



MAY 2015

# HUMAN RIGHTS, DRUG CONTROL AND THE UN SPECIAL PROCEDURES:

## *Preventing torture and other forms of cruel, inhuman or degrading treatment or punishment through the promotion of human rights in drug control<sup>1</sup>*

### THE INTERNATIONAL CENTRE ON HUMAN RIGHTS AND DRUG POLICY

Established in 2009, the International Centre on Human Rights and Drug Policy (HRDP) is dedicated to developing and promoting innovative legal and human rights research and teaching on issues related to drug laws, policy and enforcement.

The HRDP's work supports policy development that reconciles the international narcotics control conventions with international human rights law

The HRDP is an academic partner of the Human Rights Centre, School of Law at the University of Essex

[www.hr-dp.org](http://www.hr-dp.org)

1.	Introduction.....	2
2.	Research Methodology.....	3
3.	Preliminary data.....	4
4.	Historical treatment of drug control within the mandate.....	4
5.	Intersection of drug control policy and the mandate.....	5
5.1.	Punitive criminal justice responses to drug control.....	6
5.1.1.	<i>Prohibited forms of treatment under human rights law..</i>	7
5.1.2.	<i>Human rights safeguards for the protection of the accused.....</i>	8
5.1.3.	<i>Protective standards in the application of corporal &amp; capital punishment.....</i>	8
5.1.4.	<i>Penalisation under the law of international drug control.....</i>	11
5.1.5.	<i>The use of torture to extract confessions and evidence in drug crimes.....</i>	12
5.1.6.	<i>Judicial corporal punishment for drug offences.....</i>	13
5.1.7.	<i>Capital punishment for drug offences.....</i>	14
5.2.	Drug control and conditions of detention.....	15
5.2.1.	<i>Incommunicado detention &amp; solitary confinement under human rights.....</i>	15
5.2.2.	<i>Human rights standards for prison conditions &amp; access to medical care.....</i>	16
5.2.3.	<i>Drug control and the prison environment....</i>	17
5.2.4.	<i>Harm reduction, torture and inhuman or degrading treatment.....</i>	18
5.3.	Drug control and involuntary medical interventions.....	19
5.3.1.	<i>Involuntary medical interventions under human rights law.....</i>	19
5.3.2.	<i>Drug control and involuntary medical interventions.....</i>	21
5.4.	Drug control & access to essential controlled medicines for palliative care.....	23
5.3.3.	<i>Palliative care and the prohibition of inhuman or degrading treatment..</i>	24
6.	Interplay with other mandate holders.....	24
7.	Recommendations.....	27

<sup>1</sup> Written by Julie Hannah and Araks Melkonyan

## 1. Introduction

Human rights violations occurring as a consequence of drug control or enforcement efforts have been well-documented by both civil society organisations and United Nations human rights monitors. These violations highlight the degree to which the framework established under the three United Nations drug conventions contributes to an environment of increased human rights risk, and in some cases directly fuels abuses. The relationship between international human rights law and international drug control law is therefore a significant issue for human rights activists and scholars, yet to date it has largely gone unaddressed. The UN drug control bodies rarely mention human rights, while the UN human rights mechanisms rarely mention drug control. In effect, the two speak different languages and hold different priorities.<sup>2</sup> As the “eyes and ears” of the UN human rights system, the special procedures serve a critical role in bridging the normative gap and bringing thematic attention to this emerging human rights issue.

Such attention is critical to shifting the existing punitive drug control paradigm to one grounded in human rights and public health. Research underway at the International Centre on Human Rights and Drug Policy reveals that the historical treatment of drug control issues within the special procedures system is insufficient to have an impact on current drug control policy and practice. Reporting by mandate holders on drug control has been scattered and rarely collaborative, despite the numerous intersections drug control issues present across the mandates. As the special procedures develop their programme of work for the coming year, they have an important opportunity to consider ways in which coordination across the mandates can enhance the promotion and protection of human rights while countering the world drug problem—both to have an impact on policy-making and to close the normative gaps between the two legal regimes.

Ways in which the special procedures can organise their work to such ends should include the following:

**Contribute to the development of a joint special procedures statement for submission to the UN General Assembly Special Session on Drugs in 2016.** A UN General Assembly Special Session on Drugs scheduled for mid-2016 is an important opportunity for the special

---

<sup>2</sup> Paul Hunt, UN Special Rapporteur on the right to the highest attainable standard of health, ‘Human Rights, Health and Harm Reduction: States’ Amnesia and Parallel Universes’, address to Harm Reduction 2008: IHRA’s 19th International Conference (International Harm Reduction Association, 11 May 2008) <http://www.hr-dp.org/contents/952> (last accessed 01 December 2014)

procedures to have an impact on the drug policy debate, and ensure that human rights is rooted firmly at the centre of reforms moving forward.

**Advance the normative development of human rights and drug control through collaborative and individual thematic reporting on the promotion and protection of human rights while countering the world drug problem.** The normative gaps highlighted in this research present numerous opportunities for mandate holders to develop lines of inquiry within their individual work and through collaborative reporting. This can include: an analysis of normative gaps; suggestions for standard setting measures that target stakeholders responding to the world drug problem, and; promoting the issue as a thematic human rights concern within the broader UN human rights mechanisms.

## 2. Research Methodology

This research project is based on information collected from the review of publicly available reports of the special procedures. The International Centre on Human Rights and Drug Policy selected five special procedures for review due to their particular relevance to drug policy:

1. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment
2. Special Rapporteur on the right to the highest attainable standard of health
3. Special Rapporteur on summary, arbitrary or extra-judicial executions
4. Special Rapporteur on the rights of indigenous peoples
5. Working Group on arbitrary detention

A search of publicly available reports from each special procedure was undertaken to identify:

- Each instance throughout the mandate's lifetime where drug control practices were highlighted.
- The key drug control practices that overlap with the mandate holder.
- The relative strength of recommendations given by the special procedure for follow-up action based on SMART indicators.<sup>3</sup>
- The potential intersections such practices have with other mandate holders within the special procedure mechanism.

---

<sup>3</sup> Specific, Measureable, Attainable, Realistic, and Time-bound, see Human Rights Council, Manual on the Special Procedures of the Human Rights Council (June 2008) para 98  
[http://www2.ohchr.org/english/bodies/chr/special/docs/Manual\\_English\\_23jan.pdf](http://www2.ohchr.org/english/bodies/chr/special/docs/Manual_English_23jan.pdf) <last accessed December 2014>

### 3. Preliminary data

Table 3.1

Mandate	Total reports reviewed	Total reports highlighting drug control practices	Total recommendations on drug control measures
Indigenous Peoples	85	25	3
Health	64	31	13
Arbitrary Detention	64	35	2
Executions	56	37	15
Torture	89	46	23
<b>Total:</b>	<b>358</b>	<b>174</b>	<b>56</b>

### 4. Historical treatment of drug control within the mandate

The protection of individuals from torture and other forms of cruel, inhuman or degrading treatment or punishment in the context of drug control figures prominently into the mandate of this special procedure.<sup>4</sup> The scope of the Special Rapporteur's mandate has been interpreted over time to include consideration of practices in both criminal justice and healthcare contexts that may raise questions of prohibited conduct as elaborated by established international standards. As State responses to drug control impact individuals in both criminal and healthcare settings, the mandate holder has grounds to pursue questions relevant to the prohibition.

Indeed, a range of drug control measures have fallen to the consideration of Special Rapporteurs throughout the mandate's lifetime. The earliest entry point of such consideration were policing and detention practices taken under emergency law to combat illicit trafficking and its associated violence in Latin America during the late 1980's.<sup>5</sup> The effects of drug enforcement practices on traffickers and people who use drugs were examined with some frequency from the 1990's and provided contextual depth to practices of torture and ill treatment during pre-trial detention.<sup>6</sup> A concern raised with some regularity by mandate holders was how drug enforcement activities contribute to rising levels of violence and an environment where prohibited treatment was increasingly likely to occur.<sup>7</sup> Mass incarceration driven by drug policy and its effects on prison conditions was also considered,

<sup>4</sup> United Nations Human Rights Council Resolution 25/13 (27 March 2014) A/HRC/25/L.25 para 1

<sup>5</sup> Report of the Special Rapporteur on Torture, Visit to Peru (23 January 1989) E/CN.4/1989/15, paras 172, 183; Report of the Special Rapporteur on Torture, Visit to Argentina, Colombia and Uruguay (23 February 1989) E/CN.4/1988/17/Add.1, para 8

<sup>6</sup> Report of the Special Rapporteur on Torture, Visit to Mexico (14 January 1998) E/CN.4/1998/38/Add.2, para 79; Report of the Special Rapporteur on Torture (24 December 1997) E/CN.4/1998/38/Add.1, paras 31, 151, 166; Report of the Special Rapporteur on Torture (6 January 1994) E/CN.4/1994/31, para 453; Report of the Special Rapporteur on Torture (27 December 1991) E/CN.4/1992/17, para 155

<sup>7</sup> see *inter alia*, Report of the Special Rapporteur on Torture, Mission to Mexico (29 December 2014) A/HRC/28/68/Add.3, para 20; Report of the Special Rapporteur on Torture, Mission to Jamaica (11 October 2010) UN Doc. A/HRC/16/52/Add.3, paras. 34-35; Report of the Special Rapporteur on Torture (15 December 1992) UN Doc. E/CN.4/1993/26, p. 5

albeit peripherally and infrequently,<sup>8</sup> until 2009 when reporting turned to the experience of people who use drugs in detention, enhancing consideration of the problem.<sup>9</sup> During this time, the Special Rapporteur released an historic report treating drug control as a thematic human rights concern.<sup>10</sup> This significantly expanded the scope of the mandate's consideration of drug control to include issues of human dignity, access to controlled medicines, and international assistance.<sup>11</sup> The current Special Rapporteur has complemented this thematic work on drug control to include practices of torture and other forms of cruel, inhuman or degrading treatment in healthcare settings.<sup>12</sup>

Despite the frequent attention to drug control, and commendable thematic examinations of the issue, recommendations explicitly calling for States to integrate human rights protections to prevent torture and other cruel, inhuman or degrading treatment or punishment in drug control policies and practices were less frequent.<sup>13</sup> As State and international responses to the illicit drug trade include practices that increase the likelihood for human rights abuses, the mandate holder can play an important role in shifting current punitive responses to those centred on relevant international standards to protect individuals and communities from torture and other forms of cruel, inhuman or degrading treatment or punishment.

Under the framework of the research project, 89 reports of this special procedure were examined, including 47 annual and interim reports and 42 country reports. *Out of these reports, 46 refer to drug-related issues while 23 reports highlighted drug-related issues in their recommendations. Only 10 country reports included substantive drug policy recommendations to States.*

## 5. Intersection of drug control policy and the mandate

Since 1998, June 26th celebrates the ratification of the Convention against Torture and honours victims and survivors on the United Nations International Day in Support of Victims of Torture. Ten years earlier, the United Nations also officially recognized June 26th as the International Day against Drug Abuse and Trafficking, celebrated in many States by events that have included mass executions of drug traffickers, mass arrests outside of drug treatment

---

<sup>8</sup> Report of the Special Rapporteur on Torture, 'Summary of cases transmitted to Governments and replies received' (14 March 2002) E/CN.4/2002/76/Add.1; Report of the Special Rapporteur on Torture, Mission to Brazil (20 March 2001) E/CN.4/2001/66/Add.2, para 100

<sup>9</sup> Report of the Special Rapporteur on Torture, 'Applying a human rights-based approach to drug control' (14 January 2009) A/HRC/10/44, paras 49-74

<sup>10</sup> *Ibid*

<sup>11</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Mendez (1 February 2013) UN Doc. A/HRC/22/53, paras. 40-44; 51-56, 72-74.

<sup>12</sup> *Ibid*, paras. 40-44.

<sup>13</sup> Recent country visits and reporting has consistently issued strong recommendations on drug policy, including Report of the Special Rapporteur on Torture, Mission to the Gambia (16 March 2015) A/HRC/28/68/Add.4, para 106(f); Report of the Special Rapporteur (05 March 2015) A/HRC/28/68, para 79; Report of the Special Rapporteur, Follow-up Report Mission to Tajikistan and Tunisia (27 February 2015) A/HRC/28/68/Add.2, para 111; also see, Report of the Special Rapporteur on torture (14 January 2009) A/HRC/10/44, paras 49-74; Report of the Special Rapporteur on Torture (1 February 2013) A/HRC/22/53, paras. 40-44, 51-56;

centres, and burning of seized illicit drugs.<sup>14</sup> With little recognition of this ironic juxtaposition, parallel events continue to this day and pointedly illustrate the discordant institutional relationship between human rights and drug control for the past half-century.

The question of torture and other cruel, inhuman or degrading treatment in the context of drug laws and policies takes many forms, including policing and punishment as well as policies and practices carried out in health care settings. In each of these circumstances, drug control laws and policies may contribute to an environment where torture or inhuman and degrading treatment can occur if safeguards and mechanisms for accountability are not firmly in place.

The current drug control regime, underpinned by three international treaties, obliges States to take measures to control the illicit production, trade and possession of certain drugs including the use of criminal law<sup>15</sup> and the provision of treatment to persons who use drugs,<sup>16</sup> while at the same time ensuring the provision of these substances for vital medical and scientific uses. The implementation of these obligations is subject to national interpretation and domestic and international law.<sup>17</sup> States implement laws and policies to give effect to these obligations that can come into conflict with their international human rights obligations—specifically those to prevent torture and other cruel, inhuman or degrading treatment or punishment. This conflict is not limited to domestic implementation as international organisations and other States contribute to potentially abusive drug control programmes through financial and technical support.<sup>18</sup>

Many of these laws, policies, and subsequent practices examined by the Special Rapporteur and listed below are essential for the mandate holder to continue to address during country and thematic work.

### **5.1. Punitive criminal justice responses to drug control**

The use of criminal justice is a long-standing policy approach by States as a means to curb illicit production, traffic, and consumption of certain drugs. While the international drug control treaties obligate States to implement certain penal measures, in all circumstances, human rights safeguards must be in place to protect individuals from torture and other forms of cruel, inhuman or degrading treatment. In policy and practice, criminal justice responses to drug control frequently fail to include such protections and, in many cases, contribute to an

---

<sup>14</sup> The Death Penalty for Drug Offenses-Global Overview 2011 (Harm Reduction International, 2011) p 25; Hong Lu, Terance Miethé, Bin Liang, China's Drug Practices and Policies: Regulating Controlled Substances in a Global Context, 2009, p. 115; Reuters (27 June 2008) Two Nigerians executed in Indonesia for drugs; Jakarta Post (25 June 2008) Inmates riot at Nusa Kambangan maximum security prison; "Where Darkness Knows No Limits" Incarceration, Ill-Treatment and Forced Labor as Drug Rehabilitation in China (Human Rights Watch, 2010) p 12

<sup>15</sup> Single Convention on Narcotic Drugs 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961 (entered into force 8 August 1975) 520 UNTS 7515 (1961 Convention), Article 36; 1971 Convention on Psychotropic Substances (21 February 1971) 1019 UNTS 14956. (1971 Convention), Article 22; UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (20 December 1988) 1582 UNTS 95 (1988 Convention), Article 3

<sup>16</sup> 1961 Convention, Article 38; 1971 Convention, Article 20; 1988 Convention, Article 3

<sup>17</sup> 1961 Convention Article 36(1)(a) and Article 36(2), 1971 Convention Article 22(1) and Article 22(2), 1988 Convention Article 3 paragraph (a) and (b).

<sup>18</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (9 August 2012) UN Doc. A/67/275, para 88



environment where torture and other forms of cruel, inhuman or degrading treatment or punishment is more likely to occur.

### 5.1.1. Prohibited forms of treatment under human rights law

Torture and other forms of cruel, inhuman or degrading treatment or punishment are prohibited under international human rights law, permitting no limitations or derogations in any circumstance, including during public emergencies.<sup>19</sup> The prohibition is a rule of customary law, binding all States including those that have not ratified international or regional human rights treaties and is viewed as a peremptory norm under international law.<sup>20</sup>

Actions towards individuals may reach the threshold of prohibited acts of torture if characterised by four defining elements:

- The infliction of severe physical and/or mental pain or suffering;
- The act is inflicted with intention;
- The act is carried out with a purpose to obtain information or for reasons of discrimination;
- The act is carried out, instigated or otherwise undertaken with the acquiescence of a public official or one acting in such a capacity.<sup>21</sup>

Acts of abuse that fall below the threshold established by the above criteria may still be characterised as inhuman or degrading treatment<sup>22</sup>—the defining elements of which should be interpreted broadly to ensure robust protection of the individual from abuse.<sup>23</sup> Cruel and inhuman treatment has been interpreted as reaching a minimum level of severity but does not require intent or purpose to amount to prohibited conduct.<sup>24</sup> When assessing conduct as degrading, the severity threshold is lessened and actions taken to “humiliate” the individual are sufficient to come into conflict with the prohibition.<sup>25</sup>

---

<sup>19</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 7; Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 04 November 1950, entry into force 03 September 1953) 213 UNTS 222, as amended (ECHR), Article 3; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTA 123 (ACHR), Article 5; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), Article 37; UN Human Rights Committee, General Comment 20: the prohibition of torture, or other, cruel, inhuman or degrading treatment or punishment (1992) para. 3; UN Human Rights Committee, General Comment No. 29: state of emergency (31 August 2001) CCPR/C/21/Rev.1/Add.11

<sup>20</sup> UN Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties (2007) CAT/C/GC/2/CRP.1/Rev.4; ICTY, *Prosecutor v. Anto Furundzija*, Trial Judgment (December 10, 1998) IT-95-17/1-T

<sup>21</sup> Convention Against Torture, Article 1

<sup>22</sup> CAT, Article 16; “the definitional threshold between ill-treatment and torture is often not clear” at Committee Against Torture, General Comment 2, para 3

<sup>23</sup> UN General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN GA Resolution 43/173 (9 December 1998), Principle 6

<sup>24</sup> *Yordanov v. Bulgaria*, Application No. 56856/00 (ECHR, 10 August 2006), para 86-89; Interim report of the Special Rapporteur on Torture (3 August 2009) A/64/215, para 49

<sup>25</sup> *Ibid*; see also, *Ireland v. United Kingdom*, Application No. 5310/71 (ECHR, 18 January 1978) para 167; *Loayza Tamayo v. Peru*, Series C., No. 33 (Inter-American Court of Human Rights, 1997) para 57

### **5.1.2. Human rights safeguards for the protection of the accused**

Safeguards aimed at the prevention of torture include procedural guarantees for individuals in pre-trial and criminal detention settings. As persons deprived of their liberty are at increased risk of being subject to prohibited treatment or punishment, human rights law establishes minimum procedural guarantees for the protection of the individual<sup>26</sup> and must include:

- Prompt notification of reasons for arrest
- Arrest and detention location recorded by detaining authority
- Prompt review before a judge in order to challenge the lawfulness of the detention
- Access to minimum fair trial standards throughout the process of administration of justice<sup>27</sup>

Additional safeguards required under human rights law to protect the individual from abuse by the detaining authority include:

- Conditions of detention must not be inhuman or degrading
- Prompt notification of relatives or identified individuals
- Medical examination by a doctor at the outset of detention
- Evidence obtained using torture must not be used in trial proceedings<sup>28</sup>

These minimum standards must apply subsequent to the arrest or confinement of any individual, including those suspected of drug-related crimes from low-level possession to large-scale trafficking. Human rights protections extend beyond conviction and establish restrictive parameters for the application of punishment—including both capital and corporal—explored below.

### **5.1.3. Protective standards in the application of corporal & capital punishment**

The prohibition of torture and other cruel, inhuman or degrading treatment also extends to punishment and has been interpreted by international human rights mechanisms to address the practices of corporal and capital punishment.

Corporal punishment as a criminal or judicial sanction or form of discipline has been extensively reviewed by regional and international human rights mechanisms in light of the prohibition, despite no explicit reference in law to the phenomenon. Over time, corporal punishment carried out in both private and State settings has been viewed as not only a form of inhuman or degrading treatment, but as an affront to human dignity prohibited under international law.<sup>29</sup>

---

<sup>26</sup> UN Human Rights Committee, General Comment 20, para 11; UN Committee against Torture, General Comment 2, para 13

<sup>27</sup> ICCPR, Articles 9, 14

<sup>28</sup> ICCPR Articles 7, 9, 14; CAT, Article 15; *Othman (Abu Qatada) v. the United Kingdom*, Application No. 8139/09 (ECHR, 17 January 2012) para 267

<sup>29</sup> Report of the Special Rapporteur on Torture (5 February 2010) A/HRC/13/39/Add.5, para 220; UN Human Rights Committee, *Osbourne v Jamaica*, Communication No. 759/1997 (15 March 2000) para 3.3; *Tyrer v. United Kingdom* Application No. 5856/72 (ECHR, 04 April 1978); *Winston Caesar v Trinidad and Tobago*, (IACHR, 11 March 2005) Series C No. 123; UN Special Rapporteur



Unlike corporal punishment, the death penalty is explicitly referenced in human rights instruments and not expressly prohibited.<sup>30</sup> In order for capital punishment to be compliant with customary norms guaranteeing the right to life, it must never be arbitrarily applied, may only be imposed when proscribed by the law in force at the time a capital crime was committed and only then reserved for the ‘most serious crimes’.<sup>31</sup> Death sentences issued pursuant to mandatory capital punishment legislation are considered arbitrary and prohibited under international law.<sup>32</sup> ‘Most serious crimes’ has been authoritatively interpreted to exclude drug offenses in particular.<sup>33</sup> Further, capital punishment must never be imposed for offenses committed by individuals under 18 years of age or upon pregnant women.<sup>34</sup> Safeguards for the protection of the individual facing capital punishment insist upon the highest standards transparency,<sup>35</sup> the right of a condemned individual to seek commutation,<sup>36</sup> and the highest standards of fair trial proceedings.<sup>37</sup>

As human rights law establishes significant restrictions to limit the application of the death penalty to guarantee protections of the right to life, the status of the death penalty under the prohibition of torture and other forms of cruel, inhuman or degrading treatment presents unique interpretative difficulties and an additional set of restrictions.<sup>38</sup> Importantly, failure to adhere to the above-established standards would *per se* contravene the prohibition.<sup>39</sup> The anguish experienced by an individual facing a death sentence subsequent an unfair trial contravenes the prohibition.<sup>40</sup> It is argued that a similar level of anguish is possible when an individual faces the death penalty for a crime considered to not fall within the scope of “most

---

on Torture, A/60/316, para 28; Human Rights Committee, General Comment No. 20, para 5; Nigel Rodley, *The Treatment of Prisoners in International Law* (3<sup>rd</sup>edn, OUP, 2009)Chapter 10

<sup>30</sup> ICCPR, Article 6

<sup>31</sup> ICCPR, Article 6; Economic and Social Council (1984) Safeguards guaranteeing protection of the rights of those facing the death penalty, ESC Res. 1984/50 annex 1984 UN ESCOR Supp (1) at 33, UN Doc. E/1984/84, para 1

<sup>32</sup> *Eversley Thompson v. St. Vincent and the Grenadines* (18 October 2000) Human Rights Committee, Comm. No. 806/1998, para 8.2; *Kennedy v. Trinidad and Tobago* (26 March 2002) Human Rights Committee, Comm. No. 845/1998, para 7.3; See Report of the Special Rapporteur on Executions (29 January 2007) A/HRC/4/20, para 66; for an overview of regional and domestic jurisprudence, See Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (9 August 2012), A/67/279 para 59

<sup>33</sup> Human Rights Committee, Concluding Observations Sudan, Thailand, Nowak report Indonesia, etc etc. Heyns report, etc. etc; Report of the Special Rapporteur on Torture, A/HRC/10/44 14 January 2009 para 66

<sup>34</sup> ICCPR Article 6(5); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), Article 37

<sup>35</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Transparency and the Imposition of the Death Penalty (2006) E/CN.4.2006/53.Add.3

<sup>36</sup> ICCPR, Article 6(1) & (4), 14; “General comment No. 6: the right to life”, UN Human Rights Committee, HRI/GEN/1Rev.9 (Vol. 1) (2008) para 7

<sup>37</sup> see for example, *Ocalan v Turkey*, Application No 46221/99 (ECHR, 12 May 2005) para 166

<sup>38</sup> Report of the Special Rapporteur (January 2009) A/HRC/10/44 14, para 38; ‘The exception for the death penalty requires us to consider the distasteful notion of whether there can be attendant circumstances which, above and beyond the cruelty and inhumanity inherent in the death penalty, condemns an exaction as legally cruel and inhuman.’ in Rodley, *Treatment of Prisoners under International Law*, p 318, see also pp 319-321; A/HRC/10/44 paras 46-48; Article 37 under the CRC prevents capital punishment of legal minors under the prohibition of torture, not under the protection of the right to life; particular issues are also raised in cases of extradition as established under the CAT, and other human rights jurisprudence related to the death penalty that are explored later in this Section.

<sup>39</sup> Interim Report of the Special Rapporteur on Torture (9 August 2012) A/67/279, paras 53-64; Human Rights Committee General Comment No. 20 at para 6 explicitly states that when considering death penalty in light of the prohibition, the death penalty can only be carried out for the most serious crimes and by methods causing the least amount of human suffering.

<sup>40</sup> *Ocalan v Turkey*, Application No 46221/99 (ECHR, 12 May 2005) para 175

serious” and would thus be inherently contrary to the prohibition. Further, circumstances that accompany a death sentence including *inter alia* conditions on death row, the mental state of the condemned, and the length of time awaiting final execution, may directly contravene the prohibition of torture and other forms of cruel, inhuman or degrading treatment.<sup>41</sup> Likewise, methods of execution are significantly restricted<sup>42</sup> and heightened standards of transparency in notification processes in the lead up and after an execution must be followed to ensure humane treatment.<sup>43</sup>

In extradition cases, human rights standards prevent countries from returning an individual to a State that may apply capital punishment in violation of the prohibition against torture.<sup>44</sup> Arising from extradition and the customary law of complicity,<sup>45</sup> there is a legal norm emerging that constrains States from financially or otherwise,<sup>46</sup> supporting programmes and activities abroad with the knowledge<sup>47</sup> that such support can contribute to arbitrary executions or other activities contrary to the prohibition of torture.<sup>48</sup> From this, it is argued that States may not divest their responsibility when they direct such financial assistance through United Nations specialised agencies.<sup>49</sup> Likewise, United Nations entities themselves have obligations to protect human rights under the Charter, but also arguably under general international law.<sup>50</sup>

---

<sup>41</sup> Human Rights Committee, General Comment No. 20, para 6; *Johnson v Jamaica* (Human Rights Committee, 1996) CCPR/C/56/D/588/1994, paras 8.8, 8.9; Safeguards guaranteeing protection of the rights of those facing the death penalty, ESC Res. 1984/50 annex 1984 UN ESCOR Supp (1) at 33, UN Doc. E/1984/84, para 9; *Soering v United Kingdom*, Application No. 14038/88 (ECHR, 1990) paras 101-103

<sup>42</sup> Though there is evidence to suggest an emergence in international law that such a consideration would outright abolish any method of execution currently in practice: *Al-Saadoon and Mufdhi v. United Kingdom*, Application No. 61498/08 (ECHR, 2 March 2010) para 115

<sup>43</sup> *Lyashkevich v Belarus* (Human Rights Committee, 2003) CCPR/C/77/D/887/1999, para 9.2

<sup>44</sup> CAT, Article 4; ICCPR, Article 7; ECHR, Article 3; International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 (Articles on State Responsibility), Article 16; *Ng v Canada* (Human Rights Committee, 1994) CCPR/C/49/D/469/1991, para 16.4; *Soering v United Kingdom* (ECHR), para 111; Report of the Special Rapporteur on Torture (09 August 2012) A/67/279, para 81

<sup>45</sup> Articles on State Responsibility, Article 16; viewed as customary international law by the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, International Court of Justice, ICJ Reports (2007) paras 419-420

(*Bosnia and Herzegovina v. Serbia and Montenegro*), International Court of Justice, ICJ Reports (2007) para 419

<sup>46</sup> Instructive elaboration of what other forms of assistance may engage questions of complicity include those identified by the Joint Commission on Human Rights: Joint Committee on Human Rights, Twenty-Third Report of 2008–09, ‘Allegations of UK Complicity in Torture’ HL 152, HC 230, 21 July 2009; see also Bharat Malkani, ‘The Obligation to Refrain from Assisting the Use of the Death Penalty’ *International and Comparative Law Quarterly* (2013) 62, 533-535

<sup>47</sup> For an elaboration on the test for knowledge, Joint Committee on Human Rights, Twenty-Third Report of 2008–09, ‘Allegations of UK Complicity in Torture’ HL 152, HC 230, 21 July 2009

<sup>48</sup> *Judge v. Canada* (Human Rights Committee, 2003) CCPR/C/78/D/829/1998), para 10.5; *A.R.J. v. Australia* (Human Rights Committee, 11 August 1997) CCPR/C/60/D/692/1996, para 6.9; as a peremptory norm of international law, States contributing aid or assistance to acts that enable violations of the prohibition to continue are themselves committing an internationally wrongful act as elaborated by Article 41(2) in ILC Draft Articles on State Responsibility

<sup>49</sup> Rick Lines, Damon Barrett and Patrick Gallahue, ‘Complicity or Abolition?’ (Harm Reduction International, 2012)

<sup>50</sup> *Reparations for Injuries Suffered in the Service of the United Nations*, International Court of Justice, advisory opinion, ICJ Reports 179 (1949); see also Security Council resolutions regarding assistance to apartheid South Africa: UNSC, Resolution 418, Adopted by the Security Council at its 2046<sup>th</sup> meeting, on 4 November 1977, S/RES/418; Resolution 569, Adopted by the Security Council at its 2602<sup>nd</sup> meeting, on 26 July 1985, S/RES/569; UN Human Rights Committee “General Comment No. 31” UN Doc CCPR/C/21/Rev.1/Add. 13 (2004) para 2; UNODC Guidance Note, ‘UNODC and the Promotion and Protection of Human Rights’, (Vienna, 2012), page 7; Rick Lines, Damon Barrett and Patrick Gallahue, ‘Complicity or Abolition?’ (Harm Reduction International, 2012), footnote 111: The ILC stated that ‘it is apparent that ... peremptory norms of international law apply to international organizations’ and that ‘it can hardly be maintained that states can avoid compliance with peremptory norms by

#### 5.1.4. Penalisation under the law of international drug control

Penalisation within the framework of international drug control includes a range of measures that engage questions on the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment. The question is most pertinently raised when individuals are subject to abusive police practices and arbitrary forms of punishment in the name of drug control. Directly following from this is the extent to which the international drug control regime itself contributes to an environment of increased human rights risk. The international system of drug control has itself evolved into a predominantly punitive, law enforcement-led system, in which the broad application of criminal justice measures raise issues linked to the prohibition of torture.<sup>51</sup> The source of the international obligation to penalize certain drug crimes is contained within the three international drug control conventions, which establish the complex regulatory framework of international drug control.<sup>52</sup> These treaties call for a range of penal measures to prohibit the illicit production, traffic and possession of drugs for more than forty-nine offenses.<sup>53</sup> Language used throughout the treaties points to the “serious” and “grave” nature of many of these offenses, establishing a minimum requirement of “adequate” penal responses.<sup>54</sup> The treaties do not define what underpins “adequate” penalties, though the Commentaries indicate a level of severity so as to have a deterrent effect and importantly, that any penal obligation is subordinate to the constitutional provisions and legal systems of each country.<sup>55</sup> Complementing this suite of penalisation requirements is the permissive obligation established by each treaty allowing for States to selectively adopt more strict or severe measures.<sup>56</sup> While the treaties leave the specific design of criminal offenses and how they should be punished to State parties,<sup>57</sup> the absence of explicit protection of the individual throughout the drug control treaties<sup>58</sup> has contributed to an environment where States have developed highly punitive laws and severe sanctions, including those which engage the prohibition of torture and other cruel, inhuman or degrading treatment.

Indeed, the Special Rapporteur has previously pointed to the fact that State implementation of international drug control obligations have evolved in isolation, detached from the

---

creating an organization’, ILC (1981) Yearbook of the International Law Commission 1980 vol. II, no. 2, p. 56; Report of Special Rapporteur on Executions (9 August 2012) A/67/275, paras 87-92

<sup>51</sup> Report of the Special Rapporteur on Torture (14 January 2009) A/HRC/10/44, para 50

<sup>52</sup> Single Convention on Narcotic Drugs 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961 (entered into force 8 August 1975) 520 UNTS 7515 (1961 Convention); 1971 Convention on Psychotropic Substances (21 February 1971) 1019 UNTS 14956. Protocol Amending the Single Convention on Narcotic Drugs, 1961 (25 March 1972) 976 UNTS 3 (1971 Convention); UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (20 December 1988) 1582 UNTS 95 (1988 Convention)

<sup>53</sup> Julie Hannah, Nahir de la Silva, ‘Human Rights, Drug Control and the UN Special Procedures: Preventing arbitrary detention through the promotion of human rights in drug control’ (International Centre on Human Rights and Drug Policy, University of Essex, 2015) at footnote 65

<sup>54</sup> 1961 Convention Article 36; 1971 Convention, Article 22; 1988 Convention, Article 3

<sup>55</sup> Commentary on the Protocol amending the Single Convention on Narcotic Drugs, 1961 (United Nations 1976), p 429; Commentary on the Convention on Psychotropic Substances (United Nations 1976), p 352

<sup>56</sup> 1961 Convention, Article 39; 1971 Convention, Article 23; 1988 Convention, Article 24

<sup>57</sup> See 1961 Convention, Articles 36 (1)(a) and 36(2); 1971 Convention, Article 22(1) and Article 22(2); 1988 Convention, Article 3 paras (a) and (b)

<sup>58</sup> The 1988 Convention is the only treaty where there is explicit reference to the individual within the system at Article 6(6) and Article 14(2), which specifically references human rights

international human rights machinery.<sup>59</sup> Human rights law offers important guidance for implementing such measures to ensure compliance with other concurrent international legal obligations, particularly to ensure continued adherence to customary norms of international law. As established in the above sections, any penal measure required *or* permitted by the conventions must conform to domestic and international norms protecting the rights of individuals from torture and other forms of inhuman or degrading treatment or punishment.<sup>60</sup>

Throughout the mandate's lifetime, Special Rapporteurs have examined situations in which policing practices and penal sanctions pursued in the name of drug enforcement and suppression engage questions relevant to the prohibition of torture and other cruel, inhuman or degrading treatment, several of these practices will be explored in the following sections.

#### **5.1.5. The use of torture to extract confessions and evidence in drug crimes**

It has been frequently noted in the reports of mandate holders that a primary purpose for the use of torture by public officials has been to extract confessions and other information.<sup>61</sup> The practice of torture for the purpose of extracting confessions and information in drug cases by police and other security forces was widely documented in various country and annual reports.<sup>62</sup> Special Rapporteurs paid specific attention to structural features of criminal laws and policies as they commonly gave rise to unlawful interrogation procedures. Across the globe, criminal laws and policies position the illicit drug 'problem' as a unique threat requiring exceptional policing responses. This has resulted in the creation of criminal justice systems where exceptional power over individuals is conferred to enforcement agencies including police, military and security forces, enabling abusive interrogation practices following the detention of the accused. This is most evident when drug control legislation and policies permit incommunicado detention or *arriago* systems where an individual is not brought before a judge within the first 48 hours of being detained.<sup>63</sup> Drug control criminal laws often do not establish minimum thresholds, which result in the over-incarceration of relatively low-level offenders unable to obtain release prior to trial. In several country visits, Special Rapporteurs noted the large proportion of individuals detained for drug offenses who had also experienced forms of torture and ill-treatment in their initial hours of detention,

---

<sup>59</sup> Report of the Special Rapporteur on Torture (14 January 2009) A/HRC/10/44, para 51

<sup>60</sup> See Sections 5.1.1., 5.1.2., 5.1.3

<sup>61</sup> CAT, Article 1; Report of the Special Rapporteur on Torture (5 February 2010) A/HRC/13/39/Add.55, paras 59-63

<sup>62</sup> Report of the Special Rapporteur on Torture: Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention (5 February 2010) A/HRC/13/39/Add.55, para 62; Report of the Special Rapporteur on Torture, Mission to Indonesia (10 March 2008) A/HRC/7/3/Add.7, para 20; Report of the Special Rapporteur on Torture: Summary of information, including individual cases transmitted to Governments and replies received (30 March 2005) E/CN.4/2005/62/Add.1, paras 595, 601, 603, 605, 1195, 1842; Report of the Special Rapporteur on Torture, Visit to Brazil, (30 March 2001) UN Doc. E/CN.4/2001/66/Add.2, para 100; Report of the Special Rapporteur on Torture, Visit to Azerbaijan, (14 November 2000) E/CN.4/2001/66/Add.1, para 22; Report of the Special Rapporteur on Torture (25 January 2001) E/CN.4/2001/66, paras 882, 884; Report of the Special Rapporteur on Torture, Visit to Turkey (27 January 1999) E/CN.4/1999/61/Add.1, para 106; Report of the Special Rapporteur on Torture, Visit to Mexico (14 January 1998) E/CN.4/1998/38/Add.2, para 79; Report of the Special Rapporteur on Torture, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment (24 December 1997) E/CN.4/1998/38/Add.1, paras 151, 166; Report of the Special Rapporteur on Torture (6 January 1994) E/CN.4/1994/31, para 362

<sup>63</sup> Report of the Special Rapporteur on Torture, Visit to Turkey (27 January 1999) E/CN.4/1999/61/Add.1, para 106

many coerced into confessions. Laws enabling these confessions play a central role in obtaining convictions and implicate a range of actors throughout the administration of justice including doctors, prosecutors and judges. Special Rapporteurs have also examined the unique effects such an environment has on vulnerable groups, particularly people who use drugs. During interrogations, security and police forces have denied opiate substitution therapy to people who are clinically drug dependent, inducing painful withdrawal symptoms that may amount to ill-treatment and in some circumstances, torture.<sup>64</sup> It is evident that failure to incorporate human rights safeguards to prevent torture and other forms of cruel, inhuman or degrading treatment in both the design and implementation of drug control laws and policies encourages an environment of exceptionalism and impunity allowing abuse during interrogations, in many cases at alarmingly widespread and systematic levels.<sup>65</sup>

### 5.1.6. Judicial corporal punishment for drug offences

The use of bodily harm in the name of drug control is not limited to the interrogation room. In fact, physical violence exists as a sanctioned form of punishment in some States who continue to issue sentences of judicial corporal punishment for drug offenses. The offenses for which judicial corporal punishment can occur run the spectrum of illicit drug-related activity, including production, trafficking, possession, and use.<sup>66</sup> As established earlier, the legal status of corporal punishment has evolved over time and is now prohibited under both customary and treaty-based international law.<sup>67</sup> While there has been no global, systematic analysis of how many States sanction corporal punishment for drug offenses, at least 12 countries have been identified by human rights monitors and systematically reviewed.<sup>68</sup> Special Rapporteurs have repeatedly called on States to abolish the practice of judicial corporal punishment entirely, including during visits to States that punish for drug offenses.<sup>69</sup> However, the monitoring body of the international drug control treaties, the International Narcotics Control Board, has not made public calls for States to abolish such activities in the context of drug control and has further praised several States for their drug control efforts with known records of corporal punishment for drug offenses, pointing again to a lack of coherence within the UN system.<sup>70</sup>

---

<sup>64</sup> Report of the Special Rapporteur on Torture, Mission to Kazakhstan (16 December 2009) A/HRC/13/39/Add.3, para 85; See also Report of the Special Rapporteur on Torture (09 August 2013) A/68/295, para 68

<sup>65</sup> Report of the Special Rapporteur on Torture, Mission to Indonesia (10 March 2008) A/HRC/7/3/Add.7, paras 22, 64 and Appendix 1, para 2

<sup>66</sup> Eka Iakobishvili, 'Inflicting Harm: Judicial corporal punishment for drug and alcohol Offences in selected countries' (Harm Reduction International, 2011)

<sup>67</sup> *Prosecutor v Furundzija* (10 December 1998, Case No. IT-95-17/I-T); *Prosecutor v Delacic and Others* (16 November 1998, Case No. IT-96-21-T, §454); *Prosecutor v Kunarac* (22 February 2001, Case Nos. IT 96-23-T and IT-96-23/1, §466); ICCPR, Article 7; CAT, Article 16; UN Committee against Torture, Concluding observations: Indonesia (2 July 2008) CAT/C/IDN/CO/2, paras 15–17; Report of the Special Rapporteur on Torture, Mission to Indonesia (10 March 2008) A/HRC/7/3/Add.7, para 75

<sup>68</sup> As of 2011, see, Eka Iakobishvili, 'Inflicting Harm: Judicial corporal punishment for drug and alcohol Offences in selected countries' (Harm Reduction International, 2011)

<sup>69</sup> Special Rapporteur on Torture, Mission to Indonesia (10 March 2008) A/HRC/7/3/Add.7, para 75; Report of the Special Rapporteur on Torture (2005) A/60/316, para 28; Report of the Special Rapporteur on Torture, Mission to Nigeria (22 November 2007) A/HRC/7/3/Add.4, paras 56-58

<sup>70</sup> UNODC Executive Director, Yuri Fedotov, praised Iran for taking a very active role in the global fight against illicit drugs and encouraged the UN to continue supporting these efforts: Meeting of Representative of UNODC Leik Boonwaat with Iranian Interior Minister Abdolreza Rahmani Fazli in Tehran (28 December 2013); see practices of judicial corporal punishment in Iran



### 5.1.7. Capital punishment for drug offences

As previously established, capital punishment for drug offenses does not meet the threshold established by international human rights law of “most serious crime”. Mandate holders have raised repeated concern that even while this is established in law, thirty-three countries maintain capital drug crimes.<sup>71</sup>

Even though it is established that capital drug offenses are in themselves a violation of international law, elements that are attendant to the process of executing an individual for drug offenses present additional challenges to the prohibition of torture and other inhuman or degrading treatment. In many countries, death sentences are preceded by manifestly unfair trials.<sup>72</sup> Evidence used in trials is often obtained using torture and is frequently central to convictions.<sup>73</sup> In certain countries, children can be convicted of capital crimes and represent a considerable number of the death row population.<sup>74</sup> The transnational nature of drug trafficking results in large numbers of non-nationals facing execution with limited or no access to consular support, inadequate legal assistance, and oftentimes limited or no access to interpretation.<sup>75</sup> Executions for drug offenses are often carried out in public using methods such as hanging that directly contravene the prohibition of inhuman treatment.<sup>76</sup>

Of the thirty-three countries with capital drug crimes, mandate holders have visited six, calling for abolition either outright or for a reduction in scope during only four of these visits.<sup>77</sup> While the Special Rapporteur included recommendations for the abolition of the practice in several of these States,<sup>78</sup> there were not consistent calls or recommendations for the abolition of the death penalty for drug offenses. Highlighted as a concern throughout the lifetime of this mandate, the practice engages the mandates of several special procedures and

---

reviewed here: Eka Iakobishvili, ‘Inflicting Harm: Judicial corporal punishment for drug and alcohol Offences in selected countries’ (Harm Reduction International, 2011) pp 19-20

<sup>71</sup> Report of the Special Rapporteur on Torture (14 January 2009) A/HRC/7/3; Report of the Special Rapporteur on Torture (18 January 2012) A/HRC/19/61; Report of the Special Rapporteur on Torture (06 January 1994) E/CN.4/1994/31

<sup>72</sup> Special Rapporteur on the situation of human rights in the Islamic Republic of Iran (13 March 2014) A/HRC/25/61 paras 4, 84-86; Report of the Special Rapporteur on Executions, Mission to Sudan, (6 August 2004) E/CN.4/2005/7/Add.2, para 53; Report of the Working Group on Arbitrary Detention, Visit to Iran (27 June 2003) E/CN.4/2004/3/Add.2, para 65

<sup>73</sup> UN Human Rights Council, Report of the Special Rapporteur on Torture and other, cruel, inhuman and degrading treatment or punishment, Observations on Communications transmitted to Governments and replies received (12 March 2013) UN Doc. A/HRC/22/53/Add.4, paras 62 and 118

<sup>74</sup> Joint Press Release ‘Iran: UN experts condemn public execution of juvenile and reiterate call for immediate halt on death penalty’ (21 September 2011); ‘Addicted to Death: Executions for Drug Offenses in Iran’ (Amnesty International, 2011) page 19; Special Rapporteur on the situation of human rights in the Islamic Republic of Iran (13 March 2014) A/HRC/25/61; Report of the Special Rapporteur on Executions (07 October 1996) A/51/457, para 118

<sup>75</sup> Report of the Special Rapporteur on Torture, Mission to Indonesia (10 March 2008) UN Doc. A/HRC/7/3/Add.7 para 96, 109; Addicted to Death: Executions for Drug Offenses in Iran’ (Amnesty International, 2011); Special Rapporteur on the situation of human rights in the Islamic Republic of Iran (13 March 2014) A/HRC/25/61

<sup>76</sup> Addicted to Death: Executions for Drug Offenses in Iran’ (Amnesty International, 2011); Special Rapporteur on the situation of human rights in the Islamic Republic of Iran (13 March 2014) A/HRC/25/61

<sup>77</sup> Report of the Special Rapporteur on Torture, Mission to Indonesia (10 March 2008) A/HRC/7/3/Add.7; Report of the Special Rapporteur on Torture, Mission to Sri Lanka (26 February 2008) A/HRC/7/3/Add.6, p 26; less specificity here, only referenced reducing the scope by abolition for economic and non-violent crimes: Report of the Special Rapporteur on Torture, Mission to China (10 March 2006) E/CN.4/2006/6/Add.6, p 24

<sup>78</sup> Report of the Special Rapporteur on Torture, Mission to Indonesia (10 March 2008) A/HRC/7/3/Add.7, para 89; Report of the Special Rapporteur on torture, Mission to Sri Lanka (26 February 2008) A/HRC/7/3/Add.6, p 26



recent collaboration has resulted in a joint appeal to address this practice in the context of Iran.<sup>79</sup>

## 5.2. Drug control and conditions of detention

The question of torture or cruel, inhuman or degrading treatment is one that concerns the abuse of an individual by a State authority. This question is most pertinently raised when an individual comes under the custodial supervision of a State. While the incarceration of an individual is permitted under international law, protective standards have been developed to safeguard the detained from abuse, ensure the fundamental human dignity of prisoners, and to prevent conditions of care and living from becoming inhuman and degrading.<sup>80</sup> Despite the presence of such safeguards, drug laws and policies expose individuals at all stages of detention to increased risk for inhuman or degrading treatment and at times, torture. This section will explore the existing provisions of international law to protect individuals from being subject to conditions that violate the prohibition of cruel, inhuman or degrading treatment and highlight drug control practices explored by the Special Rapporteur that come into conflict with these customary and treaty-based legal obligations.

### 5.2.1. Incommunicado detention & solitary confinement under human rights

Human rights standards protecting the individual from torture or other forms of cruel, inhuman or degrading treatment include safeguards to ensure persons taken into custody are not held incommunicado. States are obligated under international law to establish minimum procedural guarantees that ensure a person taken into police custody is brought before a judge within the first 48 hours of arrest and allowed contact with family, a legal representative, doctor and relevant consular officials throughout the period of incarceration.<sup>81</sup> Policies and laws that enable incommunicado detention regimes violate the prohibition of cruel, inhuman or degrading treatment and may rise to the level of torture.<sup>82</sup>

The protections afforded by human rights law extend beyond practices that isolate a detainee from the outside world and include safeguards against the potential effects of solitary confinement within custodial institutions.<sup>83</sup> While not absolutely prohibited under international law, solitary confinement must never be incommunicado and must adhere to the strict test of proportionality and necessity to guard against its arbitrary application.<sup>84</sup> Because

---

<sup>79</sup> Joint Press Release: "UN Special Rapporteurs outraged with recent executions in Iran", Special Rapporteur on Iran, Ahmed Shaheed, Special Rapporteur on executions, Christof Heyns, Special Rapporteur on Torture, Juan Mendez, 23 October 2012.

<sup>80</sup> ICCPR, Article 10 and 7; Standard Minimum Rules for the Treatment of Prisoners; ECHR, Article 3; ACHR, Article 5; Human Rights Committee, General Comment No. 2; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988); Convention Against Torture, Articles 10, 11 and 16; *Lantsova v. Russia* (Human Rights Committee, 2002) Comm. No. 763/1997, para 9.2; *Fabrikant v. Canada* (Human Rights Committee, 2003) Comm. No. 970/2001, para 9.3; see also *Keenan v. United Kingdom* (ECHR, 03 April 2001) App. No. 27229/95, para 90

<sup>81</sup> ICCPR, Article 9(3) and(4); International Convention Against Enforced Disappearances, Articles 17,18; Vienna Convention on Consular Relations, Article 36; ECHR, Article 5; ACHR, Article 7; Report of the Special Rapporteur on Torture E/CN.4/2003/68 para 26(g); Body of Principles 15, 32 & 33; Report of the Working Group on Arbitrary Detention (24 December 2012) A/HRC/22/44, para 75; Committee against Torture, General Comment No. 2 para 13

<sup>82</sup> *El-Megrissi v Libya* (Human Rights Committee, 1990) CCPR/C/50/D/440/1990, para 5.4; *Aber v Algeria* (Human Rights Committee, 2007) CCPR/C/90/D/1439/2005, para 7.3; *Mukong v Cameroon* (Human Rights Committee, 1994) CCPR/C/51/D/458/1991, para 9.4

<sup>83</sup> Standard Minimum Rules for the Treatment of Prisoners, Rule 31; Human Rights Committee, General Comment no. 20, para 6  
<sup>84</sup> *Illascu and others v Moldova* (ECHR, 08 July 2004) App No 48787/99, para 438-440; Committee against Torture Concluding Observations USA (25 July 2006) CAT/C/USA/CO/2, para 36

the decision to subject a detainee to solitary confinement must be an exceptional measure of last resort, each instance must be individually assessed and never extend beyond a period that is necessary.<sup>85</sup>

### 5.2.2. Human rights standards for prison conditions & access to medical care

States are obligated to take positive steps to ensure environmental conditions including hygienic standards, provision of water and food, and allocation of space for sleeping and living meet minimum standards of human dignity.<sup>86</sup> Egregious or systemic failures to uphold such standards violate the prohibition of inhuman and degrading treatment.<sup>87</sup> When a purposive element can be identified, such conditions also amount to torture.<sup>88</sup> Custodial settings that subject only certain individuals or groups in detention to such conditions are inherently inhuman and degrading.<sup>89</sup> The prohibition of inhuman or degrading treatment creates a dual obligation for States to both refrain from actions that may violate the norm and to implement preventive measures to safeguard the well being of detainees.<sup>90</sup> The latter requirement has been interpreted to include a duty to provide medical care, specifically preventive interventions and treatment of disease and illness.<sup>91</sup> The provision of harm reduction services has been established both as a component of a State's obligation to ensure the right to health of persons in detention, as well as an important safeguard to prevent torture and other cruel, inhuman or degrading treatment.<sup>92</sup>

---

<sup>85</sup> Report of the UN Special Rapporteur on Torture (28 July 2008) A/63/175, para 83, see also the Istanbul Statement (Annex to this report), which calls for complete abolition of solitary confinement for those on death row or life imprisonment, children under the age of 18, the mentally ill and also raises important concerns about its application in pre-trial detention settings; Report of the Special Rapporteur on Torture (14 January 2009) A/HRC/10/44; para 74(d)

<sup>86</sup> *Kudla v Poland* (26 October 2000, ECHR) App No 30210/96, para 94; UN Commission on Human Rights, Joint Report on the Situation of Detainees at Guantanamo Bay, E/CN.4/2006/120, para 71, see also, Report of the Special Rapporteur on Torture (1 February 2013) A/HRC/22/53; UN Human Rights Committee, Concluding observations on United States of America (6 April 1995) CCPR/C/79/ADD50, para 20; UN Committee against Torture, Concluding Observations on Zambia (2002) UN Doc A/57/44 34 para 65(b). European Committee for the Prevention of Torture (CPT), The CPT standards, CPT/Inf/E (2002) 1- Rev. 2013; UN General Assembly, 'Torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary-General' (1 September 2004) A/59/324, para 46; Report of the Special Rapporteur on Health (11 February 2005) E/CN.4/2005/51, para 12; for more on overcrowding, see *inter alia Lantsova v. Russia* (Human Rights Committee, 2002) Comm. No. 763/1997, para 9.2; *Mandić and Jović v. Slovenia* (ECHR, 20 October 2011) App. Nos. 5774/10 and 5985/10; see also *Torreggiani and others v. Italy*, (ECHR, 27 May 2013) App. Nos. 43517/09

<sup>87</sup> *Caraballal v Uruguay* (Human Rights Committee, 27 March 1981) CCPR/C/12/D/33/1978, para 13; *Baritussio v Uruguay* CCPR/C/16/D/25/19, para 11; *Yakovenko v Ukraine* (ECHR, 25 October 2007) App no 15825/06, para 81-89; *Yvon Neptune v Haiti* (IACHR, 2008) Series C No. 180, paras 127-39; Report of the Special Rapporteur on Torture, Mission to the Russian Federation, Doc E/CN.4/1995/34/Add.1, para 71; Report of the Special Rapporteur on Torture, Mission to Brazil (30 March 2001) E/CN.4/2001/66/Add.2; Rodley, *Treatment of Prisoners Under International Law*, page 392-33

<sup>88</sup> Convention Against Torture, Article 1; Report of the Special Rapporteur on Torture, Mission to the Russian Federation UN Doc E/CN.4/1995/34/Add.1 para 71

<sup>89</sup> *Mukong v Cameroon*, para 9.3;

<sup>90</sup> ICCPR, Article 6, 7, 10; CAT, Article 16; *Melnik v. Ukraine* (ECHR, 28 March 2006) Application no. 72286/01, para 93;

<sup>91</sup> Human Rights Committee, Concluding Observations on Democratic People's Republic of Korea (2001) UN Doc. A/56/40 para 86; Human Rights Committee, Concluding Observations on Portugal (2003) A/58/40, para 83(11); Human Rights Committee, Concluding Observations on Kenya (2005), A/60/40, para 86(19)

<sup>92</sup> *McGlinchey and others v. The United Kingdom* (ECHR, 29 April 2003) Application No. 50390/99, para 57; Report of the Special Rapporteur on Torture (14 January 2009) A/HRC/10/44, paras 57-59; Report of the Special Rapporteur on Torture (1 February 2013) A/HRC/22/53, para 73; Lines, Rick, 'Right to Health of Prisoners in International Human Rights Law', *International Journal of Prisoner Health*, March 2008; 4(1): 3-53

### 5.2.3. Drug control and the prison environment

The relationship of drug control and treatment in detention engages a range of questions relevant to the prohibition of torture or cruel, inhuman or degrading treatment. Sweeping criminalisation and imprisonment of individuals for drug related offenses have significantly contributed to the modern global phenomenon of mass incarceration, taxing prison systems and creating an environment where inhuman or degrading treatment is more likely to occur. The structural effects of widespread imprisonment for drug crimes have both perpetuated or deteriorated poor living standards in prisons across the globe, many of which are inhuman and degrading.<sup>93</sup> The strain imprisonment for drug offenses places on prison systems, and their subsequent impact on conditions, has consistently been a concern of the Special Rapporteurs. Criminal law provisions mandating pre-trial detention and lengthy incarceration of drug offenders have had a transformative effect on prison environments, where holding centres and prisons are badly maintained and facilities, overcrowded.<sup>94</sup> In observing overcrowded prison conditions, Special Rapporteurs have repeatedly linked poor policy provisions to the erosion of human rights protections including the incarceration of individuals for drug crimes.<sup>95</sup> Despite raising concern in several reports, there have only been three recommendations calling for policy reform, including the move away from incarceration for minor drug infractions.<sup>96</sup>

In many circumstances, criminal laws and policies authorise exceptional detention regimes for suspected drug offenders placing the individual at increased risk for torture and other prohibited treatment.<sup>97</sup> This is best illustrated through the application of criminal laws that authorise the pre-trial detention of suspected drug offenders. Detaining an individual pre-trial has long been viewed as a measure of last resort as it exposes an individual to an increased likelihood of torture or other abuse.<sup>98</sup> Special Rapporteurs have repeatedly raised concern that pre-trial detention of suspected drug offenders without judicial review exposes the individual to an increased risk for torture and other forms of ill-treatment.<sup>99</sup> Likewise,

---

<sup>93</sup> Report of the Special Rapporteur on Torture, Mission to Brazil (30 March 2001) E/CN.4/2001/66/Add.2, para 100; Report of the Special Rapporteur on Torture, Manfred Nowak, Mission to Indonesia (10 March 2008) UN Doc. A/HRC/7/3/Add.7

<sup>94</sup> Report of the Special Rapporteur on Torture, Mission to Greece (21 April 2011) A/HRC/16/52/Add.4, para 77; Report of the Special Rapporteur on Torture, Mission to Brazil (30 March 2001) E/CN.4/2001/66/Add.2, para 100; Report of the Special Rapporteur on Torture, Mission to Indonesia (10 March 2008) A/HRC/7/3/Add.7, p 28

<sup>95</sup> Report of the Special Rapporteur on Torture, Mission to Gambia (16 March 2015) A/HRC/28/68/Add.4, para 77; Report of the Special Rapporteur on Torture, Mission to Greece (21 April 2011). A/HRC/16/52/Add.4, para 77 and Recommendation 13 on p 25; Report of the Special Rapporteur on Torture, Mission to Indonesia (10 March 2008) A/HRC/7/3/Add.7, p. 28; Report of the Special Rapporteur on Torture, Mission to Brazil (30 March 2001) UN Doc. E/CN.4/2001/66/Add.2, para 100, though no recommendations were made explicitly referencing drug policy reform despite highlighting 40% of the prison population in Brazil may be in detention for drug offenses; Preliminary Conclusions of UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment, Juan Mendez, Visit to Mexico, 21 April-2 May 2014—though drug crimes were not explicitly addressed.

<sup>96</sup> Report of the Special Rapporteur on Torture, Mission to Tunisia (27 Feb 2015) A/HRC/28/68/Add.2, para 111; Report of the Special Rapporteur on Torture, Mission to Gambia (15 March 2015) A/HRC/28/68/Add.4 para 116; Report of the Special Rapporteur on Torture, Manfred Nowak, Mission to Greece (21 April 2011) A/HRC/16/52/Add.4, para 77

<sup>97</sup> For further details on the practice of compulsory drug detention, see Section 5.3.2.

<sup>98</sup> Report of the Special Rapporteur on Torture (25 January 2001) E/CN.4/2001/66, para 843; Report of the Special Rapporteur on Torture, visits to Peru, Republic of Korea and Turkey (23 January 1989) E/CN.4/1989/15, para 172; Preliminary Conclusions of UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment, Juan Mendez, Visit to Mexico, 21 April-2 May 2014

<sup>99</sup> Report of the Special Rapporteur on Torture (25 January 2001) E/CN.4/2001/66, para. 843; Report of the Special Rapporteur on Torture, visits to Peru, Republic of Korea and Turkey (23 January 1989) E/CN.4/1989/15, para 172

such law and policy positions often facilitate the incommunicado detention of suspected drug offenders.<sup>100</sup>

While in prison, drug offenders or people who use drugs are arbitrarily subject to substandard living conditions, including solitary confinement, without adequate safeguards in place to ensure such measures are necessary and proportionate.<sup>101</sup> The confinement of prisoners who use drugs to isolation cells that result in total sensory deprivation were highly criticized by the Special Rapporteurs.<sup>102</sup>

#### **5.2.4. Harm reduction, torture and inhuman and degrading treatment**

The current law enforcement approach to drug use means that people who use drugs, including those who use drugs dependently, frequently cycle in and out of incarceration systems.<sup>103</sup> Likewise, prisons can be where people are first introduced to drug use, oftentimes to cope with the harsh conditions and realities of their detention.<sup>104</sup> Despite positive obligations to provide medical screening, care, and treatment, people in detention who use drugs are regularly denied access to harm reduction services including opioid substitution therapies and needle exchange programmes.<sup>105</sup> As a result, drug dependent individuals in prisons are forced to experience agonising withdrawal symptoms and prison communities face endemic disease prevalence—experiences and conditions that give rise to inhuman and degrading treatment, and possibly torture.<sup>106</sup>

Mandate holders have made considerable efforts to advance the formal recognition of people who use drugs in detention as a vulnerable group in thematic and country work including in a contribution for the revision of the Standard Minimum Rules for the Treatment of Prisoners.<sup>107</sup> While States are required to provide medical services to the general prison population, specific measures to ensure the appropriate medical care of vulnerable groups—such as people who use drugs—must be incorporated into policy and carried out in accordance with human rights law. The provision of harm reduction services ensures custodians have a

---

<sup>100</sup> Report of the Special Rapporteur on Torture, Visit to Turkey (27 January 1999) E/CN.4/1999/61/Add.1 para 106; Report of the Special Rapporteur on Torture (26 January 2001) para 843, 1311; Report of the Special Rapporteur, Visit to Mexico (14 January 1998) E/CN.4/1998/38/Add.2, p 41; Report of the Special Rapporteur, Visit to Mexico (29 December 2014) A/HRC/28/68/Add.3, paras 23-25; see also 'Out of Control: Torture and Other Ill-Treatment in Mexico' (Amnesty International, 2014) page 36

<sup>101</sup> 'Barred From Treatment: Punishment of Drug Users in New York State Prisons' (Human Rights Watch, 2009) pages 39-42; Report of the Special Rapporteur on Torture (05 February 2010) A/HRC/13/39/Add.5, para 237

<sup>102</sup> Report of the Special Rapporteur on Torture, A/HRC/10/44 (14 January 2009) para 67; Report of the Special Rapporteur on Torture, Visit to Turkey (27 January 1999) E/CN.4/1999/61/Add.1, para 22

<sup>103</sup> UN Human Rights Council, Report of the Special Rapporteur on Torture, Manfred Nowak (14 January 2009) UN Doc. A/HRC/10/44, para 55; UN Commission on Human Rights, Report of the Special Rapporteur on Torture: Summary of cases transmitted to Governments and replies received, Nigel Rodley, (14 March 2002) UN Doc. E/CN.4/2002/76/Add.1, para. 210; Ralf Jurgens, Rick Lines, Catherine Cook, 'Out of Sight, Out of Mind? Harm Reduction in Prisons and other Place of Detention' Global State of Harm Reduction 2010 (Harm Reduction International, 2011) p 106

<sup>104</sup> *Ibid*

<sup>105</sup> Global State of Harm Reduction (Harm Reduction International, 2014) p 17; Report of the Special Rapporteur on Torture, A/HRC/10/44 (14 January 2009) para 61

<sup>106</sup> Report of the Special Rapporteur on Torture, A/HRC/10/44 (14 January 2009) para 61-62; Report of the Special Rapporteur on Torture (16 November 1994) E/CN.4/1995/34/Add.1, para 85; human rights case law review available in: Rick Lines, 'From equivalence of standards to equivalence of objectives: The entitlement of prisoners to health care standards higher than those outside prisons' International Journal of Prisoner Health, December 2006, p 276

<sup>107</sup> Interim Report of the Special Rapporteur on Torture (09 August 2013) A/68/295; Report of the Special Rapporteur on Torture (5 February 2010) A/HRC/13/39/Add.5, para 237

mechanism in place to prevent torture and other prohibited treatment of prisoners requiring preventive and therapeutic medical attention.<sup>108</sup> In several strong recommendations, the current and former Special Rapporteurs highlighted the importance of preventive harm reduction measures such as needle and syringe exchange programmes to reduce the risk and spread of infectious diseases amongst people who use drugs in detention—particularly, HIV and Hepatitis C.<sup>109</sup> The denial of such specialist preventive care in detention can amount to inhuman or degrading treatment.<sup>110</sup> Practices denying therapeutic medical care such as opiate substitution treatment, to those experiencing withdrawal is inhuman and degrading.<sup>111</sup> The denial of opioid substitution treatment for the purposes of extracting information or a confession is a direct violation of the prohibition of torture.<sup>112</sup>

Despite legal obligations to ensure the adequate provision of medical care for prisoners, including those who use drugs, States fail in both policy and practice fail to uphold legally binding international standards. The denial of care is often overridden by drug control imperatives based on false presumptions: drug supplier information can be easily collected from a person experiencing withdrawal, provision of clean needles encourages drug use, etc. These practices intimate that the suppression of illicit drugs must take precedence over the individuals whose rights are gravely undermined by such measures. As has been highlighted by various mandate holders, the legality of such a position collapses when subject to human rights scrutiny.

### **5.3. Drug control and involuntary medical interventions**

While the previous section concluded with an examination of drug control practices that deny medical care to persons deprived of their liberty who use drugs, this section will turn to State practices that are in many ways antithetical. That is, when State laws and policies authorize the provision of involuntary medical treatment to persons suspected of using drugs or those using drugs dependently. The mandate holders of this special procedure have contributed significantly to the evolving consideration of torture and other forms of inhuman or degrading treatment, particularly as it relates to involuntary medical treatment of vulnerable groups, including people who use drugs.

#### **5.3.1. Involuntary medical interventions under human rights law**

The scope of a States' obligation to prohibit, prevent and remedy torture and other forms of cruel, inhuman or degrading treatment is not limited to traditional prison settings, extending

---

<sup>108</sup> Report of the Special Rapporteur on Torture, A/HRC/22/53 para 87(d); Report of the Special Rapporteur on the right to the highest attainable standard of health (06 August 2010) A/65/255, para 76

<sup>109</sup> Report of the Special Rapporteur on Torture (09 August 2013) A/68/295, para 71; Report of the Special Rapporteur on Torture (14 January 2009) A/HRC/10/44, para 57-59; Report of the Special Rapporteur on Torture, Mission to Kazakhstan (16 December 2009) A/HRC/13/39/Add.3, paras 29 and 85(b); Report of the Special Rapporteur on Torture (21 February 2012) A/HRC/19/61/Add.2, para 66

<sup>110</sup> Report of the Special Rapporteur on Torture (14 January 2009) A/HRC/10/44, para 62

<sup>111</sup> Report of the Special Rapporteur on Torture (1 February 2013) A/HRC/22/53, para 73; Report of the Special Rapporteur on Torture, Mission to Greece (21 April 2011) A/HRC/16/52/Add.4, para 77; *McGlinchey and others v. the United Kingdom* (ECHR, 29 July 2003) Appl. No. 50390/99

<sup>112</sup> Report of the Special Rapporteur on Torture (01 February 2013) A/HRC/22/53, para 73; Report of the Special Rapporteur on Torture, A/HRC/10/44 (14 January 2009) para 57, 71



to a range of custodial and control environments, such as healthcare settings, children's homes, and other institutions.<sup>113</sup> Medical interventions may reach the threshold of prohibited acts of torture if characterised by four defining elements referenced above in Section 5.1.1., including the presence of severe pain and suffering, elements of intent and purpose, and the involvement or acquiescence of a public official. Medical interventions that fall below the threshold established by the above criteria may still be characterised as inhuman or degrading treatment.<sup>114</sup> As noted earlier, when assessing conduct as degrading, the severity threshold is lessened and actions taken to "humiliate" the individual are sufficient to come into conflict with the prohibition.<sup>115</sup>

In examining the legality of a medical intervention under the prohibition of torture and other forms of cruel, inhuman or degrading treatment, several important interpretive principles are relevant:

- Non-discrimination: Medical interventions must never be discriminatory;<sup>116</sup>
- Informed consent: All medical interventions must centre on informed consent, emanating from the principles of autonomy and human dignity;<sup>117</sup>
- Medical necessity: All medical interventions must carefully balance "medical necessity" with informed consent.<sup>118</sup>

Under human rights law, involuntary medical interventions are not *per se* unlawful, but are substantially limited by safeguards to ensure such interventions do not become prohibited forms of treatment.<sup>119</sup> The circumstances in which involuntary medical procedures may be considered are limited to exigent circumstances such as for purposes of collecting evidence,<sup>120</sup> the control or prevention of infectious disease,<sup>121</sup> or medical necessity.<sup>122</sup> Even in such limited circumstances, any intervention must always be the least intrusive means medically necessary, be of limited duration, be subject to judicial review, and be of scientifically

---

<sup>113</sup> Committee Against Torture, General Comment 1, para 15; Human Rights Committee, General Comment 21, para 3; *Minor in Detention v. Honduras*, Case 11.491, Report No. 41/99, OEA/Ser.L/V/II.95 Doc. 7 rev. at 573 (IACHR, 1998), para 135; Report of the Special Rapporteur on Torture (09 August 2013) A/HRC/22/53, paras 23-25; Convention on the Rights of the Child, UNGA Res. 44/25, Annex, UN Doc. A/ 44/49 (November 20, 1989), Article 37(a)

<sup>114</sup> See Section 5.1.1. for more elaboration.

<sup>115</sup> *Ibid*; see also, *Ireland v. United Kingdom*, para. 167; *Loayza Tamayo v. Peru*, Series C., No. 33 (IACHR, 1997), para 57

<sup>116</sup> CAT, Article 2; ICCPR Article 7; discriminatory application of medical interventions sufficiently meets the definition of intent as identified in CAT, Article 1, see: Report of the Special Rapporteur on Torture (28 July 2008) A/63/175, para 49; Report of the Special Rapporteur on Torture (01 February 2013) A/HRC/22/53 paras 20, 36-38; Committee against Torture, General comment No. 2, para 21; *Ximenes Lopes v. Brazil*, para 103

<sup>117</sup> ICCPR, Article 7; Human Rights Committee, General Comment 20: Article 7 (1994), para 7; Convention of the Rights of Persons with Disabilities, article 3(a)

<sup>118</sup> *Jalloh v. Germany* (ECHR, 11 July 2006) App. No. 54810/00, para. 82; Report of the Special Rapporteur on Torture (28 July 2008) A/63/175, para 59: where a vulnerability exists and the more intrusive/irreversible the procedure, the greater the responsibility of the State to ensure protections are in place to obtain free and informed consent

<sup>119</sup> Report of the Special Rapporteur on Torture (01 February 2013) A/HRC/22/53 paras 31-35; 'If forcible testing is done on a discriminatory basis without respecting consent and necessity requirements, it may constitute degrading treatment'; Report of the Special Rapporteur on Torture (14 January 2009) A/HRC/10/44, para 65

<sup>120</sup> *Saunders v. the United Kingdom* (ECHR, 17 December 1996) App. No. 19187/91, paras 69-74

<sup>121</sup> ICESCR, General Comment 14

<sup>122</sup> *Jalloh v Germany*, *supra* note 120



accepted therapeutic value.<sup>123</sup> These circumstances require that consent is initially sought and presume consent is either refused or not possible because the individual lacks the capacity to make such decisions on their own. The international legal standards underpinning the interpretation of legal capacity are evolving, further limiting forcible interventions based on—oftentimes, dubious—grounds of medical necessity.<sup>124</sup> Denying someone legal capacity directly contributes to an environment where torture and other prohibited treatment is more likely to occur.<sup>125</sup>

### ***5.3.2. Drug control and involuntary medical interventions***

While international human rights law elaborates extensive safeguards to protect an individual from involuntary medical interventions that amount to prohibited treatment, people who use drugs or are suspected of using drugs are routinely subject to treatment that comes into conflict with these protections. Such treatment usually occurs while individuals are detained as a result of either criminal charges or because of their suspected drug use.<sup>126</sup> In some parts of the world, involuntary medical interventions of persons suspected of using drugs are widespread and systematic.<sup>127</sup> While the international drug control conventions call for the provision of treatment for those dependent on controlled substances, particularly as an alternative to incarceration, there is no legal standard obligating States to implement compulsory measures.<sup>128</sup> Special Rapporteurs of this mandate have undertaken detailed examinations of forcible medical interventions on people suspected of using drugs, calling for drug dependency—where it exists—to be treated the same as any other medical condition to avoid conflict with human rights.<sup>129</sup>

Owing to an overall lack of harm reduction services worldwide, people who inject drugs commonly have a higher HIV/AIDS and Hepatitis C disease prevalence than the average population. As a result, in many countries, people who use drugs are disproportionality

---

<sup>123</sup> *Gorobet v Moldova* (ECHR, 11 October 2011) Application No. 30951/10, para 52; *Jalloh v. Germany* (ECHR, 11 July 2006), para 82; *Herzegfalvy v Austria* (ECHR, September 1992) Application No. 10533/83, para 82

<sup>124</sup> Report of the Special Rapporteur on Torture (28 July 2008) A/63/175, paras 40, 47 and 50; Report of the Special Rapporteur on Torture (01 February 2013) A/HRC/22/53 paras 27–30; Convention on the Rights of Persons with Disabilities; UN Committee on Economic, Social and Cultural Rights, General Comment 14: Right to the highest Attainable Standard of physical and mental health (2000) para 34

<sup>125</sup> Report of the Special Rapporteur on Torture (01 February 2013) A/HRC/22/53 para 30; Report of the Special Rapporteur on Torture (28 July 2008) A/63/175 paras 47, 74

<sup>126</sup> For further details regarding the arbitrary detention of people who use drugs, see Julie Hannah and Nahir de la Silva, ‘Human Rights, Drug Control and the UN Special Procedures: Preventing arbitrary detention through the promotion of human rights in drug control’ [http://www.hr-dp.org/files/2015/02/02/WGAD.FINAL\\_30\\_Jan\\_2015\\_.pdf](http://www.hr-dp.org/files/2015/02/02/WGAD.FINAL_30_Jan_2015_.pdf)

<sup>127</sup> As many as 500,000 people worldwide are detained and forced to undergo drug rehabilitation treatment, see Report of the Special Rapporteur on Torture (01 February 2013) A/HRC/22/53, paras 40–44; Ralf Jurgens and Joanne Csete, ‘In the name of treatment: ending abuses in compulsory drug detention centers’, *Addiction*, vol. 107, issue 4, April 2012, pp. 689–691; Richard Elliot, Rick Lines, Rebecca Schleifer, Alison Symington ‘Treatment or Torture? Applying international human rights standards to drug detention centres’ (Open Society Foundations, 2011) pp 20–25

<sup>128</sup> 1961 Convention, article 38; 1971 Convention, article 20, 22(1)(b); 1988 Convention, article 3(4); for further analysis on the issue of compulsory treatment and the UN drug conventions, see Rick Lines, ‘Treatment in Liberty’ *International Law Journal of Drug Policy*, Volume 3 (publication forthcoming in 2015)

<sup>129</sup> Report of the Special Rapporteur on Torture (14 January 2009) A/HRC/10/44, para 59; WHO/United Nations Office on Drugs and Crime Principles of Drug Dependence Treatment, Discussion Paper (March 2008) p 10

subject to forcible testing for infectious disease, particularly HIV and Hepatitis C.<sup>130</sup> Procedural safeguards required to protect an individual from inhuman or degrading treatment are often absent. Notably, custodians or health care providers often perform testing as a matter of procedure without any effort to obtain informed consent. The application of such testing regimes, which fail to demonstrate necessity and discriminately target people who use drugs without their informed consent may rise to a level of inhuman or degrading treatment.<sup>131</sup> In some circumstances, testing results are withheld from the individual, which can lead to anguish amounting to prohibited treatment.<sup>132</sup>

The current and past Special Rapporteurs of this special procedure have extensively examined compulsory drug detention centres commonly run by security forces, law enforcement or private companies.<sup>133</sup> In such institutions people who use drugs are subject to a range of abusive measures, including painful withdrawal without medical assistance, administration of unknown or experimental medications, corporal punishment, forced labour, sexual abuse and intentional humiliation.<sup>134</sup> The extent to which compulsory drug detention specifically engages the prohibition of torture and other forms of cruel, inhuman or degrading treatment requires further assessment. The circumstances leading to a compulsory rehabilitative order are often based on grounds of medical necessity—that a person who uses drugs poses a threat to themselves or society because of their drug use. Drug use or dependence alone is not sufficient for involuntary commitment and such measures can only be compliant with the safeguards to prevent inhuman or degrading treatment if there is an imminent risk of immediate danger to oneself or others and the individual lacks legal capacity to consent.<sup>135</sup> More broadly, the form of medical intervention must be of therapeutic value based on scientific evidence available at the time.<sup>136</sup> Compulsory confinement for purposes of drug dependence treatment is not viewed by the scientific community as a therapeutically

---

<sup>130</sup> Interim Report of the Special Rapporteur on Torture, Juan Mendez (9 August 2013) A/68/295, para 47; Report of the Special Rapporteur on Torture (9 February 2010) A/HRC/13/39, para 74; Report of the Special Rapporteur on Torture (14 January 2009) A/HRC/10/44, paras 63-65.

<sup>131</sup> Report of the Special Rapporteur on Torture (01 February 2013) A/HRC/22/53, para 71; Report of the Special Rapporteur on Torture (14 January 2009) A/HRC/10/44, para 65; UNAIDS/WHO Policy statement on HIV (June 2004) [www.who.int/rpc/research\\_ethics/hivtestingpolicy\\_en\\_pdf.pdf](http://www.who.int/rpc/research_ethics/hivtestingpolicy_en_pdf.pdf) <last accessed 10 May 2015>

<sup>132</sup> Report of the Special Rapporteur on Torture (14 January 2009) A/HRC/10/44, para 64-65; 'At What Cost? HIV and Human Rights Consequences of the Global "War on Drugs"' (Open Society, March 2009) Vietnam at p 156 and Pakistan at p 174; similar example in China here: J.E. Cohen & J. Amon, "Health and Human Rights Concerns of Drug Users in Detention in Guangxi Province, China," PLoS Medicine 2008; 5(12): e234; also in Malaysia cited here World Health Organization, Regional Office for the Western Pacific, Assessment of Compulsory Treatment of People Who Use Drugs in Cambodia, China, Malaysia and Viet Nam: An Application of Selected Human Rights Principles (2009), p 19

<sup>133</sup> Religious institutions as well, Report of the Special Rapporteur on Torture (1 February 2013) A/HRC/22/53 para 40; See also Wolfe D., Death, Drug Treatment and Christ's Love (Open Society Foundations Voice Blogs) 14 February 2012, available at: <http://www.opensocietyfoundations.org/voices/death-drug-treatment-and-christ-s-love>

<sup>134</sup> Interim Report of the Special Rapporteur on Torture (9 August 2013) A/68/295, para 47; Report of the Special Rapporteur on Torture (9 February 2010) A/HRC/13/39, para 74; Report of the Special Rapporteur on Torture (5 February 2010) A/HRC/13/39/Add.5, para 221; Report of the Special Rapporteur on Torture (14 January 2009) A/HRC/10/44, paras 63-65

<sup>135</sup> Report of the Special Rapporteur on Torture (01 February 2013) A/HRC/22/53, instructive guidance can be found as it relates to the detention of persons with disabilities at para 68, see also calls to close compulsory centres entirely at para 87; Report of the Special Rapporteur on the right to the highest attainable standard of mental and physical health (08 August 2010) A/65/255 paras 30-39; Richard Elliot, Rick Lines, Rebecca Schleifer, Alison Symington 'Treatment or Torture? Applying international human rights standards to drug detention centres' (Open Society Foundations, 2011) p 22

<sup>136</sup> *Herzegovina v Austria* (ECHR, September 1992) para 82

valid medical intervention and may alone amount to inhuman or degrading treatment.<sup>137</sup> When such an involuntary confinement is aggravated by abusive practices in the name of 'rehabilitation', such treatment may rise to the level of torture.<sup>138</sup> As such, compulsory confinement may only be permitted treatment when an immediate danger is present and only for the purposes of enabling the individual to return to a state of personal autonomy over their decisions, and in all circumstances, judicial review must be available for the duration of the commitment.

Condemnation of the *en masse* compulsory detention of people suspected of using drugs has been voiced across the United Nations system.<sup>139</sup> While not directly naming the States where such practice is common, the Special Rapporteur has urged all States to close without delay compulsory drug detention centres and implement voluntary, evidence-based and rights-based health and social services for people who use drugs in the community.<sup>140</sup> Despite these calls, compulsory drug detention centres continue to operate in States across the globe. Many of these centres receive assistance from the United Nations or bilateral donors in the form of technical and material support.<sup>141</sup> Increasingly, donor States and organisations are withdrawing their support for programmes as the political reasons for such on-going assistance becomes less tenable and the legal case obligating them to withdraw becomes increasingly strong.<sup>142</sup>

#### 5.4 Drug control & access to essential controlled medicines for palliative care

Currently, 80% of the world's population has either limited or no access to treatment for severe pain, particularly populations located in the Global South.<sup>143</sup> Opioid analgesics, such as morphine, are an inexpensive and highly effective therapy for the management and cessation of chronic and severe pain and as such, are listed by the WHO as an essential medicine for both adults and children.<sup>144</sup> Under the current international system of drug control, morphine and other essential narcotics are subject to strict regulation to prevent

---

<sup>137</sup> Report of the Special Rapporteur on Torture (01 February 2013) A/HRC/22/53, para 42; United Nations Office on Drugs and Crime (UNODC) and WHO, "Principles of drug dependence treatment", discussion paper, 2008 "neither detention nor forced labour have been recognized by science as treatment for drug use disorders"; Richard Elliot, Rick Lines, Rebecca Schleifer, Alison Symington 'Treatment or Torture? Applying international human rights standards to drug detention centres' (Open Society Foundations, 2011) p 22

<sup>138</sup> ICCPR, Article 7; this includes the practice of experimental treatment and extreme physical abuse, documented in compulsory rehabilitation centres in Southeast Asia. For a selection of case examples and further analysis, see Richard Elliot, Rick Lines, Rebecca Schleifer, Alison Symington 'Treatment or Torture? Applying international human rights standards to drug detention centres' (Open Society Foundations, 2011) pp 36-43

<sup>139</sup> Report of the Special Rapporteur on the right to the highest attainable standard of mental and physical health (08 August 2010) A/65/255 paras 30-39; Joint statement on compulsory drug detention and rehabilitation centres ILO, OHCHR, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UN Women, WFP, WHO and UNAIDS (March 2012):

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11941&LangID=E>; Amon, J. J., Pearshouse, R., Cohen, J. E., & Schleifer, R. (2014). Compulsory drug detention in East and Southeast Asia: Evolving government, UN and donor responses. *International Journal of Drug Policy*, 25(1), 13-20

<sup>140</sup> Report of the Special Rapporteur on Torture (1 February 2013) A/HRC/22/53, para 72-74

<sup>141</sup> Patrick Gallahue, Roxanne Saucier and Damon Barrett, 'Partners in Crime: International Funding for Drug Control and Gross Violations of Human Rights' (Harm Reduction International, 2012) pp 17-32

<sup>142</sup> *Ibid* pp 33-37; Report of the Special Rapporteur on Torture (01 February 2013) A/HRC/22/53, para 87(b)

<sup>143</sup> WHO background note: Access to Controlled Medications Programme, September 2008; Report of the Special Rapporteur on Torture (9 February 2010) UN Doc. A/HRC/13/39, para 69; Report of the Special Rapporteur on Torture (01 February 2013) A/HRC/22/53, para 51

<sup>144</sup> WHO Model List of Essential Medicines (October 2013) <http://www.who.int/medicines/publications/essentialmedicines/en/>

diversion for non-medical and non-scientific uses.<sup>145</sup> While the 1961 Single Convention on Narcotic Drugs is the primary legal instrument affecting the regulation of opioid analgesics, States and monitoring mechanisms have devoted most of their resources towards fighting illicit diversion with scant attention to ensuring the provision of adequate medical supply.<sup>146</sup> The resulting framework of complex regulatory barriers has contributed to a global deficit in the supply of palliative treatment and has significant bearing on States' human rights obligations, particularly the right to health and the prohibition of torture and other cruel, inhuman or degrading treatment.

### 5.3.3. Palliative care and the prohibition of inhuman or degrading treatment

The prohibition of torture and other forms of cruel, inhuman or degrading treatment contains both positive obligations and negative obligations to protect an individual from prohibited acts of abuse.<sup>147</sup> As such, a State's obligation under the prohibition of torture and other cruel inhuman or degrading treatment is engaged when suffering should be reasonably known and the State fails to take reasonable steps to protect the physical and mental integrity of an individual.<sup>148</sup> Even though low supply levels of palliative medicines are largely due to neglect and not explicit intent to impose suffering, failure to provide palliative medicines may constitute inhuman or degrading treatment when such suffering reaches a minimum threshold of severity.<sup>149</sup> The severity level of pain experienced by those with terminal or chronic disease has been documented at length and must be assessed in each individual context.<sup>150</sup> The previous and current Special Rapporteurs of this special procedure have examined the issue and found the *de facto* denial of palliative medicine, if it causes severe mental or physical suffering, constitutes inhuman and degrading treatment. While not the lone reason for poor access, the international drug control system has been highly criticised as contributing to poor supply, particularly because of the overly restrictive regulatory framework it imposes upon States.<sup>151</sup>

## 6. Interplay with other mandate holders

Drugs laws, policy and enforcement activities engage a broad spectrum of human rights

---

<sup>145</sup> Single Convention on Narcotic Drugs, preamble, article 4(c)

<sup>146</sup> Report of the International Narcotics Control Board, 'Availability of Internationally Controlled Drugs: Ensuring Adequate Access for Medical and Scientific Purposes' (2010) [http://www.incb.org/files/2013/12/11/Availability\\_of\\_Internationally\\_Controlled\\_Drugs,\\_Ensuring\\_Adequate\\_Access\\_for\\_Medical\\_and\\_Scientific\\_Purposes,\\_INCB\\_2010\\_Full\\_Report.pdf](http://www.incb.org/files/2013/12/11/Availability_of_Internationally_Controlled_Drugs,_Ensuring_Adequate_Access_for_Medical_and_Scientific_Purposes,_INCB_2010_Full_Report.pdf) <last accessed 02 May 2015>; Moszynski P, "Restrictive Government Drug Policies Leave Kenyan Children Dying in Pain." (7772) 341 BMJ: British Medical Journal (Overseas & Retired Doctors Edition). 9/11/2010;

<sup>147</sup> ICCPR, Article 7

<sup>148</sup> *Osman v. United Kingdom* (ECHR, 1998) Application No. 23452/94, paras 115- 122; *Opuz v Turkey*, (ECHR, 9 June 2009) App. No. 33401/02, para 176; *Lopez Ostra v Spain* (ECHR, 9 December 1994) App. No. 16798/90, para. 60; ICESCR, General Comment 14: Right to the Highest Attainable Physical and Mental Health, para 12.

<sup>149</sup> See also Section 5.1.1.; Report of the Special Rapporteur on Torture (1 February 2013) A/HRC/22/53, para. 54; see also Letter from Manfred Nowak, Special Rapporteur on Torture, and Anand Grover, Special Rapporteur on the right to the highest attainable standard of health, to Her Excellency Ms. Selma Ashipala-Musavyi, Chairperson of the 52nd Session of the Commission on Narcotic Drugs, December 10, 2008; CESCR, General Comment 14, para 12

<sup>150</sup> Joseph Amon and Diederik Lohman, "Denial of Pain Treatment and the Prohibition of Torture, Cruel, Inhuman or Degrading Treatment or Punishment" INTERIGHTS Bulletin Volume 16 Number 4 2011 pp 173-174

<sup>151</sup> Report of the Special Rapporteur on Torture (1 February 2013) UN Doc. A/HRC/22/53, para 53; Report of the Special Rapporteur on Torture (14 January 2009) UN Doc. A/HRC/10/44, para 70

issues. Health, arbitrary detention, capital punishment, due process, consent to treatment, prisons and policing, indigenous rights, women’s rights and children’s rights are just a few of the areas in which drug law and policy have a direct impact, often resulting in violations of international human rights law. Similar contemporary human rights challenges of a systemic nature – those engaging a broad spectrum of rights, challenging peremptory norms of international law or displacing human rights for reasons of security or other State/private interests – have previously received thematic consideration by members of the special procedures. Some of these thematic concerns, such as counter-terrorism, have given rise to specific mandates, while others have been examined thematically through individual and joint reports.<sup>152</sup>

Considering the scope of the human rights impacts of drugs laws and policies in the context of past practice, it is proposed that the ‘promotion and protection of human rights while countering the world drug problem’ be taken up as a thematic concern by the special procedures. In the absence of a specific mandate, there is important work to be done by existing mandate-holders both individually and jointly. Several mandate holders have done work on drug control issues in the past, but there remain numerous opportunities for dynamic collaboration with additional special procedure mandates, to bring a more comprehensive and detailed human rights analysis to the issues involved.

**Table 6.1 Individual thematic consideration of drug control policies**

Report	Mandate
‘Right of everyone to the highest attainable standard of mental and physical health’ A/65/255 (06 August 2010)	Special Rapporteur on the right to the highest attainable standard of health
‘Applying a human rights-based approach to drug control’ A/HRC/10/44 (14 January 2009) paras 49-74	Special Rapporteur on torture and other forms of cruel, inhuman or degrading treatment of punishment
Report of the Special Rapporteur on Torture and other cruel, inhuman and degrading treatment or punishment, Juan Mendez, UN Doc. A/HRC/22/53 (1 February 2013) para 40-44, 51-56, 72-74, 86, 87	Special Rapporteur on torture and other forms of cruel, inhuman or degrading treatment of punishment

**Table 6.2 Joint collaboration on drug control policies**

Communication	Mandate
Urgent appeal to Colombia on aerial fumigation (June 2014)	Special Rapporteur on the right to the highest attainable standard of health Special Rapporteur on the rights of indigenous peoples

<sup>152</sup> Joint Study On Global Practices In Relation To Secret Detention In The Context Of Countering Terrorism Of The Special Rapporteur On The Promotion And Protection Of Human Rights And Fundamental Freedoms While Countering Terrorism; The Special Rapporteur On Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment; the Working Group On Arbitrary Detention; and the Working Group On Enforced Or Involuntary Disappearances (19 February 2010) A/HRC/13/42; Situation of detainees at Guantánamo Bay, Report of the Working Group on Arbitrary Detention; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on freedom of religion or belief; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (27 February 2006) E/CN.4/2006/120

Joint Press Release 'Iran: UN experts condemn public execution of juvenile and reiterate call for immediate halt on death penalty' (21 September 2011)	Special Rapporteur on torture and other forms of cruel, inhuman or degrading treatment of punishment Special Rapporteur on summary, arbitrary or extrajudicial executions Special Rapporteur on the situation of human rights in the Islamic Republic of Iran Special Rapporteur on the independence of judges and lawyers
Joint Press Release: 'UN experts call for a moratorium on death penalty in Islamic Republic in Iran' (02 February 2011)	Special Rapporteur on summary, arbitrary or extrajudicial executions Special Rapporteur on the independence of judges and lawyers
Joint Letter from UN Special Rapporteurs on Health and on the Question of Torture to the UN Commission on Narcotic Drugs (10 December 2008)	Special Rapporteur on torture and other forms of cruel, inhuman or degrading treatment of punishment Special Rapporteur on the right to the highest attainable standard of health

**Table 6.3. Opportunities for future collaboration/contributions on drug control policies**

Mandate	Issue
<b>Special Rapporteurs</b>	
<b>Adequate Housing</b>	Crop eradication; loss of housing benefits and drug offenses; homelessness; discrimination; policing practices
<b>Cultural Rights</b>	Traditional practices of licit drug use; traditional medicines; cultural practices; security and development; discrimination
<b>Education</b>	Drugs education; random school drug testing; strip searches; benefits of school retention; alternative development; reduction in school attendance due to conflict; crop eradication; displacement; policing practices; cultural practices; security and development; discrimination
<b>Extreme Poverty</b>	Access to essential controlled medicines; crop eradication; alternative development; pre-trial detention; policing practices; homelessness; security and development; discrimination
<b>Human Rights Defenders</b>	Harm reduction workers; indigenous rights defenders



<b>Independence of Judges and Lawyers</b>	Mandatory sentencing; pre-trial detention
<b>Internally Displaced Persons</b>	Crop eradication; militarized responses to drug control; access to essential controlled medicines; security and development; discrimination
<b>Migrants</b>	Access to essential controlled medicines; cultural practices; discrimination; policing practices
<b>Racism</b>	Policing practices; discrimination; over-incarceration; access to essential controlled medicines; discrimination; security and development
<b>Right to Food</b>	Crop eradication; alternative development; food shortages from displacement; security and development; displacement
<b>Right to Water</b>	Crop eradication; alternative development; security and development; displacement
<b>Freedom of expression</b>	Laws prohibiting advocacy and outreach on harm reduction; anti-drug propaganda legislation
<b>Myanmar</b>	Crop eradication; militarized responses to drug control; access to essential controlled medicines; discrimination; policing; security and development; benefits of school retention; international assistance; harm reduction
<b>Iran</b>	Executions for drug offenses; sentencing and incarceration practices; international assistance; access to essential controlled medicines; harm reduction
<b>Independent Experts</b>	
<b>Environment</b>	Crop eradication
<b>Minority Issues</b>	Policing practices; discrimination; sentencing and incarceration practices; access to essential controlled medicines
<b>Working Groups</b>	
<b>Discrimination against women in law &amp; practice</b>	Disproportionate incarceration rates of women for drug offenses; discrimination
<b>Human rights &amp; transnational corporations</b>	Access to essential controlled medicines (pharmaceutical companies); harm reduction (private prison corporations); aerial and maritime drug trafficking enforcement (private security firms)
<b>Mercenaries</b>	Crop eradication; illicit drug crop protection

## 7. Recommendations

**Contribute to the development of a joint special procedures statement for submission to the UN General Assembly Special Session on Drugs in 2016.** This statement can highlight the array of work already undertaken by the special procedures to address the gap between human rights standards and drug control activities and advocate for a human rights framework as the central feature in progressive reform.

**Revisit the 2009 thematic report ‘Applying a human rights-based approach to drug control’ and update the content to include additional areas where torture and ill-treatment continue to take place either directly or indirectly because of drug control activities, particularly developing elements of the 2013 thematic report “Emerging recognition of different forms of abuse in health-care settings”.** This report can be part of the mandate holder’s

independent contribution to the UNGASS in 2016 and/or ongoing work to call for thematic attention by the Human Rights Council on the issue.

**Consider a dynamic and collaborative report with fellow mandate-holders that presents countering the world drug problem as a thematic human rights concern.**

**Continue to seek opportunities to integrate drug control policies into country work and ensure consistent, strong recommendations to States on how to bring drug control responses in line with human rights standards and obligations**