THE NEGATIVE IMPACTS OF THE GLOBAL WAR ON DRUGS: CAN INTERNATIONAL DRUG ENFORCEMENT BE SUCCESSFUL WITHOUT INFRINGING ON HUMAN RIGHTS?

Sita Legac[*]

[*] J.D., Albany Law School, 2010; B.A., Urban Studies and Public Policy, Boston University, 2003. I would to thank my family and friends for supporting me through the years both in school and personally. I would especially like to acknowledge my mother Indu—without her none of this would be possible.

INTRODUCTION

The United Nations has long recognized that international drug trafficking and drug use are issues that must be addressed on a global scale.[1] Over the last century the international community has entered into a "global war on drugs" with its primary purposes eventually evolving into a two-fold goal—decimating the market for illicit drugs such as cocaine, heroin and methamphetamines, while also promoting the availability of licit drugs, such as narcotic pain medication, that are used for medical and scientific purposes in countries where they may not be otherwise available.[2] This war on drugs, while unquestionably a necessary endeavor, has created certain casualties within the area of human rights. Some countries maintain drug laws that, either as written or as enforced, condone inhumane and/or cruel punishments that directly contradict recognized human rights initiatives.[3] Other countries violate certain human rights by prescribing drug laws that over-regulate medically necessary drugs, such as opiate-based pain killers, creating an under-availability of them in areas where they are in high demand. [4]

The 2009 annual Commission on Narcotic Drugs (CND), held in Vienna, focused on both the status of international drug control and how to most effectively proceed with addressing issues associated with international drug control.[5] A new Action Plan, approved by member governments, was issued laying out a ten-year plan aimed at "[r]educing the illicit supply of drugs," mainstreaming drug treatment and rehab into national health care, "[c]ontrol[ing] of [drug] precursors," and an overall need for "[i]nternational cooperation to eradicate the illicit cultivation of

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[1] Allyn L. Taylor, *Addressing the Global Tragedy of Needless Pain: Rethinking the United Nations Single Convention on Narcotic Drugs*, 35 J.L. MED. & ETHICS 556, 560 (2007) ("In 1909, the first International Opium Commission was convened in Shanghai, China, and it served as the platform for the first international legal instrument regulating psychoactive substances, the Hague Opium Convention of 1912.").

[2] *See generally* David P. Stewart, *Internationalizing the War on Drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 18 DENV. J. INT'L L. & POL'Y 387, 387–90 (1990) (discussing and summarizing the three major drug conventions and their purposes).

[3] *See* Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948); *see also infra* Part II.A.

[4] *See* G.A. Res. 217A, *supra* note 3, at 71; *see also infra* Part II.B.

[5] *See* United Nations Office on Drugs and Crime, Session 52 of the Commission on Narcotic Drugs, http://www.unodc.org/unodc/en/commissions/CND/session/52.html (last visited May 7, 2010).

[drugs.]"[6] This Action Plan overlooks certain shortcomings found in current international drug enforcement policies, especially areas involving human rights infringements. Human rights groups have long called for the United Nations to publically condemn these practices, and the fact that the new ten-year plan does not address any human rights issues has led to an uproar amongst many of those human rights groups.[7]

This article examines the allegations made by human rights groups and determines that there are, in fact, human rights being violated under the umbrella of international drug control. This conclusion is exemplified and supported through an exploration of country-specific examples. After establishing that there are ongoing human rights violations, this article will go on to analyze the new Action Plan proposed and approved by the CND and pinpoint how the Plan fails to adequately address the violations of human rights. This article contends that the UN agencies involved in international drug control should assist the countries that are repeatedly violating its citizens' human rights by recommending viable alternatives to implementing drug laws that sacrifice human rights. Furthermore, countries that either continually violate human rights under the guise of drug control, or those that blatantly ignore agency recommendations, should suffer some penalty. This article is not questioning the ultimate goals of the United Nations' drug control policies, but rather is arguing that due to the United Nations' failure to actively condemn the human rights violations involved with international drug control, it is inadvertently suggesting that, in some instances, a sacrifice of human rights may be necessary to adequately enforce international drug laws.

I. CURRENT INTERNATIONAL DRUG TREATIES AND DRUG ENFORCEMENT PROGRAMS

The current system for international drug control is a complicated and multifaceted combination of international

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[6] United Nations Office on Drugs and Crime, Political Declaration and Action Plan Map out Future of Drug Control, http://www.unodc.org/unodc/en/press/releases/2009-12.03.html [hereinafter Political Declaration] (last visited May 7, 2010).

[7] *See Nations Should Reject UN Drug Policy*, HUMAN RIGHTS WATCH, Mar. 10, 2009, http://www.hrw.org/en/news/2009/03/10/nations-should-reject-un-drug-policy; *see also* Kasia Malinowska-Sempruch, Editorial, *A New Course on Narcotics*, N.Y. TIMES, Mar. 8, 2009, *available at* http://www.nytimes.com/2009/03/08/opinion/08iht-edletters.1.20672404.html.

treaties and United Nations-based agencies. The "goals of [this system] have shifted from an initial focus on the regulation and trade of drugs with legitimate medical purposes to a more recent emphasis on fostering multilateral cooperation to address the problems associated with licit and illicit drug abuse."[8] In order to analyze the most recent and ongoing events in international drug control, it is important to understand the history of the current international drug control system and how the different overseeing agencies work together.

A. Drug Control and Enforcement Treaties

The current international drug control system relies on three main drug conventions[9]: the 1961 UN Single Convention on Narcotic Drugs; the 1971 UN Convention on Psychotropic Substances; and the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[10] The bedrock of these conventions is the 1961 Single Convention—it was within the framework of this convention that the governing agencies in charge of implementing and overseeing this and future drug related treaties were established.[11] The 1961 Single Convention also established the drug scheduling system, which is still in place today, to distinguish the level of control for certain drugs.[12] Aside from logistics, the 1961 UN Single Convention specifically outlined its purpose "in its preamble and text, [as being] to control the use and trafficking of substances with abuse potential while assuring the availability of these drugs for scientific and medical purposes."[13]

The ultimate goals of both the 1961 Single Convention and the 1971 UN Convention on Psychotropic Substances assured the

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[8] Taylor, *supra* note 1, at 560.

[9] This article will use the terms "convention" and "treaty" interchangeably.

[10] Taylor, *supra* note 1, at 560.

[11] *Id.* at 560–61.

[12] *Id.* at 560 ("The Single Convention emphasizes plant-based drugs such as opium, heroin, cannabis, and cocaine and classifies narcotic drugs according to their danger to health, risk of abuse, and therapeutic value. It establishes four schedules for controlled substances, with Schedule 1, applicable to morphine and drugs with similar effects and constituting the 'standard regime of the Single Convention.' Schedule 1 contains substances that are subject to all of the control provisions of the treaty. Key features of the Schedule 1 treaty regime include the limitation to medical and scientific purposes of all phases of narcotics trade (manufacture, wholesale and retail domestic trade, and international trade) and of the possession and use of drugs.").

[13] *Id.*

availability of licit narcotic drugs for medicinal and scientific purposes; they did address illicit trade and drug abuse, but as a matter cursory to the primary goals.[14] The Conventions of 1961 and 1971 only went so far as to the production and distribution of licit drugs and the potential that those licit drugs could enter into illicit markets.[15] It was the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances that was the first international drug convention whose primary purpose was to combat illicit drug users and traffickers on an international scope.[16] The preamble of the 1988 Convention explains that the trafficking of illicit drugs is "an international criminal activity"[17] and in turn set forth a comprehensive requirement of all Parties to the Convention.[18] Specifically, all Parties to the Convention were to

> establish as criminal offenses under its domestic law a comprehensive list of activities involved in or related to international drug trafficking. It obligates party states to cooperate in taking broad measures to suppress illicit trafficking across national boundaries and, within their own jurisdictions, to enact and enforce specific domestic laws aimed at suppressing the drug trade.[19]

The 1988 Convention designated the UN Office on Drugs and Crime (UNODC) and the UN International Narcotics Control Board (INCB) as its implementing and governing agencies.[20] Today, all three conventions are used as guidance and authority for the governments of UN Member States, convention-specific parties, and agencies discussed below.

B. United Nations Agencies that Implement and Execute Drug Control Treaties

The United Nations has four primary agencies that are responsible for the implementation and the execution of the above treaties: the INCB, CND, UNODC, and World Health

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[14] *Id.*

[15] Stewart, *supra* note 2, at 390.

[16] United Nations: Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, UN Doc. E/CONF.82/15 and rev. 1, *adopted by consensus* Dec. 19, 1988, *reprinted in* 28 I.L.M. 493, 497–98 (1989) [hereinafter United Nations: Convention].

[17] *Id.* at 497.

[18] Stewart, *supra* note 2, at 387–88.

[19] *Id.*

[20] United Nations: Convention, *supra* note 16, at 493, 521–22.

Organization (WHO).[21] The first three agencies were all established for the sole purpose of addressing the issues related to international drug trafficking and trading, whereas the WHO's purpose is to address all global health issues, which include many issues stemming from drug trade and drug use.[22]

1. The United Nations International Narcotic Control Board

The INCB "is the independent and quasi-judicial monitoring body for the implementation of the United Nations international drug control conventions."[23] While it was Article 9 of the 1961 Single Convention that established the INCB, its function and authority is reiterated in all three of the above-discussed conventions.[24] The INCB addresses issues relating to both licit and illicit drugs, but it is important to note that the INBC itself has no power to take direct action against drug traders, manufacturers, users, or even indirect action towards countries that may condone certain practices involved in regulating and policing the drug trade.[25] The INCB's power to address governments that do not adhere to the provisions of the treaties or have difficulties implementing them is limited to making remedial recommendations.[26] Should its remedial recommendation be ignored or not fully address the issue, it then can "call the matter to the attention of the parties concerned, the Commission on Narcotic Drugs and the Economic and Social Council. As a last resort, the treaties empower INCB to recommend to parties that they stop importing drugs from a defaulting country, exporting drugs to it or both."[27] The INCB's overall purpose is to work with international governments to assess their country's critical drug related issues, and in turn offer guidance and assistance at remediating those issues.[28] As mentioned, though, the INCB has no actionable power, therefore should a country choose not to accept or follow the INCB's advice,

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[21] Taylor, *supra* note 1, at 561.

[22] *See generally id.* at 562–65 (explaining the function of the WHO in the overall scheme of international drug control).

[23] International Narcotics Control Board, Mandate of INCB, http://www.incb.org/incb/en/mandate.html [hereinafter International Narcotics Control Board] (last visited May 7, 2010).

[24] *Id.*; *see* Taylor, *supra* note 1, at 560.

[25] Cindy Fazey, *International Policy on Illicit Drug Trafficking: The Formal and Informal Mechanisms*, 37 J. DRUG ISSUES 755, 762 (2007).

[26] *See* International Narcotics Control Board, *supra* note 23.

[27] *Id.*

[28] *See* Taylor, *supra* note 1, at 562.

there is no recourse that can be taken.[29]

The INCB's role with respect to manufacturing, trading and using licit drugs, is to guarantee countries that a reasonable supply of those licit drugs are available for both medical and scientific purposes.[30] Going further, the INCB attempts to prevent licit drugs that are being used appropriately and in accordance with the conventions from being diverted into illicit narcotic drug markets.[31] INCB also monitors governments' control over chemicals used in the illicit manufacture of drugs, and assists them in preventing the diversion of those chemicals into illicit traffic.[32] With respect to manufacturing, trafficking, and using illicit drugs, the INCB identifies weaknesses in both national and international control systems and contributes to correcting such situations.[33] INCB is also responsible for assessing chemicals used in the illicit manufacture of drugs to determine whether they should be placed under international control.[34]

2. The Commission on Narcotic Drugs

The CND was established in 1946 as the successor to the League of Nations' Advisory Committee on Traffic in Opium and Other Dangerous Drugs.[35] As the "central policy-making body of the [UN] in drug related matters," the CND focuses primarily on trafficking and circulation of illicit drugs.[36] The original duty of the CND was only to write draft international narcotic drug agreements; however, in 1991 their duties were amended to include policy assistance to the UNODC.[37] Today, the commission assists United Nations Member States to analyze the global drug situation, provide follow-up to the twentieth special session of the

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[29] *See* Fazey, *supra* note 25, at 762.

[30] *Id.*; *see* Taylor, *supra* note 1, at 561–62; *see also* International Narcotics Control Board, *supra* note 23.

[31] Fazey, *supra* note 25, at 762; *see* Taylor, *supra* note 1, at 561–62; *see also* International Narcotics Control Board, *supra* note 23.

[32] Fazey, *supra* note 25, at 762; *see* Taylor, *supra* note 1, at 561–62; *see also* International Narcotics Control Board, *supra* note 23.

[33] Fazey, *supra* note 25, at 761–62.

[34] *Id.*

[35] *Id.* The League of Nations' Advisory Committee on Traffic in Opium and Other Dangerous Drugs was one of the original implementing bodies for international drug control laws.

[36] United Nations Office on Drugs and Crime, The Commission on Narcotic Drugs, http://www.unodc.org/unodc/en/commissions/CND/ (last visited May 7, 2010).

[37] Fazey, *supra* note 25, at 760–61.

General Assembly on the world drug problem, and to take measures at the global level within its scope of action.[38] It also monitors the implementation of the three international drug control conventions and is empowered to consider all matters pertaining to the aim of the conventions, including the scheduling of substances to be brought under international control.[39]

3. The United Nations Office on Drugs and Crime

The UNODC was developed to directly assist Member States in their battles against drug trafficking primarily by implementing the policies drafted by the CND.[40] The UNODC only addresses illicit drug issues such as crop monitoring, law enforcement, drug rehabilitation, abuse prevention, and assisting drug traffickers with developing new livelihoods.[41] One of the primary points of assistance from the UNODC comes from the UN's laboratory. The laboratory can be used not only by the UNODC, but also by Member States to determine "the origin of . . . illicitly trafficked narcotics"[42] thereby allowing the Member States to attack the narcotics trade at its root.

4. World Health Organization

The WHO is a large, global organization that has many duties relating to all worldwide health issues. In accordance with the Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol and the Convention on Psychotropic Substances, 1971, the WHO's responsibility is to evaluate substances for their "abuse liability."[43] For a substance to be reviewed, a request must be made by the WHO or by a Party associated with one of the Conventions discussed earlier, to the Secretary-General of the

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[38] *See* United Nations Office on Drugs and Crime, About UNODC, http://www.unodc.org/unodc/en/about-unodc/index.html?ref=menutop (last visited May 7, 2010).

[39] *Id.*

[40] Fazey, *supra* note 25, at 762–63.

[41] *Id.*

[42] *Id.*

[43] THE WORLD HEALTH ORGANIZATION, PROPOSED REVISION: GUIDELINES FOR THE WHO REVIEW OF PSYCHOACTIVE SUBSTANCES FOR INTERNATIONAL CONTROL, REPORT BY THE SECRETARIAT, http://www.who.int/medicines/areas/quality_safety/Executive_Board_Report_of_the_Secretariat.pdf [hereinafter PROPOSED REVISION]. The facts cited in the report are historical in nature, and therefore, that this is a draft document is irrelevant to their veracity.

United Nations.[44] Once a request is processed, and a substance is reviewed, the WHO then notifies the CND with its recommendations on whether the substance should or should not be controlled under the conventions.[45] As with other organizations, the WHO does not have any actionable power; should the CND opt not to include a recommended substance on the schedule of narcotic substances, the WHO cannot force them.[46] Essentially, the WHO is in charge of the scientific aspect of determining which drugs pose an international threat.[47]

There are obvious pros and cons to having four essential agencies within the international drug control system. Considering the size of the task, having four agencies helps divide up the duties, thereby preventing one agency from being over-burdened. However, the other side of the argument is that having four agencies controlling various aspects of such a large task can only lead to inevitable inter-agency conflicts. For example, the WHO compiles the scientific research for any given drug and makes a recommendation to the CND on whether or not that drug should be placed on a schedule. CND may or may not heed that recommendation, and the INCB does not have a function in this process. In 2006, the INCB pressed Member States to submit information on ketamine abuse to the WHO for their consideration in scheduling recommendations.[48] Later,

> [a]t the 2007 annual meeting of the[CND], [a] WHO representative stated that he was 'astonished' by the INCB's 'heartless' call to states to [attempt] schedul[ing] the essential medicine. WHO has the sole responsibility to conduct the medical and scientific evaluation of drugs and make recommendations on their scheduling to the CND. . . . Given that many countries simply ban a medication subject to scheduling or rescheduling, the INCB's unauthorized and ill-considered call on states to schedule ketamine, based upon the mere possibility of abuse and without credible medical and scientific evidence, means that many patients in developing countries will not have access to surgery or will have to undergo surgery fully conscious.[49]

This particular incident exemplifies not only the potential for inter-agency conflict, but also the delineation between some agencies whose focus is solely on drug control, while other

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[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] Taylor, *supra* note 1, at 563.
[49] *Id.*

agencies attempt to balance drug control with human rights issues. It is not the assertion of this paper that any of these agencies are mindfully or purposely violating human rights; rather, it is the agencies' lack of condemnation towards violating countries that suggests that human rights may be overlooked in certain circumstances.

II. NEGATIVE IMPACTS OF CURRENT PRACTICES AND PROCEDURES

As discussed above, there are two key human rights being negatively impacted, though inadvertently, through current international drug enforcement laws and practices: (1) the right to be free from "*torture* or to cruel, inhuman or degrading treatment or punishment";[50] and (2) "the right to a standard of living adequate for the health and well-being . . . [including] medical care."[51] Many of the drug control agencies have recognized that human rights issues are at stake,[52] but for the purposes of analysis, the issues can be further broken down to differentiate between laws pertaining to licit drugs and those pertaining to illicit drugs. Illicit drug laws in some countries, either as written or enforced, can infringe on that country's citizens' right to be free from torture or cruel and inhuman punishments. In contrast, licit drug laws in some countries tend to over-regulate medically necessary drugs, such as pain medication. This over-regulation can be so burdensome on doctors and hospitals that it leads to the unavailability of vital pain medication for patients that are in critical medical need, such as cancer or HIV/AIDS patients. Below are examples of specific countries and an analysis of how their laws on licit or illicit drugs can infringe on human rights.

A. Drug Enforcement Policies That Are Contrary to Human

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[50] G.A. Res. 217A, *supra* note 3, at 73 (emphasis added).

[51] *Id.* at 76.

[52] *See* PROPOSED REVISION, *supra* note 43 and accompanying text; *see also* Press Release, DrugScope, UN Drug Experts Must Condemn Human Rights Abuses (March 3, 2008), http://www.drugscope.org.uk/ourwork/pressoffice/pressreleases/drugscope-un-drug-experts [hereinafter UN Drug Experts] ("In its latest report, the INCB has highlighted the need for all countries to balance their obligations under the international drug treaties with those of UN human rights legislation. It describes a principle of 'proportionality' that should be applied to all national drug law enforcement (1). The principle states that member countries must ensure that drug law enforcement is proportionate and in full compliance with the rule of law, including international agreements on human rights.").

Rights

1. Thailand

Thailand is an example of a country whose illicit drug laws or, more specifically, its enforcement tactics, infringe on the right to be free from torture or cruel and inhumane punishment. Thailand is one of more than thirty United Nations Member States where certain drug offenses can be punishable by the death penalty.[53] Even lesser offenses can be punishable in a manner that infringes on an accused person's human rights. The U.S. Department of State warns that "[p]enalties for possessing, using, or trafficking in illegal drugs in Thailand are severe, and convicted offenders can expect long jail sentences under harsh conditions and often heavy fines as well."[54] These warnings described the repercussions that a U.S. citizen could potentially face when arrested on drug charges in Thailand; these penalties surely pale in comparison to the penalties a Thai citizen would be subject to when charged with the same crimes.

In 2003, former Thai Prime Minister Thaksin Shinawatra initiated an anti-drug program allowing government officials to use "heavy-handed tactics" including the extrajudicial killings of *suspected* drug traffickers.[55] During early 2003 more than 2,500 people were killed in promotion of the new drug-free Thailand.[56] A 2007 special committee, at the direction of the new Thai government, conducted an investigation and discovered that more than 1,000 of those killed in 2003 had "little or no connection to the drugs trade."[57] The 2006 ousting of Prime Minister Thaksin may not be the end of Thailand's vicious war on drugs. Prime Minister Samak Sundaravej planned to implement a similar program and cited its effectiveness.[58] "Thai Interior Minister

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[53] *See, e.g.*, Prasoprat v. Benov, 421 F.3d 1009, 1011 (9th Cir. 2005).

[54] U.S. Department of State, Country Specific Information: Thailand, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1040.html (last visited May 7, 2010).

[55] *Thailand: New Fear of Illegal Killings Coincide with Thaksin's Return,* AMNESTY.ORG.UK, Feb. 28, 2008, http://www.amnesty.org.uk/news_details.asp?NewsID=17678 [hereinafter *Thailand: New Fear*].

[56] *Thailand PM Targets Drug Dealers*, BBC NEWS, Feb. 23, 2008, http://news.bbc.co.uk/2/hi/asia-pacific/7260127.stm.

[57] *Thailand: New Fear*, *supra* note 55.

[58] *Thailand PM Targets Drug Dealers*, *supra* note 56. Thaksin was replaced by interim Prime Minister Surayud Chulanont who vowed to investigate the extra-judicial killings carried out in Thaksin's war on drugs. *See* Anucha Charoenpo, *No Drugs War Killers Found*, BANGKOK POST, Jan. 24, 2008,

Chalerm Yubamrung said the new campaign would go ahead, even if thousands had to die. 'When we implement a policy that may bring 3,000 to 4,000 bodies, we will do it,' said Mr Chalerm. . . ."[59] However, Prime Minister Samak only held the position for a period of nine months.[60] In fact, between the time Thaksin was removed from office in a coup in 2006 and early 2010, Thailand has seen four Prime Ministers (only one of which was democratically elected), each with his own proposed plan to tackle the war on drugs.[61] The current Prime Minister, Abihisit Vejjajiva, announced his plan to tackle Thailand's drug problem in March 2009; he highlighted aspects of the plan such as tightened border security and a more widespread use of drug rehabilitation programs.[62] While it is unclear whether his plan has been or will be successful, he, like interim Prime Minister Surayud Chulanont before him, vowed to seek out those responsible for the atrocities committed in the name of Thaksin's war on drugs and bring them to justice.[63] Also like Surayud, Abihisit's promises have not come to fruition.[64]

The Universal Declaration of Human Rights does not distinguish among different classes of people, therefore drug users and drug traffickers are afforded the same human rights as anyone else. It is a blatant violation of their human rights for them to face the death penalty, and in many instances, without any type of judicial proceeding.

2. China

China, similarly to Thailand, is also one of the more than thirty United Nations Member States that retain the death penalty for drug law offenses.[65] The Chinese government makes no apologies

available at 2008 WNLR 1143376. Ultimately, Surayud announced, before he was replaced in a democratic election by Samak, that "no one could be held to blame for the killings." *Id.*

[59] *Thailand PM Targets Drug Dealers*, *supra* note 56.

[60] BBC News, Timeline: Thailand, http://news.bbc.co.uk/2/hi/asiapacific/country_profiles/1243059.stm (last visited May 7, 2010).

[61] *Id.*

[62] *Three-Month War on Drugs Launched*, BANGKOK POST, Mar. 18, 2009, http://www.bangkokpost.com/news/local/137795/war-on-drugs-campaign-launched.

[63] *See Thailand: Convictions of Police in Drug Campaign Abuse a 'First Step,'* HUMAN RIGHTS WATCH, Dec. 14, 2009, http://www.hrw.org/en/news/2009/12/14/thailand-convictions-police-drug-campaign-abuse-first-step.

[64] *Id.*

[65] *UN Drug Summit: Undo a Decade of Neglect*, HUMAN RIGHTS WATCH, Mar. 9, 2009, http://www.hrw.org/en/news/2009/03/09/un-drug-summit-undo-decade-

for their practices; rather, as a sign of defiance, every year on the United Nations' International Day Against Drug Abuse and Illicit Trafficking, the Chinese government puts on "show" trials, sentencing drug law violators to death and publicly executing them.[66]

3. Afghanistan

Afghanistan is unique due to the fact that it is a country that actually has two conflicting systems of law: a formal system and a customary system.[67] Afghanistan's Constitution and formal legislation sets forth the Counter Narcotics Drug Law, but the Afghani customary law, which is based on restorative justice, tends to contradict the formal law in many key areas.[68] "[T]he jirgas, or village elders that are traditionally relied on for resolving disputes" under the customary law,[69] but "[t]here are approximately fifty-five ethnic groups in Afghanistan's tribal areas and each one [of those groups] has its own customary legal system."[70] Therefore, not only are there discrepancies between the formal courts and the tribal courts, but there also is not even consistency within the tribal courts. Also, in some Afghani regions "the formal courts [actually] rely on and enforce decisions made by the Jirgas, while in other regions, there is no relationship between the two systems."[71] There have been recent attempts by Afghanistan's government to form one cohesive body of law; however, incorporating all the various customary tribal systems into a formal system has proved to be a challenging task. The

> judicial reform efforts have neglected to consider the customary legal system . . . instead focusing on the formal system, great confusion within the formal system still remains. Afghanistan's Constitution states, in part, that "no law can be contrary to the beliefs and provisions of the sacred religion of Islam." And, if a clear legal provision for the case before the court does not exist, "the courts' decisions shall be within the limits of the Constitution in accord with the Hanafi jurisprudence . . . ." For cases that

neglect.

[66] *Id.*

[67] Alyssa Greenspan, Note, *Are We Fighting the Right War?*, 16 CARDOZO J. INT'L & COMP. L. 493, 510–11 (2008).

[68] *Id.*

[69] *Id.* at 511.

[70] *Id.* at 510.

[71] *Id.* at 512.

address personal matters, involving members of the Shia Sect, Article 131 of the Constitution provides that

> Courts shall apply Shia school of law . . . in accordance with the provisions of law. In other cases if no clarification by this constitution and other laws exist and both sides of the case are followers of the Shia Sect, courts will resolve the matter according to laws of this Sect.[72]

These discrepancies between accepted systems of law have led to an unbalanced judicial system with inconsistent approaches to applying rules of law, and, for that matter, questions about whether or not a concrete rule of law exists.[73]

One of the primary conflicts between the two systems of law can be seen clearly when examining different forms and levels of punishment for drug offenses. An example of such a discrepancy can be seen in the story of an Afghani man named Daoud Khan.[74]

> Khan brought seventy kilograms of opium to a manufacturing plant and it was processed into ten kilograms of heroin. Khan then hired a driver to take him and the processed heroin to a designated place to sell the heroin. Along the way, the car was seized and searched, and the driver was arrested while Khan escaped. The driver paid a bribe for his release, and upon his return to the village, Khan claimed that the driver reported him to the police in exchange for half of the heroin. Khan then demanded that the driver repay him for the lost heroin. "The [j]irga decided that the driver should . . . swear on the holy Koran that he did not report Daoud Kahn to the authorities . . . . The driver did so and it was decided that Daoud Kahn should repay him the 300,000 Afs as requested." Although, the jirga's decision left Kahn in debt, he never served time in jail.
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> However, in the formal system, the Counter Narcotics Drug Law establishes that anyone implicated in a drug trafficking offense involving over five kilograms of heroin is subject to "life imprisonment, and a fine of between 1,000,000 Afs and 10,000,000 Afs." Thus, in the case of Kahn, punishment under the customary system required only that he pay a substantial fee, whereas punishment under the formal system would have meant life in prison for Kahn.[75]

Another example is that of the case of a drug trafficker named Abdul Washir, who was found in possession of eighteen kilograms of opium.[76] The Afghani government seized the opium, but

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[72] *Id.*
[73] *Id.* at 510–13.
[74] *Id.* at 513.
[75] *Id.* at 513–14.
[76] *Id.* at 514; *see* DAVID MANSFIELD, EXPLORING THE 'SHADES OF GREY': AN

Washir escaped and upon return to his village, he was "sentenced" by the jirgas to repay the trader for the lost opium.[77] Washir sold his home and all his possessions to raise the money to repay his debt.[78] In the end, he was not able to raise enough cash and he was forced to give all the money he was able to raise plus his seventeen-year-old daughter to the opium trader.[79]

Many Afghanis faced with the prospect of dire poverty or those forced to repay high debts turn to the opium industry. Mohammed Khan, a landowner, owed 100,000 Afghanis (or about $2,000 U.S.) that he borrowed in 2004 to pay his household expenses.[80] In order to repay his debt he began growing opium on his land.[81] However, in 2005, the Afghani government discovered the crops and destroyed them.[82] Regardless of his crop loss and subsequent loss of income, his creditor demanded repayment of the loan.[83] The matter was taken before the jirga, and it decided that Khan should give his eleven-year-old daughter to his creditor in lieu of payment.[84] Just a year later, Khan was again cultivating opium poppy, convinced this was the solution to his economic woes.[85] Though the government stepped in to destroy the crop, Khan was not subject to any other punishment as the government likely knew he would be subject to some form of repercussions by the jirgas for the lost crops.[86] Even if Khan was not in debt, the loss of his crops would have led him to borrow money and continue the cycle of drug cultivation to pay debt. The Afghani government comes up short on that aspect of the formal law. The citizens, governed by two conflicting legal systems, are not protected adequately. Punishment or requirements imposed by the jirgas may force Afghanis to enter into the opium trade, but on the other hand, punishments by the formal government may leave the citizen vulnerable to jirga prosecution. It is all an endless cycle, with the Afghan citizenry caught in the middle.

Thailand, Afghanistan, and China are all countries whose drug

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ASSESSMENT OF THE FACTORS INFLUENCING DECISIONS TO CULTIVATE OPIUM POPPY IN 2005/06, at 31 (2006), http://www.fco.gov.uk/resources/en/pdf/pdf15/fco_driverscultivationopiumrpt06.

[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* at 24.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*

policies as written or enforced violate Article 5 of the Universal Declaration of Human Rights.[87] Also, practices such as those found in China and Thailand violate Articles 10 and 11.1 of the Declaration.[88] While both of these countries are fairly well-known as human rights offenders, they should face particularly severe repercussions for these human rights offenses since they are committed under the guise of upholding law and order. Unlike Thailand's decreases in drug related activities, Afghanistan has seen sharp increases in drug cultivation and drug trading.[89]

It is logical then that Afghanistan would receive far more negative international press since the drug problem is not being curbed. However, much of the international criticism does not condemn the human rights violations; rather, it focuses on the dueling systems of law which are leading to inadequate drug control and enforcement.[90] The United Nations, through its drug control agencies, as well as independently, must condemn the human rights violations occurring here and in other countries. "[D]rug law enforcement . . . [while a critical thread of international law, must be] proportionate and in full compliance with the rule of law, *including international agreements on human rights*."[91]

B. Drug Policies that Prevent Access to Medically Necessary Drugs

1. India

Many countries, including India, do not consider palliative care, specifically pain management, for critically ill patients to be a priority, especially if supplying that pain medication takes funds from other preventative health care programs.[92] But can access to pain relief be considered a human right? The answer is yes. First, Article 25.1 of the Universal Declaration of Human

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[87] *See* G.A. Res. 217A, *supra* note 3, at 73.

[88] *Id.* Article 10 states that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Article 11.1 states "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

[89] Greenspan, s*upra* note 67, at 508.

[90] *Id.* at 509–15.

[91] UN Drug Experts, *supra* note 52 (emphasis added).

[92] Taylor, *supra* note 1, at 557–58.

Rights states that all humans have the right to "a standard of living adequate for the health and well-being . . . [including] medical care."[93] Therefore, patients who face terminal or critical disease or those who are battling chronic pain have the right to access adequate pain medication to sustain the standard of living described. Second, the WHO considers palliative care a global priority, especially with respect to HIV/AIDS and cancer treatments.[94] Not only does the WHO conduct significant research on palliative care throughout the world, but it also mandates reform in countries that significantly lack palliative care and, more specifically, pain management.[95]

In countries where the government does not view palliative care as a fundamental human right, access to pain medication can be difficult or impossible. Countries tend to ban CND scheduled drugs completely, and if not banned totally, they are heavily regulated.[96] Most pain medications are opium-based, and therefore, scheduled by the CND.[97] In India, opioid distribution is not banned, but it is strictly controlled through licensing and distribution restrictions.[98] These restrictions become so burdensome to health care providers that many doctors and hospitals cannot offer their patients effective pain control regardless of their desire.

Should an Indian health facility want to be authorized to dispense opioid-based pain medication, there are layers of red tape it must navigate.[99] First it "must obtain an opioid possession license, as well as government license forms for opioid purchase, transport, and import, in order to legally dispense it."[100] On top of those licensing hurdles, only highly specific pharmacies can dispense the medication; regular local pharmacies would not be granted the necessary government licensing.[101] The government only issues a limited number of the licenses, thereby authorizing an inadequate amount of facilities to dispense pain medication.[102] In a country populated with more than one billion citizens, and a

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[93] G.A. Res. 217A, *supra* note 3, at 76.

[94] *See* World Health Organization, Palliative Care, http://www.who.int/cancer/palliative/en (last visited May 7, 2010).

[95] *See infra* notes 103–08 and accompanying text.

[96] *See* Taylor, *supra* note 1, at 559.

[97] *Id.* at 556, 559.

[98] *Id.* at 559.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

majority of those citizens living in rural areas, access to pain medication is exceedingly difficult and many times impossible. For example, Kerala is a state of more than thirty million people, yet there are just three health facilities authorized to dispense pain medication.[103] The most ironic part of the plight that Indian citizens face is that "much of the world's supply of morphine comes from India, [but due to the] overregulation . . . only a trickle of the production is made available to [Indian] patients."[104]

> In September 2008, the World Health Organization (WHO) estimated that approximately 80 percent of the world population has either no or insufficient access to treatment for moderate to severe pain and that every year tens of millions of people around the world, including around four million cancer patients and 0.8 million HIV/AIDS patients at the end of their lives suffer from such pain without treatment.[105]

Citizens of most African nations face similar difficulties when trying to obtain any form of pain medication.[106] As of 2002 "Uganda was the only country . . . to prioritize palliative care, including access to pain medication for persons with HIV/AIDS and cancer, in its national health plan."[107] Currently the WHO is involved in a joint project focusing on prioritizing palliative care for HIV/AIDS and cancer patients in the African countries of Botswana, Ethiopia, United Republic of Tanzania, Uganda, and Zimbabwe.[108] The WHO estimates that within these countries at least 217,000 individuals suffer from terminal, late-stage HIV/AIDS.[109] These patients have limited or no access to the medically necessary drugs to allow them to carry on a standard of living in accordance with the Universal Declaration of Human Rights. The WHO recognizes that these countries need guidance and assistance to increase the availability and accessibility of needed palliative care. Again, the UN must take a strong stance in support of the citizens of these countries who are needlessly suffering. These are countries that would benefit from education

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[103] *Id.*

[104] *Id.*

[105] DIEDERIK LOHMAN, "PLEASE, DO NOT MAKE US SUFFER ANY MORE . . . ": ACCESS TO PAIN TREATMENT AS A HUMAN RIGHT 1 (2009), http://www.hrw.org/sites/default/files/reports/health0309web_1.pdf.

[106] *See generally* WORLD HEALTH ORGANIZATION, A COMMUNITY HEALTH APPROACH TO PALLIATIVE CARE FOR HIV/AIDS AND CANCER PATIENTS (2002), http://whqlibdoc.who.int/publications/2004/9241591498.pdf [hereinafter COMMUNITY HEALTH APPROACH].

[107] *See* Taylor, *supra* note 1, at 559.

[108] *See* COMMUNITY HEALTH APPROACH, *supra* note 106, at 4, 7.

[109] *Id.* at 5.

and assistance from the UN and its subsidiary agencies in order to free up the channels for palliative care.

CONCLUSION

The CND's ten-year plan aimed at "[r]educing the illicit supply of drugs," mainstreaming drug treatment and rehab into national health care, "[c]ontrol of [drug] precursors," and an overall need for "[i]nternational cooperation to eradicate the illicit cultivation of [drugs]" fails to address the major violations of human rights that are ongoing within many Member States.[110] The overall purpose is not being challenged here; rather, the United Nations, through agencies such as the CND, UNODC, and INCB, should publically condemn national drug policies that blatantly violate human rights. The agencies should also assist the countries that are repeatedly violating its citizens' human rights through education and training that will enlighten them with alternative policies and enforcement tactics that may prove to be just as, or even more, effective than old practices. There must be a balance between the international war on drugs and the human rights of all those involved, including the suspected drug users and drug traders.

An ideal Action Plan would include language such as "[i]nternational cooperation to eradicate the illicit cultivation of [drugs *and educate local drug cultivators on alternative economic means*]"[111] or "[r]educing the illicit supply of drugs [*while increasing the availability to doctors and hospital of medically necessary narcotics for palliative care of critically ill patients in countries that have limited access*]."[112] Amendments such as these would speak volumes to the international community that international drug control does not and cannot come at the expense of one's fundamental human rights; allowing such a practice to occur would be contrary to the purpose of the United Nations and the progress it has made on the human rights front since its inception.

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[110] Political Declaration, *supra* note 6.
[111] *Id.*
[112] *Id.*