As it is concerned with co-ordination of the work of the various national agencies involved in drug control, the special administration under article 17 may be the same one envisaged by article 35(a), but this is not required by the 1961 Convention.²⁷ Such a 'special administration' may imply a group of national agencies responsible for applying the 1961 Convention as a whole.²⁸ One of these agencies may be the optional agency envisaged by article 35(a). The setting up of such an agency is discretionary because in 1961 many states did not have a single body to co-ordinate action. For this reason the qualification seriously weakens the 1961 Convention's provisions for enforcement, particularly when the Party in question had no national police force and measures against the same kinds of offences were being taken by several distinct agencies.²⁹ Moreover, because national co-ordination is an almost essential prerequisite of international co-operation, this qualification seriously undermines the effectiveness of the rest of article 35. Nonetheless, in practice, such central agencies have been set up.³⁰

5.2.2.3 International enforcement co-operation in the 1961 Convention

Article 35, paragraphs (b), (c) and (d) are special provisions relating to international co-operation. They provide that the Parties shall:

...

(b) Assist each other in the campaign against the illicit traffic in narcotic drugs;

²⁷ Under articles 15 and 11 of the 1936 Convention one central organisation was responsible for all these tasks. An attempt to combine the articles at the 1961 Conference was abandoned - *1961 Records* vol.I at 122 and vol.II at 40-1, 249-253.

²⁸ See *1961 Records* vol.II at 253 generally, and the 'Report of the Joint ad hoc Committee on Articles 25 and 44 of the Third Draft' - *1961 Records* vol.II at 278 fn87.

²⁹ See the remarks of the Interpol delegate - *1961 Records* vol.II at 249.

³⁰ Cagliotti CN 'The role of the South American Agreement on Narcotic Drugs and Psychotropic Substances in the fight against illicit drug trafficking' (1983) 35 *Bulletin on Narcotics* 83 at 93 lists existing national co-ordinating agencies in South America, including Argentina's National Committee on Drug Addiction and Narcotic Drugs (CONATON), Bolivia's National Council for the Control of Drug Traffic, Brazil's Federal Council on Narcotic Drugs, Colombia's National Council on Narcotic Drugs, Ecuador's Inter-Institutional Committee for the Co-ordination of Activities for the Control of the Illicit Narcotic Drug Traffic, Peru's Multi-sectoral Committee for Drug Control (COMUCOD) and Venezuela's Committee Against Drug Abuse (CCUID). The UN Secretary General has published a list of competent national authorities under all of the drug conventions - *Competent National Authorities under the International Drug Control Treaties* UN Doc ST/NAR.3/1993/1.

(c) Co-operate closely with each other and with the competent international organisations of which they are members with a view to maintaining a co-ordinated campaign against the illicit traffic;

(d) Ensure that international co-operation between the appropriate agencies be conducted in an expeditious manner;

Article 35(b) requires that the Parties provide mutual assistance to each other in the suppression of drug trafficking, while article 35(c) requires that the Parties co-operate with each other and with the relevant international drug control organs in this regard. Chatterjee queries why the drafters of the Convention chose to include such synonymous phrases as 'assist each other' and 'co-operate closely' in article 35(b) and (c) in the same article.³¹ The *1961 Commentary* explains that article 35(b) provides for a general obligation on the Parties to co-operate in the fight against illicit trafficking, while article 35(c) applies this general co-operation to a particular facet of the fight, viz.: to the need to maintain 'a co-ordinated campaign against the illicit traffic,' something which experience has shown requires a permanently organised international structure that includes other Parties and international drug control organs.³²

Neither article 35(b) nor (c) specifies the content of such international co-operation against the illicit traffic. The *1961 Commentary* is hesitant to submit that there is an obligation on Parties to provide technical assistance to other Parties to fight the illicit traffic, although it feels that rendering such assistance is in the spirit of article 35(b) and (c).³³ It does submit that Parties are as a result of the obligation to co-operate

bound to make all efforts within their power to prevent their territory from becoming a base of operation of the illicit traffic in other countries, or a place of refuge of drug smugglers.³⁴

³¹ *Op cit* at 435.

³² *1961 Commentary* at 419.

³³ *1961 Commentary* at 420-1.

³⁴ *1961 Commentary* at 421.

Parties appear to be under an obligation to maintain a system of general enforcement assistance which would include sharing enforcement intelligence, assisting in preparation for investigation and prosecution, assisting in preparation for an extradition request,³⁵ assisting in the training of other Party's enforcement agents in new enforcement techniques and sharing scientific or therapeutic knowledge which may impact on enforcement. In practice, Parties have based mutual legal assistance on article 35(b),³⁶ international seminars for the training of enforcement agents have taken place³⁷ and regional training centres have been set-up.³⁸

In article 35(c) the expression 'competent international organisations' must be taken to mean the non-governmental, inter-governmental and international organisations operating in the field of international drug control. The drafters of the 1961 Convention had in mind the specialised agencies of the UN and non-governmental agencies such as Interpol.³⁹ Chatterjee submits, that the UN as a whole is included since the CND and INCB are only subordinate bodies of ECOSOC.⁴⁰

³⁵ Linke R, Epp HJ, Kabelka E *Extradition for Drug Related Offences* (1985) at 8 explain that any state making the decision to extradite can only do so if it has been informed about the relevant facts (arrest of offender, his identity and nationality, the seizure of drugs etc.) by the state in which he has been found. The arresting state customarily will formally invite states having jurisdiction over the offence to request extradition. They opine at 9 that all this information including the formal invitation to extradite corresponds to the obligations to co-operate in article 35(b) and (c) of the 1961 Convention, and this information should be exchanged expeditiously to speed up the extradition process.

³⁶ See, for example, the Exchange of Notes between the United Kingdom and the United States Concerning Co-operation in the Suppression of the Unlawful Importation of Narcotic Drugs into the United States 1982 UKTS 8 Cmnd 8470. The Exchange of Notes, which mentions the 1961 Convention in its preamble, permits US authorities to board and search for drugs British vessels on the high seas in the Gulf of Mexico, the Caribbean and Eastern Seaboard. If drugs are found the vessels may be seized, taken to the US where the drugs are liable to forfeiture and the crew to stand trial - see Siddie J 'Anglo-American co-operation in the suppression of drug smuggling' (1982) 31 *ICLQ* 726-747. Another concrete example is *R v Crown Court at Southwark, ex parte Customs and Excise Commissioners; R v Crown Court at Southwark, ex parte BCCI* [1989] 3 AllER 673 where a reviewing court quashed conditions attached to a production order made in terms of section 27 of the Drug Trafficking Offences Act, 1986 which prevented clients' files (including General Manuel Noriega of Panama) seized by customs investigators into the Bank of Commerce Credit and Industry (BCCI) money laundering scandal leaving the Southwark Crown Court's jurisdiction without its permission. The review court noted that the UK was a party to the 1961 Convention and held that in terms of the UK's obligations under article 35 to co-operate with other Parties in the international fight against the drug traffic, such information must be available to officials in the US investigating the BCCI.

³⁷ For example, Cagliotti *op cit* at 92 refers to the Second Latin American Training Seminar for Instructors in the Fight Against Drug Abuse and Illicit Traffic held in Peru in 1984 under the auspices of the South American Agreement on Narcotic Drugs and Psychotropic Substances (ASEP). Assisted by the UN, eleven South American states sent participants who were lectured by experts from various national police forces and international drug control organs.

³⁸ Yodmani C 'The role of the Association of South East Asian Nations in fighting illicit drug traffic' (1983) 35 *Bulletin on Narcotics* 97 at 99 notes that ASEAN set up a regional training centre for anti-drugs law enforcement in Thailand in 1979.

³⁹ See the statements of the Yugoslavian, Polish, Turkish and French delegates - 1961 *Records* vol.II at 254. There was some dispute at the 1961 Conference over whether the provision only requires Parties to

Article 35(d) provides that Parties are under an obligation to ensure international co-operation is conducted expeditiously between 'appropriate agencies'. Read with article 35(a), it may appear that Parties are required to ensure international co-operation between their 'appropriate agencies' only if they have opted to create such an agency. But the *1961 Commentary* submits that the terms do not have the same meanings in both article 35(a) and (d) and that in terms of article 35(d) the Parties are obliged to engage in international co-operation with any of another Party's government services that is dealing with a problem of the illicit traffic, whatever its form.⁴¹ The emphasis here is on two things: i) the expeditious communication of information between the co-operating services of different Parties; and (ii) the giving of urgent attention to the request by the service once it has been received. The method and route of communication is not specified, but it appears that international co-operation between the services must be routed according to the constitutional, legal or administrative systems of the Parties. One of Interpol's major objections to the draft article 44 that became article 35 was that it made no provision for the direct international co-operation between enforcement agencies.⁴² Attempts to provide expressly for such direct co-operation were rejected; as the Yugoslavian delegate noted, 'the different administrations in Yugoslavia could not communicate direct with foreign administrations; that was done through the Ministry of Foreign Affairs.'⁴³ But this does not preclude direct co-operation. The *1961 Commentary* suggests that where direct correspondence is compatible with the systems of the Parties concerned it would be an expeditious manner of co-operation. Such direct correspondence and personal correspondence make for

co-operate with international organisations of which they are members. It was argued that co-operation between a Party which is not a member of the UN and UN drug control organisations is not required by the provision on the basis that no Party should be required to co-operate with an organisation to which it does not belong - see *1961 Records* vol.II at 255. The Executive Secretary of the Conference submitted, however, that article 35(c) does oblige non-UN members to co-operate with the UN and its organs - see *1961 Records* vol.II at 254. The *1961 Commentary* at 420 understandably supports this view and seeks to reinforce it by reference to article 5 which obliges all Parties to recognise the UN's competence in international drug control. Although the UN is in a special position and Parties while not obliged to co-operate with other organisations of which they are not members may be obliged to co-operate with it through their general contractual obligation under the 1961 Convention, whether 'competent' implies membership in addition to competency in the field of drug control is arguable; the stricter view based on international principle would tend to suggest that it does. Voluntary co-operation is of course not precluded, but unlimited co-operation is not provided for, despite the fact that the agency calling for co-operation may have the same aim of suppressing the illicit drug traffic. There is no obligation under article 35(c) to co-operate with the national organizations of other states involved in drug control.

⁴⁰ *Op cit* at 435.

⁴¹ *1961 Commentary* at 421.

⁴² *1961 Records* vol.I at 122.

article 35(d)'s 'close' co-operation, and the *1961 Commentary* suggests that diplomatic channels should in fact be avoided.⁴⁴ It also suggests that where an article 35(a) 'appropriate agency' has been designated by a Party it should be the agent of correspondence, and in cases of unfamiliarity with the organisational structure of a foreign state or where no contact had previously been had with the drug control agencies of that state, Interpol may serve as a useful intermediary to make for expeditious handling of a case.⁴⁵ The creation of a truly speedy system of international co-operation is only possible outside of the cumbersome diplomatic system.

Article 35(e) deals with the international transmission of legal papers. It provides that Parties shall:

...

(e) Ensure that where legal papers are transmitted internationally for the purposes of a prosecution, the transmittal is effected in an expeditious manner to the bodies designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that legal papers be sent through the diplomatic channel.

Requests for transmittal of legal documentation from one state to another are common in illicit drug traffic cases. Effective international co-operation demands speedy transmittal. Slow transmittal of such documents may well lead to the failure to prosecute alleged drug traffickers because of the legal inability of one Party's criminal justice system to retain such an alleged criminal in custody until the papers arrive.⁴⁶ Article 35(e) does not create a legal obligation to render mutual legal assistance. It regulates one small aspect of mutual legal assistance between Parties, viz.: Parties are expected to ensure the expeditious international transmission of papers for the purposes of prosecution to the bodies designated by requesting Parties.

The *chapeau* in the opening paragraph of article 35 means that the Parties retain the right to insist that these papers be sent to them through diplomatic channels, but should they choose more expeditious methods they are free to do so, unless the transmission of the particular papers is already regulated by, for instance, an extradition

⁴³ *1961 Records* vol.II at 249.

⁴⁴ *1961 Commentary* at 422.

⁴⁵ *1961 Commentary* at 421-2.

⁴⁶ See the example given by the Interpol representative - *1961 Records* vol.II at 257.

treaty in force. The *1961 Commentary* notes that communication to the corresponding Party of the identities of the bodies designated to receive these papers will speed up the process, and suggests that communication through article 35(a)'s 'appropriate agency', or prosecutor to prosecutor communication, or prosecutor to Justice Minister communication, or Justice Minister to Justice Minister communication may all make transmittal of legal papers more speedy.⁴⁷

The 'papers' transmitted include requests for mutual legal assistance and requests for the arrest of a person whose extradition is demanded in terms of article 36(2)(b).⁴⁸ Reports by such a requesting state on the results of the legal assistance rendered and replies to extradition requests should also, by extension, be subject to the obligation of speedy transmittal.

The 'bodies' to which these papers would be transmitted could include courts, government departments responsible for prosecution and the like. These papers must be 'for the purposes of prosecution' and they include papers for any legal action against the illicit traffic, whether initiated by a judge or prosecutor.⁴⁹ Whether they include papers solely for police investigations where prosecution is not yet a consideration is uncertain. The *1961 Commentary* submits that they do include papers in cases where prosecution is impossible because the criminals have not been apprehended or the like, but where the court must decide on the seizure or confiscation of drugs, substances or equipment used in or intended for the use in commission of drug offences.⁵⁰

The limitations of mutual legal assistance *circa* 1961 are well illustrated by article 35(e); direct transmission of legal documents between courts or prosecutors remains limited to bilateral legal assistance agreements. Linke *et al* criticise the lack of a commitment in article 35 to provide the greatest measure of assistance in criminal proceedings.⁵¹ Aware of its shortcomings, the *1961 Commentary* suggests that in accordance with article 35 (b) to (d)'s obligations to co-operate Parties should either establish treaty relations or enact the necessary domestic legislation to make provision for mutual legal assistance in cases of illicit drug trafficking.⁵²

⁴⁷ *1961 Commentary* at 423.

⁴⁸ *1961 Commentary* at 422-3.

⁴⁹ *1961 Commentary* at 423.

⁵⁰ *1961 Commentary* at 423.

⁵¹ *Op cit* at 49. They note that a much greater level of commitment was required by the other suppression conventions.

⁵² *1961 Commentary* at 422.

5.2.2.4 Enforcement co-operation in the 1961 Convention in review

Bassiouni is critical of the provisions in article 35. He argues that

invaluable co-operation between enforcing agencies is relegated to a personal exchange of confidences between agents or agencies who have developed some form of working relationship; instead it should be institutionalised, and such relations formalised.⁵³

Informal co-operation does work.⁵⁴ Article 35 represents a limited formalisation of co-operation. But the inclusion of the provision that the co-operation and organisation provided for by article 35 must be compatible with the parties' constitutional, legal and administrative systems indicates a desire on the part of states for an opt-out provision, a reluctance to commit themselves fully to the growth and formalisation that Bassiouni supports. The reason is that states want to protect their sovereignty. In 1961, the international regulation of national enforcement and international enforcement co-operation was still only in its infancy. Much work still had to be done, particularly in the area of mutual legal assistance and specialised forms of enforcement co-operation. A further obvious shortcoming of article 35's obligations for international co-operation is that they do not involve obligations to co-operate with states that are not Party to the 1961 Convention. However, article 35 must be seen against the background of article 4(b)'s obligation on Parties to co-operate with other states including non-parties in the implementation of the 1961 Convention.⁵⁵

⁵³ Bassiouni MC 'The International Narcotics Control Scheme' in Bassiouni MC (ed) *1 International Criminal Law: Crimes* (1986) 507 at 522.

⁵⁴ d'Oliveira J *International Mutual Legal Assistance and other Forms of International Legal Co-operation* (unpublished conference paper, New Delhi Global Drugs Law Conference, 1997) discusses at 7-9 the relationship between South Africa and India in combating the import of Methaqualone from India to South Africa. He notes significant successes in the interdiction of supplies, but points out that most of the co-operation which made this possible has been informal. *Apartheid* made co-operation impossible. After its demise, informal links began to grow and enforcement began to achieve success through South Africa's co-operation with other Southern African states, Britain and India.

⁵⁵ *1961 Commentary* at 419.

5.2.3 Enforcement co-operation in the 1971 Convention

5.2.3.1 The nature of the obligation in article 21

The fact that article 21 of the 1971 Convention, entitled 'Action Against the Illicit Traffic', is modelled closely on article 35 of the 1961 Convention, indicates that there was little development in the field between 1961 and 1971. Only article 21(b) adds to the general obligation on Parties in article 35(b) to co-operate in the campaign against the illicit traffic a specific instance of such co-operation by obliging Parties to inform 'other Parties deeply concerned' of certain cases of the illicit traffic. Thus the comments made above in respect of article 35 of the 1961 Convention are generally apposite to article 21. Article 21's introductory paragraph reads:

Having due regard to their constitutional, legal and administrative systems, the Parties shall:

Thus article 21's application is also subject to each Party's constitutional, legal and administrative systems, and Parties will be freed of its obligations if it is found to be incompatible with these systems. Chatterjee notes that this will affect its strength negatively.⁵⁶ The *1971 Commentary* submits, however, that no Party could find the broadly defined provisions of the article incompatible with these systems.⁵⁷ It notes that the authors of the provision, by using the phrase 'having due regard to', appear to have contemplated Parties implementing article 21 in different ways in order to make it compatible with their respective 'constitutional, legal and administrative systems'.⁵⁸ But it must, in principle, retain its effectiveness.

⁵⁶ *Op cit* at 493.

⁵⁷ *1971 Commentary* at 338.

⁵⁸ *1971 Commentary* at 338.

5.2.3.2 National enforcement co-ordination in the 1971 Convention

Article 21(a) provides that the Parties shall:

...

(a) Make arrangements at the national level for the co-ordination of preventive and repressive action against the illicit traffic; to this end they may usefully designate an appropriate agency responsible for such co-ordination;....

Article 21(a) obliges Parties to make domestic arrangements for co-ordination in preventive and repressive action against the illicit traffic. According to the *1971 Commentary* such action includes

the maintenance of lists of illicit traffickers, establishment of specialised police units, training of police officers concerned with cases of the illicit traffic, communication to all police units concerned of information on the methods used by traffickers to conceal and to transport their contraband, and purchase of equipment which may be necessary for the special needs of the fight against the illicit traffic.⁵⁹

Article 21(a) does not specify how each Party is to regulate intrastate co-operation. It only suggests⁶⁰ that an agency be designated for such co-ordination and does not specify which agency is to be designated as the co-ordinating agency. Such decisions would depend on the constitution and/or the legal and administrative system of the Party concerned. Article 21(a) can be read with article 6 which states:

It is desirable that for the purpose of applying the provisions of this Convention, each Party establish and maintain a special administration, which may with advantage be the same as, or work in close co-operation with, the special administration established pursuant to the provisions of conventions for the control of narcotic drugs.

⁵⁹ *1971 Commentary* at 339.

Such a 'special administration' may be the same body as the co-ordinating agency envisaged by article 21(a), but it may also be a formation of interested bodies which includes the co-ordinating agency, or it may simply be an organisational arrangement. Which arrangement or agency is responsible for co-ordinating the suppression of the illicit traffic will depend on the particular organisational structure adopted by the Party and upon whether the Party has opted to designate a co-ordinating agency. Designation of such an agency will be simple in a Party that has a national police force with authority over local police forces, in other words, in situations where enforcement, including drug law enforcement, is organised hierarchically. But designation of an agency is probably more necessary, and more difficult, where subordinate governmental units (such as states in a federation, provinces, towns etc.) exercise police powers and are not subject to the authority of a national police force even if one exists.⁶¹ Whatever the mechanism used by the Parties to ensure internal co-ordination of drug enforcement action, according to the *1971 Commentary* each Party must ensure 'continuous co-operation and exchange of information among the police units involved in order to make possible the effective handling of individual criminal cases.'⁶² The *1971 Commentary* also points out that national co-ordination is essential for the international co-operation envisaged by the rest of article 21, and particularly for smooth and speedy communications in the international drug control system.⁶³

5.2.3.3 International enforcement co-operation in the 1971 Convention

Article 21(b), (c) and (d), state that the Parties shall:

...

(b) Assist each other in the campaign against the illicit traffic in psychotropic substances, and in particular immediately transmit, through the diplomatic channel or the competent authorities designated by the Parties for this purpose, to the other Parties directly concerned, a copy of any report addressed to the

⁶⁰ This appears to be because of the inability of developing states to fund such an agency - see the remarks of the Russian delegate, *1971 Records* vol.II at 26.

⁶¹ *1971 Commentary* at 339.

⁶² *1971 Commentary* at 339.

⁶³ *1971 Commentary* at 339.

Secretary-General under article 16 in connection with the discovery of a case of illicit traffic or a seizure;

(c) Co-operate closely with each other and with the competent international organisations of which they are members with a view to maintaining a co-ordinated campaign against the illicit traffic;

(d) Ensure that international co-operation between the appropriate agencies be conducted in an expeditious manner; and

Article 21(b), (c) and (d) provide for a system of co-operation at the international level among state organisations and international control organs to keep each other informed about the illicit traffic.

Article 21(b) provides for a general duty on Parties to assist each other against the illicit traffic, and then specifies that this can be done by the immediate transmission of a copy of an article 16(3) report on the discovery of a case of illicit traffic or a seizure to the other Parties 'directly concerned'. The Turkish delegate to the 1971 Conference who was responsible for this part of the provision, explained that it was aimed at the situation where the information had been provided to the Secretary General but there had been delays in the provision of information to Parties concerned

and in particular to ensure that a Party of whose country the traffickers were nationals or in whose country the substance had originated was informed of seizures promptly.⁶⁴

The *1971 Commentary* suggests that such information should also be communicated to non-parties 'directly concerned'.⁶⁵ The method to be used for the transmission of this information is the diplomatic channel unless 'competent authorities' have been designated by the Parties for this purpose. The diplomatic channel will usually be too slow in transmitting this information, thus the *1971 Commentary* suggests the designation of a government unit (such as the agency envisaged by article 21(a)) able to

⁶⁴ *1971 Records* vol.II at 24-5.

⁶⁵ *1971 Commentary* at 340.

act expeditiously in the transmission and reception of information to and from the enforcement agencies having jurisdiction over the cases involved.⁶⁶

Article 21(c) expands upon article 21(b)'s general obligation on the Parties to co-operate in the suppression of illicit drug trafficking. While they both refer to international co-operation, article 21(c)

specifies that co-operation should be close, should include co-operation with 'competent' international organisations of which the Parties concerned are members and should be carried out 'with a view to maintaining a co-ordinated campaign against the illicit traffic'.⁶⁷

In order to achieve a universal and coherent system of international co-operation Parties should co-operate with non-parties. A permanently maintained international organisational structure is also crucial to co-operation. In this context, 'competent international organisations' must include intergovernmental bodies such as the UN's drug control bodies⁶⁸ and non-governmental organisations such as Interpol engaged in suppression of the illicit traffic.

With respect to the content of the co-operation envisaged by article 21(c) (and (b)), the *1971 Commentary* notes that at the very minimum the Parties are obliged to take all practical steps to prevent their territories from being used as a base of operation for the illicit traffic into other countries and/or as a refuge for traffickers.⁶⁹ Requiring Parties to provide technical assistance to other Parties under this provision or any of those relating to international co-operation in article 21 is controversial, but the effective participation of poorer states in the campaign to suppress the illicit traffic and the satisfaction of the purpose of these provisions may depend on such assistance.⁷⁰

Article 21(d) obliges Parties to ensure that co-operation between the 'appropriate agencies' be carried out speedily. Such agencies are not only those envisaged by article

⁶⁶ *1971 Commentary* at 340.

⁶⁷ *1971 Commentary* at 341.

⁶⁸ Parties to the 1971 Convention do not on the language of article 16(c) appear to be bound to co-operate with the UN drug control agencies if they are not members of the UN. The *1971 Commentary* at 341-2 submits, however, that the authors of the 1971 Convention intended that non-UN members should co-operate with it, and even if they are not legally obliged to do so by the Convention it is within the spirit of the 1971 Convention that they do so.

⁶⁹ *1971 Commentary* at 342.

⁷⁰ *1971 Commentary* at 342.

21(a); they include any of a Party's agencies dealing with an illicit trafficking problem that requires or can give international assistance.⁷¹ The provision anticipates both a rapid means of communication and the urgent attention of the various agencies to the communication of information. The *1971 Commentary* suggests that direct correspondence between enforcement agencies, or correspondence through an article 21(a) 'appropriate agency', or direct contact between enforcement officers could in appropriate cases result in the expeditious communication envisaged by article 21(d) and the close co-operation envisaged by article 21(c).⁷²

Article 21(e) states that the Parties shall:

...

(e) Ensure that, where legal papers are transmitted internationally for the purpose of judicial proceedings, the transmittal be effected in an expeditious manner to the bodies designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that legal papers be sent through the diplomatic channel.

Article 21(e) does not impose any obligation to render international legal assistance. It provides for the conditions under which transmittal of legal papers should take place internationally, viz.: the speedy transmittal of such papers to the bodies designated by the Parties.⁷³ The rules governing the Parties' relations in matters of legal assistance will be found elsewhere, usually in bilateral treaties or within a Party's domestic law. Article 21(e) was intended to '... ensure that, ... traditional forms of legal assistance would continue...' and not be supplanted.⁷⁴ However, the *1971 Commentary* does submit that the international co-operation envisaged by article 21 paragraphs (b), (c) and (d) includes making provision for international legal assistance in respect of drug offences through conclusion of mutual legal assistance treaties, or modification of existing treaties, or enactment of appropriate legislation.⁷⁵

⁷¹ *1971 Commentary* at 342.

⁷² *1971 Commentary* at 343.

⁷³ Although article 21(e) does not apply to relations with non-parties, the *1971 Commentary* at 345 suggests that it would be in the spirit of the 1971 Convention if it were so applied.

⁷⁴ The Austrian delegate explaining his introduction of the amendment that resulted in paragraph (e) - *1971 Records* vol.II at 23.

⁷⁵ *1971 Commentary* at 343.

Proposals for the direct transmission of documents between the competent authorities of the Parties were rejected, and the text allows for such transmission only between the bodies designated by the Parties.⁷⁶ In order to speed up the transmittal of such documents, the *1971 Commentary* suggests that direct prosecutor to prosecutor, or court to court, or prosecutor to Justice Ministry, or Justice Ministry to Justice Ministry communication should be authorised, and that channelling the papers through the Justice Ministry or an article 21(a) 'appropriate agency' would speed up such transmission.⁷⁷ The right of the Parties to use the diplomatic channels has been expressly reserved but such use will be slower than more direct transmittal of the documents. The documents must be for use in 'judicial proceedings', which implies that purely police investigations are not covered by the provision, but police investigations under the guidance of a judge or magistrate would be covered. As to the meaning of 'legal papers', the *1971 Commentary* explains:

The term 'legal papers' covers requests for judicial assistance, reports on the results of assistance which has been rendered, including in particular copies of the records of requested evidence which has been taken, requests for extradition and replies thereto. It includes not only papers relating to the actual or possible prosecution of illicit traffickers, but all papers concerning any judicial proceeding in matters of the illicit traffic, eg. the seizure or confiscation of psychotropic substances or of other substances or equipment used in or intended for offences of the illicit traffic.⁷⁸

The expeditious transmission of legal papers implies not only using a speedy method of transmission, but also an obligation to ensure the speedy taking of the necessary steps to prepare the papers such as the hearing of witnesses or the taking of evidence, arrest of suspects, dealing with extradition requests and the seizing of contraband or material used in or intended for use in the trafficking of psychotropic substances.⁷⁹ The actual method of transmission will probably be prescribed in

⁷⁶ Austrian amendment - *1971 Records* vol.I at 95. The *1971 Commentary* at 344 notes that papers have to be addressed to the bodies designated for their receipt, and that Parties must notify each other of the appropriate addresses through the UN Secretariat.

⁷⁷ *1971 Commentary* at 344.

⁷⁸ *1971 Commentary* at 343-4.

⁷⁹ *1971 Commentary* at 344.

international legal assistance treaties to which the Party is also party, but to accord with article 21(e) this method will have to be the most expeditious constitutionally, legally and administratively method possible.⁸⁰

5.2.3.4 Enforcement co-operation in the 1971 Convention in review

Because article 21 of the 1971 Convention largely mirrors article 35 of the 1961 Convention, many of the criticisms applicable to article 35 are apposite to it. Thus although the *1971 Commentary* suggests that in the spirit of the 1971 Convention it be applied to non-parties, article 21 may not in fact be applied to non-parties where illicit traffic may be booming. Moreover, as with article 35(b)-(e) of the 1961 Convention, it is controversial whether article 21(b)-(e) of the 1971 Convention creates a legal obligation on one Party to provide such mutual legal assistance to another party in the campaign against the illicit traffic. It achieves too little to argue that such an obligation is certainly in the spirit of both provisions. Clearly something had to be done, especially in the field of mutual legal assistance in drug trafficking matters, and this is one area of the law which received a lot of attention in the preparation of the 1988 Convention.

5.2.4 Enforcement co-operation in the 1988 Convention

5.2.4.1 Introduction

The period between 1971 and 1988 saw a massive increase in extraterritorial enforcement action by consumer states such as the United States. The earlier conventions were useless in the regulation of such activities. The 1961 Convention neither authorises nor prohibits extraterritorial policing⁸¹ or the extraterritorial enforcement of domestic judicial orders for the production of evidence.⁸² Enforcement co-operation under the 1988 Convention is far more sophisticated than that contemplated by the 1961 or 1971 Conventions. It takes a number of shapes, viz.: the innovative forms

⁸⁰ *1971 Commentary* at 344.

⁸¹ 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 at 168.

⁸² See, for example, *In re Grand Jury Proceedings Bank of Nova Scotia* 740 F.2d 817 (1981) at 830-831 where the US Circuit Court held that the 1961 Convention neither requires the US to issue foreign Grand Jury subpoenas to obtain financial records in another state (in this case the records of a Branch of the Bank of Nova Scotia operating in the Cayman Islands and allegedly involved in money laundering) and nor does it require the Cayman Islands to defer to such a subpoena. But the subpoena was allowed on the

of mutual legal assistance in drug matters and transfer of proceedings, the general enforcement co-operation of the kind provided for in the earlier drugs conventions and co-operation with respect to transit states. We turn first to examine the detailed provisions for mutual legal assistance.

5.2.4.2 Mutual legal assistance in the 1988 Convention

5.2.4.2.1 Introduction

Mutual legal assistance in respect of drug offences was first introduced in bilateral mutual legal assistance treaties (MLATs). These treaties were concluded between states so that they were able to assist each other in ways beyond just the facilitation of extradition laws or the delivery of information.⁸³ Bilateral arrangements (both formal and informal) for operational assistance in drugs policing have proliferated because of the perceived slowness of using Interpol channels.⁸⁴ They have been preferred to multilateral approaches because they do not have to reflect the lowest common denominator of agreement, they permit states to choose their treaty partners and do not oblige them to provide information to unfriendly or untrustworthy states, and because legal diversity such as the common law/civil law fracture makes multilateral MLATs difficult to agree upon and to enforce.⁸⁵ The United States has been an advocate of this

principle that the 1961 Convention was not intended to restrict the enforcement of drug trafficking laws or restrict how states choose to apply those laws.

⁸³ Dorn N, Murji K, and South N, *Traffickers: Drug Markets and Law Enforcement* (1992) at IX.

⁸⁴ Anderson M *Policing the World* (1989) 29.

⁸⁵ Nadelmann EA 'Unlaundering dirty money abroad: U.S. foreign policy and financial secrecy jurisdictions' (1986) 18 *Inter-American LR* 33 at 74. An example of the latter problem is that while civil law states require judicial authorities to issue letters rogatory, MLATs bind civil law states to accept inquiries emanating from the procuracy alone.

revolutionary legal innovation,⁸⁶ and the obvious benefits of MLATs have encouraged other states to enter into them.⁸⁷

In the context of multilateral international drug trafficking control, the MLAT revolution almost began at the 1961 Conference when the Netherlands's delegation attempted to introduce a provision for mutual legal assistance into what eventually became article 35.⁸⁸ The attempt failed, and although the UN's 1987 Comprehensive Multidisciplinary Outline targets mutual judicial and legal assistance,⁸⁹ international drug control had to wait until 1988 before a substantive provision on mutual legal assistance was incorporated into an international drug control convention.

5.2.4.2.2 Article 7's provisions for mutual legal assistance

Article 7, entitled 'Mutual Legal Assistance', is a comprehensive attempt to provide for mutual legal assistance in international drug control. The retention of the term 'legal' throughout the article indicates that it contemplates judicial assistance or assistance in investigations leading to judicial proceedings.⁹⁰ It does not contemplate purely

⁸⁶ For a survey of the negotiation history and content of recent US MLATs see Nadelmann EA 'Negotiations in criminal law assistance treaties' (1985) 33 *Am. Jnl of Comparative Law* 467-505; Ellis A, Pisani R 'The United States treaties on mutual assistance in criminal matters' in Bassiouni MC (ed) 2 *International Criminal Law: Procedure* (1986) at 151-179. It is important to note that these agreements were aimed at a facilitating procedural co-operation on a broad front and not just in respect of drug trafficking/ money laundering, although the latter activities were obviously the most significant reasons for the US's diplomatic efforts. A recent example is the Mutual Legal Assistance Co-operation Treaty between the US and Mexico, signed on 9 December 1987, 27 *ILM* 445. It makes provision for mutual assistance in i) the taking of testimony or the statements of witnesses; ii) the provision of documents, records and evidence; iii) the execution of requests for searches and seizures; iv) the serving of documents; and v) the provision of assistance in procedures regarding the immobilisation, security and forfeiture of the proceeds, fruits and instrumentalities of crime.

⁸⁷ See Gilmore W *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and psychotropic Substances* (1991) at 23. McClean D 'Mutual assistance in criminal matters: the Commonwealth initiative' (1988) 37 *ICLQ* 177-190 notes the origins and development of mutual legal assistance from the 1959 European Convention on Mutual Assistance in Criminal Matters *ETS* 30 (1971 Additional Protocol *ETS* 99) and then discusses in detail the Commonwealth Scheme Relating to Mutual Assistance in Criminal Matters agreed in Harare in 1986, (1986) 12 *CLB* 1118.

⁸⁸ Its amendment to draft article 45 read: 'Parties shall ... 1(b) render each other, within the framework of the existing treaties or practice, mutual assistance in the widest sense to enable the most appropriate Party to try the offences specified in sub-paragraph (a); ...' - see 1961 *Records* vol.II at 46.

⁸⁹ Target 20 - *Declaration of the International Conference on Drug Abuse Control and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988).

⁹⁰ Sproule DW, St-Denis P 'The UN Drug Trafficking Convention: An Ambitious Step' 1989 *CYBIL* 263 at 286 note the preference of common law states for mutual legal assistance, and civil states for mutual judicial assistance, a reflection of the fact that in common law states such functions are performed by law enforcement officers while in civil law states they are carried out by judicial officers.

administrative assistance which is catered for by article 9.⁹¹ Because many states were either not familiar in the 1980s with the concept of mutual legal assistance or not party to an MLAT, article 7 also provides a fairly detailed guideline for the development of bilateral MLATs as well as facilitating mutual legal assistance in the absence of an MLAT for those states requiring the existence of a treaty to give effect to such assistance.⁹² Some of article 7's authors favoured a loose provision limited to the laying down of a principle of international co-operation in this field because of the incompatibility of their legal systems and practices. But those that favoured a detailed approach setting out a specific mechanism for mutual legal assistance won out, indicative of the intensity of the international pressure to harmonise drug control law in the late 1980s.⁹³ Nevertheless, because of resistance the article is not as detailed as bilateral MLATs. It focuses on the key elements of mutual legal assistance and omits detailed procedures for providing such assistance, which details are left to the Parties to formulate.

5.2.4.2.3 Limitations on article 7

Before examining in detail the obligations to provide mutual legal assistance contained in article 7, it is appropriate to point out the limitations operative upon it. It too is subject to article 3(10)'s political and fiscal offence exception, discussed in detail in chapter four. This provision attempts to limit the application of the political or fiscal offence exception to MLATs. Such exceptions are common in MLATs⁹⁴ and legal assistance legislation.⁹⁵ Article 7 also contains internal provisions which limits its own application. For example, article 7(12) provides that requests for assistance must be executed in accordance with the domestic law of the requested Party and article 7(15)(d) allows Parties to refuse assistance if it would be contrary to their legal system to grant it. The domestic laws of many states insist upon the application of principles such as double

⁹¹ See the 'Expert Group Report', *1988 Records* vol.I at 40; the 'Review Group Report', *1988 Records* vol.I at 67-8; statement of the French delegate - *1988 Records* vol.II at 180.

⁹² Sproule and St-Denis *op cit* at 285 note that article 7 could be construed as a mini-MLAT.

⁹³ See the 'Expert Group Report', *1988 Records* vol.I at 39.

⁹⁴ The 1986 Harare 'Scheme Relating to Mutual Assistance in Criminal Matters Within the Commonwealth' provides for refusal of co-operation if the request relates to 'an offence or proceedings of a political character.'

⁹⁵ See, for example, section 4(3) of the UK's Criminal Justice (International Co-operation) Act, 1990.

criminality to the gathering of evidence for prosecution in foreign jurisdictions.⁹⁶

Article 7 is also limited by the operation of existing international instruments concerned with mutual legal assistance. Article 7(6) recognises that the whole field of mutual legal assistance including mutual legal assistance in respect of illicit drug matters was by 1988 already covered by an existing network of treaties,⁹⁷ and makes it clear that the operation of these instruments is not jeopardised by article 7.⁹⁸ Article 7(6) provides:

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual legal assistance in criminal matters.

Thus article 7(6) provides that article 7 will not affect the obligations created by MLATs that already govern the particular situation or which may govern it in the future, even if only partly. But as the Netherlands delegate to the 1988 Conference explained:

The inference to be drawn from [this provision] ... was that where such obligations went further than those envisaged in the draft convention, they would not be affected by the latter; and conversely, where they did not go as far as the provisions of the convention, the latter should be regarded as the basis for obligations to render legal assistance in criminal matters.⁹⁹

⁹⁶ For example, Frei L, Treschel S 'Origins and applications of the United States - Switzerland Treaty on Mutual Assistance in Criminal Matters' (1990) 31 *Harvard ILJ* 77 point out at 84 that in terms of article 4(2) of the 1973 MLAT between Switzerland and the US (27 *UST* 2019), a US or Swiss magistrate 'may decree searches, seizures of evidence, summons and interview of witnesses, or releases of banking or business secrecy only if the offence described in the request was also a violation of the laws of the requested state' and note that any rule to the contrary would contradict Swiss public order.

⁹⁷ Gilmore WC 'International action against drug trafficking: trends in United Kingdom law and practice through the 1980's' (1991) 17 *CLB* 287 at 294-300 examines, for example, the evolution of US-UK relations with regard to the Cayman Islands, a secrecy haven used for laundering by drug traffickers. After legal debacles such as the *Bank of Nova Scotia* 740 F.2d 817 (1981) where the US fined the bank \$1 825 000 for failing to produce records from offshore branches even though compliance with the grand jury subpoena would have violated secrecy laws in those jurisdictions, the US and UK concluded the limited 1984 Cayman Islands Narcotics Activity Agreement (cm.9344) which gave the US assistance in investigation and prosecution through access to documentary evidence. Its success led to the more comprehensive 1986 Cayman Islands Mutual Legal Assistance Treaty (cm.9862).

⁹⁸ Gilmore *op cit* (1995) at xix reports that a 1993 Expert Working Group on Mutual Legal Assistance and Related International Confiscation had before it in excess of 70 bilateral treaties.

⁹⁹ 1988 *Records* vol.II at 180.

Domestic courts cannot use the article as a barrier to frustrate more ambitious arrangements for legal assistance and thus impede effective law enforcement. Thus the United States delegate pointed out that the provisions of article 7 should not be considered to be 'exclusive or "first-resort" provisions' where the Parties were capable of obtaining the same results more expeditiously by treaty or under their domestic law.¹⁰⁰ But nor can existing mutual legal assistance arrangements be used to frustrate the obligation to render mutual legal assistance under article 7 in respect of novel provisions such as the money laundering offences in article 3(1). According to the United States delegation, existing bilateral treaties are amended automatically by article 7 to make such assistance possible.¹⁰¹

Article 7(7) takes article 7(6)'s principle one step further and specifically limits the application of some of the more detailed procedural provisions of article 7 contained in paragraphs 8 to 19. It provides:

7. Paragraphs 8 to 19 of this article shall apply to requests made pursuant to this article if the Parties in question are not bound by a treaty of mutual legal assistance. If these Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the Parties agree to apply paragraphs 8 to 19 of this article in lieu thereof.

Thus article 7(7) means that if there is no MLAT between the Parties they may use the procedure laid down in paragraphs 8 to 19, or if the Parties are bound by an MLAT, they may choose to rely on the procedure laid down in those paragraphs irrespective of whether the provisions of that MLAT are broader or narrower in scope than those of the 1988 Convention.¹⁰² The purpose of article 7(7) is thus to avoid the legal problems that would have resulted from obliging Parties to change to the procedures set out in the paragraphs 8 to 19 of article 7 when they were already committed to particular

¹⁰⁰ 1988 Records vol.I at 181.

¹⁰¹ '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 60.

¹⁰² Netherlands delegate, 1988 Records vol.II at 180.

procedures in their domestic law that they had put into place as a result of obligations under previous MLATs.¹⁰³

5.2.4.2.4 Article 7's substantive obligations

We now turn to an examination of the obligations of paragraphs 1 to 6 of article 7, which apply generally to all requests for mutual legal assistance between the Parties.

Article 7(1) is the cardinal provision in the 1988 Convention obliging the Parties to grant each other mutual legal assistance.¹⁰⁴ It states:

1. The Parties shall afford one another, pursuant to this article, the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with article 3, paragraph 1.

It is a strong obligation, not weakened by any internal limitation clause, although in practical terms all mutual legal assistance is subject to the domestic laws of the Parties. Article 7(1) specifies that this assistance is to be provided for the criminal investigation, prosecution and adjudication of article 3(1)'s trafficking offences, and not for the personal use offence in article 3(2). It is to be made available for all criminal proceedings except for confiscation, for which a separate mutual legal assistance regime is provided in article 5(4). The reference to investigations appears to make it clear that assistance can be requested at the police investigation stage prior to the actual institution of criminal proceedings.¹⁰⁵ The point at which an investigation actually begins is not specified by the provision. It is submitted that either an article 3(1) offence should have occurred or there should be reason to believe such an offence will occur before an investigation leading to prosecution and trial can be said to exist. 'Judicial proceedings' cannot mean

¹⁰³ See Sproule and St-Denis *op cit* at 206.

¹⁰⁴ The language used here is taken from article 1(a) of the 1959 European Convention on Mutual Assistance in Criminal Matters *ETS* 130.

¹⁰⁵ The US delegation to the 1988 Conference notes, however, that some delegations, particularly Austria, had reservations about an obligation to provide mutual legal assistance to purely police investigations - '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 59.

administrative proceedings which fall outside the scope of this article, but for which co-operation is provided for in article 9.¹⁰⁶

Article 7(2) details the assistance which may be requested. It covers a wide range of investigation procedures and information gathering usually contained in bilateral MLATs. It states:

2. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

- (a) Taking evidence or statements from persons;
- (b) Effecting service of judicial documents;
- (c) Executing searches and seizures;
- (d) Examining objects and sites;
- (e) Providing information and evidentiary items;
- (f) Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records;
- (g) Identifying or tracing proceeds, property, instrumentalities or other things for evidentiary purposes.

Article 7(2)'s wording is flexible. It catalogues a number of the modalities for which assistance 'may' be requested. Looking more closely at this catalogue, article 7(2)(a) allows requests for the gathering of information for evidentiary purposes.¹⁰⁷ A

¹⁰⁶ See the 'Expert Group Report', *1988 Records* vol.I at 39-40.

¹⁰⁷ See, for example, section 3(1) of the UK's Criminal Justice (International Co-operation) Act, 1990. It provides that a judicial officer may issue 'a 'letter of request' requesting assistance in obtaining outside the United Kingdom such evidence as is specified in the letter for use in ... proceedings or investigation.' Section 3(2) allows the accused to make such a request and section 3(3) the prosecuting authority. The request is sent to the Secretary of State for onward transmission in terms of section 3(4) to the court with jurisdiction in the foreign state or to the recognised authority for dealing with such requests in that state.

distinction between 'statements' and 'evidence' appears to have been made because in common law systems 'statements' imply the taking of evidence under oath, without which they would have no evidential value, and because making a false statement can lead to perjury.¹⁰⁸ The term 'evidence' effectively covers all other forms of oral evidence.¹⁰⁹ The provision is silent as to whether such 'persons' from whom this evidence is to be taken are compellable, that is, bound to testify or produce evidence, and what testimonial privileges they enjoy. The usual position is that if the testimony is taken in the requested state, such persons are compellable but only enjoy the testimonial privileges available in the requested state.¹¹⁰ Article 7(2)(b) allows requests for the service of judicial documents,¹¹¹ while article 7(2)(c) allows requests for the execution of searches and seizures.¹¹² These include searches of premises, land, vehicles, vessels and aircraft.¹¹³ It seems that the objective of such searches and seizures must be the obtaining of evidence for prosecution and not solely the confiscation of the material searched for or seized. Article 7(2)(d) which allows requests for the examination of 'objects and sites' is ambiguous and overlaps with article 7(2)(c), but its inclusion was justified on the basis

Section 4 of the Act makes provision for the gathering of evidence for foreign jurisdictions within the UK. The UK will in terms of section 4(1) allow such requests from courts, prosecuting authorities or other authorities in respect of investigations or proceedings. Requests are routed through the Secretary of State who in terms of section 4(2) nominates a court in the UK for receipt of such evidence.

¹⁰⁸ *1988 Records* vol.II at 174.

¹⁰⁹ Its use was criticised at the 1988 Conference because in certain states it includes items seized from persons, but was preferred to the term 'testimony' because it includes expert evidence - see the statements of the Japanese and Israeli delegates for the former position and the Italian and Australian delegates for the latter position - *1988 Records* vol.II at 174.

¹¹⁰ Ellis and Pisani *op cit* at 164-165.

¹¹¹ See, for example, sections 1 and 2 of the UK's Criminal Justice (International Co-operation) Act, 1990, which provide respectively for the service of foreign process in the UK and UK process abroad. Section 1, provides a useful example of the kind of procedure used to put article 7(2)'s provisions into domestic operation. Section 1(1) provides that the section comes into operation when the UK's Secretary of State receives from a foreign state's government or authority either i) a summons or some other process requiring a person to appear as a defendant or witness in criminal proceedings in that state or ii) some other document recording a decision of a criminal court in that state, together with a request that it be served on someone in the UK. Section 1(2) provides for personal or postal service while section 1(3) provides that service of such process imposes no obligation under the law of the UK to comply, i.e. failure to comply is not contempt of court in the UK. Section 1(4) provides that upon service such process shall be accompanied by a notice explaining section 1(3), and informing the person upon whom the notice is served that he may wish to seek advice about the possible consequences of failing to comply with the process under the law of the state which issued it, and that under that state's law he may not be accorded the same protections accorded to witnesses in the UK. Section 1(5) deals with receipt or failure to serve.

¹¹² See, for example, section 7 of the UK's Criminal Justice (International Co-operation) Act, 1990, which makes provisions for the granting of search warrants to British police upon a foreign authority's request to the Secretary of State.

that it represented a useful form of mutual legal assistance particularly for reconstituting offences committed in the territory of other States or for verifying evidence based on the interview of witnesses.¹¹⁴

Article 7(2)(e) allows requests for the provision of certain information and evidentiary items. However, provision of either of these may be hit by article 7(12) as the domestic law of Parties may in certain cases prevent information or objects from leaving national territory. Article 7(2)(f) allows requests for original documents or certified copies. These documents, which may include bank, financial, corporate or business records, would have to be positively linked to a case or cases of the illicit traffic before they could be demanded. Some delegations to the 1988 Conference stated that they would have difficulty in providing assistance in this regard and in regard to article 7(2)(g) unless criminal proceedings had been instituted against a suspected offender.¹¹⁵ Article 7(2)(g) provides for requests for the 'identification or tracing of proceeds, property, instrumentalities and other things' for the purposes of evidence. The inclusion of 'tracing' was regarded 'as useful for evidentiary purposes in cases where proceeds from drug trafficking were transmitted from one country to another by electronic means.'¹¹⁶ This provision appears to relate to the provision in article 5 for seizure and confiscation, yet explicit reference to seizure and confiscation was excluded from article 7(2)(g) because of article 7's limited objective of investigation and prosecution.¹¹⁷ Whether such requests can be made for the purpose of article 5 seizures or confiscations is thus unclear, but it seems illogical not to permit requests for such purposes as prevention of the dispersal of such material is one of the objectives of the 1988 Convention.

Assistance with regard to the modalities in article 7(2) appears mandatory. Parties cannot limit this list, but article 7(3), which provides that article 7(2) is not a *numerus clausus*, makes it clear that they may extend this list. Article 7(3) states:

¹¹³ See the widely supported remarks of the Canadian delegate - *1988 Records* vol.II at 174.

¹¹⁴ See the 'Review Group Report', *1988 Records* vol.I at 69.

¹¹⁵ See the statement of the Austrian delegate supported by the Jamaican, Saudi Arabian, Israeli and Mauritian delegates - *1988 Records* vol.II at 177. Lebanon has made a reservation regarding article 7(2)(f) (11/3/1996 - *Multilateral Treaties Deposited* (1997) at 304).

¹¹⁶ Statement of the US delegate - *1988 Records* vol.II at 177.

¹¹⁷ See the 'Review Group Report', *1988 Records* vol.I at 69.

3. The Parties may afford one another any forms of mutual legal assistance allowed by the domestic law of the requested Party.

Other forms of assistance may include the verification in laboratories of the illegal nature of substances seized,¹¹⁸ and the identification and/or location of persons, something not explicitly provided for in article 7(4) which is discussed below.¹¹⁹ States that have made specific provision for assistance of the kind envisaged in article 7(2) have specifically left open the possibility of other forms of assistance being rendered.¹²⁰

Article 7(4) obliges Parties to facilitate or encourage the presence or availability of persons to assist in investigations or proceedings. Article 7(4) states:

4. Upon request, the Parties shall facilitate or encourage, to the extent consistent with their domestic law and practice, the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings.

Triggered by a request from another Party,¹²¹ this provision anticipates the requested Party encouraging the availability of persons, both at large and in custody,¹²² for evidentiary purposes, but not for the execution of sanctions.¹²³ Such encouragement may include the simplifying of obstacles to travel such as the requirements of witnesses for

¹¹⁸ Something mentioned under paragraph 257 of Target 20 of the 1987 Comprehensive Multidisciplinary Outline *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988) at 57.

¹¹⁹ See, by contrast, article 1(2) of the 1986 US-UK Cayman Islands MLAT (cmd no.9682) which specifies this form of assistance and paragraph 1(3)(a) of the 1986 Harare Scheme for Mutual Assistance in Criminal Matters (1986) 12 *CLB* 1118.

¹²⁰ See, for example, section 31 of South Africa's International Co-operation in Criminal Matters Act 75 of 1996.

¹²¹ There is no obligation on a Party to facilitate the travel of a person in custody within its territory who demands permission to travel to another Party in order to be present at a deposition being taken there in connection with a criminal case against 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 60.

¹²² Section 5(1) of the UK's Criminal Justice (International Co-operation) Act, 1990, provides for the transfer of prisoners to give evidence or to be identified in or assist through their presence in the investigation of an offence, but the prisoner's consent is required in terms of section 5(2). Section 6 provides for the reverse procedure but once again the foreign state's prisoner must consent in terms of section 6(3).

¹²³ See the 'Expert Group Report', 1988 *Records* vol.I at 40.

travel documents or permission to travel.¹²⁴ Article 7(4) is limited by the constraints of the requested Party's domestic law and practice and by the fact that the requested Party requires the consent of the person concerned. These limitations are also backed up by the safe conduct provision in article 7(18) for persons giving evidence. Catino submits that paragraphs 4 and 18 of article 7 weaken the 1988 Convention as an effective weapon against the illicit traffic, because they only encourage and do not compel expert and lay witnesses to testify in a requesting Party. She argues that if key witnesses choose not to appear the prosecution's case may be destroyed. She believes that these provisions compare badly to existing bilateral MLATs which make provision for the compulsion of witnesses from one state to testify in another.¹²⁵ Yet inclusion in a multilateral treaty of "international subpoena" provisions doing away with the requirement that witnesses consent to give evidence in another Party was unlikely in 1988, when states were still being introduced to the concept of an MLAT.¹²⁶

Although there was some reluctance before and during the 1988 Conference to provide as a part of legal assistance for the mandatory withdrawal of the curtain of bank secrecy, article 7(5) reflects the concern that Conference delegates felt about the employment of bank secrecy as a justification for refusing assistance.¹²⁷ Moreover,

¹²⁴ '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 60.

¹²⁵ 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 at 437. She prefers the international subpoena provision in the 1982 US MLAT with Italy which in article 15 (see 423-4) makes provision for the compulsion of a witness where : i) there is no reasonable basis to deny it; ii) the witness would be compellable in similar circumstances in the requested state; and iii) the central authority of the requesting country certifies that the witness's testimony is material. Failure to appear if ordered results in the same sanctions as are usually applied to such failure in the requested state.

¹²⁶ See McClean *op cit* (1988) at 186. UK legislation requires the consent of any prisoner held in the UK before such transfer will be made - section 5(2) of the Criminal Justice (International Co-operation) Act, 1990, as does article 19 of the 1992 Inter-American Convention on Mutual Assistance in Criminal Matters.

¹²⁷ See Gilmore WC 'International initiatives' in Parlour R (ed) *Butterworths International Guide to Money Laundering Law and Practice* (1995) 15 at 24 who notes that the Nigerian delegate pointed out the importance of access to bank records in the investigation and deterrence of traffickers - see *1988 Records* vol.II at 178. Some delegates to the Expert Group which reviewed the draft convention opposed the inclusion of this provision on the basis that it was too sensitive to be dealt with by an international convention and was a matter of domestic law - see the 'Expert Group Report', *1988 Records* vol.I at 40; see generally Committee I's records in *1988 Records* vol.II at 178-9. Yet the provision reflects developments in domestic law. In 1987, for example, the Swiss Banker's Association and its member banks developed new rules (Agreement on Due Diligence of 1 July 1987) and practices on limiting bank secrecy. Dunant O and Wassmer M 'Swiss bank secrecy: its limits under Swiss and international laws' (1988) 20 *Case Western Reserve Jnl of Int. Law* 541-575 examine Switzerland's bilateral relations with the US and its own efforts at self-regulation in detail, and conclude at 574-5 that while it still preserves

bilateral MLATS had proved to be a powerful means for penetrating financial secrecy laws.¹²⁸

Article 7(5) states:

5. A Party shall not decline to render mutual legal assistance under this article on the ground of bank secrecy.

While the rest of the provisions are to be executed in accordance with the domestic law of the Party,¹²⁹ with respect to bank secrecy the 1988 Convention clearly overrides domestic law¹³⁰ and other MLATs that permit bank secrecy.¹³¹ The Canadian delegate to the 1988 Conference noted that it was appropriate 'for the purposes of the confiscation measures contemplated in the Convention, ... to have access to bank records in order to investigate drug trafficking offences.'¹³² The identification and confiscation of the proceeds of drug trafficking through article 5 is central to the 1988 Convention. This process faces enormous difficulties due to the penetration of the licit financial system by illicit funds. The provision in article 7(5) assists in the exposure of illicit funds. The US Attorney General described the extent of the obligation it imposes on Parties as follows:

First, it is an obligation to enact implementing legislation, if necessary, to modify domestic bank secrecy laws to permit execution of requests for bank records under the Convention. Second, with respect to an individual request for bank records under the Convention, it obliges a requested Party to grant the request, if the only basis for refusing would be bank secrecy laws.¹³³

bank secrecy, it has provided itself with the means to participate in international co-operation, and note that every request for assistance made by the US in 1987 in terms of their 1975 Mutual Assistance Treaty was accepted.

¹²⁸ Nadelmann *op cit* (1993) at 319.

¹²⁹ Article 7(12).

¹³⁰ McClean *op cit* (1992) at 177.

¹³¹ McClean *op cit* (1992) submits at 177-178 that an 'extensive interpretation of the provisions that the Convention is not to "affect" the obligations under other treaties could rob it of all significance where the countries concerned were parties to a general mutual assistance treaty.' This conclusion is based on the argument set out above that provisions like article 7(6) make it clear that the 1988 Convention cannot diminish but can extend the scope of existing mutual assistance obligations.

¹³² 1988 Records vol.II at 178.

¹³³ *United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances* Senate Executive Report 101-15, 101st Congress, 1st Session, at 185.

The first part of this statement implies action on the part of the requested Party. The original version of article 7(5) obliged Parties to empower their courts to order records to be made available, but this is in effect provided for now by article 5(3) read with article 5(4)(c) which together allow for such court orders to carry out the obligations of an international treaty. In the second part of the statement, the US Attorney General is pointing out that a requested Party cannot use bank secrecy as a reason for refusing mutual legal assistance under article 7(15). Thus a potential conflict between article 7(15) and article 5's provision for confiscation is also avoided.¹³⁴ In order to achieve the purpose of article 7 as a whole, article 7(5) is an exception to the general approach of article 7 summed up in article 7(12) which provides that assistance will be rendered in accordance with the domestic law of the requested Party, and which makes it plain that the requested Party is under no duty to contravene its own laws in order to give assistance. Unremarkably, Parties have made reservations to article 7(5).¹³⁵

5.2.4.2.5 Article 7's procedural obligations

By contrast to those substantive obligations discussed above, article 7's procedural obligations discussed below are limited by article 7(7) which provides that they will not apply if a request for mutual legal assistance is made by a Party to which the requested Party is already bound by an existing mutual legal assistance treaty. In such a case 'the corresponding provisions of that treaty shall apply unless the Parties agree to apply paragraphs 8 to 19 of this article in lieu thereof'. These paragraphs are mostly procedural provisions commonly found in mutual legal assistance treaties. They apply where the Parties in question are not already bound by an MLAT or they are so bound but agree to apply paragraphs 8 to 19 in any event.

In practice, states have found that the existence of a central authority through which all requests for mutual assistance flow is critical.¹³⁶ These authorities are responsible for co-ordinating and monitoring the progress of requests. With respect to making requests, experience has taught that an identifiable, knowledgeable and direct channel is essential for mutual assistance. Benefits include reduction of delay in the

¹³⁴ See the statement of the Japanese delegate - *1988 Records* vol.II at 179.

¹³⁵ Lebanon (11/3/1996 - *Multilateral Treaties Deposited* (1997) at 304).

¹³⁶ See generally 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 47-48.

transmission of a request as the central authority provides a direct entry point into the foreign legal system. Staff of such a central authority can also provide information by fax, phone and so on in respect of the relevant legislation and execution process within that particular state, and an adequately resourced and staffed organ may be in a position to influence the speed at which requests are processed. With respect to the receiving of requests, the fact that requests emanate from a strong and effective central authority within the requesting state will usually ensure that they are presented in a useable form for the requested state and that they contain sufficient information to allow for their execution. The prioritisation of requests by the requesting state will also be ensured so that the most urgent and significant requests are made first. It is not remarkable that there was strong interest at the 1988 Conference in providing for such a central authority. Unfortunately, article 7(8), which sets out which of a Party's organisations shall handle requests for assistance and what methods they will use to transmit such information, allows for the possibility of more than one authority to process such requests. It provides:

8. Parties shall designate an authority, or when necessary authorities, which shall have the responsibility and power to execute requests for mutual legal assistance or to transmit them to the competent authorities for execution. The authority or the authorities designated for this purpose shall be notified to the Secretary-General. Transmission of requests for mutual legal assistance and any communication related thereto shall be effected between the authorities designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that such requests and communications be addressed to it through the diplomatic channel and, in urgent circumstances, where the Parties agree, through channels of the International Criminal Police Organisation, if possible.

Article 7(8) obliges each Party to designate an 'authority' or 'authorities'¹³⁷ to be responsible for and competent in handling requests for legal assistance. The provision

¹³⁷ The designation of more than one authority caters for the situation in federal states or in states where mutual assistance in criminal matters is in the purview of various jurisdictions - see the 'Review Group Report', *1988 Records* vol.I at 70. While it has been criticised, the US delegation to the 1988 Conference points out that this provision will allow states which have dependent territories to designate a separate

adopts a flexible approach to the identification of these authorities similar to that of article 35(e) of the 1961 Convention. The designated authority(ies) will either execute the request, or, when it does not have the necessary information, transmit it to the competent organ together with a request to provide the requesting Party with the information. If the Party insists on the use of the diplomatic channel for requests, the designated authority would be the Ministry of Foreign Affairs. But if not, it may be an enforcement agency with the necessary authority, for example, a national police drugs unit. The identity of the designated authority or authorities must be communicated to the UN Secretariat.¹³⁸ To accommodate current practice in matters of legal assistance, article 7(8) does not insist on a single authority to handle or execute requests, but the designation of a single authority would centralise the process and make it more efficient, especially in the case of a Party which has more than one enforcement agency competent on drug issues.¹³⁹ In terms of article 7(8), the designated 'authorities' will communicate with each other. The method of such communication is not specified and the Parties will decide upon it. Direct communication is thus possible, but article 7(8) does reserve the right of a Party to use the diplomatic channel, and, where the Parties agree, in urgent circumstances, if it is possible, Interpol. The latter possibility was included to help develop Interpol's role in the struggle against drug trafficking.¹⁴⁰ Article 7(8), however, does not contemplate a rigid approach which uses direct communication between enforcement agencies or Interpol at the investigation stage, and which always switches to diplomatic channels once criminal proceedings have begun. Diplomatic channels have

authority for that territory thus making possible direct communication with the territorial authority responsible for executing requests - '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 61.

¹³⁸ For example, the UK has notified that 'The authority designated by the United Kingdom under article 7, paragraph 8 is the Central Authority, C7 division, Home Office, 50 Queen Anne's Gate, London, SW1H9AT.'

¹³⁹ Prost *op cit* at 48 notes: 'It is critical to note that the establishment of a central authority for mutual assistance does not require the creation of an elaborate structure that is resource intensive. The models for successful central authorities are as varied as the number of states that have created them. The possibilities range from a central authority created by statute, to a group of officials carrying out delegated functions within an establishment department, to a person who, by practice, is responsible for co-ordinating all such requests. There are, of course, advantages and disadvantages to each method. For example, legislated central authorities have the authority of statute, and can better control and influence the execution of requests. Legislation also provides an opportunity to clearly define the functions of the central authority. On the other hand, legislation is costly and resource heavy and provides only limited flexibility to an authority which may be required to change and adjust as the practice of mutual assistance develops. For smaller countries with limited resources, it may be more realistic to establish a central authority by practice or as a delegated authority of a minister.'

been a popular method of making requests for assistance,¹⁴¹ but although article 7(8) allows Parties to use whatever method they choose, it obviously anticipates the use of the fastest method and it has been observed that diplomatic channels should be avoided at both the trial and investigation stage as they are notoriously slow and inefficient, they do not function smoothly in all regions, and smaller states have a limited network of diplomatic representation.¹⁴² Finally, article 7(8) says nothing about the agencies which may initiate a request through the central authority,¹⁴³ thus in principle it seems possible for such requests to be initiated by private prosecutors or even the defence in a criminal case.

Article 7(9) sets out the formal requirements for a valid request. It provides:

9. Requests shall be made in writing in a language acceptable to the requested Party. The language or languages acceptable to each Party shall be notified to the Secretary-General. In urgent circumstances, and where agreed by the Parties, requests may be made orally, but shall be confirmed in writing forthwith.

Requests are to be in writing in the language(s) acceptable to the Party.¹⁴⁴ The UN Secretariat will provide information as to the acceptable languages, as Parties are obliged to notify it of such.¹⁴⁵ Requests for the service of documents requiring the appearance of persons before the authorities of the requesting Party must be transmitted in a reasonable time before the scheduled appearance.¹⁴⁶ Oral requests may be made, but only with the agreement of the Parties and only if the circumstances are urgent, and they must be confirmed in writing.¹⁴⁷

¹⁴⁰ See the Chinese delegate's statement - *1988 Records* vol.II at 183.

¹⁴¹ The virtues of the diplomatic channels touted at the 'Review Group' included the assurance that the request would reach the competent service and would secure practical facilities for translation and mail servicing - the 'Review Group Report', *1988 Records* vol.I at 70.

¹⁴² See the 'Review Group Report', *1988 Records* vol.I at 70.

¹⁴³ Unlike article 4 of the 1986 Harare Scheme Relating to Mutual Assistance in Criminal Matters which provides that a request for assistance may be initiated by law enforcement agencies or public prosecutors or judicial authorities.

¹⁴⁴ Writing would assumedly cover telex messages, telegrams, faxes and electronic mail.

¹⁴⁵ This will be especially necessary where the Party concerned has more than one official language. The UK has notified that the language to be used for the purposes of article 7(9) is English.

¹⁴⁶ This is particularly the case where the right to a speedy trial applies, but the onus is on the prosecution in the requesting Party to anticipate what information they will need and the date by which it must be available, and make their request for assistance timeously.

¹⁴⁷ Written requests are standard practice in MLATs but certain treaties such as the International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of

Article 7(10) sets out the information that a request must contain. It provides:

10. A request for mutual assistance shall contain:

- (a) The identity of the authority making the request;
- (b) The subject matter and nature of the investigation, prosecution or proceeding to which the request relates, and the name and the functions of the authority conducting such investigation, prosecution or proceeding;
- (c) A summary of the relevant facts, except in respect of requests for the purpose of service of judicial documents;
- (d) A description of the assistance sought and details of any particular procedure the requesting Party wishes to be followed; and
- (e) Where possible, the identity, location and nationality of any person concerned;
- (f) The purpose for which the evidence, information or action is sought.

Article 7(10)(a) insists upon the indication in the request of the identity of the authority making the request, but does not require any further detail on that authority. Article 7(10)(b) requires the setting out of the substance and character of the procedure to which the request relates, and the identity and functions of the authority conducting the investigation or the proceeding to which the request relates. This information is intended to give the requested Party some notion of the capacity in which this authority is acting.¹⁴⁸ This authority may be the designated authority contemplated by article 7(10)(a), but it may be some other agency. Article 7(10)(b)'s information will be used in

Customs Offences, adopted in Nairobi in 1977, provides for the possibility of oral requests to expedite the exchange of information between parties in urgent circumstances. Nonetheless, there was some resistance at the 1988 Conference to oral requests - see generally *1988 Records* vol.II at 185.

¹⁴⁸ See the 'Review Group Report', *1988 Records* vol.I at 71.

practice by Parties' authorities to decide whether they will grant the request.¹⁴⁹

Article 7(10)(c) requires a summary of the relevant facts of the matter. This applies in all cases except requests for the service of judicial documents where the 1988 Conference regarded summaries as inappropriate.¹⁵⁰ Some may regard fact-summaries as cumbersome, but others regard them as essential in practice.¹⁵¹ Article 7(10)(d) requires a description of the assistance sought and details of any particular procedure the requesting Party wishes to be followed. Article 7(10)(e) requires, if possible, the identity, location and nationality of any person concerned. Such persons include not only accused persons but any person whose testimony might be required.¹⁵² It would be essential for the requested Party to be informed as to whether such persons were suspects or only witnesses as it 'could affect the way any interview with them was conducted and the legal validity of the information gained.'¹⁵³ Article 7(10)(f) requires the request to set out the purpose for which the evidence and so on is being requested, in order 'to enable the requested Party to gain an appreciation of the circumstances surrounding the request for their assistance.'¹⁵⁴ Knowledge of the purpose of the request would also assist the requested Party in deciding on any potential violation of article 7(13) which prevents a requesting Party from using evidence for investigations and prosecutions other than that stated in the request.

Article 7(11) caters for the situation where the requested Party wants information other than that provided for in article 7(10). It states:

11. The requested party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

¹⁴⁹ See, for example, section 4(2) of the UK's Criminal Justice (International Co-operation) Act, 1990, which requires the Secretary of State to be satisfied '(a) that an offence under the law of the country or territory in question has been committed or that there are reasonable grounds for suspecting that such an offence has been committed; and (b) that proceedings in respect of that offence have been instituted in that country or that territory and that an investigation into that offence is being carried on there' before granting a request for assistance.

¹⁵⁰ See the statement of the French delegate, *1988 Records* vol.II at 186.

¹⁵¹ See the 'Review Group Report', *1988 Records* vol.I at 71.

¹⁵² Statement of the Chairman of Committee I, *1988 Records* vol.II at 186.

¹⁵³ Statement of the Netherlands delegate, *1988 Records* vol.II at 187.

¹⁵⁴ Statement of the Jamaican delegate, *1988 Records* vol.II at 187.

Such requests are likely to be few as they will take time to satisfy. Time will be saved if in consequence of the requirements of article 7(10) a copy of the court order or judgement relevant to the request and the applicable provisions of the criminal law accompany the initial request.¹⁵⁵

The principle restrictive provision on requests is article 7(12) which states:

12. A request shall be executed in accordance with the domestic law of the requested Party and, to the extent not contrary to the domestic law of the requested Party and where possible, in accordance with the procedures specified in the request.

In a sense article 7(12) is trite in that it is obvious from the provisions of the rest of article 7 that requests will be executed within the restrictions of each Party's domestic law. However, in order to be effective, the execution of a request has to provide information in a form functional to the requesting Party, hence the provisions in article 7(12) to the effect that requests shall be executed 'to the extent not contrary to the domestic law of the requested Party and where possible, in accordance with the procedures specified in the request.' This provision has its origins in the desire of negotiators not to allow the insistence upon requests being executed by the requested Party in a manner that suited the requested Party to frustrate the production of evidence effective in the requesting Party. In order to suit the requesting Party's procedural rules and requirements for admission of evidence, the provision requires the requested Party to follow the procedures specified in the request to the extent that these rules are not contrary to its domestic law even though they may not be required by that domestic law. However, if the procedure requested by the requesting Party does conflict with the law of the requested Party the latter may validly substitute these procedures with its own. Thus, for example, in a situation where the requesting Party had requested that a witness be both examined and opportunity be given for cross-examination in order to ensure the admissibility of the testimony in its courts, if the requested Party then disallowed cross-examination it would render the information dysfunctional. Cross-examination would have to be allowed unless it conflicted with the domestic law of the requested Party, in which circumstances the request would be pointless anyway. The example illustrates that

article 7(12) also functions to clarify potential conflicts between the legal systems of the Parties as quickly as possible so that both are certain of their legal position in respect of the request. States in general practice do grant authority to their courts to assist foreign tribunals and allow the taking of evidence according to the practice of the requesting state.¹⁵⁶ On a different point, article 7(12) would not, it appears, allow the resurrection of the bank secrecy rules dismantled by article 7(5).

Article 7(13) imposes restrictions on the uses to which the information requested may be put. It states:

13. The requesting Party shall not transmit nor use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party.

This obligation may be cumbersome as requesting Parties will often not be aware of all the purposes for which the information might be used. But the problem disappears when the obligation is made dependent upon the purpose for which the information is to be used. Article 7(13) provides that the requesting Party may not transfer to another Party,¹⁵⁷ or itself use, the information given it by the requested Party for any purpose other than that stated in the request without the latter's consent.¹⁵⁸ Thus disclosure in public of the information for the requested purpose is possible, but the onus is firmly on the requesting Party if it wishes to depart from the purpose laid down in the request. It has been suggested by the Jamaican delegate to the 1988 Conference that article 7(13) introduces the concept of speciality to the practice of mutual legal assistance. He said

that he interpreted the paragraph as meaning that if information was requested for the purpose of dealing with a particular type of offence, it should not be used

¹⁵⁵ Statement of the Colombian delegate, *1988 Records* vol.II at 187.

¹⁵⁶ See, for example, the broad authority to do this given to US courts by 28 USC section 1782.

¹⁵⁷ It was clearly understood by the delegates to Committee I that transmit meant transfer to another Party, *1988 Records* vol.II at 190 and 192.

¹⁵⁸ See, for example, section 3(7) of the UK's Criminal Justice (International Co-operation) Act, 1990, which provides that 'evidence obtained by virtue of a letter of request shall not without the consent of an [appropriate foreign state's] authority ... be used for any purpose other than that specified in the letter,..'. The subsection also provides for the return of the documents unless the authority indicates that it is unnecessary.

without the consent of the requested Party for dealing with any other type of offence. The Convention stipulated elsewhere that drug-related offences should not be considered as fiscal offences [article 3(10)], for otherwise the requested country might deny the request. Some countries might, however, agree to provide assistance in the case of drug-related offences notwithstanding their general policy, and it therefore seemed clear that if a Party wished to use information for any purpose other than in connection with a specific offence it had to seek the consent of the requested Party.¹⁵⁹

Thus article 7(13) limits the usage of materials, information or evidence for purposes other than those requested, and only establishes an obligation of confidentiality with respect to improper usage of the information.

An obligation of confidentiality is imposed on the requested Party by article 7(14), which states:

14. The requesting Party may require that the requested Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting Party.

Article 7(14) gives the requesting Party the right to ask that the request be kept confidential except to the extent necessary to execute it. It must inform the requested Party immediately if it cannot comply. While article 7(14) recognises the need to protect sensitive investigative information, it also recognises that it may be impossible to keep such information confidential, and leaves it up to the requesting Party to decide whether to proceed with the request if confidentiality is breached.

Neither article 7(13) or (14) deal with the situation where a Party withholds important information on the illicit traffic from another Party. The Jamaican delegate pointed out that a Party would not be in breach of either paragraph if it refused to hand over information it considered to be highly confidential unless the requesting Party guaranteed not to disclose it.¹⁶⁰ The Barbadian delegate 'hoped that countries with

¹⁵⁹ 1988 Records vol.II at 190.

¹⁶⁰ 1988 Records vol.II at 33.

superior intelligence agencies would provide small countries such as Barbados with all the information needed to put the Convention into effect.’¹⁶¹ Unfortunately, the 1988 Convention contains no obligation to that effect.

Article 7(15) sets out the authorised grounds for refusing a request. It states:

15. Mutual legal assistance may be refused:

- (a) If the request is not made in conformity with the provisions of this article;
- (b) If the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;
- (c) If the authorities of the requested Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or proceedings under its jurisdiction;
- (d) If it would be contrary to the legal system of the requested Party relating to mutual legal assistance for the request to be granted.

Grounds for refusal do not change article 7’s mandatory provisions to discretionary provisions.¹⁶² The enumeration of the grounds for refusal is framed in such a way so as to protect the essential interests of the requested Party. Article 7(15)(a) helps to ensure requests conform particularly with the procedural provisions of the article. Article 7(15)(b) protects national interests. On ratification of the 1988 Convention, the United States interpreted article 7(15)(b) to mean that it

shall deny a request for assistance when the designated authority, after consultation with all appropriate intelligence, anti-narcotic, and foreign policy

¹⁶¹ 1988 Records vol.II at 33.

¹⁶² ‘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 64.

agencies, has specific information that a senior government official who will have access to information to be provided under this treaty is engaged in or facilitates the production or distribution of illegal drugs.¹⁶³

But this is just one narrow example of the national interests that potentially fall under the protection of article 7(15)(b). It is so broadly worded that it provides a blanket opt-out provision undermining mutual legal assistance under the 1988 Convention. Article 7(15)(c) provides that legal assistance may be refused in cases where the requested Party would not be able to comply with such a request in criminal investigation or proceedings under its own jurisdiction. In effect, it means that that requested Party cannot be asked to go further at the behest of the requesting Party than it can within the confines of its law.¹⁶⁴ Article 7(15)(d) allows refusal if the request is contrary to the domestic law, legal procedure or local practices relating to legal assistance of the requested Party. This appears to cover a situation where domestic legislation provides for specific grounds for refusal. In the Netherlands's, for example, such a refusal might occur if it was known that the object of the request might be prosecuted on the grounds of race, religion or political opinion.¹⁶⁵ Other potential grounds for refusal may include: the fact that the request relates to conduct for which the suspected or alleged offender has already been acquitted or convicted in any state, that is, some form of double jeopardy provision; the application of double criminality, that is, the facts upon which the request is based should be an offence in both the requested and requesting Parties; and the potential imposition of the death penalty in the requesting Party in the absence of guarantees that it will not be carried out.

Article 7(16) states:

16. Reasons shall be given for any refusal of mutual legal assistance.

¹⁶³ 20/2/1990 - *Multilateral Treaties Deposited* (1997) at 306; see Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at endnote 110. Mexico declared (10/7/1990 - *Multilateral Treaties Deposited* (1997) at 307) that this declaration by the US was a unilateral claim to justification for denying legal assistance to a requesting Party which ran counter to the Convention, and thus amounted to a reservation to which it objected.

¹⁶⁴ Statement of the Netherlands delegate, *1988 Records* vol.II at 193. An example would be where the requesting Party requested the taking of a body-sample but the requested Party's law did not provide for the taking of such samples. See, for example, 28 USC section 1782 which provides that a US court may not, in response to a foreign request, compel a person 'to give his testimony or a statement or to produce a document or other thing in violation of a legally applicable privilege.'

Article 7(16) does not make the form which the refusal will take clear, but it is submitted that it should be a prompt, detailed written answer in order to allow the requesting Party to assess whether the refusal is valid in terms of article 7(15) or to modify its future requests so that they succeed.

Article 7(17) provides for the postponement of a request for assistance. It states:

17. Mutual legal assistance may be postponed by the requested Party on the ground that it interferes with an ongoing investigation, prosecution or proceeding. In such a case, the requested Party shall consult with the requesting Party to determine if the assistance can still be given subject to such terms and conditions as the requested Party deems necessary.

The decision to postpone lies with the requested Party. It can only be based on the ground that the request interferes with an ongoing process. If it were on some other ground the requested Party would have to seek justification elsewhere in the Convention or risk being in violation of its obligation under article 7. If the requested Party does defer, it is under a duty to consult with the requesting Party to ascertain whether the request can be met, but it may impose prerequisites. McClean submits that resort to this provision should be rare if the authorities of Parties communicate properly and agree upon strategies for handling cases.¹⁶⁶

Article 7(18) is a safe conduct provision that restricts the power of the requesting Party over persons from a requested Party who consent to assist it evidentially.¹⁶⁷ Article 7(18) states:

18. A witness, expert or other person who consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting Party, shall not be prosecuted, detained, punished or subjected to any other restriction of his personal liberty in that territory in respect of acts, omissions or convictions prior to his departure from the territory

¹⁶⁵ Statement of the Netherlands delegate, *1988 Records* vol.II at 193.

¹⁶⁶ McClean *op cit* (1992) at 178.

¹⁶⁷ It is modelled on article 12 of the 1959 European Convention on Mutual Assistance in Criminal Matters *ETS* 30.

of the requested Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days, or for any period agreed upon by the Parties, from the date on which he has been officially informed that his presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory or, having left it, has returned of his own free will.

Article 7(18) indemnifies such a person from criminal proceedings resulting from any act or omission for which they were liable that occurred before they voluntarily entered the territory of the requesting Party to assist it. This provision is designed to encourage witnesses and experts to make themselves available to the requesting Party for the purpose of assisting in judicial proceedings,¹⁶⁸ especially as most states have no legal means of compelling their citizens to respond to a summons from a foreign court.¹⁶⁹ Although it does not appear to apply to civil proceedings,¹⁷⁰ Parties have in practice guaranteed criminal immunity.¹⁷¹ The second sentence of article 7(18) provides that its protection may be waived by such a person voluntarily remaining in the territory of the requesting Party fifteen days or any agreed period after being informed that he is free to go, or by returning to that territory freely. Some Parties have made reservations to this provision to the effect that they will not grant immunity unless either the person in question or the article 7(8) authority of the requested Party specifically requests such immunity, and will in any event refuse to grant it if to do so would not be in the public interest.¹⁷² The provision does not protect the person from any offence such as perjury committed while he is in the territory of the Party.¹⁷³

¹⁶⁸ See the 'Review Group Report', *1988 Records* vol.I at 71.

¹⁶⁹ Statement of the Federal Republic of Germany, *1988 Records* vol.II at 196.

¹⁷⁰ An explicit reference to civil proceedings was deleted by Committee I because it made the provision confusing and too broad in scope - *1988 Records* vol.II at 196-7.

¹⁷¹ See, for example, section 12 of South Africa's International Co-operation in Criminal Matters Act 75 of 1996 which provides: 'No witness residing in a foreign state and who attends a court or tribunal in the Republic shall, while so attending, be liable to be arrested in the Republic on any civil warrant for debt or on a criminal charge for the commission of an offence incurred or allegedly committed in the Republic, before his or her arrival in the Republic for the purpose of his or her attendance of such court or tribunal.'

¹⁷² The UK (28/6/1991 - *Multilateral Treaties Deposited* (1997) at 306).

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 65.

With respect to the vexed question of who is going to pay for legal assistance, article 7(19) states:

19. The ordinary costs of executing a request shall be borne by the requested Party, unless otherwise agreed upon by the Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the Parties shall consult to determine the terms and conditions under which the request will be executed as well as the manner in which the costs shall be borne.

On the principle that no state should be asked to defray expenses incurred outside its territory, article 7(19) makes provision for all the ordinary costs of a request for legal assistance to be borne by the requested Party without consultation. Thus ordinary costs for, for instance, the service of documents, will be borne by the requested Party. However, flexibility is introduced by provision being made for consultation between the Parties to resolve who will bear 'substantial or extraordinary' costs, a logical necessity considering the vast differences in the infrastructures of the Parties. The reference to 'substantial' costs allows the Parties to consult to work out a scale of costs involved in executing an expensive request, and who will pay for what.¹⁷⁴ 'Extraordinary' costs might include the fees for expert witnesses, the cost of translation and transcription and personal travel allowances.¹⁷⁵

In conclusion, it must be noted that the procedural provisions set out in article 7 are not particularly adventurous. McClean notes that

the danger is that sufficient weight will not be given to the intention to make a real advance in the level of co-operation in the drugs field, and that preexisting practices and attitudes will be relied upon unthinkingly: "It is something we have never done."¹⁷⁶

¹⁷⁴ Statement of the Canadian delegate, *1988 Records* vol.II at 198.

¹⁷⁵ Proposal of the US delegate, *1988 Records* vol.II at 197.

¹⁷⁶ McClean *op cit* (1992) at 178.

5.2.4.2.6 The further development of mutual legal assistance in drug enforcement

Article 7(20) states:

20. The Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this article.

This provision complements article 7(6) and article 7(7) which recognise that many Parties have already concluded MLATs relating to drug control, by recognising that many Parties may still desire to conclude MLATs in addition to the 1988 Convention.¹⁷⁷

The UK Home Office describes the solution adopted in article 7(20) as follows:

By paragraph 20, the Parties are to consider the possibilities of bilateral or multilateral agreements to give effect to or enhance the provisions of the article, and if such an agreement is in force the procedures specified therein shall prevail over the normative procedures specified in Article 7.¹⁷⁸

States have concluded bilateral and regional MLATs on the model provided by article 7.¹⁷⁹ But Gilmore warns

that state parties to this important Convention cannot rely upon existing or future bilateral agreements to dilute the obligation to provide assistance in relation to Article 3(1) offences, including money laundering, or to evade the bank secrecy obligations contained in Article 7(5).¹⁸⁰

¹⁷⁷ The obvious model is the 1991 UN Model Treaty on Mutual Assistance in Criminal Matters GA Res. 45/117.

¹⁷⁸ 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 29 cited by Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 25.

¹⁷⁹ For example, the Southern African Development Community (SADC) Protocol on Combating Illicit Drug Trafficking of 1996, SA Foreign Affairs File NV101517/96, makes provision in article 5 for such assistance and it closely follows the forms of assistance provided for in article 7(2) of the 1988 Convention.

5.2.4.2.7 Mutual legal assistance in article 7 concluded

Article 7 provides for a specialised mutual legal assistance system for drug trafficking that is unique and comprehensive. It does not include mutual assistance in respect of confiscation because of the inclusion of appropriate provisions within the article on confiscation in order to emphasise their importance. Parties have responded to article 7 by enacting the necessary legislation to enable them both to request such assistance more easily and to respond to requests more effectively.¹⁸¹ But it is probably accurate to say that mutual legal assistance as a concept is likely to be more successful between like-minded states than states that have conflicting views on drug control,¹⁸² and the same must go for article 7.

Criticisms of the article can be divided into those relating to its effectiveness, and those relating to its fairness.

Implementation of the scheme does appear to be patchy. For example, in spite of the obligation in article 7(8), many Parties have yet to establish such authorities.¹⁸³ The obvious reason is lack of resources, but entrenched legal difference is also a problem. The article does not pursue as rigorous an approach as some would have preferred,¹⁸⁴ because such an approach would have been incompatible with many legal systems and would have failed to satisfy the diverse opinions at the 1988 Conference. Criticisms of its effectiveness as a law enforcement tool must be directed at its failure to provide for more co-operation, in greater detail. One major criticism is that the article does not provide enough guidance to Parties to understand each other's laws.¹⁸⁵ Coherency between Parties' legal systems is a difficulty. The classic problem of requests for investigative assistance from common law states to civil law states being issued by

¹⁸⁰ *Ibid.*

¹⁸¹ A good example is the UK's Criminal Justice (International Co-operation) Act, 1990, which, in a much more simple procedure than the long winded rogatory commission procedure, provides in section 3 for a presiding officer, upon application by either prosecution or defence, to simply send a letter of request to a foreign authority describing the evidence being sought and asking them to provide it. Section 4 of the Act provides that the Secretary of State may upon receipt of a request to obtain evidence in the UK from a foreign country's authorities, appoint a UK court to take such evidence.

¹⁸² See Nadelmann *op cit* (1993) at 349 who points to the US-Colombia MLAT (US Senate Treaty Doc. 97-11, 97th Congr. 1st Sess (1981)), which was never ratified.

¹⁸³ See Prost *op cit* at 48.

¹⁸⁴ See Catino *op cit* at 415-440 who generally prefers the much more rigorous Italian-American treaty.

¹⁸⁵ 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 Law Conference 1997) at 7. She suggests that Parties establish central authorities staffed by lawyers who have learned the fundamentals of foreign criminal justice systems to avoid misunderstandings that will jeopardise investigations.

prosecutorial authorities rather than judicial authorities as required in civil law, is not directly addressed by the article, although in practice some civil law states have developed ways of getting around this issue.¹⁸⁶ A further problem may be that the Parties requesting information may not get the evidence they requested in a form they are able to use. Thus the article should have provided for an obligation on Parties to enact the necessary domestic legislation to ensure that the reception of foreign evidence is actually possible.¹⁸⁷ Differences in investigative and prosecutorial powers are also seen as major obstacles to mutual legal assistance. Stafford argues that as mutual legal assistance is dependant on the same investigative and prosecutorial powers being available to the requesting Party as are usually available to the requested Party to deal with its own concerns, it is important that the requested Party's powers of investigation and prosecution should be as wide ranging and effective as possible. She notes that a Party that does not legally permit the interception of telephone and telegraphic communications, cannot make such a service available to a requesting Party's investigating agency.¹⁸⁸ This is not a criticism about policing resources so much as ensuring legal resources are available. In her view the article should have provided for the designing of implementing legislation for mutual assistance in respect of all investigative measures presently available. There is a danger that more sophisticated states, once the enabling laws are in place in the poorer states, will not provide the equipment and training to perform wiretaps, but will simply do it for their less sophisticated "partners". Extraterritorial enforcement by consumer states is made easier; reciprocity is practically unlikely. The preference of consumer states for a system of supply reduction is articulated in article 7.

The alternative criticism of the article is that it leaves enough space in its ambiguity for Parties to apply a fairly draconian system between themselves. Based as it is on existing MLATs, it provides little detail with regard to testimonial privileges and due process guarantees and evidentiary protections such as the hearsay rule, or protections such as the application of double criminality, and thus like existing MLATs,

¹⁸⁶ For example, by allowing that such a request will be acceptable if it emanates from a competent authority regardless of its status, or if it is defined by the requesting state, or simply by deeming such an authority as a 'judicial authority' - see Prost *op cit* at 49.

¹⁸⁷ Stafford *op cit* at 6 points out that this is particularly the case with the admission of foreign documentary evidence including the statements of witnesses when the witness cannot attend the trial personally. She suggests that courts must be given the discretion to admit such evidence provided it is in the interests of justice.

may be tilted against alleged offenders in a way that many domestic laws would not countenance.¹⁸⁹ One quite obvious way in which it is so tilted is that it provides no mechanism for alleged drug offenders to have access to information in other states. Such information may well be essential to their defences particularly in common law jurisdictions where the prosecutor is under no duty to gather exculpatory evidence, and their trials may be unfair if they have no access to it. It is interesting that domestic legislation has made the mechanisms which were enacted as a result of article 7 available to both defence and prosecution.¹⁹⁰ But while states in their practice have provided such mechanisms, the Convention is, in the name of ease of application, silent. Article 7 should have included specific rules for the protection of standards in the issuance of search warrants and so forth. The 1988 Convention was an opportunity to disperse both efficient enforcement regimes and criminal justice protections globally. The emphasis was on the former at the expense of the latter.

5.2.4.3 Transfer of proceedings in the 1988 Convention

Conflicts of jurisdiction are likely to occur under the provisions of the 1988 Convention and in such situations one jurisdiction may be more suitable for prosecution than another. For example, evidence may emerge in State B implicating Y, a money launderer already on trial in state A. Ideally, the proceedings (docket etc.) should be transferred from State B to State A where Y is located. Transfer of proceedings is a relatively new method of legal co-operation which was adopted in the 1988 Convention as a method ancillary to those set out in article 7 in order to provide a solution to such situations.¹⁹¹ Transfer of proceedings, in its contemporary form, is not a form of extradition, because it takes place mostly in situations where the alleged offender still remains in the state in which the offence was committed.¹⁹² The proceedings, not the person, is transferred.¹⁹³ Article 8, entitled 'Transfer of Proceedings', provides:

¹⁸⁸ *Ibid.*

¹⁸⁹ See Ellis and Pisani *op cit* at 179, who make the same complaint about existing MLATs.

¹⁹⁰ For example, while section 3(1) of the UK's Criminal Justice (International Co-operation) Act, 1990, provides for the provision of evidence from a foreign state to be used in the UK, section 3(2) provides that a letter of request for the obtaining of evidence outside the UK may be made not only by a prosecuting authority but also, 'if proceedings have been instituted, by the person charged in those proceedings.'

¹⁹¹ The article was included at the instigation of the Netherlands delegation who saw merit in co-operative measures such as those that had been set down in the 1972 European Convention on the Transfer of Proceedings in Criminal Matters ETS 73 - see the 'Expert Group Report', 1988 *Records* vol.I at 40.

¹⁹² The UK Home Office noted: 'The idea is to provide an alternative to extradition where, for example, the offender is in country A and the evidence is in Country B' 'Ratification of the UN Convention

The Parties shall give consideration to the possibility of transferring to one another proceedings for criminal prosecution of offences established in accordance with article 3, paragraph 1, in cases where such transfer is considered to be in the interests of a proper administration of justice.

The article does not oblige Parties to transfer proceedings, but simply indicates that they should consider the possibility of doing so. It is limited in scope to article 3(1)'s trafficking offences. Transfer of proceedings must only take place if the requested Party considers it to be in the interests of a proper administration of justice, that is, in effect it has to assess the purpose for which the request is made and the judicial process to which it will surrender the prosecution of the alleged offender, and the requesting Party will have to prove that the purpose for which it is prosecuting the offender and the procedure used is in the proper interests of the administration of justice. Schutte outlines various factors that can be taken into account in this decision, viz.: the gravity of the offence and the likely sentence, the position of the suspect, that is, his whereabouts and whether he can be extradited, and the nature of the case, that is, the presence of accomplices and so on.¹⁹⁴ The 1991 UN Model Treaty on the Transfer of Proceedings in Criminal Matters provides a model.¹⁹⁵ Parties have declared that they understand the provision will not be used in such a way as to impair the constitutional guarantees of the defence.¹⁹⁶

5.2.4.4 General enforcement co-operation in the 1988 Convention

5.2.4.4.1 Introduction

The inclusion of provisions for mutual legal assistance in the 1988 Convention did not prevent the adoption of more familiar provisions relating to police co-operation at a less formal level. Indeed, there is a deliberate overlap between the provisions for mutual legal

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 161 - see Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at endnote 99.

¹⁹³ Schutte J 'Transfer of criminal proceedings: the European system' in Bassiouni MC (ed) 2 *International Criminal Law: Procedure* (1986) 319 at 320 emphasises that it is the file that is transferred. The suspect remains at liberty unless extradited. Deportation coupled with transfer is illegitimate.

¹⁹⁴ *Op cit* at 331.

¹⁹⁵ GA Res. 45/118.

assistance in article 7 and those contained in article 9 entitled 'Other Forms of Co-operation and Training'. This overlap occurred according to the United States delegation because of the wide variance among states as to which forms of assistance can be provided directly by law enforcement officials and which forms require compulsory measures to be taken by courts.¹⁹⁷ The United Kingdom's Home office comments on article 9:

This article is designed to preserve and enhance forms of co-operation which may exist on a less formal basis than the mutual legal assistance referred to in Article 7. It provides that Parties shall co-operate more closely with each other in matters of intelligence in investigating offences. It also calls on them to facilitate co-ordination of the work of their competent agencies and promote exchange of staff, to carry out suitable training programmes and to assist one another in their training and research programmes.¹⁹⁸

Article 3(10)'s political and fiscal offence exception discussed in chapter four also applies to article 9. It provides that article 3 offences are not to be considered as fiscal or political offences for the purpose of co-operation in terms of article 9.

5.2.4.4.2 The general duty to co-operate in article 9(1)

The first sentence of article 9(1) reads:

1. The Parties shall co-operate closely with one another, consistent with their respective domestic legal and administrative systems, with a view to enhancing the effectiveness of law enforcement action to suppress the commission of offences established in accordance with article 3, paragraph 1.

¹⁹⁶ Colombia (10/6/1994 - *Multilateral Treaties Deposited* (1997) at 303).

¹⁹⁷ The US delegation gives as an example the fact that the US permits the taking of a statement from a person who consents to be interviewed without a court order, while other states require all such statements to be taken only by order of the courts - '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 58.

¹⁹⁸ 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 29 cited by Gilmore *Combating International Drug Trafficking: The*

This sentence establishes the general obligation on Parties to co-operate internationally with the purpose of enhancing general law enforcement action against article 3(1)'s drug trafficking offences. Again, it does not apply to article 3(2)'s personal use offence. The obligations in article 9(1) are subject to a domestic safeguard clause that insists that they must be 'consistent with their respective domestic legal and administrative systems'.

5.2.4.4.3 Specific forms of co-operation under article 9(1)

The second sentence introducing article 9(1)'s subordinate paragraphs states:

They shall, in particular, on the basis of bilateral or multilateral agreements or arrangements:...

Thus the specific obligations for international co-operation in article 9(1) set out below can be carried out either through bilateral or multilateral agreements or informal bilateral or multilateral arrangements.¹⁹⁹ All of these specific obligations are also subject to article 9(1)'s domestic safeguard clause.

Article 9(1)(a) obliges Parties to:

(a) Establish and maintain channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences established in accordance with article 3, paragraph 1, including, if the Parties concerned deem it appropriate, links with other criminal activities;

Article 9(1)(a) provides that the Parties must set up and sustain contact between their drug enforcement agencies with the aim of expediting information exchange involving all facets of article 3(1) offences, including, if both Parties feel it is relevant, links with any other crimes.²⁰⁰ The 'competent agencies and services' contemplated here include

1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1991) at 25.

¹⁹⁹ See the Netherlands delegate's statement - *1988 Records* vol.II at 275.

²⁰⁰ The specific forms of co-operation do not, given the exclusion in article 9(1)'s first sentence, apply to the personal use offence in article 3(2).

the centralised co-ordinating agencies established by states under article 35 of the 1961 Convention and article 21 of the 1971 Convention, as well as situations in Parties where many agencies or services are involved in co-operation and the exchange of information.²⁰¹ The types of information to be exchanged are not listed here because it was intended that they be specified by mutual agreement between the Parties, but they must include information on all aspects of drug trafficking offences.²⁰² The provision gives Parties the option of increasing the scope of the information to cover other linked offences. This option is mainly directed, it is submitted, at economic and commercial offences, and not at the simple possession offence in article 3(2), as the whole tendency of the enforcement provision is to focus on serious organised crime.

Article 9(1)(b) obliges Parties to:

...

(b) Co-operate with one another in conducting enquiries, with respect to offences established in accordance with article 3, paragraph 1, having an international character, concerning:

(i) The identity, whereabouts and activities of persons suspected of being involved in offences established in accordance with article 3, paragraph 1;

²⁰¹ See the 'Expert Group Report', *1988 Records* vol.I at 20. Such agencies may include police and customs agencies. The UK delegate made it clear that his delegation viewed this article as binding Parties' authorities as well as the authorities in territories for which Parties were responsible - *1988 Records* vol.II at 33. Interestingly, an attempt to make provision in the 1988 Convention for Parties to set up a single co-ordinating agency was eventually scrapped at the suggestion of the Mexican delegate on the basis that it 'called for national arrangements which States might be expected to take on their own initiative' - *1988 Records* vol.II at 330. Committee II simply noted that certain recommendations of the Comprehensive Multidisciplinary Outline as well as provisions of the 1961 and 1971 Conventions recognised the necessity of a national co-ordinating agency.

²⁰² See the statements of the Netherlands, Brazilian and French delegates - *1988 Records* vol.II at 278. Types of information were listed in draft article 6(a)(i)-(iv), and included the identity, whereabouts and activities of known or suspected traffickers; the methods employed by traffickers; the movement of proceeds derived from or used by the illicit traffic; and the ownership and utilization of means of transport suspected of being used in the illicit traffic. The list was excised because it was bound to become obsolete and was incomplete - see the 'Expert Group Report', *1988 Records* vol.I at 20. Cuba proposed an amendment to article 9(1) obliging any Party which adopts drug control measures in the vicinity of the border of another Party with which it does not have an agreement about enforcement co-operation, to supply information to that Party so that it may prevent such measures from having damaging consequences on its territory as a result of attempts by traffickers to evade surveillance or pursuit - *1988*

(ii) The movement of proceeds of property derived from the commission of such offences;

(iii) The movement of narcotic drugs, psychotropic substances, substances in Table I and Table II of this Convention and instrumentalities used or intended for use in the commission of such offences;

Article 9(1)(b) addresses the forms of investigatory assistance that are to be provided by the Parties. It creates an obligation on the Parties to engage in international co-operation when making enquiries into article 3(1) offences that have 'an international character'. It refers to drug trafficking offences that are not purely domestic.²⁰³ Although the precise meaning of the term 'enquiries' is ambiguous, it appears to mean police or prosecutorial investigations. The subject matter of these enquiries is listed²⁰⁴ and includes in terms of article 9(1)(b)(i), (ii) and (iii) respectively: 'the identity, whereabouts and activities' of suspected traffickers;²⁰⁵ the 'movement of proceeds of property derived' from these offences;²⁰⁶ and the 'movement of narcotic drugs, psychotropic substances, substances in Table I and Table II of the [1988] Convention and instrumentalities used or intended for use in such offences'. Although not mentioned in this provision, it was clear at the 1988

Records vol.II at 295. This amendment was rejected on the basis that it was adequately covered by article 9(1)(a) - see the statement of the US delegate, *1988 Records* vol.II at 296.

²⁰³ Statement of the Netherlands delegate - *1988 Records* vol.II at 278.

²⁰⁴ Article 9(1)(b) through the term 'concerning' appears on its face to make the conduct of enquiries into the matters in (i), (ii) and (iii) conditional on the existence of an article 3(1) offence. The US delegation stated that this was not the intention of Committee II which drafted the provision. It held that the true intention of the provision's authors was to provide for the conduct of enquiries involving article 3(1) offences, as well as for separate and unrelated enquiries into the items marked (i), (ii) and (iii) - see *1988 Records* vol.II at 33. Such an interpretation would, however, strain the syntax of the provision and render the colon superfluous, and cannot be supported.

²⁰⁵ These persons would include suspects in the legal sense, i.e. persons suspected of an actual offence, and known traffickers under preventative surveillance.

²⁰⁶ While provision is made to criminalise the laundering of drug crime proceeds in article 3, and to allow for the seizure and confiscation of the proceeds of drug trafficking in article 5, the actual investigation of money laundering is only dealt with directly under article 9(1)(a)(ii). Considering that enforcement co-operation in regard to money laundering is a crucial part of the general international action against money laundering, this may be regarded as inadequate in detail. See by contrast, section D of the 1990 FATF Recommendations which is devoted to strengthening international co-operation, and which goes into detail on such subjects as the exchange of information relating to suspicious transactions (recommendation 32).

Conference that delegates envisaged the use of Interpol's and other enforcement communication systems and records of traffickers in this international co-operation.²⁰⁷

Article 9(1)(c) obliges Parties to:

...

(c) In appropriate cases and if not contrary to domestic law, establish joint teams, taking into account the need to protect the security of persons and of operations, to carry out the provisions of this paragraph. Officials of any Party taking part in such teams shall act as authorised by the appropriate authorities of the Party in whose territory the operation is to take place; in all such cases, the Parties involved shall ensure that the sovereignty of the Party on whose territory the operation is to take place is fully respected;

Article 9(1)(c) goes much further than an obligation to co-operate in investigations; it creates an obligation to establish joint teams in order to carry out article 9(1). However, such an obligation exists only in 'appropriate cases'. Without guidance from the provision, it is assumed such an 'appropriate case' will exist when both Parties to the joint team agree it exists. Because of the controversial nature of joint operations and the need to respect sovereignty, this obligation is limited by domestic law.²⁰⁸ Moreover, the establishment of joint teams must take into account the need to protect operational and personal security. Article 9(1)(c) also provides that a Party's officials taking part in joint teams shall act as authorised by the appropriate authorities of the territorial Party, but with the *caveat* that in all such cases, the Parties involved must ensure full respect for the sovereignty of the territorial Party. One of the arguable shortcomings of article 9 is that it does not contain an explicit provision making it clear that operations by the law enforcement personnel of one Party in the territory of another Party should not be conducted without the explicit consent of the Party on whose territory the operations take place. This situation is, however, covered by article 2(3)'s provision protecting territorial

²⁰⁷ See the statement of the Chinese delegate, *1988 Records* vol.II at 275.

²⁰⁸ This is an important limitation, given that, for example, the Colombian delegate reserved its position on the creation of joint teams because it pointed out that in Colombia investigations were under the control of an independent judiciary which could not be interfered with and they were thus incapable of such cooperation - *1988 Records* vol.II at 280.

sovereignty. In practice, joint teams are much more likely to be effective in situations where regional organisations have jurisdiction over external border policing.²⁰⁹

Article 9(1)(d) obliges Parties to:

...

(d) Provide, when appropriate, necessary quantities of substances for analytical or investigative purposes;

Article 9(1)(d) makes provision for the provision by Parties, when required, of drug samples of sufficient quantity for analytical purposes. The provision does not require an exchange of samples. The Parties will have to agree between themselves whether the provision of samples will be automatic or on a case by case basis. Samples will have to be of suitable quality.

Article 9(1)(e) obliges Parties to:

...

(e) Facilitate effective co-ordination between their competent agencies and services and promote the exchange of personnel and other experts, including the posting of liaison officers.

Article 9(1)(e) provides that the Parties must encourage useful accord between their enforcement agencies. It also obliges Parties to encourage the exchange of personnel and other experts, including the posting of liaison officers. Whether such an exchange of personnel will be unilateral or reciprocal will depend on the Parties involved. Wealthier Parties are obviously more able to send personnel abroad, but this has already created an imbalance in the international drug control system. The 1988 Convention views the exchange of personnel and experts not directly connected with enforcement as being just as vital as the exchange of liaison officers directly involved in enforcement. There was, however, a great deal of support at the 1988 Conference for the use of liaison officers

²⁰⁹ 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 610 gives the example of Europe under the EU.

who are regarded as an extremely valuable law enforcement tool.²¹⁰ The delegate from Cameroon at the 1988 Conference noted:

Indeed, it was difficult, in the framework of ICPO/Interpol, to obtain precise information or co-ordinate activities without such officers, who provided immediate and invaluable on-the-spot information.²¹¹

5.2.4.4.4 National training obligations under article 9(2)

Article 9(2) reads:

2. Each Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement and other personnel, including customs, charged with the suppression of offences established in accordance with article 3, paragraph 1. Such programmes shall deal, in particular, with the following:

(a) Methods used in the detection and suppression of offences established in accordance with article 3, paragraph 1;

(b) Routes and techniques used by persons suspected of being involved in offences established in accordance with article 3, paragraph 1, particularly in transit States, and appropriate countermeasures;

(c) Monitoring of the import and export of narcotic drugs, psychotropic substances and substances in Table I and Table II;

(d) Detection and monitoring of the movement of proceeds and property derived from, and narcotic drugs, psychotropic substances and substances in Table I and Table II, and instrumentalities used or intended for use in, the commission of offences established in accordance with article 3, paragraph 1;

²¹⁰ See generally statements in Committee II, although Colombia reserved its position on this provision as its legal system made no provision for such officers - *1988 Records* vol.II at 286.

(e) Methods used for the transfer, concealment or disguise of such proceeds, property and instrumentalities;

(f) Collection of evidence;

(g) Control techniques in free trade zones and free ports;

(h) Modern law enforcement techniques.

Article 9(2) creates a general obligation on each Party to begin or expand training programmes for its enforcement and other personnel including customs personnel²¹² engaged in the suppression of article 3(1) offences, to the extent it is thought necessary. These programmes are to be 'specific' to each particular agency, that is, each training programme must be appropriate to that agency in its particular role. They involve the training of those involved not just in the detection of trafficking offences but in their suppression, and the bias must be towards suppression as a whole.²¹³ While article 9(2) does not set out a training course in detail, it provides an obligatory curriculum in sub-paragraphs (a) to (h). This curriculum is not a closed list. Sub-paragraph (a) requires instruction in the methods used in the detection and suppression of drug trafficking offences. As these offences have become more sophisticated, so has their investigation, and so too must the training their investigators receive. Sub-paragraph (b) requires training in the routes and methods used by suspected drug traffickers, particularly in transit states,²¹⁴ and instruction in suitable countermeasures. Sub-paragraph (c) requires training in observation of the international trade in narcotic drugs, psychotropic substances and substances in Table I and Table II. Sub-paragraph (d) requires training in the detection and monitoring of the movement of profits and assets derived from drugs and contraband substances and instrumentalities used or intended for use in the commission of drug trafficking offences. Such training is, together with the training

²¹¹ *1988 Records* vol.II at 287.

²¹² Specific mention was made of customs personnel to ensure that they would receive the specified training - see the statement of the US delegate, *1988 Records* vol.II at 283.

²¹³ Draft article 6(2) was amended by the 'Expert Group' to make this clear - see the 'Expert Group Report', *1988 Records* vol.I at 21.

²¹⁴ Defined by article 1(u), see below under article 10.

envisaged in sub-paragraph (e), necessary because of the provision in article 5 of the 1988 Convention for the seizure and confiscation of these proceeds and property. Sub-paragraph (e) requires instruction in the methods used for the transfer, concealment or disguise of such profits, assets and instrumentalities. Sub-paragraph (f) requires training in the collection of evidence. Sub-paragraph (g) requires training in control techniques in free trade zones and free ports. Sub-paragraph (h) requires training in modern law enforcement techniques. Although all of the subjects mentioned are law enforcement techniques, sub-paragraph (h) is a catch-all to ensure training in any unspecified technique. Areas of training not specified include drug identification, presentation of evidence and drug testing and analysis,²¹⁵ the latter being a particular problem in developing states, and training in foreign laws and languages.²¹⁶ Another shortcoming of article 9(2) is that it does not provide for comparative legal training, something that certainly holds up mutual assistance generally.

Enforcement training is a problem for developing states because they are unable and unwilling to devote scarce resources to it. It is one of the areas where technical assistance from the developed world will have to be forthcoming. As the Commonwealth Caribbean Conference on the International Drug Conventions emphasised in 1989:

Training should be recognised as a human resource development exercise which commences with the identification of training needs. These should be determined collectively by Heads of Narcotics Units and be reviewed regularly. Training should be conducted on a national and regional basis. The regional training of trainers is an important aspect of this process. The utilisation of experienced officers in the training process is also emphasised, and practical hands-on experience should be provided wherever possible. Training should be seen as a dynamic process involving evaluation and retraining on a continuous basis. Provision must also be made for study tours for senior staff to work alongside

²¹⁵ See the 'Commonwealth Caribbean Conference on the International Drug Conventions and drug abuse' (1989) 15 *CLB* 1005 at 1007.

²¹⁶ The UK's Home Affairs Committee *Report: Drug Trafficking and Related Serious Crime* (1989) vol.II at 66-67 noted that such training was a priority among UK police if they were to co-operate effectively with other police forces.

experienced officers in more developed countries with similar drug problems and systems.²¹⁷

Much work is done,²¹⁸ but as Oppenheimer notes, experience in the Commonwealth, indicates that very different approaches have been adopted in different regions, and that drug related training programmes have not been well co-ordinated with the basic training of the law enforcement agencies concerned.²¹⁹ He argues that the training of law enforcement personnel in the skills required to interdict the illicit traffic must be built on an adequate basic training and institutional integrity to overcome the temptations of the illicit traffic, and thus he urges institutional development rather than the organisation of ad hoc training projects.²²⁰ Article 9(2) does not address these problems specifically, although it recognises implicitly the woeful inadequacy in practice of many state's enforcement personnel.

5.2.4.4.5 International co-operation in training and research under article 9(3)

Article 9(3) reads:

3. The Parties shall assist one another to plan and implement research and training programmes designed to share expertise in the areas referred to in paragraph 2 of this article and, to this end, shall also, when appropriate, use regional and international discussion on problems of mutual concern, including the special problems and needs of transit states.

Article 9(3) provides first, for mandatory international co-operation in the planning and implementation of both research and training programmes. Although such programmes appear to be limited to those designed to share the kinds of expertise referred to in article 9(2), what is really being aimed at here is not limitation of the scope of the programmes but an attempt to ensure that training programmes concerned with law enforcement co-

²¹⁷ 'Commonwealth Caribbean Conference on the International Drug Conventions and drug abuse' (1989) 15 *CLB* 1005 at 1007-1008.

²¹⁸ The UNDCP issues an annual International Calendar of Drug Law Enforcement Training Events.

²¹⁹ Oppenheimer T 'Drug abuse control: mutual assistance between members of the Commonwealth' (1990) 16 *CLB* 979 at 986-987.

²²⁰ *Op cit* at 986-987.

operation and assistance be given special attention.²²¹ Second, article 9(3) provides for the optional use of regional and international discussion on problems of mutual concern, including the particular problems and requirements of transit states,²²² when such discussion is appropriate. This provision as a whole contemplates the use of conferences and seminars to stimulate co-operation. It recognises that some Parties have far more highly developed levels of enforcement expertise than others. What it does not recognise is that they are seldom willing to make such expertise available to others without attaching conditions that serve their own enforcement objectives. Moreover, enforcement agents often believe international forums are of little use for the gathering of information of actual consequence - they believe that they can get the information more quickly elsewhere, and that such forums are just for “talking shop”. Anderson gives the example of police cynicism over the reports of rural-development experts on the replacement of poppies by other crops. The police, he states, know that ‘if crop based drugs are eradicated, traffickers will return to the laboratory.’ Enforcement agents do not believe that the preventative specialists take drug law enforcement as seriously as they should.²²³ However, international contact at forums and through circulation of personnel does lead to informal relations that improves co-operation within the system, and Anderson emphasises the importance of these contacts.²²⁴

5.2.4.4.6 International co-operation under article 9 concluded

Article 9 provides for less in the realm of general enforcement co-operation than many of the developed Parties with major drug problems would have liked, but far more than many of the developing Parties can afford. Its provisions are not as precise as the enforcement “hawks” would prefer, but from the point of view of the developing world where the maintenance of a functioning police force is often a national miracle, they look wildly ambitious. It is not surprising that some states hide behind the shield of the legal autonomy of their judicial authorities over investigations to avoid enforcement co-operation.²²⁵

²²¹ See the statement of the US delegate - *1988 Records* vol.II at 285.

²²² Defined by article 1(u), see below under article 10.

²²³ *Op cit* at 114-5.

²²⁴ *Op cit* at 115.

²²⁵ For example, Colombia made a reservation to article 9(1) upon signature (20/12/1988), substantially repeated at ratification (10/6/1994 - *Multilateral Treaties Deposited* (1997) at 303), as follows: ‘Colombia formulates a reservation to article 9, paragraph 1, of the Convention, specifically subparagraphs (b), (c),

5.2.4.5 Article 10's provisions for international co-operation and assistance for transit states

In addition to article 9's provisions for general co-operation, provision is also made for co-operation with respect to transit states. Article 10 entitled, 'International Co-operation and Assistance for Transit States', was included in the 1988 Convention to meet the special concerns of transit states as part of an overall comprehensive strategy to achieve co-operation against the illicit traffic. A 'transit' state is defined in article 1(u) of the 1988 Convention as

any State through the territory of which illicit narcotic drugs, psychotropic substances and substances in Table I and Table II are being moved, which is neither the place of origin nor the place of ultimate destination thereof.

Many of these states are developing countries, many in border regions, many with limited financial and material resources. They are used by traffickers because they are vulnerable and have poor enforcement infrastructures. Apart from the potential health threat presented by drugs being "dumped" in them, transit state's economies are vulnerable to the negative impact of reliance on revenues generated from the transit of drugs and their officials are vulnerable to large scale bribery and corruption from the free use of money by traffickers to "smooth" the transit of drugs. Technical and financial assistance is necessary to help transit states against the illicit traffic. The problem with the concept is that most states are affected by drug production and consumption, so in theory there are very few purely transit states. But as the Soviet delegate to the 1988 Conference explained, for a state to be considered a transit state, in terms of article 1(u)'s definition,

(d) and (e) thereof, since its legislation does not permit outside co-operation with the judiciary in investigating offences nor the establishment of joint teams with other countries to that end. Likewise inasmuch as samples of the substances that have given rise to investigations belong to the proceedings, only the judge, as previously, can take a decision in that regard.'

[i]t would ... be necessary to decide not whether a given State was a producer but simply to determine that that State was neither the place of origin nor the place of ultimate destination of a given illicit shipment.²²⁶

Article 10 recognises the parlous circumstances of many developing transit states.

Article 10(1) provides:

1. The Parties shall co-operate, directly or through competent international or regional organisations, to assist and support transit States and in particular, developing countries in need of such assistance and support, to the extent possible, through programmes of technical co-operation on interdiction and other related activities.

Article 10(1) establishes a general obligation on Parties to collaborate in aiding transit states, either directly or through competent international or regional organisations. Unlike the definition of transit states, which can apply to any state and not just to states vulnerable to transit traffic,²²⁷ the provision recognises the needs of developing states and singles them out as recipients of this aid. It obliges Parties to render them this aid, where practical, through technical co-operation programmes focusing on interdiction and other related activities. Such related activities would include training programmes and other forms of assistance.²²⁸

Article 10(2) provides:

2. The Parties may undertake, directly or through competent international or regional organisations, to provide financial assistance to such transit States for the purpose of augmenting and strengthening the infrastructure needed for effective control and prevention of illicit traffic.

²²⁶ *1988 Records* vol.II at 288.

²²⁷ The Argentine delegate failed in an attempt to introduce into the definition of transit state the idea that it meant states adversely affected by the transit of drugs. To a certain extent article 10(1) compensates for this omission, see *1988 Records* vol.II at 290-1.

²²⁸ See the statement of the Indian delegate - *1988 Records* vol.II at 291.

Article 10(2) gives Parties the option of undertaking the provision of financial assistance to transit states either directly or through competent international or regional organisations. It is not surprising that this is one of the only provisions referring directly to the granting of technical assistance in the 1988 Convention's enforcement provisions, because transit states tend to be indigent and unable to police themselves effectively. The 1988 Conference was not prepared to commit to an obligation to provide technical assistance. Moreover, in terms of article 10(2), supply of financial assistance will be conditional upon its use by the transit state to augment and strengthen the transit state's drug control infrastructure in order to make that infrastructure effective.

Finally, article 10(3) provides:

3. The Parties may conclude bilateral or multilateral agreements or arrangements to enhance the effectiveness of international co-operation pursuant to this article and may take into consideration financial arrangements in this regard.

Article 10(3) gives Parties the further option of agreeing, either formally or informally, to strengthen the usefulness of international co-operation pursuant to article 10, and it allows Parties to take into consideration financial arrangements in this regard. This provision was regarded as necessary at the 1988 Conference to allow for the plugging of loopholes in the 1988 Convention.²²⁹ No rigid formula is laid down for the financing of co-operation, which is left to the Parties to work out for themselves. Although attempts at the 1988 Convention to ensure that each Party involved will share the burden of the cost of enforcement failed,²³⁰ this provision, and article 10(2), recognise that funds will have to be made available to poorer Parties in order for them to carry out effective programmes of interdiction.²³¹

Article 10 acknowledges that transit states face a particular problem, but its hortatory provisions for financial assistance do little more than recognise the problem.

²²⁹ See the statement of the Indian delegate - *1988 Records* vol.II at 291.

²³⁰ See the Netherlands' amendment to draft article 6bis (article 10) in UN Doc. E/Conf.82/C.2/L.30 which was rejected in Committee II - *1988 Records* vol.II at 292.

²³¹ See the statement of the Mauritanian delegate - *1988 Records* vol.II at 292.

5.2.4.6 Enforcement co-operation in the 1988 Convention in review

The 1988 Convention, being a dedicated suppression convention, has introduced an ambitious scheme of enforcement co-operation into international law, with detailed provisions for mutual legal assistance, transfer of proceedings, general enforcement co-operation and international co-operation and assistance for transit states. This scheme is an attempt to overcome the barriers between different national systems of enforcement, which barriers serve at present to protect drug traffickers from criminal justice. But Anderson notes that '[w]ithout harmonisation of criminal law and judicial procedures there are strict limits to police co-operation in criminal matters.'²³² The factors that hinder international police co-operation in respect of harmonisation include:²³³ different legal traditions; segregation of jurisdictions; communication of suspicions only by organisations such as Interpol; requiring evidence be sent via diplomatic channels and be verified; requiring the granting of warrants of arrest be backed by the legal authority of the jurisdiction where they are issued; problems with extradition, especially in those states that insist on confirmation of a *prima facie* case against a suspect before it is granted; and a multitude of others.²³⁴ The provisions for enforcement co-operation in the 1988 Convention were agreed upon by delegates who were aware of many of these problems. That these provisions will not overcome all of these problems is due more to these problems being integral to the state system than through want of effort by the delegates. Their intention appears to have been to lay down an institutional base to detect, investigate and prosecute transnational drug crime. Building upon this foundation is the task of states.

In practice, many Parties remain unable to give effect to the obligations for co-operation provided in the drug conventions. It remains very difficult to get evidence that is admissible from other jurisdictions. Stafford believes that while there are many reasons for this, the most pressing is the lack of human and financial resources.²³⁵ Smaller states and developing states see their international obligations as being lower in priority to pressing domestic issues and they do not devote the necessary resources to develop and implement the laws that will give effect to their treaty obligations. They also balk at the costs of giving assistance, particularly when they directly benefit from the

²³² *Op cit* at 33.

²³³ Anderson *op cit* at 188-189.

²³⁴ Anderson *op cit* at 114.

²³⁵ *Op cit* at 3.

illicit traffic, for example, they are a small financial secrecy jurisdiction which attracts large numbers of enquiries about laundering. Stafford notes that many such states may simply avoid developing international co-operation regimes because they fear the associated financial burden.²³⁶ A further reason for difficulties is that while the will to co-operate may exist, foreign authorities may only be willing to do so using the methods and procedures to which they are accustomed. For example, the fact that in common law states evidence is only sought by prosecuting authorities, while in civil law states it is sought by judicial authorities, remains a huge barrier for inter-system co-operation. Effective enforcement requires the abandonment of existing practice and in some instances principle. For example, some civil law states deem a foreign common law prosecutor to be a judicial official or simply ignore the originating officer's status thus overcoming a traditional barrier to assistance. Similarly, common law states that once required the whole record of a witness's evidence if it was taken abroad now only require a summary as is the practice in civil law states. Flexibility is a key to co-operation. So too is the recognition that co-operation at more informal levels, for instance by police and investigators, will not necessarily guarantee co-operation at formal levels, for instance by prosecutors or even judicial officers. Thus an investigation may progress well until trial and then fail due to a lack of prosecutorial or judicial enthusiasm.²³⁷ Awareness at all levels of the necessity to co-operate and a desire to co-operate is the only solution to the building of trust necessary to overcome such problems. The international provisions can be used to encourage awareness, desire and flexibility, but it is difficult to use international law to impose these qualities. Part of the reason for this is that while the provisions for enforcement co-operation in the 1988 Convention appear on paper to treat all Parties in the same way, in reality, in respect of enforcement, the Parties are not equal. They have different enforcement capabilities and objectives and articles 7, 8, 9 and 10 have an in-built bias serving the interests of those Parties with

²³⁶ *Op cit* at 3.

²³⁷ See the examples of DEA investigations recounted from personal experience by Fredericks MA 'Counter-narcotics law enforcement co-operation: a necessity' in *Souvenir Brochure of the International Conference on Global drugs Law* (1997) 29 at 30-31. He recounts how in State A the whole of the government apparatus co-operated with the DEA in deporting a known trafficker to a third state from which he was extradited to the US (there being no extradition treaty in existence between the US and State A). In State B, by contrast, a joint investigation by a local enforcement agency with the DEA into another suspected trafficker revealed that he was out on bail from a prior charge laid six years previously, and when he was brought before the court on a new charge, he was released again on bail. Fredericks states: 'In the latter instance described, it was obvious to me that the counterpart law enforcement agency

large-scale internal drug consumption problems and large-scale external enforcement programmes. Although its specific provisions cry out for technical assistance in order to make the specified forms of co-operation a reality, the articles do not provide for obligatory financial assistance. Indeed, they avoid direct reference to it. They simply allow Parties to agree to steadily upgrade their mutual relations with respect to enforcement. Bilateral financial assistance remains the preferred incentive to be used by developed states to get recalcitrant developing states to co-operate. The hidden coda is that developing Parties are “free” to negotiate their own price. Not unexpectedly, Colombia has hidden behind its constitutional order in declaring that it will not co-operate when its authorities consider that it is not in the public interest to do so and insisting upon reciprocity even though it is unlikely to be in the position to make requests for co-operation.²³⁸ In the context of the relationship between the developed and developing worlds, drug supply reduction is a one-way street in international law.

was aware, committed, and co-operative. Somewhere in the prosecution or judiciary, however, the ball appears to have been dropped ...’.

²³⁸ It has made a declaration (10/6/1994 - *Multilateral Treaties Deposited* (1997) at 303) as follows: ‘A request for reciprocal legal assistance will not be met when the Colombian judicial and other authorities consider that to do so would run counter to the public interest or the constitutional or legal order. The principle of reciprocity must be observed.’

5.3 Specific drug enforcement methods in international law

5.3.1 General

As well as making provision for the general enforcement co-operation discussed above, the drug conventions make provision for specific enforcement measures. Some of these measures, such as seizure and confiscation, are reasonably familiar instruments of criminal justice. However, the 1988 Convention vastly increased the scope of familiar measures like confiscation while at the same time introducing a number of novel provisions designed specifically to curtail illicit trafficking. The latter include investigative techniques such as controlled delivery and monitoring of precursor substances. In an effort to respond to every facet of the illicit traffic, the 1988 Convention thus extended international co-operation into what at least in 1988 were unfamiliar realms for most states by building upon old techniques and introducing new techniques. These specific enforcement measures, which all have national and international aspects, are examined below.

5.3.2 Seizure and confiscation as an enforcement measure

5.3.2.1 Introduction

As noted in the Chapter Three above, although they function as a punishment, seizure and confiscation also function as an enforcement measure. As such they assist in the investigation of offences, they are used to get evidence for the trial of alleged drug offenders, and in their modern role they are used to undermine the economic base of the illicit traffic. Typically a two step process is involved. The first provisional step of taking possession of the material involves procedural measures such as identification, tracing, freezing and seizing. These measures are necessary preliminaries to the second concluding step which involves confiscating and/ or forfeiting the material. The first step may be an administrative decision based on suspicion, while the second is usually a judicial decision based on proof.²³⁹ Both steps necessarily proceed disposal of the material. While simple in principle, the mechanics of this process often become complex due to the nature of the property to be confiscated. As we shall see, the earlier drug

²³⁹ In Spanish, for example, a distinction is made between *embargo*, a precautionary measure, and *comiso*, the penalty of confiscation which transfers ownership to the state.

conventions contemplated the confiscation of drugs and material used in the commission of their drug offences. The 1988 Convention reproduces this process, but then extends it to include the confiscation of the assets derived from illicit trafficking.

5.3.2.2 Seizure and confiscation in the 1961 Convention

Article 37 of the 1961 Convention, entitled 'Seizure and Confiscation', reads:

Any drugs, substances and equipment used in or intended for the commission of any of the offences referred to in article 36, shall be liable to seizure and confiscation.

Article 37 is unclear in a number of respects.

The first problem is whether it is an obligation or something less. Some delegates to the 1961 Conference felt that the article only binds Parties to legally empower their authorities to engage in seizure/confiscation, leaving the decision to seize/confiscate to these authorities.²⁴⁰ Others felt that it creates a duty on Parties to engage in seizures/confiscations.²⁴¹ The *1961 Commentary* notes that the wording is ambiguous, but submits that the stronger view at the 1961 Conference favoured a definite obligation on Parties to seize/confiscate, and points out that article 37 would not be very meaningful if it did not provide for such an obligation.²⁴² In the context of the 1961 Convention's purpose of suppressing the illicit traffic, the better view is that article 37 both obliges Parties to provide for the legal mechanism to enable seizure/confiscation and also obliges Parties to engage in such seizure/confiscation. The latter obligation is qualified in most states by the exercise of the discretion of the judicial arm in deciding whether such seizure/confiscation is legally possible in terms of that state's domestic law. Although a confiscation decision need not in terms of article 37 be a judicial decision, and nor is it necessary that it be proved that the owner of the material did not consent to the material's illicit use, both are recommended by the *1961 Commentary*.²⁴³

²⁴⁰ See the view of the Yugoslav delegate - *1961 Records* vol.II at 246.

²⁴¹ See the statements of the German (FRG) delegate - *1961 Records* vol.I at 128, and the Danish and FRG delegates and the Legal Adviser - *1961 Records* vol.II at 246.

²⁴² *1961 Commentary* at 442-3.

²⁴³ *1961 Commentary* at 444.

There is also some uncertainty about the kinds of material to which article 37 applies. It applies disjunctively to 'drugs, substances and equipment' that have been used or have been intended for use in an article 36 offence.²⁴⁴ No quantity of drugs or substances or type of equipment is stipulated. The provision's potentially broad scope is a possible source of dispute. For example, it was suggested at the 1961 Conference that it applied to the equipment of illicit laboratories and to vehicles used for the illicit transport of drugs.²⁴⁵ It was also felt that it did not apply to vehicles,²⁴⁶ and the *1961 Commentary*, interpreting the Spanish and French versions of the text, feels that it cannot include vehicles or at least large vehicles such as rail stock, large boats or aeroplanes.²⁴⁷ It is submitted that in practice, Parties should examine the circumstances carefully when seizing vehicles whatever their nature. While there is a plain distinction between confiscation of a large commercial aircraft flying a regular route because drugs are found on board, and a drug-laden light-plane flying an irregular route, there may be a case for an obligation to seize a large transport plane found carrying drugs on an irregular route. State practice tends to exclude real property, large vessels and aircraft from confiscation.²⁴⁸

A further issue is what the Parties are required to do with the drugs, substances and/or equipment once they had been confiscated. Some states at the Conference felt that this material should be destroyed while others believed that it should be sold if it were not integral to the illicit drug trade.²⁴⁹ The decision rests with the Party.²⁵⁰ It depends on the nature of the material, viz.: illicit drugs with no medical value must be destroyed; illicit drugs with medical value can be utilised by the confiscating Party; material not in

²⁴⁴ It does not apply to poppy straw or the leaves of the cannabis plant unaccompanied by tops because they are not drugs - article 1(1)(r) and (b). It does apply to the drugs in Schedule I and II and to all preparations including those in Schedule III because it is not one of the provisions from which the drugs in Schedule II or the substances in Schedule III are excluded.

²⁴⁵ See the statement of the Mexican delegate, *1961 Records* vol.I at 128.

²⁴⁶ *1961 Records* vol.II at 246.

²⁴⁷ *1961 Commentary* at 444.

²⁴⁸ For example, while section 37(1)(a) of the Bermudan Misuse of Drugs Act, 1972, excludes premises, ships exceeding 250 tonnes gross and aircraft from forfeiture, section 56(1)(a) of Hong Kong's Dangerous Drugs Ordinance, 1969, also excludes trains from forfeiture. Taking a different approach, Singapore allows forfeiture of any ship, hovercraft, aircraft or vehicle except when used for a regular passenger service or used without the owner's consent - section 25(a) and (b) of the Misuse of Drugs Act, 1973. Unusually, section 8(1)(c) of South Africa's Abuse of Dependence Producing Substances and Rehabilitation Centres Act 41 of 1971 allowed the forfeiture of immovable property connected with drug dealing.

²⁴⁹ See the *1961 Records* vol.I at 128 generally.

itself of an illicit nature can be sold to defray expenses. In practice, most domestic legislation leaves the decision in the hands of the court.²⁵¹

One final problem is whether the Parties are obliged to make provision for return of the material if the possessor is either not charged, or if charged, found not guilty. The overriding consideration in such situations must be the nature of the material. Material which is not contraband in itself may be returned, while material that is contraband should not be returned. With respect to the confiscation of drugs in possession for personal use, even if a Party chooses not to regard such conduct as criminal under the 1961 Convention, it appears to be obliged to confiscate such drugs because article 33 obliges Parties not to permit non-medical/scientific possession. An ancillary consideration may be the purpose for which the material is being held. If the seizure/confiscation is operating as a punishment, then if the possessor is not guilty of any offence, material that can be lawfully possessed must be returned. However, if the seizure/confiscation is part of an ongoing investigation then Parties should not be obliged to return such material.

5.3.2.3 Seizure and confiscation in the 1971 Convention

Article 22(3) of the 1971 Convention provides:

Any psychotropic substance or other substance, as well as any equipment, used in or intended for the commission of any of the offences referred to in paragraphs 1 and 2 shall be liable to seizure and confiscation.

As with article 37 of the 1961 Convention, article 22(3) is ambiguous in a number of respects.

Article 22(3)'s phrase 'shall be liable to seizure and confiscation' can be read to mean either that the Parties are legally bound to seize and confiscate the material concerned or that the Parties are bound to ensure that this material is open to seizure and

²⁵⁰ See the statement of the Legal Adviser, *1961 Records* vol.I at 148. The exception is confiscated opium which if exported can in terms of article 24(2)-(4) of the 1961 Convention only be exported to another Party.

²⁵¹ For example, section 28(1) of the Antiguan Misuse of Drugs Act, 1973, provides that anything ordered forfeited shall be 'either destroyed or dealt with as the court may order.'

confiscation. The *1971 Commentary* prefers the former interpretation, arguing that it accords with the purpose of the provision and the intentions of its authors.²⁵²

With regard to the objects which can be seized in terms of article 22(3), it applies primarily to psychotropic substances and substances used for the perpetration of an article 22(1) or (2) offence.²⁵³ Chatterjee submits that the provisions of article 22(3) also apply to preparations of psychotropic substances.²⁵⁴ 'Equipment' is vague. The Hungarian delegate stated that it meant 'any substance, plant or the like which might be used in the manufacture of a psychotropic substance.'²⁵⁵ The United States delegate explained that under

the term 'equipment', ... his Government would consider itself authorised to seize and confiscate any vehicle, lorry, vessel or aircraft which had been used for the illicit transportation of psychotropic substances.²⁵⁶

The *1971 Commentary*, however, states that vehicles especially large vehicles such as rail stock, large boats and airplanes are not 'equipment'.²⁵⁷ Whatever the exact meaning of equipment, it should be seized pending a decision (usually judicial) as to its confiscation or release.

Chatterjee also presumes that all substances, preparations and equipment seized during the pendency of legal proceedings will be returned to the alleged offender if found not guilty,²⁵⁸ but this assumes that lawful possession of such material is possible. The 1971 Convention does not restrict the way Parties may dispose of confiscated psychotropic substances or in particular insist that they be destroyed.

Like article 37 of the 1961 Convention, article 22(3) does not go beyond the insistence that drugs and instrumentalities involved in drug trafficking must be confiscated. In practice, most states had already made provision for seizure and

²⁵² *1971 Commentary* at 366-7.

²⁵³ The *1971 Commentary* at 368 submits that Schedule 1 substances found in the unauthorised possession of a user for his own consumption must be seized and confiscated by Parties through article 7(b) even if they do not regard such possession as an offence under article 22(1)(a).

²⁵⁴ *Op cit* at 484. Presumably he means through the term 'other substance' which also appears to make precursor substances liable to seizure.

²⁵⁵ *1971 Records* vol.II at 34.

²⁵⁶ *1971 Records* vol.II at 33.

²⁵⁷ *1971 Commentary* at 367; cf *1961 Commentary* at 444.

²⁵⁸ *Op cit* at 484.

confiscation of the objects involved in crimes long before either convention was concluded.²⁵⁹

5.3.2.4 Seizure and confiscation in the 1988 Convention

5.3.2.4.1 Introduction

By 1988, with the massive boom in illicit drug trafficking's profits filling the world's banks, it was apparent that further development of the law of confiscation was necessary. This development has taken place in the context of the general campaign against money laundering beginning in the United States.²⁶⁰ Nadelmann notes that the reasons for 'going after the money' are numerous, viz.: i) it is the best way of deterring and punishing major traffickers who without profit aside from paying themselves cannot reinvest in production, pay employees, purchase weapons, bribe officials; ii) while drugs "busts" rarely lead to the major traffickers, the trail of profits - the "paper trail" - does; and iii) confiscation can make law enforcement pay for itself.²⁶¹ Confiscation of proceeds presented a problem because in many cases the assets to be confiscated were many steps away from the original illicit drug transaction, they were in a completely different form to the money paid for the illicit drug transaction and they were being held in a situation practically impossible to link to the illicit drug transaction. Unfortunately, both article 37 of the 1961 Convention and article 22(3) of the 1971 Convention are married to the conception that confiscatable property has to be derived by the offender from the offence for which he was convicted, and neither make provision for the seizure of the proceeds of drug trafficking. Existing domestic legislation reflected this approach.²⁶²

²⁵⁹ See, for example, article 58(1) of Switzerland's Code Penal in force in 1942. A more recent example is the scheme in sections 60, 61 and 62 of the Indian Narcotic Drugs and Psychotropic Substances Act 61 of 1985 (as amended) which provides for the confiscation of illicit drugs, illicit substances, goods used for concealing illicit drugs and substances, and, going further than the obligation of either the 1961 or 1971 Conventions, the sale proceeds of illicit drugs and substances.

²⁶⁰ See 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 275-296 who charts the growth of national and international efforts against drug trafficking related money laundering; see also Kohler N 'The confiscation of criminal assets in the United States and Switzerland' (1990) 13 *Houston Jnl of Int. Law* 1-38; McClean D 'Seizing the proceeds of crime: the state of the art' (1989) 38 *ICLQ* 334-360; Nadelmann EA 'Unlaundering dirty money abroad: U.S. foreign policy and financial secrecy jurisdictions' (1986) 18 *Inter-American LR* 33-81.

²⁶¹ *Op cit* (1986) at 34.

²⁶² McClean *op cit* (1989) at 336 gives the useful example of section 27(1) of the English Misuse of Drugs Act, 1971, which allowed, according to Lord Diplock in *R v Cuthbertson* [1981] AC 470 at 484, the

By 1988, however, many states had already begun to enact legislation designed to secure the confiscation of assets derived from drug trafficking.²⁶³ However, such legislation did not fit comfortably under existing international provisions for seizure and confiscation.²⁶⁴ These international provisions went only a short way to countering the economic power of drug traffickers, and calls were made for steps to be taken to bring the international position into line with the more advanced domestic jurisdictions.²⁶⁵

The obvious limitations in only going after the money at the domestic level were also realised. The international nature of drug trafficking calls for international co-operation in pursuit of this property. McClean points out:

The facility with which assets, particularly in the form of financial credits of some sort, can be passed across national boundaries means that an order enforceable only in the country of origin may be of limited value.²⁶⁶

While certain kinds of confiscation orders were more effective in foreign jurisdictions than others,²⁶⁷ domestic efforts were so disparate they made international co-operation

forfeiture of 'the drugs involved, apparatus for making them, vehicles used for transporting them, or cash ready to be, or having just been, handed over for them' but, which his lordship noted at 484-5, did not 'serve as a means of stripping the drug traffickers of the total profits of their unlawful enterprises.'

²⁶³ Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 13. In its Drugs Trafficking Offences Act, 1986, the UK government made provision for the confiscation of the proceeds of drug trafficking. Apart from making the benefits of trafficking subject to forfeiture, it gave increased powers of seizure to the police, and significantly, allowed the courts to register, upon application by a designated country, an external confiscation order. The record of the 1986 Act was not initially that impressive; in its first year of operation 17 money-laundering convictions resulted in confiscation of 27.2 million pounds, while in 1989 of confiscation orders to the value of 7.9 million pounds only 1.1 million pounds was actually realised - less than one percent of estimated drug profits during that year according to Clutterbuck R *Drugs, Crime and Corruption* (1995) at 144-115.

²⁶⁴ Classification of money as 'material' under article 37 of the 1961 Convention is awkward.

²⁶⁵ The UN DND commissioned two meetings of Experts in 1983 and 1984. The Expert Group on the Forfeiture of the Proceeds of Drug Crimes recommended that the existing drug conventions should be amended or supplemented by a treaty which would specifically address the issue of money laundering and asset forfeiture in order to provide a framework for conclusion of bilateral MLATs, guidance in respect of domestic legislation and pressure on non-conforming states - see Nadelmann *op cit* (1986) at 75-6 citing UN Doc. E/CN.7/657/Add.2.

²⁶⁶ McClean *op cit* (1989) at 339.

²⁶⁷ See McClean *op cit* (1989) at 340 who points out the difficulties of enforcing forfeiture orders not linked to a conviction in foreign jurisdictions.

extremely difficult.²⁶⁸ Steps needed to be taken to develop confiscation in states where it was not being used, and to harmonise it in states where it was being used.

Article 5 of the 1988 Convention, entitled, 'Confiscation', is designed to attack the international drugs traffic, by attacking the patrimonial benefits that accrue from it wherever they may be held. It operates, together with the criminalisation of money laundering in article 3(1)(b) and (c), as a way of reaching the trafficker and his profits. Going further than the earlier international provisions, article 5 makes provision first for measures to be taken at the domestic level to provide for confiscation on the Party's own behalf, and second for international co-operation to provide for identical measures on the application of another Party. The article enables the greatest number of states to use confiscation against traffickers, and removes possible impediments to the recognition of confiscation orders of other states by ensuring that every state has such a mechanism in place.²⁶⁹ The rest of the article is devoted to measures of general application. According to its authors, article 5 is drafted in a flexible manner to avoid the necessity of expansive domestic law safeguard clauses.²⁷⁰ It is also protected by article 3(10)'s political and fiscal offence exception.²⁷¹

5.3.2.4.2 Confiscation at the national level

Article 5(1), (2) and (3) create a series of unqualified obligations that deal with the issue of confiscation at the domestic level. They read:

1. Each party shall adopt such measures as may be necessary to enable confiscation of:

(a) Proceeds derived from offences established in accordance with article 3, paragraph 1, or property the value of which corresponds to that of such proceeds;

²⁶⁸ See generally Kohler *op cit*, who describes in detail the different confiscation procedures developed in the US and Switzerland prior to the 1988 Convention, highlighting the differences in procedure which made international co-operation in this regard so difficult.

²⁶⁹ McClean *op cit* (1992) at 179.

²⁷⁰ See the 'Expert Group Report', *1988 Records* vol.I at 31.

²⁷¹ See the discussion in chapter four.

(b) Narcotic drugs and psychotropic substances, materials and equipment or other instrumentalities used in or intended for use in any manner in offences established in accordance with article 3, paragraph 1.

2. Each Party shall also adopt such measures as may be necessary to enable its competent authorities to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things referred to in paragraph 1 of this article, for the purpose of eventual confiscation.

3. In order to carry out the measures referred to in this article, each Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. A Party shall not decline to act under the provisions of this paragraph on the grounds of bank secrecy.

The introductory sentence of article 5(1) is framed in mandatory terms but leaves each Party a wide measure of discretion. It does not impose a strict obligation to confiscate, but rather obliges the Parties to adopt the domestic legal steps necessary to enable confiscation of the things mentioned in the sub-paragraphs. Early drafts of the provision specified in great detail the measures to be adopted,²⁷² but the final version leaves the Parties free to adopt whatever legal measures they deem fit to the task of confiscating these things.²⁷³ This provision recognises that Parties have very different basic systems of confiscation, procedures for the taking of decisions to confiscate and procedural frameworks for such decisions.

Confiscation is defined in article 1(f) as ‘the permanent deprivation of property by order of a court or other competent authority.’ The Chairman of Committee I noted that ‘permanent deprivation’ is used ‘not so much to indicate the finality of deprivation

²⁷² Draft article 3(3)’s sub-paragraphs provided for the procedure and content of freezing/seizure orders and confiscation orders, for the evidence to be taken into account in consideration of such orders and for measures to prevent intermingling with licit assets from adversely affecting such orders - see *1988 Records* vol.I at 4. Only the latter provision survived in article 5(6)(b), but the draft may serve as a useful model for domestic legislation.

²⁷³ These measures could include currency reporting requirements, “know your customer” measures for banks, indeed a whole host of rules. More developed national systems have instituted a complex of laws and administrative measures aimed at relieving drug traffickers of their ill gotten gains - see generally Hernandez *op cit* at 235-304.

as to distinguish the measure from provisional deprivation.²⁷⁴ Finality of deprivation depends on each Party's precise understanding of confiscation in terms of its own law. The definition's reference to the agency of confiscation indicates that while the authors of the provision thought that most confiscation orders would be made by judicial authorities, they also anticipated the situation where some other lawful authority may be given this power by a Party's domestic law.²⁷⁵ The provision does not dictate the nature of the proceedings which must be followed to enable confiscation. Any type of proceedings might qualify, proceedings linked to a criminal trial or proceedings independent of a criminal trial such as *in rem* proceedings, so long as they enable confiscation. Importantly, article 1(f)'s definition caters for the different domestic approaches to confiscation by providing that it 'includes forfeiture where applicable'.²⁷⁶

The targets of confiscation provided for in article 5(1)(a) are novel, viz.: proceeds derived from article 3(1) offences²⁷⁷ or property of corresponding value to such proceeds. The Party must choose between the two options made available.

The first option makes provision for an asset-confiscation system. It focuses on tracking down and confiscating the proceeds actually derived or obtained from the offence, that is, illicit proceeds. The central issue here is the nature of the link between the offence and the proceeds required by the provision. 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'.²⁷⁸ Because it refers to 'any property' derived or obtained 'indirectly', as well as 'directly', from article 3(1) offences, the definition of proceeds is broad enough to cover the various devices used by criminals to conceal proceeds, such as shell companies, which remove the proceeds from the formal entitlement of the original offender.²⁷⁹ The United States delegation insisted it

²⁷⁴ 1988 Records vol.II at 95.

²⁷⁵ See generally - 1988 Records vol.II at 93-4.

²⁷⁶ The reference to forfeiture is necessary because while both terms are sometimes used to refer to the same process - see the 'Expert Group Report', 1988 Records vol.I at 32, in some legal systems confiscation is a preliminary step following seizure and forfeiture is the final step - see the 'Review Group Report', 1988 Records vol.I at 63, while in others the reverse applies - see the Iranian statement, 1988 Records vol.II at 65. Generally, however, confiscation is used in Europe and forfeiture in the US to refer to the same process.

²⁷⁷ Note that these offences have to be established in the Party's domestic law before confiscation is possible - see the 'Expert Group Report', 1988 Records vol.I at 32.

²⁷⁸ While the definition looks extensive in scope, compare it to article 1(a) of the 1990 Council of Europe Money Laundering Convention ETS 141 which defines proceeds as 'any economic advantage from criminal offences.'

²⁷⁹ See McClean *op cit* (1989) at 339. The Australian delegate explained that reference to indirect derivation was necessary because before tainted property had intermingled with untainted property

included profits derived from property obtained from an offence.²⁸⁰ In spite of the fact that the provision still requires the property to be indirectly linked to an offence, some delegates to the 1988 Conference were wary of the expanding net of confiscation.²⁸¹ The provision's insistence upon a link, direct or indirect, to an offence is unclear in a number of respects. The meaning of an indirect link to an offence is completely undefined. More specifically, the provision does not state expressly that a criminal offence by the owner or holder of the property must have been proved in court before confiscation is possible. This is important, because as McClean explains and as noted above, in many jurisdictions confiscation orders are actions *in personam*, that is, these criminal confiscation orders enable only the confiscation of a convicted offender's assets derived from criminal actions. Certain jurisdictions, however, allow actions *in rem*, that is, they allow the civil forfeiture of any property declared to be the proceeds of crime and the identity of the holder is immaterial unless he is able to establish he is *bona fide*.²⁸² It is uncertain whether article 5(1)(a) applies to property linked to offences only suspected or still under investigation or being tried, in other words, where guilt has not yet been established. However, the fact that article 1(f) provides that confiscation 'includes forfeiture where applicable' suggests that the civil forfeiture proceedings used in certain jurisdictions requiring no link other than that the property be declared to be the

'various steps might occur at law in its transmission - for example, the distribution of profits to shareholders by a company - and without the words "directly or indirectly" in the definition there would be no wording to cover those steps.' - *1988 Records* vol.II at 91. The definition is so broad, however, that although article 5(6)(c) expressly caters for the confiscation of income generated from the proceeds of an article 3(1) offence, it is arguable that the definition of property is broad enough to include it anyway.

²⁸⁰ '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 40.

²⁸¹ The French made a formal reservation during the Plenary with respect to use of the term 'indirectly', and the German delegation echoed their concern - *1988 Records* vol.II at 28.

²⁸² *Op cit* (1989) at 339. Civil law states rely on criminal confiscation only, while common law states use criminal confiscation, but do not rely upon it entirely because of the difficulties in proving offences and linking proceeds to offenders. Zagaris B, Kingma E 'Asset forfeiture international and foreign law: an emerging regime' (1991) 5 *Emory ILR* 445 at 448-449 explain that the use in the US of civil *in rem* proceedings (eg. 21 USC section 881(d)) to forfeit the proceeds of drug crime does not require the proof of an offence or conviction of an offender. As penal sanctions are not involved, criminal due process is not afforded to the property owner, forfeiture may occur without the benefit of a judicial proceeding, and once seized the property remains in the government's custody until title is determined. The burden of proof is on the claimant of the property. Zagaris and Kingma note that this divergent practice poses obstacles to US requests for confiscation in other jurisdictions being considered favourably. The 1990 European Convention on Money Laundering 30 *ILM* 148 attempts to overcome this by obligating Parties to assist on request whenever 'judicial proceedings' are pending, and paragraph 15 of the Council of Europe's Explanatory Memorandum on the Convention explains that the Convention applies to diverse

proceeds of crime are also covered by this provision,²⁸³ and this submission is borne out by the legislation passed by Parties after the conclusion of the 1988 Convention.²⁸⁴ It would be controversial to suggest that this means that Parties to which civil forfeiture proceedings are completely foreign are under a legal obligation to enact legislation making them possible. The vagueness of the provision and the use of 'where applicable' suggest that the provision anticipates Parties taking steps appropriate to their legal systems. In any event, the inclusion of money laundering offences in article 3(1)(b) and 3(1)(c)(i) expands the net of confiscation enormously, because rendering the actual laundering of the proceeds of an offence means that the authorities can avoid having to link the assets to the actual trafficking of drugs.²⁸⁵ The identity of proceeds is a further issue. Proceeds are made up of property, and article 1(q) defines 'property' 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.' As defined, while proceeds are distinguished by the fact that they are assets and the like derived or obtained from an article 3(1) offence, property is a broad generic term. The authors of the definition of property wanted it to be formulated as broadly as

decisions, by criminal courts, administrative courts and separate judicial authorities, to confiscate in civil and criminal proceedings totally separate from those in which the guilt of the offender is determined.

²⁸³ The Convention's solution has been to make confiscation a generic term that includes notions of both forfeiture and confiscation in the narrow sense, so as to enable Parties to apply the process appropriate to their legal system - see the statements of the Chairman of Committee I, *1988 Records* vol.II at 65 and 95.

²⁸⁴ See, for example, section 22(3)(a) of the New South Wales Drug Trafficking (Civil Proceedings) Act 23 of 1990 which provides that the finding of a court upon which an asset forfeiture order is to made 'need not be based on a finding as to the commission of a particular offence that constitutes a drug-related activity or a finding as to any particular quantity involved; ...'.

²⁸⁵ See McClean *op cit* (1989) at 340. In *International Judicial Assistance* (1992) at 216 he expands on this point. He notes that where a Party has criminalised money-laundering itself, the practical difference between confiscation orders and forfeiture orders is much reduced because while forfeiture orders seek to reach property held by third parties linked in some way to the primary offender but not themselves convicted of the primary offence, if such a third party can be convicted of money laundering a confiscation order can be applied to him and to any property he controls.

possible so that nothing could avoid the net of article 5.²⁸⁶ Domestic legislation has correspondingly broad definitions of confiscatable property.²⁸⁷

The second option makes provision for a value-confiscation system. It expands the confiscation net even further. It focuses not on the proceeds of the offence but on their value, and anticipates the confiscation from the offender of property as broadly defined in article 1(q) which corresponds to the proceeds in value. Such property need not be linked, either directly or indirectly, to an offence;²⁸⁸ it may in fact have been legally acquired. The only link required is that it belong to the offender, who must have benefitted in some way from drug trafficking. The investigating authorities are not claiming the proceeds of the crime nor are they concerned with property into which those proceeds have been transformed. Under this provision the enforcement agencies do not have to waste time proving that the property is in some way related or linked to the crime at all. All they have to prove is ownership by the offender and that he has benefitted from committing a criminal offence. It is the 'value' of this benefit which is crucial. In effect, this approach allows the state in question to exert a financial claim against the person against whom the order is made. If it is not paid, it may be realised in any property (no matter whether legally or illegally acquired) belonging to that person.²⁸⁹ The order is thus executed in a way similar to a court order for civil damages.²⁹⁰ Article 5(1)(a) was drafted to allow adequate scope to accommodate the

²⁸⁶ See the US delegate's statement - *1988 Records* vol.II at 89. Unlike 'proceeds' its definition is not subject to any qualification. 'Assets of every kind' includes anything of value whether it be 'movable or immovable, tangible or intangible, corporeal or incorporeal.' It includes 'incorporeal property' such as copyrights and patent rights in addition to corporeal property, because one of the aims of article 5 is to eliminate the source of financing of the illicit traffic. It may include proceeds and thus be derived from an article 3(1) offence but this is not necessarily so. 'Legal documents or instruments' were included in the definition because they evidence title and their confiscation may be necessary. Moreover, although they are not regarded by some domestic legal systems as property, their confiscation serves in some legal systems as symbolic of the confiscation of the property they represent.

²⁸⁷ See, for example, section 38(1) of the UK's Drug Trafficking Offences Act, 1986, which defines property as including 'money and all other property, real or personal, heritable or moveable, including things in action and other intangible or incorporeal property.'

²⁸⁸ Statement of the Chairman of Committee I - *1988 Records* vol.II at 66.

²⁸⁹ Typically legislation provides that persons such as the wife of a drug trafficker, who are given property, such as a car, can have this property confiscated from them even if they were completely unaware of how the drug trafficker actually got the money to purchase it.

²⁹⁰ The British delegate to Committee I noted that British law provided for the substituted value approach and then gave as an example of its application a situation where 'if a trafficker had ownership of a one-eighth share in a race horse, the United Kingdom might confiscate from the trafficker's bank account the value of that one-eighth share.' - see *1988 Records* vol.II at 66 referring to the use of section 1 of the Drug Trafficking Offences Act, 1986. However, unlike a civil judgement, default on payment can lead to a heavy prison sentence (up to ten years under the 1986 Act). McClean *op cit* (1989) at 344-349 reviews a range of Commonwealth legislation along these lines. He cites at 345 sections 24 and 27 of the Commonwealth of Australia's Proceeds of Crime Act, 1987, as an elaborate example of how the value of

differing approaches to confiscation that have evolved in domestic legislation.²⁹¹

Some states only permit confiscation of property directly acquired through criminal activities, some also permit confiscation of property indirectly acquired through criminal activities, while others go even further and adopted the substitute of assets approach.²⁹²

Although some delegates to the 1988 Convention regarded their adoption of measures to enable confiscation of proceeds, or of property of corresponding value, but not both, as satisfying article 5(1)(a)'s obligation, the provision read literally appears to require that the choice between the two options must be available to each Party.²⁹³ Moreover, article 5(4) requires Parties to take legislative measures to enable them to deal with requests for co-operation under article 5, and this implies that Parties that only choose to adopt measures for confiscation of proceeds will be required to adopt measures to enable them to grant a request from a Party that uses the substituted value option, and *vice versa*. Seen in the context of the rest of the Convention the options of article 5(1)(a) are really obligations for uniform adoption of both approaches to confiscation, and, by extension, to the taking of provisional measures under article 5(1)(b). Yet Panama has made a reservation to this provision to the effect that it does not consider itself obligated to apply the value confiscation system in so far as it contravenes its Constitution²⁹⁴ and the

the benefit is assessed. In assessing the amount of the pecuniary penalty to be imposed the court has regard to evidence on the following matters: 1) the value of the money and other property which came into the possession or under the control of the defendant (or of any person at the defendant's request) by reason of any of the offences of which the defendant was convicted; 2) the value of any other benefit provided for the defendant (or such other person) in these circumstances; 3) the market value of substances similar to the drugs involved in the offence or the amount ordinarily paid for doing the act in question; 4) the value of the defendant's property before and after the relevant offence or offences; and 5) the defendant's income and expenditure at those times. In addition, in terms of section 28 the court may also treat as the defendant's property anything subject to his effective control even if he has no interest or right in it, such as trusts, shares or debentures held by a corporation (the court may lift the corporate veil) or other property held through domestic or family relationships.

²⁹¹ See Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 14.

²⁹² While Portugal, for example, is not allowed in terms of its constitution to permit confiscation of property indirectly acquired - see *1988 Records* vol.II at 64, the UK allows substituted value confiscation orders in terms of section 38(1) of the Drug Trafficking Offences Act, 1986, and section 102 of the Criminal Justice (International Co-operation) Act, 1990. See also, for example, New South Wales's Drug Trafficking (Civil Proceedings) Act 23 of 1990, and see McClean *op cit* (1989) at 341 for a summary of Commonwealth approaches.

²⁹³ The Italian delegation made it clear that their understanding of the provisions was that a Party which was only able in terms of its domestic law to apply one of the options would still be fulfilling its obligations under the Convention if it adopted only one of them in its law; see also the statements of Japanese delegate - *1988 Records* vol.II at 31. However, on the face of the provision, choice of either one of the two options would be dictated by the nature of the assets to be confiscated, i.e. whether proceeds could be confiscated or only substituted property was exposed to confiscation, and each Party is under an obligation in terms of the 1988 Convention to make either option possible in its domestic law.

²⁹⁴ 13/1/1994 - *Multilateral Treaties Deposited* (1997) at 305.

Philippines has made a reservation to the effect that it does not feel itself bound by article 5(1)(a).²⁹⁵

The extension of confiscation to indirect proceeds and adoption of the substitute of assets approach are provisions that make for effective law enforcement.²⁹⁶ However, remarking upon these provisions the Austrian delegate at the 1988 Conference drew attention to the necessity in Austrian law of proving links with concrete offences and the need to protect the rights to property, privacy and to be presumed innocent, while the Philippines delegate noted their inconsistency with due process.²⁹⁷ It would be easy to revert to article 5(9)'s protection of each Party's domestic application of article 5, but experience has shown that such domestic application does not always protect individual rights.²⁹⁸ Potential areas of abuse include interference with attorney-client privilege, authorities only having to satisfy civil burdens of proof,²⁹⁹ and the application of presumptions³⁰⁰ and reverse onus provisions³⁰¹ of unusual severity. It is not surprising

²⁹⁵ 7/6/1996 - *Multilateral Treaties Deposited* (1997) at 305.

²⁹⁶ The progenitors of article 5(1)(a) are the provisions that the US has long had in place allowing civil and criminal forfeiture of property relating to drug trafficking and drug money laundering - see generally Kohler *op cit* at 16-23. She notes at 17 that between 1970 and 1980 the US forfeited around two million dollars using the criminal forfeiture provisions in the Racketeer Influenced and Corrupt Organisation Act (RICO) of 1970 and the Continuing Crime Enterprise Statutes (CCE) (codified at 18 USC section 1961 and 1963 (1988)), while in 1980 alone the DEA confiscated 42 million dollars in assets using civil forfeiture provisions codified in 21 USC section 881. US legislation has been consistently updated to allow under the 1988 Anti-drug Abuse Act forfeiture of any property involved in illegal transactions and any property 'traceable' to property involved in illegal transactions (see 18 USC section 981(a)(1)(a) and section 982(a)).

²⁹⁷ *1988 Records* vol.II at 31.

²⁹⁸ See, for example, Sallon C, Beddingfield D 'Drugs, money and the law' (1993) *Criminal LR* 165-173 who complain that the UK's Drug Trafficking Offences Act, 1986, virtually eliminates the right to silence and trial by jury and question whether this takes us any closer to eliminating drug use.

²⁹⁹ See, for example, the application of confiscation in the UK's Drug Trafficking (International Co-operation) Act, 1990. Rather than satisfying the criminal standard of proof, the statute requires only that the prosecution satisfy the civil standard of proof for the confiscation order to be granted.

³⁰⁰ McClean *op cit* (1989) at 345 cites as an example section 27(6) of the Commonwealth of Australia's Proceeds of Crime Act, 1987, which provides that in the case of 'serious offences' all the property of the defendant at the time of the application of a pecuniary penalty as well as all his property since the date of the earliest relevant offence (or within five years if that is the shorter period) is presumed, unless the contrary is proved, to be property that came into the possession or under the control of the defendant by reason of the commission of the offence or offences.

³⁰¹ For example, Kohler *op cit* at 20-21 explains that US laws permitting civil forfeiture, such as the Drug Abuse Prevention and Control Act of 1970, 21 USC section 881 (1988), depend firstly on the government showing probable cause for instituting the forfeiture proceeding. In doing so they can even rely on hearsay, and often do because of the difficulty of getting direct evidence linking the assets to the illicit activity. Once probable cause has been established, the burden of proof shifts to the claimant to show by a preponderance of the evidence that the property is not subject to forfeiture or that he is an innocent owner. Section 881(d) of the 1970 Act requires the owner to show by a preponderance of the evidence that he was not involved in or aware of the unlawful conduct giving rise to forfeiture, and that he had taken all precautions that he could reasonably be expected to take to prevent the proscribed use of his

that article 5(7) invites the Parties to consider applying such reverse onus provisions. Fairness may also be the victim of the incredible complexity of resulting confiscation legislation.

The targets of confiscation provided for in article 5(1)(b) are the conventional targets,³⁰² viz.: 'narcotic drugs and psychotropic substances, materials and equipment or other instrumentalities used in or intended for use in any manner' in article 3(1) offences. The provision requires actual conduct, or preparatory conduct,³⁰³ although the gloss 'in any manner' gives it a very broad scope. The United States delegation believed that instrumentalities included all property used or intended for use in the offence.³⁰⁴ Whether it extends to vessels, aircraft, real property and so on will depend on the law of the Party. What is to be done with contraband confiscated property is settled by article 14(5) of the 1988 Convention. Article 14(5) provides:

5. The Parties may also take necessary measures for early destruction or lawful disposal of the narcotic drugs, psychotropic substances and substances in Table I and Table II which have been seized or confiscated and for the admissibility as evidence of duly certified necessary quantities of such substances.

According to the Indian delegation which authored article 14(5), it is 'intended to prevent any recycling of seized or confiscated substances on to the illicit market'.³⁰⁵ It invites Parties to engage in the destruction or lawful disposal of the substances mentioned that have been seized or confiscated by the Party's authorities as soon as is reasonably possible. The measures to be used are left to the Parties, but they must ensure that the substances do not re-enter the illicit traffic. Article 14(5) also invites Parties to take the necessary measures to ensure that quantities of the substances, duly certified by a government laboratory or the like as an illicit substance, are made available for

property. This standard of 'exceptional innocence' contrasts with the standards of criminal forfeiture, and is very difficult to meet.

³⁰² See article 37 of the 1961 Convention and article 22(3) of the 1971 Convention.

³⁰³ In other words, drugs etc. used in the preparatory offences contemplated under article 3(1)(c).

³⁰⁴ '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 40.

³⁰⁵ See *1988 Records* vol.II at 307. It is in line with the recommendation in paragraph 267 of the Comprehensive Multidisciplinary Outline - see target 21 *Declaration of the International Conference on*

evidential purposes. Article 14(5) says nothing about what is to be done with the other material mentioned in article 5(1)(b), but it is submitted that Parties should exercise strict control over any resale of such material.

Confiscation of proceeds, property or drugs and so on in terms of article 5(1) is largely dependant on article 5(2)'s provisions requiring Parties to adopt provisional measures for the purpose of eventual confiscation of these things so as to prevent criminals removing them from the requested Party prior to confiscation. Article 5(2) provides that each Party is obliged to authorise its competent authorities to put the confiscation procedure into practice through restraining measures. With confiscation as their aim, they must be empowered to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things referred to in article 5(1). Parties that adopt a value confiscation system will of course be obliged to provide for the taking of provisional measures on any realisable property. The paragraph does not set out in detail how this is to be done, leaving it to the Parties to work out their own methods, but article 1(l) does define 'freezing' or 'seizure' as

temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or competent authority.

The United States delegate explained that the terms 'freeze' and 'seize' do not refer to the same process:

'Freezing' applied, for example, to bank accounts, which were in principle intangible entities, while 'seizure' applied to concrete objects, such as houses, boats, and so on. Whereas freezing referred to the prohibition of transfer, conversion or movement operations, seizure involved assuming custody or control of an object, often physical control.³⁰⁶

It appears from the 1988 Conference Records that different verbs were left in the provision to cater for the different domestic approaches of the Parties to freezing or

Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control (1988) at 59-60.

seizure.³⁰⁷ The provision recognises that orders from judicial authorities or other competent authorities such as the customs or police, depending on the individual Party's domestic law, are required to serve as the basis for freezing or seizure. But it is important to note that as defined, both are temporary processes, and as such the emphasis is on speed of issue and authorities may not require the same level of proof from enforcement agents for the granting of such orders.³⁰⁸ Domestic legislation enacted in response to this provision is particularly broad in scope.³⁰⁹

Bank secrecy has long served as a veil behind which the financial activities of drug traffickers were hidden from the enforcement authorities.³¹⁰ Article 5(3) now

³⁰⁶ 1988 *Records* vol.II at 96.

³⁰⁷ See generally 1988 *Records* vol.II at 67-8. For a review of Commonwealth legislation on freezing and seizure see McClean *op cit* (1989) at 352-356 and 356-358 respectively. With respect to freezing, he discusses, for example, the UK's Drug Trafficking Offences Act, 1986, which provides in section 7(1)(c) that courts can order freezing of property when they are satisfied that there is reasonable cause to believe that the defendant has benefitted from drug trafficking. Material not usually admissible as evidence, such as hearsay, is admissible at this hearing. McClean notes that Canadian legislation provides much greater protection to those whose property may be affected by freezing including notice to persons appearing to have an interest in that property that it is to be frozen. With respect to seizure, McClean cites a developed example, the Commonwealth of Australia's legislation on search and seizure (Proceeds of Crime Act 1987 as amended) which provides for the search for tainted property of a person, including his clothing and other property in his immediate control, land and premises; it envisages warrants being issued in anticipation of the presence of tainted property within the next 72 hours; and it allows for telephone applications when urgent, and for searches without warrant in emergency - defined as situations where action is necessary to prevent the concealment, loss or destruction of the property and in which the circumstances are so serious that immediate action without prior warrant is required. The Australian legislation also provides for additional far reaching information gathering powers relating to the production of property tracing documents - documents used to locate, identify or quantify any of the defendant's property or to locate documents necessary for the transfer of the defendant's property, the search and seizure of property tracing documents etc.

³⁰⁸ Depending on the domestic legal system they may only require a reasonable suspicion or perhaps the issuing authority will not enter into the merits at all.

³⁰⁹ See, for example, section 8(4) of Botswana's Proceeds of Serious Crime Act 19 of 1990 which allows a restraining order to be imposed on any person in order to prohibit him 'from dealing in any way with any property to which the order applies.' Restraining orders apply in terms of section 8(6) to '(a) property described in the order, being property (i) of the defendant, or (ii) received in connection with, or derived from, the commission of the offence and held by any person, other than the defendant in the order, or (b) all property of the defendant, whether described in the order or not, and including property acquired by the defendant after the making of the order.'

³¹⁰ 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 at 438 cites the Panamanian Government prior to the removal of General Noriega as particularly zealous in the upholding of its bank secrecy laws in international drug trafficking investigations. See Hernandez *op cit* at 250ff for a history of the clashes between the US and foreign sovereigns over bank secrecy provisions. See also Knapp J 'Mutual legal assistance treaties as a way to pierce bank secrecy' (1988) 20 *Case Western Reserve ILJ* 405-433 on how the US pioneered MLATs designed to remove bank secrecy as a screen for money laundering, and Paget-Brown I 'Bank secrecy and criminal matters: Cayman Islands and U.S. co-operative development' (1988) 20 *Case Western Reserve ILJ* 369-391 on the slow unveiling of the Cayman Islands' bank secrecy provisions under US pressure. Paget-Brown notes that the Cayman Islands passed its Confidential Relationships (Preservation) Law (Law 16 of 1976) in order to move from the common law position where violation of bank secrecy lead only to civil remedies, to the civil law position where its breach resulted in a criminal offence. The hardening of such domestic secrecy provisions protect

ensures that bank secrecy will not obstruct the confiscation procedure.³¹¹ It makes possible access to bank, financial or commercial records³¹² as it obliges Parties to empower their courts or other competent authorities³¹³ to order the production or seizure³¹⁴ of these records. The Parties are obliged in terms of article 5(3) not to decline to act on the grounds of bank secrecy. The removal of the veil of bank secrecy is generally viewed as a major breakthrough, especially with regard to the pursuit of laundered drug money.³¹⁵ There is ambiguity as to the precise meaning of 'bank'. Is it limited only to registered banks? Or does it apply to all types of financial institutions that take deposits of money in some way including building societies, insurance houses and so on? Or does it extend to any person, actual or juridical, prohibited by law from disclosing information about the deposit of funds by other persons, such as lawyers who hold funds in trust? A contextual interpretation does not take the matter much further as the conference records reveal little discussion by the delegates of the meaning of bank.³¹⁶ Reverting to a teleological interpretation, however, it is apparent that one of the objects of article 5 is to make possible the seizure and confiscation of the proceeds and profits of the drug trafficking offences set out in article 3(1). This purpose is echoed throughout the Convention as a whole. Thus, for example, the preamble expresses the concern that the 'illicit traffic generates large financial profits and wealth enabling transnational criminal organisations to penetrate ... legitimate commercial and financial business...'. In addition, the transfer or disguise of such profits and proceeds has been criminalised in their own right in terms of article 3(1) of the 1988 Convention. In practice, the laundering of profits and proceeds takes place through everything from insurance houses to post-offices. It is submitted, therefore, that in the light of the clear

and foster financial business for the jurisdiction involved, but almost certainly attract the attentions of money launderers and the US, usually resulting in the piecemeal lowering of secrecy provisions for the purpose of mutual legal assistance.

³¹¹ See Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 15.

³¹² By referring to commercial records the article appears to be providing for access to corporate or business records and in particular those of sham corporations established by traffickers.

³¹³ These 'competent authorities' would be empowered by legislation or in some other way in exactly the same way as courts. Examples of existing authorities with the power to order the lifting of bank secrecy include investigating authorities (Italy), official commissions into drug trafficking (common law states), tax inspectors and customs authorities (India) - see generally *1988 Records* vol.II at 68-9.

³¹⁴ In some states seizure is required for such records to become available for inspection.

³¹⁵ See Catino *op cit* at 438; Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 15; Sproule and St-Denis *op cit* at 281.

³¹⁶ See generally *1988 Records* vol.II at 68-9.

purpose of the 1988 Convention to eliminate money-laundering and to enable the seizure and confiscation of the profits and proceeds of the drug traffic, 'bank' should be interpreted broadly so as to include any financial institution to which deposits are made and to which domestic financial secrecy laws apply where such secrecy laws could possibly frustrate the aforementioned clearly articulated purpose of the Convention. The extension of this interpretation to apply to any person, actual or juridical, who holds funds for another and whose custody of those funds is protected by some domestic legal privilege, is perfectly logical and in accordance with the aim of the Convention. It is submitted, however, that such an extensive definition must be at the election of the Party as it may be regarded as straining the ordinary meaning of 'bank'.³¹⁷ There was some debate at the 1988 Conference as to whether a court's exercise of judicial discretion not to order production or seizure of records would mean that that Party had failed to implement the Convention.³¹⁸ It is clear, however, that although the provision obliges Parties to empower their courts or authorities to order the production or seizure of records, it does not oblige Parties to produce those records, thus leaving a measure of discretion in the hands of their courts or authorities.³¹⁹ While article 5(3) targets national application of confiscation, through the wording 'in order to carry out the measures referred to in this article', it also appears to apply to international co-operation in terms of article 5(4). States have applied article 5(3),³²⁰ but some bank secrecy laws remain as impervious as ever³²¹ and some Parties have made reservations to article 5(3).³²²

³¹⁷ The UK's Drug Trafficking Offences Act, 1986, simply refers to a 'person', which includes all juridical and actual persons.

³¹⁸ See the questions of the Mexican delegate, *1988 Records* vol.II at 68-9.

³¹⁹ See the explanation provided by the Australian delegate who noted that the grounds upon which a court might decline to order the lifting of bank secrecy included the presentation of insufficient evidence linking the commission of the proved offence with the property in question - *1988 Records* vol.II at 68. Sproule and St-Denis *op cit* at 282 query whether this interpretation 'portends the utilization of inventive ways to refuse access to financial records.'

³²⁰ For example, section 9 of the South African Drugs and Drug Trafficking Act 140 of 1992, entitled 'Relaxation of restrictions on the disclosure of information', allows any person prohibited by law from '(a) from disclosing any information relating to the affairs or business of any other person; or (b) from permitting any person to have access to any registers, records or other documents which have a bearing on the said affairs or business' to 'disclose ... such information where disclosure 'is necessary for the prevention or combating, whether in [South Africa] or elsewhere, of a drug offence or an economic offence...'. Evidence from the UK suggests that a similar provision in the Drug Trafficking Offences Act, 1986, (section 24(3)) has been very extensively used by banks and other financial institutions to disclose to police funds in their client's accounts which they suspect are drug related - see Home Affairs Committee Report: *Drug Trafficking and Related Serious Crime* (1989) vol.II at 48-49.

³²¹ See, for example, Austria's bank secrecy law codified in the *Kreditwesengesetz* (KWG) idF, November, 1986, section 23 which states that banks, their organisation members, employees, persons otherwise connected with the bank's business activity, and persons exclusively bound by a confidential business relationship with the bank's clients, are expressly forbidden to disclose or use financial information

The obligations in article 5 paragraphs 1-3 are not encumbered by any limitations or safeguard clauses, an indication of the seriousness with which the attack on the proceeds of drug trafficking at the national level was viewed by the 1988 Conference.³²³

5.3.2.4.3 International co-operation on confiscation

Until 1988, while some multilateral conventions may have allowed for the tracing of the proceeds of drug trafficking by one state at the request of another exercising its jurisdiction over a drug offender, under general mutual legal assistance there was no convention that made possible the mutual enforcement of court orders to seize or confiscate that offender's criminally derived property.³²⁴ Recognising the need for mutual legal assistance between Parties to trace and seize the proceeds of drug trafficking, article 5(4) provides:

4. (a) Following a request made pursuant to this article by another Party having jurisdiction over an offence established in accordance with article 3, paragraph 1, the Party in whose territory proceeds, property, instrumentalities or any other things referred to in paragraph 1 of this article are situated shall:

(i) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, give effect to it; or

(ii) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by the requesting

derived from their business relationship with a client. Zagaris B 'The emergence of an international anti-money laundering regime: implications for counselling businesses' in Atkins D (ed) *The Alleged Transnational Criminal* (1995) 127 at 178-182 notes Austria's increased popularity as a money laundering centre, the unwillingness of its authorities to change the law and the fact that it is not party to the 1988 Convention.

³²² For example, Lebanon (11/6/1996 - *Multilateral Treaties Deposited* (1997) at 304).

³²³ Sproule and St-Denis *op cit* at 282.

³²⁴ Kohler *op cit* at 26 sets out the different solutions used to overcome this lack of direct enforceability prior to the conclusion of article 5(4). States relied on legislation to allow confiscation of assets of an individual convicted in another state and bilateral MLATs expressly providing for the seizure and confiscation of assets in one state at the request of the other (eg. article 1(2)(g) of the 1982 US-Italy MLAT TIAS no. 8052). States could also in extradition requests ask for the return of all assets relating to the offence, or rely on coercive court orders, but the latter two methods have obvious limitations.

Party in accordance with paragraph 1 of this article, in so far as it relates to proceeds, property, instrumentalities or any other things referred to in paragraph 1 situated in the territory of the requested Party.

(b) Following a request made pursuant to this article by another Party having jurisdiction over an offence established in accordance with article 3, paragraph 1, the requested Party shall take measures to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things referred to in paragraph 1 of this article for the purpose of eventual confiscation to be ordered either by the requesting Party or, pursuant to a request under subparagraph (a) of this paragraph, by the requested Party.

(c) The decisions or actions provided for in subparagraphs (a) and (b) of this paragraph shall be taken by the requested Party, in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral treaty, agreement or arrangement to which it may be bound in relation to the requesting Party.

(d) The provisions of article 7, paragraphs 6 to 19 are applicable *mutatis mutandis*. In addition to the information specified in article 7, paragraph 10, requests made pursuant to this article shall contain the following:

(i) In the case of a request pertaining to subparagraph (a)(i) of this paragraph, a description of the property to be confiscated and a statement of the facts relied upon by the requesting Party sufficient to enable the requested Party to seek the order under its domestic law;

(ii) In the case of a request pertaining to subparagraph (a)(ii), a legally admissible copy of an order of confiscation issued by the requesting Party upon which the request is based, a statement of the facts and information as to the extent to which the execution of the order is requested;

(iii) In the case of a request pertaining to subparagraph (b), a statement of the facts relied upon by the requesting Party and a description of the actions required.

(e) Each Party shall furnish to the Secretary-General the text of any of its laws and regulations which give effect to this paragraph and the text of any subsequent changes to such laws and regulations.

(f) If a Party elects to make the taking of measures referred to in subparagraphs (a) and (b) of this paragraph conditional on the existence of a relevant treaty, that Party shall consider this Convention as the necessary treaty basis.

(g) The Parties shall seek to conclude bilateral and multilateral treaties, agreements or arrangements to enhance the effectiveness of international co-operation pursuant to this article.

Article 5(4) envisages a special and novel form of mutual legal assistance unlike the general form provided for in article 7. It provides for a Party having jurisdiction over an article 3(1) offence to request that confiscation of proceeds or drugs and so on be carried out by another Party because the material to be confiscated is within the latter's territorial jurisdiction.

Article 5(4)(a) is a flexible provision adopting two different approaches to securing this co-operation with regard to confiscation, reflecting different approaches to international confiscation adopted in state practice.³²⁵ By 1988 a few states had enacted laws that permitted the recognition of foreign penal judgements including confiscation orders against any of an offender's assets,³²⁶ but most followed the traditional rule that did not permit the enforcement of foreign penal judgements of any sort. Certain of the latter states were prepared to enforce their own criminal confiscation orders against the assets or proceeds within their territories of someone who has committed an offence abroad, provided that the foreign state afforded them with a sufficient factual basis for

³²⁵ Kohler *op cit* at 36.

³²⁶ By 1988 only Switzerland (article 24 of the 1951 Federal Drug Law), the UK (section 26 of the Drug Trafficking Offences Act, 1986) and the US (18 USC section 981(a)(1)(b)) had such enabling legislation.

their authorities to find that the property was involved in or derived from, in our case, drug offences committed abroad.³²⁷

Under the 1988 Convention, however, Parties can no longer refuse to acknowledge the existence of the proceeds of a foreign drug offence within their territory. A requested Party is obliged to do one of two things.

Its first option is to in terms of article 5(4)(a)(i) seek a confiscation order from its competent authorities and, if granted, to give effect to that order - a system of direct execution. The Chairperson of Committee I explains that '[t]he order in that case would be issued by the local authorities of the requested state. It was immaterial whether an order by the requesting state had been issued or not.'³²⁸ Article 5(4)(a)(i) makes the requested Party's submission of the request to its competent authorities, usually its judicial authorities,³²⁹ mandatory, and gives those authorities the discretion to grant or decline it, a decision dependant on the requesting Party providing sufficient information.³³⁰ This reflects judicial practice in most states.

The second option open to a requested Party where an offence has been committed abroad but the proceeds are in its territory is in terms of article 5(4)(a)(ii) to enforce the confiscation order granted in the requesting Party - a system of indirect execution.³³¹ The chairperson of Committee I explains that in this case 'an order by the requesting state was essential.'³³² Article 5(4)(a)(ii) requires that the requesting Party's order, which has to be made in terms of article 5(1), must be submitted by the requested Party to its competent authorities. The confiscation order will be issued according to the requested Party's procedural rules,³³³ and the foreign order is then to be given effect to

³²⁷ See Kohler *op cit* at 36 who gives as an example Switzerland which under LFS article 24 made it possible for this to happen.

³²⁸ 1988 Records vol.II at 70.

³²⁹ See the statement of the US delegate, 1988 Records vol.II at 75.

³³⁰ See article 5(4)(d)(i) for details of the information required.

³³¹ Kohler *op cit* at 37 explains that article 5(4)(a)(ii) provides 'for an *exequatur*-type proceeding in which the requested party executes a forfeiture order which has entered into force in the country of the requesting party'.

³³² 1988 Records vol.II at 70.

³³³ The South African Drugs and Drug Trafficking Act 140 of 1992 has adopted the article 5(4)(a)(ii) approach. Section 56(1) provides for the registration of a foreign confiscation order in the manner to be prescribed by the Minister of Justice in terms of section 61. Section 56(2) provides for the clerk of the court to notify persons against whom the foreign confiscation order may be enforced, which person is entitled to apply for the registration of the foreign confiscation order to be set aside in terms of section 58. In terms of section 57 the foreign confiscation order becomes a civil judgement of court within a prescribed period.

the extent requested.³³⁴ This anticipates the situation where the requesting Party's order relates to a number of items, some of which may have been situated in the requesting Party's territory and some in the requested Party's territory, and while the order will have been carried out with respect to the former, the requested Party's co-operation will be required with respect to the latter.³³⁵ It is not clear whether article 5(4)(a)(ii)'s 'competent authorities' means only its judicial authorities, as the latter appears to refer also to the enforcement agencies that will give effect to the order, unless it is assumed that what is meant is that the requesting Party's court order requires the sanction of the requested Party's courts. The choice between the two options will depend on the Party and its domestic law. Article 5(4) does not provide many specifics with respect to the modalities for the implementation of requests, and Parties are left to work it out between themselves.

Article 5(4)(b) obliges Parties to take preliminary restraining steps to make confiscation order requests possible,³³⁶ again changing the traditional rule that states are not obliged to aid other states in the execution of their penal laws. It obliges them, in response to a request by a Party in whose jurisdiction an article 3(1) offence has occurred, to take steps to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things referred to in article 5(1) for the purpose of eventual confiscation whether by an order granted by its authorities or by the requesting Party.³³⁷ If the requested Party decides to discontinue the provisional measures, the provision does not oblige it to give the requesting Party an opportunity to present any reasons for continuing the measures.³³⁸ In practice, states have complied with this provision because making provision for enforcement of foreign confiscation orders without making

³³⁴ See article 5(4)(c) and (d)(ii) below.

³³⁵ See the explanation of the British delegate - *1988 Records* vol.II at 70.

³³⁶ Wren T 'The enforcement of confiscation law in Great Britain' (1992) 17 *CLB* 1413 at 1414 recounts, for example, how documents recovered from a Colombian farm indicated the global dispersion of assets in bank accounts. The US Department of Justice, which had indicted the leader of the organisation that held these assets, Gonzales Rodriguez Gacha, transmitted a formal request to the British Home Office asking for immediate action from British authorities in terms of the Confiscation Agreement between the US and UK. The UK's National Drugs Intelligence Unit co-ordinated the work of a Customs Officer and a number of further bank accounts were identified in London. Restraining orders were issued awaiting determination of the case.

³³⁷ McClean *op cit* (1989) at 359 notes, for example, that section 49 of the Malaysian Dangerous Drugs (Forfeiture of Property) Act of 1988 authorises searches of persons or premises at the request of a foreign government or authority, while section 50 authorises the seizure of property in cases which include those where the ground for the request by the foreign government is that the property is liable to forfeiture under the law of the foreign country.

³³⁸ Unlike article 12(2) of the 1990 European Laundering Convention *ETS* 141.

provision for seizure is futile in a situation where as soon as suspects become aware that they are under investigation they will remove all incriminating evidence and confiscatable property.³³⁹

Article 5(4)(c) makes it clear that execution of seizure and confiscation requests takes place through and is thus subject to the domestic laws and particularly the procedural rules³⁴⁰ of the requested Party, and to any bi- or multilateral treaty, agreement or arrangement to which it may be bound in relation to the requesting Party. Application via domestic law is necessary because it ensures respect for the requested Party's substantive and procedural law. It secures application of the principle of double criminality, and it recognises that confiscation is a penalty resulting from a conviction which must be enforced through the requested Party's domestic law. Thus the domestic law relating to burden of proof, notice requirements and defences to seizure and confiscation are determined exclusively by domestic law. The United States delegation explains:

[A]lthough a Party is obliged to assist another Party to trace, identify, seize, freeze and forfeit proceeds and instrumentalities, it does so according to its own domestic laws and procedures. The article does not require Parties to make any changes in their substantive or procedural laws on forfeiture except to the extent necessary to allow the international assistance contemplated in subparagraphs (a) and (b).³⁴¹

The United States delegation does however, suggest that article 5(4)(c) must be read with article 5(3) which requires Parties to empower their courts to pierce bank secrecy, and submits that article 5(4)(c) does not permit a Party to block either the preliminary

³³⁹ The US, for example, in 18 USC section 981(c) gives the Attorney General or the Secretary of the Treasury the power to seize and retain in their custody any property subject to forfeiture as the proceeds of a foreign drug offence pursuant to 18 USC section 981(a)(1)(b) pending final outcome of forfeiture proceedings.

³⁴⁰ The necessity for this term may seem confusing to states where procedural rules are part of domestic law, but its inclusion was thought necessary by the French delegate who explained that in France it means the body of judicial and administrative rules other than the laws enacted by Parliament - see *1988 Records* vol.II at 75. Some states have no legal provisions allowing the domestic enforcement of foreign confiscation orders, but they can do so through their procedural rules.

³⁴¹ '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 43.

proceedings or confiscation proceedings because of its bank secrecy laws.³⁴²

Alteration of a Party's domestic laws in response to article 5(3) will eliminate such problems. Article 5(4)(c)'s provision that the implementation of requests for confiscation are subject to any of the requested Party's international obligations recognises the primacy of the specifics of existing international agreements over article 5. Application via existing domestic or international law assumes such application is possible in terms of existing law. If it is not, existing law may have to give way to the provisions of article 5. One problem is that Parties may be asked either to grant an order where the basis of the confiscation does not include a criminal conviction against the owner of the property or to enforce a foreign confiscation order originally granted on such a basis. Thus a civil law state such as Austria which only makes criminal confiscation orders in its own law may be asked by a common law state such as the United States to enforce a civil forfeiture order. It is unlikely that in such circumstances the 1988 Convention envisaged Austria complying, and it would be for the requesting Party to tailor its request to the requested Party's domestic legal principles or fail in its request. A similar problem would arise when a Party like the United Kingdom which uses a value-confiscation system makes a request for co-operation to a Party that insist that the property to be confiscated is property derived from the commission of an article 3(1) offence and is not just property held by an article 3(1) offender. The United States would be precluded from complying because its domestic law only permits the confiscation of illicit assets.

Article 5(4)(d)'s first sentence provides that article 7's provisions for the regulation of requests for mutual legal assistance (article 7 paragraphs 6 to 19), also apply in the same way to the requests for co-operation made in terms of article 5(4). Reference to the procedural requirements in article 7 was necessary because for a number of Parties the 1988 Convention would form the basis of international co-operation in respect of confiscation and these states would need guidance with respect to procedure.³⁴³ This measure was adopted because it was felt that although the measures on mutual legal assistance may not dovetail with the requirements for international co-operation under article 5(4), the adoption of specific rules applicable to article 5(4) could

³⁴² '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 43-4.

³⁴³ See the 'Review Group Report', *1988 Records* vol.I at 63.

be avoided by the flexible application of article 7's procedural safeguards.³⁴⁴ Thus, for example, while co-operation in terms of article 5(4) cannot be refused in terms of article 5(3) on the grounds of bank secrecy, in terms of article 7(15)(b), it may be refused if executing the request is 'likely to prejudice the [requested Party's] sovereignty, security, *ordre public* or other essential interests'. Refusal on grounds of double jeopardy, due process and so on, that is, refusal in the interests of the owner of the property, is provided obliquely by article 7(15)(c) which allows a Party to refuse assistance if it would be prohibited by its own law from carrying out such an action itself. Such grounds of refusal have been recognised in practice.³⁴⁵

Article 5(4)(d) also provides for the information which Parties are required to furnish pursuant to the different procedures established for confiscation assistance. This provision grew out of the experience of states that had already engaged in international co-operation in respect of confiscation, as well as the perceived need to avoid bureaucratic delays and misunderstandings.³⁴⁶ The provision accommodates the two major approaches taken to international confiscation.

Article 5(4)(d)(i) requires that a request in terms of article 5(4)(a)(i) must contain a description of the property to be confiscated and a statement of the facts relied upon by the requesting Party that is sufficient to enable the requested Party to seek the order under its domestic law.³⁴⁷ Article 5(4)(d)(ii) requires that a request in terms of article 5(4)(a)(ii) must contain a 'legally admissible' copy³⁴⁸ of the requesting Party's³⁴⁹ order

³⁴⁴ See the statement of the Chairman of Committee I, *1988 Records* vol.II at 71.

³⁴⁵ For example, the UK's Drug Trafficking Offences Act, 1986, recognises in section 26 that a request for the execution of a foreign forfeiture or restraining order may be refused if the defendant is still in a position to appeal against conviction or did not receive notice of the proceedings against him and thus could not defend his interests, or enforcement of the foreign order would be contrary to the interests of justice.

³⁴⁶ Sproule and St-Denis *op cit* at 283.

³⁴⁷ As an example, Kohler *op cit* at 33 expands on the information that is required from US authorities for a request to be executed in Switzerland: 'To prepare a confiscation case, a Swiss prosecutor or judge handling the investigation must receive certain types of evidence from the United States Government: He must obtain a certified copy of a conviction or plea bargain from a United States court, which demonstrates not only that the defendant is guilty of drug trafficking, but also that the frozen assets in Switzerland stem directly from his unlawful activity. The Swiss magistrate must receive the exact dates, places, and names of persons involved, and sufficient evidence of their connection with the forfeitable assets in Switzerland. This information must be obtained through a mutual assistance request sent to the FOPM [Swiss Federal Police Office], which will be transmitted to the United States Attorney General.'

³⁴⁸ 'Legally admissible' was understood by the authors of the provision to mean that the document in question must be in accord with the laws of both Parties - see the statement of the French delegate and the Chairman of Committee I, *1988 Records* vol.II at 71.

³⁴⁹ This is likely in practice to be issued by the requesting Party's court. Indeed, some delegations to the 1988 Conference noted that it would be impossible for their countries to give effect to a confiscation order

of confiscation upon which the request is based, a fact statement and information about the extent the order is to be executed. Article 5(4)(d)(iii) requires that a request in terms of article 5(4)(b) must contain a statement of the facts relied upon by the requesting Party and a description of the actions required. All of this information is in addition to that required under the provisions of article 7(10) for mutual legal assistance.

Article 5(4)(e) requires Parties to provide the UN Secretary General with the texts of relevant legislation and regulations. The purpose of this provision is to allow the Secretary General to make generally available information on the procedures to be used for domestic confiscation as well as international requests for confiscation by one Party.³⁵⁰ This provision is mandatory to ensure the completeness of the information for which the Secretary General is to serve as a clearing house. If, however, a Party does not have domestic legislation to give effect to article 5(4), this sub-paragraph does not oblige it to enact it simply in order to furnish information on it.³⁵¹

Article 5(4)(f) provides that if a Party chooses to find that a treaty is 'necessary' for such co-operation, the 1988 Convention is 'sufficient', that is, it shall serve as a treaty basis for such co-operation. Gilmore regards this mandatory provision as unusual,³⁵² but it was necessary because the novelty of the procedure meant that most Parties were not legally prepared to execute other Parties' confiscation requests and required a legal basis upon which to do so. Sproule and St-Denis note:

This formulation makes amply clear that states which become party to the Convention must be prepared to provide confiscation co-operation with other state parties. This is in spite of the fact that the states in question may have widely divergent views on the legal status of private property and what constitutes a sufficient ground to confiscate it.³⁵³

issued by an authority other than a court of the requesting Party - see the Netherlands delegate's statement (supported by Jamaica, Austria and Portugal), *1988 Records* vol.II at 71.

³⁵⁰ See the statement of the German (FRG) delegate - *1988 Records* vol.II at 76.

³⁵¹ See generally *1988 Records* vol.II at 77-8.

³⁵² Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 17. It appears to have been borrowed from the standard practice in suppression conventions of making the convention the basis for extradition in the absence of bilateral extradition treaty relations.

³⁵³ *Op cit* at 283.

Article 5(4)(g) encourages Parties to enter into treaties and agreements, both bilaterally and multilaterally, to enhance the operation of confiscation provisions. Bilateral treaties and agreements are popular,³⁵⁴ and regional and other multilateral arrangements are also becoming popular.³⁵⁵

While article 5(4) is an innovatory provision, states have been urged to make provision in their laws for enforcement of confiscation orders made outside their jurisdiction, and steps have been taken.³⁵⁶ The relative merits of the article 5(4)(a)(i) and article 5(4)(a)(ii) approaches are debateable. Some Parties such as Australia have extremely sophisticated legislative schemes for the requests from other Parties in respect of restraint and confiscation, permitting the registration and enforcement of foreign restraint and confiscation orders (that is, in terms of article 5(4)(a)(i)). Prost praises this approach and is critical of the Canadian approach which has been to rely almost entirely on domestic process.³⁵⁷ Canada makes no provision for the registration of foreign restraint or confiscation orders insisting rather upon the Canadian authorities initiating a domestic investigation with a view to charging and prosecuting the offender in Canada and then imposing its own restraint and criminal confiscation orders. Enforcement of a foreign restraint or confiscation order must be made by application to the Canadian Courts (that is, in terms of article 5(4)(a)(ii)). The former approach is more effective from an enforcement point of view as it is expeditious. It also avoids the cumbersome process of trying to apply a domestic process to a foreign request which tends to discourage the requested Party's authorities from vigorous pursuit of investigations

³⁵⁴ The US and UK concluded their first bilateral agreement of this nature, the 1988 Agreement Concerning the Investigation of Drug Trafficking Offences and the Seizure and Forfeiture of the Proceeds and Instrumentalities of Drug Trafficking (cmdn no.755) only after alteration to domestic legislation made it possible (UK's Drug Trafficking Offences Act, 1986). Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 48 notes that the UK has subsequently signed a number of such bilateral agreements, and gives as an example, the Agreement with Barbados concluded in April 1991. Its Article 1 reads: '(1) The Parties shall, in accordance with this Agreement, grant to each other assistance in investigations and proceedings in respect of drug trafficking, including the tracing, restraining and confiscation of the proceeds and instruments of drug trafficking. (2) This Agreement shall be without prejudice to other obligations between the Parties pursuant to other treaties or arrangements or otherwise, and shall not prevent the Parties or their law enforcement agencies from providing assistance to each other pursuant to other treaties or arrangements.'

³⁵⁵ A major regional step was the conclusion of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime ETS 141. This Convention is much broader in scope than article 5 of the 1988 Convention, with article 2 providing for seizure and confiscation of the proceeds of all forms of serious criminality even when the state in question does not have jurisdiction over the predicate offence.

³⁵⁶ See, for example, the 'Commonwealth Caribbean Conference on the International Drug Conventions and drug abuse' (1989) 15 CLB 1005 at 1006.

flowing from foreign requests. Yet the latter approach provides greater human rights protections to individuals because it ensures that foreigners and citizens are treated uniformly when it comes to restraint and confiscation orders. Prost believes that the latter approach does so at the expense of societal interests.³⁵⁸ But it is questionable whether the requested Party has sufficient review powers to check the abuse of individual human rights in the requesting Party in systems where only registration of foreign orders is required.

5.3.2.4.4 Disposition of confiscated assets

Article 5(5) provides:

5. (a) Proceeds or property confiscated by a Party pursuant to paragraph 1 or paragraph 4 of this article shall be disposed of by that Party according to its domestic law and administrative procedures.

(b) When acting on the request of another Party in accordance with this article, a Party may give special consideration to concluding agreements on:

(i) Contributing the value of such proceeds and property, or funds derived from the sale of such proceeds or property, or a substantial part thereof, to intergovernmental bodies specialising in the fight against illicit traffic in and abuse of narcotic drugs and psychotropic substances;

(ii) Sharing with other Parties, on a regular or case-by-case basis, such proceeds or property, or funds derived from the sale of such proceeds or property, in accordance with its domestic law, administrative procedures or bilateral or multilateral agreements entered into for this purpose.

Article 5(5) deals with the final disposition of confiscated proceeds and property. The general principle in article 5(5)(a) is that these matters are to be dealt with by the

³⁵⁷ Prost *op cit* at 50-51.

³⁵⁸ *Op cit* at 51.

confiscating Party according to its 'domestic law and administrative procedures'.³⁵⁹ 366

When a Party acts in terms of article 5(1) it does so entirely on its own accord and it is only logical that the disposal decision should be its own. When a Party acts in terms of article 5(4) on behalf of another Party, then the decision in respect of disposal has been left to it by the 1988 Convention in order to encourage Parties to co-operate internationally in the execution of seizure and confiscation.³⁶⁰ The ultimate destiny of such funds may be the national budget, or in federal states, provincial budgets. Allowing police forces to benefit directly from confiscations is potentially corruptive of their motives for making seizures as even at the most benign level it creates a dependancy situation which confiscated drug-money becomes one of the police forces most reliable sources of income.³⁶¹ The common state practice of allocating the proceeds of confiscated assets to the funding of national therapeutic programmes should, however, be encouraged although it should be seen as substitute for normal governmental funding allocations but as an addition to such allocations.

Article 5(5)(b) invites requested Parties to consider concluding bilateral or multilateral agreements to engage in two forms of asset-sharing.³⁶²

Article 5(5)(b)(i) envisages that confiscated assets should be donated to appropriate intergovernmental drug control organisations such as the UNDCP.³⁶³ The use of such funds would be at the discretion of these IGO's. They could for instance, be used to fund joint projects with the donating Party. But it was urged by representatives at

³⁵⁹ The Australian delegation understood 'domestic law' to include legal obligations arising out of international treaties, *1988 Records* vol.II at 80.

³⁶⁰ See the 'Expert Group Report', *1988 Records* vol.I at 19. Frei and Treschel *op cit* at 91 note that in terms of the Swiss Federal Law (SR 812.81) implementing the 1973 US-Switzerland MLAT (27 UST 2019) 'drug-trafficking profits situated in Swiss territory will be forfeited to the Canton where they are found, even when the offence was committed abroad.' They continue: 'Thus where the United States Department of Justice seeks evidence and a freeze of assets generated by drug trafficking, the Swiss federal Office for Police Matters insists that the United States co-operate with Swiss authorities in securing the evidence necessary to turn those assets over to the canton. Indeed without such an understanding, a forfeiture process would be doomed to failure and a preceding freeze would be useless.'

³⁶¹ Blumenson E and Nilsen E 'Policing for profit: the drugs war's hidden economic agenda' (1998) 65 *University of Chicago LR* 35-114 examine in depth the effect on police motivation in the US of legislation allowing them to retain most of the assets they seize, noting that in the ten years since this permission was given, police agencies have chosen law enforcement strategies which take maximum advantage of federal forfeiture laws in order to maximise property seizures while at the same time pursuing practices which reduce fairness and ignore crime control policies, all of which leads to the aggrandisement of unaccountable police forces.

³⁶² The Moroccan, Iranian and Saudi-Arabian delegations all made reservations to this provision on the basis that their domestic legal systems did not permit the sharing of the proceeds of property of the illicit traffic, *1988 Records* vol.II at 32.

³⁶³ The provision does not apply to non-governmental organisations working in the field of drug control.

the 'Expert Group' that because the proceeds of the illicit traffic were located mostly in the developed world, they should be distributed through the agency of the UN to assist developing states to combat the illicit traffic,³⁶⁴ and it was noted at the Conference that this provision supports the UN's drug control organs because they provide assistance to states with limited resources.³⁶⁵ There has been continued support for the donation of confiscated assets and isolated donations have been made.³⁶⁶

Article 5(5)(b)(ii) envisages that assets confiscated by one Party at the request of another should be shared between them. This provision was motivated by the consideration that the benefit of the confiscation should be shared with the requesting Party as the latter had assisted in the confiscation by furnishing information.³⁶⁷ Sharing of assets is seen as one method of encouraging poorer Parties to co-operate.³⁶⁸ In practice, agreements to share confiscated assets have already been concluded, and profits shared,³⁶⁹ although this appears to be the exception rather than the rule due to the obvious desire of states to keep their hands on the profits of enforcement.³⁷⁰

The exact timing and modalities of these two forms of profit sharing have been left up to the Parties or IGO's to determine.

5.3.2.4.5 Conversion of illicit assets, severance of illicit from licit assets, income from illicit assets

Article 5(6) provides:

³⁶⁴ See the 'Expert Group Report', *1988 Records* vol.I at 34.

³⁶⁵ See the statement of the Ghanaian delegate, *1988 Records* vol.II at 79. This point was made again at the 'Commonwealth Caribbean Conference on the International Drug Conventions and Drug Abuse' (1989) 15 *CLB* 1005 at 1007.

³⁶⁶ See Paragraph 17 of the 'Recommendations of the Intergovernmental Expert Group to study the Economic and Social Consequences of Illicit Traffic in Drugs' UN Doc. E/CN.7/1991/25 in Gilmore WC (ed) *International Efforts to Combat Money Laundering* (1992) 150 at 151. In 1996 Luxembourg became the first Party to donate part of such proceeds to international drug control efforts - INCB *Report of the International Narcotics Control Board for 1996* UN Doc. E/INCB/1996/1. Luxembourg donated a further 1.7 million dollars of confiscated assets in 1998, but remained the only state to do so - UN Press Release Soc/Nar/779.

³⁶⁷ See the statement of the Ghanaian delegate, *1988 Records* vol.II at 79.

³⁶⁸ Stafford *op cit* at 7.

³⁶⁹ See, for example, the Mexico-US Treaty on Mutual Legal Assistance, 9 December, 1987, (1988) 27 *ILM* 443. In August 1989, the US Justice Department announced that it would give one million dollars each to Canada and Switzerland for their help in the investigation and prosecution of the Panama based Banco de Occidente - Nadelmann *op cit* (1990) at 62.

³⁷⁰ Zagaris and Kingma *op cit* at 512.

5. (a) If proceeds have been transformed or converted into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

(b) If proceeds have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to seizure or freezing, be liable to confiscation up to the assessed value of the intermingled proceeds.

(c) Income or other benefits derived from:

(i) Proceeds;

(ii) Property into which proceeds have been transformed or converted; or

(iii) Property with which proceeds have been intermingled

shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds.

In order to avoid the situation where the transformation³⁷¹ or the mixing of the asset-benefits of drug trafficking with other assets prevents the confiscation of those assets because of problem of identification or for other reasons, Gilmore states that article 5(6) provides in essence that Parties are obliged to

³⁷¹ The English case of *R v Cuthbertson* [1980] 2 ALLER 401 is a good example. Following a conviction of conspiracy to provide LSD in terms of section 4 of the Misuse of Drugs Act, 1971, the trial court ordered forfeiture of assets held in French and Swiss bank accounts in terms of section 27 of the Act. An appeal was lodged inter alia on the ground that the power of forfeiture only extended to a thing shown to 'relate to' an offence. The Court of Appeal dismissed the appeal, but the House of Lords upheld it, giving as one of their reasons that in terms of section 277 of the Act, 'the power of forfeiture only applied to tangible things capable of being physically destroyed and not choses in action or other intangibles ...'. The conversion of the profits into credit in a bank made it impervious to forfeiture.

render transformed, converted and intermingled property and proceeds, as well as income or other benefits derived there from, liable to the measures, including confiscation, provided for elsewhere in Article 5.³⁷²

Most of the proceeds of the illicit traffic are converted or intermingled in order to escape detection and most generate profits. More advanced domestic jurisdictions were, prior to the 1988 Convention, already adapting their law to enable the confiscation of profits.³⁷³ However, making converted and intermingled property and income open to confiscation is now mandatory under article 5(6). Sproule and St-Denis note that despite resistance, article 5(6) was made obligatory because the skill and speed with which large-scale traffickers are able to launder their profits would otherwise have meant that the bulk of drug profits would have been insulated from the threat of confiscation.³⁷⁴ Note that seizure and or confiscation is not obligatory under any of the sub-paragraphs; the property mentioned is simply 'liable' to seizure and or confiscation which means that the Parties competent authorities still retain the discretion to order these measures or not. Article 5(8)'s protection of *bona fide* third parties is obviously operative here, and the 1988 Conference clearly understood that article 5(6) would be construed in a manner that would not prejudice article 5(8).³⁷⁵ Article 5(6) makes provision for three different situations, differentiated according to the class of asset.

Article 5(6)(a) provides that if illicit proceeds have been transformed or converted into other property, Parties are obliged to apply article 5's measures to this other property instead of to the proceeds. Article 5(6)(a) applies according to the Australian delegation to the 1988 Conference to 'transfers or conversions of proceeds into property, whether it remained in the hands of the person who had first obtained the proceeds or was passed on to another person, natural or judicial.'³⁷⁶ The use of 'measures' implies that this property is open to the provisional measures provided for in

³⁷² See Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 17.

³⁷³ See, for example, section 4 of South Australia's Crimes (Confiscation of Profits) Act, 1986, which allows the confiscation of property acquired with the proceeds of an offence or property into which the proceeds of an offence have, in some manner, been converted.

³⁷⁴ Sproule and St-Denis *op cit* at 284. There was resistance to this provision at the 1988 Conference on the grounds that it would violate the constitutions of certain states - see the statements of the Philippines' and Egyptian delegates, 1988 Records vol.II at 82.

³⁷⁵ See 1988 Records vol.II at 81.

³⁷⁶ 1988 Records, vol.II at 82.

article 5(2) and to the final measures provided for in article 5(1). Parties have resisted this provision.³⁷⁷

Article 5(6)(b) provides for the mandatory severance of illicit proceeds from licit property with which it has been intermingled, and then for its confiscation. Severance is mandatory because of the rapidity of the laundering of drug profits and their blending with the licit economy. It may, however, prove difficult in reality.³⁷⁸ The confiscation of offenders' assets derived from other criminal activities or from legitimate sources is not provided for, but this provision is 'without prejudice to any powers relating to seizure or freezing', and article 24 allows Parties to apply stricter measures.

Article 5(6)(c) deals with derived benefits. It provides in essence that income³⁷⁹ or other benefits³⁸⁰ derived from either proceeds, or from property into which proceeds have been transformed or converted, or from property with which proceeds have been intermingled, shall also be liable to article 5's measures, in the same manner and to the same extent as proceeds. Thus derived benefits are also subject to article 5(2)'s provisional measures and article 5(1)'s final measures. Proof of derivation may be difficult, but the standards required will be a matter of domestic law. Article 5(6)(c) went further than much existing domestic law, and required new legislation.³⁸¹

5.3.2.4.6 General provisions

Article 5 (7), (8) and (9) are general provisions. They provide:

³⁷⁷ The Philippines has made a reservation (7/6/1996 – *Multilateral Treaties Deposited* (1997) at 305) to the effect that it does not consider itself bound by article 5(6)(a).

³⁷⁸ The delegate from the Philippines gave the example of a luxury yacht purchased in part with tainted proceeds by co-owners when one of the co-owners was acting in good faith. This is an example of both conversion and intermingling. The British delegate submitted that in such a case one method to recover the value derived from the illicit traffic and at the same time to safeguard the interests of the *bona fide* co-owner was to buy out his share - see generally *1988 Records* vol.II at 81. It is submitted that article 5(8) will, however, protect the innocent co-owner in such circumstances not only from loss of his half of the value of boat but also from a forced buy-out.

³⁷⁹ The obvious example is interest generated by capital in a bank-account, which may be difficult for Islamic states to confiscate because of the injunction against usury in the *Sharia*.

³⁸⁰ This term would cover benefits such as the bonus issue of shares which some states do not regard as income.

³⁸¹ Dickson A 'Taking dealers to the cleaners' (1991) 141 *New LJ* 1120 (part two of two part article) noted, for example, that while the UK's Drug Trafficking Offences Act, 1986, and its Criminal Justice (International Co-operation) Act, 1990, catered for the situations contemplated by article 5(6)(a) and (b), they did not go as far as article 5(6)(c). She explains by example: 'Income derived from proceeds or property into which these proceeds have been converted would also include, for example, money obtained as a result of leasing a house which had been bought with the proceeds of drug trafficking or the profits from a restaurant which had been established with those proceeds. The DTOA and the 1990 Act would permit the confiscation of the house and the restaurant but not the money which had been generated by those enterprises.' Further extension of the law was required.

7. Each Party may consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings.

8. The provisions of this article shall not be construed as prejudicing the rights of *bona fide* third parties.

9. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a Party.

Article 5(7) invites Parties to examine the possibility of reversing the burden of proof in regard to the lawful origin of the alleged proceeds of drug trafficking. The INCB notes:

Such a reversal can take different forms; for example, there could be a rebuttable presumption that all property acquired before the beginning of the legal proceedings within a defined period of time would be treated as property derived from drug trafficking. The onus of proof in this case would shift to the offender, who must satisfy the court that the assumption is incorrect. It is expressly stated in the laws of some countries that the standard of proof applicable to confiscation proceedings is the civil standard, instead of the more onerous criminal standard of proof “beyond reasonable doubt”. Some countries also provide for the possibility of proceeding with confiscation independently from a conviction, in particular when the person charged with an offence has absconded or died.³⁸²

A national law enacted or promulgated in terms of this provision would leave it to the accused trafficker to prove that his or her assets and property were acquired by licit means. The purpose of this provision is to make investigations of fraudulent conduct relating to the proceeds of drug trafficking less arduous. For that reason it is supported

by enforcement agencies of consumer states. However, this provision is exhortatory and Parties are under no obligation to comply with it, and some Parties have made it clear that they do not feel bound to apply it.³⁸³ The provision also allows such a reversal to be tested for its consistency with a Party's domestic legal principles and the nature of its judicial and other proceedings. Parties where the presumption of innocence is constitutionally entrenched are certain to have constitutional problems with article 5(7),³⁸⁴ and where such provisions exist there is evidence of reluctance to use them by prosecutors and the judiciary.³⁸⁵

Article 5(8) functions to protect the rights of *bona fide* third parties and specifically with respect to the confiscation procedure as a whole when, as is envisaged in article 5(6), licit and illicit property is mixed. While the provision does not define these rights and it appears that it has been left to the Parties to do so in their domestic law, in practice they must include the following long established due process guarantees: the right of all interested parties to be informed of possible confiscation and of all their attendant rights; their right to be heard;³⁸⁶ their right to challenge the confiscation order when already in force in cases where they had no earlier opportunity to take legal action; their right to legal assistance and to present testimony and other evidence; and their right to review of the order by a higher court. These protections must by necessary implication be available when the confiscation is purely a domestic affair or when it involves international co-operation under article 5(4).³⁸⁷ Third parties who acquire property legally would only be protected by this provision if, in addition, their acquisition of the assets was in good faith. The definition of *bona fide* has been left to the legal system of the Parties. Obviously article 5(8) cannot serve as a shield to protect allegedly *bona fide*

³⁸² *Report of the International Narcotics Control Board for 1996* UN Doc. E/INCB/1996/1 notes at 5.

³⁸³ Colombia has made a reservation (10/6/1994 - *Multilateral Treaties Deposited* (1997) at 303) to this effect.

³⁸⁴ Article 5(7) appears to have been included in the Convention despite the misgivings of some of the delegates to the 1988 Conference because of the desire of other delegates to provide support in the shape of an international instrument for a change in domestic law to accommodate a reversal of the onus - see the statements of the Netherlands delegation, *1988 Records* vol.II at 84.

³⁸⁵ See, for example, the report that members of the UK's Crown Prosecution Services were reluctant to use the reverse onus provision in section 24(4) of the Drug Trafficking Offences Act, 1986, and that there was considerable 'differential' in regard to its use among the judiciary - Home Affairs Committee *Report: Drug Trafficking and Related Serious Crime* (1989) vol.II at 49.

³⁸⁶ For example, article 28(2) of the Antiguan Drugs Act, 1973, provides that : 'The court should not order anything to be forfeited under this section, where the person claiming to be the owner of or otherwise interested in it has applied, before the making of the order, to be heard by the court, unless an opportunity has been given to him to show cause why the order should not be made.'

third parties conscious that they are being used by criminals.³⁸⁸ Examples would include situations where the proceeds of the illicit traffic are transferred in the form of gifts to relatives, payments are made to own companies, or transfers are made between entities owned by the same persons. The problem is that article 5(8) only protects *bona fide* third parties who manage to prove to the domestic courts that they are *bona fide*. In the domestic law of many Parties this may entail having to satisfy the reverse onus placed on them to prove that they did not know or that they should not reasonably have known of the illicit derivation or nature of the property.³⁸⁹ In the meanwhile, their property may well already vest in the state. The dangers for the abuse of individual rights are manifold.

Article 5(9) is a general safeguard clause which provides that the measures referred to in article 5 shall be defined and implemented in accordance with and subject to the domestic law of a Party.

5.3.2.4.7 Seizure and confiscation under the 1988 Convention in conclusion

Article 5 represents a compromise between the need for flexibility to allow Parties to develop their own responses to the situation, while still providing sufficient detail to ensure a harmonised response. While some refer to it as a basic model in comparison to more sophisticated domestic provisions³⁹⁰ or as an early development of the law which had to satisfy diverse participants at the 1988 Conference,³⁹¹ it has attracted a great deal of praise for its innovative approach to the realising of a strategy for attacking the benefits accruing from the drug traffic,³⁹² and has played a significant part in the rash of

³⁸⁷ For example, where protection was not afforded in the requesting Party, and the third party wishes to exercise her rights in the requested Party.

³⁸⁸ The Netherlands delegate placed on record the following definition of *bona fide* third party: 'Any person, corporation or other legal entity, who has acquired exclusive ownership rights in, or any real or personal rights with respect to any item of property and who, at the time of the establishment of such right, did not know or should not reasonably have known that such property was, or might have become, subject to a confiscation order as referred to in [draft] article 3.' - *1988 Records* vol.II at 98. Section 5(2) of the South Australian Crimes (Confiscation of Profits) Act, 1986, provides that innocent third parties are protected from forfeiture unless they either gave no valuable consideration for the property (i.e. got it for free) or received it in circumstances such as to arouse a reasonable suspicion as to its origin.

³⁸⁹ See, for example, the 'innocent ownership' standard in US law.

³⁹⁰ 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 414.

³⁹¹ Zagaris *op cit* (1995) at 130.

³⁹² See Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 18; Sproule and St-Denis *op cit* at 281.

money laundering and asset confiscation legislation enacted since 1988.³⁹³ Bassiouni believes that only a global system of financial control of all illicit funds entering the legitimate economy will achieve effective control.³⁹⁴ Article 5 coupled with article 3's criminalisation of money laundering is a step towards such a system. Development has been rapid in this area since 1988³⁹⁵ and has been the subject of extensive comment.³⁹⁶

³⁹³ See Hernandez *op cit* at 275-280 who records new legislation in over 24 states. A typical example, is the French *Loi No. 90-1010 du Novembre 14, 1990, portant adaptation de la legislation francaise au dispositions de l'article 5 de la convention des Nations Unies contre le trafic illicite de stupefiants*, which implements article 5 specifically.

³⁹⁴ Bassiouni MC 'Critical reflections on international and national control of drugs' (1990) 18 *Denver Jnl of Int. Law and Policy* 311 at 323.

³⁹⁵ Space constraints make it impossible to do justice to these developments. However, the more significant developments include the following:

- i) In 1985 Interpol introduced Model Legislation on Money Laundering and Forfeiture of Assets which it promoted heavily and the UN agreed to attach as an addendum to the 1988 Convention.
- ii) The Group of Seven Industrialised Democracies (G7) in 1989 established its Financial Action Task Force (FATF), which has also assumed considerable significance in this field, and whose membership now extends beyond the G7. The 1990 FATF report makes forty recommendations for inter alia the improvement at a national and international level of the combating of money-laundering and the enhancement of the role of the financial system in reporting and monitoring suspicious activity. The report also states that Parties agree not to let financial security policies inhibit the implementation of the recommendations, urges that each Party to the 1988 Convention should implement its money laundering provisions and confiscation provisions in national legislation, suggests the extension of national money laundering crimes beyond drug offences, and suggests a variety of other steps such as exchange of information etc. The 1992 FATF report sets out a process which allows members to audit each other's implementation of anti-money laundering schemes.
- iii) The Basle Committee on Banking Regulations and Supervisory Practice issued a 1989 Statement of Principles on Money Laundering (the Basle Concordat), which encourages banks to know their customers, spot suspicious transactions and co-operate fully with law enforcement authorities. This was backed up in 1992 with the issuing of minimum standards to be applied when governments regulate international banks.
- iv) The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime *ETS* 141 and the 1991 European Community Directive on the Prevention of the Use of the Financial System for the Purpose of Money Laundering (Council Directive 91/308, OJ 1991 L166.77), adopt the strictest standards globally for the control of money laundering, with the Convention setting out a complete set of rules for the procedure. The EC Directive covers the same ground as the 1988 Convention's provisions criminalising money laundering, while the Council of Europe Convention complements it by providing for international law enforcement and judicial co-operation.
- v) In 1990, a Caribbean Financial Action Task Force (CFATF) was formed which discussed compliance with FATF's forty recommendations and produced its own 21 recommendations with regard to money laundering.
- vi) The OAS's Inter-American Drug Abuse Commission (CICAD) adopted model anti-money laundering laws in 1992.
- vii) Other models for legislation include the 1990 UN Model Treaty on Mutual Assistance which has a Protocol concerning the Proceeds of Crime, GA Res. 45/117 (30 *ILM* 1434-1441) that is particularly concerned with mechanisms enabling the identification and confiscation of assets in other jurisdictions.
- viii) Bilateral agreements on money laundering co-operation are also beginning to be concluded, eg. US-Venezuela Anti-Money Laundering Agreement of 1990.

³⁹⁶ See Hernandez *op cit* at 284-293; Gilmore WC 'International efforts to combat money laundering' (1992) 18 *CLB* 1129 a 1136-1140; Magliveras KD 'Defeating the money launderer - the international and European framework' (1992) 3 *Journal of Business Law* 161-177; Nilsson HG 'The Council of Europe Laundering Convention: a recent example of a developing international criminal law' (1992) 2 *Criminal Law Forum* 419-465 (reproduces Convention); Parlour R (ed) *Butterworths International Guide to Money Laundering Law and Practice* (1995); Solomon P 'Are money launderers all washed up in the western

Indeed, the provisions of the 1988 Convention relating to the criminalisation of money laundering and the confiscation of illicit proceeds, although limited, are considered by Zagaris and Castilla to have been the first step towards the very rapid construction of an anti-money laundering regime in the 1990s.³⁹⁷ They note that subsequent efforts, both recommendations and regional conventions, have used the same terminology and system of the 1988 Convention's approach, unless change has been necessary due to a need to respond to the rapid evolution of the money laundering business.³⁹⁸ Law enforcement agencies in the United States believe that recent international money laundering legislation has been successful in curtailing money laundering,³⁹⁹ and confiscation regimes have been held to work reasonably well,⁴⁰⁰ although recent scandals suggest otherwise.⁴⁰¹ Whether this international regime will be able to provide sufficient protection to legitimate finance from the proceeds of the illicit traffic will depend on how quickly it can respond to change. There is still a lack of international co-operation and legal complications remain. Technical difficulties abound especially since money launderers constantly change techniques,⁴⁰² and there is a

hemisphere? The OAS Model Regulations' (1994) 17 *Hastings Int. and Comp. LR* 433-455; Zagaris B, Kingma E 'Asset forfeiture international and foreign law: an emerging regime' (1991) 5 *Emory ILR* 445-513; Zagaris B, MacDonald SB 'Money laundering, financial fraud and technology: the perils of an instantaneous economy' (1992) 26 *George Washington Jnl of Int. Law and Economics* 61-107; Zagaris B, Castilla SM 'Constructing an international financial enforcement subregime: the implementation of anti-money laundering policy' (1993) 19 *Brooklyn JIL* 871-965; Zagaris B 'The emergence of an international anti-money laundering regime' in Atkins D (ed) *The Alleged Transnational Criminal* (1995) 127-217.

³⁹⁷ *Op cit* at 877.

³⁹⁸ *Ibid.*

³⁹⁹ Statement by the DEA Chief of Operations, Harold D Wankel, to the Housing and Banking Committee, Money Laundering by Drug Trafficking Organisations, 28/2/1996, cited by Srinivasan N, Underwood R 'Money laundering: international efforts and recent developments in the movement of drug related money' in *Souvenir Brochure of the International Conference on Global drugs Law* (1997) 195 at 198 and endnote 18.

⁴⁰⁰ Home Office Working Group on Confiscation *Report on the Drug Trafficking Offences Act 1986* (1991) at 1 commenting on the effectiveness of the provisions of the Drug trafficking Offences Act, 1986, for dealing with the proceeds of crime.

⁴⁰¹ See Solomon *op cit* at 434. Major banking scandals, such as that surrounding the Bank of Commerce and Credit International (BCCI), have refocused attention on the need to regulate international money movement - see generally the Panel discussion 'New frontiers in the regulation of international money movement in the wake of BCCI' (1992) 86 *American Society of International Law: Proceedings* 188-209. At 191 Macdonald suggests that while the 1988 Convention's provisions in respect of money laundering indicated a trend towards international co-operation in control, the BCCI affair indicated a trend toward 'fragmentation of international banking supervision compounded by poor communication among national supervisory agencies.' Suggestions for future control methods include a new international banking regulator such as the Bank for International Settlements (at 205).

⁴⁰² On the problems of control of illicit activities presented by constantly developing technologies in international and national finance see Zagaris and MacDonald *op cit* at 61-107. Jost P 'Black hawala, financial crimes and the world drug trade' in *Souvenir Brochure of the International Conference on Global drugs Law* (1997) 116-128 illustrates how trust-based 'alternative remittance systems' such as 'hawala' used in India and Pakistan can also be used for the purposes of laundering drug proceeds

shortage of skilled personnel who understand how money laundering methods work.⁴⁰³ Developing states require economic assistance if they are to aggressively pursue anti-money laundering practice.⁴⁰⁴ One potential danger is that the legislation generated will begin to overreact and construe the confiscation process as one akin to a civil reparation for damages, and the blurring of its penal nature through, for example, article 5(7)'s reversal of the onus of proof, will allow a lapse in procedural safeguards.⁴⁰⁵ A further danger is that sacrifice of bank secrecy will involve an unjustifiable erosion of the right of privacy of many not involved in illicit drug trafficking.⁴⁰⁶ An obvious shortcoming is that while provision for due process protection is made for *bona fide* third

because they enable the movement of money leaving little or no paper trail. Cybermoney on the internet and simple currency smuggling present the same problem.

⁴⁰³ One way of overcoming this shortage has been the establishment of Financial Intelligence Units (FIUs). FATF's recommendation 15 called for financial institutions to report suspicious activities to a designated authority, and states have responded by establishing FIUs to assess and process these reports. These FIUs, such as France's Tracfin, are part of states' comprehensive anti-money laundering strategies. In 1995, a meeting of states and IGOs held at the Palais d'Egmont-Arenberg in Brussels to examine FIUs, formed the Egmont group, which seeks ways to develop more effective and practical co-operation among FIUs especially in the area of information exchange and sharing of expertise. In 1997, there were 24 FIUs in operation and twenty more were planned or under development.

⁴⁰⁴ See Solomon *op cit* at 453. De Koker L 'South African money laundering legislation' (1997) 22 *Journal of Juridical Science* 17 at 25 notes, for instance, that the new confiscation procedures enacted in the South African Drugs and Drug Trafficking Act 140 of 1992 had only been used once by 1995. Such a poor response is directly ascribable to poor training in both the police and procuracy in South Africa.

⁴⁰⁵ See, for example, Hinton's argument that confiscation orders under the UK's Drug Trafficking Offences Act 1986 are reparative not punitive - Hinton M 'Are drug trafficking confiscation orders punitive?' (1992) 136 *Solicitors Jnl* 1264-1265. Zagaris *op cit* (1995) at 130 notes that the employment in the US of a civil *in rem* procedure has lead to the denial of US forfeiture requests by states that allow criminal forfeiture only. Zagaris notes that the 1990 European Laundering Convention "resolves" this problem by obliging requested states to assist on a request whenever 'judicial proceedings' are pending, thus making it clear the obligation applies to decisions to confiscate generated by criminal courts, administrative courts and judicial authorities in civil and criminal proceedings totally separate from those in which the guilt of the alleged offender is determined. Stahl MB 'Asset forfeiture, burdens of proof and the war on drugs' (1992) 83 *Jnl of Criminal Law and Criminology* 274-337 criticises the civil forfeiture procedure under the US's Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USC section 881), arguing inter alia that it is a form of criminal punishment and thus the prosecution should be forced to prove its case beyond reasonable doubt and not on civil standards of proof. If the confiscation is regarded by the Parties' domestic law as an action *in rem* the danger is that due process guarantees will simply be abandoned. Henham R 'Criminal justice and sentencing policy for drug offenders' (1994) 22 *Int. Jnl of the Sociology of Law* 223 at 225 notes a number of erosions of due process rights discernible in the UK's Drug Trafficking Offences Act, 1986 (as amended by the Criminal Justice Act, 1993), such as section 1(7)(a)'s setting of the civil standard of proof in confiscation proceedings to determine either whether a person has benefited from drug trafficking or the amount to be recovered.

⁴⁰⁶ Hernandez *op cit* at 235-304 trenchantly criticises the overreaching of US domestic law in this regard and questions the adoption, through the medium of international law, of similar approaches by many other states (at 293). His point is that there are many innocent people involved in "grey economies" in the developing world. They are involved in "parallel financial systems" as a hedge against political and economic instability because of the instability of their own currencies, and they are going to get hurt by the operation of article 5 type laws, because in terms of article 5 derived laws, like the present US law, these parallel financial systems are seen to be inherently suspect (at 295). Nadelmann *op cit* (1986) at 79 also points out that it is extremely difficult to distinguish drug money from other money in the enormous international underground economy.

parties, no provision is made for such protection to be afforded to the subject of the confiscation order. The legal challenge of a seizure or confiscation order may well be out of the financial reach of many, Parties may not provide legal aid, and the whole situation may be exacerbated when the property is in a foreign state. Complaints have been heard in states where forfeiture is common that people lose their cars and homes without due process.⁴⁰⁷ No provision is made for liability for wrongful seizure. And there is the danger that the facilitation of occasional seizures of the proceeds of drug trafficking will not affect the profit incentive of traffickers. Hernandez comments that '[n]o evidence exists that the enactment and enforcement of reporting and forfeiture laws has in any way curbed the drug activity at which they are aimed.'⁴⁰⁸ When the political harm to the innocent and the insignificant is coupled with both the fact that no adequate link can be established between the deprivation of drug traffickers ill-gotten wealth and the curtailment of the drug usage driving the whole system, and with the fiscal interest law enforcement agencies now have in drug profits,⁴⁰⁹ the legal development of seizure and confiscation is in danger of becoming isolated from its purpose of disempowering the illicit traffic.

5.3.2.5 Conclusion - seizure and confiscation

The 1988 Convention has dramatically developed the provisions for seizure and confiscation from their foundation in the 1961 and 1971 Conventions. This development has taken place around the nature of the property open to seizure and confiscation. The earlier conventions focus on drugs and material used in drug offences, while the 1988 Convention focuses on asset and profit confiscation. This marked change in the conception of what is permissible action against the illicit traffic has emerged in the developed world because of the impact of the profits of the illicit traffic on the licit economy of the developed world. The difficulty in the transfer of these tactics through the medium of international law to the developing world, has much to do with the fact

⁴⁰⁷ See Vance MA in 'Comments on Nadelmann' (1991) 5 *Notre Dame Jnl of Law, Ethics and Public Policy* 809. Gordon DR *The Return of the Dangerous Classes* (1994) notes at 176 that a ten month study conducted by the *Pittsburgh Press* (11-16 August 1991) in the US found that most property seized and confiscated was cash and cars belonging to ordinary people, many of whom were never charged, or were innocent, or were only guilty of minor offences.

⁴⁰⁸ *Op cit* at 297. See also Nadelmann EA 'Drug prohibition in the United States: costs, consequences and alternatives' (1991) 5 *Notre Dame Jnl of Law, Ethics and Public Policy* 783 at 787.

that the developing world has not yet felt the impact of drug money laundering as acutely as the developed world.

5.3.3 Controlled delivery

Article 11 of the 1988 Convention endorses the investigative technique termed controlled delivery, already targeted by the 1987 United Nations Comprehensive Multidisciplinary Outline.⁴¹⁰ Cutting notes:

A controlled delivery occurs when a consignment of illicit drugs is detected, ... in circumstances making it possible for those goods to go forward under the control and surveillance of law enforcement officers with a view to identifying and securing evidence against the persons responsible for organising the smuggling.⁴¹¹

Controlled delivery can be applied to accompanied and unaccompanied consignments, to freighted consignments, postal consignments, indeed to any form of transferral where detection and monitoring is possible. The central purpose of this technique is to bring to justice those persons or organisations involved in any way with the shipment, transportation, delivery, concealment or receipt of an illicit consignment of controlled substances that may escape detection if the intermediaries or couriers are arrested immediately upon identification of the contraband. Controlled delivery becomes significant in international drug control terms when the consignment's delivery across national boundaries is permitted. Here the co-operation of the enforcement agencies of a number of states is essential to make sure the international drug traffickers are successfully arrested and the consignment of illicit drugs is not successfully supplied. From a legal point of view the transit state waives its right to arrest the courier and seize the consignment of drugs and usually reserves its right to request the extradition of the

⁴⁰⁹ Baum D 'Tunnel vision: the war on drugs, 12 years later' (1993) 79 *ABA Jnl* 70 at 71 and 72 reports that \$1.6 billion worth of private property is seized in the US every year and that state and local police collected \$218 million in confiscated shared assets in 1992.

⁴¹⁰ Target 18, *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988) at 55-56.

⁴¹¹ Cutting PD 'The technique of controlled delivery as a weapon in dealing with illicit traffic in narcotic drugs and psychotropic substances' (1983) 35 *Bulletin on Narcotics* 15 at 16. Cutting makes it clear at 16 that controlled delivery does not involve "official" drug trafficking or entrapment as crimes have already been committed.

courier once the consignment has reached its destination.⁴¹² After the UN Legal Office ruled that controlled delivery was not in contradiction to the provisions for enforcement co-operation in article 35 of the 1961 Convention (as amended) and article 21 of the 1971 Convention, the Customs Co-operation Council (CCC) and Interpol promoted its use.⁴¹³ However, provisions regulating controlled delivery have practical problems to overcome. As the US delegation to the 1988 Conference put it, 'the decision on the costs and risks associated with the controlled delivery must be weighed against the potential benefit in identifying the traffickers involved'.⁴¹⁴ Legal and constitutional hurdles also exist in the domestic law of many states making the authorisation of this technique difficult. Gilmore notes that while common law systems grant a large measure of discretion to enforcement and prosecutorial authorities, civil law systems stress the legal duty of enforcement and judicial authorities once they become aware of an illegal shipment to intercept it and arrest and prosecute suspects, which means the non-prosecution of suspects in a controlled delivery operation may result in the prosecutorial authorities breaching the law themselves.⁴¹⁵ The 1988 Conference recognised that any successful international provision on controlled delivery would have to reflect the reluctance of Parties to relax their sovereignty as well as provide a basis for the development of this technique in state practice.⁴¹⁶ Article 11 is the final outcome of deliberations at the 1988 Conference that tried to resolve these problems and still establish an effective provision. It attempts to provide a framework for action by the Parties, and leaves the operational details to the competent national enforcement agencies because it recognises that the technique is essentially a covert police operation which, in order to be effective, has to be carried out with the utmost discretion.⁴¹⁷ Entitled 'Controlled Delivery', article 11 reads:

⁴¹² Linke et al *op cit* at 3. They justify at 55 controlled delivery's compliance with the general duty to enact and prosecute drug offences under the drug conventions as not being a case of the Parties abolishing or relinquishing jurisdiction and letting drugs pass, but rather of lengthening 'the scope of the administration of justice in compliance with the obligation to investigate the background of the offence and to detect the principals, organizers and financiers of the traffic.'

⁴¹³ Statement of CCC observer, 1988 *Records* vol.II at 236.

⁴¹⁴ 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 76.

⁴¹⁵ Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 36.

⁴¹⁶ See the statement by the Mexican delegate, 1988 *Records* vol.II at 231.

⁴¹⁷ See the 'Expert Group Report', 1988 *Records* vol.I at 21.

1. If permitted by the basic principles of their domestic legal systems, the Parties shall take the necessary measures, within their possibilities, to allow for the appropriate use of controlled delivery at the international level, on the basis of agreements or arrangements mutually consented to, with a view to identifying persons involved in offences established in accordance with article 3, paragraph 1, and to taking legal action against them.

2. Decisions to use controlled delivery shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the Parties concerned.

3. Illicit consignments whose controlled delivery is agreed to may, with the consent of the Parties concerned, be intercepted and allowed to continue with the narcotic drugs or psychotropic substances intact or removed in whole or in part.

Controlled delivery is defined by the Convention in article 1(g) which reads:

“Controlled delivery” means the technique of allowing illicit or suspect consignments of narcotic drugs, psychotropic substances, substances in Table I and Table II annexed to this Convention, or substances substituted for them, to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences established in accordance with article 3, paragraph 1 of the Convention;

The authors of the 1988 Convention applied the technique not only to narcotic drugs and psychotropic substances, but also to the precursor substances in Tables I and II, because as the United States delegate noted, ‘controlled delivery of such precursor chemicals was one of the main ways of locating illicit processing laboratories.’⁴¹⁸ This is also the reason why the definition makes reference to both ‘illicit’ consignments - meanings narcotic

drugs or psychotropic substances - and 'suspect' consignments - meaning consignments of substances such as those in Table I and Table II which may not in themselves be illicit but which may become illicit when their final destination is discovered.⁴¹⁹ A shortcoming of article 11 from the enforcement perspective is that it does not apply to the controlled delivery of the proceeds or property of drug trafficking.⁴²⁰

Article 11(1) creates the basic provision for the possibility of co-operation with respect to controlled delivery 'at the international level'.⁴²¹ Article 11(1) requires Parties to make a *bona fide* attempt to use the technique because although it appears obligatory, the provision is subject to three conditions that, in practical terms, negate the use of 'shall' and render it optional. The first is that Parties are only obliged to take the necessary measures if possible within the limitations of the basic principles of their domestic legal system. The 1988 Conference recognised that 'permitted by' means for some Parties enabling legislation is required to make the use of controlled delivery possible, while for others controlled delivery is legally possible without such legislation.⁴²² Such legislation would have to allow by implication the postponement or waiving of arrest of suspected persons and/or the seizure of the contraband either for the purpose of identifying other persons involved in the smuggling or for the purposes of evidence gathering. But the Conference recognised that some Parties would have legal difficulty in its implementation, and ensured that its use was not mandatory.⁴²³ The second condition on the provision's operation is a practical one, viz.: it operates within the practical capabilities of the Parties, recognising by the use of the phrase 'within their possibilities' the reality that some Parties do not have the enforcement infrastructure or

⁴¹⁸ 1988 Records vol.II at 243.

⁴¹⁹ Explanation of the British delegate, 1988 Records vol.II at 245-6.

⁴²⁰ Recommendation 36 of the 1990 FATF Recommendations encourages states to co-operate in using controlled delivery with regard to 'assets known or suspected to be the proceeds of crime.' The Interpretive Notes supplied by FATF to this recommendation note that certain states allow controlled delivery to be used in respect of the proceeds of crime, and encourage states to get the necessary legal authorisation to make this possible.

⁴²¹ See generally Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 36. It thus applies to external controlled delivery and internal use of this technique is left untouched by the 1988 Convention.

⁴²² See the statement of the Chairman of Committee II, 1988 Records vol.II at 240.

⁴²³ Sproule and St-Denis *op cit* at 287 note that some delegations were unable to use controlled delivery because it would present unacceptable constitutional, legal and administrative problems. Colombia (10/6/1994 - *Multilateral Treaties Deposited* (1997) at 303) and Venezuela (16/7/1991 - *Multilateral*

financial wherewithal to carry out such operations. The third condition on the provision's operation is that it does not oblige Parties to engage in controlled delivery operations when requested; it simply makes provision for co-operation in respect of such operations if both Parties agree. The provision makes it clear that the consent of the Parties is necessary for the use of the technique, whether obtained through formal prior agreement if time permits, or through informal arrangement if a more expeditious response is called for by circumstances.⁴²⁴ Controlled delivery in a practical sense anticipates informal links and direct communication between the different Parties' enforcement authorities. The 'competent authorities' of the definition in article 1(g) and article 11(1)'s loose provisions make this possible.⁴²⁵ Agreement or arrangement between the Parties must include consensus about the modalities to be used and the comprehensive supply of information about the particular case. It is significant that other than the limited provision in article 11(3), article 11 does not provide for the details of the operations to be undertaken, which it leaves up to the Parties to arrange or agree to. Their enforcement authorities⁴²⁶ which article 1(g) places in a supervisory position will be responsible for the actual form which the co-operation takes, and especially for the essential confidentiality required. They will, however, be guided by the definition in article 1(g) that the technique involves allowing illicit or suspect consignments of contraband or substituted substances to pass out of, through or into the territory of one or more countries with a view to identifying article 3(1) offenders. The provision makes it clear, as does the definition in article 1(g), that the purpose of controlled delivery is to identify persons involved in article 3(1) offences. Identification is made with a view to taking 'legal action' against such persons. Such 'legal action' remains undefined, and while investigation, apprehension and prosecution are obviously contemplated, it is unclear whether and if so at what stage they are obligatory.⁴²⁷

Treaties Deposited (1997) at 306) have both declared that the obligations in article 11 are conditional on respect for their constitutional principles and national legislation requiring the prosecution of offences.

⁴²⁴ See the 'Expert Group Report', *1988 Records* vol.I at 22.

⁴²⁵ Consistent with article 9, article 11 allows for direct co-operation between individual enforcement organs of different Parties without going through a central authority, something which may be desirable for confidentiality but undesirable when other national enforcement agencies are not made aware of a controlled delivery and end up arresting the courier and ruining the operation. Thus for practical purposes, some national co-ordination is advisable.

⁴²⁶ Customs organisations are likely to be heavily involved in such operations.

⁴²⁷ The 1988 Conference records do not reveal whether the authors of the provision also contemplated the situation where arrest and prosecution did not occur, for instance, where the suspect was left alone in order to allow an investigation to develop, although 'legal action' is vague enough to include such a situation.

Article 11(2) provides that the decisions to use controlled delivery shall be made casuistically,⁴²⁸ taking into account the financial and jurisdictional problems its use may entail. Recognising controlled delivery's potential financial burden on requested Parties, article 11(2) mitigates the issue of costs to an extent by providing that this factor be taken into account in the decision to use the technique. Controlled delivery is to take place 'on the basis of agreements or arrangements mutually consented to'. An arrangement

denotes the most informal type of interaction, and can include standard practices mutually applied by the most competent authorities of each party in such situations, including co-operation among police officials in controlled deliveries without the need for formal written agreements.⁴²⁹

Article 11(3) makes optional provision for the possibility of "clean" deliveries to take place, that is, where the drugs are removed and partially or totally substituted by some innocuous substance.⁴³⁰ This provision requires the consent of the Parties because of the concern that the substitution of innocuous substances could give rise to legal difficulties, in particular when seeking to prove the identity and the illicit nature of the content of the seized consignment.⁴³¹ Both partial and total substitution is provided for because it may well be, for instance, that in some Parties' domestic law the receipt of a totally innocuous substance by a trafficker is not an offence, demanding that if not all then some of the substance received must be contraband. But surveillance by customs becomes a lot easier when there is no contraband involved, and the United Kingdom's

⁴²⁸ This limitation is necessary given that comprehensive application of the technique overlooks the necessity of investigating its appropriateness to each case.

⁴²⁹ '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 75.

⁴³⁰ See Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 36-7. An 'innocuous substance' would be one not regarded as a contraband substance in article 3(1) of the 1988 Convention. In other words it would not include narcotic drugs, psychotropic substances, opium poppy, coca bush or cannabis plant as contemplated in the 1961 (as amended) and 1971 Conventions, or the equipment, materials or substances in Tables I and II of the 1988 Convention (see article 3(1)(a)). Whether the latter list of nocuous substances would include the 'property' derived from drug trafficking offences mentioned in article 3(1)(b) and (c), is unclear, but in principle it would seem not to because it is not mentioned in article 1(g)'s definition of controlled delivery.

⁴³¹ The 'Review Group Report', *1988 Records* vol.I at 59.

delegate to the 1988 Conference called article 11(3) a 'marker for the future' in the sense that while complete substitution may not have been possible in 1988, it was the desired method of controlled delivery as the technique's use grew.⁴³²

A major problem with article 11 as a whole is that it is another example of the trade-off of practical impact to national sovereignty implemented through safeguard clauses. The latter leave so much discretion in the hands of the Parties to decide, for instance, what their basic principles of domestic law with respect to the technique are, that the operation of controlled delivery internationally is based on case by case consensus only. But these safeguard clauses recognise that in many states accommodation of controlled delivery by revision of the principle of legality which insists upon immediate prosecution of all offences was going to be a slow process. However, Parties that once refused to use the technique prior to article 11's agreement, are now prepared to use it,⁴³³ and it appears that article 11 has been very influential in this change of attitude.⁴³⁴ It must be pointed out, however, that while article 11's conclusion implies a global loosening of the restrictions on entrapment of drug traffickers with regard to the particular investigative technique of controlled delivery, it does not imply acceptance of the range of other far more intrusive techniques often associated with it.⁴³⁵

5.3.4 The monitoring and control of precursor substances

5.3.4.1 Introduction

Interpol defines precursors and suggests why they have not generally been subject to international legal control as follows:

⁴³² See *1988 Records* vol.II at 231-2.

⁴³³ Evidence by customs officials reprinted in the UK Home Affairs Committee *Report: Drug Trafficking and Related Serious Crime* (1989) vol.II at 33 indicates that Spain which was reluctant to use the technique now uses it. Austria amended its customs laws in 1985 to allow use of the technique - see article 121 of the 1955 Austrian Customs Law amended 10 May 1985.

⁴³⁴ Nadelmann *op cit* (1993) at 236.

⁴³⁵ See, for example, the South Australian case of *R v Ridgeway* (1993) 60 SASR 207 where the prosecution, in an appeal against conviction, attempted to rely on article 11 as a justification for the inclusion of evidence gleaned by the entrapment of the appellant. Legoe J, dissenting in the minority, rejected this reliance because the statute incorporating article 11 into Australian law (Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act, 1990 (Cth)) had not been enacted at the time of the offence, while the majority of the court did not discuss the issue. But even had article 11 been in effective operation in Australia, it is doubtful whether it justified legally both the controlled importation of heroin from Malaysia, as well as the purchase of that heroin in Malaysia in breach of Malaysian law by a police informer in order to supply it to the accused (at 216 of the judgement).

A precursor is a raw material that is specific and critical to the production of a finished chemical product The term “immediate precursor” is usually applied to precursors which are only one reaction step away from the final product [whereas] ... Essential chemicals are less specific or critical than precursors to the production of the final drugs, and usually have widespread legitimate industrial applications. Placing these chemicals under international control similar to drugs is not a viable solution because of the enormous quantities used in legitimate manufacturing processes. In addition, although national restrictions on chemicals may be imposed, experience shows that they can be circumvented easily when supporting measures are not imposed by other nations. The most effective strategy may be ... an international programme of selective monitoring and exchange of information.⁴³⁶

Such strategies are new in inception but not in conception. In 1934 the Opium Advisory Committee noted that control of acid acetic anhydride, used in producing heroin, might prove a valuable weapon against illicit manufacture of drugs.⁴³⁷ Yet the international community, focused on control of drugs, waited until 1961 before it took legal steps to control such substances.

5.3.4.2 Supervision of precursors under the 1961 Convention

Article 2(8) of the 1961 Convention provides:

The Parties shall use their best endeavours to apply to the substances which do not fall under this Convention, but which may be used in the illicit manufacture of drugs, such measures of supervision as may be practicable.

This optional provision requires the Parties to use their ‘best endeavours’ to control the raw materials that can be used in manufacturing drugs and that are not covered elsewhere in the 1961 Convention.⁴³⁸ It is concerned with substances not readily

⁴³⁶ ICPO General Secretariat ‘The diversion of chemicals and the clandestine manufacture of drugs’ (1989) 417 *International Criminal Police Review* 18 at 21 quoted in Dorn et al *op cit* at 164.

⁴³⁷ Report to the Council on the Work of the 18th Session LN Doc. C.56.M.105.1934.XI at 17.

⁴³⁸ 1961 *Records* vol.II at 77-8.

convertible into drugs. Readily convertible substances can be placed under control by the CND incorporating them in Schedule I or II of the 1961 Convention and thus subjecting them to the Convention's regime as a whole. The identity of substances not readily convertible is vague. The only condition on their definition in article 2(8) is that it is possible to subject them to 'practicable' measures of supervision. The *1961 Commentary* notes:

It cannot, however, be foreseen what kind of substance could in the future be employed in the illicit manufacture of narcotic drugs, and which by 'practicable' measures could be made unavailable or much more difficult to obtain for clandestine manufacturers. It is this impossibility to foresee the substances which might require the application of control measures which led to the adoption of this very broad and vague provision.⁴³⁹

The provision leaves to each Party the decision on identifying the substances to be controlled and the measures of supervision practicable to take. Such measures could include precursor monitoring but that would depend on what was practicable for the particular Party. The *1961 Commentary* gives as an example acetic anhydride, used to convert morphine into heroin. It notes:

Countries which do not have a chemical industry may find practicable the application to acetic anhydride of control measures which industrial countries may find impractical or even impossible to impose.⁴⁴⁰

For most states in 1961 any control measures were far beyond their capacity and they chose to apply no control. But the quote alerts us to the central source of tension in the development of this area of law, viz.: the pressure from industrialised states, especially those with chemical industries, not to apply control measures.

⁴³⁹ *1961 Commentary* at 71.

⁴⁴⁰ *1961 Commentary* at 71.

5.3.4.3 Supervision of precursors under the 1971 Convention

Article 2(9) of the 1971 Convention also makes provision for control of uncontrolled substances, but in this instance those used in the manufacture of psychotropic substances. It reads:

The Parties shall use their best endeavours to apply to substances which do not fall under this Convention, but which may be used in the illicit manufacture of psychotropic substances, such measures of supervision as may be practicable.

The 1971 Convention does not schedule precursors in any of its four schedules and does not provide for the application of any one of its four control regimes to these substances. Thus article 2(9) is the sole provision in the 1971 Convention dealing with these substances. Unlike article 2(8) of the 1961 Convention, article 2(9) of the 1971 Convention is concerned with substances that were readily convertible into psychotropic substances as well as those that are not.⁴⁴¹ Under article 2(9), the Parties are urged to impose supervision measures which are ‘practicable’. These measures are left to the Parties’ discretion to decide upon, and the *1971 Commentary* suggests that the nature of these measures will

vary from country to country and also at different times in the same country [and] ... will depend on the economic character of the country and the particular economic activities in which it is engaged.⁴⁴²

The *1971 Commentary* notes that the provision in article 2(9) is ‘not only very vague, but also very weak’.⁴⁴³ The same can be said of article 2(8) of the 1961 Convention. It seems that their authors were overwhelmed by the unlimited potential scope of provisions for the control of precursors, as well as the difficulty of balancing the regulation of potential precursors against the non-regulation of materials having an important or potentially important legitimate economic function.

⁴⁴¹ See *1971 Commentary* at 111.

⁴⁴² *1971 Commentary* at 112.

5.3.4.4 Control and monitoring of precursors under the 1988 Convention

5.3.4.4.1 Introduction

The situation under the earlier Conventions was obviously not ideal and in 1986 the CND called for the inclusion of measures in the new Convention to control precursors used in the illegal processing or manufacture of illicit drugs and for provisions to prevent the use of materials and equipment in this context.⁴⁴⁴ These measures were to be a response to both the need for better supervision of these substances and to the role of precursor monitoring in drugs intelligence. The UN's 1987 Comprehensive Multidisciplinary Outline targeted the 'Control of the commercial movement of precursors, specific chemicals and equipment', and pointed to the inadequacy of existing controls.⁴⁴⁵ Yet international consensus on precursor monitoring in principle did not necessarily make for agreement on the actual steps to be taken, mainly because in practice such monitoring was bound to impact on legitimate commerce. Recognising these problems, the Chairman of Committee II of the 1988 Conference noted:

Care must be taken to keep a balance between the interests of licit manufacture and trade and the need for the most efficient methods to monitor the compounds and solvents in question and to ensure law enforcement and detection of illicit manufacture and illicit laboratories.⁴⁴⁶

The UN's Comprehensive Multidisciplinary Outline states:

While the use of some specific chemicals is in some cases limited to the manufacture of narcotic drugs and psychotropic substances, other chemicals, and some materials and equipment (for example, tableting and encapsulating machines) are traded and required legitimately in large volume and the

⁴⁴³ 1971 Commentary at 111.

⁴⁴⁴ See Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) *op cit* at 25.

⁴⁴⁵ Target 12, *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988) at 40-42.

⁴⁴⁶ 1988 Records vol.II at 246.

shipments should therefore be monitored in such a way as to permit law enforcement intervention with a minimum of burden on legitimate commerce.⁴⁴⁷

Although in 1988 developing states were the sites of illicit drug manufacture, the burden of precursor control was going to be borne mainly by industrialised states as they were largely responsible for the production of precursors.⁴⁴⁸ There was disagreement during the preparation of the 1988 Convention as to the necessity for control of precursors,⁴⁴⁹ but the 1988 Conference eventually settled on articles 3 and 12.

Article 3 makes precursors the subject of two offences, both discussed in detail above in Chapter Three. Article 3(1)(a)(iv) criminalises their 'manufacture, transport or distribution ... knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs and psychotropic substances', while article 3(1)(c)(ii) criminalises their 'possession ... knowing that they are being or are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances'. The latter provision is subject to the constitutionality clause. These offences in place, the Convention directs itself to detailing the actual system of precursor monitoring. Article 12, entitled 'Substances Frequently Used in the Illicit Manufacture of Narcotic Drugs or Psychotropic Substances',⁴⁵⁰ sets up the system for the monitoring and control of precursors. It provides for prevention of diversion of precursors at the national level and for international co-operation in this regard.

5.3.4.4.2 The tabling of precursors

Article 1(t) defines 'Table I' and 'Table II' as 'the correspondingly numbered lists of substances annexed to this Convention, as amended from time to time in accordance with article 12'. Article 12, paragraphs 2 to 7, deals with the procedure to place a particular substance in either Table I or Table II. These paragraphs are discussed in

⁴⁴⁷ *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988) at 40.

⁴⁴⁸ See generally Bland KL 'The Chemical Diversion and Trafficking Act of 1988: stopping the flow of chemicals to the Andean drug cartels' (1991) 7 *American University Jnl. of Int. Law and Policy* 105-143. She notes at 107, for example, that the US exports ninety-five percent of the chemicals used to produce cocaine.

⁴⁴⁹ See the 'Expert Group Report', 1988 *Records* vol.I at 22.

⁴⁵⁰ The INCB *Report of the International Narcotics Control Board for 1994* UN Doc. E/INCB/1994/1 at 7 notes that although the expression 'substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances' is used in the 1988 Convention it remains common practice to use the less technically correct term precursor.

Appendix A to this study entitled 'Substances Controlled'. It is enough to note here that agreement at the 1988 Conference on the criteria used to identify the substances to which the control and monitoring provisions of article 12 would apply was essential for the adoption of those provisions. The two tables which are annexed to the Convention contain lists of chemicals.

Table I originally listed six but now lists eleven immediate precursor chemicals (and their salts where the existence of salts is possible) with a narrow range of uses and which are traded in limited volume internationally.⁴⁵¹ Table I was required because of the absence of a provision in the 1971 Convention providing for the scheduling of substances that had no psychotropic effect but which should be placed under control because of the possibility of their being transformed into psychotropic substances.⁴⁵²

Table II originally listed six but now lists eleven chemicals essential to illicit drug production that have a much wider range of uses and which are traded in much greater volumes than Table I substances.⁴⁵³ These organic solvents and chemical reagents cannot be monitored as closely as the substances in Table I because they are used in huge quantities by the chemical and other industries and they are not specific to the production of drugs.⁴⁵⁴

The enormous quantities and easy substitution of both classes of these substances had, prior to the 1988 Conference, led to different domestic approaches being taken to their control. The main controversy at the Conference over what to do about them was whether to opt for full control as some states had done, or for selective monitoring as

⁴⁵¹ Table I consisted as at 1996 of N-acetylanthranilic acid; ephedrine; ergometrine; ergotamine; isosafrole; lysergic acid; 3,4 methylenedioxyphenyl-2-propanone; 1-phenyl-2-propanone; piperonal; pseudoephedrine; safrole; and their salts were possible. Five of these substances were added in 1992 using the procedure set out in article 12 paragraphs 2 to 7- see Gilmore WC 'Drug trafficking and the control of precursor and essential chemicals: the international dimension' in MacQueen HL, Main BG (eds) *Drug Trafficking and the Chemical Industry: Hume Papers on Public Policy* Vol.4, no.1, (Edinburgh UP, Edinburgh, 1996) at 5 and 18.

⁴⁵² The Chairman of Committee II explained that there was no way, for example, of scheduling ergotamine or other ergot alkaloids even though they were easily convertible into LSD ((+)-lysergide), *1988 Records* vol.II at 246. The 1961 Convention has a provision for the scheduling of substances that do not have a pharmaceutical effect but must be placed under control because of their potential for transformation into narcotic substances. An example is ecgonine, which has no narcotic effects but is easily transformable into cocaine, and is thus placed in Schedule I of the 1961 Convention.

⁴⁵³ Table II consisted as at 1996 of acetic anhydride; acetone; anthranilic acid; ethyl ether; hydrochloric acid; methyl ethyl ketone; phenylacetic acid; piperidine; potassium permanganate; sulphuric acid; toluene and their salts where possible excluding the salts of hydrochloric and sulphuric acid. Again, five of these substances were added to the list in 1992 using the procedure in article 12 - see Gilmore *loc cit*.

⁴⁵⁴ The Chairman of Committee II gives as an example, ether, which because it is used by illicit laboratories to produce cocaine can lead police to these laboratories, but which can easily be substituted by dozens of other organic solvents - *1988 Records* vol.II at 246.

other states had done. The differentiation between Tables I and II allowed states to compromise on what measures to apply to each kind of precursor.

5.3.4.4.3 The general obligation

Article 12(1) contains the general obligation. It reads:

1. The Parties shall take the measures they deem appropriate to prevent diversion of substances in Table I and Table II used for the purpose of illicit manufacture of narcotic drugs or psychotropic substances, and shall co-operate with one another to this end.

Article 12(1) appears to create a mandatory duty on Parties to prevent the diversion of precursors into the illicit traffic. Yet it obliges Parties to take ‘appropriate’ ‘measures’, but does not articulate these measures, allowing the Parties to decide what measures they ‘deem appropriate’. This discretion appears to suggest that the Parties can in effect decide to do very little to prevent diversion. But it is submitted that the Parties are under a duty to apply the provision *bona fide* and thus to provide for effective measures to prevent diversion, whatever they may be. The Parties are also obliged to co-operate internationally to prevent diversion.

5.3.4.4.4 National control and monitoring of precursors

Article 12(8) reads:

8. (a) Without prejudice to the generality of the provisions contained in paragraph 1 of this article and the provisions of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention, the Parties shall take the measures they deem appropriate to monitor the manufacture and distribution of substances in Table I and Table II which are carried out within their territory.

(b) To this end, the Parties may:

- (i) Control all persons and enterprises engaged in the manufacture and distribution of such substances;

(ii) Control under license the establishment and premises in which such manufacture or distribution may take place;

(iii) Require that licensees obtain a permit for conducting the aforesaid operations;

(iv) Prevent the accumulation of such substances in the possession of manufacturers and distributors, in excess of the quantities required for the normal conduct of business and the prevailing market conditions.

Article 12(8) provides for the control and monitoring of precursors at the national level. Once again, it has been left to the Parties to decide what control measures to take, and article 12(8) can be interpreted simply as a suggestion and not as an obligation, but it is submitted that *bona fide* application of the provision would require each Party to apply effective provisions for the national control and monitoring of precursors.

Article 12(8)(a) obliges Parties to ‘take the measures they deem appropriate’ to monitor the domestic manufacture and distribution of the tabled substances. ‘Manufacture’ is not defined in the 1988 Convention but must be taken to include the preparatory stages of manufacturing. The Chairman of Committee II of the 1988 Conference opines that each Party is left to decide what is an appropriate response and whether any action is required at all, and continues that while ‘it might not be necessary to monitor large, reliable concerns, it was vital to monitor the activities of small unreliable concerns.’⁴⁵⁵ The bias towards sizeable concerns is obvious. This provision operates without prejudice to the general obligation in article 12(1) and to any obligations under the existing drug conventions.⁴⁵⁶

Article 12(8)(b) recommends a number of measures that the Parties may opt for to achieve article 12(8)(a)’s purpose. Article 12(8)(b)(i) suggests that the Parties control all persons and enterprises engaged in manufacturing and distributing precursors, but does not propose how this is to be done. A national register setting who is engaged in

⁴⁵⁵ 1988 Records vol.II at 266.

⁴⁵⁶ The US delegate pointed out that this affirmation is strictly speaking unnecessary as neither the 1961 nor 1971 Conventions require the licensing of manufacturers of the substances in Tables I and II - 1988 Records vol.II at 260.

such activities would be appropriate. Article 12(8)(b)(ii) suggests that the Parties control through licensing the business and premises in which manufacturing or distribution takes place. Article 12(8)(b)(iii) suggests that the Parties oblige licensees to obtain a permit for manufacturing or distribution. Article 12(8)(b)(iv) provides that the Parties may consider taking measures to prevent the accumulation in the possession of manufacturers or suppliers of quantities of the tabled substances in excess of those required for normal trade. The decision as to what is to be regarded as an 'excess' quantity of the tabled substances remains the Parties, and it is likely that in interpreting 'excess' quite generously they will take account of the fact that it is common to find large quantities of these substances on the books of importers in bonded warehouses.

Despite these recommendations, in practice Parties like the United Kingdom have made it clear that they regard licensing systems as completely impractical given the volume and diversity of transactions involved.⁴⁵⁷

5.3.4.4.5 Control of the international trade in precursors

Agreement on a suitable provision to control the international trade in precursors was difficult. Comprehensive control of the trade in precursors would help developing states into which such substances were imported from the industrialised world in their fight against the illicit traffic, but would severely hamper the legitimate manufacture of precursors in industrialised states. The former favoured formal rigid systematic bureaucratic control; the latter, informal flexible systems for the co-operation of enforcement agencies and industry with respect to suspicious consignments.⁴⁵⁸ The compromise agreed upon is contained in Article 12 paragraphs (9) and (10). Article 12(9) reads:

9. Each Party shall, with respect to substances in Table I and Table II, take the following measures:

⁴⁵⁷ See Annexure C 'UN Convention against Illicit Trafficking in narcotic Drugs and Psychotropic Substances: Action Required Prior to Ratification' in UK Home Affairs Committee *Report: Drug Trafficking and Related Serious Crime* vol.II (1989) at 164.

⁴⁵⁸ See the 'Expert Group Report', *1988 Records* vol.I at 23. The EC was a particularly vociferous advocate of selective controls. It had competence to negotiate a provision with respect to precursors because they fall within the EC's sphere of competence under article 113 of the EEC treaty. This was the reason that it signed the 1988 Convention and became party to it.

(a) Establish and maintain a system to monitor international trade in substances in Table I and Table II in order to facilitate the identification of suspicious transactions. Such monitoring system shall be applied in close co-operation with manufacturers, importers, exporters, wholesalers and retailers, who shall inform the competent authorities of suspicious orders and transactions.

(b) Provide for seizure of any substance in Table I and Table II if there is sufficient evidence that it is for use in the illicit manufacture of a narcotic drug or psychotropic substance.

(c) Notify, as soon as possible, the competent authorities and services of the Parties concerned if there is reason to believe that the import, export or transit of a substance in Table I or Table II is destined for the illicit manufacture of narcotic drugs or psychotropic substances, including in particular information about the means of payment and any other essential elements which led to that belief.

(d) Require that imports and exports be properly labelled and documented. Commercial documents such as invoices, cargo manifests, customs, transport and other shipping documents shall include the names, as stated in Table I or Table II, of the substances being imported or exported, the quantity being imported or exported, and the name and address of the exporter, the importer and, when available, the consignee.

(e) Ensure that documents referred to in subparagraph (d) of this paragraph are maintained for a period of not less than two years and may be made available for inspection by the competent authorities.

Article 12(9) obliges Parties to establish a selective system for monitoring international trade including, in particular, a selective notification system of suspicious transactions.

Article 12(9)(a) obliges Parties to establish and maintain a system to monitor the international trade in precursor substances with the purpose of facilitating the identification of suspicious transactions. The Parties are obliged to co-operate closely

with the various participants in the chemical industry in the application of this monitoring system. These participants in the chemical industry must be obliged by domestic law to inform the competent authorities of suspicious orders and transactions. Precisely how such a suspicious order or transaction is to be identified is left undefined, but factors such as the identity of the purchase and final consignee, the final destination of the substance, the size of the consignment, and the method of payment may be useful guidelines.

Article 12(9)(b) obliges each Party to make provision in its legal and administrative system for the seizure of a consignment of precursors if there is sufficient evidence that it is intended for use in illicit drug manufacture. The provision does not oblige Parties to make such seizures. The discretion to seize must lie in the hands of the Parties' enforcement agencies. The provision also insists upon the presence of sufficient evidence before seizure is permitted. The Japanese delegation to the 1988 Conference understood that seizure was only permitted within the particular Party's territorial jurisdiction.⁴⁵⁹ The provision does not oblige Parties to make provision for the confiscation of suspect shipments, as the latter process was felt to fall outside the legal competence of the administrative services responsible for implementing the envisaged monitoring system.⁴⁶⁰ Article 5(1)(b) does, however, allow confiscation of precursors that are going to be used in an article 3(1) offence.

Article 12(9)(c) obliges a Party to inform as speedily as possible the competent authorities and services of other Parties of any suspicions its enforcement agencies may have that the import, export or transit of a precursor is destined for illicit drug manufacture. The provision sets out that this notification should contain information about the means of payment and any other essential elements which led to the formation of the suspicion. The form of payment is singled out in the provision as a key element in the tracing of illicit transactions. A suspicion must be founded on a reasonable belief, that is, on objectively verifiable grounds. The competent authorities are those contemplated in article 9.⁴⁶¹

Article 12(9)(d) requires the correct labelling and documentation of imports and exports. It requires that the commercial documents mentioned should contain the quantity and the names of the substances being imported or exported, in the manner in

⁴⁵⁹ *1988 Records* vol.II at 262.

⁴⁶⁰ See the 'Expert Group Report', *1988 Records* vol.I at 24.

which these names are stated in the two Tables. A uniform nomenclature for these substances has thus become necessary, as in practice they are known under different names, and the UN Secretariat has drawn one up.⁴⁶² This provision also requires that the commercial documents mention the name and address of the exporter and the importer. As the final consignee is not always known, the provision only requires that these documents should contain the name of the consignee 'when available.'

Article 12(9)(e) requires the retention of document records for a minimum of two years for inspection by the competent authorities.

Article 12(10) sets out an additional list of more rigorous provisions which are only to be applied to Table I substances, because they have few legitimate and practical uses and involve fewer shipments than the substances in Table II.⁴⁶³ It reads:

10. (a) In addition to the provisions of paragraph 9, and upon request to the Secretary-General by the interested Party, each Party from whose territory a substance in Table I is to be exported shall ensure that, prior to such export, the following information is supplied by its competent authorities to the competent authorities of the importing country:

(i) Name and address of the exporter and importer and, when available, the consignee;

(ii) Name of the substance in Table I;

(iii) Quantity of the substance to be exported;

(iv) Expected point of entry and expected date of dispatch;

(v) Any other information which is mutually agreed upon by the Parties.

⁴⁶¹ See the 'Expert Group Report', *1988 Records* vol.I at 24.

⁴⁶² See the statement of the DND's Senior Scientific Officer, *1988 Records* vol.II at 263. The nomenclature uses all possible synonyms and is based on the International Nonproprietary Names for Pharmaceutical Substances.

⁴⁶³ See the statement of the US delegate, *1988 Records* vol.II at 257.

(b) A Party may adopt more strict or severe measures of control than those provided by this paragraph if, in its opinion, such measures are desirable or necessary.

The major added requirement in article 12(10) is for the country of destination to be given advanced warning of the arrival of Table I substances. The provision obliges Parties which export such substances to ensure that prior to such exportation its competent authorities supply the specified information directly to the competent authorities of the importing country. However, such information need only be supplied if a request has been made through the Secretary-General. By contrast to article 12(9), the information system provided for in article 12(10) is compulsory and systematic; it is not isolated to selective suspicious cases. The information to be supplied includes (i) the identity of both exporter and importer, and, when available, the consignee, (ii) information on the name of the substance and (iii) its quantity, (iv) the port of entry and shipment date, and (v) any other information which is mutually agreed upon by the Parties.

This provision, and particularly transmission of the identity of the importer and exporter by the exporting Party, was the main battleground between the EC and the bulk of the delegations at the 1988 Conference.⁴⁶⁴ The EC's suggestion to continue its practice of allowing the export of Table I substances to an undeclared importer was regarded as playing into the illicit traffickers' hands. The compromise reached insisted only on identification of the exporter and effectively the first importer, and not upon the final consignee unless that information is available. The provision as a whole does not provide what steps should be taken if the information required is unknown to exporting Parties' authorities, or is in fact incorrect. The United States delegate understood article 12(10)(a)(i) to mean that the exporting of Table I substances to an undeclared importer would have to be stopped by Parties,⁴⁶⁵ while the German Democratic Republic's delegate saw this practice as a violation of article 12(1)'s general obligation.⁴⁶⁶ In reality,

⁴⁶⁴ The EC favoured a selective information system. The observer for the Commission of European Communities noted that more than thirty percent of all exported goods from the EC left it without the final buyer of these goods having yet been found, which lead to the inevitable possibility that incorrect information as to the importer would be supplied and the goods may in fact end up in an entirely different country - *1988 Records* vol.II at 250.

⁴⁶⁵ *1988 Records*, vol.II at 251.

⁴⁶⁶ *1988 Records*, vol.II at 253.

it is submitted that all that is required of Parties is that they act in good faith in providing information on the identity of the exporter, which should be easy, and the identity of an importer, even if ultimately this information is not entirely correct, because the system does not require the final importer's identity. Although comprehensive information is essential for the monitoring of the consignment by the importing Party, a compulsory system's shortcomings are an overflow of irrelevant data, lack of confidentiality, cost, and the fact that it loses sight of provision's aim which is to provide information of real value in the following up of suspicious transactions.⁴⁶⁷ Finally, as Gilmore notes, these obligations are selective because article 12(10)(a) only requires that they be carried out when the Secretary-General is so requested by the interested Party.⁴⁶⁸ In the absence of such a request, the consignment will enter the territory of a Party without notice and unmonitored.

Article 12(10)(b) invites Parties to adopt more rigorous measures of control if they feel such measures are desirable or necessary. This would cater for the situation where more specific information was required, such as where information was required on all shipments of a particular chemical.⁴⁶⁹ It was the understanding of delegates to the 1988 Conference that article 12(10)(b) allowed the measures contemplated in article 12(10)(a) to be applied to Table II substances as well.⁴⁷⁰ Provisions such as article 12(10)(b) may seem superfluous against the background right of every state to adopt more stringent control measures, but it does assure Parties that that right is undisturbed by the Convention and it prevents other Parties from contesting any decision they may make to apply more severe measures to precursors.⁴⁷¹ Article 24 does, however, already provide for the taking of more severe measures than the Convention as a whole by each Party, thus making article 12(10)(b) redundant.

5.3.4.4.6 General provisions in respect of precursors

Article 12 paragraphs 11, 12, 13 and 14 read:

⁴⁶⁷ The EC's rationale for a selective system - see the Greek delegate's statement, *1988 Records*, vol.II at 248.

⁴⁶⁸ See Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 28.

⁴⁶⁹ Statement of the US delegate, *1988 Records*, vol.II at 251.

⁴⁷⁰ Statements of the delegate for Kuwait and Chairman of Committee II - *1988 Records* vol.II at 256 and 257 respectively.

11. Where a Party furnishes information to another Party in accordance with paragraphs 9 and 10 of this article, the Party furnishing such information may require that the Party receiving it keep confidential any trade, business, commercial or professional secret or trade process.

12. Each Party shall furnish annually to the Board, in the form and manner provided for by it and on forms made available by it, information on:

(a) The amounts seized of substances in Table I or Table II and, when known, their origin;

(b) Any substance not included in Table I or Table II which is identified as having been used in illicit manufacture of narcotic drugs or psychotropic substances, and which is deemed by the Party to be sufficiently significant to be brought to the attention of the Board;

(c) Methods of diversion and illicit manufacture.

13. The Board shall report annually to the Commission on the implementation of this article and the Commission shall periodically review the adequacy and propriety of Table I and Table II.

14. The provisions of this article shall not apply to pharmaceutical preparations, nor to other preparations containing substances in Table I or Table II that are compounded in such a way that such substances cannot be easily used or recovered by readily applicable means.

Article 12(11) requires Parties requesting information under paragraphs 9 and 10 of article 12 to keep trade secrets secret when so requested by the requested Party. The purpose of the provision of information is the detection of the illicit traffic and it must not be used for other reasons. Confidentiality is necessary to ensure the confidence of Parties in the system and thus to ensure its smooth functioning.

⁴⁷¹ Statement of the Chairman of Committee II, *1988 Records* vol.II at 257.

Article 12(12) requires that Parties furnish the INCB annually with information on seizures of precursors, new precursors and methods of diversion. In terms of the provision the INCB decides the form and manner in which this information is to be provided and makes available forms to this end. The provision also sets out what specific information is required. Article 12(12)(a) requires information on the quantities of precursors seized and their origin if it is known. Article 12(12)(b) requires information on any substance not tabled but which has been used in the illicit manufacture of narcotic drugs or psychotropic substances and which in the opinion of the Party reporting on it is significant enough to be brought to the INCB's attention. The provision was included to enable the INCB to gather information on different substances of abuse in different Parties to assist it in any assessment of the possible tabling of these substances.⁴⁷² Article 12(12)(c) requires information on methods of diversion and illicit manufacture of tabled substances.

Article 12(13) requires the INCB to report to the CND annually on the implementation of article 12 and requires the CND to review periodically the adequacy and appropriateness of Table I and Table II.

Article 12(14) excludes from the ambit of precursor monitoring pharmaceutical preparations intended for therapeutic uses, and preparations of tabled substances which have legitimate industrial uses and which are compounded in such a way as to prevent their easy use or recovery by readily available means. 'Preparation' is not defined in the 1988 Convention but it was the understanding of the delegates to the 1988 Conference that the definition in the 1961 and 1971 Convention applied,⁴⁷³ and thus it can be taken to mean any solution or mixture in whatever physical state containing one or more of the substances in Table I or Table II.

5.3.4.5 Precursor monitoring in conclusion

The INCB believes that the generality of article 12 allows sufficient flexibility to adapt precursor control to national situations, and to the different requirements of, for example,

⁴⁷² See the 'Expert Group Report', *1988 Records* vol.I at 25.

⁴⁷³ Statement of the Chairman of Committee II - *1988 Records* vol.II at 267 Article 1(s) of the 1961 Convention defines 'preparation' as 'a mixture, solid or liquid, containing a drug' while article 1(f) of the 1971 Convention defines it as '(i) any solution or mixture, in whatever physical state, containing one or more psychotropic substances, or (ii) one of more psychotropic substances in dosage form.'

chemical producing and transit countries.⁴⁷⁴ Various plans and statutes have been touted as models for the implementation of the 1988 Convention's provisions on precursor monitoring.⁴⁷⁵ In 1990, for example, the EC adopted a Regulation with the following aims:

Each member state shall take, in accordance with its legal system, appropriate measures to encourage operators to immediately notify the competent authorities of any circumstances, such as unusual orders for and transactions of scheduled substances [twelve are mentioned in the appendix] which indicate that such

⁴⁷⁴ 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 17.

⁴⁷⁵ One of the most influential organisations in the implementation of article 12 was the Chemical Action Task Force (CATF), established like FATF by the G7, as a task force but with the aim of ensuring that effective procedures were adopted by states to prevent the diversion of precursors and essential chemicals to the manufacture of illicit drugs. The CATF was composed of representatives from G7 countries and representatives of states that manufacture and trade in the substances. In its first report in 1991, it produced a list of 46 recommendations for consideration by the G7. Central to these was the recommendation that article 12 of the 1988 Convention be regarded as 'the foundation for international regulation' in this area. It thus urged states to become party to the 1988 Convention. The CATF isolated five basic regulatory control measures to prevent chemical diversion to the illicit traffic. These were:

- a) vigilance - the duty on commercial operators to alert competent authorities about suspicious transactions;
- b) administrative surveillance - the requirement that commercial operators maintain records and documents for all transactions in the subject chemicals;
- c) registration/authorisation of operators - the subjection of commercial operators to a licensing or authorisation system;
- d) export authorisation - the requirement of an export permit for exports the application for which must identify all consignees; and,
- e) import authorisation - the obligation on importing states to exercise strict diligence when authorising imports by, for example, ascertaining the importers's competence and integrity as well as the purpose for which the chemicals are being imported.

CATF recategorised the substances in the Tables in the following way: Category 1 chemicals were those used in the manufacture of synthetic drugs (7 substances in Table I); Category 2 chemicals had a wider legitimate commercial application than those in Category 1 (7 substances in Table II), and Category 3 consisted of chemicals essential for the production of cocaine and heroin (2 substances in Table II). CATF recommended that all five regulatory measures should be applied to Category 1 chemicals. It recommended that vigilance, administrative surveillance, and export and import authorisations should be applied to Category 2 chemicals 'to the extent necessary for the effective control of international transactions.' A registration procedure was recommended for acetic anhydride in heroin producing states, and it was recommended that exporters in chemical producing countries should be obliged to register. In respect of Category 3 chemicals, CATF recommended only vigilance and administrative surveillance, although it suggested the development by chemical manufacturing states of a strategy for targeting countries involved in heroin and cocaine production with the aim of determining appropriate import and export authorisation systems. The CATF continued its work in the early 1990s but it was not intended to become institutionalised, and its role has been taken over by the INCB - see Gilmore WC 'Drug trafficking and the control of precursor and essential chemicals: the international dimension' in MacQueen HL, Main BG (eds) *Drug Trafficking and the Chemical Industry: Hume Papers on Public Policy* Vol.4, no.1, (Edinburgh UP, Edinburgh, 1996) at 18-22.

substances destined for import or export may be diverted for the illicit manufacture of narcotic drugs or psychotropic substances.⁴⁷⁶

The EC initially focused on regulation of the international trade in response to article 12(9).⁴⁷⁷ Its response to the international trade was fine-tuned roughly at the same time⁴⁷⁸ it addressed the issue of domestic monitoring and the requirements of article 12(8).⁴⁷⁹ For the EC, and for Interpol, compulsory monitoring is unrealistic. They are wedded to voluntary monitoring, the practice in Europe and Britain.⁴⁸⁰ In Britain,

⁴⁷⁶ Council Regulation (EEC) No.3677/90 of 13 December 1990 (OJ 1990 L357/1). See generally McClean *op cit* (1992) at 180-183.

⁴⁷⁷ The EC Regulation provides for an extensive response to article 12(9)'s obligations. It applies to a broadly defined category of operators and applies to the same list of substances tabled in the 1988 Convention. Its article 2 deals with the documentation, records and labeling as demanded by article 12(9)(d) and (e) of the 1988 Convention, while a duty of notification set out in article 3 meets the obligation in article 12(9)(c) of the 1988 Convention. Its chief obligation is a duty of pre-export notification contained in its article 4 which obliges operators to supply full details of exports to the exporting state's competent authorities at least 15 working days before a customs export declaration is lodged thus giving the customs officials sufficient time to decide whether to allow the export or to forbid it if they have reasonable grounds to suspect that the substances are to be used in the illicit manufacture of drugs. It also contains provisions for controlling the trade in precursors with non-member states. It makes special reference to the establishment of machinery for the authorisation of exports of precursors varying according to the substance involved and the destination, administrative surveillance of importation, exportation and transit, as well as an authorisation system for operators. The Regulation also sets up systems of close administrative co-operation and for exchange of information between member states and the European Commission, which are designed to reinforce the effectiveness of the measures. Express provision is made for monitoring the kinds of products most frequently diverted, along with the main methods used, and for the adaptation of the Regulation to developments in the field. The Regulation allows search powers to authorities but not the seizure powers in article 12(9)(b) of the 1988 Convention. The plan has been criticised by the DEA because it does not control all the chemicals used to make cocaine - see Bland *op cit* at 121 fn127.

⁴⁷⁸ The 1990 Regulation was amended and supplemented to bring it into line with the more ambitious CATF recommendations through Council Regulation (EEC) No.900/92 of 31 March 1992 (OJ 1992, L96/1), Council Regulation (EEC) No.3679/92 of 21 December 1992 (OJ 1992, L383/17), Council Regulation (EEC) No.2959/93 of 27 October 1993 (OJ 1993, L267/8) - see Estievenart G 'The European Community and the global drugs phenomenon' in Estievenart G (ed) *Policies and Strategies to Combat Drugs in Europe* (1995) 50 at 78. These later regulations gave expression to the category based classification scheme and application of appropriate control measures adopted by the CATF in 1991. Thus in respect of Category 3 chemicals, widely traded in the legitimate commerce, article 5(a)(1) of Council Regulation (EEC) No.900/92 subjects them to export authorisation only if the country of destination has been targeted. Identification of a state as the source of illicit heroin or cocaine production can be unilateral but the Commission prefers to enter into a dialogue with the individual states in question - see EC Regulation No.2959/93.

⁴⁷⁹ Council Directive (EEC) 92/109 of 14 December 1992 (OJ 1992, L370/76) is concerned with the manufacture and placing on the European market of certain substances used in the illicit manufacture of narcotic drugs and psychotropic substances. It has been amended by Commission Directive (EEC) No.93/46 of 22 June 1993 (OJ 1993, L159/134). This adopts the licensing and authorisation recommendations in respect of the highly sensitive chemicals listed in CATF category 1. See generally Gilmore *op cit* at 22.

⁴⁸⁰ Section 13 of the UK's Criminal Justice (International Co-operation) Act, 1990, provides that the Secretary of State may make regulations to for instance impose documentation requirements for transactions of scheduled substances, requiring the keeping of records, allowing the inspection of records

companies likely to sell such chemicals are contacted, and when a customer fits the right profile⁴⁸¹ the authorities are informed. The United States adopted legislation on precursor monitoring prior to the conclusion of the 1988 Convention which it regards as model legislation to promote the implementation of the 1988 Convention's provisions.⁴⁸² Its Chemical Diversion and Drug Trafficking Act of 1988⁴⁸³ regulates the import and export of 'precursor' and 'essential' chemicals. Manufacturers, distributors, importers and exporters of listed chemicals are obliged to notify the DEA fifteen days before any sale is completed. The DEA then investigates the prospective purchaser and if the Attorney General is satisfied that there are reasonable grounds for suspecting the shipment may be diverted, the DEA may suspend the sale.⁴⁸⁴ Criminal liability attaches to deliberately unreported exports suspected of being destined for the illicit traffic.⁴⁸⁵ The Act anticipates extraterritorial jurisdiction and investigation, with all their attendant difficulties.⁴⁸⁶ By contrast, Bland notes that under the OAS's Model Regulations to Control Chemical Precursors licences are issued for the handling of precursors and every transaction is registered, strict records must be kept, the consignee must be identified and information must be furnished regarding the transportation of the chemicals allowing easier identification of point of diversion, and provision is made for international exchange of information and international co-operation in investigations of alleged diversions, making for a much tighter system altogether.⁴⁸⁷ The contrast between the European, American and Latin American approaches reflects their varying commitment to this enforcement mechanism.

The INCB has been particularly diligent in its encouragement and monitoring of compliance with article 12,⁴⁸⁸ although it has complained consistently about the failure

and the labelling of consignments (section 13(1)), but the emphasis is on the notification of proposed exports of such substances (section 13(2)).

⁴⁸¹ For example, if a new buyer buys in bulk for export and pays cash.

⁴⁸² Bland *op cit* at 108 citing *U.S. Chemical Exports to Latin America: Hearing Before the Subcomm. of Foreign Commerce and Tourism of the Senate Comm. on Commerce, Science and Trans.* 101st Cong., 2nd Sess. 1 (1990).

⁴⁸³ 21 USC section 801 (1990). See generally Bland *op cit* 105 et seq fn27.

⁴⁸⁴ 21 USC section 971(c)(1). 'Suspicious' behaviour must also be reported to the DEA, including requests for 'extraordinary' amounts of chemicals, and 'an uncommon method of payment' or any other suspicious circumstance - 21 USC section 830(b) (1990).

⁴⁸⁵ 21 USC section 960(d) (1990).

⁴⁸⁶ Bland *op cit* at 132-134.

⁴⁸⁷ See Bland *op cit* at 134 to 139 commenting on the Model Regulations to Control Chemical Precursors and Chemical Substances, Machines and Materials RM/NARCO/doc.18/90 rev.1 (1990).

⁴⁸⁸ It publishes a supplementary report to its annual report on the subject, for example *Precursors and Chemicals Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances*:

of Parties to furnish information under article 12(12) adequate enough to make a comprehensive assessment of the situation.⁴⁸⁹ In 1994, it directly criticised the failure of Parties to put into operation mechanisms enabling them to obtain information on the licit requirements for tableted substances and on the identity of manufacturers, distributors, importers and exporters of such substances.⁴⁹⁰ In Resolution 20 of 1995 ECOSOC confirmed the INCB's appeal to exporting Parties to provide pre-export notifications on a routine basis prior to shipment even in situations where such notifications have not been formally requested by importing Parties. Importing Parties were requested upon receipt of pre-export-notification to investigate questionable cases and to seek the views and information of the INCB, IGOs and other Parties as appropriate.⁴⁹¹ Clearly the legal and administrative framework is not yet in existence in most Parties and while there have been successes, the methods and routes of diversion are becoming more visible⁴⁹² and major diversions are being prevented,⁴⁹³ it is doubtful whether precursor monitoring will put a stop to the market, a conclusion evidenced by the continued availability of illicit drugs made using precursors. Dorn et al suggest that it is probably better to use control of precursors to shape the nature of the market, that is, to influence which drugs are available and which are not.⁴⁹⁴ Such an approach would on a literal interpretation seem to be in accord with the existing international obligations, though it may not be in accord with a purposive interpretation of these provisions because it flies in the face of the policies of blanket prohibition and supply reduction.

5.3.5 Control of materials and equipment used for drug production

The 1988 Convention also addresses the problem of the purchase by illicit traffickers of materials and equipment designed for licit drug production, such as glassware, mixing

Report of the International Narcotics Control Board for 1995 on the Implementation of Article 12 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 UN Doc. E/INCB/1995/4. In 1993 it also took over the functions of the Chemical Action Task Force (CATF) set up in 1990.

⁴⁸⁹ INCB *Report of the International Narcotics Control Board for 1995* UN Doc. E/INCB/1995/1 at 27.

⁴⁹⁰ INCB *Report of the International Narcotics Control Board for 1994* UN Doc. E/INCB/1994/1 at 7.

⁴⁹¹ The INCB reported in 1995 that only one Party had made a special notification to the Secretary-General in terms of article 12(10) although such notifications are often sent by states to other states - 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 18.

⁴⁹² INCB *Report of the International Narcotics Control Board for 1995* UN Doc. E/INCB/1995/1 at 28.

⁴⁹³ The *Report of the International Narcotics Control Board for 1996* UN Doc. E/INCB/1996/1 notes at 30 that 16 tonnes of ephedrine, a methamphetamine precursor, was seized in 1996, preventing the potential production of 10 tonnes of the drug.

⁴⁹⁴ *Op cit* at 168.

tanks and tableting and encapsulating machines. Article 13, entitled 'Materials and Equipment', provides:

The Parties shall take such measures as they deem appropriate to prevent trade in and the diversion of materials and equipment for illicit production or manufacture of narcotic drugs and psychotropic substances and shall co-operate to this end.

This mandatory provision requires Parties to: a) take steps nationally to prevent the trade in and diversion of materials and equipment used for illicit drug production or manufacture; and b) to co-operate internationally to achieve this purpose. The Chairman of Committee II explains the purpose of this provision as follows:

[I]n many countries it was known that equipment used in the pharmaceutical industry was being diverted to the illicit manufacture of drugs and ... initially it had been thought that control could be imposed over trade in such equipment. However, in view of the huge quantities involved, it was found impossible to introduce a form of control similar to that for narcotic drugs. The original purpose of [draft] article 9 had therefore been to promote co-operation between the Parties in the monitoring, follow up and regulation of trade in the equipment in question so as to prevent its use in the illicit manufacture of narcotic drugs and psychotropic substances.⁴⁹⁵

Article 13 requires the Parties, at the national and international levels, to monitor the licit trade in materials and equipment used in drug production and manufacture, in the same way as they monitor drugs and precursors, in order to identify when this material and equipment is being diverted to the illicit traffic, and then to take steps to prevent its diversion to the illicit traffic. Article 13 also requires the Parties to monitor the illicit trade in these materials which takes place entirely separately from the licit trade and involves no diversion from the licit trade, and take steps to stop it. The 'measures' to be taken by the Parties are not specified, and obviously remain at their discretion, but they must be 'appropriate' to the purpose of preventing the trade in and diversion of materials

and equipment used for illicit drug production or manufacture. The detailed control measures suggested in the draft article were considered to be too difficult to implement and potentially undesirable for the legitimate international trade in materials and equipment used by the pharmaceutical industry.⁴⁹⁶ But control of tableting and encapsulating machinery and the glassware used in drug manufacture and production is clearly what is called for, and domestic legislation should penalise diversion to the illicit traffic and illicit trade in such equipment.⁴⁹⁷ Thus the 'materials and equipment' covered by the provision appear to be those used for drug production or manufacture in the narrow sense, that is, the actual means by which the substances are produced and not, for example, the aircraft and vehicles used for their transportation, weapons for the protection of laboratories, communications devices and so on.⁴⁹⁸ They do not include precursors to the precursors listed in Tables I and II.⁴⁹⁹

5.3.6 Enforcement measures for source reduction

5.3.6.1 Introduction

Source reduction methods such as eradication of drug bearing plants are dealt with here under enforcement because they usually involve action by enforcement agencies. But supply reduction methods such as crop substitution have been left Chapter Six below as they do not usually involve enforcement action. The provisions of the drug conventions that relate to demand reduction are also dealt with in Chapter Six as in the main they entail the adoption of alternative methods of suppression to those used by criminal law enforcement.

Crop eradication is one of the most controversial of all the supply reduction methods.⁵⁰⁰ While the destruction of drug bearing crops presents an apparent benefit,

⁴⁹⁵ *1988 Records* vol.II at 228.

⁴⁹⁶ See the 'Expert Group Report', *1988 Records* vol.I at 25. Draft article 9 went into great detail in paragraphs 2 and 3 which read: '2. The Parties shall require that the intention to export a tableting or encapsulating machine be reported in advance to an appropriate authority. If such a machine is to be exported to another Party, the authority of the Party of origin shall notify the Party of destination of the particulars of the transaction. 3. The Parties shall consider requiring: (a) The registration with the appropriate authority of tableting and encapsulating machines; (b) The notification to said authority of the domestic sale or other disposition of such machines.' - *1988 Records* vol.I at 8.

⁴⁹⁷ As US legislation does.

⁴⁹⁸ The Peruvian delegate suggested an extension of the article to cover these items but this was rejected by other delegations, *1988 Records* vol.II at 227 and 228.

⁴⁹⁹ *1988 Records* vol.II at 224.

⁵⁰⁰ See generally Bland *op cit* 105 at 114 and 115.

numerous problems are associated with this practice. Some of the methods used, for example, burning and use of herbicides or chemicals, are environmentally destructive. The practice also hurts the poorest actors in the chain of supply, the peasants,⁵⁰¹ and undermines local economies. Finally, due to the enormous area of land under cultivation, it is probably pointless. Yet this method is still vigorously pursued by consumer states and the drug conventions make provision for it and other methods of enforcing supply reduction.

The only provisions in the earlier conventions which deal directly with illicit source reduction are article 22, article 26(2) and article 24(1)(b) of the 1961 Convention, and article 22(2) of the 1961 Convention as inserted by the 1972 Protocol. Following the 1987 Comprehensive Multidisciplinary Outline which provides detailed suggestions for the identification and elimination of illicit narcotic plant cultivation and for the redevelopment of areas where such crops had been growing,⁵⁰² the 1988 Convention has, however, taken greater steps in this direction. The first three paragraphs of article 14 are devoted to source reduction which largely involves crop eradication, a law enforcement measure, and they are thus dealt with here. Paragraph 4 provides for demand reduction and is dealt with under the 'Alternatives' chapter, Chapter Six, while paragraph 5, devoted to the disposal of illicit drugs once they are in the hands of the authorities and also to their use as evidence, has been discussed above under seizure and confiscation in terms of the 1988 Convention but it is of obvious relevance here as it deals with a potential source of supply in the hands of corrupt officials.

⁵⁰¹ The peasants are acutely aware of their interests. *The Economist* 14 January 1995 reported that the Colombian Government's Operation Splendour, aimed at eliminating coca and poppy plants by the spraying of herbicides by 1997, came to a halt when thousands of angry peasants occupied strategic oil-pumping stations and halted pumping, demanding that spraying be halted. They had to be removed by the military with loss of life.

⁵⁰² Target 14 of the Comprehensive Multidisciplinary Outline relates to the 'Identification of illicit narcotic plant cultivation'. It identifies the major growing areas of opium poppies and coca bushes and the efforts made to hide illicit crops, then suggests a survey focusing on the precise location of illicit crops and gathering information from suitable national and international sources on growing conditions, market factors etc. to build an extensive picture of the situation. Target 15 relates to the 'Elimination of illicit plantings', which describes different techniques of manual and mechanical uprooting or flattening, and manual and aerial spraying, and the conditions suitable to their usage including safety issues. Ways of assisting farmers who have been subject to such methods are discussed as is crop substitution, and particular responses to particular crops. The emphasis is on developing and using a master plan in each state, with the assistance of international agencies, for the elimination of such plants. Target 16, discussed under crop-substitution, sees the 'Redevelopment of areas formerly under illicit drug crop cultivation' as integrally linked to eradication. See *Declaration of the International Conference on Drug Abuse and*

5.3.6.2 Prohibition of cultivation and production in the 1961 Convention

Article 22 of the 1961 Convention, entitled 'Special Provision Applicable to Cultivation', provides:

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

Article 22 is based upon the understanding that the plants mentioned are the sources of many of the more widely abused drugs, and that while their products are easily concealed, the cultivated plants themselves are more difficult to conceal and are thus open to greater enforcement intervention.⁵⁰³ This provision envisages the Party prohibiting the 'cultivation'⁵⁰⁴ of the opium poppy,⁵⁰⁵ coca bush⁵⁰⁶ or cannabis plant.⁵⁰⁷ The Party's decision to prohibit cultivation is based on its subjective appreciation that the objective conditions prevailing within its territory threaten the public health and welfare and allow for the divergence of drugs into the illicit traffic, and that prohibition of cultivation is the most suitable measure to stop this threat and divergence. Prohibition will usually be easier than attempting to stop divergence from licit production. However, the provision makes it clear that divergence is not the only condition for the operation of the provision. Interpreted literally the Party must consider that there exists both

Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control (1988) 43-52.

⁵⁰³ See the *1961 Commentary* at 275.

⁵⁰⁴ Article 1(i) defines 'cultivation' as 'the cultivation of the opium poppy, coca bush or cannabis plant.'

⁵⁰⁵ Article 1(q) defines 'opium poppy' as 'the plant of the species *papaver somniferum* L'. Prohibition of cultivation of the opium poppy would necessarily include prohibition of cultivation for all purposes including for poppy seeds and poppy straw as well as for opium.

⁵⁰⁶ Article 1(e) defines 'coca bush' as 'the plant of any species of the genus *Erythroxylon*'.

⁵⁰⁷ Article 1(c) defines 'cannabis plant' as 'any plant of the genus *Cannabis*'. While article 28(2) allows the cultivation of cannabis plants 'exclusively for industrial (fibre and seed) or horticultural purposes', article 22 would allow prohibition of such authorised cultivation if it was a significant source of diversion to the illicit traffic as it would no longer be cultivated 'exclusively' for the authorised purposes. However, as the leaves of cannabis plants not accompanied by the tops are not considered as drugs in the 1961 Convention, if the highly unlikely situation should arise where only the leaves and not the tops are diverted into the illicit traffic then in principle article 22 would not apply. Article 28(3) does provide, however, that Parties 'shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant.' Such a measure could include prohibition of cultivation in serious cases.

divergence and a need to protect the public health and welfare before prohibition is mandatory. The *1961 Commentary* opines:

This additional condition appears to indicate that the authors of article 22 did not consider that any diversion whatever constitutes *ipso facto* a problem of *public* health and welfare, but only one which is sufficiently large to present such a problem. A Party is therefore not bound to prohibit cultivation if the drug in question is diverted only in relatively minor quantities.⁵⁰⁸

Interestingly, the *1961 Commentary* also submits that the ‘public health and welfare’ to be protected by such prohibition includes the public health and welfare of the populations of other states, and any Party that considers that the conditions prevailing within its territory threaten the public health and welfare of other states must prohibit cultivation, even though its own population is not engaged in significant abuse of the drugs derived from these plants.⁵⁰⁹ While noting that the decision to prohibit cultivation is based on the opinion of the Party, the *1961 Commentary* submits that it must be a *bona fide* decision. It continues:

The decision whether the conditions of article 22 for prohibition exist is left to the *judgement*, but not entirely to the *discretion* of the Party concerned. A Government which for many years, despite its efforts, has been unable to prevent large-scale diversion of drugs from cultivation can hardly be of the opinion that the prohibition of such cultivation would not be ‘the most suitable measure ... for protecting public health and welfare and preventing the diversion of drugs into the illicit traffic.’⁵¹⁰

A provision that must be read with article 22 is article 24(1)(b) of the 1961 Convention. It provides that :

⁵⁰⁸ *1961 Commentary* at 275.

⁵⁰⁹ *1961 Commentary* at 275-6.

⁵¹⁰ *1961 Commentary* at 276. The *1961 Commentary* notes, however, that this opinion applies only to areas under the effective control of the government.

A Party shall not permit the production of opium or increase the existing production thereof if in its opinion such production or increased production in its territory may result in illicit traffic in opium.

This provision allows the continued cultivation of opium but obliges Parties not to permit the separation of the opium from the poppy or any increase in such production, if the Party is of the opinion that there is a risk of illicit traffic from such production. The *1961 Commentary* submits that such a risk must be significant, as experience has shown that private opium production is always accompanied by some minor diversion, and in effect minor diversion has to be tolerated or else all Parties would be obliged to prohibit opium production.⁵¹¹ As with article 22, the decision is the Party's, but it must base its decision on its *bona fide* opinion; prohibition of production is left to the judgement of the Party but not its arbitrary discretion.⁵¹²

Article 26 of the 1961 Convention, entitled 'The Coca Bush and Coca Leaves' is concerned with the licit cultivation of coca in paragraph 1. However, article 26(2) provides:

2. The Parties shall so far as possible enforce the uprooting of all coca bushes which grow wild. They shall destroy the coca bushes if illegally cultivated.

Article 26(2) is a special provision that obliges Parties to take further steps in respect of coca bushes than those applicable to poppy and cannabis plants. With respect to wild coca bushes, the provision prescribes a particular method, 'uprooting', for their destruction. This method shall be used as far as is practically possible. The condition of practicality shows that the authors of the provision recognised that wild growth often occurs in remote areas in difficult terrain and is often much more difficult to uncover than cultivated growth. With respect to illicitly cultivated coca bushes, the provision simply requires their destruction without specifying how this is to be done or making it conditional on practicality. The *1961 Commentary* opines that any effective method of destruction would be satisfactory to achieve the provision's purposes.⁵¹³

⁵¹¹ *1961 Commentary* at 288.

⁵¹² See *1961 Commentary* at 288.

5.3.6.3 Prohibition of cultivation in the 1972 Protocol

Article 12 of the 1972 Protocol adds a second paragraph to article 22 of the 1961 Convention, which now reads:

2. A Party prohibiting cultivation of the opium poppy or the cannabis plant shall take appropriate measures to seize any plants illicitly cultivated and to destroy them except for small quantities required by the Party for scientific or research purposes.

While article 22 of the unamended 1961 Convention is concerned only with prohibition of cultivation, the new paragraph 2 added by the 1972 Protocol obliges Parties to seize and destroy illicitly cultivated poppy and cannabis plants thus bringing the position of these plants into line with the obligation to destroy illicitly cultivated coca plants under the unamended article 26(2) of the 1961 Convention. The measures used by the Parties to destroy illegally cultivated plants must be appropriate, that is, those that are practical and can be reasonably expected of them under their special conditions.⁵¹⁴ Article 22(2) does not oblige Parties to destroy the products of illegally cultivated plants such as poppy straw, nor does it oblige Parties to

destroy legally cultivated opium poppies used for illegal production of opium, or legally cultivated cannabis plants used for the illegal production of cannabis or cannabis resin. This would in particular be the case of opium poppies planted for other purposes than the production of opium (seeds or decorative purposes) or of cannabis plants grown for industrial purposes (fibre and seed) or horticultural purposes.⁵¹⁵

Article 22(2) provides for an alternative to destruction which is the use of such plants for scientific or research purposes. This alternative was introduced because it accords with existing state practice.⁵¹⁶ The domestic law of most states allows the authorisation of the use of these plants for such purposes. The exact scope of 'scientific and research

⁵¹³ 1961 *Commentary* at 308.

⁵¹⁴ 1972 *Commentary* at 70.

⁵¹⁵ 1972 *Commentary* at 70.

⁵¹⁶ See the statement of the Indian delegate, 1972 *Records* vol.II at 50.

purposes' is uncertain, but it is submitted would have to include the use of these plants in evidence in criminal cases as such evidence would be of a scientific nature. The provision does not allow the use of seized plants to supplement licit drug production. Article 22(2) does not include a duty to seize and destroy cannabis and poppy plants that grow wild.⁵¹⁷

5.3.6.4 Eradication of illicit cultivation of narcotic plants in the 1988 Convention

Article 14 of the 1988 Convention is entitled 'Measures to Eradicate Illicit Cultivation of Narcotic Plants and to Eliminate Illicit Demand for Narcotic Drugs and Psychotropic Substances'. Its first three paragraphs provide:

1. Any measures taken pursuant to this Convention by Parties shall not be less stringent than the provisions applicable to the eradication of illicit cultivation of plants containing narcotic and psychotropic substances and to the elimination of illicit demand for narcotic drugs and psychotropic substances under the provisions of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention.
2. Each Party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as opium poppy, coca bush and cannabis plants, cultivated illicitly in its territory. The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historical evidence of such use, as well as the protection of the environment.
3. (a) The Parties may co-operate to increase the effectiveness of their eradication efforts. Such co-operation may, *inter alia*, include support, when appropriate, for integrated rural development leading to economically viable alternatives to illicit cultivation. Factors such as access to markets, the availability of resources and prevailing socio-economic conditions should be

⁵¹⁷ This idea was rejected in Committee II of the 1972 Conference *inter alia* because: i) there were large areas where such plants grew wild and their destruction would be too burdensome on states; ii) the delegates feared that a determined effort to destroy the plants may bring about undesirable ecological changes; and iii) wild cannabis had a low THC content - see *1972 Records* vol.II at 219-225.

taken into account before rural development programmes are implemented.

The Parties may agree on any other appropriate measures of co-operation.

(b) The Parties shall also facilitate the exchange of scientific and technical information and the conduct of research concerning eradication.

(c) Whenever they have common frontiers, the Parties shall seek to co-operate in eradication programmes in their respective areas along these frontiers.

Article 14's provisions on source reduction provide for the meeting of existing international obligations in article 14(1), reduction at the national level in article 14(2) and international co-operation in respect of reduction in article 14(3). While the article focuses on crop eradication, it adopts to an extent the same balanced approach as that of the 1987 Comprehensive Multi-disciplinary Outline by responding to the debilitated economic situation of illicit cultivators through the provision, for instance, of measures to tackle rural development. The British Home Office comments on the background to the article:

The negotiations over this article were politically very contentious with the producing countries, especially those in Latin America, seeking to extract a recognition from consumer countries that they also had responsibility for reducing the demand for drugs and that they should assist the producing countries in matters such as crop substitution and integrated rural development.⁵¹⁸

Rouchereau notes that the issue of accountability was central to the debate, and that the eventual solution to the arguments between those who contend that production causes demand and those who believe demand causes production, was to adopt a compromise position that attacked both production and demand.⁵¹⁹

⁵¹⁸ See Annexure B 'Ratification of the UN Convention against Illicit Trafficking in narcotic Drugs and Psychotropic Substances: Contents' in UK Home Affairs Committee *Report: Drug Trafficking and Related Serious Crime* vol.II (1989) at 162.

⁵¹⁹ Rouchereau F 'La Convention des Nations Unies Contre le Traffic Illicite de Stupefiants et de Substances Psychotropes' (1988) 34 *Annuaire Francais de Droit Internationale* 601 at 612. She notes that during the course of the debate exaggerated tactics were employed by producer states, eg. Bolivia and

Article 14(1) clarifies the relationship between article 14 and similar provisions of earlier conventions by making it clear that the eradication measures that Parties take as a result of article 14 must not be less exacting than the eradication measures taken under the provisions of the 1961 Convention, the 1971 Convention and the 1972 Protocol.⁵²⁰ The specific measure contemplated is article 22 of the 1961 Convention as amended by the 1972 Protocol.⁵²¹

Article 14(2) obliges Parties to take appropriate measures to prevent the illicit cultivation of drug containing plants within their territories and to eradicate drug containing plants cultivated within their territories. These plants are plants containing narcotic or psychotropic substances, such as the opium poppy, coca bush and cannabis plant.⁵²² The use of the terms 'cultivation' and 'cultivated' implies that Parties are not under an obligation to eradicate or prevent the growth of wild plants. Article 14(2) does not provide any specific guidance in respect of the modalities to be adopted in the eradication of these plants. The particular methods used are thus left to the Parties. The methods they choose will largely be dictated by their economic position. Article 14(2) does, however, contain a safeguard clause to the effect that the prevention and eradication measures adopted must: i) respect fundamental human rights; ii) take due account of traditional licit uses, where there is historical evidence of such use, and iii) take due account of the protection of the environment.

The reference to fundamental human rights is not specific about which rights it is anticipated will be endangered by illicit crop eradication, although the right to health may be directly affected by use of herbicides.

There is an obvious danger that the reference to traditional licit usage will present the illicit traffic with a loophole to continue undisturbed cultivation of drug bearing

Peru argued for the legalisation of the cultivation of the coca plant for personal consumption. But the consumer states insisted that the 1988 Convention was not going to be used as a mechanism for lifting the obligations placed on producer states by the earlier conventions.

⁵²⁰ This provision was included in the article because of concerns that subjecting the duty in article 14(2) on Parties to eradicate illicit plants to respect for the 'traditional licit uses, where there is historic evidence of such use' of these plants, was contrary to the provisions for eradication in especially the 1961 Convention as amended, and represented a step backwards - see the statements of the French and Soviet delegates, *1988 Records* vol.II at 298 and 300 respectively.

⁵²¹ See the 'Expert Group Report', *1988 Records* vol.I at 25.

⁵²² Article 1(b) defines 'cannabis plant' as 'any plant of the genus *Cannabis*'. Article 1(c) defines 'coca bush' as 'the plant of any species of the genus *Erythroxylon*'. Article 1(o) defines 'opium poppy' as 'the plant of the species *papaver somniferum* L'. Poppy straw is not included in this list because it has to be subject to a lengthy manufacturing process to yield opiates and similar considerations excluded specific mention of coca leaf - see the statement of the Bolivian delegate, *1988 Records* vol.II at 297.

plants, especially as the 1988 Convention does not define such traditional usage other than to insist on evidence of a history of use.⁵²³ The intention of this qualification appears to be that legitimate producers and users of coca leaves should not be discriminated against by article 14(2).⁵²⁴ This qualification must be seen in the context of article 49 of the 1961 Convention's provisional arrangements for traditional medical usage of opium, coca leaf and cannabis. However, as the Chairman of Committee II noted, the temporary arrangements to maintain and respect coca leaf chewing and tea drinking in the 1961 Convention were coming to an end in 1988.⁵²⁵ Thus the rationale for reference to traditional usage is dubious, a point highlighted by the fact that delegates to the 1988 Conference accepted that the traditional use of opium for smoking was illegitimate while the traditional use of coca leaves for chewing and so on was legitimate and needed protection.⁵²⁶ It appears that both Bolivia and Peru now interpret such traditional usage as endorsement of coca leaf production for coca leaf chewing, something objected to by other Parties like the UK.⁵²⁷ It is not surprising that the evidence illustrates that article 14 is ineffective, and little crop eradication takes place in the most important source states.⁵²⁸

In protecting the environment the use of herbicides or other toxic substances with the potential to affect it adversely should be avoided, although burning crops and pulling them up also present risks. The Soviet delegate noted that

⁵²³ There was genuine concern in this regard at the 1988 Conference - see the statements of the Italian and Soviet delegates, *1988 Records* vol.II at 297.

⁵²⁴ For example, the Bolivian delegate stated that '[i]t was particularly important to ensure that the Convention did not penalize the licit cultivation of coca bushes and the licit traditional uses of coca leaf and its consumption.' - *1988 Records*, vol.II at 297. The Colombian delegate noted that 'certain ethnic groups traditionally used such plants' and there was 'a need to protect their social and cultural conditions when illicit plants were destroyed.' - *1988 Records* vol.II at 298. He later noted that 'the target of [eradication] measures should not be the peasants but the traffickers who exploited them.' - *1988 Records* vol.II at 301.

⁵²⁵ *1988 Records*, vol.II at 299.

⁵²⁶ See the Bolivian delegate's statement - *1988 Records*, vol.II at 303. The problem is compounded by the fact that article 14(1)'s obligation to apply measures as stringent as those with respect to illicit cultivation under the earlier conventions, which was included in article 14 to curtail the effect of the reference to licit usage in article 14(2), refers implicitly to article 22 of the 1961 Convention which does not apply to the coca bush! Article 14(2)'s qualification, included to protect coca leaf chewers, ends up inadvertently providing potential legal protection to traditional users of opium and cannabis.

⁵²⁷ See Annexure B 'Ratification of the UN Convention against Illicit Trafficking in narcotic Drugs and Psychotropic Substances: Contents' in UK Home Affairs Committee *Report: Drug Trafficking and Related Serious Crime* vol.II (1989) at 162.

⁵²⁸ For example, in Peru, the worlds largest producer of illicit cocaine, while an estimated 108 600 ha of land were under coca bush cultivation, only 74 000 square meters of coca seedbeds (not mature crops) were eradicated in the Upper Huallaga Valley in 1994, while in Bolivia, where an estimated 48100 ha were under coca cultivation, only 1 100 ha were eradicated - National Narcotics Intelligence Consumers Committee *The NNICC Report 1994: The Supply of Illicit Drugs to the United States* (1995) at 15-16.

the need for crop-eradication programmes should not be allowed to outweigh a legitimate concern to conserve areas vulnerable to desertification and consequent loss of habitat.⁵²⁹

In practice externally driven eradication appears inevitably to demand environmentally destructive action, although Parties are becoming sensitive to the need to protect the environment when using herbicides.⁵³⁰

Article 14(3) is vulnerable to the criticism that it is a 'best efforts' provision, but it does oblige Parties to create the necessary foundation for international co-operation and communication on eradication. Article 14(3)(a) invites the Parties to co-operate to increase the effectiveness of their eradication efforts. The provision does not oblige Parties to use any particular method of co-operation, but notes that this co-operation may include support, when appropriate, for integrated rural development programmes leading to economically viable alternatives to illicit cultivation. Crop substitution and preferential tariffs for substitute products were mentioned in this context by representatives in the Expert Group.⁵³¹ The provision notes that market access,⁵³² resource availability and prevailing socio-economic conditions are factors that should be taken into account in the design of such programmes. The provision finally invites the Parties to agree on any other appropriate co-operation measures. Article 14(3)(b) obliges Parties to facilitate the exchange of scientific and technical information and the conduct of research concerning eradication. Article 14(3)(c) obliges Parties that have common frontiers to seek to co-operate in eradication programmes within their territory abutting these frontiers. This provision was included in the Convention, according to its Mexican sponsor, 'to reassure countries with common frontiers that they would have jurisdiction over activities carried out within their respective areas along those frontiers.'⁵³³

⁵²⁹ 1988 Records, vol.II at 297.

⁵³⁰ Gardner SA 'A global initiative to deter drug trafficking: will internationalizing the drug war work?' (1993) 7 *Temple Int. and Comparative LR* 287 at 301 notes that Peru has engaged in extensive testing of herbicides before use.

⁵³¹ See the 'Expert Group Report', 1988 Records vol.I at 26.

⁵³² The level of demand for substituted crops on the open markets and the cultivator's ease of physical access to those markets.

5.3.6.6 Source reduction - conclusion

The measures in the drug conventions for source reduction remain limited and uneven, despite article 14 of the 1988 Convention. As such they reflect the ascription of responsibility for the global drug problem to demand by producer states coupled with the continued ambivalence of these states to commit themselves to a comprehensive programme of source reduction, an ambivalence which is rooted in the dubious utility of source reduction methods and in the historical linkage of certain drug producing plants to certain areas and continued economic dependency on those plants in those areas.⁵³⁴ In the face of the intransigent opposition of crop producing states towards such methods, they appear to be becoming less popular.⁵³⁵

5.3.7 Control of commercial carriers

The shift of illicit trafficking into the legitimate transportation sector and particularly into commercial air-cargo and ship-borne containers parallels its penetration of the legitimate financial sector. Article 15 of the 1988 Convention recognises that traffickers exploit commercial carriers for the transshipment of drugs, and makes provision for steps to be taken to suppress this practice.⁵³⁶ Entitled 'Commercial Carriers', it provides:

1. The Parties shall take appropriate measures to ensure that means of transport operated by commercial carriers are not used in the commission of offences established in accordance with article 3, paragraph 1; such measures may include special arrangements with commercial carriers.

⁵³³ 1988 Records vol.II at 303.

⁵³⁴ Gardner *op cit* at 301-303 gives Peru's coca crop eradication efforts in the early 1990's in conjunction with the UNDCP as an example of successful action by a Party in terms of article 14. This program concentrated on crop substitution and access to foreign markets for alternative products, in addition to large-scale eradication. Gardner contrasts the Peruvian attitude to that adopted by Bolivia, which seeks to protect its coca crop with a 'National Commission Pro-Coca' to study the licit uses of coca leaf.

⁵³⁵ For example, Reuter P 'The limits and consequences of U.S. foreign drug control efforts' (1992) 521 *Annals of the American Academy of Politics and Social Science* 151 at 156 reports that while throughout the 1980s the US State Department's Bureau of International Narcotic Matters (BINM) sought to induce source states to engage in crop eradication, none of the Andean states permitted the spraying of coca fields, and in 1991 the US government appeared to deemphasise this program.

⁵³⁶ Concealment can take place within the walls of containers, in boxes intermingled with other goods and within legitimate bulk cargo. Amounts are large. For example, over 21.4 metric tons of cocaine was seized from commercial cargo vessels from January 1 to November 14, 1994 - National Narcotics Intelligence Consumers Committee *The NNICC Report 1994: The Supply of Illicit Drugs to the United*

2. Each Party shall require commercial carriers to take reasonable precautions to prevent the use of their means of transport for the commission of offences established in accordance with article 3, paragraph 1. Such precautions may include:

(a) If the principal place of business of a commercial carrier is within the territory of the Party:

(i) Training of personnel to identify suspicious consignments or persons;

(ii) Promotion of integrity of personnel;

(b) If a commercial carrier is operating within the territory of the Party;

(i) Submission of cargo manifests in advance, whenever possible;

(ii) Use of tamper-resistant, individually verifiable seals on containers;

(iii) Reporting to all the appropriate authorities at the earliest opportunity all suspicious circumstances that may be related to the commission of offences established in accordance with article 3, paragraph 1.

3. Each Party shall seek to ensure that commercial carriers and the appropriate authorities at points of entry and exit and other customs control areas co-operate, with a view to preventing unauthorised access to means of transport and cargo and to implementing appropriate security measures.

Article 1(d) defines a 'commercial carrier' as 'any person or any public, private or other entity engaged in transporting persons, goods or mails for remuneration, hire or any other benefit'. Thus article 15 applies to the activities of individuals, legal entities, public

States (1995) at 3. But the problem is enormous. For example, in the US, only 3% of the over four million containers entering the US in 1993 were inspected by customs (*NNICC Report* at 4).

and private companies transporting persons, goods or mail⁵³⁷ for reward. The definition was intended to be all-inclusive, and the words 'or other entity' enable the definition to apply to carriers that are neither private nor public.⁵³⁸

Article 15(1) obliges Parties to take appropriate measures to ensure that the means of transport operated by commercial carriers within their jurisdiction are not used in the commission of article 3(1) offences. Such measures may be legislated or simply take the form of administrative guidelines.⁵³⁹ Article 15(1) does not specify appropriate measures, although searches are likely to be regarded as one of the most appropriate measures for ensuring that the illicit traffic does not use commercial carriers.⁵⁴⁰ The procedure for such searches will depend entirely upon the Party. The reference to 'special arrangements' with commercial carriers anticipates that effective control of their means of transport is best achieved with their co-operation and consent.

Article 15(2) shifts the responsibility to the commercial carriers themselves. It obliges Parties to require commercial carriers to take reasonable precautions to prevent the use of their means of transport for the commission of article 3(1) offences. 'Means of transport' must be taken to include all conveyances operated by such carriers, whether owned or used, from ships, boats, aircraft, motor vehicles to bicycles and human carriers. The International Civil Aviation Organisation (ICAO) representative noted at the 1988 Conference that:

The term 'reasonable precautions' ... should not impose an excessive burden on commercial carriers and should not delay the carriage of passengers and cargo. The role of the commercial air-carriers should be confined to reducing illegal access to the aircraft and associated equipment.⁵⁴¹

⁵³⁷ Reference to mail was included to cover private firms which carry mail outside the rules embodied in the Universal Postal Union (UPU) Conventions - see the statement of the French delegate, *1988 Records* vol.II at 220.

⁵³⁸ '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 91.

⁵³⁹ See the statement of the Japanese delegate and Chairman of Committee II - *1988 Records* vol.II at 218.

⁵⁴⁰ Draft article 11(1) included 'thorough searches of all means of transportation suspected of containing evidence of illicit traffic.' *1988 Records* vol.I at 8.

⁵⁴¹ *1988 Records* vol.II at 219. One problem with assigning responsibility to the carriers is that, as the Japanese delegate pointed out, in commercial practice the carrier cannot inspect the contents of cargo carried without the authority of the consignors; he thus felt that the provision should have held the exporter responsible - *1988 Records* vol.II at 216.

Article 15(2) suggests two lists of 'reasonable precautions'. Article 15(2)(a)'s suggested precautions when the carrier's principal place of business is in the Party's territory are: (i) training personnel to identify suspicious consignments or persons; and (ii) promoting the integrity of personnel. In other words it recommends trying to increase the level of effectiveness of personnel and their ability to withstand corruption. Article 15(2)(b)'s more extensive list of precautions which apply when the carrier is operating within the Party's territory are: (i) submission of cargo manifests to the competent authority in advance whenever possible; (ii) using tamper-resistant individually verifiable seals on containers; and (iii) expeditiously alerting all the appropriate authorities of suspicious circumstances that may be related to the commission of article 3(1) offences. What is contemplated here are precautions effective during cross-border transport operations. The 'Expert Group' understood that in appropriate cases a Party could apply both lists of precautions to all carriers.⁵⁴²

Finally, with the goal of preventing unauthorised access to means of transport and cargo and the implementation of appropriate security measures to prevent this access, article 15(3) obliges Parties to 'seek to ensure' the co-operation of commercial carriers and the appropriate authorities at entry and exit points and other customs control areas, choke-points where the illicit traffic is vulnerable.

While article 15 is a novel provision that ties carriers into a co-operative role in enforcement, the draft article 11(2) went further in shifting responsibility. It obliged Parties to penalise commercial carriers that failed to prevent their use by the illicit traffic and providing for the confiscation of the means of transport if the commercial carrier was aware of its use by the illicit traffic.⁵⁴³ The present provision leaves the modality and severity of any sanctions the commercial carrier might face up to the Party to determine within its own criminal law. Seizure and confiscation, if the carrier acts *mala fides*, is possible under article 5. But legislating for a positive attitude on the part of carriers is difficult; encouragement is as likely to be effective. In any event, the sheer volume of container traffic will limit the impact of this provision.

⁵⁴² See the 'Expert Group Report', 1988 Records vol.I at 36. The US supported this interpretation in Committee and in Plenary - 1988 Records vol.II at 218 and 34 respectively.

⁵⁴³ 1988 Records vol.I at 8. These provisions were deleted in the 'Expert Group' because they were held to add nothing to the rights already enjoyed by states in international law - see the 'Expert Group Report', 1988 Records vol.I at 27.

5.3.8 Measures to control commercial documents and exports

Interdiction efforts are hampered by the improper, irregular and inaccurate documentation of legitimate exports. Article 16 of the 1988 Convention, entitled 'Commercial Documents and Labelling of Exports', focuses on the correct documentation of licit drug exports as a tactic against the illicit traffic. It provides:

1. Each Party shall require that lawful exports of narcotic drugs and psychotropic substances be properly documented. In addition to the requirements for documentation under article 31 of the 1961 Convention, article 31 of the 1961 Convention as amended and article 12 of the 1971 Convention, commercial documents such as invoices, cargo manifests, customs, transport and other shipping documents shall include the names of the narcotic drugs and psychotropic substances being exported as set out in the respective Schedules of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention, the quantity being exported, and the name and address of the exporter, the importer and, when available, the consignee.

2. Each Party shall require that consignments of narcotic drugs and psychotropic substances being exported be not mislabelled.

Article 16(1) obliges each Party to require, either by way of legislation or through administrative arrangement, the proper documentation of lawful exports of narcotic drugs and psychotropic substances.⁵⁴⁴ This provision operates in addition to the documentation requirements in the earlier conventions and does not alter them, but its scope is wider than these provisions as it applies to documents other than just import or export authorisations.⁵⁴⁵ It applies to commercial documents such as invoices and cargo manifests, to administrative documents such as customs documents, to transport

⁵⁴⁴ The provision does not apply to precursor substances in Tables I and II as their correct labelling is already required under article 9(d).

⁵⁴⁵ Article 31(4)(a) and (b) of the 1961 Convention requires that import or export authorizations must be obtained for drugs and that they shall state inter alia the name of the narcotic, the quantity and the name and address of the importer and exporter, and the specified period within which the import or export must take place. Article 12(a) and (b) of the 1971 Convention makes similar provisions in respect of the psychotropic substances in Schedules I and II only.

documents such as bills of lading and other shipping documents. It applies whether these documents accompany the goods or not. It insists that these commercial documents include: i) the names of the narcotic drugs and psychotropic substances being exported as set out in the respective schedules of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention, that is, their international non-proprietary names; ii) the quantity being exported; and iii) the name and address of the exporter, the importer and, when available, the consignee.

Article 16(2) applies to the labelling of consignments. It does not require such consignments to be labelled as in some cases this would invite theft and the decision to require labelling or not has been left to the Parties.⁵⁴⁶ What article 16(2) does is to oblige each Party to require that export consignments of narcotic drugs and psychotropic substances shall not be mislabelled, for example, as 'inoffensive chemicals' or 'reagents'.⁵⁴⁷

5.3.9 Measures aimed to ensure enforcement co-operation at sea⁵⁴⁸

5.3.9.1 Introduction

Trafficking by sea has an enduring popularity because it enables the movement of drugs, especially of bulky drugs such as cannabis,⁵⁴⁹ long distances in bulk without hindrance at low cost, and it is protected by the principle of freedom of navigation. Encroachment on this freedom in the name of drugs enforcement has been gradual. None of the pre-1988 drug conventions contained provisions specifically designed to suppress trafficking by sea. However, international provisions aimed at controlling the sea-borne traffic did exist before 1988. Article 19(1)(d) of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone⁵⁵⁰ provides:

⁵⁴⁶ In the spirit of article 30(4) of the 1961 Convention, many states have enacted domestic legislation stipulating that the outer wrapping of a package containing narcotic drugs or psychotropic substances shall not indicate its contents.

⁵⁴⁷ Article 16(2) impacts on the trade in substances falsely labeled as familiar medicines but which contain little or none of the active ingredients of that medicine - see the statement of the Chairman of Committee II, *1988 Records* vol.II at 223.

⁵⁴⁸ See generally Gilmore WC 'Drug trafficking by sea: the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' (1991) 15 *Marine Policy* 183-192.

⁵⁴⁹ See Gilmore *op cit* (1991) at 184.

⁵⁵⁰ 15 *UST* 1607.

1. 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 connection with any crime committed on board the ship during its passage, save only in the following cases: ...

(d) If it is necessary for the suppression of the illicit traffic in narcotic drugs.

Gilmore points out that although not evident in state practice, this exception was explicable through the inclination to apply universal jurisdiction to drug offences using the historical example of piracy.⁵⁵¹ Article 19(1)(d)'s effect is limited by article 19(5) which forbids enforcement measures in respect of offences that took place before the ship entered territorial waters.

As traffickers took to the waves in greater numbers, driven by necessity, state practice surged beyond the enabling international law, and criminal jurisdiction crept out to sea. Although they had little treaty support, Gilmore notes that states relied on the criminal law principles of hot pursuit and constructive presence in their efforts to suppress the illicit sea-borne traffic.⁵⁵² These principles allowed strong action near the coast, but their allowable strength of action diminished progressively to zero the further from the coast and the nearer to international waters one went.⁵⁵³ States like the United States with long and vulnerable coastlines close to supply areas in the Caribbean and Central and South America, began for pragmatic reasons to interdict vessels on the high seas. Interdiction and assertion of jurisdiction over their own vessels was uncontroversial, while interdiction and assertion over stateless vessels became less controversial in the 1970s and 1980s.⁵⁵⁴ Interdiction of foreign vessels was

⁵⁵¹ *Op cit* (1991) at 184 citing Shearer IA 'Problems of jurisdiction and law enforcement against delinquent vessels' (1986) 35 *ICLQ* 327. Examples of the provision in operation are *Pianka v R* [1977] 3 WLR at 870 (UK) and *R v Dakin* [1978] 15 JLR 302 (Jamaica).

⁵⁵² *Op cit* (1991) at 184. See also Gilmore WC 'Hot pursuit and constructive presence in Canadian law enforcement' (1988) 12 *Marine Policy* 105-111; Shearer *op cit* at 338.

⁵⁵³ See Gilmore *op cit* (1991) at 184.

⁵⁵⁴ See Lewis SL 'The Marijuana on the High Seas Act: extending U.S. jurisdiction beyond international limits' (1982) 8 *Yale Jnl of World Public Order* 359-383 who explains at 361 that prior to the enactment in 1980 of the Marijuana on the High Seas Act, 21 USC section 955a(h), US authorities, in order to obtain the conviction of the crew of drug carrying vessels seized on the high seas had to prove conspiracy or attempt to import the drugs into the US, i.e. a direct connection between the drugs and the US. After the enactment of the Marijuana on the High Seas Act US authorities no longer had to prove such a nexus between the drugs on board a captured vessel and the US. The application of this extended jurisdiction to US vessels was uncontroversial, and courts held that jurisdiction over stateless vessels could be established simply because they were stateless (*US v Marino Garcia* 679 F.2d 1373 at 1382 (11th Cir.

controversial,⁵⁵⁵ and Gilmore notes that interdicting states found it difficult to obtain timeous waiver of exclusive flag jurisdiction by the state of registry.⁵⁵⁶ Despite growing concern, the 1982 United Nations Convention on the Law of the Sea⁵⁵⁷ did not provide much relief in this area. Criminal jurisdiction over foreign vessels in lateral transit within the territorial sea was extended through article 27(1)(d) to include the illicit traffic in psychotropic substances in addition to narcotic drugs. Interdiction on the high seas was provided for in article 108. Entitled 'Illicit Traffic in Narcotic Drugs or Psychotropic Substances', it provides:

1. All states shall co-operate in the suppression of the illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.
2. Any state which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may require the co-operation of other states to suppress such traffic.

This provision only does two things, viz.: it obliges Parties generally to co-operate in the suppression of the illicit traffic at sea without stipulating the nature of such co-operation,

1982)). See generally 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 at 173-183. He explains that stateless vessels often sit just outside territorial waters and act as mother ships for fast inshore vessels to smuggle drugs ashore. Eventually the US passed the Maritime Drug Enforcement Act (MDEA) 46 USC section 1902 (1988) which extended its criminal jurisdiction over 'vessels without nationality' on the high seas. Boggis submits that the US's extension of jurisdiction over stateless vessels is legally defensible.

⁵⁵⁵ See Lewis *op cit* at 379-382 who explains that existing US legislation in 1982 did not extend jurisdiction over foreigners aboard foreign vessels. Sorenson CE 'Drug trafficking on the high seas: a move towards universal jurisdiction under international law' (1990) 4 *Emory Int. LR* 207-230 charts the growth of US reliance on the objective territoriality and protective principles of extraterritorial jurisdiction to extend US jurisdiction on to the high seas over all vessels.

⁵⁵⁶ *Op cit* (1991) at 185. See also Siddle J 'Anglo-American co-operation in the suppression of drug smuggling' (1982) 31 *ICLQ* 726-747. 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 at 381 fn 161 notes that the United States Coast Guard had to follow a Panamanian registered vessel for a day and a night while awaiting permission through diplomatic channels to board her - *US v Steifel* 507 F.Supp. 480 (SDNY 1981). Other problems might include the onset of night or bad weather, the dumping of the contraband before permission is granted, the suspect vessel running into a third party state's territorial waters - see statement of the US Coast Guard's Admiral Cueroni before the House of Representatives Sub-committee on crime cited by Gilmore WC 'Narcotics interdiction at sea: UK-US co-operation' (1989) 15 *CLB* 1480 at 1486.

⁵⁵⁷ UN Doc. A/Conf.62/122, 21 *ILM* 261.

and it provides that such co-operation can be demanded by a flag state when it has an objectively based belief that a vessel flying its flag is engaged in the illicit traffic. The obvious lacuna is that it makes no provision for requests from non-flag states to flag-states to be allowed to board and search vessels.

Heavy dependence by the illicit traffic on high seas smuggling lead to a surge in pressure for the adoption of international principles and procedures concentrating on interdiction that did not disrupt the lawful use of the high seas. This pressure finally yielded article 17 of the 1988 Convention, entitled, 'Illicit Traffic by Sea'.

5.3.9.2 Article 17's basic obligation

Article 17(1) sets out a basic obligation on Parties to co-operate in the suppression of the illicit drug traffic, that is, the illicit transport of drugs by sea.⁵⁵⁸ It provides:

1. The Parties shall co-operate to the fullest extent possible to suppress the illicit traffic by sea, in conformity with the international law of the sea.

In terms of this provision the Parties' obligation to co-operate is limited by: i) their capacity; and ii) compliance with the international law of the sea.⁵⁵⁹ The latter limitation is of equal importance to all states, but the former admits that there is a serious disparity in the capacity of consumer states like the United States and producer states like Jamaica to carry out interdiction operations on the high seas.

5.3.9.3 Interdiction of own or stateless vessels

Article 17(2) allows a Party that suspects that a vessel, which is either flying its flag or is stateless, is engaged in the illicit traffic, to request the assistance of other Parties in interdicting that vessel. It provides:

⁵⁵⁸ The Netherlands pointed out (8/9/1993 – *Multilateral Treaties Deposited* (1997) at 303) that in this narrow context illicit traffic must in effect mean illicit transport.

⁵⁵⁹ This 'international law of the sea' is the customary law of the sea codified in the navigational articles of the 1982 UN Convention on the Law of the Sea - 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 95.

2. A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose.

The Party making the request must have an objectively grounded suspicion. Article 17(2) develops the law in article 108(2) of the UN Convention on the Law of the Sea by, most importantly, according to the United States delegation, 'expanding the situations in which co-operation may be requested to include the interdiction of stateless vessels, thereby recognising a practice which has developed unchallenged over the years.'⁵⁶⁰

5.3.9.4 Interdiction of foreign vessels

Foreign flag vessels are customarily regarded as part of the territory of the flag state over which it exercises exclusive criminal jurisdiction. Article 17(3) is the most controversial of the 1988 Convention's provisions for enforcement at sea, because it involves the interdiction of these vessels by other Parties. Article 17(3) provides:

3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorisation from the flag State to take appropriate measures in regard to that vessel.

Article 17(3) becomes operative when a Party suspects that a vessel exercising freedom of navigation and flying the flag or displaying the registry marks of another Party is engaged in illicit traffic. The requesting Party must have a suspicion grounded on facts. The words 'engaged in illicit traffic' must be interpreted broadly enough to include situations where the vessel has been used recently to commit offences, such as when a mother ship had just unloaded contraband for smaller vessels to take inshore. Obviously, the whole vessel need not be engaged in the illicit traffic; it will be sufficient if one or

⁵⁶⁰ '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 95.

more of the crew are. Article 17(3) allows the suspicious Party to notify the flag state and to request confirmation of the vessel's registry.⁵⁶¹ If this is confirmed, the suspicious Party can then request the flag state to authorise it to take appropriate measures in regard to that vessel.

Article 17(3) applies to the interdiction of vessels 'exercising freedom of navigation'. This formulation does not deprive any coastal state of its exclusive right to jurisdiction in its territorial waters.⁵⁶² It was the coastal states' interests in the zone outside the territorial sea which caused great controversy in the preparation of this provision.⁵⁶³ As finally adopted, article 17(3) abandons the idea of zones and uses the concept of a vessel exercising 'freedom of navigation'. This formula necessarily implies that the vessel must be sailing in a zone where freedom of navigation is possible, and thus the question of whether navigation of EEZ's or contiguous zones is free of the exclusive encumbrance of coastal states' jurisdiction has been fudged. Inevitably, the formula has been interpreted restrictively by the United States and other consumer states to mean navigating in any maritime area seaward of the territorial sea of a coastal state.⁵⁶⁴ Article 17(3) must be read with article 17(11) which ensures that actions taken

⁵⁶¹ Article 6 of the 1958 Geneva High Seas Convention 450 *UNTS* 82 requires all vessels to be registered and fly the flag of one state only; see also article 92 of the 1982 United Nations Convention on the Law of the Sea, 21 *ILM* 261.

⁵⁶² See the statement of the Australian delegate who introduced the final text - *1988 Records* vol.II at 308.

⁵⁶³ Gilmore *op cit* (1991) at 187 notes that the most controversial element of the draft article was its definition of the maritime area to which the provision would apply - the area 'beyond the external limits of the territorial sea'. The debate that led to the adoption of this formula was a repetition of attempts made at the UN Conference on the Law of the Sea by some coastal states to claim exclusive sovereignty over the exclusive economic zone (EEZ), or at the least, greater rights than the right to hot pursuit and the exercise of contiguous zone jurisdiction. Although some states such as Brazil felt that this wording would encroach on the rights coastal states had in their EEZ's because it would give other states the right to board, search and seize vessels in these waters - see *1988 Records* vol.II at 267-8, most states, interpreting article 58 of the Law of the Sea Convention as allowing all states the freedom of the high seas as set out in article 87, felt that article 17(3) of the 1988 Convention would not encroach on the coastal states' rights within the EEZ - see *1988 Records* vol.II at 268 and 269 for the Venezuelan and British views. There was greater support for the argument that article 17(3)'s wording was incompatible with the optional law enforcement rights a state enjoyed in its contiguous zone in terms of article 33 of the Law of the Sea Convention - see *1988 Records* vol.II at 268 and 269 for the views of the Indian, Indonesian and Algerian delegations, and some states wanted article 17(3) revised because of the need to safeguard these rights - see *1988 Records* vol.II at 268 for the views of the French and Netherlands delegations and 270 for Argentina's view.

⁵⁶⁴ *1988 Records* vol.II at 309; the UK has adopted a similar interpretation - see (1988) *BYIL* 528-529 and see section 20(6) of the Criminal Justice (International Co-operation) Act, 1990, which only requires the powers of arrest of foreign vessels not to be used in the territorial waters of other states. The Netherlands has made a declaration to this effect upon signature (18/1/1989 - *Multilateral Treaties Deposited* (1997) at 305). Colombia, rather ambiguously, simply declared that it understood article 17's assistance would only be effective on the high seas and at the express request and with its authorisation (20/12/1988 - *Multilateral Treaties Deposited* (1997) at 303), but the US objected to the declaration 'to the extent it purports to restrict the right of other states to freedom of navigation and other internationally lawful uses

in terms of article 17 do not interfere with any rights and obligations and the exercise of jurisdiction enjoyed by coastal states under the international law of the sea. This does not appear to require that coastal states would have to be informed of the interdiction of vessels carrying illicit drugs in their EEZ's or contiguous zones, something in which they do have both a law enforcement and commercial interest. Brazil has made a controversial reservation to the effect that article 17(11) does not prevent a coastal state from requiring prior authorisation for any action under article 17 by other states in its EEZ.⁵⁶⁵ It is submitted that in practice it would be in the interest of all Parties to ensure that coastal states are kept informed of interdictions on the high seas adjacent to their territorial waters.

Article 17(3) makes it clear that the requesting Party must receive 'authorisation' to interdict the vessel.⁵⁶⁶ This word was deliberately used to

stress the positive nature of the decision and of the action which the flag State in the exercise of its sovereignty was to take with regard to its vessel. Nothing in the article was intended in any way to affect the rights of the flag State with regard to its vessel and there was no obligation in the article for a flag State to

of the sea related to that freedom seaward of the outer limits of any state's territorial sea' as determined under the law of the sea. Interestingly, Gilmore WC 'Narcotics interdiction at sea: the 1995 Council of Europe Agreement' (1996) 20 *Marine Policy* 3 at 4 notes that the 1995 Council of Europe Agreement allows action against vessels beyond the territorial sea.

⁵⁶⁵ Reservation upon signature (20/12/1988 - *Multilateral Treaties Deposited* (1997) at 303). Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain and the UK objected to this reservation (27/12/1989 - *Multilateral Treaties Deposited* (1997) at 306). Jamaica made a reservation (29/12/1995 - *Multilateral Treaties Deposited* (1997) at 304) to the effect that article 17(11) requires the consent of a coastal state for action in its EEZ 'and all other maritime areas under the sovereignty or jurisdiction of the coastal state.' Tanzania simply made a reservation upon signature (20/12/1988 - *Multilateral Treaties Deposited* (1997) at 306) to the effect that article 17(11) did not restrict the rights and privileges of the coastal state in its EEZ as envisaged by the Law of the Sea Convention or accord third parties greater rights than they enjoyed under that Convention in the EEZ. It is at least arguable that, given the ambiguity of article 17(3)'s 'freedom of navigation', these reservations are allowable in terms of general international law as they are not incompatible with the object and scope of the 1988 Convention if we assume that the reserving states motive is to reserve rights they regard as already protected by international law, and not to protect the illicit drug traffic by sea.

⁵⁶⁶ See, for example, section 20(2) of the UK's Criminal Justice (International Co-operation) Act 1990 which provides that the Secretary of State must authorise the use of enforcement powers against non-British ships on the high seas that are registered with Parties to the 1988 Convention but only if their flag state requests the UK's assistance or it has 'authorised the United Kingdom to act'. Section 20(4) allows for the Secretary of State to give authorisation when requests are made to the UK. Harding A 'Criminal Justice (International Co-operation) Act 1990: Forfeiture, Money Laundering, Confiscation and Maritime Provisions' (1991) 155 *Justice of the Peace* 492 at 493 notes that authorisation may be conditional, eg. the UK may require persons arrested on British ships to be extradited back to the UK.

provide the authorisation requested of it; it was entirely at its discretion to decide whether it would allow another State to act against its vessel or not.⁵⁶⁷

To function effectively, it is essential that flag states respond to requests for authorisation under article 17(3).⁵⁶⁸ Although not specified, the logical implication of authorisation is that it will be granted only if the requested flag state is also satisfied that 'reasonable grounds' exist for the interdiction of the vessel. But the right of flag states to refuse authorisation even if such grounds exist is reserved.

Article 17(3) provides for permission for the taking of 'appropriate measures' by the interdicting Party without specifying these measures. Article 17(4) sets out the types of action which may be taken by the interdicting Party once permission by the flag state has been given to go ahead. It provides:

4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorise the requesting State to, *inter alia*:

(a) Board the vessel;

(b) Search the vessel;

(c) If evidence of involvement in illicit traffic found, take appropriate action with respect to the vessel, persons or cargo on board.

⁵⁶⁷ The view of the Australian delegate - *1988 Records* vol.II at 308 cited by Gilmore *op cit* (1991) at 189. Forms of authorisation other than express authorisation such as tacit authorisation implied from a failure to respond to a request appear not to have been contemplated by article 17(3). It may, however, be met by a blanket prior authorisation. For example, Gilmore notes (at fn 65) that the Canadian government's practice has been not to grant permission but to express no objection should the requesting Party demonstrate reasonable grounds for such measures - citing *1988 Records* vol.II at 315. This implied blanket permission in the presence of reasonable suspicion was also adopted by the 1981 Agreement between the US and UK (cmdnd 8470). Retrospective authorisation such as the 'consensual boarding' by the US Coastguard where the Coastguard boards with only the permission of the Master of the vessel and requests authorisation from the flag state only once arrest or seizure appear warranted, is not permitted in terms of article 17(3). Thus situations such as that reported in *United States v Hernandez* 655 F. Supp. 1069 (D. Puerto Rico 1987) where consent was not obtained from the Honduran authorities by the US Coastguard until two days after the initial boarding, will be in violation of article 17(3).

⁵⁶⁸ See the 'Expert Group Report', *1988 Records* vol.I at 28.

The flag state's right over the vessel is safeguarded by article 17(4) because it provides that permission must be given in terms of article 17(3) or in terms of b-lateral agreements or arrangements between the Parties before the interdicting Party can take the suggested action. Article 17(4) then highlights 'the disjunctive nature of the various processes which might be taken against the vessel: boarding, search; and - only if evidence of illicit traffic were found - any further action.'⁵⁶⁹ Such further 'appropriate action' would, according to Harding, 'include putting into port and handing any persons found to be involved in the illicit traffic over to the authorities for prosecution and, if convicted, punishment.'⁵⁷⁰ While reference to seizure of the vessel was deliberately omitted,⁵⁷¹ the use of the phrase '*inter alia*' emphasises the flexibility of the provision and the fact that the Parties are free to agree to forms of action other than those specified.

5.3.9.4 Constraints on action and other general provisions

Article 17 paragraphs 5 to 11 either constrain action, or oblige the active Party to keep other Parties informed and so on. They read:

5. Where action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State.

6. The flag State may, consistent with its obligations in paragraph 1 of this article, subject its authorisation to conditions to be mutually agreed between it and the requesting Party, including conditions relating to responsibility.

7. For the purposes of paragraphs 3 and 4 of this article, a Party shall respond expeditiously to a request from another Party to determine whether a vessel that

⁵⁶⁹ Statement of the Australian delegate, 1988 Records vol.II at 308.

⁵⁷⁰ *Op cit* at 492. He noted that the UK had made provision for the taking of such action through section 19 of the Criminal Justice (International Co-operation) Act, 1990, which in subsection (2) makes it an offence for a person on 'a British ship, a ship registered in another state which is a Party to the Convention, or an unregistered ship to: (a) have a controlled drug in his possession; or (b) be in any way knowingly concerned in the carrying or concealing of a controlled drug on the ship.'

⁵⁷¹ Statement of the Australian delegate, 1988 Records vol.II at 308.

is flying its flag is entitled to do so, and to requests for authorisation made pursuant to paragraph 3. At the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests. Such designation shall be notified through the Secretary-General within one month of the designation.

8. A Party which has taken any action in accordance with this article shall promptly inform the flag State concerned of the results of the action.

9. The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article.

10. Action pursuant to paragraph 4 of this article shall be carried out only by warships or military aircraft, or other ships and aircraft clearly marked and identifiable as being on government service and authorised to that effect.

11. Any action taken in accordance with this article shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea.

Article 17(5) requires Parties that take action in terms of article 17 to take a number of factors into account such as safety of life at sea, the security of the vessel and its cargo, and the commercial and legal interests of the flag state or any other interested state.

Article 17(6) is intended to meet Parties' concerns about liability.⁵⁷² It allows the flag state to subject its granting of permission for interdiction to any conditions.⁵⁷³ Included must be conditions relating to the responsibility of the interdicting Party for compensation for unjustified searches. This requirement meets concerns expressed at the

⁵⁷² Statement of the Australian delegate - *1988 Records* vol.II at 308.

⁵⁷³ The UK's Criminal Justice (International Co-operation) Act, 1990, recognises this when it provides in section 20(3) that the Secretary of State may impose such conditions on enforcement actions on the high seas against non-British ships as are necessary 'to give effect to any conditions or limitations imposed by the [authorising] state'.

1988 Conference that consent was unlikely to be forthcoming without some guarantee of compensation in case the search was unjustified.⁵⁷⁴ Article 17(6) is the only provision that provides indirectly for what will happen when searches prove fruitless. Compensation for delay may be necessary, especially if a ship has been forced to put into port and unload its cargo.⁵⁷⁵ Compensation may depend on the absence of 'reasonable grounds' for interdiction. But compensation is subject entirely to agreement.

The goal of article 17(7) is to expedite replies from the Parties from whom either data in respect of the registration of a vessel (paragraphs 3 and 4) and/or authorisations (paragraph 4) are sought.⁵⁷⁶ It also obliges a state, upon becoming party to the Convention, to designate an authority or authorities to receive such requests and to communicate the identity or identities of such through the Secretary-General to the other Parties within one month of designation.⁵⁷⁷

Article 17(8) obliges the interdicting Party to inform the flag state concerned of the outcome of any action taken under the article. Article 17(8)'s aim is to stress and defend the interests of the flag state.⁵⁷⁸

Article 17(9) requests Parties to consider entering bilateral or regional agreements or arrangements to implement or reinforce the effectiveness of the provisions of article 17. Its intention is to build upon the successes of existing bilateral agreements

⁵⁷⁴ See the statement of the Netherlands delegate - *1988 Records* vol.II at 268.

⁵⁷⁵ The Chilean delegation, in attempting to amend the draft article to include provision for mandatory compensation in the case of a fruitless search and for no compensation in the case of a successful search, noted that searches were certain to result in delays which would cost money through increased running costs, increased insurance costs, time penalties and possible rejection of the cargo - *1988 Records* vol.II at 269.

⁵⁷⁶ Gilmore *op cit* (1996) at 8 notes that the 1995 Council of Europe Agreement provides for communication of requests by modern means including telefax (article 19(1)), answerable 24 hours a day (article 6), with a four hour wait (article 7).

⁵⁷⁷ For example, the UK in section 20 of the Criminal Justice (International Co-operation) Act, 1990, has placed such responsibility on the Secretary of State. The 'appropriate agency' of article 35(a) of the 1961 Convention and article 21(a) of the 1971 Convention, and the 'competent agencies' of article 9(1)(a) of the 1988 Convention are of obvious relevance here.

⁵⁷⁸ See the 'Expert Group Report', *1988 Records* vol.I at 29.

saved in article 17(4).⁵⁷⁹ Agreements in terms of article 17(9) have already been concluded.⁵⁸⁰

Article 17(10) restricts the types of vessels and aircraft that may be used in article 17(4)'s interdiction operations to warships or military aircraft, or others clearly marked and distinguishable as authorised government ships and aircraft.⁵⁸¹

Article 17(11) is a non-derogation provision that reserves the rights, duties and exercise of jurisdiction enjoyed by coastal states under the international law of the sea, by providing that any action taken under article 17 as a whole and not just paragraph 3, must respect the need not to interfere with or affect these rights and so on. Coastal states enjoy complete sovereignty over their territorial waters, and in their contiguous zones they enjoy exclusive rights in respect of matters relating to customs, taxation, health and immigration. Their rights in their EEZ's are controversial, although delegations to the 1988 Conference accepted that in the EEZ they have the same law enforcement rights as all states have on the high seas,⁵⁸² but some delegations insisted that in the EEZ they did not have the right to prevent other states from taking action against drug traffickers.⁵⁸³ This issue remains controversial, but if a coastal state does have a right of refusal over enforcement operations by third party states in its EEZ as some states insist it does,⁵⁸⁴ then it must be under a corollary duty to police this zone effectively.

⁵⁷⁹ See Gilmore *op cit* (1991) at 191 who notes that the best known of these is the highly effective 1981 agreement between the US and UK - 13 November 1981 Exchange of Notes concerning Co-operation in the Suppression of the Unlawful Importation of Narcotic Drugs into the United States (Cmd. 8470, 1981). In terms of paragraph 1 of this agreement the UK gave blanket permission to the US to board private UK flag vessels if the US authorities had a reasonable belief that such vessels were carrying drugs for illicit importation into the US. By 1989, this permission had resulted in the seizure of 47 vessels, 322 arrests and confiscation of 913 233 lbs of cannabis, 29 961 lbs of hashish and 659 lbs of cocaine; see generally Gilmore WC 'Narcotics interdiction at sea: UK-US co-operation' (1989) 15 *CLB* 1480-1497.

⁵⁸⁰ For example, the 1995 Council of Europe Agreement - see generally Gilmore *op cit* (1996) at 3-14. Gilmore notes at 4 that article 17(9) and other relevant provisions of the 1988 Convention acted as a frame of reference for the drafters of the 1995 Council of Europe Agreement. The 1995 agreement's subject matter jurisdiction is explicitly confined in article 1(c) to the offences in article 3(1) of the 1988 Convention and in terms of article 27(1) only Parties to the 1988 Convention may participate in the 1995 Agreement. The substance of the 1995 Agreement provides, however, far more detailed guidance than article 17 of the 1988 Convention.

⁵⁸¹ See also articles 107 and 111(5) of the 1982 Convention on the Law of the Sea which use the same language and have the same meaning - Gilmore *op cit* (1991) at 190.

⁵⁸² See the statement of the Netherlands delegate, 1988 *Records* vol.II at 271.

⁵⁸³ See the statement of the US delegate, who cited article 58(2) and its references to articles 88 to 115 and particularly articles 92, 94 and 108(1) and (2) of the 1982 Law of the Sea Convention in support of this submission - 1988 *Records* vol.II at 272.

⁵⁸⁴ See the statement of the Indian delegate, 1988 *Records* vol.II at 309 at 315.

5.3.9.5 Enforcement at sea concluded

The net of international regulation of law enforcement at sea has expanded slowly and in a piecemeal fashion. Holes still exist in it. For example article 17 says nothing about the use of force in the interdiction of foreign vessels,⁵⁸⁵ and the Convention does not apply to vessels registered with non-parties. Moreover, the 1988 Convention makes no provision for international co-operation within the territorial sea. States, such as the United States, have lead the way in their domestic law in making provision for their own consensual enforcement activities in the territorial seas of other states.⁵⁸⁶ Such innovative state practice has lead the development of international treaty law with respect to drug law enforcement at sea in the past, and seems likely to continue to do so. The UN has concentrated on developing existing provisions through actions like the CND's establishment of a UN Working Group on Maritime Co-operation to promote implementation of the 1988 Convention's articles relating to enforcement at sea.⁵⁸⁷ However, it is important to emphasise that innovative provisions like article 17(3) of the 1988 Convention provide for the interdiction of foreign flag vessels by consent, that is, they provide for the extension of jurisdiction by consent.⁵⁸⁸ Gilmore points out that they must thus be seen as complimentary to the main jurisdictional thrust of the 1988

⁵⁸⁵ On the problems associated with the use of force see Gilmore *op cit* (1989) at 1495. Gilmore *op cit* (1996) at 9 notes that the 1995 Council of Europe Agreement in article 12(1)(d) restricts the use of force to the minimum necessary.

⁵⁸⁶ An example is the 1986 Maritime Drug Law Enforcement Act 46 USC section 1903 (c)(E) which requires the consent of the coastal state. Gilmore *op cit* (1991) at 186 fn41 notes that the US has concluded extensive bilateral agreements for this purpose, and gives as an example the SEARIDER programme agreement with the Bahamas described by the Bahamian Ministry of National Security in *A Report on the Traffic in Cocaine and Marijuana Affecting the Bahamas in 1987 and 1988* (1989: Government of the Bahamas) at 84 as follows: 'The joint Royal Bahamas Defence Force US Coast Guard Sea Rider programme was formulated on 19 January 1986 and provides for the embarkment of a member of the RBDF aboard selected USCG Cutters operating in international waters surrounding the Bahamas. The embarked RBDF officials have the authority to authorise the US Coast Guard Cutters to enter Bahamian territorial waters to board, search and if evidence warrants, seize US, states or third nation vessels. Also to board, search and seize Bahamian vessels on the high seas if warranted.' The UK's Criminal Justice (International Co-operation) Act, 1990, section 20(6) authorises the exercise of enforcement authority with the consent of the coastal state.

⁵⁸⁷ CND Res. 3(XXXXVI) UN Doc. E/CN.7/1993/L.5/Rev.1 5 April 1993; see generally Gilmore *op cit* (1996) at 14.

⁵⁸⁸ Gilmore *op cit* (1991) at 191. Non-consensual means such as hot-pursuit are thus still resorted to and expanded upon when the flag-state is not a party to the 1988 Convention, or is unwilling to consent to interdiction, or for pragmatic reasons is simply not consulted. See, for example, *R v Mills* 1995 Croyden Crown Court unreported (reported in Harris *DJ Cases and Materials on International Law* London, Sweet and Maxwell, 5ed, 1998, at 443) where the doctrine of hot pursuit was used to establish the constructive presence of the 'Poseidon', a vessel registered in St Vincent, in the UK's territorial waters, even though the 'Poseidon' never left international waters, and its only link was to a UK registered fishing vessel that sailed to a UK port after a cargo of cannabis worth 24 million pounds had been transferred to it from the 'Poseidon'.

Convention in article 4 which provides for the extension of jurisdiction by prescriptive measures. The INCB suggested in 1996 that a right of visit as is provided in cases of piracy, slavery and non-authorised radio emissions, and the extension of the provisions relating to maritime interdiction to include precursors, are the next step in the development of this area of drug enforcement law,⁵⁸⁹ implying that flag state's consent is going to become less important in the future.

5.3.10 Enforcement in free trade zones and free ports

Free trade zones and free ports are sensitive areas where large quantities of goods and large numbers of persons are handled. They are particularly vulnerable to the illicit traffic because although they fall within the Parties' criminal jurisdiction customs controls tend to be relaxed.⁵⁹⁰ Article 18 of the 1988 Convention attempts to ensure that they do not become a haven for traffickers. Entitled 'Free Trade Zones and Free Ports', it reads:

1. The Parties shall apply measures to suppress illicit traffic in narcotic drugs, psychotropic substances and substances in Table I and Table II in free trade zones and in free ports that are no less stringent than those applied in other parts of their territories.

2. The Parties shall endeavour:

(a) To monitor the movement of goods and persons in free trade zones and free ports, and, to that end, shall empower the competent authorities to search cargoes and incoming and outgoing vessels, including pleasure craft and fishing vessels, as well as aircraft and vehicles and, when appropriate, to search crew members, passengers and their baggage;

⁵⁸⁹ The *Report of the International Narcotics Control Board for 1996* UN Doc. E/INCB/1996/1 at 10.

⁵⁹⁰ For example, Colon Free Zone (CFZ) in Panama (including the Free Port of Coco Solo), the largest free trade zone in the Americas, is heavily used for maritime drug transshipment and money laundering operations - National Narcotics Intelligence Consumers Committee *The NNICC Report 1994: The Supply of Illicit Drugs to the United States* (1995) at 11.

(b) To establish and maintain a system to detect consignments suspected of containing narcotic drugs, psychotropic substances and substances in Table I and Table II passing into and out of free trade zones and free ports;

(c) To establish and maintain surveillance systems in harbour and dock areas and at airports and border control points in free trade zones and free ports.

Weak provisions apply to free ports and zones in the earlier conventions, but they do not apply directly to the illicit traffic.⁵⁹¹ Article 18 is something of an improvement.

Article 18(1) sets up a general obligation on Parties to ensure that the measures they use against the illicit traffic⁵⁹² in free trade zones and free ports are at least as tough as those they apply to the rest of their territory. The INCB has been particularly diligent in emphasising the application of these measures not only to narcotic drugs and psychotropic substances but to precursors as well.⁵⁹³

Article 18(2) is recommendatory, not mandatory. It only obliges the Parties to endeavour to take a number of steps against the illicit traffic within free trade zones and free ports. Article 18(2)(a) places Parties under a duty to make a *bona fide* attempt to monitor the movement of goods and persons in these areas, and, to that end, to empower their competent authorities to perform search operations. It specifies that these authorities must be empowered to search a comprehensive list of potential hiding places including cargoes and incoming and outgoing vessels, pleasure craft and fishing vessels, as well as aircraft and vehicles. Searches of individuals such as crew members, passengers and personal baggage is, however, limited to appropriate situations, so as to avoid legal problems with individual rights and the practical difficulties associated with indiscriminate or blanket searches.⁵⁹⁴ Article 18(2)(b) places Parties under a duty to try

⁵⁹¹ Article 31(2) of the 1961 Convention and article 12(3)(a) of the 1971 Convention. Annexure F1 of the International Convention on the Simplification and Harmonisation of Customs Procedures 950 UNTS 13561 sets out guidelines for the monitoring of drugs and precursors in free zones.

⁵⁹² Article 1(m) defines this as 'the offences set forth in article 3, paragraphs 1 and 2.'

⁵⁹³ See, for example, the INCB's *Report of the International Narcotics Control Board for 1995* UN Doc. E/INCB/1995/1 at 30 where the INCB noted that such measures were being taken in Hong Kong and the United Arab Emirates.

⁵⁹⁴ See the 'Expert Group Report', 1988 *Records* vol.I at 29. The Bolivian delegate in Committee II proposed a provision that searches 'respect human rights and be without discrimination on the basis of race, nationality, religion or similar reasons' because he said that nationals of cocaine producing countries tended to be subject to indiscriminate and undignified searches. His amendment was rejected on the basis that the 1988 Convention would provide a blanket provision for such protections, but in fact, it does not - see generally 1988 *Records* vol.II at 212 and 215.

bona fide to establish and maintain a system to detect consignments suspected of containing contraband⁵⁹⁵ passing into and out of free trade zones and free ports. Article 18(2)(c) places Parties under a duty to try *bona fide* to establish and maintain surveillance systems⁵⁹⁶ in harbour and dock areas and at airports and border control points in the above mentioned areas.

Article 18's obvious weakness is that its more detailed provisions in paragraph 2 are directive rather than mandatory. It does little to overcome the practical problem of regulating zones that are by definition unregulated and of changing their legal characters.

5.3.11 The prevention of the use of the mails

The UN's 1987 Comprehensive Multidisciplinary Outline targets 'controls over use of the international mails for drug trafficking' because of the discovery by customs services that the mails were being used for trafficking despite the existing controls in the Universal Postal Union's (UPU) Conventions.⁵⁹⁷ The major problem is presented by the fact that while states of origin and states of destination of the mailed item are free to open it if they suspect it contains drugs as long as they satisfy their own domestic law, transit states are unable to do so in terms of the right of freedom of transit enshrined in article 1 of the UPU Convention.⁵⁹⁸ Thus it was felt necessary to insert a provision in the 1988 Convention to provide for ways of overcoming such problems and preventing the use of the post for trafficking generally.⁵⁹⁹ Entitled 'The Use of the Mails', article 19 reads:

1. In conformity with their obligations under the Conventions of the Universal Postal Union, and in accordance with the basic principles of their domestic legal

⁵⁹⁵ Narcotic drugs, psychotropic substances and substances in Table I and Table II.

⁵⁹⁶ These would include patrols, guard towers, electronic surveillance systems etc.

⁵⁹⁷ Target 27, paragraph 321 - *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988) at 69. Article 13 of the 1984 Universal Postal Convention 611 UNTS 8844 reads: 'The governments of member countries shall undertake to adopt, or to propose to the legislature of their countries, the necessary measures: ... e) for preventing and, if necessary punishing the insertion in postal items of narcotics and psychotropic substances ... where the insertion has not been expressly authorised by the Convention or the Agreements.' See generally Malekian F *International Criminal Law: The Legal and Critical Analysis of International Crimes* Volume II (1991) 376-398.

⁵⁹⁸ 611 UNTS 8844. The opening of mail in a state of destination or origin is entirely a matter of that state's domestic law.

⁵⁹⁹ The Netherlands pointed out (8/9/1993 - *Multilateral Treaties Adopted* (1997) at 305) that in this narrow context illicit traffic must in effect mean illicit transport.

systems, the Parties shall adopt measures to suppress the use of the mails for illicit traffic and shall co-operate with one another to that end.

2. The measures referred to in paragraph 1 of this article shall include, in particular:

(a) Co-ordinated action for the prevention and repression of the use of the mails for illicit traffic;

(b) Introduction and maintenance by authorised law enforcement personnel of investigative and control techniques designed to detect illicit consignments of narcotic drugs, psychotropic substances and substances in Table I and Table II in the mails;

(c) Legislative measures to enable the use of appropriate means to secure evidence required for judicial proceedings.

As with many of the other provisions in the 1988 Convention for enforcement, article 19 moves from the general to the particular.

Article 19(1) sets out the basic obligation on the Parties to adopt measures to suppress the use of the mails by the illicit traffic⁶⁰⁰ and to co-operate to achieve this purpose. This obligation is qualified in two ways, viz.: i) it must conform to the Parties' existing obligations under the UPU's Conventions, for example freedom of transit under article 1 of the UPU Convention; and ii) it is subject to the basic principles of the Parties' domestic legal systems. The latter qualification leaves the Parties free to choose how to implement article 19(1), to adopt or amend legislation or use some other measure to provide for article 19(1)'s implementation, as long as they do not interfere with their basic domestic legal principles.

Article 19(2) sets out specific measures to be undertaken by the Parties in amplification of article 19(1)'s obligation. These specific measures must also comply with a Party's obligations under the UPU's Conventions and its basic domestic legal principles. The measures listed are not a *numerus clausus*. Article 19(2)(a) requires the

Parties to co-operate internationally in thwarting illicit traffickers' use of the mails.

Article 19(2)(b) requires the Parties to use authorised law enforcement personnel to initiate and sustain investigative and control techniques⁶⁰¹ designed to detect illicit consignments of contraband⁶⁰² in the mails. Typically these will involve the detection of illicit substances in suspicious mail items, and the identification of the item, its origin and destination. If its destination is within national territory then application for a search warrant should be made and the usual procedures followed. An example of such a control technique which also falls under the general obligation in article 19(2)(a) to co-ordinate action occurs when mail containing contraband is discovered in transit by authorities of a state party to the Universal Postal Convention who cannot in terms of article 1 of that Convention open the mail even if they have a search warrant. The authorities of the discovering Party would in terms of article 19(2)(a) of the 1988 Convention be under an obligation in such circumstances to notify the authorities of the state of destination as soon as possible and to verify the origin of the item, so that action can be taken by the authorities in the state of destination. Article 19(2)(c) requires the Parties to take legislative steps to make possible the use of suitable methods to obtain evidence required for judicial proceedings against traffickers. Such steps would include enabling the use of investigative mechanisms such as X-Rays and so on. Article 19 demands an integrated enforcement system directed at one aspect of the illicit traffic - its use of the mail. It gives little detail as to the precise modalities of this system. Guidance may be had from the explanation and recommended courses of action in the UN's 1987 Comprehensive Multidisciplinary Outline, but further development of such systems dealing with isolated aspects of the traffic is likely to be ongoing and progressively more specialised.

⁶⁰⁰ Article 1(m) defines this as 'the offences set forth in article 3, paragraphs 1 and 2.'

⁶⁰¹ According to the French delegation, investigative techniques imply searches of the mail through the use of sensing devices, sniffer dogs, X-rays etc., while control techniques are those used to detect illicit substances in the mails; the techniques supplement each other - *1988 Records* vol.II at 213.

⁶⁰² It must be noted that the provision relates to 'illicit' consignments of narcotic drugs, psychotropic substances and substances in Table I and Table II, and not just any consignments of these substances, a qualification introduced to prevent Parties from having to interfere in the large scale commercial use of the mail to transmit licit consignments of these substances - see the statements of the British delegate, *1988 Records* vol.II at 213-4.

5.4 Enforcement concluded

The drug conventions have tried to overcome problems with national drug enforcement by creating domestic uniformity in policing, they have tried to overcome problems with extraterritorial enforcement through international co-operation in policing. This chapter has divided the examination of the drug conventions enforcement provisions into two categories, viz.: those dealing generally with the creation of national uniformity and international co-operation generally and those dealing with specific enforcement measures.

With respect to the former category, the provisions of the drug conventions that deal with uniformity of national enforcement action serve the two-fold purpose of creating more effective national drugs policing while simultaneously laying the foundations for more effective international co-operation. The provisions of the drug conventions for such co-operation, provisions for both general co-operation and mutual legal assistance, can be seen as an example of enforcement co-operation in themselves. If we adopt the heuristic device suggested by Benyon *et al* for the analysis of police co-operation, the drug conventions can be classified as the fruits of co-operation at a macro-level. They embody international legal agreement settled by senior government officials leading to the harmonisation of national law. These officials have in the drug conventions attempted to resolve some of the fundamental issues facing drug law enforcement, such as applying one state's drug control laws in another state. They have tried to achieve political consensus as a precondition for action.⁶⁰³ The meso-level of enforcement co-operation, by contrast, is concerned primarily with operational structures, practices and procedures of the police and other law enforcement agencies. In other words, it is concerned with the day to day framework of operational policing,⁶⁰⁴ together with which can also be categorised the enforcement actions of the procuracy and judiciary. The drug conventions attempt in their detail to provide some direction in this regard by setting up broad structures and mechanisms for co-operation, to centralise authority to make communication easier, and to overcome legal and administrative obstacles to effective enforcement. Enforcement co-operation at the micro-level is concerned with the actual investigation of specific offences and the prevention and

⁶⁰³ Benyon J, Turnbull L, Willis A, Woodward R 'Understanding police co-operation in Europe: setting a framework for analysis' in Anderson M and Den Boer M (eds) *Policing Across National Boundaries* (1994) 46 at 50.

⁶⁰⁴ See Benyon *et al op cit* at 53.

control of actual crimes.⁶⁰⁵ The drug conventions cannot provide much guidance or assistance in this regard. They are unable to create uniformity at the level of operational policing, precisely because they are examples themselves of macro-level co-operation. Put graphically, the kind of detailed obligations that a United States Drug Enforcement Agency official might want of an international instrument obliging the Bolivian police to assist him in a particular investigation are not available in the broadly drawn drug conventions. He is bound by foreign laws and administrative procedures. All the drug conventions can do is provide some direction as to the authorities that might be of help, and the UN Secretary General has obliged by publishing data on the competent national authorities under the drug conventions.⁶⁰⁶

Many of the comments made above also apply to the specific enforcement measures in the drug conventions because they too are examples of the creation of national uniformity and international co-operation through international law. More specifically, it is clear that these international drug enforcement strategies and tactics have their roots in the successful practice of consumer states such as the United States concerned with suppressing drug supply at source or interdicting chains of supply. At the international level, however, some states are more willing to co-operate in the application of such strategies and tactics than others. Again the crystallisation of these strategies and tactics into international legal provisions has been a political process conducted by senior government officials concerned as much with overcoming state sovereignty as overcoming the illicit traffic. Again they have been forced to try to overcome what Nadelmann calls the central paradox of international law enforcement,

[t]he need for law enforcement agents to perform outside their nation's borders a function that relies primarily on the sovereign powers of the state.⁶⁰⁷

A good example of this paradox in operation is the difficulty surrounding the adoption of article 17(3) of the 1988 Convention which is concerned with the interdiction of suspicious foreign flag vessels on the high seas. Again the detail of legal obligation becomes less dense the lower the level of co-operation. Article 17(3) overcomes

⁶⁰⁵ See Benyon et al *op cit* at 55.

⁶⁰⁶ *Competent National Authorities under the International Drug Control Treaties* UN Doc. ST/NAR.3/1993/1.

⁶⁰⁷ Nadelmann *op cit* (1993) at 247.

sovereignty through the provision for consensual interdiction, directs the necessary operational co-operation at the meso-level but provides little guidance for direct police, naval or coastguard co-operation at the micro-level. Because of the political barriers they must overcome the drug conventions impose a top-down enforcement model, and it is thus almost unavoidable that their provisions tend to be weaker than some bilateral or domestic provisions.

It is thus inevitable that the 1988 Convention, dedicated, unlike the earlier conventions, to enforcement, should have been criticised as not being stringent enough in the enforcement area.⁶⁰⁸ A substantive weakness of the 1988 Convention is that it does not integrate its various enforcement measures particularly well. It takes particular aspects of the trafficking problem and deals with each in some degree of isolation from the others with the result that national legislation in many less zealous state participants in the drug war still tends generally to be poorly integrated.⁶⁰⁹ The 1988 Convention is also not as comprehensive as some might have wished. For example, the “soft” law of the UN’s 1987 Comprehensive Multidisciplinary Outline targets areas such as strategies and tactics for the disruption of major trafficking networks, admissibility of evidence in samples of bulk seizures of drugs, tightening of controls of movement through official points of entry, strengthening of external border controls and of mutual assistance machinery within economic unions of sovereign states, and surveillance of land, water and air approaches to national frontiers,⁶¹⁰ but these targets have not been transformed into “hard” law. Yet the generally more hostile atmosphere in international society towards illicit drug trafficking is reflected in the substance of the enforcement provisions of the 1988 Convention, and nowhere is the development of international law to fight a global war on drugs more obvious. The distinction between the earlier conventions’ bland enforcement provisions which emphasise co-operation and little else, and the 1988 Convention’s enforcement provisions which specify a varied range of enforcement responses to the illicit traffic, indicates the coming of age of drug enforcement in international law. States have supported the adoption of potent measures to eliminate drug production, interdict chains of supply, prise open sanctuaries for money laundering

⁶⁰⁸ See generally Catino *op cit* at 437-440.

⁶⁰⁹ Bassiouni *op cit* (1990) at 331 complains that very few states have integrated legislation on inter-state penal co-operation.

⁶¹⁰ Targets 17, 21, 24, 25 and 26 respectively - *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988) at 52, 59, 64, 67, 67 respectively.

and confiscate as much as possible. In the period post-1988 the issue for drug enforcement “hawks” has become whether states are prepared to apply these paper rules. In this period the issue for drug enforcement “doves” has become the realisation that international drug control law provides few human rights protections to those subject to its formidable array of legal weapons.

CHAPTER SIX: ALTERNATIVE/ADDITIONAL METHODS OF CONTROLLING ILLICIT DRUG RELATED ACTIVITIES UNDER INTERNATIONAL LAW

6.1 Introduction

In the early part of this century international society decided that the drug problem could only be solved by prohibition. Prohibition and its complementary strategy, supply reduction, have since been institutionalised in international law. The international illicit drug control system emphasised the use of law to prevent drugs from reaching and being consumed by the user, and has paid little attention to the reasons for demand for drugs or to the causes, treatment and rehabilitation of drug dependency. In this the international system mirrors the national response to the problem; a heavy emphasis on enforcement, criminal sanction and penalisation, coupled with little stress on the nature of consumption and its effects.

Perceptions of the nature of the drug problem have, however, been changing in the second half of this century. It is now recognised to be at least in part a problem of a medical and a social nature, and the international system has adopted measures which to some extent recognise that the criminal law cannot provide a total solution to the problem. This does not imply that the international system has made a fundamental shift away from prohibition and punishment. Parties are obliged to incorporate these alternatives to punishment as part of their criminal law, either as alternatives to conviction and punishment, or in addition to conviction and punishment. These “softer” measures have simply been integrated into the prohibitionist penal legal system. They are discussed separately in this study, however, because it is submitted that they represent a distinct approach to dealing with the drug problem. It is perhaps necessary at this point to familiarise the reader with some of the approaches to drug control that do not or only partially involve intervention by the criminal justice system.

6.2 An introduction to alternative approaches to drug control

6.2.1 Socio-economic upliftment

It has been said that:

Drug addiction has its roots in social conditions: malnutrition, insecurity, custom. Unless these are modified, enforcement measures can do little more than limit opportunities for addiction.¹

If one accepts that drug use is a medico-social problem closely connected with the conditions under which people live,² then the only long term solution to the drug problem is socio-economic development. The obstacle to this is cost. The UN has been and remains heavily involved in giving technical assistance to states to help them strike at the roots of drug abuse, but the socio-economic problems of the drug-producing and drug-consuming states are deeply entrenched, and money will not solve every drug related problem. For example, in states where drug consumers are wealthy, the social reintegration of alienated individuals cannot be bought. In the post-war period, the CND has consistently encouraged states to strike at the roots of the drug problem through social and economic upliftment.³ It has tried to get a clearer picture of the causes of drug dependence by requesting or commissioning research into drugs, users and their environments. Calls for in-depth investigation of the drug problem culminated in the 1987 'Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control', in which the 138 participating states recognised their collective responsibility to provide resources for the elimination of all aspects of both the supply of and demand for illicit drugs. But it has been impossible thus far to get states to agree to bind themselves in a multilateral convention to expend precious resources on the socio-economic roots of the drug problem.

¹ Editorial note (1960) 530 *International Conciliation* at 1.

² Renborg B 'International Control' (1957) 22 *Law and Contemporary Problems* 86 at 103.

³ See May HL 'Twenty years of narcotics control under the United Nations' (1966) 18 *Bulletin on Narcotics* 1 at 42-3.

6.2.2 Crop substitution

The concept of crop substitution involves encouraging the agricultural producers of crops from which drugs are derived to switch to commercially viable legal crops. While the 1961 Convention tolerates the continued cultivation of cannabis, coca bush and opium poppy for economic purposes, it obliges Parties to strictly control this cultivation and envisages the prohibition of uncontrolled cultivation.⁴ Until the 1970s, no real attempt was made to help poorer source states institute a program of crop substitution because of the enormous costs and the great difficulties involved. The 1987 Comprehensive Multidisciplinary Outline targets the redevelopment of areas formerly under illicit drug cultivation,⁵ but today it is generally recognised that although crop substitution has a role to play in such redevelopment, it is plagued with difficulties. First, effective political control of the growing areas is necessary.⁶ Second, the cultivators must have the political will to make the program work, a will that is often missing because of economic dependence on the illicit crops and related problems.⁷ Economic incentives to change crops are not competitive with the secure and relatively large profits to be made from drug crop cultivation.⁸ Finally, given the small scale of production necessary to supply existing illicit markets and the necessity for crop-substitution to be globally comprehensive to avoid the development of alternative supply areas, the whole

⁴ See, for example, article 22 discussed under enforcement in Chapter Five.

⁵ Target 16 is entitled 'Redevelopment of areas formerly under illicit drug crop cultivation'. The Outline's detailed recommendations envisage the identification of the crops that can be substituted in a particular situation, the markets for alternative crops, and the provision of infrastructural back-up and close monitoring once such a programme is undertaken. See *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988) at 48-50.

⁶ This kind of control does not exist, for example, in the jungles of the golden triangle in South East Asia or the north-west frontier provinces of Pakistan. See generally Murphy JW 'Implementation of international narcotics control: the struggle against opium cultivation in Pakistan' (1983) 6 *Boston College Int. and Comp. LR* 199-241. By contrast, the Peoples Republic of China almost completely suppressed opium production in the 1950s and 1960s.

⁷ See Bruun K, Pan L, Rexed I *The Gentlemen's Club* (1975) at 215-6. They note that before a program can be instituted the complete development of the local economy and infrastructure may have to take place. It may be difficult to find an alternative crop that will grow in the same poor conditions and in the same season. The crops substituted are usually of a much lower wholesale value than drug producing crops. In effect, cultivators must be bribed by subsidy to stop growing the drug-bearing crops, and as the program begins to work and the supply of drugs begins to shrink so the price goes up and in order to prevent reversion to the drug bearing crops, subsidies also have to rise.

⁸ Rodd R 'The politics of failure: a perspective on the war on drugs' in *Souvenir Brochure of the International Conference on Global drugs Law* (1997) 52 at 55 notes: 'Simple mathematics show how inadequate US commitment to economic development in the Andes has been and is as a means of convincing growers to change crops: while millions are spent on economic development projects, the coca-cocaine trade sees billions repatriated to the Andean nations yearly. Bush's Andean initiative plan

concept may be fatally flawed.⁹ Crop substitution, although usually regarded as marginally successful in practice,¹⁰ has come under increased criticism because of its failure to impact in a meaningful way on the amount of land under drug crop cultivation.¹¹ Seccombe suggests that it in fact encourages illicit cultivation in other areas.¹² Most commentators believe that only real economic progress will bring about the substitution of drug cultivation in the developing world. Crop substitution is, of course, wholly ineffective against totally synthetic drugs.

6.2.3 Education

International drug control organs have always had an ambivalent attitude towards education as a method of demand reduction. For example, the CND and ECOSOC reiterated the position taken by the League's Opium Advisory Committee that other than in states where addiction was widespread direct anti-drug education would be dangerous on the basis *inter alia* that it would draw attention to drugs and stimulate their use.¹³ Unfortunately, few states admitted that they had a serious drug problem so education was effectively barred by the League and UN until the 1970s. During the 1972 Conference to amend the 1961 Convention, Costa Rica proposed an education provision coupled with alternative methods of drug control such as the control of advertising encouraging drug use, national rehabilitation and prevention centres, and regional centres for investigation, education, co-ordination and control.¹⁴ As redrafted it emerged

contributed around \$1 billion in development funds to all Andean nations combined for the period 1990-1994.'

⁹ Bruun et al *op cit* at 210.

¹⁰ Bruun et al *op cit* at 214 note that the increase in UN technical assistance programs after the establishment of UNFDAC brought life to the crop-substitution program, which rapidly became the largest recipient of its funds. The most significant effort in the 1970s was made by the US independently of the UN, when it financed the replacement of opium poppy crops in Turkey. Various other ideas to eradicate drugs at source such as the synthesising of opium substitutes, the isolation of biological controls for drug producing plants and the development of new non-drug producing varieties of plants, have been attempted, all without much success.

¹¹ For example, although the Bolivian Coca Crop covers hundreds of thousands of hectares, the negligible impact of crop-substitution on this crop has resulted in the removal of not more than 3000ha in the last decade - see Rodd *op cit* at 53.

¹² Seccombe R 'Squeezing the balloon: international drugs policy' (1995) 14 *Drug and Alcohol Review* 311-316. At 312 he notes that when UNFDAC mounted a rural development project in two areas of Pakistan's North West Frontier Province, it was regarded as a success when poppy cultivation was eliminated from the target areas, but what in fact happened is that 'poppy cultivation responded like a balloon: being squeezed at one point, it bulged out elsewhere. Restricted in the east, poppy cultivation was shifted westward to areas closer to the border with Afghanistan ... [and] total production actually increased over the last decade.'

¹³ CND 2 May 1951.

¹⁴ E.Conf.63/c.1/L.20, 1972 cited by Bruun et al *op cit* at 237.

as article 38*bis* which places education firmly in the context of 'action against the illicit traffic in drugs'. Unsurprisingly, a 1989 study of thirty-seven states revealed that few had made legislative provision for drug education.¹⁵ The UN is conscious of this problem, and targeted it in its 1987 Comprehensive Multidisciplinary Outline.¹⁶ International law is still struggling with accepting the principle of illicit drugs education and has yet to come to grips with the content of such education.¹⁷

6.2.4 Treatment in the generic sense including treatment, education, after-care, rehabilitation and social-reintegration

6.2.4.1 Methods and systems

Treatment involves a whole range of different methods including identification, detoxification, maintenance, rehabilitation, and social reintegration and so on, all of which may involve medical professionals, psychotherapists and social workers.¹⁸ The most controversial issue surrounding treatment is whether it should be voluntary or imposed, independent or linked to the criminal justice system, unrestricted or limited.

Voluntary treatment methods include those which can be categorised under the generic term "harm reduction". They focus on preventing and reducing the harmful consequences associated with drug abuse. Prescribing to addicts is one such method which has had an enduring popularity because it ensures addicts get unadulterated dosages and are not exposed to the hazards of the illicit traffic. But it has been accused of aggravating the problem.¹⁹ Maintenance therapy employs synthetic narcotic substitutes to block the drug's dependence producing effects (eg. methadone for heroin), but although extremely popular, it has been criticised for substituting one form of addiction

¹⁵ Chatterjee SK *Drug Abuse and Drug Related Crimes* (1989) at 5.

¹⁶ Target 3, 'Prevention through education', identifies education as crucial in strengthening the community's resolve to avoid drug use, and emphasises that it should be integrated into formal education while at the same time avoiding generating interest in drug usage. At the formal level it emphasises developing curricula, specialised training and the use of appropriate materials regarding prevention. At the informal level it emphasises the generation of basic information for the general public. See the *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988) at 18-22.

¹⁷ For example, most US federally funded education programmes teach a 'just say no' approach and forbid the teaching of harm reduction methods such as safe use of drugs - *Los Angeles Times* 1-3-1997.

¹⁸ See generally Eldridge WB *Narcotics and the Law* (1967) 104-114 and 142-160; Ghodse A *Drugs and Addictive Behaviour: A Guide to Treatment* (1989).

¹⁹ See Nahas G 'Drugs, the brain and the law' (1991) 5 *Notre Dame Jnl of Law, Ethics and Public Policy* 729 at 742.

for another, and may be ineffective because the substitute does not match the original drug's effects. Outpatient clinics dispense drugs freely to users and thus eliminate the illicit traffic and remove the aura of criminality making rehabilitation easier. Users are given decreasing doses until they are weaned from the drug (detoxification), but are not actually confined in any way. These clinics are vulnerable to the criticisms that supplies are never sufficient to satisfy users and that they eliminate the problem not its causes. Other popular harm reduction strategies are the supply of hypodermic syringes and needles to reduce infection risk and HIV transmission, and the less successful prohibition free zones.²⁰ Such methods are controversial because of their apparent encouragement of drug abuse.²¹ State aided and private 'therapeutic communities' where former addicts help current addicts have been fairly successful, but they suffer from being insufficient in size to deal with the scale of the problem and lengthy stays are necessary to achieve results.²²

The most important form of involuntary treatment is 'civil commitment' which is based on the philosophy that if drug users will not rehabilitate themselves, and evidence indicates that few voluntarily enter treatment,²³ then the state will commit them to a hospital and do it to them, either before they are tried for an offence or in lieu of punishment. It aims to keep users out of jail, but civil commitment involves in effect incarceration in a hospital.²⁴ Today, users are encouraged to commit themselves before they get caught up in the criminal process, and when they are caught up in that process they are often given the option of voluntary commitment and diversion from that process. Diversion can occur before or after arrest, or before trial, or before or after sentencing. More modern systems of punishment diversion have sent drug using offenders into the community for treatment.²⁵ Apart from its penal nature, the hospitalisation of all users is practically impossible because of insufficient room. Imprisonment also presents, in theory, a good opportunity for treatment as many drug

²⁰ Zurich's famous Plaspitz or 'Needle-Park' was such an example. Users were able to buy and consume drugs here openly without legal interference, but its popularity with users from all over Europe eventually soured local sentiment and it was shut in 1994.

²¹ Bucknell P, Ghodse H *Misuse of Drugs* (1991) at 82.

²² See generally Nahas *op cit* at 738.

²³ Nahas *op cit* at 738.

²⁴ In terms of Malaysia's Drug Dependents (Treatment and Rehabilitation) Act 83 of 1983, for example, registration as an 'addict' exposes that person to involuntary commitment to a prison-like rehabilitation center - see Haring 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 at 369.

users pass through the prison system. But treatment in prison is diluted and usually regarded by the inmates as punitive.²⁶ Moreover, due to the extensive use of drugs in prisons, it is very likely that non-users will be introduced to use while in prison.

After experiment with a wide variety of different methods, Musto doubts whether any of the currently available systems used in isolation or in combination can have more than a limited impact on use, because of the inability of medicine to come up with a suitable cure or treatment for drug addiction.²⁷ Nonetheless, the prevailing wisdom appears to be that drug treatment is a good thing which does work to reduce both drug consumption and crime rates.²⁸

6.2.4.2 National experiences

Historically at the national level, systems of control that gave unrestricted access to drugs such as treatment of drug users as outpatients (ambulatory treatment) were rejected in favour of systems relying on confinement, forced cure and rehabilitation such as treatment of users as inpatients (civil commitment).²⁹ This attitude was determined by the dominant conception of drug use as a legal not a medical problem. While recently official attitudes have been changing towards more voluntary commitments before and in lieu of penalisation, the value of treatment itself is still officially doubted.

Provision for treatment is commonly made in national drugs legislation. This is rationalised by the INCB thus:

A drug offender's encounter with the criminal justice system can provide a valuable opportunity to motivate him or her to undergo treatment, particularly if it occurs early in the offending cycle, before the offender becomes more deeply involved in criminal activities. The individual can be provided with a diagnostic assessment of his or her clinical needs. A treatment programme can be recommended or provided that may not ordinarily be available in the court or prison system. Furthermore the inclusion of treatment provisions in drug control

²⁵ See, for example, Collison M in 'Punishing drugs: criminal justice and drug use' (1993) 33 *British Journal of Criminology* 382-399 who examines modern British legislation.

²⁶ Henham R 'Criminal justice and sentencing policy for drug offenders' (1994) 22 *Int. Jnl of the Sociology of Law* 223 at 224.

²⁷ Musto DF *The American Disease* (1987) at 72 and 86.

²⁸ Stares PB *Global Habit: The Drug Problem in a Borderless World* (1996) at 77.

²⁹ See Anslinger HJ, Tompkins WF *The Traffic in Narcotics* (1953) at 190-1.

legislation gives the courts additional flexibility in imposing alternatives to penal sanctions. A court order in favour of treatment can demonstrate to the offender the seriousness of the offence and can also help to keep him or her in treatment long enough for the outcome to be successful. However, care needs to be taken that the treatment is not more restrictive than the proportional punishment would have been.³⁰

The danger with this approach is that the crime reduction goals of the treatment will outweigh the health care considerations. One of the major problems for treatment of users is their concurrent criminality. Collision points out that while it is generally considered that victims of drugs require treatment, and dealers in drugs require punishment, this

distinction between the legitimate and the illegitimate, the deserving and the undeserving, or the victim and the villain, is extremely fragile and is one difficult to draw in theory, in practice, and, importantly, in court.³¹

The victims, once in the system of prohibition, may soon become the villains, for example through involvement in trafficking to support their dependence.

Adequate resources present a major problem. The modern British system provides a model of a fairly advanced resource intensive national system.³² Statutorily based, it leaves treatment - withdrawal, maintenance and so on to the medical profession and the National Health Service, while it gives responsibility for rehabilitation - therapy, counselling and so on to the social services. The medical profession uses medical practitioners (some with a special license to prescribe opiates), drug treatment clinics and hospital in-patient treatment to carry out the treatment component, while rehabilitation relies on government social workers, the probation service and voluntary agencies. Treatment interventions include psychotherapy, counselling, behavioural techniques, vocational rehabilitation, therapeutic communities and self-help groups, while reliance is placed on differing methods for the treatment of different forms of drug abuse such as maintenance for opiate abusers. Heavy government intervention requires considerable

³⁰ *Report of the International Narcotics Control Board for 1996* UN Doc. E/INCB/1996/1 at 9.

³¹ *Op cit* at 383.

public funding. In the United States the institutionalisation of drug treatment has spawned a treatment industry closely linked to mandatory testing of employees for drug usage.³³ But treatment facilities are mostly private and hence largely inaccessible.³⁴ And as Chatterjee notes, most states are not in a position to take such measures due to lack of resources and facilities.³⁵ The private sector offers no solution in such states as cost puts treatment in poorer states way beyond the reach of the average person.³⁶ Stares comments:

Beyond the advanced industrialised and former communist world, however, the training and resources for drug treatment are minimal or non-existent. India, for example, has only 250 drug treatment centres.³⁷

6.2.4.3 The international approach

At the international level, it was only during the 1960s that the international system began to try to pay more than just lip-service to the problems of the user. Originally, the CND regarded these issues as falling beyond its strict technical competence.³⁸ Heavily reliant on the WHO Expert Committee for guidance with regard to the treatment and care of addicts, the CND was also unsure about the extent of drug dependence. Inadequacy of information resulted in it encouraging states to report addiction in their annual reports. In 1954 the CND sponsored an ECOSOC Resolution which called for more information and set out in an appendix the various topics upon which states were asked to concentrate.³⁹ The Resolution showed the heavy influence of enforcement agencies and a distinct bias against ambulatory treatment. The growth in interest in the CND in the treatment of drug dependency was finally matched in the positive

³² Bucknell P, Ghodse H *Misuse of Drugs* (1991) 71-82.

³³ See generally Jacobs JB, Zimmer L 'Drug treatment and workplace drug testing: politics, symbolism and organizational dilemmas' (1991) 9 *Behavioural Sciences and the Law* 345-360.

³⁴ Rodd *op cit* at 57.

³⁵ Chatterjee SK *A Guide to the International Drugs Conventions* (1988) at 51.

³⁶ In, for example, Nigeria the cost of treatment is between US\$300-US\$500 per admission to a local clinic which places it way beyond the means of an average Nigerian - DEA *Nigeria Country Report* (1995).

³⁷ *Op cit* at 77.

³⁸ May *op cit* at 40-1.

³⁹ Resolution 548E (XVIII) of 12 July 1954. The Resolution requested information on the classification of addicts and their duty to report to authorities, the treatment of addicts whether compulsory or voluntary, institutional or non-institutional, the degree and character of control of public authorities over the use of drugs in treatment, the methods of treatment, after-care and rehabilitation, questions of cost, treatment of addicts under penal law including application of parole and suspended sentences to drug addicts, and education and propaganda.

international law by provision being made in the 1961 Convention for the treatment of drug dependency.

6.3 Alternatives to punishment in the 1961 Convention

The 1961 Convention contains the first ever multilateral treaty provision for the treatment of drug dependency. Draft article 47(2) firmly rejected ambulatory treatment of addicts, called for ‘the compulsory treatment of drug addicts in closed institutions’ and urged member states with a serious drug ‘addiction’ problem and the economic means to do so to provide such facilities. However, some states at the 1961 Conference objected to this approach on the basis that health matters were within the jurisdiction of local authorities.⁴⁰ States also objected to the specification of compulsory treatment in a closed institution which they regarded as restricting the use of other potentially effective methods. The Conference acted cautiously, and adopted article 38. Entitled ‘Treatment of Drug Addicts’, it reads:

1. The Parties shall give special attention to the provision of facilities for the medical treatment, care and rehabilitation of drug addicts.
2. If a Party has a serious problem of drug addiction and its economic resources permit, it is desirable that it establish adequate facilities for the effective treatment of drug addicts.

Article 38 does not detail precisely how Parties should implement the measures recommended. While it uses the terms ‘drug addict’ and ‘drug addiction’, the article’s scope is not limited to narcotic drugs that cause physical dependence. It applies to all narcotic drugs subject to the 1961 Convention.⁴¹

Article 38(1) only obliges the Parties to give regard to the provision of facilities for treatment, care and rehabilitation. According to its authors the term ‘medical treatment’ refers to ‘necessary therapeutic treatment’ and the phrase ‘care and

⁴⁰ Goodrich LM ‘New trends in narcotics control’ (1960) 530 *International Conciliation* 181 at 219.

⁴¹ *1961 Commentary* at 446. Cannabis is the obvious example of a drug that does not produce physical dependence but which does fall under article 38.

rehabilitation' must be understood very broadly.⁴² The *1961 Commentary* notes the difficulty sometimes of distinguishing between 'care' and 'rehabilitation', and suggests

that the term 'care' includes such psychiatric, psychoanalytical or psychological treatment of the addict as may be necessary after he has been withdrawn from the drugs which he abused. The word 'rehabilitation' covers such measures as may be required to make the addicts physically, vocationally and otherwise fit for living a normal life as useful members of society (cure of diseases, physical rehabilitation of disabled addicts, vocational training, supervision, accompanied by advice and encouragement, of a perhaps gradual transition to a normal self-reliant life etc.).⁴³

Article 38(2) recommends that Parties establish an adequate infrastructure for the effective treatment of drug addicts. It is desirable that all Parties establish such an infrastructure, but this recommendation is qualified. It applies only if a Party has a serious drug problem and its economic resources permit it to establish such an infrastructure. The identification of the drug problem as serious is at the Parties' discretion,⁴⁴ and Parties that use scarce resources for other tasks do not act contrary to the recommendation.⁴⁵ The phrase 'adequate facilities for the effective treatment' allows Parties to use whatever methods their medical authorities may consider appropriate.⁴⁶

⁴² *1961 Records* vol.II at 283 fn19.

⁴³ *1961 Commentary* at 447.

⁴⁴ The *1961 Commentary* at 448 suggests that it would be desirable for Parties to establish such an infrastructure even were the addiction problem not 'serious', and the New Zealand delegate made the point that all drug addiction was 'serious' - *1961 Records* vol.I at 107.

⁴⁵ *1961 Commentary* at 447.

⁴⁶ *1961 Records* vol.I at 110 and 114. The US strongly supported draft article 47(2) requiring Parties 'to use their best endeavours to establish facilities for the compulsory treatment of drug addicts in closed institutions'. It argued that such isolation was not punitive, that it was necessary because drug addiction was contagious as addicts tended to convert others, and that treatment at liberty had failed where it had been tried - *1961 Records* vol.I at 103. Canada, the UAR, China, India and Iran also supported compulsory commitment - *1961 Records* vol. I at 103-6. Yet compulsory commitment was rejected because the 1961 Conference was unwilling to prescribe a particular method of treatment as valid under all conditions and for the duration of the operation of the Convention - *1961 Records* vol.I at 103-114. Lack of resources was a significant factor in the rejection of compulsory commitment - see the statement of the Greek delegate, *1961 Records* vol.I at 105. The delegate from the Netherlands remarked that 'closed institutions' sounded like 'prisons', highlighting for some the repugnancy of the penal nature of commitment - *1961 Records* vol. I at 109. Resolution II of the Conference did declare, however, that one of the most effective methods of treating addiction was in a hospital with a drug free atmosphere and urged Parties having a serious addiction problem to provide such facilities if they had the means - *1961 Records* vol.II at 316.

The term 'treatment' must include what is termed in article 38(1) 'medical treatment, care and rehabilitation'.⁴⁷

Article 38 was regarded as an innovation which suggested that all facets of control were being addressed internationally. While the article extended regulation of the drug control activities of Parties to the medical aspects of drug use, no mention was made of other methods of control such as education. Treatment and so on was also regarded by most states as the province of the wealthy states. Commenting on it at the time, Gregg pointed out that article 38 would have little concrete effect except in states with adequate resources to undertake the expensive task of institutional care and rehabilitation.⁴⁸ Interestingly, a proposed amendment to draft article 47 by Byelorussia which characterised the drug problem as a socio-economic problem and called for measures to address this problem was rejected by the 1961 Conference.⁴⁹

Development of international drug control was still at an early stage in 1961. The Conference's energies were devoted to reinforcing the policy of prohibition though establishing uniform penal provisions. Noll notes that the 1961 Convention does not even go so far as linking the provisions for penalisation for drug offences in article 36 with the provisions for other measures to be applied against drug use as envisioned by article 38.⁵⁰ That linkage had to wait until 1971.

6.4 Alternatives to punishment in the 1971 Convention

During the early 1970s, punitive and retributive methods of dealing with drug offenders were giving way at the national level to alternative approaches to dealing with the problem. The provisions in the 1971 Convention thus go further in this direction than those in the 1961 Convention. This more enlightened attitude was reflected by the use of

⁴⁷ 1961 *Commentary* at 446.

⁴⁸ See Gregg RW 'The Single Convention for Narcotic Drugs' (1961) 16 *Food Drug Cosmetic Law Journal* 187 at 203.

⁴⁹ The proposed draft read: '1. The Parties consider that the most important prerequisite for the prevention and eradication of drug addiction is the consistent application by States of measures aimed at improving the economic and social well-being of the people, raising its cultural level and providing medical services that are available to all segments of the population.' - 1961 *Records* vol.II at 49. The amendment's strongest opponent was the US which rejected as political philosophy the idea that measures aimed at improving the economic and social well-being of the people was the most important prerequisite for eradication of drug addiction, and threatened not to ratify the convention if the amendment was included - 1961 *Records* vol.II at 111.

⁵⁰ Noll A 'Drug abuse and penal provisions of the international drug control treaties' (1977) 19 *Bulletin on Narcotics* 41 at 45-46.

the terms drug 'dependence' and drug 'abuser' rather than 'addiction' and 'addict' throughout the 1971 Convention.⁵¹ Yet Bassiouni notes that the 1971 Convention remains primarily penal-sanctions oriented and only secondarily treatment-rehabilitation conscious, something illustrated by its failure to make pharmacological distinctions between different drugs when it comes to distinguishing different methods of treatment for their abuse.⁵² Article 22(1)(b) makes a clear link between article 22's penal measures and treatment and so on. It 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.

The provision recommends that Parties use certain 'measures of treatment, education, aftercare, rehabilitation and social reintegration' in addition to or in the alternative to conviction and punishment of article 22(1)(a) offences relating to psychotropic substances. The meanings of these measures are discussed below in the discussion of article 20.

With respect to the provision of these measures in addition to penalisation, Parties to the 1971 Convention were at liberty before the conclusion of the Convention to apply such measures to offenders while they were serving their sentences. The mention of such additional measures in article 22(1)(a) serves to remind Parties that these measures may be advisable.⁵³

Substitution of such measures, although also entirely at the Parties' discretion, is more contentious. It is controversial first in respect of the nature of the offences to which it can apply. The *1971 Commentary* notes in this regard:

⁵¹ It was only in 1967 that the WHO Expert Committee proposed to the CND that the terms 'drug dependence' be substituted for the terms 'drug addiction' or 'drug habituation' thus resolving some of the problems associated with differentiating between drugs producing physical as opposed to psychological dependence.

⁵² Bassiouni MC 'The International Narcotics Control Scheme' in Bassiouni MC (ed) *1 International Criminal Law: Crimes* (1986) 507 at 521.

⁵³ *1971 Commentary* at 354.

It may however be expected that in accordance with the purpose of article 22 Parties will normally do so only in the case of relatively minor offences, such as unauthorised possession of substances in Schedule I for personal consumption, unauthorised sale of comparatively minor quantities of psychotropic substances for the purpose of obtaining the financial means required to support the seller's dependence on such substances, or unauthorised supply of small amounts of a psychotropic substance to a friend abusing it, with or without consideration.⁵⁴

In a similar vein, Noll argues that article 22(1)(b)'s measures deal with drug abusers, and are not intended to apply to traffickers.⁵⁵ It is submitted, however, that substitution is not limited to these minor offences, and that no general rule denying substitution to traffickers can be extracted from article 22(1)(b); each case must be dealt by the Party concerned on its merits. With respect to the other problem with substitution, the level of abuse to which it can be applied, the *1971 Commentary* makes the further submissions: (i) that article 22(1)(b) applies to frequent and not occasional abusers of psychotropic substances, that is, to dependency; and (ii) that substitution would only be justified if it could reasonably be hoped that the abuser will not only be cured of his dependence but would not commit a serious offence again.⁵⁶ However, on the wording of the provision the Party is able to employ substitution under any circumstance to any abusers of a psychotropic substance. Moreover, occasional abusers of potent substances may need treatment, while making substitution conditional on hope of the abuser being cured and on his not committing another serious offence unrealistically links substitution to speculation about the effectiveness of treatment and the commission of further possibly unrelated offences. Surely the point of the provision is to address the personal problems of abusers, and not to construe it as a part of the machinery of prohibition.

A problem integral to substitution is deciding the stage in the legal process at which it should occur, that is, should it apply after conviction, or after prosecution but before conviction, or after arrest but before prosecution? Article 22(1)(b) only establishes that an offence must have occurred. The *1971 Commentary* opines that Parties should divert an offender after prosecution has been instituted, reasoning that

⁵⁴ *1971 Commentary* at 353.

⁵⁵ *Op cit* at 48; see also the French delegate, *1971 Records* vol.II at 30.

during the process of prosecution the Party will be able to decide on the appropriateness of substitution.⁵⁷ It is submitted, however, that Parties retain the discretion to substitute at pre-prosecution stages of criminal proceedings. Substitution may well, for example, be appropriate at the arrest stage when the offence is obviously not serious.

Article 22(1)(b) provides for measures of 'treatment' and so on 'in conformity with paragraph 1 of article 20'. The two provisions must be read together. Article 20, entitled 'Measures Against the Abuse of Psychotropic Substances', requires that:

1. The Parties shall take all practicable measures for the prevention of abuse of psychotropic substances and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved, and shall co-ordinate their efforts to these ends.
2. The Parties shall as far as possible promote the training of personnel in the treatment, after-care, rehabilitation and social reintegration of abusers of psychotropic substances.
3. The Parties shall assist persons whose work so requires to gain an understanding of the problems of abuse of psychotropic substances and of its prevention, and shall also promote such understanding among the general public if there is a risk that abuse of such substances will become widespread.

Article 20 can be seen as a updated version of article 38 of the 1961 Convention. Its provisions are general and operate as guidelines rather than obligations.

Article 20(1) deals with the measures to be applied to abusers of psychotropic substances. These measures are aimed first at the 'prevention' of the abuse of psychotropic substances. These measures include appropriate socio-economic control measures in addition to the penal and administrative control measures in the Convention.⁵⁸ Co-ordination of efforts across various disciplines at the national and

⁵⁶ 1971 *Commentary* at 353-4.

⁵⁷ 1971 *Commentary* at 353.

⁵⁸ *Contra* the 1971 *Commentary* at 334 which includes all the 1971 Convention's control measures among these preventative measures, an interpretation abandoned by the 1972 *Commentary* in its interpretation of

international levels is envisaged here,⁵⁹ but these measures need only be taken if they are 'practicable'. Practicability varies, but is dependent on the resources available to the Party and on the importance of its drug problem relative to other social problems.⁶⁰ Chatterjee points out that the standard of the 'measures' available will depend generally on the socio-economic conditions prevailing in a Party and specifically on the treatment and rehabilitation infrastructure available, conditions that are bound to vary enormously.⁶¹ 'Identification', 'treatment', 'education', 'after-care', 'rehabilitation' and 'social reintegration' form stages in the restoration of the abuser's well-being. It must be noted, however, that the meanings of these terms are not the subjects of strict agreement and the dividing lines between them are not always clear. Their definition must thus be tentative, as must the suggested sequence of their application; but the blurring of the timing and content of these stages presents no practical problem and indeed reinforces the main thrust of article 20(1) which is the application of all practicable measures for the successful restoration of abusers at any time.⁶²

'Identification', the *1971 Commentary* suggests, means the identification of groups of potential abusers as well as individual abusers.⁶³ Nothing is said about which steps should be taken in the 'early identification' of such groups/individuals, but the Netherlands delegate to the 1971 Conference suggested that such steps should have the character of public health measures, and penal measures should be avoided at this stage as they would hamper the process of rehabilitation and social reintegration.⁶⁴

'Treatment' can mean the entire process of restoration, but the *1971 Commentary* suggests that in article 20(1) it means 'the process of withdrawal of the abused substances, or where necessary of inducing the abuser to restrict his intake of substances liable to be abused to such minimum quantities as are medically justified in the light of his personal condition.'⁶⁵

the identical provision in article 38(1) of the amended 1961 Convention. The latter interpretation is to be preferred as article 20 is clearly a provision for alternative measures.

⁵⁹ *1971 Commentary* at 334.

⁶⁰ *1971 Commentary* at 331.

⁶¹ Chatterjee SK *Legal Aspects of International Drug Control* (1981) at 482.

⁶² *1971 Commentary* at 333.

⁶³ *1971 Commentary* at 334. It suggests the inspection of prescriptions retained by drug-retailers and a reporting system patterned on that used for communicable diseases as two ways of achieving such identification.

⁶⁴ *1971 Records* vol.II at 20.

⁶⁵ *1971 Commentary* at 332.

The *1971 Commentary* suggests that 'education' in article 20(1) means the education of actual abusers, classes in schools, and special groups prone to substance abuse about the harmful consequences of substance abuse, and not the education of the general public in these matters.⁶⁶ This restrictive interpretation appears to be rooted in the apprehension that general drugs education will encourage drug use.

'After-care', the *1971 Commentary* suggests, consists of psychiatric, psychoanalytical or psychological measures necessary after withdrawal or restriction (in the case of a maintenance programme) of the intake of psychotropic substances.⁶⁷ Such measures may also be necessary during treatment.

'Rehabilitation', the *1971 Commentary* suggests, consists of measures designed to make the former abuser

physically, vocationally, morally and otherwise fit for living a normal life as a useful member of society (cure of diseases, physical rehabilitation of disabled persons, vocational training, supervision, accompanied by advice and encouragement, measures of gradual progress to a normal self-reliant life, etc.).⁶⁸

After-care measures may have to be continued during this stage.

'Social integration' overlaps considerably with rehabilitation, but the *1971 Commentary* suggests that while rehabilitation refers to the development of the personal qualities of the abuser, social integration refers to the measures designed to make it possible for the abuser to live in a better environment and would cover such measures as a suitable job, appropriate housing and the opportunity for the abuser to leave the environment which nurtured his abuse for one less likely to do so.⁶⁹ Such a change of environment will also prevent the abuser from being stigmatised.

Article 20(2) should be seen as an effort to iron out differences in capability between states by promotion of the training of personnel involved in the process of restoring abusers. Article 20(2) is concerned with the professional skills training of the personnel dealing with the treatment (in the generic sense) of abusers, that is, mainly health-care professionals, and not personnel engaged solely in the administrative or

⁶⁶ *1971 Commentary* at 333.

⁶⁷ *1971 Commentary* at 332.

⁶⁸ *1971 Commentary* at 332.

⁶⁹ *1971 Commentary* at 332.

penal aspects of drug control.⁷⁰ The provision states that the Parties shall as far as possible 'promote' such training. Promotion does not necessarily mean direct engagement in training, but implies the support or encouragement of such training appropriate to a particular Party's abuse problem and its educational infrastructure. Promotion 'as far as possible' depends on the means available to a particular Party and the seriousness of the threat of abuse relative to other demands on those means.⁷¹ Although training centres for rehabilitation and preventive education have been set up,⁷² the heavily qualified nature of this recommendation indicates that the authors of the 1971 Convention did not expect too much to come of it.

Article 20(3) deals with the promotion of an understanding of the drug problem by those persons who handle users and by the general public. The goal of the first part of this provision is the promotion of a broad grasp of the multi-faceted nature of the problem by personnel whose work brings them into contact with it but who are not directly involved in treatment.⁷³ The second part of article 20(2) provides that such a broad understanding is also to be promoted, where appropriate, on the part of the general public 'if there is a risk that abuse of such substances will become widespread'.⁷⁴ This promotion is essential for the formation of informed public opinion and the adoption of adequate drug policies. While couched as an obligation, this provision does not actually oblige a government of a Party to engage directly in promotion of knowledge about drug abuse; it may do so but can legitimately promote the educative work of private individuals and organisations.⁷⁵ There is no qualification on article 20(3)'s requirements in terms of practicability. Nonetheless, the *1971 Commentary* suggests that the authors of the provision expected Parties only to do what could reasonably be expected of them

⁷⁰ *1971 Commentary* at 334.

⁷¹ *1971 Commentary* at 335. The delegate from the Holy See to the 1971 Conference made a fruitless effort to urge the deletion of 'as far as possible' on the basis that states should be bound to take steps such as moral and social reconstruction to deal with the causes rather than just the symptoms of drug abuse - *1971 Records* vol.II at 20.

⁷² Yodmani C 'The role of the Association of South East Asian Nations in fighting illicit drug traffic' (1983) 35 *Bulletin on Narcotics* 97 at 99 notes that ASEAN set up training centres for rehabilitation in Malaysia and preventive education in Thailand after 1979.

⁷³ These personnel include all those to whom article 20(2) applies but, in addition, persons engaged in any aspect of drug control or whose work is only partly concerned with drug control such as police officers, social workers, psychologists, judges, probation officers, prison officers, doctors, religious workers etc., in fact anyone involved in the restorative process in any way.

⁷⁴ The *1971 Commentary* notes at 335 that this qualification was motivated by the fear of spreading substance abuse through the promotion of the 'morbid curiosity of psychologically weak persons' about them; see the comments of the Interpol delegate to the 1971 Conference - *1971 Records* vol.II at 22.

⁷⁵ *1971 Commentary* at 336.

in the light of the seriousness of their abuse problem and the means available to them for education.⁷⁶

The measures in articles 22(1)(b) and 20 of the 1971 Convention were a modernisation of the measures in the 1961 Convention. But their shortcomings are patent: article 22(1)(b) particularly falls within the general prosecutorial framework of the 1971 Convention's measures against the illicit traffic and is linked inextricably to those measures, while article 20 is hamstrung by *inter alia* constant reference to the capacity of Parties, which capacity the Parties are free to determine themselves. These provisions do not represent a dramatic departure from previous state practice with respect to the treatment of users. The former embodies the colonisation of alternative measures of dealing with drug use by the penal process, the latter signifies a failure to meaningfully divert resources away from punishment.

6.5 Alternatives to punishment in the 1972 Protocol to the 1961 Convention

Using the 1971 Convention as a model, the 1972 Protocol amended, in terms of its articles 14 and 15, the 1961 Convention, replacing the short article 38 with two provisions. The intention of the Swedish Government which introduced these amendments was that the 1961 Convention should be revised to bring it into line with modern views and to ensure that persons addicted to narcotics could receive the same treatment as psychotropic abusers.⁷⁷ It would also help to create 'a proper balance between control measures, law enforcement and so on, on the one hand, and therapeutic and rehabilitative activity on the other.'⁷⁸ Article 36(1)(b) now provides:

(b) Notwithstanding the preceding sub-paragraph, when abusers of drugs have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such

⁷⁶ 1971 *Commentary* at 336.

⁷⁷ The 1971 *Commentary* at 347 notes, however, 'that as long as the Protocol is not accepted by all Parties to the unamended Single Convention, Parties to its amended text which are simultaneously Parties to its unamended text are not able to make use of the choice because of their continued obligation under the unamended text to those Parties thereto that have not accepted the Protocol.'

⁷⁸ See the Explanatory Memorandum presented to the 24th Session of the CND where the amendments were first proposed - 1972 *Records* vol.I at 4.

abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of Article 36.

This recommendatory provision closely follows the wording of article 22(1)(b) of the Psychotropic Convention, establishing the link between penal and other measures against drug abuse. Treatment and so on 'may' serve as an alternative or as an addition to the conviction and punishment for the criminal offences listed in article 36(1)(a).⁷⁹

When allowing that the measures listed may be used in addition to conviction and punishment, article 36(1)(b) is only stating what Parties may do anyway. Although Parties also retain the discretion to substitute these measures for conviction and punishment for all offences, the legal position is complex.⁸⁰ The UN's view expressed in the *1972 Commentary* is that the purpose of article 36 demanded that such measures be substituted for conviction and punishment

only in the case of relatively minor offences such as the illicit sale of comparatively small quantities of narcotic drugs for the purpose of obtaining the financial means required to support the seller's drug dependence, or the supply with or without consideration of a small amount of a narcotic drug to a friend abusing it.⁸¹

This view is too conservative. The provision allows substitution in principle for a range of offences from the most serious case of drug trafficking to cases of simple possession.⁸² Moreover, while article 36(1)(b)'s alternatives are clearly not intended to apply to non-users, the *1972 Commentary* goes too far when it states that they may not be applied to occasional drug users but only to frequent drugs users which it classifies as

⁷⁹ *1972 Commentary* at 77.

⁸⁰ The *1972 Commentary* at 78 qualifies enthusiasm for the substitution of these alternative measures listed in article 36(1)(b), by pointing out that such substitution is not possible by Parties to both the 1961 Convention and the 1972 Protocol because of their continued obligation to Parties to the 1961 Convention which have not accepted the 1972 Protocol. The *Commentary* explains that article 39 of the 1961 Convention only allowed the substitution of more 'strict' or 'severe' measures. This qualification only subsists while there are Parties to the 1961 Convention which are not Parties to the 1972 Protocol.

⁸¹ *1972 Commentary* at 77.

⁸² Although it has been submitted above that the 1961 Convention does not demand conviction and punishment of simple possession of drugs, if the view were taken by a state that it does, article 36(1)(b) allows the substitution of conviction and punishment of simple possession with treatment etc.

those users dependent on drugs.⁸³ For one thing, not all drugs create dependency, yet education, for instance, can be of enormous long-term benefit when it prompts occasional drug users to choose to stop using drugs. The *1972 Commentary's* submission that in the light of the purpose of article 36 substitution should be made 'only if it can reasonably be hoped that the drug-dependent offender would not only be cured of his dependence, but would also not again commit a serious offence,'⁸⁴ must also be rejected. While it is true that national legislation often allows substitution only once or for a strictly limited number of times with any reversion being subject to conviction and punishment, that decision falls entirely within the Parties' discretion and speculation about cures and the commission of other serious offences may not always be good reasons for a Party to limit substitution.

The use of these measures as a substitute for conviction and punishment raises the question of when in the legal process such substitution should take place. In other words, is such substitution permissible after arrest but before prosecution, or only after prosecution but before conviction, or only after conviction? The *1972 Commentary* states that Parties are bound to prosecute and may only divert an offender to treatment and so on before conviction, reasoning that it is during the trial that the decision as to the suitability of diversion is best made.⁸⁵ It is submitted, however, that the Parties retain the discretion to divert at any stage of criminal proceedings. Diversion may well be appropriate at the arrest stage when it is patent that the offence is not serious.

The measures listed, viz.: 'treatment, education, after-care, rehabilitation and social reintegration', are steps in the general process of reintegration of the drug user. Their precise meaning is described below in the discussion of article 38(1).

The amended article 36(1)(b)'s attempt to characterise the drug problem as social and medical as well as criminal is complemented in the 1972 Protocol by the amendment of article 38. The new article 38, with the new title 'Measures against the abuse of drugs', closely follows article 20 of the 1971 Convention. It reads:

1. The Parties shall give special attention to and take all practicable measures for the prevention of abuse of drugs and for the early identification, treatment,

⁸³ *1972 Commentary* at 77.

⁸⁴ *1972 Commentary* at 77.

⁸⁵ *1972 Commentary* at 77.

education, after-care, rehabilitation and social reintegration of the persons involved, and shall co-ordinate their efforts to these ends.

2. The Parties shall as far as possible promote the training of personnel in the treatment, after-care, rehabilitation and social reintegration of abusers of drugs.

3. The Parties shall take all practicable measures to assist persons whose work so requires to gain an understanding of the problems of abuse of drugs and of its prevention, and shall also promote such understanding among the general public if there is a risk that abuse of drugs will become widespread.

Article 38(1) provides that the Parties 'shall give special attention to and take all practicable measures' for certain stated ends. The provision's use of 'shall' obliges Parties to 'give special attention' to these ends, but the measures that they 'shall' use to achieve these ends are qualified by the requirement that these measures be 'practicable'. The provision, recognising the different situations prevailing in different Parties, does not involve a binding obligation to take specified concrete steps. It becomes a question of the capacity of a Party to implement the steps to be taken to observe the principles outlined, and should that capacity exist, the priority to be given by the Party to this implementation in the light of other demands on the resources it has available to address social problems.⁸⁶

The first of the ends article 38(1) mentions is drug abuse 'prevention'. The *1972 Commentary* notes that by prevention the authors of article 38(1) mean measures other than administrative control measures or penal sanctions. It states that prevention means

all practicable economic and social measures capable of changing a social atmosphere or subcultural conditions responsible for the development of personality traits finding expression in the abuse of narcotic drugs.⁸⁷

⁸⁶ *1972 Commentary* at 84. At 86 it submits that governments need not engage directly in the implementation of these measures and may leave their implementation to private facilities. In Plenary, certain states which doubted their capacities to implement these provisions were referred to the UNFDAC for financial help - *1972 Records* vol.II at 18.

⁸⁷ *1972 Commentary* at 86.

The rest of the ends of article 38(1) constitute stages within a comprehensive treatment programme for drug users.

The first of these is the 'early identification' of drug abuse. Such identification may apply to both individual users and groups specially prone to use.⁸⁸

The 'treatment' of abusers appears to mean either the withdrawal of drugs from the user or restriction of intake through, for instance, a maintenance programme.⁸⁹ Appropriate measures may include commitment to an institution for treatment, or ambulatory treatment, depending upon the individual's condition.

The *1972 Commentary* notes that the use of 'education' in article 38(1) seems limited.⁹⁰ It appears only to apply to education about the harmful consequences of drug abuse and not to the propagation of a general understanding of the problems of drug abuse; it is directed at drug abusers and target groups such as school children, and not to the education in these matters of the general public. While the context of the term may indicate such a limited interpretation, the education of the general public in these matters is of obvious importance, and again an irrational fear of education is manifest in the *1971 Commentary's* interpretation.

'After-care', the *1972 Commentary* opines, consists of 'psychiatric, psychoanalytical or psychological measures' to treat users from whom drugs have been withdrawn or users subject to a maintenance programme.⁹¹

'Rehabilitation' implies the personal improvement of the individual user. The *1972 Commentary* states that it covers measures

required to make the former abuser of narcotic drugs physically, vocationally, morally and otherwise fit for living a normal life as a useful member of society (cure of diseases, physical rehabilitation of disabled persons, vocational training, supervision accompanied by advice and encouragement, measures of gradual progress to a normal self-reliant life, etc.).⁹²

⁸⁸ The *1972 Commentary* suggests at 86 two methods to make such identification possible, viz.: inspection of prescriptions retained by retail distributors of drugs and a reporting system based on that used for the reporting of communicable diseases.

⁸⁹ *1972 Commentary* at 84.

⁹⁰ *1972 Commentary* at 86.

⁹¹ *1972 Commentary* at 77.

⁹² *1972 Commentary* at 85.

'Social reintegration', by contrast, the *1972 Commentary* suggests, refers to environmental measures, that is, measures intended to make it possible for the rehabilitated abuser to live in an environment most favourable to him. Such measures may include provision of employment, housing, and ideally the movement of the abuser away from the environment which nurtured the abuse or from one likely to stigmatise that abuse.⁹³

For practical reasons and because there was little agreement in 1972 as to these details, article 38(1) does not detail to which types of drug abuse, when and how treatment and so on should be applied. The detailing of the measures to be used to achieve its stated ends is left entirely up to the Parties.⁹⁴ However, at the very least in respect of treatment in the generic sense (which includes after-care and so on) it would include any kind or stage of treatment that was determined to be an appropriate response to the patient's requirements. The provision does not state whether treatment and so on should be voluntary or compulsory, leaving that choice to the Parties.⁹⁵ The *1972 Commentary* is also at pains to point out that the categories of treatment are not easily distinguishable and may overlap.⁹⁶ It submits, however, that agreement on the strict demarcation of the stages is unnecessary for the purpose of appropriate implementation of the provision, and suggests that by overlapping the stages the authors of the provision were encouraging the application of 'all practicable measures' necessary for the successful treatment of abusers.⁹⁷ Finally, article 38(1) also provides for the co-ordination of Parties' efforts to these stated ends, which implies both co-ordination internally at the national level⁹⁸ and internationally as well.

Article 38(2) provides that the Parties shall as far as possible 'promote' the training of personnel in treatment, education, aftercare, rehabilitation and social reintegration of drug abusers. This provision contemplates the promotion of training of those personnel directly engaged in alternative methods of dealing with drug users, but it can be broadly interpreted to indicate the training of any person engaged in the

⁹³ *1972 Commentary* at 85.

⁹⁴ Many different approaches were espoused at the Conference; see, for example, the French delegate's comment that epidemiological study, search for causes of abuse, and treatment of abuse, varied because little was known and there was a lot of disagreement in and between states - *1972 Records* vol.II at 183. There was a clear need for more research on the subject in order to generate consensus.

⁹⁵ An Argentinean proposal that it should be compulsory was rejected - *1972 Records* vol.II at 182-185.

⁹⁶ *1972 Commentary* at 85.

⁹⁷ *1972 Commentary* at 85-6.

application of penal measures to drug offenders in these alternative methods. The *1972 Commentary* suggests that the 'promotion' of training by the Parties means the encouragement and support of this training, and that the Parties may support private initiatives and are not obliged to engage in governmental training programmes.⁹⁹ The obligation is dependent upon the Parties' capacity to undertake this training. Once again this is a question of the capacity of the Party to implement the training and the priority it can give to the training in the light of the seriousness of its drug abuse problem and other social demands on its training capacity.¹⁰⁰

Article 38(3) provides that the Parties shall assist persons whose work so requires to gain an understanding of the problems of drug abuse and of its prevention, but only to the extent that the Parties' have the capacity to do so. The Parties are also required to promote such understanding among the general public but only if there is a risk that drug abuse will become widespread, something left to the Parties' to decide. In pursuit of a more widespread understanding of the drug problem, the 'persons' contemplated by the first obligation in article 38(3) include both persons engaged directly in treatment of abusers, and persons involved in any aspect of the penal or administrative control of drug abuse.¹⁰¹ The second obligation under article 38(3), the promotion of a wider understanding of the drug problem among the general public, is dependent upon the risk of drug abuse becoming widespread, but the *1972 Commentary* suggests that such a promotion is also required if drug addiction has already become widespread.¹⁰² The *1972 Commentary* submits that there is no difference between 'promote' and 'assist' as they are used in the two obligations in article 38(3); they mean the same as 'promote' in article 38(2) which implies that governments are not obliged to engage in training or publicity directly and may rely on promoting private activities engaged in such training and publicity.¹⁰³ While Parties are limited in respect of the first obligation under article 38(3) to taking all practicable measures to assist persons working

⁹⁸ At the national level, what is contemplated is the special administration pursuant to article 17 of the 1961 Convention.

⁹⁹ *1972 Commentary* at 88.

¹⁰⁰ *1972 Commentary* at 88.

¹⁰¹ The *1972 Commentary* states at 87 that these include judicial officers, police officers, prison wardens, doctors and religious workers who deal with drug abusers, even though their work may not be concerned entirely with drug abusers.

¹⁰² *1972 Commentary* at 87. At 87-8 the *1972 Commentary* explains that the linking of the obligation to potential or actual widespread abuse is based on the assumption of the officials of some governments that the promotion of knowledge about drugs in states where their abuse is rare may actually lead to their abuse through the arousal of the curiosity of 'psychologically weak' persons.

in drug control to gain an understanding of the problems of drug abuse, no such express limitation applies in respect of the second obligation. The *1972 Commentary* submits, however, that the drafting history of article 38(2) implies a limitation of practicability on the second obligation as well.¹⁰⁴

The 1972 Protocol's provisions on alternatives to conviction and punishment reflect a modest shift from a purely administrative/penal regime to a more multidisciplinary approach to the drug problem. This shift was already evidenced by the similar provisions of the 1971 Convention. However, the 1972 Protocol goes further by making provision in article 16 for a new article 38*bis* entitled 'Agreements on Regional Centres'. The article reads:

If a Party considers it desirable as part of its action against the illicit traffic in drugs, having due regard to its constitutional, legal and administrative systems, and if it so desires, with the technical advice of the Board or the specialised agencies, it shall promote the establishment, in consultation with other interested Parties in the region, of agreements which contemplate the development of regional centres to engage in scientific research and education to combat the problems resulting from the illicit use and traffic in drugs.

As it is only 'desirable', this article does not impose any legal obligations on Parties. Nor does the article directly recommend that the Parties promote the establishment of regional centres; it simply provides that Parties should engage in such promotion if they consider it desirable as part of their action against the illicit traffic.¹⁰⁵ Together with a desire on the part of the Party, the undertaking of promotion of such centres must also have due regard to their constitutional, legal and administrative systems. Such promotion is not made subject to these systems because strict domestic limitation appears unnecessary given what is being promoted. A Party may have recourse to the technical advice of the INCB and other specialised agencies in promoting these agreements, but this does not preclude it from seeking advice elsewhere.¹⁰⁶ The promotion of these agreements is to be made 'with other interested Parties in the region' which covers all

¹⁰³ *1972 Commentary* at 88.

¹⁰⁴ *1972 Commentary* at 88-9.

¹⁰⁵ *1972 Commentary* at 90.

¹⁰⁶ *1972 Commentary* at 91.

Parties in the region including those that can benefit, those with something to offer and even non-parties.¹⁰⁷ Precisely what is to be promoted is couched in vague terms. The article envisages the promotion of agreements contemplating the development of regional centres, and not the immediate setting up of such centres. The aim of these centres is to engage in scientific research and education aimed at combating all aspects of the drug abuse problem.¹⁰⁸ Yet the *1972 Commentary* suggests that they also be used for

such operational activities as the development of regional policies for the campaign against drug abuse, the exchange of police information, or more generally the co-ordination of the illicit traffic work of the enforcement services of the States of the region and forming a centre of international information on problems of drug abuse.¹⁰⁹

What thus begins as an effort to develop regional centres to engage in research and education into drug usage falling outside the matrix of enforcement, the *1972 Commentary* would envelop within the general prohibitive thrust of the international drug control system by making such centres regional centres for drug law enforcement. This interpretation of the provision is symbolic of the colonisation by the prohibitory arms of the international system of attempts in the 1972 Protocol to put in place a multi-disciplinary approach to drug control. This is not to detract from the value of regional centres to Parties that lack the individual resources or competencies to mount effective multidisciplinary programs against drug abuse. States have signified their intention to set up regional centres,¹¹⁰ but little appears to have been done.

¹⁰⁷ *1972 Commentary* at 91.

¹⁰⁸ The *1972 Commentary* at 91-2 mentions sociological, economic, medical (including pharmacological and psychiatric), psychological, chemical, legal and governmental (including policing) aspects of the drug problem.

¹⁰⁹ *1972 Commentary* at 92.

¹¹⁰ Cagliotti CN 'The role of the South American Agreement on Narcotic Drugs and Psychotropic Substances in the fight against illicit drug trafficking' (1983) 35 *Bulletin on Narcotics* 83 at 86 notes that the 1973 South American Agreement on Narcotic Drugs and Psychotropic Substances (ASEP) contemplates such a centre.

6.6 Alternatives to punishment in the 1988 Convention

6.6.1 Introduction

The sixteen years between 1972 and 1988 did not see any remarkable development of the positive international law when it came to a multidisciplinary approach to drug control. Such development was left to the “soft” law¹¹¹ that culminated in the 1987 Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control.¹¹² Chapter one of the Outline focuses on demand reduction, while chapter four examines the problems and suggests solutions in respect of treatment and rehabilitation of users.

The Outline sets out a number of demand reduction measures, which were not translated into positive legal obligations in the 1988 Convention. These include an assessment of the size and nature of the drug problem that each state faces,¹¹³ to overcome the problem that relevant data and analysis are not available to many states. The Outline also identifies the workplace as a major arena for drug abuse and suggests steps to both publicise the risks of such usage and to identify and treat it when it occurs.¹¹⁴ The community is considered a resource in the war against drugs, and the Outline targets for support prevention programmes by civic, community, special interest groups and law enforcement agencies that stress the risks involved and provide facilities for treatment and so on.¹¹⁵ Leisure time is identified as crucial in drug usage and

¹¹¹ For example, in 1976, the CND recommended and ECOSOC passed Resolution E/Res/1934 (LVIII) on ‘Measures to reduce illicit demand for drugs’. In the belief that efforts to reduce illicit supply could not be effective without efforts to reduce illicit demand, ECOSOC recommended that states take all possible measures to reduce abuse and to provide treatment facilities for addicts, and requested WHO with the aid of UNFDAC to provide financial and technical assistance to governments to provide treatment and rehabilitation. The resolution also recommended that states incorporate measures for prevention and treatment in their integrated health programs, and urged appropriate international organisations to provide worldwide exchange of information on prevention/treatment and research.

¹¹² *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988).

¹¹³ Target 1, ‘Assessment of the extent of drug misuse and abuse’, recognises the difficulties of collecting data on drug use. It identifies the problems associated with using data from sources such as the police, and recommends that a comprehensive system of data-collection be developed utilising sophisticated methodologies for gathering and analysing information from as many sources as possible to give a more accurate reflection of the nature of the problem faced - see *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988) at 12-15. Target 2, entitled ‘Organization of comprehensive systems for the collection and evaluation of data’, focuses on the nature of the actual data collection system used and the skills of those who run it (at 16-18).

¹¹⁴ Target 4, *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988) at 22.

¹¹⁵ Target 5, *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988) at 23-25.

alternative leisure time activities are targeted as a way of coaxing especially young people away from drug usage.¹¹⁶ Finally, the media is targeted as having a particularly important role to play in encouraging drug usage and the Outline suggests that guidelines be drawn up for the portrayal of drug usage in the media.¹¹⁷

With respect to treatment and rehabilitation the Outline begins by suggesting the development of a national policy towards treatment.¹¹⁸ To this end it proposes the establishment of a national body to co-ordinate a national treatment programme. It recommends that this task be pursued by making an inventory of available methods of treatment and rehabilitation.¹¹⁹ As part of this inventory the Outline makes recommendations with respect to the evaluation of funding and apportionment of resources, the evaluation of available material and manpower and the evaluation of the effectiveness of the different treatment methods. Then it goes on to tackle the thorny problem of which treatment programmes to adopt in what circumstances, and suggests a selection of appropriate treatment programmes.¹²⁰ In doing so it tries to meld the role of government, the community, the family and the individual into an appropriate treatment programme. It recommends training for personnel working with drug addicts, both basic and specialised.¹²¹ It targets, rather vaguely, the reduction of diseases and infections transmitted through drug-using habits.¹²² It targets care for drug-addicted offenders within the criminal justice and prison systems.¹²³ The latter recommendation recognises the proliferation of prisoners through drug prohibition and suggests the studying of this part of the prison population. Finally the Outline focuses on the social reintegration of

¹¹⁶ Target 6, *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988) at 26.

¹¹⁷ Target 7, *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988) at 27.

¹¹⁸ Target 29, *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988) at 74.

¹¹⁹ Target 30, *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988) at 76.

¹²⁰ Target 31, *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988) at 78.

¹²¹ Target 32, *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988) at 80.

¹²² Target 33, *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988) at 82.

¹²³ Target 34, *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988) at 83.

users who have undergone treatment and rehabilitation, and urges the adoption of the programme most cost-effective to the community.¹²⁴

The scope and detail of the recommendations is impressive, but they betray the underdevelopment of the non-criminal justice response to drug use and the harm it causes. The recommendations tend to vagueness when, for example, they deal with difficult issues such as HIV communicated shared needle use - the provision of free needles by the authorities is not mentioned as a possible tactic. They anticipate drug control remaining in government hands, and they envisage international intervention to be co-ordination rather than direction of national authorities. The fact that the Outline places such emphasises on the gathering and analysis of data at the national level indicates how impoverished demand and harm reduction policies are at the national level because there is no shared empirical basis with which to work. Although they require further development, only a skeleton of these recommendations was transformed into “hard” law in the 1988 Convention. As the United States delegation to the 1988 Conference notes: ‘Domestic and international strategies for reducing the demand for illegal drugs are, for the most part, not the subject of the Convention.’¹²⁵

6.6.2 Punishment alternatives in article 3(4)

The 1988 Convention follows the pattern of the earlier conventions by integrating alternatives to punishment into the punishment provisions. Article 3(4) provides:

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

(c) Notwithstanding the preceding subparagraphs, in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment,

¹²⁴ Target 35, *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (1988) at 85.

¹²⁵ ‘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 26.

measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.

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

These provisions, which are entirely at the option of the Parties and serve only as a guide to them, were not even included in the draft convention and had their origin as amendments submitted by the 'Expert Group' that reviewed the draft convention.¹²⁶ They function either as an addition to conviction or punishment of serious drug trafficking offences; as an alternative to conviction or punishment only in minor cases of drug trafficking; and as an addition or alternative to conviction or punishment in respect of personal use offences.

Article 3(4)(b)'s measures are not limited to drug abusers; they apply to all offenders convicted of and punished for an article 3(1) offence. Because these measures are aimed at drug traffickers and the authors of the provision felt that it was inappropriate to substitute them for the conviction or punishment of major traffickers, Parties have the discretion to apply these measures only in addition to and not as alternatives to punishment.¹²⁷

By contrast, article 3(4)(c)'s provisions do function as alternatives to the obligatory punishment of article 3(1) offences contemplated in sub-paragraphs (a) and (b) of article 3(4), but only in 'appropriate cases of a minor nature'. The definition of such cases is left to the Parties. The wording of the measures suggested emphasises that measures for drug abusers differ from those for ordinary offenders, which suggests that this provision has in mind article 3(1) offenders who are themselves drug users and who

¹²⁶ See 'Expert Group Report', *1988 Records* vol.I at 13 and 15. At 15 reference was made to the need to preserve the application of the provision in the amended article 36(1)(b) of the 1961 Convention, the rationale being that if such provisions were left out of the 1988 Convention it might lead to the interpretation that they were not applicable. Objections were raised to the inclusion of these provisions on the basis that the new convention was concerned with the criminalisation of the illicit traffic and not all aspects of drug abuse.

¹²⁷ See the 'Expert Group Report', *1988 Records* vol.I at 15.

are engaging in trafficking in order perhaps to finance their own drug usage. But this does not limit the Parties' discretion.

Article 3(4)(d)'s provisions are alternative or additional measures, but they are limited to article 3(2) offenders - possessors, users or purchasers for personal use. A separate sub-paragraph to this effect was necessitated by the criminalisation of the aforementioned activities.¹²⁸

The measures suggested in all three provisions, viz.: 'treatment, education, aftercare, rehabilitation or social reintegration of the offender' are intended not to be exhaustive but rather only indicative of the measures which the Parties may provide.¹²⁹ 'Treatment' implies the withdrawal of the drugs from the user or the enforced restriction by the user of his intake to a maintenance dosage. 'Education' implies the education of both special target groups such as users and school children about the harmful consequences of drug abuse, and the education of the general public in this regard. 'Aftercare' implies measures of a psychiatric, psychoanalytical or psychological nature used to treat users from whom drugs have been withdrawn or users subject to a maintenance programme. 'Rehabilitation' is the process designed to render the formerly drug dependent individual physically, vocationally, morally and otherwise fit for living a normal life as a useful member of society. This may involve the cure of diseases, physical rehabilitation of disabled persons, vocational training, supervision accompanied by advice and encouragement, measures of gradual progress to a normal self-reliant life, and so on. 'Social reintegration', finally, refers to the measures taken to allow the rehabilitated drug abuser to live in an environment most favourable to him. These measures may include provision of employment, housing and ideally the movement of the abuser away from the environment which nurtured the abuse or from one likely to stigmatise that abuse.

These measures may overlap in terms of their content and the stages in the process at which they are applied. All of these measures may be applied in terms of article 3(4)(b) to traffickers¹³⁰ and in terms of article 3(4)(d) to simple users, but in respect of the minor trafficking offences in article 3(4)(c) only 'education, rehabilitation

¹²⁸ The Netherlands delegation understood that the discretion afforded by article 3(4)(d) to either punish or treat users made the Parties' discretionary powers with respect to the offence in article 3(2) wider than the Parties' discretionary powers with respect to the offences in article 3(1), *1988 Records* vol.II at 30.

¹²⁹ See the 'Expert Group Report', *1988 Records* vol.I at 15.

¹³⁰ The provision obviously contemplates that such traffickers should be users or else it is redundant.

or social reintegration' apply, while 'treatment and aftercare' apply when these offenders are users. Parties should apply the measures that are indicated in each particular case.

The stage in the trial process at which these measures in all three provisions are to be applied is made clear by their wording. They operate additionally and/or alternatively to 'conviction or punishment', which implies that they only become operative after the alleged offender has been prosecuted. The authors of the provisions obviously felt that such a decision is best made when more about the offence is known. However, Parties still retain the discretion to apply these provisions at any stage in the criminal process and it is submitted that diversion at an early stage should be used if it is appropriate to the circumstances of the particular case.

The provisions in article 3(4) relating to alternatives to punishment were an afterthought, a late attachment to an enforcement convention. They reflect in the positive law the conservative interpretation given to the similar but more broadly worded provisions in the 1961 Convention, 1971 Convention and 1972 Protocol examined above. Discretion is of course still retained by the Parties as these provisions in article 3(4) are only recommendatory, but their general tone is much more restrictive than that of the earlier provisions, which is indicative of the swing in the 1980s to a more strongly prohibitionist approach to drug control. State response has been uneven. For example, in a 1995 survey of European states, most of which were Parties to the 1988 Convention,¹³¹ Leroy found that some states had specific provisions for using treatment as an alternative to repression,¹³² others had no such specific provisions but still used treatment as an alternative in terms of their general laws,¹³³ while other states had specific legal provisions for compulsory treatment.¹³⁴

¹³¹ 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 121-124.

¹³² Germany, Spain, France, Greece, Ireland, Italy, Luxembourg and Portugal all provided for treatment measures as an alternative to punishment to be handed down at any stage of the procedure, viz.: before the start of proceedings; instead of starting on the initiative of the prosecutor; at the pronouncement of sentence by the court; after judgement; and when enforcing a penalty at either the prosecutor's or judge's discretion - *op cit* at 121.

¹³³ Belgium, Denmark, the Netherlands and the UK all relied on their ordinary law to encourage or compel users to seek treatment, usually through suspension of sentence during probation and by suspending sentences coupled with tests or conditional discharge - *op cit* at 122.

¹³⁴ Spain, Italy, Denmark, France, Luxembourg, Portugal and the UK all provided for the compulsory treatment through hospitalisation etc. on the order of a judicial official outside of criminal proceedings. States such as Germany, France, Greece, Ireland and Italy also provided for the compulsory committal of offenders in criminal proceedings - *op cit* at 123-124.

6.6.3 Demand reduction in the 1988 Convention

Other than the provisions in article 3(4), the 1988 Convention is not concerned with alternative methods of dealing with drug use. Article 14(4) contains the only other reference to such methods. This provision which is aimed at the reduction of demand for illicit drugs is contained within article 14, the bulk of which sets out the general provisions in the 1988 Convention aimed at source reduction (examined in Chapter Five above).¹³⁵ Article 14(4) it is subject to article 14(1) which makes it clear that the reduction measures that Parties take as a result of article 14(4)

shall not be less stringent than the provisions applicable ... to the elimination of illicit demand for narcotic drugs and psychotropic substances under the provisions of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention.

Article 14(4) reads:

The Parties shall adopt appropriate measures aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances, with a view to reducing human suffering and eliminating financial incentives for illicit traffic. These measures may be based, *inter alia*, on the recommendations of the United Nations, specialised agencies of the United Nations such as the World Health Organisation, and other competent international organisations, and on the Comprehensive Multidisciplinary Outline adopted by the International Conference on Drug Abuse and Illicit Trafficking, held in 1987, as it pertains to governmental and non-governmental agencies and private efforts in the fields of prevention, treatment and rehabilitation. The Parties may enter bilateral or multilateral agreements aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances.

¹³⁵ This provision was not contained in the original draft convention, but was included at the Review Group stage - *1988 Records* vol.I at 83.

The aim of article 14(4) is to correct the imbalance between supply reduction and demand reduction measures in the 1988 Convention.¹³⁶ It recognises that ‘prevention, treatment and rehabilitation’ of offenders are valid forms of demand reduction. The notable exception is education, which was mentioned in earlier drafts, but omitted here.¹³⁷ While the Parties are obliged to adopt measures aimed at demand reduction, the measures to be adopted are at their discretion, although they may have reference to the recommendations of the UN, its specialised agencies and most significantly the 1987 ‘Comprehensive Multidisciplinary Outline’.¹³⁸ Article 14(4) is the strongest attempt in the 1988 Convention to enforce UN policy with respect to demand reduction. But article 14(4) is recommendatory because there was a strong sense at the 1988 Conference that it was not the business of the Convention to spell out the measures to be used by the Parties, and reference to the Outline did not mean that a Party was obliged to follow its recommendations.¹³⁹ The provision’s optional nature serves as the escape route for Parties unwilling to address the roots of the domestic demand for drugs. Nonetheless, it is submitted that Parties that have a drug demand problem must address that problem, using the “soft” law of the Comprehensive Multidisciplinary Outline as a guide, and taking into account the seriousness of the problem and the reasonableness of devoting their resources to the ‘elimination or reduction’ of demand. If not, they will not be acting *bona fide* with regard to article 14(4).

The only other provision of the 1988 Convention that touches upon alternative approaches to drug control is article 14(3)(a) which makes reference to rural development programmes when it expands on its general invitation to Parties to co-operate in eradication of illicit drug bearing plants. By referring to integrated rural development programmes ‘leading to economically viable alternatives to illicit cultivation’ crop substitution is necessarily implied. It also notes that factors such as market access, resource availability and prevailing socio-economic conditions should be taken into account before rural development programmes are implemented. But this provision is optional, and in the context of the 1988 Convention, is focused on

¹³⁶ Statement of the Mexican delegate - 1988 Records vol.II at 304.

¹³⁷ See the ‘Expert Group Report’, 1988 Records vol.I at 26.

¹³⁸ The relevant chapter of the Comprehensive Multidisciplinary Outline aimed at the prevention and reduction of the illicit demand for narcotic drugs and psychotropic substances is discussed above.

¹³⁹ 1988 Records vol.II at 304.

suppression of the illicit cultivation through enforcement action, and so it has been dealt with in the enforcement chapter, Chapter Five.

6.7 International provisions for alternatives to conviction and punishment in conclusion

The 1961 Convention focused on criminal repression. The 1971 Convention and the 1972 Protocol adopted a moderately holistic approach then in vogue at a national level. The 1988 Convention represents a swing back to a reemphasis on criminalisation and a deemphasis on alternatives. At all times, however, the international drug control system has remained primarily penal-sanctions oriented and only secondarily treatment-rehabilitation directed. Efforts to integrate these two approaches as equal partners in the drug conventions have been unsuccessful. They have been linked in international provisions, but the identity of the junior partner is obvious. This uneasy relationship reflects the uneasy relationship at the national level between treatment programmes and the criminal justice system.¹⁴⁰ Although law enforcement agencies have, because of the obvious limitations of the punitive approach, turned increasingly to treatment programmes through referral schemes, Ghodse notes that the difference in goals - abstinence as opposed to health - make working together difficult.¹⁴¹ Moreover, integrated approaches always tend to place criminal justice in the position of senior partner in this relationship. A great deal of work needs to be done to raise the profile of alternative approaches to the drug problem in black letter international law, if the existing orthodoxy is to change.

A number of problems beset this task. One of the problems is that there is a paucity of information about the extent to which Parties actually do provide alternatives to punishment.¹⁴² The extent of the application of these measures is simply unknown.¹⁴³

¹⁴⁰ Ghodse H *The Criminal Justice System and the Treatment of Drug Misuse* (unpublished paper, New Delhi Global Drugs Law Conference, 1997) explores this relationship.

¹⁴¹ *Op cit* (1997) at 3 and 5.

¹⁴² See the INCB's *Report of the International Narcotics Control Board for 1994* UN Doc. E/INCB/1994/1 at 6 where it stated that it did not know the extent to which Parties made provision for such alternatives.

¹⁴³ Something the INCB admitted in 1995 - *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 22.

Another related issue is the capability of the majority of Parties and especially those from the developing world to implement these alternative provisions. This is a question of the economic resources such states can devote to alternative methods of dealing with abusers, and the priority which they attach to these programmes. At present, credible demand reduction and treatment programmes are beyond the reach of most developing states,¹⁴⁴ and the supply of technical assistance through the UN an inadequate substitute. Bassiouni suggested prior to the conclusion of the 1988 Convention that the way to overcome problems of capacity is to attach to a comprehensive convention on drug control a proposed model statute that would set out provisions for the treatment of abusers in detail and which could be adopted by each state according to its national legal system.¹⁴⁵ The idea is to force states to direct resources towards treatment and so on. Yet the international community's response has been to relegate alternatives to the status of recommendations, the most obvious example being the failure of the 1987 Ministerial Conference in Vienna to confirm the Comprehensive Multi-disciplinary Outline as a multilateral convention. This is not surprising given the INCB's opinion that while supply reduction can be codified in international law, 'demand reduction methods ... cannot be "standardised" by legal documents.'¹⁴⁶ The UN's latest efforts are the measures adopted by the General Assembly's Special Session on Countering the World Drug Problem held in June 1998.¹⁴⁷ But while the international community recognises the need for such measures, it again has not accorded them the legal status they deserve. They are left largely in the realm of soft law. The reason for this, Ghodse argues, is that to be successful demand reduction strategies must be socioculturally sensitive to the norms of the community to

¹⁴⁴ See, for example, the situation in Nigeria - DEA *Nigeria Country Report* (1995). The DEA comments that the Nigerian National Drug Law Enforcement Agency's demand reduction programme 'primarily consists of distribution of posters with anti-drug slogans and an occasional newspaper article.'

¹⁴⁵ *Op cit* (1986) 507 at 523.

¹⁴⁶ INCB *Report of the International Narcotics Control Board for 1994* UN Doc. E/INCB/1993/1 at 4. The INCB does not believe that a demand reduction treaty can be agreed upon - 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 6.

¹⁴⁷ The Declaration on the Guiding Principles of Drug Demand Reduction, apart from exhorting the adoption of the measures in article 14(4) of the 1988 Convention, contains standards to assist governments to establish drug demand reduction programmes by 2008 and standards to guide governments to set up prevention, treatment and rehabilitation programmes. It also calls for the provision of adequate resources for such programmes. The Political Declaration adopted simultaneously calls for UN member states to 'achieve significant and measurable results in demand reduction', while the Resolution on Measures to Enhance International Co-operation to Counter the World Drug Problem contains an Action Plan on

which they are being applied.¹⁴⁸ It seems, by contrast, that supply reduction strategies, as manifested in the drug conventions, need not be. But there is no logical reason why demand reduction should be local and enforced politically, supply reduction global and enforced legally. A more compelling reason why treatment and so on is not able to be translated into binding international law is that it implies a withdrawal of authority and funding from the enforcement of prohibition. Not surprisingly, examination of the steps taken by the UN General Assembly at its 1998 Special Session on Drugs reveals that they do not mark a watershed in the UN's attitude to alternative approaches to drug control. Law enforcement remains the dominant concern.¹⁴⁹

It is submitted, however, that the greatest shortcoming of the provisions for demand reduction in the drug conventions are that they focus on the individual pathological problems of drug users and not upon the structural problems of modern society. For example, using treatment and rehabilitation as curative methods assumes that society is healthy. These methods have been criticised as having little long term effects on demand.¹⁵⁰ International drug control should be more closely integrated into international development.

Finally, the conventions have been criticised for not defining precisely the scope and main characteristics of the alternatives it recommends. The INCB fears that this leaves open the possibility for 'interpretations that would not be in line with the spirit of the conventions.'¹⁵¹ The spectre of other policies beyond supply and demand reduction such as harm reduction is not welcomed by organs of the international drug control system such as the INCB. It sees the absence of implementation of either penal or alternative methods to users as an entry point of de facto legalisation, which it regards as undesirable.¹⁵² In a sense then, the paradigm is fixed, supply and demand reduction, in an unequal relationship, with all else excluded.

International Co-operation and Alternative Development (Part E). See generally GA Press Release GA/9423 10 June 1998.

¹⁴⁸ *Op cit* (1997) at 7.

¹⁴⁹ The 1998 measures emphasise the application of the existing features of the international supply reduction system - extradition, mutual legal assistance etc. Thus when addressing the issue of putting together alternative development programmes for areas under illicit cultivation, Part E of the Action Plan on International Co-operation on the Eradication of Illicit Drug Crops and Alternative Development urges governments to ensure that such measures are complemented by law enforcement measures - see GA Press Release GA/9423.

¹⁵⁰ Rodd *op cit* at 57.

¹⁵¹ INCB *Report of the International Narcotics Control Board for 1994* UN Doc. E/INCB/1994/1 at 6.

¹⁵² 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 21.

CHAPTER SEVEN: ORGANISATION, SUPERVISION AND EXECUTION OF DRUG CONTROL

7.1 Introduction

This chapter examines the various organisations that supervise and execute the international legal system suppressing illicit drugs. The focus is on the specialist drug control organs that derive their authority from the international drug conventions, and on the general United Nations bodies that derive their authority from the UN Charter and the decisions of ECOSOC. Mention is also made of Interpol and significant regional and national drug control organs. Non-governmental organisations operating in the drug control field specialise mainly in promoting drug abuse prevention and awareness, treatment and education, and as such fall outside the focus of this chapter which is on the organs involved with the use of the criminal law to suppress drugs. This discussion aims only to give the reader some idea of: (i) the nature and function of each of these organs; (ii) their role in the supervision of the drug conventions and especially of the information system; and (iii) the execution of the illicit drug control system against Parties to the system and non-parties alike. This discussion does not pretend to provide an encyclopedic exposition of the organisations involved in drug control at the international level.¹ It tries only to place the key organs within the system and to draw some conclusions about the nature of the system itself.

7.2 United Nations organs

7.2.1 General

Most of these organs are forums for debate and information exchange. While some deliver services, they are not usually directly involved in enforcement operations.² But they have played an important role in the preparation of a legal basis for the illicit drug control system. Being non-state organs they tend to act fairly flexibly and to expand the

¹ Sheptycki J 'Law enforcement, justice and democracy in the transnational arena: reflections on the war on drugs' (1996) 24 *Int. Jnl of the Sociology of Law* 61 at 65 notes that there are many such organisations about which very little is known.

² Anderson M *Policing the World* (1989) 2.

scope of their terms of reference.³ Ostensibly neutral, it would, however, be naive to believe that they act in an entirely neutral manner. The history of international drug control has shown that these organs are often less agents of change in their own right than instruments of change being used by competing national interests.

7.2.2 ECOSOC⁴

As a non-legislative framework for discussion and recommendation to UN member states about the illicit drug problem, ECOSOC plays both a direct and indirect role in the drug control system. In terms of article 62 of the UN Charter, ECOSOC initiates studies, drafts conventions and calls conferences on the illicit drug problem. Article 68 of the UN Charter gives it the power to set up development programs and commissions to perform its functions, one of which is to implement UN drug policy.⁵ Typically, ECOSOC functions as supervisor of the UN drug control system. Its relationship to the CND is discussed below. It is enough to note that the CND has more effective power in the sphere of drug control than ECOSOC itself and has assumed a functional independence from it.⁶ The INCB submits annual reports to ECOSOC to keep it and the CND informed of the drug control situation and state compliance with the drug conventions. ECOSOC has, in terms of article 71 of the UN Charter, a formal consultative relationship with IGOs and NGOs involved in illicit drug control.

7.2.3 The United Nations Commission on Narcotic Drugs (CND)⁷

Established in 1946 as a functional commission of ECOSOC, the CND operates under its authority and direction to assist it in carrying out its UN Charter functions.⁸ However, the CND also has an explicit functional role set out in the drug conventions.⁹ It considers the changing nature and control of the illicit drug traffic, promotes international agreements for that control, and plays a role in the exchange of related information. It

³ See Lowes PD *The Genesis of International Narcotics Control* (1965) at 148.

⁴ See generally Chatterjee SK *Legal Aspects of International Drug Control* (1981) at 228-233.

⁵ In terms of article 66 of the UN Charter, ECOSOC is required to carry out General Assembly recommendations with respect to drugs. It also co-ordinates the functions of specialised IGOs involved in drugs work such as the WHO.

⁶ Chatterjee *op cit* at 232.

⁷ See generally May HL 'Twenty years of narcotics control under the United Nations' (1966) 18 *Bulletin on Narcotics* 4-11; Chatterjee *op cit* at 234-256.

⁸ ECOSOC Resolution I(IX) amended by 199 (VIII). Article 62 of the Charter provides ECOSOC with a general authority to impose functions on the CND.

maintains links with the other international organisations involved in the control of drugs. The CND is an advisory organ of ECOSOC, and thus its decisions are subject to ECOSOC confirmation unless it has been given a specific function under the drug conventions. It is the central policy making body within the UN dealing with drug control. Membership has grown from 15 in 1946 to 53 in 1991, broadening the CND's representational base in order to keep pace with the global expansion of drug abuse. CND members are mainly government representatives whose appointment is not subject to UN approval, thus making the CND representative of the opinions of governments involved.

The CND may ask any UN member to participate in its deliberations when the problem concerns that state. As a functional commission of ECOSOC the CND must hold at least one session annually, and it meets once a year for three weeks in Vienna. It sometimes holds a second meeting for budgetary purposes. It can and has set up sub-committees to do work of a specialist nature. It reports to ECOSOC on the work of each session and when making a recommendation does so in the form of a draft resolution of ECOSOC. The CND is heavily reliant on the UNDCP (United Nations Drug Control Programme) for administrative and technical back-up.

The scope of the CND's work under the UN Charter was enlarged in 1991.¹⁰ Its functions significant with regard to the illicit traffic include advising ECOSOC on all matters relating to drug control and, supervision of the application of the drug conventions and the development of international drug control law. It also considers any changes that may be required in the existing international drug control system. It reviews the implementation of the General Assembly's various Action Plans on Drug Abuse Control, governs the UNDCP, and approves the budget of the programme of the Fund of UNDCP.

Under the drug conventions, the CND's functions as applied to the illicit traffic include being authorised in terms of article 8 of the 1961 Convention (and as amended) and article 17 of the 1971 Convention to consider all matters affecting the conventions' aim of suppression of the illicit traffic, and the implementation of their provisions relating to the illicit traffic, and to make appropriate recommendations. The 1988 Convention makes similar provision in article 21. Article 21's opening wording provides

⁹ For example, under article 5 of the 1961 Convention the Parties entrust to the CND and INCB the functions assigned to them under the Convention.

that the CND is authorised to consider all matters pertaining to the aims of the 1988 Convention. Article 21 then sets out matters of particular concern. Article 21(a) allows the CND to review the operation of the 1988 Convention on the basis of the information submitted to it by Parties in accordance with article 20. Article 21(b) allows the CND to make suggestions and general recommendations based on the examination of the information it receives from the Parties. Article 21(c) allows the CND to call the attention of the INCB to any matters which may be relevant to the INCB's functions. Article 21(d) obliges the CND to take appropriate action on any matter referred to it by the INCB under article 22(1)(b). Article 21(e) allows the CND to amend Tables I and II, in conformity with the procedures laid down in article 12. Article 21(f) allows the CND to draw the attention of non-Parties to decisions and recommendations that it adopts under the 1988 Convention, with a view to their considering taking appropriate action.

In carrying out these functions, the CND reviews and analyses the global illicit drug control situation and monitors application of the drug conventions. It makes recommendations to strengthen international drug control and acts against illicit production, traffic and manufacture of drugs through gathering information and designing methods of suppression. The CND and the UNDCP have since 1988 taken a number of steps to facilitate the implementation of the 1988 Convention, in particular with respect to mutual legal assistance, money-laundering, control of precursors, and illicit traffic by sea. The CND has also become increasingly involved in the furnishing of technical assistance to states with drug control problems either through financial assistance or training.¹¹

7.2.4 Subsidiary bodies of the CND

To encourage closer regional collaboration in drug law enforcement, the CND has since the 1970s established five subordinate bodies. In 1974, it established the Subcommission on Illicit Drug Traffic and Related Matters in the Near and Middle East, and the Meeting of Heads of National Drug Law Enforcement Agencies (HONLEA), Asia and the Pacific. Other HONLEA meetings followed. HONLEA, Africa, met in 1985; HONLEA, Latin America and the Caribbean, met in 1987; and HONLEA, Europe, met in 1990.

¹⁰ ECOSOC Resolution 38 of 1991 and General Assembly Resolution 46/185 C, section XVI.

¹¹ In terms of article 14*bis* of the 1961 Convention.

International HONLEA meetings also take place.¹² Membership in HONLEA is based on membership in ECOSOC's regional commissions; membership in the Subcommittee on Illicit Drug Traffic is recommended by the CND and approved by ECOSOC. Observers from states outside the regions and IGOs with a mandate in drug law enforcement or related areas attend the meetings of these subordinate bodies. The purpose of this global network of organisations is to identify priority issues facing drug law enforcement agencies in each region. *Ad hoc* working groups discuss these priorities. Recommendations are prepared for government action and participants report on action taken in terms of recommendations adopted at previous meetings. The recommendations adopted are then brought to the attention of the CND.

7.2.5 The United Nations Drug Control Programme (UNDCP)

Formerly the Division of Narcotic Drugs or DND, the UNDCP was established by the General Assembly in 1990¹³ as the main unit of the UN Secretariat responsible for the co-ordination and direction of UN action against illicit drugs. Although since 1997 it has fallen under the management of the UN Office for Drug Control and Crime Prevention (ODCCP), it has maintained its independent existence within the UN's new structures. It carries out most of the duties assigned to the Secretary-General in respect of drug control under the drug conventions and UN resolutions, and provides administrative support for the CND, for HONLEA meetings and for the INCB. It prepares much of the CND's documentation, its senior officials attend CND meetings, many CND resolutions originate with it, and it follows up on the CND's decisions. It plays a significant part in the preparation of draft conventions. The UNDCP has also become increasingly involved in advising Parties concerning accession to and implementation of the drug conventions, and in giving them legal assistance in drafting national laws. One of its main functions is the formulation and execution of technical co-operation programmes relating to drug control both at the international and national levels. The UNDCP manages the 'Fund of the UNDCP'¹⁴ which serves as a trust fund aimed at solving drug problems without diminishing the UN's other resources. The Fund gets its money from

¹² See 'Drugs: law enforcement and interdiction' (1989) 15 *CLB* 1463-1464, for the resolutions of the 1989 meeting which was attended by officers from more than 100 states.

¹³ General Assembly Resolution 45/179.

¹⁴ The Fund was created in 1990 and subsumed the United Nations Fund for Drug Abuse Control (UNFDAC).

governments, NGOs, and private sources. The Fund is used to support treatment/rehabilitation programmes, education programmes, drug research and identification test development, and laboratory training for chemists. It is also employed to assist national law-enforcement authorities in the provision of training, to provide developing states with vehicles and telecommunications equipment and other materials for the policing of drug trafficking, and to sponsor meetings for the exchange of information about drug abuse trends and enforcement techniques. The UNDCP also functions as a drug control research centre. As part of this function it controls the UN Narcotics Laboratory which *inter alia* determines the origins of confiscated drugs thus building up a geographical picture of the drug trade.¹⁵ To these ends the UNDCP is structured along functional lines.¹⁶ Most significantly, from a practical point of view, it supports a global network of 'Field Offices' located in states that face complex drug-related problems. These units assist these states and monitor their application of the

¹⁵ The Laboratory periodically produces a *List of Narcotic Drugs under International Control*.

¹⁶ The independent 'Office of the Executive Director' provides support for the Executive Director. The rest of the UNDCP falls roughly into divisions, branches and sections.

1) The Division for Programme Planning and Support comprises of two branches. The Intergovernmental Affairs Branch consists of the Commission and Secretariat Services Section and the Legal Affairs Section. The CND's Secretariat provides the CND with secretariat services, substantive advice and prepares documents for CND meetings such as draft resolutions and reports and is involved in a range of other activities including the collection of information and scheduling of substances. It produces the publication *Competent National Authorities under the International Drug Control Treaties*. The Programme Support Service consists of the Planning and Evaluation Section, the Budget and Administration Support Unit, and the Financial Control and Reporting Unit.

2) The Division of Treaty Implementation and Policy Development is concerned with carrying out the responsibilities of the UN Secretary-General under the drug conventions and planning the UNDCP's strategic development. It contains the Secretariat of the INCB, which provides secretariat services to the INCB, and two branches. The Information Resources Development Branch runs a sophisticated system for the exchange of information. The Policy Development and Methodology Branch consists of a number of sections. The Demand Reduction Section's expertise embraces drug abuse, education, treatment, rehabilitation, social re-integration, and community mobilisation. The Supply Reduction and Law Enforcement Section's expertise embraces suppressing the illicit traffic, money laundering, diversion of precursors and licit drugs, and promoting advanced technological aids, safe methods of eradication of illicit plants and crop replacement. The Research Section is the focal point for drug abuse control-related research. The Laboratory Section runs the UN's laboratory.

3) The Division for Operations and External Resources is split into three. This division is responsible for co-ordination of the UNDCP's technical co-operation activities and for assisting governments in the development and implementation of drug control programmes. The 'Operational Activities Branch' actually carries out many of these technical co-operation functions. It comprises of sections: the Africa Section, the Asia I Section [West and Central Asia], the Europe and Middle East Section, the Latin American and Caribbean Section and the Legal Advisory Group. These 'Regional Sections' guide the 'Field Offices' in assisting governments in their drug control policies and are responsible for managing drug abuse control programmes supported by the UNDCP, and together with Field Offices serve as the channels for communications between the UNDCP and governments on operational activities. The Legal Advisory Group assists states with questions of legal compliance with their obligations under the drug conventions. The Interagency Co-ordination, NGO liaison and Resources Mobilisation Branch and

drug conventions. Although not heavily involved in the direct policing of the illicit traffic, this work has grown.

7.2.6 The CND's/UNDCP's information system

7.2.6.1 Introduction

The CND/UNDCP are at the centre of an information system on drug control, and thus it seems appropriate to discuss that system here. The system grows out of the provisions of the international drug conventions which make it obligatory for Parties to transmit important information on the drug problem to the Secretary General and thus to the CND. Only some of these provisions elicit information concerned with the illicit traffic and these are discussed below.

7.2.6.2 Furnishing information under the 1961 Convention

Article 18 of the 1961 Convention, entitled 'Information to be Furnished by Parties', makes provision for the furnishing of information on narcotic drug control to the UN Secretary General by the Parties, and this provision includes within it obligations to provide information on the illicit traffic. It reads:

1. The Parties shall furnish to the Secretary-General such information as the Commission may request as being necessary for the performance of its functions and in particular:

(a) An annual report on the working of the Convention within each of their territories;

(b) The text of all laws and regulations from time to time promulgated in order to give effect to this Convention;

(c) Such particulars as the Commission shall determine concerning cases of illicit traffic, including particulars of each case of illicit traffic discovered which may

be of importance, because of the light thrown on the source from which drugs are obtained for the illicit traffic, or because of the quantities involved or the method employed by illicit traffickers;

(d)...

2. The Parties shall furnish the information referred to in the preceding paragraph in such a manner and by such dates and use such forms as the Commission may request.

In principle, the CND must request Parties to the 1961 Convention to provide it with the information necessary for it to carry out its functions, although the *1961 Commentary* submits that the specific forms of information set out in article 18(1)'s sub-paragraphs must be furnished without the necessity of a specific request from the CND.¹⁷ Whether general or specific, once made, the request is binding on the Parties, although state practice indicates that Parties are only bound to supply information at their disposal or which they can acquire with a reasonable effort.¹⁸ The *1961 Commentary* suggests that non-parties are bound as UN members to help solve the international drug problem and that supplying information may fall under this general obligation, while non-parties that are not UN members may be bound to supply information if drug control generally can be proved to be part of customary international law.¹⁹

Article 18(1)(a) provides for the furnishing of an annual report by the Parties on the operation of the 1961 Convention within their territories. In terms of this provision, Parties have to supply information on the annual impact of the Convention's provisions for the suppression of the illicit traffic. This information, which augments the specific information required by article 18(1)(c), includes

statistical figures on drug abuse (classified by agent of abuse, source of agent of abuse, origin of addiction, occupation, age and sex); and illicit traffic with many

¹⁷ *1961 Commentary* at 209. It explains that this is because the CND is obliged to determine the particulars of the illicit traffic based on the information supplied in terms of article 18(1)(c) and specific information is necessary for the performance of the CND's work.

¹⁸ *1961 Commentary* at 209-210.

¹⁹ *1961 Commentary* at 210 generally.

details, such as sources of supply of the traffic, quantities of each drug seized, prosecutions, convictions, penalties, prices in the illicit traffic, methods used by traffickers and disposal of seized drugs.²⁰

Article 18(1)(b)'s requirement that the Parties submit the texts of all laws and regulations promulgated to give effect to the Convention includes the criminal laws giving effect to the Convention's penal provisions. The obligation to supply this information is ongoing - 'from time to time' - and thus amendments to the legislation must also be supplied as they are made. This information is important for the UNDCP to build up its national drugs legislation register, a gargantuan, unfinished, task.²¹ Moreover, article 18 does not oblige the Parties to supply information on the enforcement of these laws and how rigorously violations have been punished, so the picture generated is incomplete.

Article 18(1)(c) provides a critical tool for the CND because it both obliges Parties to provide information on cases of the illicit traffic, and it specifies that the CND may demand the particulars of important cases. Under both the general and the specific obligation it is the CND and not the Parties that decides the type of cases that should be reported on and the particular information that should be provided. Moreover, in respect of the specific obligation the Parties must give the CND the particular information it decides that it requires on each, not actually, but only potentially, important drug trafficking case that they discover. Cases are potentially important if they illuminate illicit drug sources, or because of the quantities of drugs involved, or because of the methods used by the traffickers.

The information furnished by Parties under article 18 is furnished to the UN Secretariat (now UNDCP). In terms of article 18(2), the CND determines the manner in which the Parties must supply the information, the precise dates by which it must be

²⁰ 1961 *Commentary* at 213.

²¹ The UNDCP issues the E/NL document series of published national laws and regulations concerning narcotic drugs and psychotropic substances on a continuing basis. The UNDCP regularly provides a summary of these laws and regulations and produces a cumulative index and tabulation of changes in the scope of control, eg. the *Cumulative Index 1987-1990* (UN Doc. E/NL.1990.Index, UN Sales No. E.91.XI.5, New York, 1991). This system of information covers the laws issued from 1947 to 1990. Nonetheless, in-depth analysis of specific areas of national application of international law is not available. For instance, Linke R, Epp HJ, Kabelka E *Extradition for Drug Related Offences* (1985) at 35 complained that in spite of this provision there was, for instance, no comprehensive overview of existing extradition law.

furnished and the form to be used.²² The CND may require in terms of article 18(2) that reports of the illicit traffic made in terms of article 18(1)(c) that are considered important be made 'as soon as possible'.²³ But the information is usually provided in a Party's annual report as required by article 18(1)(a). The form the CND presents to Parties for reports on individual cases of drug trafficking requires them to provide a lot of detail.²⁴ Summaries of reports are used by the CND in its annual deliberations and distributed to governments on request. The summaries are used to develop policy responses to the illicit drug problem and to monitor the effectiveness of law enforcement.²⁵ Individual reports are not distributed to other Parties and are not used to aid international enforcement co-operation on individual cases. The *1961 Commentary* explains:

Actual international police co-operation takes place on a bilateral basis through the national police services concerned, and on a multilateral basis through ... Interpol.

The only concession to direct enforcement involvement is:

In the ... form which the Commission has prepared for reports on individual cases of the illicit traffic, Governments are invited to use the form not only for reports furnished to the Secretary-General of the United Nations, but also for reports to be made to Interpol. It is requested in the form that when the report is forwarded to that organisation, photographs, finger-prints and records or previous convictions of the illicit traffickers should be attached.²⁶

²² *1961 Commentary* at 219.

²³ *1961 Commentary* at 220.

²⁴ They are required to report on among other things the type and mass of the drug seized, the date and place of the illicit transaction or seizure, packaging, labelling and trade mark of the seized substance, type of transportation used by the trafficker including name, owner, nationality and registration of ship, aircraft or other vehicle involved, route followed by the drug, destination, place of acquisition of the drug, place of manufacture of the drug or place where the plant was cultivated from which the drug was obtained, means by which the drug was obtained (purchase, theft etc.), in cases of clandestine laboratories the apparatus seized, personal data on the trafficker (name, date and place of birth, nationality, occupation, residence, whether arrested or at large, etc.) and judicial or administrative measures taken against him - see the *1961 Commentary* at 216-217.

²⁵ *1961 Commentary* at 216.

²⁶ *1961 Commentary* at 216.

The 1961 Convention also gives the INCB a role in the collection of information about the illicit traffic. Article 20(1)(e) provides:

1. The Parties shall furnish to the Board for each of their territories, in the manner and form prescribed by the Board, statistical returns on forms supplied by it in respect of the following matters:

....

(e) Seizure of drugs and disposal thereof;

This information forms part of the general statistical returns Parties furnish to the INCB. The purpose of this provision is to reveal the extent of the illicit traffic and the effectiveness of enforcement action against it.²⁷ Thus all seizures of illicit drugs²⁸ must be taken into account for the purpose of calculating the figures anticipated by article 20(1)(e), and not merely those resulting from cases considered important under article 18(1)(c) and consequently reported to the UNDCP. Article 20(1)(e) obliges the INCB to supply Parties and non-Parties alike with the forms to be used to furnish this information. The INCB prescribes whether the information supplied must be the pure drug content of the particular substance seized or some other measure.²⁹ With regard to the disposal of drugs, the INCB asks the Party to indicate separately the quantities of drugs destroyed, taken over by the Government for special purposes or utilised for licit purposes in that year even if seized previously. The INCB has continually complained about the repeated failure of Parties to furnish the information required in terms of article 20(1)(e).³⁰

²⁷ *1961 Commentary* at 243.

²⁸ Excluding cannabis leaves without tops as they are not a drug in terms of article 1(1)(b) of the Convention, and drugs contained within preparations listed in Schedule III because of article 2(4).

²⁹ See the *1961 Commentary* at 245 generally.

³⁰ It reminds governments of this failure and continually compares the seizure data presented by Parties with information made available by Interpol - INCB *Report of the International Narcotics Control Board for 1995* UN Doc. E/INCB/1995/1 at 11.

7.2.6.3 Furnishing information under the 1971 Convention

The 1971 Convention requires less information from the Parties on criminal laws and activities than does the 1961 Convention.³¹ Modelled on article 18 of the 1961 Convention, article 16, entitled 'Reports to be Furnished by the Parties', provides for the general reporting function of the Parties. The information it obliges Parties to provide to the UN Secretariat includes, in terms of article 16 paragraphs (1) and (3) specific information on the illicit traffic. Article 16 paragraphs (1) and (6) state:

1. The Parties shall furnish to the Secretary-General such information as the Commission may request as being necessary for the performance of its functions, and in particular an annual report regarding the working of the Convention in their territories including information on:

(a) important changes in their laws and regulations concerning psychotropic substances;

(b) significant developments in the abuse of and the illicit traffic in psychotropic substances within their territories.

...

6. The Parties shall furnish the information referred to in paragraph 1 ... in such a manner and by such dates as the Commission or the Board may request.

There appears to be a general duty in terms of article 16(1) on the Parties to furnish at the CND's request the information necessary for the CND to function, including information on the illicit traffic. This obligation is vague and appears to give the CND a right to unlimited information.³² There is no specific provision in the 1971 Convention for the furnishing of statistical data on the illicit traffic to the INCB. The *1971 Commentary* suggests, however, that the general obligation in article 16(1) also covers requests for statistical data relating to the extent of the illicit traffic and of abuse

³¹ For example, no provision is made for the return of statistical data to the INCB on the quantities of psychotropic substances seized from the illicit traffic and disposed of by the Parties because there is no estimates system in the 1971 Convention.

³² The concern of the Australian delegate to the 1971 Conference - *1971 Records* vol.II at 157.

of psychotropic substances.³³ But Parties are only bound to furnish the CND with such information on the illicit traffic that they have at their disposal or are able to gather by a reasonable effort.³⁴ According to the *1971 Commentary*, the CND can require such information from non-parties that are Party to the 1961 Convention because it obliges them to furnish the data under article 18(1), or if they are not party to either Convention but are UN members, because their membership of the UN obliges them to co-operate in solving the international social problem of drug abuse.³⁵

The second obligation created by article 16(1) is a specific duty on the Parties to provide, in addition to the information furnished under the general obligation,³⁶ an annual report³⁷ on the working of the Convention in their territories which must include specific information in terms of sub-paragraphs (a) and (b). Article 16(1)(a) obliges them to report important changes in their laws and regulations concerning psychotropic substances which must include important changes in their criminal laws and regulations.³⁸ Article 16(1)(b) obliges them to report significant developments in the abuse of and illicit traffic in psychotropic substances within their territories. The *1971 Commentary* notes that this information may include:

participation in international drug treaties, including bilateral treaties and extradition treaties relating to drug offences; laws and regulations implementing the [1971] Convention; ... legal and social measures concerning illicit traffickers; ... details on the extent and pattern of the abuse of psychotropic substances; details on the prevention of abuse of such substances and on the treatment of their abusers, including measures of rehabilitation; details on the illicit traffic covering such items as illicit cultivation, harvesting, manufacture, diversion from

³³ *1971 Commentary* at 278-9.

³⁴ *1971 Commentary* at 279.

³⁵ *1971 Commentary* at 279, referring in respect of the UN Charter to articles 55(b) and 56.

³⁶ The *1971 Commentary* at 280 submits, correctly, that the words 'and in particular' must be taken through the practice of states in respect of the similarly worded provision in article 18(1) of the 1961 Convention to mean 'and also in particular', and thus the special obligation operates separately from the general obligation if article 16(1) of the 1971 Convention. For practical purposes, the annual report envisaged by the special obligation under article 16(1) can contain information requested under article 16(1)'s general obligation - *1971 Commentary* at 280.

³⁷ Such a report is usually combined with the annual reports required under the other drugs conventions - *1971 Commentary* at 280.

³⁸ Note that the 1971 Convention, unlike the 1961 Convention, does not provide explicitly for the furnishing of the texts of all laws and regulations promulgated to give effect to it, although the CND may request these texts under the general obligation in article 16(1) - *1971 Commentary* at 281-2.

licit channels, smuggling, quantities of psychotropic substances seized, prices in the illicit traffic, prosecution, characteristics describing the kind of persons engaged in the traffic and the organisation of the domestic enforcement services.³⁹

The information required by article 16(1) must be supplied to the UNDCP, and in terms of article 16(6), the Parties must provide this information in the time and manner that the CND requests, which is usually in time for use by the CND at its meetings.

Article 16(3), like article 18(1)(c) of the 1961 Convention, is the pivot of the international information system on the illicit traffic in psychotropic substances. Article 16(3) states:

3. The Parties shall furnish, as soon as possible after the event, a report to the Secretary-General in respect of any case of illicit traffic in psychotropic substances or seizure from such illicit traffic which they consider important because of:

(a) new trends disclosed;

(b) the quantities involved;

(c) the light thrown on the sources from which the substances are obtained; or

(d) the methods employed by illicit traffickers.

Copies of the report shall be communicated in accordance with sub-paragraph (b) of article 21.

Article 16(3) obliges the Parties to report to the Secretary-General, as soon as possible after the event,⁴⁰ important cases of the illicit traffic or seizures.⁴¹ Importance is

³⁹ 1971 *Commentary* at 281.

gauged here by the incident revealing new trends, the quantities involved, assistance in the identification of sources of substances, or because of the trafficker's methods. If a case is found to be important only because of one or two of these reasons, the Party concerned should provide information on the other topics, in order to provide a more complete picture.⁴² These reports are summarised and these summaries assist the CND in its task of reviewing the illicit traffic in individual Parties and formulating an international strategy in response to it. The information provided in the reports is, as became the practice under the 1961 Convention, not used directly for the purpose of international enforcement co-operation in individual cases, but the *1971 Commentary* suggests that this purpose may be served by the obligation in article 16(3) to communicate the report in accordance with article 21(b) which obliges the Parties to communicate copies of the report 'to the other Parties directly concerned'.⁴³ The speedy dissemination of the information supplied to other Parties is essential, and although not provided for in article 16(3), it is provided for in article 21(b). In addition, the *1971 Commentary* suggests that the seizure reports also be sent to Interpol. Although article 16(3) does not give the CND the authority to lay down the form such reports must take, the practice has been to use the same forms used for reports under article 18(1)(c) of the 1961 Convention.⁴⁴

7.2.6.4 Furnishing information under the 1972 Protocol to the 1961 Convention

Paragraphs (f) and (g) were added to article 35 of the 1961 Convention by article 13 of the 1972 Protocol. Article 35(f) and (g) provide that the Parties shall:

(f) Furnish, if they deem it appropriate, to the Board and the Commission through the Secretary-General, in addition to information required by article 18, information relating to illicit drug activity within their borders, including

⁴⁰ Where discovery of the case and seizure take place simultaneously, the report should be made immediately; where discovery precedes seizure a report should be made as soon as possible after discovery, and be supplemented after seizure. Only delays in reporting required by valid considerations of policing are acceptable - *1971 Commentary* at 284.

⁴¹ 'Seizure from the illicit traffic' includes seizure of objects other than psychotropic substances including, for instance, laboratory equipment - *1971 Commentary* at 284.

⁴² *1971 Commentary* at 285.

⁴³ *1971 Commentary* at 285.

⁴⁴ See note 24 *supra*.

information on illicit cultivation, production, manufacture and use of, and on illicit trafficking in, drugs; and ...

(g) Furnish the information referred to in the preceding paragraph as far as possible in such a manner and by such dates as the Board may request; if requested by a Party, the Board may offer its advice to it in furnishing the information and in endeavouring to reduce the illicit drug activity within the borders of that Party.

These two paragraphs of article 35 provide that Parties furnish the UN's drug control organs information on the whole range of illicit drug activity (paragraph (f)), and the manner in which the information is to be furnished (paragraph (g)). This information is in addition to the information on the illicit traffic required by article 18 of the unamended 1961 Convention. By contrast, this information relates to all illicit drug activity including, significantly, use.⁴⁵ Parties are encouraged to provide information on all aspects of the illicit drug activity taking place within their territories but, in addition, the *1972 Commentary* suggests that

references to the foreign origin of the drugs found in the illicit traffic and to the lack of control or defective control in a foreign country causing or rendering more difficult a domestic problem, may be included in the Party's report.⁴⁶

The potential for antagonising foreign states is obvious, but the alternative is an incomplete picture of the illicit traffic.

The implementation of these provisions is entirely voluntary. The Parties themselves decide when it is appropriate to furnish information and identify the appropriate information to be furnished.⁴⁷ The information here, unlike the information contemplated by article 35(c) of the unamended 1961 Convention, is furnished to the INCB as well as to the CND. These provisions were introduced in order to give the

⁴⁵ Statement of the US delegate - *1972 Records* vol.II at 161.

⁴⁶ *1972 Commentary* at 73. See also Gross NG, Greenwald JG 'The 1972 Narcotics Protocol' (1973) 2 *Contemporary Drug Problems* 119 at 131-132.

⁴⁷ Statement of the US delegate, *1972 Records* vol.II at 156.

INCB greater access to information as its powers were increased by the 1972 Protocol.⁴⁸ It appears that the same information must be sent to both the CND and the INCB.⁴⁹ Article 35(g) gives the INCB the power to direct how and when the information is to be furnished.⁵⁰ Like all the provisions for the supply of information, its observance will depend not only on the will of the Parties but upon their financial wherewithal. The *1972 Commentary* submits that both the CND and the INCB have the right to solicit information under article 35(f).⁵¹ Article 35(g) provides for the unusual situation where the INCB assists the Parties on request in the furnishing of the information to it. What is contemplated here is advice on the presentation of the information so that it is better organised and more useful to the INCB.⁵² Article 35(g) also appears to provide that the INCB may on request assist a Party in trying to reduce the general illicit drug activity taking place within it. Whether actual assistance was really contemplated by the paragraph is unclear; it seems unlikely as the whole tenor of the paragraph is the supply of information and assistance in that regard only.⁵³

7.2.6.5 Furnishing information under the 1988 Convention

In the 1988 Convention there are two types of obligations to furnish information.

First, there are those provisions in the 1988 Convention for the furnishing of information on specific areas of co-operation. Parties are obliged to transmit this information to the Secretary General in his clearing house role for onward transmission to other Parties. Examples include: article 5(4)(e), which requires the furnishing of information on the text of laws and regulations giving effect to the confiscation provisions in article 5; article 7(9) which obliges the Parties to identify the acceptable

⁴⁸ See the statement of the US delegate, *1972 Records* vol.II at 156. The *1972 Commentary* explains at 72-3 that the information furnished under paragraph (f) would qualify as 'information submitted by Governments to the Board under the provisions of this Convention' as defined in article 14(1)(a) and consequently could be the basis for the INCB's initiation of an article 14 embargo procedure.

⁴⁹ See the statement of the Indian delegate, *1972 Records* vol.II at 158.

⁵⁰ It may specify a particular form and method for furnishing the information and specify the date by which the information is to be supplied, but its power to do so is conditional upon the Party first expressing its willingness to supply the information.

⁵¹ The *1972 Commentary* at 74 explains that the CND's right flows from its power as a functional commission of the ECOSOC to invite Parties to the UN Charter to furnish information and its power under article 18(1)(c) of the 1961 Convention to require Parties to supply it with the information necessary for the performance of its functions. The INCB's 'right' is more tenuous, as it is simply suggested by the provision in paragraph (g) that the INCB decides when and how information pursuant to paragraph (f) should be supplied.

⁵² Comment of the US delegate - *1972 Records* vol. II at 166.

⁵³ Statement of the Indian delegate, *1972 Records* vol.II at 166.

language or languages for the purposes of requests for mutual legal assistance; article 12(2) which requires provision of information on the addition to or deletion of substances in Tables I and II of the annex; and, article 17(7) which requires the notification of the designated authority or authorities to receive and respond to requests relevant to the interdiction of non-flag vessels at sea. The supply of this information is of great importance to the administration of the illicit control system, and is in addition to the information in respect of seizures and laws described below.

Second, there is provision for the furnishing of information on the application of the Convention as a whole. Under the 1988 Convention, article 21 gives the CND an oversight and supervisory role and in discharging this mandate it is at least partly reliant on the information which the Parties are obliged to supply it in terms of article 20. Article 20, which is patterned on earlier provisions, is entitled, 'Information to be Furnished by the Parties'. It reads:

1. The Parties shall furnish, through the Secretary General, information to the Commission on the working of this Convention in their territories and in particular:

(a) The Text of laws and regulations promulgated in order to give effect to the Convention;

(b) Particulars of cases of illicit traffic within their jurisdiction which they consider important because of new trends disclosed, the quantities involved, the sources from which the substances are obtained, or the methods employed by persons so engaged.

2. The Parties shall furnish such information in such manner and by such dates as the Commission may request.

Article 20(1)'s opening sentence places a general obligation on the Parties to furnish the CND, via the UNDCP, with information on the functioning of the 1988 Convention as a whole in their territories, while its sub-paragraphs oblige the Parties to provide specific information. Article 20(1)(a) obliges Parties to furnish the CND with

copies of the laws and regulations, whatever their source or status, that they have promulgated in order to apply the Convention. Article 20(1)(b) obliges Parties to furnish the CND with details of illicit trafficking cases that have occurred within their jurisdictions and which the Parties consider important because of the disclosure of new trends, quantities of drugs involved, sources of the drugs, or trafficking methods. The specific types of information mentioned under the sub-paragraphs are already covered by article 20(1)'s general obligation to supply information, but the sub-paragraphs guide the Parties as to the types of information of particular value. It is interesting that, unlike the earlier conventions, article 20 does not make any provision for an annual report by the Parties to the CND on the working of the Convention within its territory.⁵⁴

Article 20(2) makes it clear that the CND will dictate to the Parties when and how the information, general or specific, will be furnished.

7.2.6.6 Furnishing information in conclusion

Through the drug conventions the international community has created a drug information system. Supervised by the UN's control organs, this system allows information to be shared among the Parties and these organs. In practice, part of the Parties' annual reports relates to the illicit traffic and serves as the basic source of information on the illicit traffic in each reporting state for the preceding year. Other sources of information include Interpol, which from 1949 has regularly contributed a memorandum on the illicit traffic to the CND. These reports and memoranda are analysed by the UNDCP and an annual summary is drawn up. This document constitutes the review of the illicit traffic in drugs during the preceding year. It serves as the basis of the CND's main task at its annual meeting, the discussion of the illicit traffic. Bruun *et al* note that this information determines 'to a large extent the picture which the international community has of drug trafficking and its perception of the nature of the problem.'⁵⁵ Although it generally tries to take a friendly attitude, the CND questions states involved in unsatisfactory situations and states which do not produce annual reports, and it can demand information from Parties to the conventions and non-parties alike.⁵⁶ It

⁵⁴ A joint amendment, UN Doc. E/Conf.82/C.2/L.39 did make provision for such a report, but was rejected in favour of the present wording.

⁵⁵ Bruun K, Pan L, Rexed I *The Gentlemen's Club* (1975) 226.

⁵⁶ In terms of article 55 of the UN Charter the CND can demand all this information from non-parties to the drug conventions but who are UN members; with non-parties which are not UN members it has to rely on persuasion.

commonly makes demands in the form of resolutions in which it, for example, invites a state to take measures in a given field or act to remedy a situation. It also requests the UNDCP to communicate with governments or take any action that may be necessary. Although certain states such as the United States have made a significant input into the information system,⁵⁷ the quality of information supplied by states has been criticised,⁵⁸ and is not always reliable or complete. Bassiouni complains that the type of data report submitted by states and summarised by the UNDCP 'is almost wholly ineffective in practice, even though in theory it is useful.'⁵⁹ The problem is that the information is supplied by the Parties themselves and because it is a commentary on their performance in terms of their international obligations they are in a position to tailor the information accordingly. Parties may not be willing to co-operate and only limited sanctions exist for Parties failing to provide reliable information or failing to respond at all to requests for information. The unreliability of information from Parties also means that the INCB may not be aware of the need to apply sanctions to the offending Party. On the other hand, there has been a lot of criticism about the amount of information which Parties have to supply. The Jamaican delegate observed at the 1988 Conference that

countries were being called upon to provide a growing number of increasingly voluminous reports under the provisions of the various instruments and agreements; there was a danger that the burden would become unbearable.⁶⁰

While this information system serves the Parties needs in meeting their substantive obligations under the drug conventions, its shortcomings from an enforcement point of view are obvious. Unlike national enforcement agencies, the UN's international drug control organs do not focus on gathering of information about individual offenders with the purpose of using that information to hunt those offenders down. Summaries of reports are circulated, but reports are not used in operational policing. Law enforcement has seen increased surveillance of citizens by authorities,⁶¹

⁵⁷ Bruun et al *op cit* at 227.

⁵⁸ See Bruun et al *op cit* at 95-6.

⁵⁹ Bassiouni MC 'The International Narcotics Control Scheme' in Bassiouni MC (ed) *1 International Criminal Law: Crimes* (1986) 507 at 522.

⁶⁰ *1988 Records* vol.II at 331.

⁶¹ Dorn N, Murji K, South N *Traffickers: Drug Markets and Law Enforcement* (1992) at 177.

and national drug control is a good example of this trend. The 1980s saw a growth in popularity at the national level of gathering information about illicit drug related activities and processing it so that it becomes intelligence - information that can be used to guide action.⁶² At the international level, gathering and sharing drugs intelligence depends either on the direct communication of information between co-operating Parties, or the creation of an applied intelligence system. The direct communication of information between Parties is often hampered by suspicion and problems with the revelation of information about private individuals in conflict with data protection measures. The UN's drug control organs are not yet prepared to fully engage in the provision of drugs intelligence because they do not have the authority or capacity to do so. Interpol, however, serves this purpose in any event.

7.2.7 The International Narcotics Control Board (INCB)

7.2.7.1 General

The INCB is a thirteen member board of impartial experts that is responsible for monitoring the international drug trade and taking measures to ensure the execution of the provisions of the drug conventions.⁶³ Although a creature of treaty,⁶⁴ as opposed to other UN organs which are creations of ECOSOC, and independent in its technical work,⁶⁵ the General Assembly controls its budget, the UNDCP its secretariat, and in terms of the drug conventions it is accountable to ECOSOC and must submit an annual report of its work. Article 23 of the 1988 Convention, designed to mirror the INCB's reporting duty under article 15(1) of the 1961 Convention and article 18(1) of the 1971

⁶² Dorn et al *op cit* at 149-175 generally.

⁶³ Articles 9 and 10 of the 1961 Convention, as amended by articles 2 and 3 of the 1972 Protocol, provide that the INCB consists of 13 members elected for 5 years by ECOSOC, three with medical or pharmacological expertise nominated by WHO and ten with *inter alia* knowledge of narcotics administration and its problems nominated by Parties to the 1961 Convention with the aim of equitable geographic representation' of representatives of producer, manufacturer and consumer states - see Chatterjee *op cit* at 256-9.

⁶⁴ Articles 9-11 of the 1961 Convention.

⁶⁵ Article 9(2) of the 1961 Convention provides that members cannot hold government posts. Article 10(6) provides for adequate remuneration for its members. Article 11 provides that the INCB can elect its own President and adopt its own procedure. In practice it usually meets in private with a representative of WHO and of the UNDCP, and, when necessary, of a particular state.

Convention,⁶⁶ deals with the annual and periodic reporting function of the INCB under the 1988 Convention.⁶⁷

The INCB is particularly concerned with quantitative control of drug production and distribution. It administrates the estimates system and the statistical returns system.⁶⁸ Its examination of the estimates allows it to determine the maximum permissible national and global drug production totals which information, together with its analysis of the statistical information furnished by Parties, it then uses for its supervision of the application of the drug conventions by Parties and for the possible invocation of sanctions in the form of drugs embargoes against defaulting Parties. To this end it meet twice annually and produces various documents including the Annual Report mentioned above which reviews the general situation and specific problems and is used to exert pressure on defaulting states.

Although concerned mainly with watching the international production of and trade in drugs, the INCB's role in suppression of the illicit traffic has grown steadily. Article 9(4) of the 1961 Convention, as inserted by article 2 of the 1972 Protocol, provides that the INCB must endeavour 'to prevent illicit cultivation, production and manufacture of, and illicit trafficking in and use of, drugs.' In reality, article 9(4) simply codifies the practice of the INCB under the unamended 1961 Convention.⁶⁹ The INCB monitors the implementation of all the drug conventions. Article 9(4) requires the INCB to 'endeavour' 'in co-operation with Governments' and 'subject to the terms of this Convention' to prevent illicit cultivation and so on. Obviously co-operation is crucial here, and the INCB has always maintained friendly relations with Parties. The statistical data that Parties are obliged in terms of article 20(1)(e) of the 1961 Convention to provide the INCB with on the illicit drug activities within their borders is central to its response to the illicit traffic. The INCB's strength is its informality. It has maintained a continuing dialogue with Parties and has supervised the application of provisions relating to seizure and confiscation. Operating in strict confidence, and sometimes beyond its

⁶⁶ 1988 Records vol.II at 323-4.

⁶⁷ Entitled 'Reports of the Board', it reads: '1. The Board shall prepare an annual report on its work containing an analysis of the information at its disposal and, in appropriate cases, an account of the explanations, if any, given by or required by the Parties, together with any observations and recommendations which the Board desires to make. The Board may make such additional reports as it considers necessary. The reports shall be submitted to the Council through the Commission which may make such comments as it sees fit. 2. The reports of the Board shall be communicated to the Parties and subsequently published by the Secretary-General. The Parties shall permit their unrestricted distribution.'

⁶⁸ See generally Chatterjee *op cit* at 260-3.

strict competence, the INCB has frequently prevented or corrected problems on an informal basis and thus avoided the political confrontation that may have resulted had the matter been brought up in the CND.⁷⁰ The major weakness in the INCB's action against the illicit traffic is that its review and evaluation of national drug control legislation to determine whether the drug conventions are being implemented by Parties is largely dependent on the information provided by the Parties and the INCB is incapable of systematic and comprehensive independent analysis.⁷¹

7.2.7.2 The INCB and the embargo procedure in the earlier drugs conventions

Although the 1961 Convention, 1971 Convention, and 1972 Protocol give the INCB wide powers to deal with problems of implementation inter alia of the provisions relating to the illicit cultivation, production, manufacture and traffic of drugs, these powers are not unlimited.⁷²

The 1961 Convention provides the INCB with a number of ways of forcing 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 both import and export embargo procedures. The embargo procedure gives the INCB a prosecutorial role, in that it collects the evidence, and a quasi-judicial role, in that it recommends the embargo and its decision cannot be overturned by a higher body. This procedure has been elaborated and reinforced by the 1972 Protocol.⁷³

There are two main procedures for enforcing the 1961 Convention against Parties that have failed to carry out their obligations or which constitute potentially threatening centres of illicit traffic or consumption.⁷⁴ Article 14(1) (and article 6(1)(a) of the 1972 Protocol amending it), provides that if, on examination of information submitted by a government or by a recognised agency, the INCB has 'objective reasons' to believe that the aims of the Convention are threatened by a Party's failure to carry out its obligations, for example, failing to enact and apply article 22 offences, the INCB has the right to confidentially consult with that Party or request it to supply information. After taking such action, article 14(1)(b) (and article 6(1)(b) of the 1972 Protocol)

⁶⁹ See *1972 Records* vol.II at 107.

⁷⁰ *1988 Records* vol.II at 323.

⁷¹ *INCB Report of the International Narcotics Control Board for 1994* UN Doc. E/INCB/1994/1 at 6.

⁷² See generally *1972 Commentary* at 12.

⁷³ See generally Gross and Greenwald *op cit* at 143-149.

⁷⁴ See generally Chatterjee *op cit* at 264-273.

provides that the INCB may, if it finds it necessary, call upon this Party to adopt appropriate remedial measures. Article 6(1) of the 1972 Protocol has given the INCB the added power at this stage to propose to a Party that a study be carried out in its territory, and if it agrees and requests help, to provide help and settle the details with the Party. The results of the study would be communicated to the INCB together with the remedial steps intended. If, however, none of these steps bring the desirable results and it appears that the situation is serious, in terms of article 14(1)(c) (and article 6(1)(d) of the 1972 Protocol) the INCB can call the attention of the Parties, ECOSOC and the CND to the matter. But this is only possible if one or more of the following conditions is met: (i) either the aims of the Convention are being seriously endangered and it is not possible to resolve the matter satisfactorily in any other way; (ii) or the INCB finds that there is a serious situation that needs co-operative action at the international level with a view to remedying it; (iii) or bringing such a situation to the notice of the Parties, ECOSOC, and the CND is the most appropriate method of facilitating co-operative action. If one of these conditions is met, the INCB can in terms of article 14(3) make a special report including the views of the defaulting Party to ECOSOC, and recommend in terms of article 14(2) that Parties stop the import and export of all drugs to and from that country for a designated period or until it is satisfied with the situation in that country. The Party has the right to put its case to ECOSOC. Thus the process moves from one of cautioning to punishing the Party. States have objected to these provisions as an encroachment on sovereignty.⁷⁵

The INCB has been given similar embargo powers under the 1971 Convention. It has the right to ask a Party to furnish information which it needs in connection with the Party's execution of the 1971 Convention's provisions, and article 19 allows it to recommend an embargo against a Party when it has reason to believe that the aims of the Convention are being seriously endangered by the Party's failure to carry out the Convention's provisions. As under the 1961 Convention, the procedure begins with the INCB requesting an explanation in article 19(1)(a), moves to it calling upon the Party to take remedial steps in article 19(1)(b), and in case of the Party failing in respect of either of these steps, calling the attention of other Parties and the CND and ECOSOC to the matter in article 19(1)(c). At this stage the INCB may under article 19(2) recommend the

⁷⁵ 1988 *Records* vol.II at 35. India has made a reservation in regard to article 6 of the 1972 Protocol (14/12/1978 - *Multilateral Treaties Deposited* (1997) at 295).

embargo. It alone can lift the embargo when it is satisfied that the situation has returned to normal.⁷⁶ Parties have made reservations to these provisions, because they regard it as an interference in their domestic affairs.⁷⁷

7.2.7.3 The INCB's powers under the 1988 Convention

At the 1988 Conference, Sproule and St-Denis note that certain delegations made proposals which would have granted the INCB both far greater powers of supervision to the INCB than it was at that stage competent to exercise as well as powers to take action in cases of non-compliance.⁷⁸ Other delegations resisted any monitoring and supervision.⁷⁹ In a compromise solution, the INCB was given control over the application of technical and scientific provisions, while the CND was put in charge of penal provisions, which meant that the INCB had lost some of the control it exercised over states under the earlier conventions and the CND had gained control.⁸⁰ Under the 1988 Convention, the INCB's role is laid down in articles 22 and 23. Article 22, entitled 'Functions of the Board', confers on the INCB investigatory powers in response to allegations that the aims of the 1988 Convention are not being met by a Party. Article 22 reads:

1. Without prejudice to the functions of the Commission under article 21, and without prejudice to the functions of the Board and the Commission under the 1961 Convention, the 1961 Convention as amended and the 1971 Convention:

(a) If, on the basis of its examination of information available to it, to the Secretary-General or to the Commission, or of information communicated by United Nations organs, the Board has reason to believe that the aims of the

⁷⁶ See Chatterjee *op cit* at 273.

⁷⁷ See the reservations made by Iraq (17/5/1976 - *Multilateral Treaties Deposited* (1997) at 290), Myanmar (20/6/1994 - *Multilateral Treaties Deposited* (1997) at 290).

⁷⁸ *Op cit* at 288 referring to the Canadian proposal in UN Doc. E/Conf.82/C.2/L.38/Rev.1, L.39/Rev.1, L.40/Rev.1 and L.41/Rev.1. Debate at the Conference concerning the role of the INCB split into four groups: those in favour of the INCB; those in favour of the CND; those who wanted to see authority shared; and those who called for control to stop - Rouchereau F 'La Convention des Nations Unies Contre le Traffic Illicite de Stupefiants et de Substances Psychotropes' (1988) 34 *Annuaire Francais de Droit Internationale* 601 at 615.

⁷⁹ The Mexican delegation's proposal, UN Doc. E/Conf.82/3 at 114.

⁸⁰ Rouchereau *op cit* at 616.

Convention in matters relating to its competence are not being met, the Board may invite a Party or Parties to furnish any relevant information;

(b) With respect to articles 12, 13 and 16:

(i) After taking action under subparagraph (a) of this article, the Board, if satisfied that it is necessary to do so, may call upon the Party concerned to adopt such remedial measures as shall seem under the circumstances to be necessary for the execution of the provisions of article 12, 13 and 16;

(ii) Prior to taking action under (iii) below, the Board shall treat as confidential its communications with the Party concerned under the preceding subparagraphs;

(iii) If the Board finds that the Party concerned has not taken remedial measures which it has been called upon to take under this subparagraph, it may call the attention of the Parties, the Council and the Commission to the matter. Any report published by the Board under this subparagraph shall also contain the views of the Party concerned if the latter so requests.

2. Any Party shall be invited to be represented at a meeting of the Board at which a question of direct interest to it is to be considered under this article.

3. If in any case a decision of the Board which is adopted under this article is not unanimous, the views of the minority shall be stated.

4. Decisions of the Board under this article shall be taken by a two-thirds majority of the whole number of the Board.

5. In carrying out its functions pursuant to subparagraph 1(a) of this article, the Board shall ensure the confidentiality of all information which may come into its possession.

6. The Board's responsibility under this article shall not apply to the implementation of treaties or agreements entered into between Parties in accordance with the provisions of this Convention.

7. The Provisions of this article shall not be applicable to disputes between Parties falling under the provisions of article 32.

Similar to the investigatory and embargo procedures laid down in the 1961 and 1971 Conventions, article 22(1) confers an investigatory function on the INCB in respect of allegations that the aims of the 1988 Convention in matters relating to its competence are not being met. It does not limit the wide powers to deal with the illicit traffic already granted to the INCB by these earlier instruments.⁸¹

Under article 22(1)(a) the INCB must first form, on the basis of examination of information available to it, the Secretary-General or the CND, or of information communicated by UN organs to it, a reasonable belief that the aims of the 1988 Convention in matters relating to its competence are not being met. Once this opinion is formed, the INCB is authorised to invite a Party or Parties to furnish it with information relevant to the situation. This provision arguably grants the INCB extensive powers of scrutiny. The scope of matters in which the INCB is competent has been broadly interpreted by some Parties to include oversight of all the provisions of the 1988 Convention.⁸²

⁸¹ See the statement of the British delegate, *1988 Records* vol.II at 35. The British delegate noted that lack of clarity with respect to the definition of the INCB's competence in matters relating to the illicit traffic 'would provide substantial scope for Parties to argue that a particular matter on which the Board had asked for relevant information was not within its competence and, therefore, that the information need not be provided.' - see *1988 Records* vol.II at 328. Nevertheless, the Indian delegation regarded the amended 1961 Convention as objectionable because it conferred excessive powers on the INCB. It had made a reservation to the earlier provision and was thus forced to make a similar reservation to article 22 of the 1988 Convention - see *1988 Records* vol.II at 328-9.

⁸² In this regard the US delegation submitted the following written statement (see *1988 Records* vol.II at 333): 'It is the view of the United States that the wording of paragraph (1)(a) of article [22] did not limit the action of the Board to any specific articles of the Convention. Document E/CONF.82/C.2/L.42 had contained limitations on the articles for which the Board would have had responsibility, but the limitation had been removed when the qualifier "in matters related to its competence" had been added. That allowed for Board oversight of implementation of all articles of the Convention in respect of matters related to its competence. That was a compromise between the proposal for full implementation responsibility without restriction, put forward by the Canadian delegation and supported by other delegations, and the Netherlands proposal in document E/CONF.82/C.2/L.42 to limit Board responsibility to specific articles. In the United States view, "matters related to its competence" must be interpreted as referring to the

In regard to the implementation of certain provisions which fall within the INCB's traditional province of control of drug trade and manufacture, the INCB may go further than just asking for explanations. Special measures are set down in article 22(1)(b) with respect to article 12 regulating precursor substances, article 13 regulating materials and equipment used in drug production and article 16 regulating commercial documents and the labelling of exports. These measures may be applied by the INCB after action has been taken in terms of article 22(1)(a). In terms of article 21(1)(b)(i), the INCB may, if it is satisfied that it is necessary, call upon the Party concerned to adopt such remedial measures as seem necessary for the execution of articles 12, 13 or 16. The particular remedial measures recommended will depend on the situation. In terms of article 21(1)(b)(iii), if the INCB finds that the Party concerned has not taken the remedial measures which it has been called upon to take under article 22(1)(b)(i), it may call the attention of the Parties, ECOSOC and the CND to the matter. In the event of the INCB publishing a report under article 21(1)(b)(iii), the Party concerned may insist that the report also contain its views. If the INCB contemplates action under article 21(1)(b)(iii), article 21(1)(b)(ii) provides that all communications in this regard with the Party shall be treated as confidential. The problem here, as with the position under the earlier conventions, is that the Parties supply the information and the INCB comments. Its own investigatory powers are extremely limited.

The rest of article 22 is devoted to procedural matters. Article 22(2) allows any Party to be represented at an INCB meeting at which a question of direct interest to it is to be considered under article 22. Article 22(3) provides that if the INCB takes a decision under article 22 which is not unanimous, the minority's views shall be stated. Article 22(4) provides that an article 22 decision by the INCB must be made by a two-thirds majority of the full membership of the INCB. Article 22(5) place an absolute duty of confidentiality of information on the INCB when it carries out article 22(1)(a) functions. Article 22(6) limits the INCB's article 22 powers when it provides that the

competence of the Board under the existing two Conventions as well as any functions under the new Convention. That interpretation was supported by the "chapeau", which made clear the non-derogation of functions under the existing Conventions. It was also supported by the explanatory comments made by the representative of the Netherlands during the meeting. In that context, Board responsibility and competence would extend to a broad range of actions against the illicit traffic as set out in article 35 of the Single Convention and article 21 of the Convention on Psychotropic Substances. Those articles dealt with punishable offences, alternative forms of punishment, extradition and financial aspects of drug trafficking. Article 37 of the Single Convention supported the argument for competence in such areas as seizure and confiscation.'

INCB's responsibility under article 22 shall not apply to the implementation or supervision of treaties or agreements entered into between Parties in accordance with the provisions of this Convention. Article 22(7) provides that article 22 shall not be applicable to disputes between Parties falling under the settlement of disputes provision in article 32.

The obvious lacuna in the 1988 Convention is that no provision is made for the INCB to take steps against a defaulting Party to force it to comply with the Convention's provisions. As Gianaris notes: 'In actuality, the Board can do nothing to reprimand a state for not co-operating with the terms of the 1988 U.N. Convention or for assisting in narcotics trafficking or related crimes.'⁸³ Sproule and St-Denis are critical of article 22 in a number of respects.⁸⁴ First, in respect of all but articles 12, 13, and 16 the INCB's power to examine compliance extends only as far as the furnishing of information in terms of article 22(1)(a). Second, the effective weapon of adverse publicity used in the other drug conventions has been discarded.⁸⁵ They argue that the INCB, despite being unelected and a technical body, can on the basis of its record, function as an appropriate and effective body to encourage compliance with penal provisions. They point out that in other fields of international regulation such as arms control, technical bodies have increased their supervision roles, and that to leave supervision in the hands of the CND under the 1988 Convention was a mistake given the politicised nature of the UN's elected bodies and the ineffectiveness of goodwill and diplomatic pressure.⁸⁶

7.2.7.4 Conclusion - the INCB and execution of the illicit drug control system

Information on the operations of the INCB is scarce because all information supplied to it by governments is confidential, thus the agendas and minutes of its meetings are confidential. Only the INCB's reports provide information. Bruun et al thus complain that it is 'difficult to determine to what extent the INCB has fully used or under-used its powers, or to what extent it has kept strictly to the performance of its obligations under the treaties.'⁸⁷ What we do know is that the INCB has never gone as far as using its embargo powers against a Party because of that Party's failure to implement either the

⁸³ Gianaris WN 'The new world order and the need for an international criminal court' (1992/3) 16 *Fordham ILJ* 88 at 108.

⁸⁴ *Op cit* at 289.

⁸⁵ Article 14(3) and article 19(3) of the 1961 and 1971 Conventions respectively.

⁸⁶ *Op cit* at 290.

⁸⁷ *Op cit* at 76.

criminal law provisions of the early drug conventions or to take action against the illicit traffic.⁸⁸ While these powers do exist as a threat to coerce compliance by Parties, the obvious problem with them is that they are limited to the suggestion of an embargo on the export or import of drugs and are not mandatory. A further weakness is that they are largely reliant on the co-operation of the Party involved. Their utility in enforcing criminal law is doubtful. One can question how, for instance, such an embargo can assist directly in forcing a Party to extradite or prosecute a drug trafficker. The INCB's reporting powers suffer from the handicap of being reliant on the Parties' provision of information.

The INCB has been forced to develop its own informal procedures of treaty implementation. It relies on constant diplomatic dialogue, such as the exchange of letters with defaulting governments, raising problems within its annual report, sending missions to the states concerned and mentioning the findings of these missions in its annual report, requesting governments to provide explanations or to take remedial measures, and drawing the attention of other Parties, the CND and ECOSOC to worrying situations.⁸⁹ It has in effect followed a policy of making "local enquiries" because nothing in the drug conventions says it cannot, but it would like this policy to be concretised in international legal provisions.⁹⁰

The particular weakness of the drug conventions is that they lack any type of concrete enforcement mechanism suited to the enforcement of their criminal law provisions.⁹¹ In effect, political visibility is the ultimate sanction available to the system. The general weakness of the whole drug control system's powers of enforcement have been severely criticised,⁹² but that weakness reflects the unwillingness of states to grant a technical independent body embargo powers.⁹³ Moreover, despite the fact that states pro-enforcement and supply reduction may support the INCB's supervision of the system rather than the CND's, the difference in merit of technical versus political supervision

⁸⁸ INCB *Report of the International Narcotics Control Board for 1994* UN Doc. E/INCB/1994/1 at 6.

⁸⁹ 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 20.

⁹⁰ 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 20.

⁹¹ Gianaris *op cit* at 107.

⁹² See for example Cabranes JA 'International law and the control of the drug traffic' (1973) 7 *International Lawyer* 761 at 766.

⁹³ Gross and Greenwald *op cit* at 148.

seems irrelevant without an initial willingness to grant strong powers to whatever body actually carries out the supervision.

7.2.8 The World Health Organisation (WHO) and the WHO Expert Committee

The WHO's involvement in drug control stems from the somewhat belated realisation that the drug problem is also a medical-social problem. The WHO is represented on the CND, which relies on it for advice in respect of the medical and scientific aspects of drug dependence. In turn, the WHO relies largely on the work of its Expert Committee on Drug Dependence in this regard. These specialists are appointed on an ad-hoc basis for each particular session of the Committee.⁹⁴ The Committee makes recommendations, and is structurally independent of the WHO. New drugs are constantly being discovered, and the international control system is largely dependant on the findings of the Committee to bring these substances within the scope of the system. Chatterjee notes:

This Committee recommends, inter alia, additions to the list of substances subject to control, the examination of suspected substances for possible addiction producing properties, the transfer of a substance from one schedule to another, and the deletion of a substance from a schedule of drugs, if necessary. The Director-General of the World Health Organisation decides on the question of the control of drugs on the basis of the recommendations of this Committee, and he communicates his decisions to the Secretary-General of the United Nations.⁹⁵

The Committee bases each decision to place a substance under control and the particular type of control on the degree of risk the substance presents to the public health and on its medical usefulness, and not purely on pharmacological classification.⁹⁶ The merits of having the drug selection process in the hands of a Committee that meets occasionally and for short periods, can be questioned, and it is significant that under the 1988 Convention the decision to table precursor substances has been left entirely in the INCB's hands without reference to the WHO.⁹⁷ Moreover, the Expert Committee is

⁹⁴ The need for continuity and 'adequate geographical distribution' is borne in mind - Chatterjee *op cit* at 279.

⁹⁵ *Op cit* at 277.

⁹⁶ Chatterjee *op cit* at 280 citing (1969) 407 *WHO Technical Report Series* 6.

⁹⁷ Article 12(4).

vulnerable to the criticism that it is dominated by members of the medical profession who have expertise in pharmacology but little expertise in law or administration. But on the other hand, it presents one avenue where these professions do have an influence on the drug control system, and this influence is a light counter-weight to domination of the system by administrators, lawyers and policemen.

7.2.9 Other interested UN Agencies

Beyond the UNDCP's direct management link under the ODCCP (Office for Drug Control and Crime Prevention) with the UN's Centre for International Crime Prevention (CICP) (formerly the Crime Prevention and Criminal Justice Branch),⁹⁸ which exists because of their shared concern with internationally organised crime, a whole range of UN organs can potentially involve themselves in international drug control.⁹⁹ For example, the CND relies on the Food and Agriculture Organisation (FAO) for technical advice on agricultural subjects and the FAO has given assistance in connection with crop substitution. There has also long been recognition of the need for co-operation between the CND and the Universal Postal Union (UPU) in considering the various questions relating to the international shipment of drugs by post. The General Assembly has long had a policy role in drug control but technically even the Security Council could become involved in the drug control system by using its powers under article 94 of the UN Charter to settle problems with a defaulting state. Unlike the INCB and CND, the Security Council has in terms of article 25 of the Charter the power to make legally binding decisions on member states or in terms of article 2(6) to enforce measures against non-UN members.¹⁰⁰ There may be potential under the new world order dominated by a United States obsessed with drug control for the Security Council to be used as an instrument of drug control.¹⁰¹

⁹⁸ The principal UN organ concerned with matters relating to crime prevention and criminal justice.

⁹⁹ These include the General Assembly, UNESCO (UN Educational, Scientific and Cultural Organization) because of its educative role in drug abuse programmes; the ILO because of the role of drug use in the workplace; UNCTAD (the UN Conference on Trade and Development); UNIDO (UN Industrial Development Organisation); UNDP (United Nations Development Programme); UNICEF (UN Children's Fund); Regional Economic Commissions; and because of human rights issues, the Center for Human Rights, the Commission on Human Rights, and the Subcommittee on the Prevention of Discrimination and Protection of Minorities etc.

¹⁰⁰ May HL 'The evolution of the international control of narcotic drugs' (1950) 2 *Bulletin on Narcotics* 1 at 7.

¹⁰¹ Gardner SA 'A global initiative to deter drug trafficking: will internationalizing the drug war work?' (1993) 7 *Temple Int. and Comparative LR* 287 at 308 notes that the US, arguing that drug traffickers threatened destabilisation of Colombia and thus represented a threat to international peace and security

7.2.10 The UN's structures in review

The CND, UNDCP and INCB have the collective aim of implementing the international drug control system. They are the three key organs in the supervision and execution of this system. To paraphrase Chatterjee, they are not guardians but monitors, they have no law-making function but initiate law-making, no judicial function but administrative and executive powers.¹⁰² One of the functions of the system which they administer and enforce is the suppression of the illicit drug traffic. It is impossible here to give an accurate assessment of their success at this task. Undoubtedly, however, the illicit traffic continues, and Bassiouni responds by criticising the limited authority given the drug control organs which he states appears to be 'inadequate to halt or even slow down the illicit traffic.'¹⁰³

The problem is that the UN organs are largely subject to the self-reporting by Parties of the situations in their territories and their progress in implementing the drug conventions, and the UN organs can do little more than expose unsatisfactory situations when they do discover them. To make the system more effective would first require the UN organs to be given far greater investigatory powers, or to adopt a system where one Party would be examined by others according to an agreed protocol for examination.¹⁰⁴ The second part of the solution would be to give the UN organs authority to impose sanctions.

From a different perspective, Bruun et al focus on the organs themselves and note that on the surface, relations between them display harmony and mutual respect, but below the surface there have been disagreements, mostly about the boundaries of each

under the UN Charter, suggested that the Security Council oversee a new international anti-drug movement, but developing states opposed the Security Council being given this role as it was undemocratic, preferring the General Assembly take control. As a technical legal matter, in order for the Security Council to be used as a forum for international action against the illicit drug traffic, situations in drug producing states would have to be categorised either as a likely threat to the international peace and security thus meriting action under Chapter VI of the UN Charter, or as an actual threat to the international peace and security and deserving of action under Chapter VII. The US must have in respect of Colombia had in mind the use of Security Council Recommendations under Chapter VI. Such recommendations would have carried greater weight than General Assembly Recommendations and thus served as potential blueprints for the solution of the international drug trafficking problem. The real problem for those who would like to use the Security Council in this way is that characterisation of the destabilisation of a drug producing state by the illicit traffic as a threat, latent or patent, to international security, would be extremely difficult, particularly when such categorisation is a political decision made by a political body subject to the possibility of veto by one of the permanent members.

¹⁰² *Op cit* at 256.

¹⁰³ *Op cit* at 515.

organ's competence.¹⁰⁵ Arguing for the system's overhaul,¹⁰⁶ they are critical of the CND's heavy reliance on its secretariat and suggest it seek fresh external input, they criticise ossification of staff in the DND (now UNDCP) and the lack of fresh ideas emanating from it, and they suggest that the INCB should be stripped to just its statistical function and its members be incorporated into the CND because they do not believe in its independence.

These two views represent a different response to two different imperatives. Bassiouni would centralise power and strengthen the enforcement capacity of the system, to move away from indirect to direct control, because he is responding to the general perception that the goal of the system is the elimination of the illicit use of drugs through prohibition which relies on law enforcement. Bruun et al, on the other hand, question that goal and question the underlying rationale of the system. But reevaluation of prohibition is an unlikely prospect, and given the development of the enforcement provisions of the 1988 Convention it appears that the UN organs may one day, if somewhat unwillingly, be forced to become guardians of international drug control.

7.3 The International Criminal Police Organisation (ICPO or Interpol)¹⁰⁷

Interpol exists for the exchange of information on criminal matters, including drug matters.¹⁰⁸ Its structure is complex, with designated National Central Bureaux (NCB) at the state level serving as information and request relay stations between governments and the Interpol General Secretariat. Interpol's preventative drug control activities include the supply and analysis of information to governments about prospective crimes, law enforcement training, the unification of criminal law and the holding of conferences

¹⁰⁴ This is the position under the FATF-2 agreement of 1990.

¹⁰⁵ *Op cit* at 103-110. At 105-6 they note that the CND has had misgivings about the WHO Expert Committee's competence to *de facto* schedule drugs because of the lack of non-medical input, and there have been disputes about the independence of the INCB from the rest of the UN, and the INCB's withholding of information from the CND.

¹⁰⁶ *Op cit* at 278-282.

¹⁰⁷ See Anderson *op cit* generally; Chatterjee *op cit* at 499-506; Kendall RE 'Drug control: policies and practices of the International Criminal Police Organisation' (1992) 44 *Bulletin on Narcotics* 3-10; Lemay WJ 'International co-operation through the Interpol system to counter illicit drug trafficking' (1983) 35 *Bulletin on Narcotics* 55-60. See also on the economic crime aspects of Interpol's work Kendall RE 'Drug trafficking and related serious crime: the international dimension' (1991) 17 *Commonwealth Law Bulletin* 1361-1368.

¹⁰⁸ Its objectives are to promote mutual assistance between criminal police authorities and develop institutions likely to contribute to the efficient suppression of crime - Article 2 of its 1956 Constitution.

and so on. In this role it assists the UN drug control organs in their efforts to avert potential drug control problems. Its curative function covers those activities performed after the commission of an offence, including acting upon information supplied by governments through NCBs. Its task here is to provide sufficient information for national enforcement officers to arrest and prosecute offenders successfully.¹⁰⁹ In order to fulfil these functions Interpol has steadily expanded its drug control activities, establishing a Drugs Subdivision with the task of enhancing co-operation and the exchange of information among national law enforcement agencies on drug crime, and strengthening their ability to fight drug crime.¹¹⁰ It is the largest and most active subdivision in the Police Division.¹¹¹ An analysis of performance must recall that Interpol is reliant on national co-operation, and in this regard governments are often neither willing nor able to co-operate.¹¹² Willingness depends upon an interplay of how seriously the government views the illicit drug problem and its desire to preserve sovereignty, while capacity depends largely on the performance of NCBs, which has been uneven.¹¹³ With respect to Interpol itself, there have been complaints that the system is too slow, and doubts have been expressed about the security of the communications network and the quality of the intelligence.¹¹⁴

Interpol has also had a long involvement in drug control at the international level.¹¹⁵ It has been an official observer at the CND since 1949, and in 1972 it was

¹⁰⁹ This information includes: their personal details, eg. names, passport details; descriptions of vehicles used by them; and special records, eg. fingerprints and photographs. It also serves as a conduit for international arrest warrants, extradition requests, and requests for evidence.

¹¹⁰ Kendall *op cit* (1992) at 4-9 sets out the structure of the subdivision. The Operations Group, staffed by liaison officers each responsible for liaising with NCBs in specific geographical areas and assessing the drug control situation, reports to the General Secretariat. The Intelligence Group is responsible for assessing the global drugs situation. Raw data on new drug trafficking routes, new methods of concealment, seizures etc. is analysed to provide strategic intelligence. Intelligence officers are assigned to sections working on particular drug types, eg. the Psychotropic Substances Section. Intelligence is fed to the UN. Other special projects exist, including the FOPAC group set up to counter money-laundering. Interpol is also involved in drug enforcement training.

¹¹¹ Its duties amount to approximately 60 per cent of Interpol headquarters activities - see Anderson *op cit* at 117-118. At the 1988 Conference, the Interpol delegate reported that in 1987 almost sixty percent of the more than one million messages exchanged among member states dealt with the illicit drug traffic, its records contained more than 200 000 computerised files with the photographs and fingerprints of notorious international drug traffickers, and this information was available twenty-four hours a day to law enforcement officers of member states, *1988 Records* vol.II at 274.

¹¹² See Chatterjee *op cit* at 503.

¹¹³ Anderson *op cit* at 48 reports that NCBs in poor countries often do not report statistics of drug seizures.

¹¹⁴ Anderson *op cit* at 119-120.

¹¹⁵ See Marabuto P 'The International Criminal Police Commission and the illicit traffic in narcotics' (1951) 3 *Bulletin on Narcotics* 3-15 for a history of its early work against the illicit traffic.

granted participative status.¹¹⁶ It has made important contributions to the formulation of the drug conventions, but although the importance of its resources were referred to specifically in resolution 3 of the 1961 Convention, it had no formal jurisdiction under the drug conventions until article 7(8) of the 1988 Convention was adopted allowing Parties to make requests for mutual legal assistance through Interpol in urgent circumstances. Interpol was given this role because of its increasing importance in the suppression of drug trafficking and particularly because experience had shown that its communications system and archives were extremely effective as a means of international co-operation and should be developed.¹¹⁷ Before the adoption of this provision, Interpol channels were already being used for the passage of drug crime related information as well as judicial documents from one enforcement agency to another. Interestingly, the first of the non-binding resolutions passed by the 1988 Diplomatic Conference established Interpol's role in the exchange of information on drug offenders internationally. Entitled the 'Exchange of Information', it reads:

The United Nations Conference for the adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,

Calling attention to Resolution III adopted by the 1961 United Nations Conference for the adoption of a Single Convention on Narcotic Drugs, in which attention was drawn to the importance of the technical records on international drug traffickers of the International Criminal Police Organisation and their use by that organisation for the circulation of descriptions of such traffickers,

Considering the machinery developed by the International Criminal Police Organisation for the timely and efficient exchange of crime investigation information between police authorities on a worldwide basis,

Recommends that the widest possible use should be made by police authorities of the records and communications system of the International Criminal Police

¹¹⁶ It was transformed from NGO to IGO status which allowed it to vote on the CND.

¹¹⁷ Statement of the Chinese delegate, *1988 Records* vol.II at 182.

Organisation in achieving the goals of the United Nations Convention against
Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

Interpol's role in the international drug control system has been confirmed by the 1988 Convention. Assessing this role, Chatterjee states:

[Interpol's] aim is not to unify the penal laws of various countries, but to promote the standard of such laws by identifying the common elements in them, and to internationalise crimes of a serious nature. It is not an international law-making body, in the strictest sense of the term; it acts as a guide to the enactment of necessary laws at the domestic level. It cannot usually issue directives; it can only recommend and request nations to do certain things, as necessary. Although a guardian, it cannot command the general obedience of its member nations, especially because binding decisions require the unanimous approval of all members. Also, it has no power to enforce its decisions beyond its organisational jurisdiction, nor has it any financial autonomy. The powers of decisions are exercised by representatives of governments, who are *inter pares*.¹¹⁸

Nonetheless, the considerable weight attached to its recommendations at the policy level means that Interpol functions in much the same way as the UN organs within the drug control system. Like them it monitors the system. Unlike them, however, it is much closer to national agencies in its participation in enforcement. In 1986, Bassiouni suggested that Interpol be vested with the characteristics of a truly international police force and be granted the necessary technical and scientific means to carry out this function, including the right

to participate with local authorities in arrests, searches and seizures, and other techniques of law enforcement along the model of a federal police system, and ... function as one of the supervisory bodies of the international agency.¹¹⁹

¹¹⁸ *Op cit* at 503.

¹¹⁹ *Op cit* at 523.

The 1988 Convention's enforcement provisions may have taken us closer to this position, but whether Interpol could mature into an international drugs police, is uncertain. Anderson describes the evolution of proposals to establish an international drug-trafficking control agency,¹²⁰ but notes that police officers are generally negative about such an idea.

7.4 Regional organisations and other inter-governmental groups operating in international drug control

Unlike the other drug conventions, the 1988 Convention makes provision for regional organisations to participate in the international drug control system. Articles 26,¹²¹ 27,¹²² 28,¹²³ and 29¹²⁴ allow regional economic integration organisations that possess the necessary competence in respect of the negotiation, conclusion and application of international agreements in areas covered by the Convention to become Party to it. The Working Group that drew up these provisions felt that the word 'regional' 'should be interpreted in the widest sense to cover groupings of states, including subregional groups.'¹²⁵ The most prominent among these competent regional economic organisations are those European,¹²⁶ Asian,¹²⁷ and American¹²⁸ organisations that were already

¹²⁰ *Op cit* at 99.

¹²¹ Article 26 allows 'regional economic integration organisations which have competence in respect of the negotiation, conclusion and application of the international agreements in matters covered by this Convention' to sign the Convention, and provides that 'references under the Convention to Parties, States or national services' are 'applicable to these organisations within the limits of their competence.' This provision insists that the regional organisation specify its jurisdiction, something which protects the interests of other Parties to the 1988 Convention.

¹²² Article 27(1) provides that the 1988 Convention is subject to 'acts of formal confirmation by regional economic integration organisations referred to in article 26(c)'. Article 27(2) reads: 'In their instruments of formal confirmation, regional economic integration organisations shall declare the extent of their competence with respect to the matters governed by this Convention. These organisations shall also inform the Secretary-General of any modification in the extent of their competence with respect to the matters governed by the Convention.'

¹²³ Article 28 is a provision identical to article 27 with respect to accession.

¹²⁴ Article 29(3) provides when the 1988 Convention will come into force for such regional economic integration organisations.

¹²⁵ *1988 Records* vol.II at 316.

¹²⁶ The European Community, which has ratified the 1988 Convention, is an obvious example - see generally Estievenart G 'The European Community and the global drugs phenomenon' in Estievenart G (ed) *Policies and Strategies to Combat Drugs in Europe* (1995) 50-93. Europe has a number of groups and organisations involved in international drug control. The European Committee to Combat Drugs (CELAD) set up in 1988 and representative of each member state, has been the central political organisation in the European drug control system. Its efforts have led to the setting up of organs such as the European Community Monitoring Centre on Drugs and Drug Addiction (EMCDDA) in Lisbon in 1993, and Europol, the European Police with its special drugs unit established in the Hague in 1993.

involved in drug control. However, the 1988 Convention is encouraging the involvement in international drug control law of other regional organisations in order to foster uniform regional application and interpretation of the drug conventions.

Other multilateral drug control IGOs include the Customs Co-operation Council (CCC) founded in 1953. Now called the World Customs Organisation (WCO), it is a forum for the co-operation of the major customs authorities of more than 111 states.¹²⁹ Through its Enforcement Committee, it facilitates exchange of information on topics such as smuggling methods and routes, and methods of concealment. Also significant are the organisations initiated by the Group of Seven major industrialised countries. In 1989, it set up the Financial Action Task Force (FATF) to study and recommend regulatory steps in respect of the threat to the global banking and financial system

Europol functions essentially as a clearing house for information held by national drugs intelligence units - see generally Anderson M and Den Boer M (eds) *Policing Across National Boundaries* (1994).

¹²⁷ The Association of South East Asian Nations (ASEAN) established a Narcotics Desk in 1982 in order to co-ordinate anti-narcotics matters in ASEAN states and encourage co-operation in this regard. In 1986, ASEAN states adopted a common programme to counter drug-trafficking and related crime. Efforts were made to harmonise legislation on such matters as the refusal of travel documents to convicted drug offenders and the refusal of entry into member states to convicted drug offenders. The death penalty was also introduced for serious drug offences. Three ASEAN training centres were established dealing with prevention in the Philippines, rehabilitation in Malaysia, and law enforcement in Thailand. But in most case-related matters there has only been co-operation at a bilateral level. See Anderson *op cit* 95 at 3; generally Yodmani C 'The role of the Association of South East Asian Nations in fighting illicit drug traffic' (1983) 35 *Bulletin on Narcotics* 97-104. Abarro PA 'The role of the Drug Advisory Programme of the Colombo Plan Bureau in the fight against illicit drug traffic' (1983) 35 *Bulletin on Narcotics* 67-72 examines the large scale involvement since 1973 of the Colombo Plan's Drug Advisory Programme's in regional drug control in concert with the UN, and particularly its role in helping to organise the first HONLEA meetings in 1976.

¹²⁸ The Organisation of American States (OAS), in pursuit of its 'Inter-American Program of Action of Rio de Janeiro Against the Illicit Use and Production of Narcotic Drugs and Psychotropic Substances and Traffic Therein' (1986), established the Inter-American Drug Abuse Control Commission (CICAD) to oversee and develop its drug control policy and to work with member states to aid in formulating regional plans designed to combat illicit drug trafficking. CICAD has also been directed to oversee the ratification of the 1988 Convention by member states and their application of its provisions. In 1992, it produced Model Regulations Concerning Laundering Offences Connected to Illicit Drug Trafficking and related Offences. See generally Zagaris B and Papavizas C 'Using the Organisation of American States to control international narcotics trafficking and money laundering' (1986) 57 *Revue Internationale de Droit Penal* 119-132.

¹²⁹ See Gotschlich GD 'Action by the Customs Co-operation Council to combat illicit drug trafficking' (1983) 35 *Bulletin on Narcotics* 79-81; Dickerson GR 'The Customs Co-operation Council and international customs enforcement' (1985) *The Police Chief* 16-18. At 17 Dickerson notes the importance of the drug conventions along with the 1977 Nairobi Convention (the International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences; in force 1980) as a legal basis for the WCO's activities. Annex X of the Nairobi Convention is specifically concerned with action against illicit drug smuggling and associated financial operations. The WCO is mainly involved in the pooling and supply of information, and liaises with the UN drug control organs and states in this regard.

presented by money laundering.¹³⁰ In 1990, it established the short-lived Chemical Action Task Force, which studied and recommended regulatory steps in respect of precursors and other chemicals.¹³¹ The problem with regional organisations and IGOs is that certain jurisdictions are well covered, but other areas, such as Africa, remain outside their influence. This is compensated to a certain extent by organs involved in illicit drug control fall under the British Commonwealth, for example, the Commonwealth Secretariat's Commercial Crime Unit.¹³²

7.5 National drug control structures

The international drug conventions acknowledge the vital role of national drug control structures in the international system. It is trite that the execution by Parties of their treaty obligations takes place through their own structures. It would be impossible for this study to provide an exhaustive study of the international activities of these structures, so what follows is nothing more than a comment on some features of the international operations undertaken by national structures and their relations with the international drug control system.

International drug control law has successfully encouraged the development of drug control agencies. These can be somewhat artificially split into legal control and policing agencies.¹³³ Both types commonly generate policy, and in some states there are entirely separate overarching policy control bodies.

With respect to agencies dealing with the legal aspects of drug control, some Parties have opted for general supervisory drug commissions with representatives from

¹³⁰ See generally Gilmore WC 'International efforts to combat money laundering' (1992) 18 *Commonwealth Law Bulletin* 1129 at 1138-1139.

¹³¹ Like the FATF, the CATF issued a series of recommendations in 1990 which have generated close international co-operation – see generally Gilmore WC 'Drug trafficking and the control of precursor and essential chemicals: the international dimension' in MacQueen HL, Main BG (eds) *Drug Trafficking and the Chemical Industry: Hume Papers on Public Policy* Vol.4, no.1, (Edinburgh UP, Edinburgh, 1996) 18-22.

¹³² The Commonwealth Secretariat's various agencies involved in action against the international drug traffic have been particularly active in concentrating enforcement at the international level against the resources and property of illicit traffickers. See generally Rider BAK 'The role of the Commonwealth Secretariat in the fight against illicit drug traffic' (1983) 35 *Bulletin on Narcotics* 61-65.

¹³³ The drug conventions provide for central organisations for administering the drug control system and for the existence of specialised drug control agencies in direct communication. See, for example, article 35(a) of the 1961 Convention.

various authorities,¹³⁴ while others have chosen centralised control in one body. The development and proliferation of national central authorities has been a priority of the UN because such authorities are crucial to international co-operation in areas requiring legal expertise such as extradition, mutual legal assistance and asset confiscation. These authorities are usually present in a form dedicated to international crime control in developed states,¹³⁵ but the position in developing states is usually that such requests are handled by the general offices of justice ministries, which often do not have the appropriate expertise. Hence, the continued pressure for the establishment of national central authorities.¹³⁶

At the level of policing, the position depends on the resources available. In developing states drugs policing may still be performed by the ordinary police force. Developed states operate a range of enforcement agencies, some specialised and others not, and develop others in advance of any international obligation to meet the changing threats offered by the illicit traffic.¹³⁷ From the national enforcement perspective, international drug control is dramatically out of political balance. The heavyweights, exerting most of the power, are the consumer states from the developed world, dominated by the United States.¹³⁸ The national drugs strategy of the United States has obvious international implications, because the United States has extended its war

¹³⁴ David TJ 'The British Government's international anti-drugs work' (1991) 17 *CLB* 1368 explains that Britain's international anti-drugs work is carried out by a large number of different departments, with the Home Office playing a central co-ordinating role.

¹³⁵ For example, at the level of legal interstate relations, the US has created a number of agencies which have great influence in international law enforcement concerns such as the handling of extradition and legal assistance matters, negotiating MLATs etc, viz.: the Office of International Affairs (OIA) in the Justice Department's Criminal Division, and the Office of Law Enforcement and Intelligence (OLEI) in the State Department Legal Adviser's Office, both in place since 1979.

¹³⁶ See, for example, Stafford D *International legal co-operation against serious crime: inter-legal systems issues impacting on international co-operation* (unpublished paper, New Delhi Global Drugs Law Conference, 1997) at 4.

¹³⁷ A recent development with obvious international implications has been the establishment of Financial Intelligence Units (FIUs) dealing with money laundering intelligence and ensuring adherence to financial laws. For example, AUSTRAC (the Australian Transaction Reports and Analysis Centre) which is a central body established by the Australian Parliament to receive, collate and analyse reports of transaction from cash dealers - see generally Willis P et al 'Australia' in Parlour R (ed) *Butterworths International Guide to Money Laundering Law and Practice* (1995) 29-45. Many of these FIUs operate separately from Justice Ministries in their countries and maintain independent relationships with financial institutions and law enforcement agencies. The Egmont Group formed in 1995 serves as a basis for international co-operation among FIUs, encouraging sharing of information, co-ordinating training and addressing legal issues unique to money laundering.

¹³⁸ The "drug czar" of the US is the head of the Office of National Drug Control Policy (ONDCP) located in the Executive Office of the President. A lot of power is exerted by the State Department's Bureau of International Narcotic Matters (BINM) which uses economic aid either directly or to the ONDCP's fund to achieve its international enforcement goals.

against drugs internationally. The enforcement model in developed states has been heavily influenced by United States practice. Nadelmann notes that most European states have followed the American example by making three changes.¹³⁹ First, they have developed specialised drug enforcement units, often working in tandem with specialised prosecutors.¹⁴⁰ Second, they have adopted American investigative techniques, such as controlled delivery, 'buy-bust' operations, electronic surveillance, and the reduction of charges against alleged criminals in order to 'flip' them and transform them into informants. Third, European states have made legal changes so that previously illegal investigative techniques such as controlled delivery now have both national and international sanction. Nadelmann notes that "Americanisation" of foreign drug enforcement has its roots in the American desire for other developed states to share the burden of international drug enforcement, to improve the capacity of foreign criminal justice systems to assist American based investigations, and to make it easier for the DEA to police drugs extraterritorially.¹⁴¹ Yet he recognises that the main impetus has come from the response of European criminal justice systems to significant increases in domestic drug trafficking.¹⁴²

Developing producer and transit states present more of a problem of the United States. The necessity for it and other developed consumer states to police extraterritorially in these states is the cause of most of the growth of the international drug control system and most of the friction in respect of its application. But resistance has not deterred the United States which has entered many formal agreements and informal arrangements with other states for the exchange of information, enforcement co-operation, mutual legal assistance and so on. Anderson comments:

The activist role of the United States is such that the domestic legislation of other countries has been amended to allow for effective co-operation with the United States in the drugs field.¹⁴³

¹³⁹ Nadelmann EA *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (1993) at 192.

¹⁴⁰ For example, in France, the *Office Centrale de Repression du Traffic Illicite de Stupefiants*, and in Italy, the *Servizio Centrale Antidroga*.

¹⁴¹ Nadelmann *op cit* (1993) at 247.

¹⁴² *Op cit* at 247.

¹⁴³ *Op cit* at 120.

The claims of the United States to extraterritorial jurisdiction are directed mainly at developing consumer states. Its main drug enforcement arm, the DEA, has the largest international presence of any domestic law enforcement agency in the world,¹⁴⁴ while the Federal Bureau of Investigation (FBI) and US Customs also maintain permanent representatives in many countries. The United States has large numbers of officials, often attached to embassies as attaches, who engage in extraterritorial operational activity with the consent and co-operation of host countries.¹⁴⁵ Their purposes include: maintaining communications with local police; training local police; undertaking joint drug enforcement operations with local police; conducting limited unilateral activities such as surveillance and recruitment of informants; providing drugs intelligence to local authorities; lobbying for changes in local laws to facilitate drug enforcement objectives; and promoting co-operation.¹⁴⁶ It has resorted to a number of measures to overcome local corruption and inertia, such as the financing and training of elite local drug enforcement units which effectively do its bidding, and its activities have reached the levels of military operations in Columbia and Bolivia.¹⁴⁷ Anderson notes:

The case for a large overseas presence of the DEA is based on the assumption that action in the source and transit countries can significantly reduce drug abuse in the United States.¹⁴⁸

¹⁴⁴ Over 250 agents, in sixty offices, in 44 states - see Nadelmann EA 'The role of the United States in the international enforcement of criminal law' (1990) 31 *Harvard ILJ* 37 at 48.

¹⁴⁵ US officials are not permitted in terms of domestic legislation to participate directly in drug arrests abroad - the 1961 Foreign Assistance Act 22 USC section 481(c) and section 2291(c) as amended by section 504(b) of the International Security Assistance and Arms Export Control Act of 1976, Public Law No. 94-329, 90 Stat.764. There have been further amendments to this legislation. Under the 1989 International Narcotics Control Act Public Law No. 101-231, 103 Stat.1954 they may be present at arrests and assist foreign law enforcement officials and take direct action to ensure their own safety. See generally Campbell AB 'The Ker-Frisbie doctrine: a jurisdictional weapon in the war on drugs' (1990) 23 *Vanderbilt Jnl of Transnational Law* 385 at 422-427, Murphy SR 'Drug diplomacy and the supply side strategy: a survey of United States practice' (1990) 43 *Vanderbilt LR* 1259 at 1277-1281. Nadelmann *op cit* (1990) at 46-57 sets out the international enforcement role of US agencies in full.

¹⁴⁶ Nadelmann *op cit* (1990) at 48.

¹⁴⁷ Nadelmann EA 'The DEA in Latin America: dealing with institutionalized corruption' (1989) 62 *Police Journal* 31-42 (part one of two part article) and 'The Drugs [sic] Enforcement Agency in Latin America: the ins and outs of working around corruption' (1989) 62 *Police Journal* 157-173 (part two of two part article), gives a thorough account of the DEA's extraterritorial enforcement action and the methods which it uses.

¹⁴⁸ See Anderson *op cit* at 162.

The flamboyant international operations of the DEA have, however, been criticised.¹⁴⁹ They are good value politically in the United States, but they have political costs, especially in Latin America.

Where the United States has lead, others have followed. Nadelmann refers to the emergence of a 'transnational police community and subculture based upon common tasks and the common objective of immobilising the criminal.'¹⁵⁰ Most developed states now have drug liaison officers (DLOs) posted in producer and transit states but they take a lower profile than US agents.¹⁵¹ This practice remains unregulated by any general international agreement on permissible forms of representation. The threat to the sovereignty of the host state is obvious. Indeed, a feature of the proliferation of national drug enforcement agencies working internationally is their lack of accountability and transparency.¹⁵² They are in principle accountable to their home governments but they often work far beyond any sort of review or restraint on their actions.

The United States' increasing use of its military in drug enforcement during the 1980s and 1990s falls completely outside any international agreement, and has been heavily criticised.¹⁵³ But it is interesting that the British Navy is now employed full time in drug interdiction,¹⁵⁴ and that a role for naval vessels is set out in article 17(10) of the 1988 Convention. The employment by the United States of its intelligence services to combat drug trafficking seems bound to set another unregulated precedent.¹⁵⁵

At the other end of this unequal relationship are the enforcement agencies of those developing states in which large scale agricultural production, manufacture, and transit of drugs take place. These agencies have become heavily involved in the international criminal system for the suppression of illicit drugs. They frequently serve as vicarious police forces for the enforcement agencies of developed states.¹⁵⁶ But they

¹⁴⁹ For example, in the 1986 'Operation Blastfurnace' the US lent Bolivia 170 soldiers and an unknown number of DEA personnel to destroy coca crops. Some Latin Americans considered this to be an infringement of Bolivian sovereignty and its effects were short-lived. A drugs intelligence specialist said that despite '180 days of 7 days a week work' by the joint task force, 'everything is back where we started.' See Anderson *op cit* at 122 quoting from *The Washington Post* 6 Feb 1987.

¹⁵⁰ Nadelmann *op cit* (1993) at 188. In 1997, for example, the UK had 47 law enforcement officers located abroad.

¹⁵¹ See Anderson *op cit* at 166. David *op cit* at 1374 sets out the details of Britain's system of drug liaison officers which has become steadily more extensive (27 in 1990).

¹⁵² Sheptycki *op cit* at 66.

¹⁵³ See generally Murphy SR 'Drug diplomacy and the supply side strategy: a survey of United States practice' (1990) 43 *Vanderbilt LR* 1259 at 1277-1289.

¹⁵⁴ See Sheptycki *op cit* at 69.

¹⁵⁵ See Sheptycki *op cit* at 71 who notes that British intelligence services are also entering the field.

¹⁵⁶ Nadelmann *op cit* (1993) at 193.

suffer from understaffing and inexperience¹⁵⁷ and find themselves in a vastly unequal relationship with the enforcement authorities of the consumer states because of the resources and capabilities of the latter. Nadelmann notes wryly that 'the fairly operational activities of U.S. agents in foreign countries only rarely have lead to demands that foreign police agents be permitted to do likewise in the United States.'¹⁵⁸ Moreover, while the enforcement agencies of the developing world may have different views as to how the system should develop, with more emphasis on demand rather than supply reduction because they see the consumer states as the source of the problem, these views do not carry great weight because of their lack of political influence or professional expertise.¹⁵⁹

It would be politically convenient to characterise the UN drug control organs and the international drug control system as neutral arbiters mediating between developed and developing states. From this perspective, the developed states would consider the UN and the system as too soft on source and transit states, while the developing states would consider the UN and the system as too pliable by consumer states. The UN does steer a difficult political course between these groups of states. But the UN organs and particularly the legal system, are not neutral. They are oriented toward the interests of the developed states, if only because the developed states drove their creation. This point is well illustrated by the way in which the international legal system relies upon national drug control agencies for operational policing. Any assessment of the practical impact of the various organs involved in international drug control illustrates that the national control organs of developed states are significantly more successful at enforcing international drug prohibition than the organs of the UN. This success relates to their different nature and functions. Apart from the fact that they are performing different tasks - the former engaged in operational policing and the latter in a non-operational role - they are also different types of organisations, and thus subject to different restrictions on their actions. The various national drug control organs such as the DEA operating internationally are, to use Huntington's term, 'transnational organisations' rather than 'international organisations' in that they are organs that

¹⁵⁷ For example, the Indian Narcotic Control Bureau, formed in 1994, only has 160 personnel, which as Saxena DR *Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the Law in India* (unpublished conference paper, New Delhi Global Drugs Law Conference, 1997) notes at 24, given India's size and population, is 'really quite inadequate'.

¹⁵⁸ Nadelmann *op cit* (1993) at 469.

¹⁵⁹ See Anderson *op cit* at 8.

perform relatively limited, specialised, and in some sense technical functions across national boundaries.¹⁶⁰ Thus, unlike the UN's drug control organs which are international organisations, they appear to be more effective because they have adopted the operating principles associated with nongovernmental transnational organisations such as commercial multi-nationals - a disinterest in sovereignty - and thus do not face the problems with confronting and overcoming state sovereignty in acquitting their tasks.¹⁶¹ The DEA's ostensibly non-political programme (ostensibly in that the pursuit of individual criminals disguises the political task of enforcing drug prohibition), allows it in effect to submerge below politics, a luxury not afforded to the UN's drug control organs which are, by contrast, interested in sovereignty and do respect it. This means that the UN organs' success is subject to the vagaries of state politics to a much greater extent than national organs or even Interpol. What is significant though is that through their provisions for extraterritorial jurisdiction, extradition, international law enforcement co-operation and so on, the drug conventions recognise the important role internationally of national enforcement agencies that operate internationally. Nadelmann points out:

As a transnational organisation, the [DEA] is a hybrid of a national police agency and an international law enforcement organisation. It represents the interests of one nation and its agents are responsible to the ambassador, yet it has a mandate and a mission effectively authorised by international conventions and the United Nations.¹⁶²

Nadelmann sees the DEA as playing some kind of role as an international drugs police by proxy; and as having a powerful influence in this role. It seems unlikely that many other states would agree that this is the role a national government organisation should be playing, but without an international drugs police force, and a declared international war on drugs being waged, the withdrawal of national organisations such as the DEA seems unlikely. Indeed, their role is implicit within the international drug control system.

¹⁶⁰ Nadelmann *op cit* (1993) at 110 citing Huntington S 'Transnational organisations in world politics' (1973) 25 *World Politics* 333.

¹⁶¹ See Nadelmann *op cit* (1993) at 111 citing Huntington at 368.

¹⁶² Nadelmann *op cit* (1993) at 129.

7.6 The problems facing the international drug control system

7.6.1 Problems at the institutional level

The drug control system, like any other of an institutional nature, has its problems.

The UN's drug control organs, especially the UNDCP, often find themselves in a dire funding position.¹⁶³ Resolution Three of the 1988 Diplomatic Conference's non-binding resolutions aims to secure the necessary financial appropriations for the UN drug control organs to enable them to act against the illicit drug traffic. It urges Parties to the 1988 Convention to press within the UN for approval of the necessary budgetary appropriations for drug control. Organisations such as Interpol also suffer from funding problems, in marked contrast to the funds available at the national level in the United States, for example. National contributions as part of total drug control expenditure are low. In 1991, for example, the United States drug control budget of \$11.9 billion was split as follows: 93.6% to domestic efforts, 6.3% to bilateral assistance, and 0.1% to multilateral drug control programmes such as the UNDCP.¹⁶⁴

The whole system is too complex. Anderson notes that 'few people grasp how the various elements fit together.'¹⁶⁵ The formation of the UNDCP has addressed this problem to a certain extent, but at the regional level for example, I defy anyone to produce a comprehensive survey of which organisation is competent to do what. Complexity of the system reflects the proliferation of professions involved in the system. Police, social workers, politicians, bureaucrats, rural development specialists, chemists, psychologists and psychotherapists, economists, intelligence experts, lawyers and so on, can all be found within it. Complexity is exacerbated by institutional overlap. Too many institutions do the same kind of work. Overlap hinders effectiveness. Proliferation of organisations in, for example, Europe, all operating in the same market as it were and all competing for resources, can both overcomplicate the system and waste resources.¹⁶⁶

Rivalry and lack of trust at the operational level is also a problem. 'Turf wars' between law enforcement organisations within states can frustrate adequate international

¹⁶³ The UNDCP's budget for 1996-1997 was 157 million dollars, 89.9% made up of voluntary contributions which are not always forthcoming.

¹⁶⁴ 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 20.

¹⁶⁵ *Op cit* at 115.

¹⁶⁶ For example, Anderson *op cit* at 112-3 points out the duplication of Interpol functions by HONLEA meetings.

co-operation. An example is the often poor relations between customs and police.¹⁶⁷

Rivalry also exists between the national agencies of different states, and between the UN's drug control organs. Sometimes trust relationships, crucial to international co-operation, are also absent.¹⁶⁸

The size of the task undertaken, the geographical scope of the system and the system's own complexity all help to generate an information overload. Too much information is demanded of Parties. Information blockages that hold up enforcement action can be circumvented by direct contact at the enforcement level.

National differences will always be a problem in a system that rests on national co-operation. Language differences, differences in legal systems and procedures, differences in appreciation of the causes and solutions of the drug problem, all present a problem. Political considerations lead to pointless political posturing at forum meetings,¹⁶⁹ and these tensions are also at work within the international drug control organs.

The system is run by a large bureaucracy which makes it vulnerable to the criticism that it is self-interested and resistant to change. The Panamanian delegate to the 1972 Conference wryly noted:

Panama knew from experience that many United Nations bodies, more particularly the Commission on Narcotic Drugs and INCB, were paralysed by bureaucracy and hence incapable of providing real assistance to countries which requested it.¹⁷⁰

Recent reorganisation of the UN's Vienna operations appears to have been carried out with the aim of reducing the bureaucracy and thus cost of international drug control.¹⁷¹

The system is largely self-regulating. The UN organs evaluate their own performance, when they should be audited by external auditors. This criticism is highlighted by Seccombe's allegations that the UNDCP responds in a contradictory manner to the failure of its efforts to suppress illicit cultivation, and that it is inclined to

¹⁶⁷ Anderson *op cit* at 115.

¹⁶⁸ Anderson *op cit* at 115.

¹⁶⁹ Anderson *op cit* at 114.

¹⁷⁰ 1972 *Records* vol.II at 161.

¹⁷¹ The collapse of the UNDCP and CACP under the control of the ODCCP is one such step.

public relations type reporting rather than accurate reporting of indicators.¹⁷² Recently, steps have been taken to address this criticism.¹⁷³

7.6.2 Settlement of disputes and problems with the execution of the system

7.6.2.1 Settling disputes under the system

Dispute settlement under the 1961 Convention is governed by article 48, which requires the Parties in terms of article 48(1) to make an attempt to settle the dispute by the peaceful means there specified before being obliged to refer it in terms of article 48(2) to the ICJ. However, article 50 permits Parties to make reservations to article 48, and some Parties to the 1961 Convention have made a reservation to article 48(2) to the effect that they do not accept the compulsory jurisdiction of the ICJ.¹⁷⁴ Thus Chatterjee submits that the ICJ's jurisdiction is, despite the peremptory wording of the provision, still only optional.¹⁷⁵ The very similar article 31 of the 1971 Convention, provides for peaceful settlement of a dispute in paragraph 1, but in paragraph 2 provides that disputes that cannot be settled using such means 'shall be referred, at the request of one of any one of the parties to the dispute,' to the ICJ for decision. However, article 32(2)(c) allows Parties to reserve in respect of article 31 of the 1971 Convention. Some Parties have objected to article 31 as a whole.¹⁷⁶ Some Parties have objected to the granting to one Party of the unilateral right to refer the dispute to the ICJ, and have made reservations to the effect that the agreement of all Parties to the dispute is required before it can be

¹⁷² Seccombe R 'Squeezing the balloon: international drugs policy' (1995) 14 *Drug and Alcohol Review* 311-316. Previously a Field Adviser with the UNDCP in Pakistan, he argues that the UNDCP's failure to control illicit cultivation has resulted in it responding contradictorily. It reports the spread of illicit cultivation in order to attract funding, but also reports success in suppressing illicit cultivation. Illicit production increases are sometimes not reported to the CND or said to be fluctuating when in fact they are increasing.

¹⁷³ The UN has shown greater interest in institutional reform since the beginning of Kofi Annan's term as UN Secretary General, and at present we await a final report of the Expert Group convened to review the UN's organs work on international drug control. It is due in 1999 - UN Press Release GA/9423.

¹⁷⁴ The wording of the article states that Parties 'shall' refer the dispute to the ICJ for decision, if the preliminary measures fail to resolve it. Algeria (7/4/1965), Argentina (24/10/1969), Indonesia (3/9/1976) and Romania (14/1/1974) have all made reservations to the effect that they do not recognise the compulsory jurisdiction of the ICJ in terms of article 48(2) (see *Multilateral Treaties Deposited* (1997) at 282-284).

¹⁷⁵ Chatterjee *op cit* at 448 endnote 104 submits that article 48(2) does not oblige the Parties to accept jurisdiction and that following general principles, the common will of the parties to the dispute will determine the ICJ's jurisdiction.

¹⁷⁶ Cuba reserved its rights in respect of article 31 on the basis that all disputes should be resolved diplomatically (26/4/1976 - *Multilateral Treaties Deposited* (1997) at 289). See also reservations by

referred to the ICJ.¹⁷⁷ Other Parties have simply refused to recognise the compulsory jurisdiction of the ICJ.¹⁷⁸ In practical effect, the possibility of reservation means that both the provisions in the 1961 and 1971 Convention may only provide for the optional jurisdiction of the ICJ depending on the presence or absence of such reservations.

The 1988 Convention appears to provide for the compulsory jurisdiction of the ICJ. Its dispute settlement mechanism is set out in article 32. Article 32(1) provides that should a dispute arise between Parties as to the application or interpretation of the Convention they must first try to settle it by peaceful means between themselves. If they cannot, article 32(2) provides that the dispute 'shall be referred, at the request of any one of the parties to the dispute, to the International Court of Justice for decision.' Article 32(3) provides for the situation where a regional economic organisation is participating in the Convention and has become party to a dispute. In terms of article 34(1) of the Statute of the International Court of Justice only states can be party to contentious cases before the ICJ, thus article 32(3) provides that such an organisation

may, through a State Member of the United Nations, request the Council to request an advisory opinion of the International Court of Justice in accordance with article 65 of the Statute of the Court, which opinion shall be regarded as decisive.

Gilmore identifies the weakness in the 1988 Convention's dispute mechanism scheme as the provision in article 32(4)¹⁷⁹ which allows Parties to opt out of article 32's "compulsory" system of jurisdiction.¹⁸⁰ Gianaris argues that article 32's opt out allows

Egypt (4/6/1972), Myanmar (20/6/94), South Africa (27/1/1972), Turkey (1/4/1981) (see *Multilateral Treaties Deposited* (1997) at 289-291).

¹⁷⁷ See the reservations made by Afghanistan (21/5/1985), Belarus (15/12/1978), France (28/2/1975), Iraq (17/5/1976), Poland (3/1/1975), Russian Federation (3/11/1978), Tunisia (23/7/1979), Ukraine (20/11/1978) (see *Multilateral Treaties Deposited* (1997) at 288-291).

¹⁷⁸ Bahrain (7/2/1990), India (23/4/1975), Libyan Arab Jamahiriya (24/4/1979), Papua New Guinea (28/10/1980) (see *Multilateral Treaties Deposited* (1997) at 288-290).

¹⁷⁹ It reads: '4. Each State, at the time of signature or ratification, acceptance or approval of this Convention or accession thereto, or each regional economic integration organization, at the time of signature or deposit of an act of formal confirmation or accession, may declare that it does not consider itself bound by paragraphs 2 and 3 of the article. The other Parties shall not be bound by paragraphs 2 and 3 with respect to any Party having made such a declaration.'

¹⁸⁰ Gilmore WC *Combating International Drugs Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 40. A number of states have taken advantage of this escape clause. Peru declared (20/12/1988) as follows: 'In accordance with the provision of article 32, paragraph 4, Peru declares, on signing the Convention ... that it does not

Parties to avoid dispute settlement completely,¹⁸¹ and Catino suggests that this weakens the whole of the 1988 Convention, pointing out that unsettled disputes can lead to a lack of co-operation among Parties and a weakening of enforcement action against the illicit traffic.¹⁸² As yet, no breach of the conventions' obligations has been referred to international arbitration or judicial settlement, nor has any dispute arisen as to their interpretation. The likely explanation is that in most cases the Parties prefer to use more discreet methods of solving problems, while in the case of serious problems the Parties do not believe that the optional dispute settlement mechanism can produce concrete results.

7.6.2.2 The execution of the system

Bassiouni argues that the international measures for ensuring state compliance with the undertakings they have made in terms of the illicit drug control system are ineffective.¹⁸³ There are various methods of ensuring compliance both conventional and unconventional, and it is perhaps due to the disuse rather than ineffectiveness of the former, that the latter exist. Thus far this study's examination of the execution powers of the UN drug control organs has focused on the INCB and the export-import embargo procedure contained in the early drug conventions. The inappropriateness and weakness of these provisions is obvious, while similar provisions are simply absent from the 1988 Convention. Other options are available.

Chatterjee argues, for instance, that a failure by Parties to obey the general duty to co-operate in articles 35 and 36(2)(b) of the 1961 Convention is a breach of a contractual obligation. He states:

consider itself bound by article 32, paragraphs 2 and 3, since, in respect of this Convention, it agrees to the referral of disputes to the International Court of Justice only if all the parties, and not just one, agree to such a procedure.' The list of objecting Parties include: Algeria (9/5/1995) - article 32(2); Bahrain (7/2/1990) - article 32(2); Brunei (12/12/1993) - article 32(2) and (3); China (25/8/1989) - article 32(2) and (3); France (31/12/1990) article 32(2) and (3); Iran (7/12/1992) - article 32(2) and (3); Lebanon (1/3/1996) - article 32(2) and (3); Malaysia (11/5/1993) - article 32(2) and (3); Myanmar (11/6/1991) - article 32(2) and (3); Peru (16/1/1992) - article 32(2) and (3); Saudi Arabia (9/1/1992) - article 32(2) and (3); United States (20/2/1990) - article 32(2) and (3); (see generally *Multilateral Treaties Deposited* (1997) at 302-307).

¹⁸¹ Gianaris WN 'The new world order and the need for an international criminal court' (1992/3) 16 *Fordham ILJ* 88 at 108.

¹⁸² 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 at 438.

¹⁸³ *Op cit* at 515.

Indeed, the co-operation which is needed, especially in the case of punishment of illicit traffickers, or prevention from use of a territory for the purposes of illicit traffic and so on, even if it means enacting new laws and/or setting up new administrative procedures, should not only be viewed seriously, but also taken as a legal duty, for a breach of which the Contracting Party can be taken to task.¹⁸⁴

Action to remedy such a breach, indeed any breach of the conventions, may include collective economic sanctions, but such action will always be ad hoc and dependent on the nature of the political support available.

Another method of enforcing the system is through publicity. The provision of information by states to the international organs controlling the system, is an obligation provided by treaty. The publication of that information is not, but it has become international practice, and plays an important role in execution of the system. Bassiouni states:

The effectiveness of international narcotics control ... lies in world public opinion, thus "publicity" will foster compliance with international obligations according to the terms of the various narcotics treaties. While over-dramatisation by information media of drug addiction, illicit traffic, and other aspects of narcotics control has often been found to be harmful to the efforts of national and international authorities, publicity given to the lack of governmental co-operation has a salutary effect. Governments are extremely sensitive to any public outcry that they have failed to co-operate in such a social humanitarian activity. Such publicity is intended to be provided by published reports of the organs of international control based on information furnished by governments (annual reports, laws, statistics, estimates, seizure reports) and by discussions in various United Nations bodies and dissemination of general information.¹⁸⁵

However, as has been pointed out, the information furnished by states and thus reproduced by international organs is not always complete or reliable.

¹⁸⁴ *Op cit* at 356.

¹⁸⁵ *Op cit* at 510.

A further method of executing the Conventions is through diplomatic pressure. States do resort to such pressure.¹⁸⁶ Bruun et al note that this pressure is usually used to force states to make arrests and seizures, and suggest that

... an alternative course may be in employing international relations to effect changes in previously overlooked or underplayed facets of the illegal trade, such as the acquiescence of governments, on political or economic grounds or both, to facilities on their soil for illegal production and distribution, and for the holding of profits (for example, in Swiss Banks).¹⁸⁷

They might equally have pointed to the use of such pressure to enforce demand reduction.

Finally, extraordinary methods of execution may also be resorted to in the future. In 1935, Bailey likened a state failing to prevent the export of illicit drugs which threaten the health and welfare of the inhabitants of other states to the responsibility of a state for allowing its inhabitants to fire shots across an international frontier.¹⁸⁸ Given the preoccupation of the United States with illicit drug production in states in Central and South America, this analogy of failing to stop the illicit traffic as constituting a form of aggression which can by extension be met by self-defence is more dangerous than ever. It is not remarkable that the United States has resorted to a similar argument to justify its abduction of drug traffickers from foreign states.¹⁸⁹

7.6.3 Problems with reservations

Reservations to the more ambitious provisions of the drug conventions may well prove to be a problem. Reservations in respect of the 1961 and 1971 Convention's penal provisions are not directly provided for, but are possible.¹⁹⁰ The 1988 Convention makes no provision for reservations at all. It leaves the issue to general international law which means that reservations may be made unless they are incompatible with the object and

¹⁸⁶ See David *op cit* at 1374 noting British practice.

¹⁸⁷ See Bruun et al *op cit* at 282.

¹⁸⁸ See Bailey SH *The Anti-Drug Campaign: An Experiment in International Control* (1935) at 143-4.

¹⁸⁹ 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 at 259.

purpose of the treaty.¹⁹¹ Sproule and Saint-Denis comment that in spite of the fact that it was hoped that the 1988 Convention would eliminate the loopholes in earlier conventions by providing for a complete prohibition on reservations:

States unwilling to shoulder strong obligations will not only have available to them numerous safeguard clauses, but will also be able to reserve on provisions they deem objectionable so long as the provisions comply with the Vienna Convention's rather generous rules on reservations.¹⁹²

The presence of safeguard clauses in the 1988 Convention appears to have limited the number of reservations in practice.

7.6.4 Other problems with the legal basis of the system

While substantial progress has been made towards providing a basis for the international drug control system in international law, the system is still seen by the national enforcement agencies as inadequate for combating the drug epidemic.¹⁹³ The reasons for this are many. One is the system's lack of success in suppressing the illicit traffic by comparison to the more direct approach of the national agencies. Whether this lack of success can be ascribed to the inadequacy of international law in the sense that if this law granted enforcement agencies greater powers they would be more successful in stopping the illicit traffic is speculative, and usually assumes that heavier enforcement of prohibition will do the trick.

The elaboration of international law is well into its second phase; the first was concerned with legal regulation of licit drugs; the second is concerned with supply reduction. Progressive development of international drug control law appears to point to concrete movement into the third phase, viz.: greater legal elaboration of demand suppression and harm reduction in an international convention. This might well achieve more than the existing conventions that are devoted to the policing of supply. Obviously

¹⁹⁰ Article 50(1) provides for a general ban on reservations, but article 50(3) provides for a special procedure that allows reservations in the absence of the objections by at least one third of the other Parties. Article 32(1) and (3) of the 1971 Convention are of similar effect.

¹⁹¹ See *Genocide Convention Case* 1951 ICJ Reports at 15 and articles 19 and 20 of the 1969 Vienna Convention on the Law of Treaties 1155 UNTS 331.

¹⁹² *Op cit* at 290-291.

¹⁹³ Anderson *op cit* at 115.

the existing conventions can be amended. It is unlikely that recourse will be taken to the amendment provisions in the 1961 or 1971 Conventions now.¹⁹⁴ Amending the 1988 Convention to bolster its enforcement provisions is more likely, and the process is uncomplicated.¹⁹⁵ However, it is submitted that an entirely discreet convention dealing with demand and harm reduction is the next logical step in the development of international drug control law.

7.6.5 The international drug control system?

This chapter began by examining the various organs that form part of the UN's system of drug control. The discussion focused on their roles as defined by the drug conventions, that is, their roles within international law. Organisations that have a semi-defined role within international law such as Interpol also have a place within this global system of co-operation. It is this system which has been the focus of this study as a whole. To call it a system at all may be a misnomer, given that while mechanisms for co-operation and co-ordination are in place, the strength of these mechanisms is doubtful, and organisations appear to operate largely independently of each-other and at different levels of co-operation - the UN organs operating at the macro levels of international agreement and diplomacy, Interpol largely at the micro levels of specific co-operation on specific problems. When one adds to this the regional organisations and national organisations in drug control at the international level a much larger and even more incoherent system begins to emerge, of which the UN's system is simply a small part. The laws which define and empower this much larger system are, however, only indirectly the subject of this study. This larger system is of interest because it grows out of the system of international drug control created by the drug conventions. Indirect application of international law makes this system possible because it overcomes sovereignty concerns. But indirect application is also the system's greatest weakness from the point of view of the effective institutionalisation of enforcement of global prohibition because it compromises that effectiveness. It is submitted that this weakness

¹⁹⁴ Article 47 and article 30 respectively. They are identical.

¹⁹⁵ Article 31, entitled 'Amendments', leaves the amendment process largely in the hands of the Parties. A proposed amendment is circulated and enters into force after two years (long enough for a Party to complete the necessary legislative changes) if no other Party has objected to it, and comes into operation for each particular Party ninety days after that Party deposits an instrument of acceptance with the UN Secretary-General. If any Party rejects an amendment, a process begins which may result in ECOSOC calling a diplomatic conference.

is only ameliorated by the provision through the system of subtle avenues for the intervention of developed consumer states internationally to suppress drugs. From the point of view of the effectiveness of enforcement of prohibition, there is no substitute for a centralised drug control system applying prohibition directly.

CHAPTER EIGHT: CONCLUSION

[One] of the prime advantages of [the 1988] Convention which largely replicates the criminal sanctions which you and your colleagues and we in the law enforcement community have succeeded in having placed on the books in the United States - [is that] replicating those among all the signatory nations of the world will have a distinct advantage in not only securing a uniformity in terms of offence, but a worldwide consensus which expresses our abhorrence of this type of trafficking.

(United States Attorney General Richard Thornburgh before Senate Hearing on ratification of the 1988 Convention)¹

8.1 The international illicit drug control system - an international legal system enforcing global drug prohibition

The statement by the United States Attorney General quoted above reflects the two major concerns of the international drug control system. The first is the technical concern of the law enforcer - that international law establishes uniform and strong domestic drugs law in order to institute as effective an international illicit drug suppression system as possible. The second is the concern of the policy maker - that all states should subscribe to the policy of prohibition. Although these interests are in a dynamic relationship, the latter largely drives the former. The advocates of drug prohibition have attempted to institutionalise it globally by using international law to first define licit drug production, supply and use, and then to create an international system to suppress illicit drug production, supply and use. Agreement to specific international conventions setting out a range of technical measures has provided the legislative foundation for the illicit drug control system. This study has examined the law which makes up the illicit drug control system and, to a lesser extent, the policy which drives the law. Comments and conclusions about the system can usefully be grouped into these two general categories of law and policy.

¹ *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* Senate Executive Report 101-15, 101st Congress, 1st Session at 134.

8.2 An evaluation of the international legal provisions for the suppression of illicit drugs

8.2.1 The specific substantive and procedural provisions of the drug conventions

Through a progressive layering of provisions in the 1961 Convention, 1971 Convention, 1972 Protocol and 1988 Convention, international law has attempted through the agency of domestic law to suppress illicit drugs.

The drug conventions attempt first to lay down a system of uniform drug offences in domestic law. Although they provide that Parties shall render certain conduct unlawful in domestic law, a range of limitation clauses render these obligations open to domestic variation. With respect to conduct, these provisions criminalise the full range of conduct relating to the illicit production and supply of drugs, providing for the “classical” trafficking offences that are the cornerstone of the illicit drug control system. The conventions also controversially criminalise personal use, but the provisions of the conventions betray an overwhelming concern with reducing supply rather than demand. The *numerus clausus* of offences set out in the 1961 Convention (as amended) have been criticised for being too inflexible, the open-ended provision in the 1971 Convention for being too ambiguous. The range of conduct was expanded in the 1988 Convention to include drug related financial and commercial activity such as money laundering. Generally speaking, the drug conventions struggle to introduce to civilian legal systems exotic common law notions such as conspiracy, and their provisions are not sufficiently flexible to comfortably embrace new forms of conduct such as narco-terrorism.² Problems of ambiguity plague the mental element of the offences allowing states to vary the fault requirements of domestic drug offences to include negligence. As a whole the provisions for offences are capable at most of the harmonisation of different domestic drug offences because of their struggle to overcome distinctive domestic grammars of criminal law while responding to the changing illicit drugs economy.

Linked to their criminalisation of certain forms of conduct, the drug conventions also attempt to secure the uniform application by Parties of severe penalties for serious offences such as the classical trafficking offences, and less-severe punishment for less-serious offences such as personal use offences. The conventions do little more than

construct this crude framework, as states have resisted international intervention in this area. In state practice serious punishment involves heavy terms of imprisonment or heavy financial penalties operating in combination or alone, and potentially even the death penalty. Incoherence in international punishment policy - it is driven by conflicting notions of deterrence, retribution and to a much smaller extent rehabilitation - results in hortatory and ambiguous punishment provisions in the drug conventions that are incapable of establishing global uniformity of punishment.

Although ostensibly committed to a no-hiding place approach to drug offenders, the drug conventions, sensitive to territorial and national sovereignty, approach the issue of jurisdiction over drug offences cautiously. The earlier conventions affirm the principle of territorial jurisdiction as the primary form of jurisdiction, and then regulate extraterritorial jurisdiction through a qualified form of the principle of subsidiary universality subject to heavy domestic limitation. Considering these provisions inadequate for reaching transnational drug offenders, the authors of the 1988 Convention attempted greater extension of jurisdiction. But the 1988 Convention also reaffirms the primacy of territorial jurisdiction, and then circumscribes the reach of extraterritorial jurisdiction. It does so by subjecting the establishment of extraterritorial jurisdiction to recognised links between the offender and Party establishing jurisdiction such as nationality and the effects principle. What neither the 1988 Convention nor its predecessors do, is apply universality of jurisdiction to drug offences. Provisions for subsidiary universality do exist in all of the conventions but they are heavily qualified because common law states reject universal jurisdiction over drug offences as they are committed to the extradition of extraterritorial drug offenders whatever their nationality.

The drug conventions' no-hiding place approach in respect of drug traffickers is also expressed in the attempt to make extradition possible in every situation in which drug offenders remove themselves from the state in which they commit an offence. The 1961 Convention makes weak provision for extradition, the 1971 Convention's extradition provisions are only slightly more effective, while the 1972 Protocol moderately strengthens the extradition provisions of the 1961 Convention. After 1972 there was a steady increase in the extradition of drug offenders, but this development was mainly bilateral as states were reluctant to base their extradition relations on the

² See Patel F 'Crime without frontiers: a proposal for an international narcotics court' (1990) 22 *NYU Jnl of Int. Law and Politics* 709 at 727 who notes that the training of militia for drug traffickers is an offence

multilateral drug conventions. Although the 1988 Convention's provisions on extradition echo the development of bilateral relations in extradition, they have not overcome obstacles to effectiveness such as the nationality and political offence exceptions. At a more fundamental level, the drug conventions' limited extradition provisions reflect the opposition of civilian states to the policy of universal extradition being pursued by common law states. The jurisdictional and extradition provisions reveal that the international community has not reached a consensus on how to establish an effective no-hiding place approach to international drug offences.

The practical requirements of policing drug offences nationally and internationally have driven the development of the drug conventions' provisions for enforcement co-operation. The earlier conventions do little more than: i) attempt to centralise national control of drug enforcement to facilitate international co-operation; ii) provide for such general international co-operation; iii) provide for the furnishing of information on the illicit traffic to control organs; and iv) provide for the speedy transmission of legal papers. Limitation clauses abound. The massive increase in extraterritorial enforcement action in the 1970s and 1980s saw the dedication of the 1988 Convention as an enforcement instrument. Thus, for example, the 1988 Convention makes detailed provision for mutual legal assistance in respect of the investigation, prosecution and adjudication of drug offences, and specifically makes provision for the neutralisation of bank secrecy. Such assistance presents technical difficulties because it involves adjustment of Parties' procedural law in respect of the routing and formatting of requests for assistance, something indicated by the permissible domestic limitation of the process. Mutual legal assistance is politically controversial because it appears designed to enable large drug consumer Parties to pursue criminals and evidence through the proxy of the assisting Party with little prospect of reciprocity. The 1988 Convention also makes provision for the novel concept of transfer of proceedings, and for sophisticated forms of general enforcement co-operation such as provision for direct communication between enforcement agents and prosecutors, and international co-operation in the conduct of investigations. In addition, it obliges Parties to train their personnel in modern law enforcement methods and provides for international co-operation in this regard. Hortatory provisions recognise the financial needs of transit states in respect of enforcement co-operation. Uniform application of the drug convention's international

enforcement provisions is vulnerable to the incompatibility of the criminal procedures of different states and to the financial incapacity of Parties to meet their international commitments. These provisions are skewed towards the interests of drug consumer states with large external enforcement programmes and tend to leave poorer producer and transit Parties in the passive position of receptors of “co-operation”.

The earlier conventions and to a much greater extent the 1988 Convention are also concerned with specific forms of enforcement co-operation. The earlier conventions made weak provision for the seizure and confiscation of the drugs, substances and equipment used in drug offences. The 1988 Convention dramatically extends the material scope of seizure and confiscation to include the profits and proceeds of drug offences. It provides for different systems of confiscation, for the penetration of bank secrecy, and for a discreet system of mutual legal assistance in this regard. These “model” provisions, part of the 1988 Convention’s anti-money laundering scheme, tend to catch up innocent and powerless property holders within their nets, and their effectiveness is also questionable.³ Controlled delivery is an investigative technique pioneered in consumer states which has been introduced through the 1988 Convention to states unfamiliar with it. The 1988 Convention also makes provision for a separate legal regime for the national control and monitoring of the international trade in precursor substances. Poor application of this regime by Parties has been criticised by the INCB. The 1961 Convention as amended allows for the prohibition of cultivation of drug bearing plants, while the 1988 Convention goes further and provides for the eradication of illicit cultivation. In a sustained effort to sever supply lines the 1988 Convention also provides for the control of commercial carriers, commercial documents, free trade zones and free ports, postal drug trafficking, and for the interdiction of drug carrying vessels at sea. Considered together, the specific law enforcement provisions of the drug conventions create an impressive regime that attacks the production and transport of drugs to the consumer at various points, but which uncomfortably straddles the conflicting interests of extraterritorial enforcement by consumer states and the preservation of the sovereignty of producer and transit states.

Alternatives to penalisation such as treatment of users have been integrated into the drug conventions slowly and to a very limited extent. The system of control set up by the 1961 Convention is principally preventive and subordinately remedial or curative.

The 1971 Convention and the 1972 Protocol attempt ineffectively to remedy the absence of curative options. The 1988 Convention turns away from curative options and back to repression. Provisions for identification of drug abuse, treatment, education, after-care, rehabilitation and social reintegration do exist in international law, but only in the least serious cases do these provisions operate as substitutes for rather than additions to punishment. Training is provided for, but the dissemination of information is restricted. The main feature of these alternative provisions is their assimilation into the penal system. The insubstantial content of the provisions is apparently determined by the financial incapacity of most states to engage in sophisticated treatment programmes, but the drug conventions reveal the international community's profound reluctance to pass control of the drug problem into non-enforcement hands. Non-enforcement intervention is internationally a matter for "soft law", something well illustrated by the recommendatory provision for demand reduction in the 1988 Convention that depends upon the 1987 Comprehensive Multidisciplinary Outline for content.

The drug conventions and the UN have placed the supervision of the illicit drug control system in the hands of a number of organs. The CND, a body of state representatives, advises ECOSOC in respect of all drug control matters and supervises the execution of the drug conventions. Various subsidiary bodies, such as HONLEA, assist it in this task. The UNDCP is concerned primarily with the administration of the system. In terms of specific provisions of the drug conventions, the CND and UNDCP are supplied with information on the illicit traffic by Parties and they use this data as the basis for an annual survey of the illicit traffic, but not as the basis for direct policing. The INCB, a panel of independent experts, monitors the implementation of the drug conventions by the Parties. It has the competence to investigate problems and suggest embargoes against non-compliant Parties. But its enforcement powers are weak, and it relies on political embarrassment and diplomatic intervention to get compliance. The CND, UNDCP and INCB are assisted by the WHO with respect to medical issues, and rely indirectly on Interpol with respect to direct policing and information, although the latter organisation does not act as an international drugs police force. Regional organisations amplify the scope of the system, but much more significant are national enforcement organisations. The extensive extraterritorial activities of agencies like the United States' DEA make them in effect international drugs police forces, a role

³ See Clutterbuck R *Drugs, Crime and Corruption* (1995) at 115.

recognised in the provision by the drug conventions for extraterritorial operations.

The system as a whole suffers inter alia from poor mechanisms for the settlement of disputes, weak execution methods and the allowance of reservations to Parties commitments, all of which undermine its normative capacity.

8.2.2 Unaddressed aspects of drug related crime

Beyond their internal shortcomings, the drug conventions have been criticised for leaving significant aspects of the international drug traffic unaddressed. They pay little attention to collateral problems such as the illicit trade in weapons even though such weapons prop up the illegal traffic and make it more dangerous to police. They also do not directly address narco-terrorism. But the most prominent of these unaddressed collateral problems is corruption. The lucrative drugs trade makes large amounts of money available for bribery and corruption, and none of the conventions address the issue of corruption of public and private officials adequately.⁴ Corruption has been shown to extend, particularly in producer states, through all levels and arms of government, from the highest ranking to the lowest, through customs, army, police (particularly drug control agencies), prosecutors, judges, and prison warders.⁵ Corruption of the criminal justice system is a problem for local drug law enforcement, but it is a particular problem for extraterritorial law enforcement because of the difficulty of officials from one state attempting to do anything about another state's corrupt officials especially as they may be forced to work through these officials to get information, evidence or custody of suspects.⁶ Nadelmann points out that policing corruption in foreign jurisdictions by diplomatic means is difficult when even the political leaders of these countries do not have the power to police middle ranking bureaucrats.⁷ And while corruption at the pre-arrest stage is a problem for extraterritorial law enforcement, corruption at the post-arrest stage presents an even greater obstacle because foreign

⁴ Mexican drug traffickers are estimated to spend up to \$6 billion on bribes - *The Guardian* 24 February 1997. For a survey of drug inspired corruption in the US see Johns CJ *Power, Ideology, and the War on Drugs* (1992) at 19-24. On corruption and drug enforcement see generally Nadelmann EA 'The DEA in Latin America: dealing with institutionalised corruption' (1989) 62 *Police Journal* 31-42 (part one of two part article), and 'The Drugs [sic] Enforcement Agency in Latin America: the ins and outs of working around corruption' (1989) 62 *Police Journal* 157-173 (part two of two part article).

⁵ See Nadelmann *op cit* (part one - 1989) at 35-36.

⁶ See Nadelmann *op cit* (part one - 1989) at 32-3.

⁷ *Op cit* (part one - 1989) at 33.

prosecutors, judges and gaolers are largely unreachable.⁸ But fixation with the drug related corruption in producer states ignores the fact that it has spread to consumer states.⁹ Taking steps to control corruption through its criminalisation has been recommended.¹⁰ However, Bassiouni points out that criminalisation of corruption is ineffective because it is difficult to detect and because corrupt officials ensure that the law is not applied, and he suggests that systems should be developed to monitor those in controlling positions.¹¹ The appointment of external ombudsmen and the like is popular today.¹² International efforts to counter corruption at the national and international levels have increased in recent years.¹³ Nadelmann warns, however, that drug related

⁸ See Nadelmann *op cit* (part two - 1989) at 165.

⁹ The *Seattle Post-Intelligencer* 8 June 1995 reported the indictment in Miami of three former federal prosecutors, one of whom had been involved in the extradition of Colombian drug traffickers, for 'smoothing the path of Cali cartel drug lords'.

¹⁰ Recommendation 5 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 recommends the criminalisation of the 'knowing payment, receipt or transfer, or attempted payment, receipt or transfer of property known to represent the proceeds of drug trafficking or money laundering, where the recipient of the property is a public official, political candidate, or political party. In countries where it is already a crime, countries should consider the imposition of enhanced punishment or other sanctions, such as forfeiture of office.'

¹¹ Bassiouni MC 'Effective national and international action against organized crime and terrorist criminal activities' (1990) 4 *Emory International LR* 9 at 22.

¹² See for example article 8 of the Southern African Development Community (SADC) Protocol on Combating Illicit Drug trafficking of 1996, SA Foreign Affairs File NV101517/96, which makes detailed provision for steps to 'institute appropriate and effective measures for co-operation between enforcement agencies to curb corruption, resulting from illicit drug trafficking.' (article 8(1)). Central to this effort is the establishment of anti-corruption agencies that have full investigative powers, are able to rely on a range of other measures including mutual legal-assistance, stronger anti-corruption laws and administrative measures, investigation of suspects, seizure and confiscation of assets derived from corruption, channels for the public to reveal corruption, improved financial regulation to prevent capital flight and the obligatory disclosure of the assets of suspects (article 8(2)).

¹³ In 1996 the OAS adopted the Inter-American Convention Against Corruption, 35 *ILM* 724. The Convention's preamble expresses deep concern about the 'steadily increasing links between the corruption and the proceeds generated by illicit narcotics trafficking which undermine and threaten legitimate commercial and financial activities and society at all levels.' The Convention which is aimed at improving the Parties' domestic mechanisms for prevention, detection and eradication of corruption also envisages international cooperation in this regard (article 2). It adopts a range of measures to achieve this aim including conduct standards, the criminalisation of acts of national and transnational corruption, and the full gamut of support measures including mutual assistance, extraterritorial jurisdiction, extradition, seizure and confiscation of property, and removal of bank secrecy. The Convention envisages progressive development of action against corruption and is an important feature of the OAS's Inter-American Program of Cooperation in the Fight Against Corruption. The UN has also become involved in a flurry of anti-corruption activity. A special session on corruption was held at the Ninth UN Congress on the Prevention of Crime and the Treatment of Offenders held in Cairo in 1995. In December 1996 the General Assembly adopted 'The UN Declaration on Corruption and Bribery in Transnational Commercial Activities', GA Resolution 51/191, 36 *ILM* 1043. The UN Crime Prevention and Criminal Justice Program (CPCPJ) is developing a project entitled Corruption and Anti-Corruption Strategies Around the World. The Council of Europe has created a detailed 'Programme of Action Against Corruption' implemented by the Council's

corruption is one of the less significant explanations for the failure of United States agents to stem the flow of drugs into the United States.¹⁴

8.2.3 The absence of human rights protections in the specific provisions of the drug conventions

Critical of their shortcomings from the enforcement perspective, most commentators ignore the fact that the drug conventions fail to adequately protect the human rights of those individuals subject to the system, whether offenders, alleged offenders or innocent third parties. Article 14(2) of the 1988 Convention provides that all measures designed to prevent and eradicate illicit cultivation of drug producing plants shall respect fundamental human rights, take account of traditional licit use, and protect the environment. Article 6(6) of the 1988 Convention provides that Parties may refuse extradition where their authorities believe that the extradited alleged offender would be prosecuted or punished on grounds of 'race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any person affected by the request.' But there is little more. For example, the principles of specialty and double criminality with respect to extradition are state privileges rather than individual rights, and their violation cannot be used as a defence by individual offenders.¹⁵ Gilmore notes that while international human rights law and policy and international drug control law and policy have evolved side-by side within the United Nations, international drug control law and policy has not been subject to scrutiny for compliance with international human rights standards.¹⁶ The development of international illicit drug control has been driven by the exigencies of effective enforcement and has avoided dealing with consequential human rights infringement.

The drug conventions fail human rights in two ways, viz.: i) they make provision for or encourage national law which is heavily weighted against the alleged offender, for example, they include optional provisions that shift the onus onto the accused to prove

Multidisciplinary Group on Corruption. The OECD adopted Recommendations on Combating Bribery in International Business Transactions, in 1994, 33 *ILM* 1389, and in 1997, 36 *ILM* 1016.

¹⁴ *Op cit* (part one - 1989) at 32.

¹⁵ Bernholz SA, Bernholz, MJ, Herman JN 'International extradition in drug cases' (1985) 10 *North Carolina Jnl. of Int. Law and Commercial Regulation* 353 at 355, 369.

¹⁶ 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 401.

his innocence;¹⁷ and ii) they leave the protection of individual human rights to national law, something it manifestly fails to do.¹⁸ The drug conventions cultivate a whole range of new procedures while providing nothing in the way of checks or balances. Cotic notes that specialist drug legislation created in terms of the conventions generally allows for the expansion of expediency powers to law enforcement officials to search and seize premises, vehicles, and persons and to intercept postal communications and telephone conversations of suspected persons, as well as the shifting of the onus of proof to the accused.¹⁹ National law often permits the taking of draconian steps against the offender, for example, by providing for the indefinite detention of alleged drug offenders.²⁰ The dangers are obvious to Bassiouni:

[V]iolating the right of privacy in tracing assets; unjustified seizure of property; searches and inquisitions based on mere suspicion or insufficient evidence; arrest and detention on mere suspicion or without sufficient evidence; wiretapping and eavesdropping with less than the quantum of evidence otherwise needed in investigating other forms of criminality; unwarranted preventive detention; unjustified prolonged detention; improper limitations on the right to counsel during pre-trial or pre-accusation stages of proceedings; developing secret dossiers with prejudicial information that cannot be corrected by the person in question; and the dissemination of such information to other public agencies without the knowledge of the person in question and using harassing forms of investigation which affect a person's everyday life.²¹

¹⁷ For example, article 5(7) of the 1988 Convention.

¹⁸ See for example, *Welch v United Kingdom* (1995) 20 EHHR 247 where the European Court of Human Rights upheld a complaint that confiscation orders made under the UK's Drug Trafficking Offences Act, 1986 prior to the Act coming into force on January 12 1987 were in contravention of article 7 of the European Convention on Human Rights which provides: 'Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.' Importantly, the European Court held that a confiscation order made in terms of the Act was fundamentally penal in nature and not a civil reparation, and thus article 7 could apply, primarily because such orders allowed confiscation of proceeds irrespective of whether there had been any personal enrichment, and thus they went beyond the realms of reparation and prevention into that of punishment.

¹⁹ Cotic *D Drugs and Punishment* (1988) at 115.

²⁰ See, for example, section 12 of the South African Drugs and Drug Trafficking Act 140 of 1992. In the parliamentary debate on the legislation those parties opposed to the legislation pointed out that while it was designed to incorporate the 1988 Convention's provisions into South African law, the 1988 Convention made no provision for such detention - see SA Hansard 18 June 1992 col.11808.

²¹ *Op cit* at 30.

He notes that these dangers to lawfulness apply to an even greater extent at the level of interstate co-operation 'because of the inadequacy of procedural safeguards.'²² Thus, for example, the drug conventions also make no provision for the access of the alleged offenders to the system. Alleged offenders are not given rights to review decisions that may be detrimental to them, and states are not obliged to make mutual legal assistance available to them to construct their defences. Moreover, international law enforcement co-operation is usually beyond national or international review. The drug conventions do little to ensure that the operation of the laws and administrative arrangements they propagate depend more on rules than on the discretion of the operators of these rules.²³ Bassiouni notes that the conventions are 'administered by state agencies in a manner neither subject to judicial supervision nor scrutiny, or subject to it only in a limited manner.'²⁴ The fact that the international drug control organs are self-regulating means that there is no independent international control either. These organs have played a central role in the international elaboration of the war on drugs and as Kingham and Wallon note:

The United Nations are both judge and party here, being both responsible for the application of the international anti-drug treaties, and simultaneously guarantor of respect for the Universal Declaration of Human Rights.²⁵

The absence of human rights provisions in the drug conventions is a function of the process of their development. The drug conventions' structures have an in built bias to enforcement as they are designed by enforcers to be enforcement efficient. Their reliance on domestic protection of human rights labours under the deliberate delusion that such protection exists. Finally, transnational offenders exist outside of most national political constituencies, thus their interests are bound to be neglected in the creation of any criminal law affecting them. Indeed, provisions like article 39 of the 1961 Convention, article 23 of the 1971 Convention, and article 24 of the 1988 Convention encourage Parties to take more severe drug control measures without any international due process

²² *Op cit* at 31.

²³ Bassiouni *op cit* at 32.

²⁴ *Ibid.*

²⁵ Kingham RA and Wallon A 'The role of the European Citizen's Associations in strategies and policies to combat drugs' in Estievenart G (ed) *Policies and Strategies to Combat Drugs in Europe* (1995) 311 at 316.

guarantees being attached. Such provisions are open to abuse by the executives of Parties which may use them to assume greater powers than their constitutions permit, something that may be encouraged by foreign states urging these executives to greater enforcement co-operation at the expense of the domestic protection of rights.²⁶

It may well be that international drug control law is forced in the future to expressly incorporate human rights protections as individuals exercise their rights under conventional human rights law,²⁷ thus exposing the absence of protections in the drug conventions.²⁸ The UN's Model Treaties on Extradition and Mutual Legal Assistance which have human rights protections written into them offer good examples. Such a development is likely against the background of the growing awareness of the impact of international criminal law on human rights.²⁹ This awareness recognises that individuals cannot rely entirely for protection on traditional bars such as the principle of double criminality. The link between these traditional protections and human rights norms drawn from the international human rights instruments is obvious, but it appears that the latter may supplant the traditional protections because:³⁰ i) the traditional norms regard the alleged offender as the object of proceedings, while in terms of international human rights instruments the individual's right to file applications against Parties on his own behalf is slowly maturing; and ii) under the traditional approach the legal position of the alleged offender is mainly governed by the Parties' domestic law and/or the relevant international agreement, while the more modern approach allows the individual to rely directly on the international human rights instruments. The recognition of individuals as subjects of international law, must and will inevitably permeate international drug control law.

²⁶ Interestingly, Colombia has declared (10/6/1994 - *Multilateral Treaties Deposited* (1997) at 304) that it considers article 24 of the 1988 Convention as not conferring broader powers upon the Colombian government than those conferred by the Colombian Constitution, even in states of emergency.

²⁷ The 1981 African Charter on Human and Peoples' Rights 21 *ILM* 58; the 1969 American Convention on Human Rights 1144 *UNTS* 123; the 1950 European Convention for the Protection of Human Rights and Freedoms *ETS* 46; the 1966 International Covenant on Civil and Political Rights 999 *UNTS* 171 etc. Individuals are already having recourse to these instruments; see *Welch v United Kingdom* (1995) 20 *EHHR* 247.

²⁸ In the same way that *Soering v United Kingdom* ECHR Series A vol.161 (1989) at 35 exposed the aridity of human rights protections in extradition treaties generally.

²⁹ See, for example, Van Den Wyngaert C 'Rethinking the law of international criminal co-operation: the restrictive function of international human rights through individual-oriented bars' in Eser A, Lagodny O (eds) *Principles and Procedures for an New Transnational Criminal Law* (1991) 489-503.

³⁰ See Van Den Wyngaert *op cit* at 491 referring to the application of the 1950 European Convention on Human Rights and the *Soering* Case ECHR Series A vol.161 (1989).

8.2.4 Obstacles to the preparation and application of international drug control

Of the factors which complicate or frustrate the goal of global prohibition, the most significant are found in the nature of international society. State sovereignty and national difference present the major stumbling blocks for international drug control law because it is international law. International law's fundamental unit is the state, not drug suppliers or users, its fundamental principle is state sovereignty, not the prohibition of drugs, and in the conflict between sovereignty and drug prohibition, sovereignty prevails, a point well illustrated by the blanket escape clause based on sovereignty contained in article 2 of the 1988 Convention. Thus while the people who supply/use drugs are seen as the cause of the problem, states intervene between these people and international law. The drug control system is a system of state co-operation which depends upon the capacity and willingness of states to co-operate.

The creation of the system required an awkward legal compromise accommodating opposing civil and common law approaches to substantive and procedural law, and an awkward political compromise accommodating the opposing views of consumer and producer states about responsibility for the drug problem. Any international law capable of eliciting the general commitment of states is also going to be vulnerable to the criticism that it is too general to be effective. The drug conventions adopt a lowest common denominator approach in order to generate widespread support among states. Because of the need for consensus, the specific problems of states are ignored or glossed over. This allows almost universal participation at very low-levels of commitment and potentially high-levels of violation of obligations. The weakness of the system is exposed in the fabric of the drug conventions. The use of ambiguous language open to conflicting interpretation, the proliferation of escape clauses, the absence of effective enforcement mechanisms such as sanctions against states who commit themselves to the system but renege on their commitment, and the non-application to non-parties, illustrates this weakness.³¹ It is also well illustrated by the following declaration Colombia made on ratification of the 1988 Convention:

³¹ Penna LR 'Forfeiture of drug trafficking benefits: need for a viable international legal regime' (1993) 14 *Singapore LR* 351 at 377 suggests that the large number of Parties to the 1961 Convention has transformed it into customary international law binding upon non-parties. However, although post-1961 state practice has seen the enactment of very similar domestic drugs legislation by many states, it would be difficult to assert that there is sufficient evidence to establish a uniform, consistent and general state practice and *opinio iuris* in this regard or in respect of any of the drug conventions, given the abundant evidence of contradictory practice and opinion.

No provision of the Convention may be interpreted as obliging Colombia to adopt legislative, judicial, administrative or other legal measures that might impair or restrict its constitutional or legal system or that go beyond the terms of the treaties to which the Colombian State is a contracting party.³²

It has been argued that the provisions of the drug conventions are indicative of only a pretence at commitment by states.³³ Some states do engage in a diplomatic conference, sign the subsequent convention, become party to it, pass a national drug law, and even go so far as setting up the administrative structures to implement it, with no intention of actually doing so. They do so because they derive numerous benefits from their apparent engagement with international law and with the consumer states that drive the law.

Agreement to the drug conventions is only one step towards global prohibition. The application of the drug conventions indirectly through national law is inevitably imperfect because the indirect incorporation of international criminal law norms into national criminal laws is an uneven and uncertain process.³⁴ Application of the earlier conventions has been very slow,³⁵ but their implementation is more complete than that of the 1988 Convention³⁶ for a number of reasons. First, Parties are more likely to implement offences and provisions with which they have become familiar such as the classical trafficking offences, than they are the novel offences in the 1988 Convention such as those criminalising money laundering. Second, Parties, especially poorer states, find that it is cheaper to implement the limited older provisions than the expensive

³² 10/6/1994 - *Multilateral Treaties Deposited* (1997) at 303. The US objected to the declaration (23/10/1995 - *Multilateral Treaties Deposited* (1997) at 307) as 'it purports to subordinate Colombia's obligations under the Convention to its Constitution and international treaties, as well as to that nation's domestic law generally.'

³³ Chatterjee SK *Legal Aspects of International Drug Control* (1981) at 449.

³⁴ Bassiouni MC *A Draft International Criminal Code and a Draft Statute for an International Criminal Tribunal* (1987) 70.

³⁵ The provisions of the 1961 Convention took decades to transform into domestic law. For example, many of the 1961 Convention's provisions were only transformed into law in Pakistan in 1979 (Prohibition (Enforcement of Hadd) Order, President's Order No. 4 of 1979, Gazette of Pakistan, Extra, Part 1, 9 February 1979).

³⁶ Milton JRL 'Law reform: the Drugs and Drug Trafficking Act 1992' (1993) 6 *South African Jnl of Criminal Justice* 216 at 217-218 notes, for example, that the South African Drugs and Drug Trafficking Act 140 of 1992 enacted to give effect to the 1988 Convention only implements the provisions of the 1988 Convention on a selective basis, making no provision for the Convention's provisions on extradition, controlled delivery, eradication of cultivation, prevention of trafficking by air, postal services or sea.

obligations undertaken in terms of the 1988 Convention.³⁷ Application of the latter tends to be the domain of richer states. Third, while consumer states that have vested interests in the implementation of the drug conventions implement these provisions, producer states that have vested interests in their non-implementation choose not to do so.

Although their effectiveness may be impaired by the conditions of their birth and application, this does not mean that the drug conventions are without utility. Nadelmann points out that the general nature of the drug conventions lends them symbolic value; they institutionalise widespread agreement among states about the need to co-operate against drug crime irrespective of political and other differences and thus avoid the necessity of a large number of bilateral arrangements.³⁸ But the avoidance of the necessity of bilateral agreements indicates that the drug conventions do have a limited functional utility. Heymann argues that there are two models of international criminal law enforcement.³⁹ The "prosecutorial" model, favoured by the United States, is highly informal. Championed by policeman and prosecutors, it is a goal driven model, that is, in our case the suppression of drug crime. The means used are flexible, co-operation is regarded as crucial, and controls are based on levels of reasonable demand and reciprocity. Principles like the political offence exception to extradition are immaterial. Limited self-help is permissible, and a pragmatic co-operative structure is created. This model is only possible, however, between or among states that have great trust in each other and faith in each other's legal systems. The "international law" model, favoured by states such as Germany, is a highly structured set of rules that can be used to control co-operation between any group of states. Advocated by scholars and judges, its goals and means are precisely specified. A complete set of rules coherently applying principles such as sovereignty create a system that fits into a larger international criminal justice system, a world order. Drug control internationally has been driven by the prosecutorial model, as a pragmatic response to the problems of consumer states like the United States and as evidenced by the plethora of bilateral arrangements and treaties concluded in the last two decades. Although its formalisation in the drug conventions and particularly in

³⁷ The UK Home Affairs Committee *Report: Drug Trafficking and Related Serious Crime* vol.II (1989) comments at 76 on the expense of implementing the Drug Trafficking Offence Act, 1986, especially its provisions relating to money-laundering and confiscation.

³⁸ Nadelmann EA *Cops Across Borders* (1993) at 9.

³⁹ Heymann PB 'Two models of national attitudes toward international co-operation in law enforcement' (1990) 31 *Harvard ILJ* 99-107.

the 1988 Convention appears to indicate a shift to an international law model, the influence of the prosecutorial model is still very strong. Indeed, the drug conventions arguably implement a disguised form of the prosecutorial model to the benefit of consumer states. The utility of the drug conventions thus depends on their capacity to reduce supply, and in areas of extraterritorial enforcement such as the interdiction of foreign flag vessels, in terms of article 17(3) of the 1988 Convention, while limited, this utility is not purely symbolic.

8.3 An evaluation of the war on drugs in international law

The international drug control system is a multilateral system for the globalisation of prohibition. It exists for two reasons. The first is technical. Unilateral and bilateral enforcement measures are considered incapable of dealing with transnational criminality. The international drug control system is designed to provide for uniform national responses to transnational drug offenders, to minimise or eliminate havens for these offenders, and generate the expectation of international co-operation in pursuit of these offenders and their assets.⁴⁰ But if we look beyond this technical reason, Nadelmann argues that moral proselytism, the compulsion of anti-drug crusaders to convert everyone to their belief in prohibition, is also important in the creation of what he calls the international drug prohibition regime.⁴¹ Important figures in influential governments and NGOs, functioning as 'transnational moral entrepreneurs', advocate international drug control because of the transnational character of trafficking. Nadelmann argues that these moral views deal not with how states treat other states but with how states treat individuals.⁴² He suggests that this anti-drug morality transcends the state, depoliticises the individual and emphasises the existence of an international society of humans who share this morality. Thus for Nadelmann, the United States' vigorous pursuit of the creation of a global drug prohibition regime indicates more than just a desire to cut external sources of supply.⁴³ He believes that its international drug control efforts, like domestic prohibition, have been driven by fear and moralistic condemnation of drug use,

⁴⁰ See Nadelmann E 'Global prohibition regimes: the evolution of norms in international society' (1990) 44 *International Organisation* 479 at 481.

⁴¹ *Op cit* (1990) at 481.

⁴² *Op cit* (1990) at 483.

⁴³ *Op cit* (1990) at 505.

righteousness and the compulsion to proselytise, and that this is demonstrated by the massive rhetorical and actual commitment of the United States to the global war on drugs.⁴⁴ With many allies, and few opponents, this war has had a massive impact. Nadelmann notes that international drug prohibition laws did not threaten powerful constituencies or vested interests in other states.⁴⁵ The regulatory schemes of the licit drug control system met the concerns of pharmaceutical companies in the West, while moral views condemning drugs were easily subscribed to by local elites in drug producing states. This made the signing of the drugs conventions and the enactment of the necessary domestic legislation under pressure from the United States and United Nations relatively easy.⁴⁶ In essence then, the global war on drugs is a necessary, just, war. But it struggles to overcome the limited normative effect the international anti-drug morality has on the general populace of drug producing states that do not share this morality with local elites or transnational moral entrepreneurs.

The form the war has taken has been determined by the retreat of policy-makers from the causes and problems of drug use. They have adopted a strategy of supply reduction because of the generally held belief that it is easier to cut off the supply of drugs than to change the behaviour of users. In addition, supply reduction is less politically⁴⁷ and financially expensive than harm or demand reduction to influential consumer states. Moreover, any tampering with the system is strongly resisted by the enforcement agents, lawyers and bureaucrats who run the system. The operational arms of international drug control have a vested interest in its existence and develop it to suit their perceptions of the need for heavier intervention. Sheptycki gives as an example the introduction of controlled delivery as an investigative technique in Europe by police who first employed it without legal sanction and who slowly persuaded prosecutors, then judges, then legislators and finally the international community in article 11 of the 1988 Convention to sanction it.⁴⁸

⁴⁴ *Op cit* (1990) at 508.

⁴⁵ *Op cit* (1990) at 510.

⁴⁶ *Op cit* (1990) at 511.

⁴⁷ Polls have indicated, for example, that Americans support supply reduction rather than demand reduction -see Bland KL 'The Chemical Diversion and Trafficking Act of 1988: stopping the flow of chemicals to the Andean drug cartels' (1991) 7 *American University Jnl. of Int. Law and Policy* 105 at 109 fn27.

⁴⁸ Sheptycki J 'Law enforcement, justice and democracy in the transnational arena: reflections on the war on drugs' (1996) 24 *Int. Jnl of the Sociology of Law* 61 at 67.

In practice, the illicit traffic has shown itself to be remarkably resilient and adaptable to this strategy, and national authorities have been unable to maintain high-levels of interdiction for sustained periods. Drugs are available to users and their retail price has remained relatively stable.⁴⁹ Reaching producers through international law is difficult for a number of reasons. Nadelmann notes that cultural diversity weakens the normative power of international law, while the strong external sovereignty and weak internal sovereignty of producer states means that such states can neither be policed internationally nor police themselves.⁵⁰ Supply reduction also ignores the fact that sections of the populace within producer states are economically dependent upon illicit drug production. For example, drug-crop cultivating peasants resent external interference and support traffickers and revolutionary groups allied to the traffickers thus threatening the political stability of growing regions.⁵¹ In producer states the principal interest in suppressing drug trafficking becomes the desire to destroy competitors for power, not the suppression of drug supply. Nadelmann notes that the other factors which undermine the application of the strategy of supply reduction through international law depend on the nature of drug supply and its vulnerability to global suppression.⁵² Drug supply only requires limited readily available resources, and no particular skill. It is easily concealed and unlikely to be reported to the authorities. But the major reason for the persistence of supply is that demand for illicit drugs is substantial and relatively inelastic. Although supply reduction efforts drive prices up, users are prepared to pay whatever it costs, and supplies find a way to meet demand.⁵³ Efforts to impose heavier and more stringent legal regimes within producer states appear to have failed.⁵⁴ And even if it were possible to

⁴⁹ See Nadelmann EA in Panel discussion 'Drugs and small arms: can law stop the traffic?' (1987) 81 *American Society of International Law: Proceedings* 44 at 52.

⁵⁰ *Op cit* (1990) at 486.

⁵¹ See Bland *op cit* at 116-120 and the authors cited there.

⁵² Nadelmann *op cit* (1990) at 512.

⁵³ For example, Reuter P 'The limits and consequences of U.S. foreign drug control efforts' (1992) 521 *Annals of the American Academy of Politics and Social Science* 151-162 shows that all the supply reduction efforts to reduce cocaine production in the Andean region and imports to US (crop eradication etc.) serve to do is drive up the price of cocaine derivatives in the US; they do not actually effect the quantity of supply at all. The reason for this is that while such efforts impose a cost on the producer and supplier, it is not big enough to prevent supply, and such a cost is simply passed on to the consumer in the form of price increase. See also Fowler TB 'The international narcotics trade: can it be stopped by interdiction' (1996) 18 *Journal of Policy Modelling* 233-270 whose economic models of drug supply suggest that supply interdiction cannot work.

⁵⁴ For example, Jauhar DN *Rethinking Drug Legislation in India* (unpublished conference paper, New Delhi Global Drugs Law Conference, 1997) at 8 complains that India's Narcotic Drugs and Psychotropic Substances Act, 1985 (as amended in 1988 in response to the 1988 Convention), although enacted as a deterrent to drug traffickers with harsh sentences and the possibility of capital punishment, has proved a

completely cut-off external sources of supply to consumer states, internal sources would almost certainly grow to meet demand.⁵⁵

Weighed against these “benefits”, the costs of making war on drugs internationally are great. They include the costs of creating international law, the costs of the administration of the system, the costs of implementing ineffective law, the costs of media attention, public concern and so on. Social costs are also enormous, and continue to increase. Large prison populations increase, and numbers of users increase especially among young people. Drug law enforcement funding increases, and funding is diverted from other enforcement activities, from treatment and research, and in poorer states from other pressing economic and social demands. Police corruption increases, fuelled by the lucrative drug trade. The economic dependence of developing states on drug production and trafficking grows. Health risks also increase. But the primary costs of global prohibition are the costs of ignoring the social, economic, psychological and physiological reasons for drug usage because this ignorance leads to the endurance of these causes and of drug usage.

To sum up, it appears that international law has got caught up in a drugs war model of drug control, a public order model rather than a public health model. This public order model has its origins in the United States. International drug control law is the mechanism for the global dissemination of this model. It would be fair, following Nadelmann, to suggest that the harmonisation of international drug law has in fact been an Americanisation of that law.⁵⁶ International subscription to the technical necessity for that model or to the anti-drugs morality which underpins it is largely absent. This lack of international support is reflected in the drug conventions themselves. For example, the principle *aut dedere aut judicare*, the principle of subsidiary universality of jurisdiction, is said to rest on the *civitas maxima*, a social or moral order common to all humanity.⁵⁷ The fact that the principle of subsidiary universality receives only imperfect application in the drug conventions, points to the conclusion that at least in respect of drug offences there is no consensus in the *civitas maxima* as to the drug prohibition policy. The rhetoric of universality is hollow. Active prohibitionist consumer states are using

failure. He notes that of the drugs cases that came before the special courts in New Delhi in 1994-1996, 76 (11 foreigners) resulted in convictions and 1906 in acquittals (77 foreigners).

⁵⁵ Nadelmann EA ‘Commonsense drug policy’ (1998) 77 *Foreign Affairs* 111 at 113.

⁵⁶ Nadelmann *op cit* (1993) at 470.

⁵⁷ Bassiouni MC, Wise EM *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995) at 28.

international law to try to get passive drug dependant or unaffected states to do what they think these unresponsive states should do. International law almost exclusively addresses the manifestations of the global drug problem rather than its causes. Its focus will have to shift to the causes of the problem, when the emptiness of the present approach becomes commonly understood. At present, Bassiouni believes that states do not have the necessary will to make prohibition work either in the content of the drug conventions or in their practice, but he concludes that although the global community is still interested in appearing to make an effort, it will ultimately move away from prohibition.⁵⁸

8.4 Future developments

8.4.1 The prognosis is for more of the same

In spite of the failure to achieve prohibition, the future emphasis of international drug control law is likely in the short term to remain on enforcement of the penal provisions of the international drug control conventions. But as Stares states:

There is little reason to believe that the primary policy emphasis on negative controls to deter and deny the production, trafficking and consumption of illicit drugs will be any more successful in the future than it has been in the past. The standard supply-reduction tactics - eradication and interdiction - will surely achieve periodic successes in which production or trafficking is suppressed in a specific area, but given the incentive structure of the illicit business, the overall effect is likely to be marginal or short lived at best. The historical record provides overwhelming evidence of this. Increasing the penalties for illicit drug trafficking and consumption in order to deter others is also of dubious long-term value. Besides the costs that this imposes on society in terms of law enforcement and civil liberties, it is difficult to sustain the deterrent effect.⁵⁹

Yet legalisation is an unlikely prospect. Stares continues:

⁵⁸ Bassiouni MC 'Critical reflections on international and national control of drugs' (1990) 18 *Denver Jnl of Int. Law and Policy* 311 at 330.

⁵⁹ Stares PB *Global Habit: The Drug Problem in a Borderless World* (1996) at 106.

Ultimately, however, the prospects for a radical departure from the prevailing prohibitionist stance look remote. Reversing or jettisoning nearly a century of effort when the putative benefits are so uncertain and the potential costs are so high would represent a herculean leap of faith. Only an extremely severe and widespread deterioration of the situation globally is likely to produce the level of consensus that would have to be attained - domestically and internationally - to bring about such an attitudinal shift and generate the necessary political impetus.⁶⁰

The illicit drug control system is locked into a particular course of action, and is unlikely to change in the near term. What is likely is an extrapolation of the present policy and strategy.

At the "soft" end of the drug control spectrum, we are likely to see the development of mechanisms for assistance in the exchange of medical data on causes of addiction and methods of rehabilitation, mechanisms for study and exchange of information on the role of economic development in combating illicit drug trafficking, pro-active supply reduction programmes which introduce crop eradication and substitution programmes into new supply areas like the central Asian republics,⁶¹ and the "hardening" of softer options like demand reduction.⁶² Low-level drug enforcement strategies aimed at separating or breaking the link between retailers and consumers are becoming popular in developed states because of the perceived limitations of supply reduction strategies.⁶³ There is scope at the international level

⁶⁰ *Op cit* at 111.

⁶¹ 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 xi.

⁶² For example, mandatory workplace drug testing. See Jacobs JB, Zimmer L 'Drug treatment and workplace drug testing: politics, symbolism and organizational dilemmas' (1991) 9 *Behavioural Sciences and the Law* 345-360. They argue that workplace drug testing places employers on the front line of drug control. It is attractive because the cost is borne by the private-sector and it achieves levels of control relatively cheaply that criminal justice controls simply cannot achieve. The problem is that although penal in nature it falls outside of the due process protections of the criminal law.

⁶³ Dorn N, Murji K 'Low-level drug enforcement' (1992) 20 *International Jnl of Sociology of Law* 159-171. They describe *inter alia*: demand reduction strategies such as policing of retail-level drug sites and sellers and/or drug purchasers - disruptive policing which directs policing at particular drug retailing areas and inconvenience policing which makes it more difficult to purchase drugs; diversion of the increased numbers of users being caught out of the criminal justice system; police reorganisation to allow centralised information supply but greater autonomy of action; inter-agency approaches linking policing

for the transmission of these sorts of strategies, because demand reduction is not solely a national concern as demand in one state generates supply in others. The negative consequences of simplistic demand reduction policing, such as zero tolerance programs, will include skyrocketing prison populations, increased burdens on the criminal courts and police, and greater violations of the civil liberties of users.

At the “hard” end of the drug control spectrum, consumer states are likely to become more heavily involved in the development of the criminal justice systems of producer states. In other words, they will move beyond training to the provision of investigatory equipment, providing the means to assure the personal safety of judicial officers and witnesses, building prisons and taking other steps to ensure that offenders receive “appropriately” harsh penalties.⁶⁴ Regional organisations are also likely to enhance their roles in combating drug trafficking, while international organs and regional organs are likely to increase their roles in the dissemination of information on implementation of existing law and general education. Most new developments are likely to reinforce the indirect control of consumer states; an extension of what Heymann terms the prosecutorial model of international drug control. A significant step away from this model to an international law model would be the development of mechanisms for direct international enforcement including a multinational drugs police. A universal umbrella for illicit drug control would see the international system subsume all national systems.⁶⁵ But the frustration of efforts to establish an International Criminal Court (ICC) with jurisdiction over drug offences indicates that there is resistance to a shift to universalism. Detailed examination of these efforts gives a clear picture of the likely development of the illicit drug control system along its present path.

8.4.2 The international criminal court and the “international drug offence”⁶⁶

In 1989, Trinidad and Tobago lead a coalition of Caribbean states which called upon the UN to create an ICC with jurisdiction over illicit trafficking in drugs across national

to agencies involved in social development; and working with the mass media to cultivate a better image for drugs policing.

⁶⁴ Flynn and Grant *op cit* at xi.

⁶⁵ Flynn and Grant *op cit* at xxi.

⁶⁶ The gist of this section appears in ‘The exclusion of treaty crimes from the jurisdiction of the International Criminal Court: law, pragmatism, politics’ (1988) 3 *Journal of Armed Conflict Law* 27-43.

frontiers.⁶⁷ The UN responded positively and instructed the International Law Commission (ILC) to direct its attentions to the creation of such a court.⁶⁸ A process of development was initiated.⁶⁹ Initially, it was assumed that drug offences as defined by the drug conventions would fall within the ICC's subject matter jurisdiction.⁷⁰ The INCB gave its backing to the idea.⁷¹ The ILC's 1991 Draft Code of Crimes against the Peace and Security of Mankind had included crimes created by the drug conventions,⁷² and they were included in all the drafts of the code up to and including the 1995 Draft Code.⁷³ However, some members of the ILC opposed their inclusion in the Code, and they were excluded from the 1996 Draft Code.⁷⁴ The evolution of the ICC's subject matter jurisdiction underwent a parallel contraction. The ILC's 1993 Draft Statute for an ICC included a separate category of crimes under suppression conventions that provide for offences to be legislated into existence by the Parties to these conventions (draft article 26(2)(b)).⁷⁵ The 1993 Draft Statute required these offences to reach a threshold of seriousness in order to fall under the ICC's jurisdiction, a measure designed to prevent

⁶⁷ *UNGAOR* 6th Comm. 44th Sess. UN Doc. A/C.6/44/SR.38-41 (1989).

⁶⁸ General Assembly Resolution 44/39 of 1989.

⁶⁹ As a result of GA Resolution 47/33 of 1992 calling for the elaboration of a draft Statute, the ILC produced a Draft Statute for an ICC in 1993. A Working Group of the ILC revised it and produced a 1994 Draft Statute, which took into account the recommendations of governments (see 'Report of the ILC, 46th Session' *UNGAOR* 49th Sess. Supp. No.10 UN Doc. A/49/10/1994 (1994)). The Statute was then examined by the Sixth Committee of the General Assembly, and in April and August of 1995 by an Ad Hoc Committee (see 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court' *UNGAOR* 50th Sess. Supp. No.22 UN Doc. A/50/22). A Preparatory Committee took over this task in March and August of 1996 and again in 1997 (see 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' *UNGAOR* 51st Sess. Supp. No.22A UN Doc. A/51/22). Its purpose was to draft a text for a convention to be discussed by a diplomatic conference to be held, in terms of GA Resolution 51/207 of 1996, in 1998. On the development process see generally Crawford J 'The ILC's Draft Statute for an international criminal tribunal' (1994) 88 *AJIL* 140-152; Crawford J 'The ILC adopts a statute for an international criminal court' (1995) 89 *AJIL* 404-416; Dugard J 'Obstacles in the way of an international criminal court' (1997) 56 *Cambridge LJ* 329-342; McCormack T and Simpson G 'A new international criminal law regime?' (1995) 42 *Netherlands ILR* 177-206.

⁷⁰ An assumption made by the American Bar Association's Task Force on an International Court 'Report' (1993) 27 *International Lawyer* 258-275 and 'Final report' (1994) 28 *International Lawyer* 475-533; Bassiouni MC 'The need for an international criminal court in the new international world order' (1992) 25 *Vanderbilt Jnl of Transnational Law* 151-182; 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* 1-73.

⁷¹ See *Report of the International Narcotics Control Board for 1996* UN Doc. E/INCB/1996/1 at 4.

⁷² 'Report of the ILC, 43rd session' *UNGAOR* 46th Sess. Supp. No.10 at 238-250, UN Doc. A/46/10 (1991).

⁷³ See 'Report of the ILC, 47th Session, *UNGAOR* 50th Session Supp. No.10 (A/50/10) at para's 112-118.

⁷⁴ 'The ILC's Draft Code of Crimes Against the Peace and Security of Mankind' *UNGAOR* 51st Sess. Supp. No.10 UN Doc A/51/10.

⁷⁵ 'Report of the ILC, 45th session' *UNGAOR* 48th Sess., Supp. No.10, UN Doc. A/48/10 (1993) at 255-335.

the ICC from being overwhelmed by minor cases.⁷⁶ The 1994 Draft Statute simplified the jurisdictional breakdown of offences.⁷⁷ It created a combined list of self-executing criminal law treaties and suppression conventions (draft article 20(e)). It required all of these treaty crimes to be 'exceptionally serious crimes of international concern' before the ICC could take jurisdiction. The *numerus clausus* of treaty crimes in the annex included article 3(1) of the 1988 Convention.⁷⁸ The criteria for their inclusion in the annex were: a) that they were created by a multilateral treaty of universal as opposed to regional scope; and b) that they were either of international concern as evidenced by application within each treaty of subsidiary universality of jurisdiction or a provision for an ICC to take jurisdiction.⁷⁹

Over time, considerable opposition grew to the inclusion of drug trafficking within the ICC's jurisdiction.⁸⁰ In the discussions in the Ad Hoc Committee, UN General Assembly Sixth Committee and Preparatory Committee, a majority opinion emerged that the ICC's jurisdiction should be limited to a set of serious crimes which concern the international community as a whole.⁸¹ The Preparatory Committee's draft provision on drug offences was left in square brackets. It provided that drug offences essentially meant any article 3(1) of the 1988 Convention's offence 'committed on a large scale and in a transboundary context.'⁸² But the provision continued that the ICC could only take jurisdiction over such offences if the Parties involved accepted the jurisdiction of the ICC with regard to such offences, and referred to the different mechanisms in the 1998 Draft Statute for states to individually and expressly become party to the ICC taking jurisdiction over the specific treaty crimes.⁸³ At the 1998 Rome Diplomatic Conference held to establish an ICC, despite support from CARICOM states for the inclusion of drug offences,⁸⁴ the general consensus was that the issue of the

⁷⁶ 'Report of the ILC, 45th session' *UNGAOR* 48th Sess. Supp. No.10 UN Doc. A/48/10 (1993) at 284.

⁷⁷ 'Report of the ILC, 46th Session' *UNGAOR* 49th Sess. Supp. No.10 UN Doc. A/49/10/1994 (1994).

⁷⁸ The Annex reads: 'Crimes pursuant to Treaties (see article 20(e)) ... 9. Crimes involving illicit traffic in narcotic drugs and psychotropic substances as envisaged by Article 3 (1) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 which, having regard to Article 2 of the Convention, are crimes with an international dimension.'

⁷⁹ 'Report of the ILC, 45th session' *UNGAOR* 48th Sess. Supp. No.10 UN Doc. A/48/10 (1993) at 276.

⁸⁰ See Dugard *op cit* at 334. See McCormack and Simpson *op cit* at 192-3 citing the statement of the United States representative to the UN's Sixth Committee, 25 October 1994.

⁸¹ 'Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II' *UNGAOR* 51st Sess. Supp. No.22A (A/51/22).

⁸² *Report of the Preparatory Committee on the Establishment of an International Criminal Court* UN Doc. A/Conf/183/2/Add.1.

⁸³ *Ibid.*

⁸⁴ Proposal of Barbados, Dominica, Jamaica and Trinidad and Tobago UN Doc. A/Conf.183/C.1/L.48.

inclusion of treaty crimes should be postponed because of insufficient time to deal with it.⁸⁵ Article 5 of the ICC's Statute⁸⁶ limits the ICC's jurisdiction to the core crimes. Drug offences have been relegated to Resolution E annexed to the Final Act of the 1998 Conference. It provides that the 1998 Conference:

Recognising that the international trafficking of illicit drugs is a very serious crime, sometimes destabilising the political and social and economic order in states,

Deeply alarmed at these scourges, which pose serious threats to international peace and security,

Regretting that no generally acceptable definition of ... drug crimes could be agreed on for inclusion within the Court,

Affirming that the Statute of the International Criminal Court provides for a review mechanism, which allows for an expansion in future of the jurisdiction of the Court,

Recommends that a Review Conference pursuant to article 111 of the Statute of the International Criminal Court consider ... drug crimes with a view to arriving at an acceptable definition and then inclusion in the list of crimes within the jurisdiction of the Court.⁸⁷

Article 111 allows the UN Secretary General to convene a Review Conference seven years after the entry into force of the Statute. Its purpose will be to consider amendments to the ICC's Statute and such amendments are specifically not restricted to those dealing with the crimes in article 5. However, this apparently unlocked door is partially obstructed by article 110 which makes it clear that in the case of adoption by the Review Conference of amendments to article 5, such amendments will only enter into force for those Parties which expressly accept the amendment. Article 110(5) specifically provides that in respect of a Party which has not accepted the amendment, the ICC

⁸⁵ The *Rome Treaty Conference Monitor* 10/8/1998 revealed that 14 states favoured inclusion while 38 opposed it, 13 of the latter due to lack of time.

⁸⁶ UN Doc. A/Conf.183/C.1/L.76/Add.2.

⁸⁷ UN Doc. A/Conf.183/C.1/L.76/Add.14.

shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

Ironically, the development process that finally established the ICC which began with the concern of Caribbean states about drug offences has culminated in the exclusion of these offences, at least temporarily, from the subject matter jurisdiction of the proposed court. There is nothing in the ICC's Statute that will hamper the independent progress of drug crimes towards greater international legal status.⁸⁸ But the Statute, of itself, leaves the issue in abeyance. The concerns of Caribbean states remain unaddressed.⁸⁹ Exclusion of drug offences from the ICC's jurisdiction is regarded as a compromise solution because it has been linked to review of the ICC's jurisdiction for future inclusion of treaty crimes. Such a review may occur and drug offences may be included at a later stage but many of the arguments against their inclusion set out below will remain relevant at that review, and the mere fact that the ICC's statute will have to be amended to include them, will be a barrier to the ICC taking responsibility over them.

Analysis of the arguments for and against inclusion of drug offences within the ICC's jurisdiction provides a useful perspective on the suppression of drug offences through international law today. The view in the ILC's Working Group that drug offences should fall under the ICC's jurisdiction relied on the following aspects of their legal nature: they have been constituted as offences under international law; the provisions designed to punish them exist under national law; the drug conventions make provision for extraterritorial jurisdiction; the *aut dedere aut judicare* principle applies; and, provisions for extradition and mutual legal assistance apply.⁹⁰

According to Dugard, the main objection to the inclusion of drug offences within the subject matter jurisdiction of the ICC is that they have a contractual basis.⁹¹ Not all states are party to the drug conventions, hence the conventions do not establish the crimes universally. At best they qualify as international crimes only for the Parties to the conventions. Digging deeper, it becomes apparent that the drug conventions themselves do not establish universal jurisdiction over drug offences even in respect of the states that

⁸⁸ Article 10 specifically provides that nothing in the ICC's Statute 'shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.'

⁸⁹ As Dugard *op cit* at 335 predicted.

⁹⁰ 'Report of the ILC, 45th session' *UNGAOR* 48th Sess. Supp. No.10 UN Doc. A/48/10 (1993) at 282.

⁹¹ *Op cit* at 334.

are party to them. They establish territorial jurisdiction and extend jurisdiction extraterritorially through versions of accepted jurisdictional principles like nationality and unusual jurisdictional principles like the effects principle. The ILC's Working Group did not consider drug offences as international and automatically falling within the ICC's jurisdiction because the drug conventions did not create with regard to the crimes therein defined 'either a system of universal jurisdiction based on the principle *aut dedere aut judicare* or the possibility that an international criminal tribunal try the crime or both.'⁹² The 1994 Draft Statute attempted to compensate for this weakness by providing under draft article 53(2)(b) that if a state party to a listed treaty did not consent to jurisdiction being taken by the ICC over a treaty crime it was obliged to either extradite the accused or refer the matter to its own authorities. The 1994 Draft Statute thus altered the substantive law and applied subsidiary universality without qualification to drug offences precisely because the drug conventions do not do so. Despite these problems with jurisdiction, there is no reason in principle why the ICC should not have jurisdiction over drug offences when the state involved expressly consents, the method impliedly suggested by article 110(5) of the ICC's Statute. This would mean selective application of drug offences by the ICC which is not as desirable as universal application, but it would be ameliorated by the fact that most states have become party to the drug conventions thus indicating at least a tentative willingness to allow drug offences to be dealt with by international law.⁹³

The major problems with the definition and execution of drug offences is that the drug conventions are not self-executing and they define drug offences quite broadly.⁹⁴ However, most states have legislated the basic offences into being, and domestic drugs legislation replicates quite closely the penal provisions in the drug conventions.⁹⁵ Moreover, the advocates of the inclusion of drug offences have argued that they should be redefined more narrowly in the ICC's statute in order to make it possible for the ICC to take jurisdiction. Thus Trinidad and Tobago's 1989 proposal related to trans-national-

⁹² ILC *Revised Report of the Working Group on the Draft Statute for an International Criminal Court* UN Doc. A/CN.4/L.490 (July 1993) at 22.

⁹³ For example, there are presently 138 Parties to the 1988 Convention (75 percent of states) - Wells A *International Legal and Policy Framework* (unpublished conference paper, New Delhi Global Drugs Law Conference, 1997) at 2.

⁹⁴ 'Report of the ILC, 45th session' *UNGAOR* 48th Sess. Supp. No.10 UN Doc. A/48/10 (1993) at 282. See also Crawford *op cit* (1994) at 146, (1995) at 410.

⁹⁵ See, for example, the penal sections of the South African Drugs and Drug Trafficking Act 140 of 1992 which almost replicate article 3 of the 1988 Convention.

boundary drug trafficking.⁹⁶ In terms of draft article 26(2)(b), the 1993 Draft Statute for an ICC placed drug offences under international jurisdiction if such crimes were 'exceptionally serious'. The precise meaning of this jurisdictional limitation was left to the ICC to decide. But the ILC recognised that 'serious drug offences' do not as yet exist as a discrete category of crimes in international law and that such a category will have to be created if the ICC is to take jurisdiction over such offences. Draft article 20(e) of the 1994 Draft Statute thus recognised the ICC's jurisdiction over drug offences if they are exceptionally serious crimes of international concern. This limitation was backed up by the provision in draft article 35 that the ICC could decide a matter is inadmissible if it 'is not of such gravity to justify further action by the Court', and by internal limiters like the requirement in the annex that drug offences have an 'international dimension' referring to the purpose of the 1988 Convention as set out in its article 2.⁹⁷ Crawford argues that what the ILC originally proposed is a jurisdictional limitation, not a substantive change to the definition of the crimes in question.⁹⁸ Jurisdictional limitation or redefinition, some delegates to the Preparatory Committee continued to make the point

that particularly serious drug trafficking offences which involved an international dimension should be included, that these offences had serious consequences for the world population and that there was no unified system for addressing these crimes because of divergences in national laws.⁹⁹

The problem becomes one of distinguishing serious offences from those less serious, and crimes with an international dimension from those that do not have such a dimension. The drug conventions do not make such a distinction; they were not intended to do so. But such distinction is possible. Bassiouni suggests that the motivation, goal and impact of a particular offence can be used to distinguish a serious offence from one less

⁹⁶ UN Doc. A/44/195 cited in ABA Task Force's 'Report' (1993) 27 *International Lawyer* 258 at 260.

⁹⁷ The first sentence of Article 2(1) makes it clear that the purpose of the 1988 Convention 'is to promote co-operation among the Parties so that they may address more effectively the various aspects of the illicit traffic in narcotic drugs and psychotropic substances having an international dimension.'

⁹⁸ *Op cit* (1994) at 146.

⁹⁹ Preparatory Committee on the Establishment of an International Criminal Court *Summary of the Proceedings of the Preparatory Committee during the period 25 March - 12 April 1996* UN Doc. A/AC.249/1, 7 May 1996 at paras 71-72.

serious.¹⁰⁰ Threats to the stability of a state through, for example, narco-terrorism, may also be useful yardsticks because such threats are of obvious international concern. The fact that the conduct crosses national boundaries is another distinguishing factor. Following this type of approach at the 1998 Conference, Caribbean states felt that drug offences should be included within the ICC's jurisdiction when committed:

- (a) on a large scale (and)(or) in a transboundary context,
- (b) within the framework of an organised and hierarchical structure;
- (c) with the use of violence and intimidation against private persons, judicial persons or other institutions, or members of the legislative, executive or judicial arms of government, (thereby) creating fear or insecurity within a state or disrupting its economic, social, political or security structures or with other consequences of a similar nature; or
- d) in a context in which corrupt influence is exerted over the public, the media and public institutions.¹⁰¹

The legal advantages of including drug offences within the ICC's jurisdiction relate mainly to the inadequacies of the present system with respect to jurisdiction, extradition and mutual legal assistance. Patel suggests,¹⁰² for example, that the ICC would provide a useful forum for a state requiring an extradition treaty where one does not exist, as the state could delegate its authority to the ICC, not surrender jurisdiction, thus avoiding domestic legal hurdles. It has also been argued that problems¹⁰³ like the fiscal offence exception to extradition would be more easily overcome because of the symbolic neutrality of the court, and problems like the *de facto* death penalty exception would be avoided as the sentence would not be competent. The ICC is unlikely to overcome constitutional prohibitions on the extradition of nationals unless states are willing to recognise it as a neutral higher authority. The ICC could, however, provide an effective forum in cases of concurrent jurisdiction.

¹⁰⁰ Bassiouni MC 'Effective national and international action against organized crime and terrorist criminal activities' (1990) 4 *Emory International LR* 9 at 23 suggests these qualities may change the nature of an offence.

¹⁰¹ Proposal of Barbados, Dominica, Jamaica and Trinidad and Tobago UN Doc. A/Conf.183/C.1/L.48.

¹⁰² *Op cit* at 734-736.

¹⁰³ See Patel *op cit* at 736-737.

The major arguments for inclusion are practical. Trinidad and Tobago called for the ICC to be established to take jurisdiction over the increasingly uncontrollable, from their point of view, drug traffic. They argue that it would make for more predictable prosecution of unreachable drug barons than national prosecution. Rampilla argues that the threats, bribery and influence of traffickers on judges and municipal courts have a much stronger effect on national trials of traffickers than they would have at the international level.¹⁰⁴ Such threats also have negative consequences for extradition requests and requests for mutual assistance. The ICC's territorial removal from vulnerable states suggests that it would be more effective. Moreover, it will have the specialised facilities to deal with large complex cases, facilities not available in many states, and will also have the resources to establish prisons to hold offenders in areas remote from the scene of their crimes. There is no doubt that large complex trials of offenders who can afford impressive legal defences present a problem for poorer states, and the ICC would almost certainly provide a better quality prosecution and more effective punishment of such individuals. Inconsistency in sentencing across states is a strong argument for ICC jurisdiction over drug offences where the punishments for small scale trafficking range from death to no punishment at all, and the treatment of large-scale traffickers in some states is so lenient it verges on the ludicrous. The analysis that practical considerations call for ICC jurisdiction over drug offences does, however, ignore the fact that many of the same considerations apply potentially in respect of most if not all crimes, given the international mobility of criminals today.

There are many pragmatic reasons for exclusion of drug offences from the ICC's jurisdiction. The ICC's start-up process has been left unencumbered by the problem of jurisdiction over drug offences primarily because it was felt that an ICC with a narrow jurisdiction will be more broadly accepted, and such acceptance will strengthen its moral authority and credibility.¹⁰⁵ The ICC will also be cheaper to start up and to run while it only has jurisdiction over core crimes. But these arguments are of limited effective duration. The chief practical argument against the ICC's jurisdiction over drug offences

¹⁰⁴ Rampilla NR 'Towards prosecuting the illicit drug traffickers before the proposed international criminal court - a challenge beyond 2000' in *Souvenir Brochure of the International Conference on Global drugs Law* (Indian Law Institute, New Delhi, 1997) 167 at 171.

¹⁰⁵ Lawyers' Committee for Human Rights *Establishing an International Criminal Court: Major Unresolved Issues in the Draft Statute* (Lawyers' Committee for Human Rights: New York, 1996) position paper at 10.

is that their incidence is too high and they would swamp the ICC and trivialise it.¹⁰⁶

Thus, in the Preparatory Committee it was argued

that drug trafficking should not be included because these crimes were ... of such a quantity as to flood the court; the court would not have the necessary resources to conduct lengthy and complex investigations required to prosecute the crimes; the investigation of the crimes often involved highly sensitive information and confidential strategies; and the crimes could be more effectively investigated and prosecuted by national authorities under existing international co-operation arrangements.¹⁰⁷

But as noted above, criteria can be established in order to allow the ICC to take jurisdiction over only the most serious drug offences, the offences where national authorities are manifestly ineffective. There will not be many such cases and they should be easily distinguishable if a high threshold is set. What is very interesting, however, is that these arguments against the ICC's jurisdiction over drug offences are the same arguments raised at the 1988 Conference by the American and British delegates against the application of universal jurisdiction to drug offences. They appear to be pragmatic arguments, but they disguise a political agenda. This agenda is to retain the present system of indirect international control over drug offences which embodies a prosecutorial model favouring large consumer states' interests, and to reject the alternative international law model which would equalise the interests of states in the system. The argument that the ICC would not be used to prosecute drug offences and the ICC's jurisdiction over such offences would be a pointless waste of resources also reveals this agenda. For example, it was argued by the United States' representative in the UN General Assembly's Sixth Committee that states would be reluctant to hand over drug traffickers to an ICC.¹⁰⁸ But the present system of extradition is of questionable effectiveness in any event, particularly from the point of view of poorer states who are

¹⁰⁶ Preparatory Committee on the Establishment of an International Criminal Court *Summary of the Proceedings of the Preparatory Committee during the period 25 March - 12 April 1996* UN Doc. A/AC.249/1, 7 May 1996 at para. 16.

¹⁰⁷ Preparatory Committee on the Establishment of an International Criminal Court *Summary of the Proceedings of the Preparatory Committee during the period 25 March - 12 April 1996* UN Doc. A/AC.249/1, 7 May 1996 at paras 71-72.

¹⁰⁸ UNGAOR 46th Sess. UN Doc. A/C.6/46/SR.31 (1991) at 3.

far less active in requesting extradition than developed states. Perhaps what states like the United States are more concerned about is that the ICC would 'undermine efforts to strengthen the extradite or prosecute approach and to improve the administration of justice in a number of countries, especially in Latin America.'¹⁰⁹ Producer and transit states are often unwilling to extradite offenders for political reasons, and unwilling for the same reasons to prosecute the alleged offenders themselves. This unwillingness may be due to the fact that they are under pressure to do so by more powerful states and that they are diminishing their own sovereignty. ICC jurisdiction over drug offences was proposed as a solution to the sovereignty concerns of weaker states.¹¹⁰ Trinidad and Tobago and Colombia both indicated that an ICC would present an attractive third alternative to extradition or prosecution without their political problems.¹¹¹ A related concern is perceptions of political bias by extraditing states, hence the recourse of requested states to the political offence exception. A neutral representative ICC would not be as likely to exhibit bias, and sending an alleged offender to it would be less offensive to national pride. But while some states may be willing to surrender jurisdiction, as they are already doing so to stronger states, drug consumer states are not willing to trust the ICC to prosecute drug traffickers and would rather extradite and prosecute these traffickers themselves.¹¹² At present subsidiary universality is not in reality a useful basis for effective prosecution by requested states. Drug consumer states are thus entirely committed to extradition and they do not want to lose the control that it gives them to an ICC. In the face of reluctance to extradite they appear more willing to rely on diplomatic pressure to force extradition than to give up jurisdiction to the ICC. Thus while the ICC's jurisdiction over drug offences could be of enormous practical assistance to states like Trinidad and Tobago in prosecuting drug offences because they will be more able in terms of their own constitutional and political restrictions to give up control over drug offenders to the ICC, it will be of little functional value to consumer states like the United States in the prosecution of such offences. Indeed, it is likely to diminish their control over the suppression of illicit drugs.

¹⁰⁹ ABA's Task Force 'Report' *op cit* (1993) at 264.

¹¹⁰ Patel *op cit* at 709-747.

¹¹¹ ABA's Task Force 'Report' *op cit* (1993) at 263 citing Scharf 'The jury is still out on the need for an international criminal court' (1991) *Duke Journal of Comparative and International Law* 135 at 151-152.

¹¹² Dugard *op cit* at 334.

A more principled reason for excluding drug offences from the ICC's jurisdiction is that they do not as yet affect the international community's interests seriously enough nor shock its collective conscience. But Patel argues that they do threaten international peace and security, something evidenced by the major international breach of peace that occurred when the United States invaded Panama in 1989, and by the internal destabilisation and threat to the sovereignty of states such as Colombia poised by drug traffickers under threat of extradition.¹¹³ It is argued that drug trafficking threatens the stability of states and could result in these states becoming ungovernable.¹¹⁴ This threat may ultimately extend to international society if the governments of states become criminal entities and other states intervene not just to police drug traffickers but to police these governments. However, although instruments like the 1988 Convention proclaim in their preambles that international society perceives traffic in drugs to be 'a serious threat to the health and welfare of human beings', the provisions of the drug conventions do not always reflect a uniform conviction that drug offences threaten the world order, the *civitas maxima*. Thus, as defined in the 1988 Convention, drug offences contain no significant international element. Although the international community does recognise through the drug conventions the need to suppress illicit drugs globally, at present states do not sponsor drug offences, individuals do, and most states do not perceive these offences as a threat to the international order. Yarnold concludes that drug offences 'neither present a threat to world peace nor do they "shock the conscience" of the world community'.¹¹⁵ Although it is true to say that this perception may well be changing, especially in the states most seriously affected by drug trafficking, it has not reached a threshold of general acceptance.

The conflict in respect of jurisdiction over drug offences is a conflict between the "co-operationists" who advocate the use of national justice and the "internationalists" who advocate an ICC with a wide jurisdiction.¹¹⁶ States like the United States favour the present indirect method of control over drug offences because it suits them. Co-operation implies individual freedom for states within the system, and that freedom is most valued

¹¹³ *Op cit* at 712-714.

¹¹⁴ See Harrison M 'The PRI and drug trafficking: a cancerous combination' (1996) *The Latin American Studies Symposium - Birmingham Southern College* 1 at 1 on the dangerous combination of drug trafficking and Mexican politics.

¹¹⁵ Yarnold BM 'Doctrinal basis for the international criminalization process' (1994) 8 *Temple Int. and Comp. LR* 85 at 103.

¹¹⁶ Crawford *op cit* (1995) at 408.

by the most powerful individuals within that system. The indirect system involves many potential but few actual inroads on their sovereignty. CARICOM states favour direct international control of drug trafficking because they have no confidence in the indirect method of control, and it involves massive actual inroads into their sovereignty. They would prefer a system to which all states are equally subject. ICC jurisdiction over drug offences would represent a fundamental shift from the informal prosecutorial model where states like the United States have an inordinate influence to the international law model where the international drug control based on rigid rules finds a new central locus of control in the ICC. But the Hobbesian reality of international relations which contextualised the creation of the drug conventions - strong states blaming weak states for the drug problem and using international law to try to control it - has dictated that for the moment drug offences should not be internationalised through the ICC. Given the lugubrious development of international law, an opportunity to reorient the international drug control system to suit the interests of all states has been lost. What the recent history of the ICC's proposed jurisdiction over drug crimes does reveal is that if a review conference is held and such offences are included within article 5 of the ICC's Statute they are likely to be: (a) the subject of elaborate attempts to redefine them more narrowly and attach threshold conditions to them emphasising their seriousness, transboundary nature and their threat to international stability; and (b) states will be permitted to opt into the ICC's jurisdiction over such redefined drug offences on an individual basis. Acceptance or rejection of the redefinition of international drug offences outside of the drug conventions and the taking of the option of centralised prosecution of such offences will reveal whether states such as the United States which are committed to the prosecutorial system embedded in the drug conventions have the political will to embrace a more universalist system of control over drug crime. Such a change in attitude seems unlikely, and as a result the system is unlikely to change its prosecutorial orientation. What is now in the best interests of the international community to do with regard to international drug control is a question best answered by reexamining the history of the development of international drug control.

8.4.3 The future of drug control through international law

International drug control has gone through three distinct historical phases and produced three distinct kinds of law.

The first phase, regulation of licit drug production, distribution and consumption was developed in the period 1913 to 1972 and is in effect fully mature. The 1961 Convention, 1971 Convention and 1972 Protocol are mainly concerned with this aspect of drug control. The major problem with the first phase was that while it clarified licit behaviour in respect of drugs, it provided little guidance in respect of the steps to be taken against illicit behaviour.

The second phase, the suppression of illicit drug related activities, began abortively with the 1936 Suppression Convention failing to garner any real support from states. A small number of provisions in the 1961 and 1971 Conventions and the 1972 Protocol concerned themselves with penal law but did not take it much further. The chief instrument today is, however, the 1988 Convention which is concerned almost entirely with the criminal suppression of illicit drugs. There appear to be two major problems with the second phase of international drug control. First, the system developed to suppress illicit drug control has been strongly influenced by major consumer states like the United States. Through a combination of provisions relating to the definition of offences, the extraterritoriality of national jurisdiction and enforcement assistance, it is skewed towards the interests of these states. The adjustment of the system to meet the needs of all states equally is necessary. One way of achieving this realignment is to place more serious drug offences under the jurisdiction of the ICC, another is to make unqualified universal jurisdiction over these offences obligatory through a protocol to the 1988 Convention. But whether such measures can solve the global drug problem is debatable. The second problem with the second phase of international drug control is that it has been consumed with supply reduction. Moving from a prosecutorial model to an international law model of international drug control does not necessarily mean a movement away from supply reduction. It is likely to become an effort to make supply reduction work. Yet supply is likely to continue, inexorably, to meet demand. A more radical solution is required - a complete shift in emphasis to dealing with the victims of drug abuse and the social and psychological conditions which lead to drug abuse.

International drug control law appears to be moving into a third phase addressing the needs and problems of users. Advocates of the definition of the drug problem as a public health and social welfare issue have been knocking on the door of the control organs and conferences since the 1970s. The small number of optional provisions in the 1961, 1971 and 1988 Conventions and 1972 Protocol are obviously insufficient. The

most “concrete” steps taken thus far have been those suggested in the 1987 Comprehensive Multidisciplinary Outline. However, the drug consumption problem is now a problem shared by most states, which appears to be leading toward a reevaluation of the lack of progress made in the first two phases. To this end, it is proposed that the international organisations begin to develop a draft international convention that focuses on the social and psychological realities that underpin drug use and supply. This convention would take as its departure point the total social context of the user and supplier - childhood, family life, education, employment, leisure, living standards and community life. Two measures suggested by Stares would serve as useful linchpins for the convention, viz.: a global monitoring and evaluation network to measure more accurately the nature of the problem; and a global drug crisis response programme to provide rapid assistance to badly affected areas.¹¹⁷ This convention would have two major facets.

First, it would focus on the social and psychological context of the user. Under the rubric of demand reduction the proposed convention would outline and enforce a global drug use prevention programme with the goal of promoting internationally and not only in the developed world a general anti-drug use ethos. It would oblige states to use education, workplace, community and mass media programs to illustrate the harmful effects of drug use. Harm reduction methods would be included such as an international drug treatment training programme focused primarily on raising the levels of expertise among health care professionals in countries where such expertise is lacking or absent. While the adoption of such methods would, it is submitted, be largely uncontroversial, it is clear that the international control organs are opposed to more radical harm reduction policies being developed.¹¹⁸ The problem is that methods developed to reduce the harm associated with drug use, such as official testing of drugs at point of use to ensure that users do not poison themselves, are technically in violation of international law. In such a case government officials must: i) accept an offence is taking place and do nothing about it; and ii) assist in that offence by guaranteeing drug quality.¹¹⁹ But international law can and must live with the contradiction of criminalising use and supply but at the

¹¹⁷ *Op cit* at 114-121.

¹¹⁸ See, for example, the INCB's opposition to Switzerland's prescription of heroin to addicts - INCB *Report of the International Narcotics Control Board for 1995* UN Doc. E/INCB/1995/1 at 63.

¹¹⁹ The same problem applies in respect of paraphernalia laws forbidding the provision of needle swops to intravenous drug users.

same time allowing government intervention to ensure reduction of harm even though such intervention appears to sanction use and supply. International law can be adapted to focus not on the logical integrity of the law but on the desirable outcome, the reduction of harm from drug usage. A more controversial step would be for the proposed convention to guide the global decriminalisation of certain drugs such as cannabis. Such a step would mean a movement away from absolute global prohibition on the basis that the behaviour of individuals in respect of some drugs is more properly controlled through a process of socialisation than through formal legal control. The control organs of the international drug control system remain firmly opposed to decriminalisation, something evidenced by the INCB's continual criticism of Dutch drug policy.¹²⁰ Nevertheless, Bassiouni believes that the international community will turn to decriminalisation.¹²¹ He notes that there has been a substantial *de facto* decriminalisation in practice.¹²² Decriminalisation in isolated instances means that illicit trafficking still continues to generate the same profits and associated crime globally. To be successful it must be global. Demand reduction, harm reduction, decriminalisation - all accept drug usage and abandon the pretence of the attainability of a drug free society. The unknown future cost of abandoning absolute prohibition is what appears to be holding a shift to such an approach in check.

The second facet of this new convention would be a focus on the socio-economic conditions of the supplier. Recognising the socio-economic roots of supply, the convention would have to be integrated within global developmental policy. It would have to be integrated into larger policy initiatives that focus on global economic, social and political development, and respond differently to the distinct problems that states experience.¹²³ For Stares the ultimate solution to drug control is a developmental one, a

¹²⁰ Referring to aspects of this policy including the policy of tolerance of soft drug use and coffee shops selling cannabis products, the INCB expressed again in 1995 its 'continued concern at the persistence of certain practices, only slightly altered, which call into question the Government of the Netherlands' fidelity to its treaty obligations.' INCB *Report of the International Narcotics Control Board for 1995* UN Doc. ENCB/1995/1 at 58.

¹²¹ *Op cit* at 335.

¹²² *Op cit* at 330-1. The Frankfurt Resolution is a good example of official concession that prohibition has failed. Adopted by official representatives of Amsterdam, Zurich, Hamburg and Frankfurt in 1990, it advocates the legal purchase, possession and use of cannabis, and non-punishment of purchase, possession and use of small quantities of other drugs. The list of cities party to the resolution stood at 20 in 1995. They have formed themselves into the European Cities on Drug Policy (ECDP). The EDCP is opposed by the twenty cities of the European Cities Against Drugs (ECAD) who support prohibition. See generally Larsen D 'European cities explore harm reduction' Internet site of the ECDP.

¹²³ Stares *op cit* at 113.

solution that focuses on drug production and use because they are bound up with most of the social and economic ills facing humanity today, and a solution that recognises that the solving of these ills is a step towards reducing the impact of drugs on society.¹²⁴ Economic aid to producer states must have a role in this solution and the burden of responsibility should fall on the major consumer states, because these states are in a stronger position economically than producer or transit states.

The prospects for the adoption of such a convention in the near future are not great. States conditioned to prohibition are unlikely to abandon strict conformity with it with alacrity. Thus Nadelmann reports that the United States delegation to the UNDCP in 1994 refused to sign any statement incorporating the phrase harm reduction.¹²⁵ When at the 1988 Conference Mexico resisted the pressure of consumer states to turn the 1988 Convention into an instrument solely directed against the movement of drugs between states, it managed to focus some attention on demand. It was suggested then that a new convention could be elaborated in the future on the problem of demand.¹²⁶ While the 1988 Convention can be amended,¹²⁷ it would seem that the updating of a convention dedicated to supply reduction is inappropriate. The INCB favours the supplementation of existing conventions by provisions emphasising the importance of demand reduction as a principle, but it is opposed to specific obligations being generated, and particularly obligations contained in a new convention. It states:

But the Board is not convinced that specific, universally binding treaty provisions on demand reduction could be agreed upon or that such a treaty would be an appropriate instrument to deal with such an issue. The Board considers that demand reduction is a national task, which in a number of countries may have to be carried out with international support, and that demand reduction programmes are to be designed at the national and local levels, based on knowledge of the real drug abuse situation and taking into consideration the cultural, political, economic and legal environment.¹²⁸

¹²⁴ *Op cit* at 120-121.

¹²⁵ Nadelmann E 'Commonsense drug policy' (1998) 77 *Foreign Affairs* 111 at 124.

¹²⁶ Sproule DW, St-Denis P 'The UN Drug Trafficking Convention: An Ambitious Step' 1989 *CYBIL* 263 at 266 note that both Canada and The Federal Republic of Germany made this suggestion to Mexico.

¹²⁷ Article 31.

¹²⁸ INCB *Report of the International Narcotics Control Board for 1994* UN Doc. E/INCB/1994/1 st 3.

It comes as no surprise that when the 1998 UN General Assembly's special session reviewed the basic policy documents of the drug control programme, it adopted *inter alia* Guiding Principles on Demand Reduction which contain standards to guide governments to set up effective prevention, treatment and rehabilitation programmes. But more is required than relatively isolated references in soft law guiding the national application of restrained alternative approaches to drug control. Relegating demand reduction to the national is to remove from the realm of international legal obligation the confrontation of the problems of individual users and the problems of the societies from which they spring. It also allows the domination of the ideology of prohibition to continue, unquestioned, at the international level. The time is ripe for a new convention on demand and harm reduction precisely because it is uncertain to what extent existing international law permits such policies, especially harm reduction. The hard law of prohibition and the soft law of demand and harm reduction appear to be in conflict because they are. International law should be modified to allow the taking out of the legal process of certain categories of criminal such as users and small time traffickers, and certain types of drugs such as cannabis. A new convention would require the amendment of provisions of the existing drug conventions, because it would be the realisation of a dramatic change in policy.

International suppression of the illicit traffic and use of drugs can never, on its own, achieve total eradication of the problem. Even when coupled with other measures of active intervention such as technical assistance to states and rehabilitation, it is unlikely that the drug problem will disappear. What seems more likely is that we have to live with this problem, and attempt to stabilise drug use at reasonable levels. It may well be that markets reach certain saturation points anyway, and that these saturation points are determined by the factors such as the psychological disposition of the potential drug users, together with other social and economic factors that make up a total environmental structure determining who will take drugs. Thus, in simple terms all those who intend taking drugs are already taking them. Law enforcement is one of these environmental factors, and it is submitted that successful law enforcement should be measured not only by interdiction and arrest rates, but also by the ability to combine with other control factors to keep drug use as low as possible. Ultimately, this success rate must be balanced against the costs of enforcement itself, whether economic or human. However, we must beware that focusing on the problems with the expression of the policy of

prohibition in international law does not lead us to ignore the problems of alternative approaches. Any realistic evaluation of a policy of legalisation in international law would realise very quickly that it is no panacea.¹²⁹ But fixation with legalisation diverts attention away from the pressing question of how to reform the international war on drugs so as to reduce drug usage more effectively as well as preserve human rights. The threat of legalisation is presently used to justify the closing of international society's options in respect of drugs. What is needed is an expansion of those options and a concretisation of that expansion in international law.

¹²⁹ See for example, the problems raised by Jacobs JB 'Imagining drug legalization' (1990) 101 *The Public Interest* 28-42. He notes the absence of fully worked out proposals for legalisation focuses concentration on the short-comings of prohibition. He examines in some depth the practical shortcomings of "free market" and "government regulated" systems of legalisation of drugs most of which are attributable to the inherently dangerous properties of drugs, the need to kill off the present heavy involvement of criminals in the market, and the social costs of legalisation such as automobile accidents.

ANNEXURE A: SUBSTANCES CONTROLLED

1. All drugs

This annexure examines briefly which substances are controlled by the international conventions and how they are placed under control in terms of these conventions. The general principle is that all substances with recognised dependence producing properties are subject to international control. There are obvious exceptions such as alcohol and tobacco, but they fall outside the system for reasons of policy and not because of an assessment of their addictive properties. Indeed, there has never been an adequate definition of addictive drugs. The terms used, viz.: drugs, narcotics, dependence producing substances and so on have never found universal acceptance. International legislators have simply chosen to enumerate

the substances to which the Conventions apply, and in addition provided machinery for including under the scope of the Conventions other substances with the same or similar effect as those originally covered.¹

Most of the main drug types fall under international control, viz.: the opiates, coca derivatives, cannabis, synthetics, barbiturates, amphetamines. The catalogue is being added to continually so a list of all drugs covered by a particular drug convention is attached in a schedule to that instrument. Bruun et al explain the reason for this:

In the earlier treaties the drugs are named in the text, which means that, as a rule, to change the type of control to which a drug is subjected, the treaty must be amended. The more recent treaties arrange drugs in separate schedules, corresponding to different regimes of control. A change in the degree of control of any drug can be brought about by moving it into another schedule, without amending the treaty.²

National legislation usually follows the same approach. Drugs are placed in different schedules attached to drug legislation. In most states the same or similar offences are

¹ Renborg BA *International Drug Control* (1947) 51.

linked to the drugs in these schedules but different penalties attach. These schedules are then amended as the drug conventions' schedules are amended, unless a state has taken the lead in respect of a particular drug.

2. The procedure for scheduling drugs under the 1961 Convention (and as amended)³

Article 36 of the 1961 Convention, the provision requiring Parties to penalise conduct contrary to the Convention's provisions, requires Parties to do so in connection with any of the 'drugs' covered by the Convention. Without distinction as to their organic or synthetic origin, article 2 of the Convention divides narcotic drugs into four different schedules based on an assessment of their properties, and different control regimes are applied to the drugs in these schedules. In terms of article 2(1) all the general regulative control articles apply to Schedule I drugs,⁴ in terms of article 2(2) less stringent provisions apply to the drugs listed in Schedule II,⁵ while in terms of article 2(4) an even greater number of exceptions to the control articles are applied to the drug preparations included in Schedule III.⁶ Schedule IV is a list of the drugs considered most dangerous, to which it is recommended in terms of article 2(5) that additional, special control measures should be applied including prohibition of manufacture, traffic or use, except for medical or scientific use.⁷ The opium poppy, the coca bush, the cannabis plant, poppy straw and cannabis leaves are subject to special measures of control under article 2(6) of the 1961 Convention and article 1 of the 1972 Protocol.

² Bruun K, Pan L, Rexed I *The Gentlemen's Club: International Control of Drugs and Alcohol* (1975) at 47.

³ There are no relevant provisions in the 1972 Protocol.

⁴ Schedule I is composed of those substances which: a) have addiction-producing or addiction-sustaining properties greater than codeine and more or less comparable to those of morphine; b) are convertible into substances having addiction-producing or addiction-sustaining properties with an ease or yield such as to constitute a risk of abuse greater than codeine; or c) have a liability to abuse comparable to that of cocaine.

⁵ Schedule II is composed of those substances which: a) have addiction-producing or addiction-sustaining properties not greater than codeine but at least as great as dextropropoxyphene; or (b) are convertible into a substance having addiction-producing or addiction sustaining properties with an ease and yield such as to constitute a risk of abuse not greater than that of codeine.

⁶ Schedule III is composed of preparations a) intended for legitimate use; and which b) have a specified drug content and are compounded with one or more ingredients in such a way that the drug content cannot be recovered by readily applicable means or in yield which would constitute a risk to public health.

⁷ Schedule IV is composed of those substances which a) have strong addiction-producing properties or a liability to abuse not offset by therapeutic advantages that cannot be afforded by some other drug; and/or b) for which expunging from general medical practice is desirable because of the risk to public health.

Article 3 of the 1961 Convention contains the procedure for any change in the schedules.⁸ In carrying out these procedures the WHO, relying upon the expertise of its ad-hoc Expert Committee, plays a crucial role. The most important procedure is the placing of new drugs under control. This procedure can only be initiated by Parties or by WHO, who must notify the Secretary-General and furnish him with information in support of the notification.⁹ The Secretary-General must notify the other Parties and the WHO if necessary of the potential scheduling.¹⁰ The WHO makes the necessary recommendation upon which the CND takes the final decision.¹¹ While the WHO is deliberating, however, due to the urgency of the need for control over drugs not included in Schedules I or II, Parties may at their discretion provisionally apply the standard control measures of the Convention (ie. those applicable to Schedule I drugs),¹² and in addition, the CND may issue a mandatory direction that Parties apply these provisional controls until it makes its decision.¹³

The decision making process for placing a new drug under control is set out in article 3(3)(iii) and takes place in two stages. Stage one consists of the WHO, customarily relying on the decision of its Expert Committee, making a finding that the substance is a) liable to similar abuse and productive of similar ill effects as the drugs in Schedule I or Schedule II, or b) is convertible into such a drug.

Criteria a) depends on similarity in abuse and effect to scheduled substances. Thus the criteria used to schedule the drugs by the Technical Committee at the 1961 Conference become important. The two tests it used in preparing Schedules I and II were the substance's 'degree of liability to abuse' and 'its risk to public health and social welfare'. The *1961 Commentary*¹⁴ notes that as a result of the application of these two tests 'the substances in these two Schedules, that is, the drugs under the narcotics regime have morphine like, cocaine like, or cannabis like effects or are convertible into "drugs" having such effects.' Thus in placing a new substance under control the WHO Expert Committee must determine its similarity of abuse and ill-effects to morphine, cocaine or cannabis-type drugs. The test leaves the Committee a measure of discretion, and it is

⁸ See Bruun et al *op cit* at 47-8; Chatterjee SK *Legal Aspects of International Drug Control* (1981) at 345-355 for a more in depth study and *1961 Commentary* at 80-107 for much greater detail.

⁹ Article 3(1).

¹⁰ Article 3(2).

¹¹ Article 3(7).

¹² Article 3(3)(i).

¹³ Article 3(3)(ii).

guided by the risk which the substance presents to 'public health and social welfare'.

Criteria b), convertibility of a substance into a scheduled drug, is not dependent upon that substance belonging to a certain chemical group. The *1961 Commentary*¹⁵ notes, however, that not every possible substance convertible into a scheduled drug was intended to be covered by the drafters of the 1961 Convention in this provision, but that the convertibility required 'must be of such a kind as to make it, by the ease of process and by the yield, practicable and profitable for a clandestine manufacturer to transform the substance in question into controlled drugs.' If the substance is found by WHO to be liable to similar abuse and productive of similar ill effects as drugs already controlled, or convertible into a controlled substance, then WHO will notify the CND of this finding. Stage two consists of the CND deciding, upon the basis of the WHO's recommendation, that the 'substance shall be added to Schedule I or Schedule II.' The WHO is obliged to make a recommendation as to which schedule the drug will go into. The CND makes the actual decision. The CND takes its votes in this case by simple majority. The CND's decision is binding immediately on the Parties upon receipt of notification thereof. The CND's decision may be reviewed by ECOSOC, which may accept or reject the original proposal by WHO or alter it by placing the drug in a schedule other than the one proposed.

Article 3(4) provides for the situation where the WHO recommends that a preparation should not be placed in Schedule I or II by the CND. The article allows the CND to 'exempt' the preparation from the controls of these two schedules and place it in Schedule III, intended for preparations with a recognised medical use and containing specified amounts of drugs compounded in such a way they offer no risk of harm. In terms of the provisions, however, the CND may refuse to accept the WHO's recommendation to exempt the substance.

Article 3(5) allows the WHO to recommend 'that a drug in Schedule I which is particularly liable to abuse and to produce ill effects ... and that such liability is not offset by substantial therapeutic advantages not possessed by substances other than drugs in Schedule IV,' be placed in Schedule IV. Schedule IV is reserved for drugs with

¹⁴ At 86-7.

¹⁵ At 88-9.

strong addiction producing properties or a liability to abuse not offset by therapeutical advantages which cannot be afforded by some other drug, and/or ... for which deletion from general medical practice is desirable because of the risk to public health.¹⁶

Once again, however, the CND need not comply with the WHO's recommendation.

Article 3(6) allows the CND, again in accordance with the WHO's recommendation, to amend any of the schedules by transferring a drug from Schedule I to Schedule II or vice versa, or deleting any drug or preparation, as the case may be, from a schedule.

3. The procedure for scheduling substances under the 1971 Convention

Barbiturates, tranquilisers and amphetamines fall outside the scope of the 1961 Convention, hence the elaboration of the 1971 Convention, which like the 1961 Convention, has four schedules of substances to which different control regimes apply.¹⁷ From the point of view of criminal law, article 22 of the 1971 Convention, the provision that requires Parties to penalise conduct contrary to the Convention's provisions, impliedly requires Parties to do so in connection with any psychotropic substance covered by the Convention.

As under the 1961 Convention, article 2(1) of the 1971 Convention provides that either a party or the WHO may, if it has information relating to an uncontrolled substance and believes that it should be scheduled, notify the Secretary-General to this effect, justifying its opinion and thus setting in motion the process for scheduling. This process is also used to initiate the transfer of a substance from one schedule to another or the deletion of a substance from the schedules. Under article 2(2) the Secretary-General is obliged to transmit the notification to the Parties, the CND and if the notification is made by a Party, the WHO. Article 2(3) obliges the Parties to examine the possibility of provisional application to the substance of the control measures applicable to Schedule I or II substances, as appropriate, if the notification transmits information which indicates that the substance is suitable for inclusion in either of these schedules.

¹⁶ *1961 Records* vol.II at 264.

¹⁷ The substances covered include 'hallucinogenics, stimulants similar to the amphetamines, depressants similar to the barbiturates and to those tranquilizers' - *1971 Commentary* at 50.

Under the 1971 Convention, WHO is required to spell out in greater detail the criteria it applies in evaluating a drug for control than under the 1961 Convention. Under article 2(4), if the WHO Expert Committee finds:

- (a) that the substance had the capacity to produce
 - (i) (1) a state of dependence, and
 - (2) central nervous system stimulation or depression, resulting in hallucination or disturbances in motor function or thinking or behaviour or perception or mood, or
 - (ii) similar abuse and similar effects as a substance in Schedule I, II, III, or IV, and
- (b) that there is sufficient evidence that the substance is being or is likely to be abused so as to constitute a public health and social problem warranting the placing of the substance under international control,

then it is obliged to communicate an assessment of the substance to the CND,

including the extent or likelihood of abuse, the degree of seriousness of the public health and social problem and the degree of usefulness of the substance in medical therapy; together with recommendations on control measures, if any, that would be appropriate in the light of its assessment.

Thus the WHO takes four actions: it examines whether the substance fulfils the criteria in paragraphs (a) and (b), it assesses the substance on the basis of its likelihood of abuse and so on, recommends control measures and communicates its recommendation to the CND. The WHO may in terms of the provision examine a substance solely on the basis of its chemical structure, but Chatterjee opines, that following its usual practice, it will take into account the effects the substance might produce.¹⁸ WHO has the discretion over what abuse and ill effects 'similar' to an already scheduled substance means. Chatterjee notes that the Convention appears to have emphasised through these criteria the dependence producing characteristics of the controlled substances, but then points out that already scheduled substances like LSD may not be dependence producing, and

suggests that the true criteria for classification is the capacity of the substance to cause harm.¹⁹ While according to article 2(5) the Expert Committee's assessment is determinative as to medical and scientific matters, the CND takes the decision to schedule the substance and in doing so it has the right to seek advice elsewhere, and may alter the proposal. This innovation was apparently included because it was felt that not only medical and scientific considerations should govern such decisions, but that other factors such as social and administrative considerations should also play a role.²⁰ A two-thirds majority is required in the CND when voting on such a question.

Under article 2(6) the same procedure as set out above is used for the deletion of substance from a schedule or its transfer from one schedule to another.

Article 2(7) obliges the Secretary-General to communicate the CND's decision to all UN members, the WHO, the INCB and those Parties to the 1971 Convention who are not UN members. The CND's decision is not binding until 180 days after receipt by the Parties of notification thereof, and a Party may take exception to such a decision and make a reservation. However, it is obliged to apply a lesser category of controls to the substance, including in every case the adoption of 'measures in accordance with article 22 for the repression of acts contrary to the laws or regulations adopted pursuant to the foregoing obligations'.²¹

Article 2(8) provides for review of the CND's decision, and article 2(9) urges Parties to 'apply such measures of supervision as practicable' to substances not falling under the scope of the Convention but which may be used in the manufacture of psychotropic substances.

Under article 3(1) of the 1971 Convention, preparations containing psychotropic substances are subject to the same measures of control as the psychotropic substances which they contain, and if there is more than one, the measures of control apply to the more strictly controlled substance. However, the escape clauses in article 3(2) and (3) exempt a Party from complying with certain requirements under various articles including article 22's penal provisions, whenever that Party decides that a

¹⁸ *Op cit* at 460.

¹⁹ *Op cit* at 460-1.

²⁰ See Chatterjee *op cit* at 472.

²¹ Article 2(7)(a)(vi), (b)(vi), (c)(v) and (d)(iii).

preparation containing a psychotropic substance other than a substance in Schedule I is compounded in such a way that it presents no, or negligible, risk of abuse and the substance cannot be recovered by readily applicable means in a quantity liable to abuse, so that the preparation does not give rise to a public health and social problem

If a Party makes such a finding it notifies the Secretary-General of the preparation's name and composition and the measures of control from which it is exempted, and this notification is transmitted to the other Parties and drug control organs and to the WHO. Under article 3(4) if a Party or the WHO has information indicating that the exception should be terminated, it is obliged to communicate this information to the Secretary-General who is obliged to pass it on to the Parties, the CND and as the case may be, to the WHO, which shall also make a finding, which may be different, and the CND, taking into account the WHO's assessment, will finally decide if the preparation should be controlled or not. Communication of the decision and termination/non-termination follows accordingly.

4. Drugs and substances covered by the 1988 Convention

4.1 The general provisions

For most purposes the material scope of the 1988 Convention is defined by the 1961 and 1971 Conventions as in effect it simply elaborates the criminal law provisions of those conventions. Thus article 1(n) provides that 'narcotic drug' means 'any of the substances, natural or synthetic, in Schedules I and II of the Single Convention on Narcotic Drugs, 1961, and that Convention as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs' while article 1(r) defines 'psychotropic substance' as 'any substance, natural or synthetic, or/and natural material in Schedules I, II, III and IV of the Convention on Psychotropic Substances, 1971'.

4.2 Precursors and the procedure for tabling precursors under the 1988 Convention

Article 12 of the 1988 Convention is a novel provision providing for the control and monitoring of precursor substances at the national and international levels. Essential to its effective implementation is an efficient mechanism for bringing the specified substances under control. Article 1(t) defines 'Table I' and 'Table II' as 'the correspondingly numbered lists of substances annexed to this Convention, as amended from time to time in accordance with article 12'. The process for inclusion and amendment is set out in paragraphs (2) to (7) of article 12. They read:

2. If a Party or the Board has information which in its opinion may require the inclusion of a substance in Table I or Table II, it shall notify the Secretary-General and furnish him with the information in support of that notification. The procedure described in paragraphs 2 to 7 of this article shall also apply when a Party or the Board has information justifying the deletion of a substance from Table I or Table II, or the transfer of a substance from one Table to the other.

3. The Secretary-General shall transmit such notification, and any information which he considers relevant, to the Parties, to the Commission, and where notification is made by a Party, to the Board. The Parties shall communicate their comments concerning the notification to the Secretary-General, together with all supplementary information which may assist the Board in establishing an assessment and the Commission in reaching a decision.

4. If the Board, taking into account the extent, importance and diversity of the licit use of the substance, and the possibility and ease of using the alternate substances both for licit purposes and for the illicit manufacture of narcotic drugs or psychotropic substances, finds:

(a) That the substance is frequently used in the illicit manufacture of a narcotic drug or psychotropic substance;

(b) That the volume and extent of the illicit manufacture of a narcotic drug or psychotropic substance creates serious public health or social problems, so as to warrant international action, it shall communicate to the Commission an assessment of the substance, including the likely effect of adding the substance to either Table I or Table II on both licit use and illicit manufacture, together with recommendations of monitoring measures, if any, that would be appropriate in the light of its assessment.

5. The Commission, taking into account the comments submitted by the Parties and the comments and recommendations of the Board, whose assessment shall be determinative as to scientific matters, and also taking into due consideration any other relevant factors, may decide by a two-thirds majority of its members to place a substance in Table I or Table II.

6. Any decision of the Commission taken pursuant to this article shall be communicated by the Secretary-General to all States and other entities which are, or which are entitled to become, Parties to this Convention, and to the Board. Such decision shall become fully effective with respect to each Party one hundred and eighty days after the date of such communication.

7. (a) The decisions of the Commission taken under this article shall be subject to review by the Council upon the request of any Party filed within one hundred and eighty days after the date of notification of the decision. The request for review shall be sent to the Secretary-General, together with all relevant information upon which the request for review is based.

(b) The Secretary-General shall transmit copies of the request for review and the relevant information to the Commission, to the Board and to all the Parties, inviting them to submit their comments within ninety days. All comments received shall be submitted to the Council for consideration.

(c) The Council may confirm or reverse the decision of the Commission.

Notification of the Council's decision shall be transmitted to all States and other entities which are, or which are entitled to become, Parties to this Convention, to the Commission and to the Board.

Article 12(2) makes it clear that the procedure for addition of substances to the lists in Tables I and II, deletion of substances from these Tables and transfer of substances from one Table to another is that set out in paragraphs 2 to 7 of article 12. Article 12(2) also clarifies that it is the Parties or the INCB that initiate the process. If a Party or the INCB has information that it feels may require the inclusion of a substance in Table I or Table II, article 12(2) requires it to notify the Secretary-General and furnish him with the information in support of this notification.

Article 12(3) sets out what the Secretary-General must do with such a notification. He must transmit it, together with any other relevant information, to the Parties, the CND, and to the INCB, if notification is made by a Party. The Parties are then required to return their comments on this notification to him, together with all additional information that may assist the INCB to make an assessment and the CND to reach a decision on this assessment. This obligation obviously applies whether the notification is in respect of the addition, deletion or transfer of a substance.

Article 12(4) sets out the test to be used by the INCB in its assessment of the substance once notification has been received by the Secretary General. The INCB is obliged to take into account two important considerations in applying this test, viz.: (i) the extent, importance and diversity of the substance's licit use; and (ii) the possibility and ease of using the alternate substances both for licit and illicit purposes. The test is set out in sub-paragraphs (a) and (b). Sub-paragraph (a) provides that the INCB must find that the substance in question 'is frequently used in the illicit manufacture of a narcotic drug or psychotropic substance'. Sub-paragraph (b) provides that the INCB must find that the volume and extent of the illicit manufacture of such drugs creates such serious public health or social problems that international action is necessary. If both legs of the test are satisfied then the INCB is obliged to transmit an assessment of the substance to the CND. Included in this assessment must be its conclusions as to the likely consequences to licit use and illicit manufacture of tabling the substance, and its

recommendations for any appropriate monitoring measures. This procedure applies whether the assessment is in respect of the addition, deletion or transfer of a substance.

Article 12(5) then sets out how the CND decides to table a substance. The paragraph provides that this decision must take into account the Parties' comments, the INCB's comments and recommendations, and any other relevant factors. The INCB's assessment is, however, determinative as to scientific matters. The decision to table a substance in either Table I or II must be by a two-thirds majority of the CND's members. This procedure applies whether the decision is to add, delete or transfer the substance.

Article 12(6) sets out who must be informed by the CND of a decision in respect of the tabling of a substance. It requires the CND to communicate such a decision through the Secretary-General to the INCB and to all Parties and potential parties to the 1988 Convention. This obligation applies whether the decision is to add, delete or transfer the substance. The decision becomes effective one hundred and eighty days after the date of such communication. Unlike the position under the earlier conventions,²² no provision is made for Parties to enter reservations in respect of newly included substances to allow them time to adjust their legal and administrative systems to comply with application of article 12's controls to the new substance.

Article 12(7) provides for review of the CND's decisions. Sub-paragraph (a) makes it clear that the CND's decisions to add, delete or transfer substances are subject to the ECOSOC's review at any Party's request. The provision sets out the procedure for reviewing the CND's decision. Parties requesting review of the CND's decision must file such a request, together with all the relevant information upon which this request is based, with the Secretary General within one hundred and eighty days after the date of notification of the decision. Sub-paragraph (b) obliges the Secretary-General to transmit copies of the review request and relevant information to the CND, INCB and to all the Parties, inviting them to comment within ninety days. Comments are to be submitted to the ECOSOC for consideration. Sub-paragraph (c) gives the ECOSOC the power to confirm or reverse the CND's decision. Notification of the ECOSOC's decision must be transmitted to all Parties and to all potential parties, to the CND and to the INCB.

²² For example, article 2(7) of the 1971 Convention.

In practice, the article 12 procedure was used in 1992 to add five substances to each Table.²³

5. Conclusion

The scheduling procedures in the Conventions are very similar. The governments notify drug control organs of the need to bring a substance under control, and while the decision is taken by the CND, the real assessment is made by a small group of experts applying a fairly loose test. Since 1961 the test has become slightly more elaborate, and the organisation responsible for providing the expert opinion has changed. The key organisation under the 1961 Convention is the WHO's Expert Committee, while under the 1971 Convention its influence has been diluted a little through the CND's power to seek advice elsewhere. The unusual thing about the procedure set out in the 1988 Convention for the tabling of precursors is that the INCB completely subsumes the role of the WHO. The INCB President informed the 1988 Conference that it would arrange the role of the WHO and would use the services of special consultants and consult with the (then) DND's laboratory.²⁴ This may be explicable because precursors are substances with a commercial value, but then so are drugs themselves. It may be that the real reason for this change is because the CND did not have complete confidence in the WHO Expert Committee's technical and administrative background and its commitment to drug prohibition. The fact that the CND is the central power in the process of placing drug and precursors under international control has been attacked in the past because of the restraint it places on domestic actions in respect of controlled drugs and substances, particularly preventing Parties from choosing to decriminalise or legalise such drugs and substances unilaterally.²⁵ Ideally, should Parties choose to remove substances from control the whole of the international community should do so. There is no doubt that this is one of the few substantial powers the CND wields, and it is certainly a power that

²³ See Gilmore WC 'Drug trafficking and the control of precursor and essential chemicals: the international dimension' in MacQueen HL, Main BG (eds) *Drug Trafficking and the Chemical Industry: Hume Papers on Public Policy* Vol.4, no.1, (Edinburgh UP, Edinburgh, 1996) at 18.

²⁴ *1988 Records* vol.II at 247.

²⁵ See, for example, Comment 'The Convention on Psychotropic Substances: domestic consequences of ratification' (1978) 63 *Iowa LR* 950 at 953 which cites this as a reason why the US should not ratify the 1971 Convention (it did).

will retard any progressive change towards global growth of policies of decriminalisation because of the prevailing law and order ethos within the CND.

Bibliography

Books and Articles

- Abarro PA 'The role of the Drug Advisory Programme of the Colombo Plan Bureau in the fight against illicit drug traffic' (1983) 35 *Bulletin on Narcotics* 67-72.
- Abramovsky A 'Extraterritorial abductions: America's "Catch and Snatch" policy run amok' (1991) 31 *Virginia JIL* 151-210.
- ABA's Task Force on an International Court 'Report' (1993) 27 *International Lawyer* 258-275 and 'Final report' (1994) 28 *International Lawyer* 475-533 (containing the draft statute of the ILC for an International Criminal Court).
- Adams M 'How to destroy the market for drugs?' (1993) 66 *The Police Journal* 42-46.
- Akehurst M 'Jurisdiction in international law' (1972/3) 46 *BYIL* 145-257.
- Allsop S, Nicholas R 'Harm minimisation' in *Souvenir Brochure of the International Conference on Global drugs Law* (Indian Law Insititute, New Delhi, 1997) 22-28.
- Anderson M *Policing the World* (Clarendon, Oxford, 1989).
- Anderson M 'The Agenda for police cooperation' in Anderson M and Den Boer M (eds) *Policing Across National Boundaries* (Pinter, London, 1994) 3-21.
- Anslinger HJ 'The implementation of treaty obligations in regulating the traffic in narcotic drugs' (1959) 8 *American ULR* 112-116.
- Anslinger HJ, Tompkins WF *The Traffic in Narcotics* (Funk and Wagnalls, New York, 1953).
- Bailey SH *The Anti-Drug Campaign: An Experiment in International Control* (PS King, London, 1935).
- Bassiouni MC 'Transnational control of narcotics' (1972) *Proceedings of the American Society of International Law* 227-233.
- Bassiouni MC 'International criminal law' in Kadish SH (ed) *Encyclopedia of Crime and Justice* Volume 3 (MacMillan, New York, 1983) 901-910.

- Bassiouni MC 'Characteristics of international criminal law conventions' in Bassiouni MC (ed) *1 International Criminal Law: Crimes* (Transnational, Dobbs Ferry, 1986) 1-13.
- Bassiouni MC 'The International Narcotics Control Scheme' in Bassiouni MC (ed) *1 International Criminal Law: Crimes* (Transnational, Dobbs Ferry, 1986) 507-524.
- Bassiouni MC 'Extradition: the United States model' in Bassiouni MC (ed) *2 International Criminal Law: Procedure* (Transnational, Dobbs Ferry, 1986) 405-426.
- Bassiouni MC *A Draft International Criminal Code and a Draft Statute for an International Criminal Tribunal* (Nijhoff, Dordrecht, 1987) 36.
- Bassiouni MC 'Effective national and international action against organized crime and terrorist criminal activities' (1990) 4 *Emory International LR* 9-42.
- Bassiouni MC 'Critical reflections on international and national control of drugs' (1990) 18 *Denver Jnl of Int. Law and Policy* 311-337.
- Bassiouni MC 'The need for an international criminal court in the new international world order' (1992) 25 *Vanderbilt Jnl of Transnational Law* 151-182.
- Bassiouni MC, Wise EM *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Nijhoff, Dordrecht, 1995).
- Barnett JR 'Extradition treaty improvements to combat drug trafficking' (1985) 15 *Georgia Jnl of Int. and Comp. Law* 285-315.
- Baum D 'Tunnel vision: the war on drugs, 12 years later' (1993) 79 *ABA Jnl* 70-74.

- Benyon J, Turnbull L,
Willis A, Woodward R
- ‘Understanding police cooperation in Europe: setting a framework for analysis’ in Anderson M and Den Boer M (eds) *Policing Across National Boundaries* (1994) 46-65.
- Bernholz SA, Bernholz MJ,
Herman JN
- ‘International extradition in drug cases’ (1985) 10 *North Carolina Jnl of Int. Law and Commercial Regulation* 353-382.
- Bin RM
- ‘Drug Lords and the Colombian Judiciary: A story of threats, bribes and bullets’ (1986) 5 *UCLA Pacific Basin LJ* 178-182.
- Bland KL
- ‘The Chemical Diversion and Trafficking Act of 1988: stopping the flow of chemicals to the Andean drug cartels’ (1991) 7 *American University Jnl. of Int. Law and Policy* 105-143.
- Blakesly CL
- ‘United States jurisdiction over extraterritorial crime’ (1982) *Journal of Criminal Law and Criminology* 1109-1163.
- Blakesly CL
- ‘Extraterritorial jurisdiction’ in Bassiouni MC (ed) 2 *International Criminal Law: Procedure* (Transnational, Dobbs Ferry, 1986) 3-53.
- Blakesly CL, Lagodny O
- ‘Finding harmony amidst disagreement over extradition, jurisdiction, the role of human rights, and issues of extra-territoriality under international criminal law’ (1991) 24 *Vanderbilt Jnl of Transnational Law* 1-73.
- Blakesly CL
- Terrorism, Drugs, International Law and the Protection of Human Liberty* (Transnational, Ardsley-on-Hudson, 1992).
- Blum YZ
- ‘Extradition: a common approach to the control of international terrorism and the traffic in narcotic drugs’ (1978) 13 *Israel LR* 194-202.
- Blumenson E, Nilsen E
- ‘Policing for profit: the drugs war’s hidden economic agenda’ (1998) 65 *University of Chicago LR* 35-114.
- 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* 165-190.

- Bourne PG Drug abuse in the United States: a public policy review (1977) 6 *Contemporary Drug Problems* 473-477.
- Bowett DW 'Jurisdiction: changing patterns of authority over activities and resources' in MacDonald RSJ and Jhonston DM (eds) *The Structure and Process of International Law* (Nijhoff, Dordrecht, 1983) 555-580.
- Brule C 'The role of the Pompidou Group of the Council of Europe in combatting drug abuse and illicit drug trafficking' (1983) 35 *Bulletin on Narcotics* 73.
- Bruun K, Pan L, Rexed I *The Gentlemen's Club: International Control of Drugs and Alcohol* (University of Chicago Press, Chicago, 1975).
- Bucknell P, Ghodse H *Misuse of Drugs* (Waterlow, London, 1991).
- Cabranes JA 'International law and the control of the drug traffic' (1973) 7 *International Lawyer* 761-769.
- Cagliotti CN 'The role of the South American Agreement on Narcotic Drugs and Psychotropic Substances in the fight against illicit drug trafficking' (1983) 35 *Bulletin on Narcotics* 83-95.
- Campbell AB 'The Ker-Frisbie doctrine: a jurisdictional weapon in the war on drugs' (1990) 23 *Vanderbilt Jnl of Transnational Law* 385-433.
- Catino TM 'Italian and American cooperative 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.
- Chatterjee SK *Legal Aspects of International Drug Control* (Nijhoff, Dordrecht, 1981).
- Chatterjee SK *A Guide to the International Drugs Conventions* (Commonwealth Secretariat, London, 1988).
- Chatterjee SK *Drug Abuse and Drug Related Crimes* (Nijhoff, Dordrecht, 1989).
- Clark RS 'Offences of international concern: multilateral state treaty practice in the forty years since Nuremberg' (1988) 57 *Nordic Jnl of Int. Law* 49-118.

- Clutterbuck, R *Drugs, Crime and Corruption* (MacMillan, London, 1995).
- Coggins P, Roberts WA 'Extraterritorial jurisdiction: an untamed adolescent' (1991) 17 *Commonwealth Law Bulletin* 1391-1412.
- Collison M 'Punishing drugs: criminal justice and drug use' (1993) 33 *British Journal of Criminology* 382-399.
- Comment 'Narcotics Regulation' (1953) 62 *Yale LJ* 751-787.
- Comment 'The Convention on Psychotropic Substances: domestic consequences of ratification' (1978) 63 *Iowa LR* 950-974.
- Commonwealth 'Commonwealth Caribbean Conference on the International Drug Conventions and drug abuse' (1989) 15 *Commonwealth Law Bulletin* 1005-1011.
- Cotic D *Drugs and Punishment: An up-to-date Interregional Survey on Drug Related Offences* (UN Social Defence Research Institute, Rome, 1988, UN Sales No. E.88.III.N.I).
- Crawford J 'The ILC's draft statute for an international criminal tribunal' (1994) 88 *AJIL* 140-152.
- 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* (The Center for Strategic and International Studies, Washington, 1993).
- Cutting PD 'The technique of controlled delivery as a weapon in dealing with illicit traffic in narcotic drugs and psychotropic substances' (1983) 35 *Bulletin on Narcotics* 15-22.
- David TJ 'The British Government's international anti-drugs work' (1991) 17 *Commonwealth Law Bulletin* 1368-1376.
- DeFeo MA 'Depriving international narcotics traffickers and other organized criminals of illegal proceeds and combatting money laundering' (1990) 18 *Denver Jnl of Int. Law and Policy* 405-415.
- De Koker L 'South African money laundering legislation' (1997) 22 *Journal of Juridical Science* 17-39.

- Dickerson GR 'The Customs Cooperation Council and international customs enforcement' (1985) *The Police Chief* 16-18.
- Dickson A 'Taking dealers to the cleaners' (1991) 141 *New LJ* 1068-1069 (part one of two part article).
- Dickson A 'Taking dealers to the cleaners' (1991) 141 *New LJ* 1120-1122 (part two of two part article).
- Division of Narcotic Drugs 'Twenty years of narcotics control under the United Nations' (1966) 18 *Bulletin on Narcotics* 1-65.
- Dorn N, Murji K 'Low level drug enforcement' (1992) 20 *Int. Jnl of the Sociology of Law* 159-171.
- Dorn N, Murji K, South N *Traffickers: Drug Markets and Law Enforcement* (Routledges, London, 1992).
- d'Oliveira J *International Mutual Legal Assistance and Other Forms of International Legal Co-operation* (unpublished conference paper, New Delhi Global Drugs Law Conference, 1997).
- Dugard, J 'Obstacles in the way of an international criminal court' (1997) 56 *Cambridge LJ* 329-342.
- Dunant O, Wassmer, M 'Swiss bank secrecy: its limits under Swiss and international laws' (1988) 20 *Case Western Reserve ILJ* 541-575.
- Eisenlohr LES *International Narcotics Control* (George Allen and Unwin, London, 1934).
- Eldridge WB *Narcotics and the Law: A Critique of the American Experiment in Narcotic Drug Control* (The University of Chicago Press, Chicago and London, 2nd edition 1967).
- Ellington SB 'United States v. Noriega as a reason for an international criminal court' (1993) 11 *Dickinson Jnl of Int. Law* 451-475.
- Ellis A, Pisani R 'The United States treaties on mutual assistance in criminal matters' in Bassiouni MC (ed) 2 *International Criminal Law: Procedure* (Transnational, Dobbs Ferry, 1986) 151-179.
- Estievenart G (ed) *Policies and Strategies to Combat Drugs in Europe* (Nijhoff, Dordrecht, 1995).

- Estievenart G 'The European Community and the global drugs phenomenon' in Estievenart G (ed) *Policies and Strategies to Combat Drugs in Europe* (Nijhoff, Dordrecht, 1995) 50-93.
- Evans K 'The hundred per cent solution' (1993) 143 *New LJ* 751-752.
- Fisher K 'Trends in extraterritorial narcotics control: slamming the stable door after the horse has bolted' (1984) 16 *NYU Jnl of Int. Law and Politics* 353-413.
- Fletcher A 'Pirates and smugglers: an analysis of the use of abductions to bring drug traffickers to trial' (1991) 32 *Virginia JIL* 233-264.
- Fraser A, George M 'Cautions for cannabis' (1992) 8 *Policing* 88-102.
- Freestone D 'The principle of co-operation: terrorism' in Warbrick C and Lowe V (eds) *The United Nations and the Principles of International Law* (Routledge, London, 1994) 137-159.
- Frei L, Treschel S 'Origins and applications of the United States - Switzerland Treaty on Mutual ssistance in Criminal Matters' (1990) 31 *Harvard ILJ* 77-97.
- Fredericks MA 'Counter-narcotics law enforcement cooperation: a necessity' in *Souvenir Brochure of the International Conference on Global drugs Law* (Indian Law Insititute, New Delhi, 1997) 29-32.
- Friman HR 'International pressure and domestic bargains : regulating money laundering in Japan' (1994) 21 *Criminal Law and Social Change* 253-266.
- Ferencz BB 'An international criminal code and court: where they stand and where they're going' (1992) 30 *Columbia Jnl of Transnational Law* 345-399.
- Gardner SA 'A global initiative to deter drug trafficking: will internationalising the drug war work?' (1993) 7 *Temple Int. and Comp. LR* 287-317.
- Ghodse H *The Criminal Justice System and the Treatment of Drug Misuse* (unpublished paper, New Delhi Global Drugs Law Conference, 1997).
- Gianaris WN 'The new world order and the need for an international criminal court' (1992/3) 16 *Fordham ILJ* 88-119.

- Gilbert G 'Crimes *sans frontieres*: jurisdictional problems in english law' (1992) 63 *BYIL* 415-441.
- Gilmore N 'Drug use and human rights: privacy, vulnerability, disability, and human rights infringements' (1996) 12 *The Journal of Contemporary Health Law and Policy* 355-447.
- Gilmore WC 'Hot pursuit and constructive presence in Canadian law enforcement' (1988) 12 *Marine Policy* 105-111.
- Gilmore WC 'Narcotics interdiction at sea: UK-US cooperation' (1989) 15 *Commonwealth Law Bulletin* 1480-1497.
- Gilmore WC 'International action against drug trafficking: trends in United Kingdom law and practice' (1990) 24 *International Lawyer* 365-392.
- Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (Commonwealth Secretariat, London, 1991).
- Gilmore WC 'Drug trafficking by sea: the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' (1991) 15 *Marine Policy* 183-192.
- Gilmore WC 'International action against drug trafficking: trends in United Kingdom law and practice through the 1980's' (1991) 17 *Commonwealth Law Bulletin* 287-313.
- Gilmore WC 'International efforts to combat money laundering' (1992) 18 *Commonwealth Law Bulletin* 1129-1142.
- Gilmore WC (ed) *International Efforts to Combat Money Laundering* (Grotius, Cambridge, 1992).
- Gilmore WC 'International initiatives' in Parlour R (ed) *Butterworths International Guide to Money Laundering Law and Practice* (Butterworths, London, 1995) 15-27.
- Gilmore WC (ed) *Mutual Assistance in Criminal and Business Regulatory Matters* (Grotius, Cambridge, 1995).
- Gilmore WC 'Narcotics interdiction at sea: the 1995 Council of Europe Agreement' (1996) 20 *Marine Policy* 3-14.

- Goodrich LM 'New trends in narcotics control' (1960) 530 *International Conciliation* 181-242.
- Gordon DR *The Return of the Dangerous Classes: Drug Prohibition and Policy Politics* (WW Norton, New York, 1994).
- Gotschlich GD 'Action by the Customs Cooperation Council to combat illicit drug trafficking' (1983) 35 *Bulletin on Narcotics* 79-81.
- Gregg RW 'The Single Convention for Narcotic Drugs' (1961) 16 *Food Drug Cosmetic Law Journal* 187-208.
- Gregg RW 'The United Nations and the opium problem' (1964) 13 *ICLQ* 96-115
- 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.
- Gross NG, Greenwald GJ 'The 1972 Narcotics Protocol' (1973) 2 *Contemporary Drug Problems* 119-163.
- Harding A 'Criminal Justice (International Cooperation) Act 1990: Forfeiture, Money Laundering, Confiscation and Maritime Provisions' (1991) 155 *Justice of the Peace* 492-493.
- 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.
- Harrison MK 'The PRI and drug trafficking: a cancerous combination' (1996) *The Latin American Studies Symposium - Birmingham Southern College* 1 at 1-12.
- Henham R 'Criminal justice and sentencing policy for drug offenders' (1994) 22 *Int. Jnl of the Sociology of Law* 223-238.
- 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* 1-7.

- 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* 235-304.
- Heymann PB 'Two models of national attitudes toward international cooperation in law enforcement' (1990) 31 *Harvard ILJ* 99-107.
- Hinton M 'Are drug trafficking confiscation orders punitive?' (1992) 136 *Solicitors Jnl* 1264-1265.
- Holt E *The Opium Wars in China* (Putnam, London, 1964).
- Inglis B *The Forbidden Game* (Hodder and Stoughton, London, 1975).
- Inglis B *The Opium War* (Hodder and Stoughton, London, 1976).
- Jauhar DN *Rethinking Drug Legislation in India* (unpublished conference paper, New Delhi Global Drugs Law Conference, 1997).
- Jacobs JB 'Imagining drug legalization' (1990) 101 *The Public Interest* 28-42.
- Jacobs JB, Zimmer L 'Drug treatment and workplace drug testing: politics, symbolism and organizational dilemmas' (1991) 9 *Behavioural Sciences and the Law* 345-360.
- Johns CJ *Power, Ideology, and the War on Drugs* (Prager, New York, 1992).
- Jost P 'Black hawala, financial crimes and the world drug trade' in *Souvenir Brochure of the International Conference on Global drugs Law* (Indian Law Institute, New Delhi, 1997) 116-128.
- 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* 169-216.
- Kaufman V 'United Nations: International Conference on Drug Abuse and Illicit Trafficking' (1988) 29 *Harvard ILJ* 581-586.
- Keig LA 'A proposal for direct use of the United States military in drug enforcement operations abroad' (1988) 23 *Texas ILJ* 291-316.

- Kelley JP 'United States - Colombian extradition treaty: efforts to prosecute drug lords' (1990) 14 *Suffolk Transnational LJ* 162-182.
- Kendall RE 'Drug control: policies and practices of the International Criminal Police Organisation' (1992) 44 *Bulletin on Narcotics* 3-10.
- King R 'Law and enforcement policies' (1957) 22 *Law and Contemporary Problems* 113.
- King R *The Drugs Hang Up: Americas Fifty Year Folly* (CC Thomas, Springfield, 1972).
- Kingham RA, Wallon A 'The role of the European Citizen's Associations in strategies and policies to combat drugs' in Estievenart G (ed) *Policies and Strategies to Combat Drugs in Europe* (1995) 311-318.
- Kirby M 'Drugs - an international prohibition' (1992) 18 *Commonwealth Law Bulletin* 312-320.
- Knapp J 'Mutual legal assistance treaties as a way to pierce bank secrecy' (1988) 20 *Case Western Reserve ILJ* 405-433.
- Kohler N 'The confiscation of criminal assets in the United States and Switzerland' (1990) 13 *Houston Jnl of Int. Law* 1-38.
- Lagodny O 'Legally protected interests of the abducted alleged offender' (1993) 1&2 *Israel LR* 339-361.
- Lande A 'The Single Convention on Narcotic Drugs, 1961' (1962) 16 *International Organisation* 776-797.
- 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.
- 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* 641-658.
- Leigh MN 'Contemporary practice of the United States relating to international law: territorial jurisdiction' (1990) 84 *AJIL* 725-729.

- Leinward MA 'The international law of treaties and United States legalization of marijuana' (1971) 10 *Columbia Jnl of Transnational Law* 413-441.
- Leroy B 'The United Nations strategy' in Estievenart G (ed) *Policies and Strategies to Combat Drugs in Europe* (Nijhoff, Dordrecht, 1995) 27-38.
- 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) 112-130.
- Lewis SL 'The Marijuana on the High Seas Act: extending U.S. jurisdiction beyond international limits' (1982) 8 *Yale Jnl of World Public Order* 359-383.
- Lindesmith AL *The Addict and the Law* (Indiana UP, Bloomington, 1965).
- Lindesmith AL 'The drug-control bureaucracy creates the "drug-problem"' in Silver I (ed) *The Crime Control Establishment* (Prentice Hall, Engelwood Cliffs, 1974) 58-69.
- Linke R, Epp HJ, Kabelka E *Extradition for Drug Related Offences* (UN Publication St/Nar/5, Austria, 1985, UN Sales No. E.85.XI.6).
- Littas R 'The SEPAT-plan and its development' (1979) *International Criminal Police Review* 101-104.
- Lowenstein LF 'Legalising or not legalising drugs' (1993) 66 *The Police Journal* 296-301.
- Lowes PD *The Genesis of International Narcotics Control* (Librairie Droz, Geneva, 1966).
- Macdonald SB, Zagaris B (eds) *International Handbook on Drug Control* (Greenwood Press, Westport, 1992).
- Magliveras KD 'Defeating the money launderer - the international and European framework' (1992) 3 *Journal of Business Law* 161-177.
- Malekian F *International Criminal Law: The Legal and Critical Analysis of International Crimes Volume II* (Uppsala UP, Uppsala, 1991).
- Mann FA 'The doctrine of jurisdiction in international law' (1964-I) 113 *Recueil des Cours* 9.

- Mann FA 'The doctrine of international jurisdiction revisited after twenty years' (1984-III) 186 *Recueil des Cours* 19.
- May HL 'Narcotic Drug Control - Development of International Action and the Establishment of Supervision under the United Nations' (1948) 441 *International Conciliation* 303-380.
- May HL 'The evolution of the international control of narcotic drugs' (1950) 2 *Bulletin on Narcotics* 1-12.
- May HL 'Narcotic drug control' (1952) 485 *International Conciliation* 489-536.
- McClellan D 'Mutual assistance in criminal matters: the Commonwealth initiative' (1988) 37 *ICLQ* 177-190.
- McClellan D 'Seizing the proceeds of crime: the state of the art' (1989) 38 *ICLQ* 334-360.
- McClellan D *International Judicial Assistance* (Clarendon, Oxford, 1992).
- McCormack T, Simpson G 'A new international criminal law regime?' (1995) 42 *Netherlands ILR* 177-206.
- Milton JRL 'Law reform: the Drugs and Drug Trafficking Act 1992' (1993) 6 *South African Jnl of Criminal Justice* 216-222.
- Morrison W 'Modernity, knowledge and the criminalisation of drug usage' in Loveland I (ed) *Frontiers of Criminality* (Sweet & Maxwell, London, 1995) 195-218.
- Murji K 'Drug enforcement strategies' (1993) 32 *Howard LJ* 215-230.
- Murphy JW 'Implementation of international narcotics control: the struggle against opium cultivation in Pakistan' (1983) 6 *Boston College Int. and Comp. LR* 199-241.
- Murphy SR 'Drug diplomacy and the supply side strategy: a survey of United States practice' (1990) 43 *Vanderbilt LR* 1259-1309.
- Musto DF *The American Disease: Origins of Narcotics Control* (OUP, New York, 1987 expanded edition).

- Nadelmann EA 'Negotiations in criminal law assistance treaties' (1985) 33 *American Jnl of Comparative Law* 467-505.
- Nadelmann EA 'Unlaundering dirty money abroad: U.S. foreign policy and financial secrecy jurisdictions' (1986) 18 *Inter-American LR* 33-81.
- Nadelmann EA 'The DEA in Latin America: dealing with institutionalized corruption' (1989) 62 *Police Journal* 31-42 (part one of two part article).
- Nadelmann EA 'The Drug Enforcement Agency in Latin America: the ins and outs of working around corruption' (1989) 62 *Police Journal* 157-173 (part two of two part article).
- Nadelmann EA 'Global prohibition regimes: the evolution of norms in international society' (1990) 44 *International Organisation* 479-526.
- Nadelmann EA 'The role of the United States in the international enforcement of criminal law' (1990) 31 *Harvard ILJ* 37-76.
- 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; 'Comments on Nadelmann' 809-815; 'Nadelmann's response' 817-822.
- Nadelmann EA 'The evolution of United States involvement in the international rendition of fugitive criminals' (1993) 25 *NYU Jnl of Int. Law and Politics* 813-885.
- Nadelmann EA *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (The Pennsylvania State University Press, University Park, Pennsylvania, 1993).
- Nahas G 'Drugs, the brain and the law' (1991) 5 *Notre Dame Jnl of Law, Ethics and Public Policy* 729-746.
- Nellis JL 'International narcotics control efforts and policies as seen in congress' (1977) 6 *Contemporary Drug Problems* 479-490.

- Nilsson HG 'The Council of Europe Laundering Convention: a recent example of a developing international criminal law' (1992) 2 *Criminal Law Forum* 419-465 (reproduces Convention).
- Noll A 'International treaties and the control of drug use and abuse' (1977) 6 *Contemporary Drug Problems* 17-39.
- Noll A 'Drug abuse and penal provisions of the international drug control treaties' (1977) 19 *Bulletin on Narcotics* 41-57.
- Oehler D 'Criminal Law, International' in Bernhardt R (ed) *Encyclopedia of Public International Law* Volume I (Elsevier, Amsterdam, 1992) 877 - 883.
- Okagbue I *The Death Penalty as an Effective Deterrent to Drug Abuse and Drug Trafficking: Myth or Reality* (Nigerian Centre for Advanced Legal Studies, Lagos, 1991).
- 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* 955-1008.
- 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* (Dartmouth, Aldershot, 1995) 441-467.
- Oppenheimer T 'Drug abuse control: mutual assistance between members of the Commonwealth' (1990) 16 *Commonwealth Law Bulletin* 979-992.
- Ostrowski J 'Answering the critics of drug legalization' (1991) 5 *Notre Dame Jnl of Law, Ethics and Public Policy* 823-851.
- Paget-Brown I 'Bank secrecy and criminal matters: Cayman Islands and U.S. cooperative development' (1988) 20 *Case Western Reserve ILJ* 369-391.
- Panel discussion 'Drugs and small arms: can law stop the traffic?' (1987) 81 *American Society of International Law: Proceedings* 44-59.

- Panel discussion 'International drug trafficking and money laundering' (1988) 82 *American Society of International Law: Proceedings* 444-455.
- Panel discussion 'International drug traffic' (1990) 84 *American Society of International Law: Proceedings* 1-12.
- Panel discussion 'New frontiers in the regulation of international money movement in the wake of BCCI' (1992) 86 *American Society of International Law: Proceedings* 188-209.
- Parlour R (ed) *Butterworths International Guide to Money Laundering Law and Practice* (Butterworths, London, 1995).
- Patel F 'Crime without frontiers: a proposal for an international narcotics court' (1990) 22 *NYU Jnl of Int. Law and Politics* 709-747.
- Penna LR 'Forfeiture of drug trafficking benefits: need for a viable international legal regime' (1993) 14 *Singapore LR* 351-381.
- Prost K 'Breaking down the barriers: international cooperation in combatting transnational crime' in *Souvenir Brochure of the International Conference on Global drugs Law* (Indian Law Insititute, New Delhi, 1997) 44-52.
- Puttler A 'Extraterritorial application of criminal law: jurisdiction to prosecute drug traffic conducted by aliens abroad' in Meesen KM (ed) *Extraterritorial Jurisidcition in Theroy and Practice* (Kluwer, London, 1996) 103-121.
- Rampilla NR 'Towards prosecuting the illicit drug traffickiers before the proposed international criminal court - a challenge beyond 2000' in *Souvenir Brochure of the International Conference on Global drugs Law* (Indian Law Insititute, New Delhi, 1997) 167-171.
- Renborg BA *International Drug Control: A Study of International Administration by and Through the League of Nations* (Washington, Carnegie Endowment for International Peace, 1947 - reprinted by Kraus Reprint Co. New York, 1972).
- Renborg BA 'International Control' (1957) 22 *Law and Contemporary Problems* 86.

- Reuter P 'The limits and consequences of U.S. foreign drug control efforts' (1992) 521 *Annals of the American Academy of Politics and Social Science* 151-162.
- Reuter P, MacCoun R 'Assessing the legalisation debate' in Estievenart G (ed) *Policies and Strategies to Combat Drugs in Europe* (Nijhoff, Dordrecht, 1995) 39-49.
- Rider BAK 'The role of the Commonwealth Secretariat in the fight against illicit drug traffic' (1983) 35 *Bulletin on Narcotics* 61-65.
- Rouchereau F 'La Convention des Nations Unies Contre le Traffic Illicite de Stupefiants et de Substances Psychotropes' (1988) 34 *Annuaire Francais de Droit Internationale* 601-617.
- Rodd R 'The politics of failure: a perspective on the war on drugs' in *Souvenir Brochure of the International Conference on Global drugs Law* (Indian Law Institute, New Delhi, 1997) 52-65.
- 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.
- Rolley R 'United Nations activities in international drug control' in Macdonald SB, Zagaris B (eds) *International Handbook on Drug Control* (Greenwood Press, Westport, 1992) at 415-433.
- Sallon C, Beddingfield D 'Drugs, money and the law' (1993) *Criminal LR* 165-173.
- Saxena DR *Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the Law in India* (unpublished conference paper, New Delhi Global Drugs Law Conference, 1997).
- Schutte JJE 'Transfer of criminal proceedings: the European system' in Bassiouni MC (ed) 2 *International Criminal Law: Procedure* (Transnational, Dobbs Ferry, 1986) 319-336.
- 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* 135-157.

- Seccombe R 'Squeezing the balloon: international drugs policy' (1995) 14 *Drug and Alcohol Review* 311-316.
- Shearer IA 'Problems of jurisdiction and law enforcement against delinquent vessels' (1986) 35 *ICLQ* 320-343.
- Sheptycki J 'Law enforcement, justice and democracy in the transnational arena: reflections on the war on drugs' (1996) 24 *Int. Jnl of the Sociology of Law* 61-75.
- Solomon P 'Are money launderers all washed up in the western hemisphere? The OAS Model Regulations' (1994) 17 *Hastings Int. and Comp. LR* 433-455.
- Sorenson CE 'Drug trafficking on the high seas: a move towards universal jurisdiction under international law' (1990) 4 *Emory International LR* 207-230.
- Spencer DE 'Bank liability under the UN Drug Trafficking Convention' (1990) 9 *International Financial LR* 16-19.
- Sproule DW, St-Denis P 'The UN Drug Trafficking Convention: An Ambitious Step' 1989 *CYBIL* 263-293.
- Srinivasan N, Underwood R 'Money laundering: international efforts and recent developments in the movement of drug related money' in *Souvenir Brochure of the International Conference on Global drugs Law* (Indian Law Insitute, New Delhi, 1997) 198-204.
- Stahl MB 'Asset forfeiture, burdens of proof andd the war on drugs' (1992) 83 *Jnl of Criminal Law and Criminology* 274-337.
- Stafford D *International Legal Cooperation Against Serious Crime: Inter-legal Systems Issues Impacting on International Cooperation* (unpublished paper, New Delhi Global Drugs Law Conference, 1997).
- Stares PB *Gobal Habit: The Drug Problem in a Borderless World* (Brookings Institution, Washington DC, 1996).
- Starke JG 'The Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs' (1937) 31 *AJIL* 31-43.

- 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.
- Taisch F 'Swiss statutes concerning money laundering' (1992) 26 *The International Lawyer* 695-714.
- Tauber J 'A systems participants glossary of a drug court' in *Souvenir Brochure of the International Conference on Global drugs Law* (Indian Law Insititute, New Delhi, 1997) 159-166.
- Taylor AH *American Diplomacy and the Narcotics Traffic, 1900-1939: A Study in International Humanitarian Reform* (Duke UP, Durham, 1969).
- Terry CE, Pellins M *The Opium Problem* (Bureau of Social Hygiene, New York, 1928 - reprint Patterson-Smith, Montclair NJ, 1970).
- Torr D (ed) *Marx on China, 1853-1860* (Lawrence and Wishart, London, 1968).
- Van Atta DM 'Effects of the single convention on narcotic drugs upon the regulation of marijuana' (1968) 19 *Hastings LJ* 848-861.
- Van Den Wyngaert C 'Rethinking the law of international criminal cooperation: the restrictive function of international human rights through individual-oriented bars' in Eser A, Lagodny O (eds) *Principles and Procedures for a New Transnational Criminal Law* (Max Planck Institute, Freiburg im Breisgau, 1991) 489-503.
- Waddel JG 'International Narcotics Control' (1970) 64 *AJIL* 310-321.
- 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.
- Wells A *International Drug Control: Recent Developments, Patterns and Trends* (unpublished conference paper, New Delhi Global Drugs Law Conference, 1997).
- Wells A *International Legal and Policy Framework* (unpublished conference paper, New Delhi Global Drugs Law Conference, 1997).

- Wise EM 'The obligation to extradite or prosecute' (1993) 1&2 *Israel LR* 268-287.
- Woltring HF, Greig J 'State-sponsored kidnapping of fugitives: an alternative to extradition?' in Atkins D (ed) *The Alleged Transnational Criminal* (Nijhoff, The Hague, 1995) 115-125.
- Wren T 'The enforcement of confiscation law in Great Britain' (1991) 17 *Commonwealth Law Bulletin* 1412-1416.
- Wright H 'The International Opium Commission' Part 1 (1909) 3 *AJIL* 648-673; Part 2 (1909) 3 *AJIL* 827-868; 'Treaties and Documents Concerning Opium' (1909) 3 *AJIL Supplement* 253.
- Wright H 'The International Opium Convention' Part 1 (1912) 6 *AJIL* 865-889; Part 2 (1913) 7 *AJIL* 109-139.
- Wright Q 'The Opium Question' (1924) 18 *AJIL* 281-295.
- Wright Q 'The American Withdrawal From the Opium Conference' (1925) 19 *AJIL* 348-355.
- Wright Q 'The Opium Conference' (1925) 19 *AJIL* 559-569.
- Wright Q 'The Narcotics Convention of 1931' (1934) 28 *AJIL* 475-486.
- Yarnold BM 'Doctrinal basis for the international criminalization process' (1994) 8 *Temple Int. and Comp. LR* 85-115.
- Yodmani C 'The role of the Association of South East Asian Nations in fighting illicit drug traffic' (1983) 35 *Bulletin on Narcotics* 97-104.
- Zagaris B 'Developments in international judicial assistance and related matters' (1990) 18 *Denver Jnl of Int. Law and Policy* 339-386.
- Zagaris B, Kingma E 'Asset forfeiture international and foreign law: an emerging regime' (1991) 5 *Emory International LR* 445-513.
- Zagaris B, MacDonald SB 'Money laundering, financial fraud and technology: the perils of an instantaneous economy' (1992) 26 *George Washington Jnl of Int. Law and Economics* 61-107.

Zagaris B, Castilla SM

'Constructing an international financial enforcement subregime: the implementation of anti-money laundering policy' (1993) 19 *Brooklyn JIL* 871-965.

Zagaris B

'The emergence of an international anti-money laundering regime: implications for counselling businesses' in Atkins D (ed) *The Alleged Transnational Criminal* (Nijhoff, The Hague, 1995) 127-217.

