

OVOM Position Paper on Article 33 Convention on the Rights of the Child

Analysis of Article 33 Convention on the Rights of the Child Part I

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States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Convention on the Rights of the Child, Article 33

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Convention on the Rights of the Child, Article 3(1)

Deeply concerned also by the steadily increasing inroads into various social groups made by illicit traffic in narcotic drugs and psychotropic substances, and particularly by the fact that children are used in many parts of the world as an illicit drug consumers market and for purposes of illicit production, distribution and trade in narcotic drugs and psychotropic substances, which entails a danger of incalculable gravity,

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, Second Preambular paragraph

Desiring to eliminate the root causes of the problem of abuse of narcotic drugs and psychotropic substances, including the illicit demand for such drugs and substances and the enormous profits derived from illicit traffic,

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, Seventh Preambular paragraph

Introduction

Neither human rights nor drug control are new areas of concern for the United Nations (UN). Since its inception the development of the two regimes' body of law and, theoretically, the coordination of these two regimes has been the Organization's tasks.

The concerted effort to control narcotics at international level predates the existence of the United Nations itself and the UN treaty based human rights system. It goes back to the Shanghai International Opium Commission of 1909 and the first Opium Convention of 1912. The legal framework of the contemporary international drug control regime has been developed under the auspices of the UN and comprises the three international drug conventions, namely the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol (hereinafter: the Single Convention), the Convention on Psychotropic Substances of 1971 (hereinafter: the '71 Convention), and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (hereinafter: the '88 Convention). The declared dual aim of this regime is to ensure the health and welfare of humankind by restricting the illicit production, trafficking and use of narcotic drugs and psychotropic substances and facilitate the availability of controlled substances for medical and scientific purposes.

The UN human rights framework has been developed in the shadow of the Second World War with the adoption of the 1948 Universal Declaration of Human Rights (UDHR), which according to the Office of High Commissioner for Human Rights (OHCHR) "spelled out the rights everyone on the planet could expect and demand simply because they are human beings."¹ According to the same source "human rights are inalienable, and no Government or other actor may legitimately take those rights away".² On the foundation of the 1945 UN Charter and of the UDHR, and due to the fact that the Universal Declaration is not of legally binding nature, the UN gradually expanded the body of the human rights law to its present form consisting nine multilateral human conventions. In a less idealistic depiction of the regime, human rights are legal guarantees "codified in international, regional, or national instruments, they constitute a set of performance standards against which duty-bearers at all levels of society—but especially organs of the State—can be held accountable."³ The articulation and adoption of the international human rights instruments placed the human being at the centre of international law transforming it from a State-centred system to an individual-centred one.

The two legal regimes coexisted in their legally binding form for over 60 years. However, despite their partly coincidental aims and their multiple convergence points, the drug control and human rights regimes' coordination has been insignificant. The cooperation between their respective UN machineries, and their nexus generated a small amount of interest and literature or written outputs. A noteworthy aspect is the

¹ Office of High Commissioner for Human Rights, *What are Human Rights?*, <https://www.ohchr.org/en/what-are-human-rights>.

² Conseil de Paris Commemorating the anniversary of the adoption of the Universal Declaration of Human Rights, #UDHR70 Address at Paris City Hall, Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein, 11 December 2017, <https://www.ohchr.org/en/statements/2017/12/conseil-de-paris-commemorating-anniversary-adoption-universal-declaration-human>

³ Office of High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*, 2006, p.1, <https://www.ohchr.org/sites/default/files/Documents/Publications/FAQen.pdf>

fact that the interest and engagement with the drug control-human rights dynamic is of recent date, and it was not initiated by the UN itself or its entities, but rather it was pioneered and mainly pursued by a small number of civil society organisations engaged in drug policy reform.⁴ Therefore, most of these outputs carry the message and serve the mandate of an activist movement whose central purpose is the legalization or regularization of illicit drugs.

This paper discusses the most obvious and, paradoxically, the most ignored point of intersection of the two regimes: the only UN human rights provision that is directly addressing illicit drugs, namely Article 33 of the Convention on the Rights of the Child (CRC), a provision stipulated by the most ratified UN human rights convention.

The International Human Rights Regime

Any human rights discourse must take in consideration the existing international legal framework and every human rights-based campaign must be validated by the legal instruments in force. The human rights regime discussed here is mainly treaty law, and as above stated, it started being articulated in the post-Second World War period. It refers to the International Bill of Human Rights and the seven specialized conventions and their Optional Protocols (OPs).

The International Bill of Human Rights comprises:

- The Universal Declaration of Human Rights (UDHR).
- International Covenant on Civil and Political Rights (ICCPR) of 1966.
- International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.

The International Covenant on Civil and Political Rights (ICCPR) has 114 States Parties, and it is monitored by the Human Rights Committee (CCPR). It has two Optional Protocols. The first was adopted by the General Assembly in December 1966 and has 116 Parties. The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty was adopted on 15 December 1989 and it has 90 Parties.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) has 112 States Parties and is monitored by the Committee on Economic, Social and Cultural Rights (CESCR). It has one Optional Protocol adopted by the General Assembly in December 2008 and 29 Parties.

The seven specialised human rights conventions are:

- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 1965-182 States Parties.
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁵ of 1979-189 States Parties.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) of 1984- 114 States Parties.
- Convention on the Rights of the Child (CRC)⁶ of 1989-196 States Parties.
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) of 1990-59 States Parties.

⁴ See Chapter II, Stephan Dahlgren and Roxana Stere, *The Protection of Children from Illicit Drugs: A Minimum Human Rights Standard*, Fri Förlag, Sweden, 2012, also available on OVOM web page.

⁵ An amendment to article 20 was proposed by the Governments of Denmark, Iceland, Finland, Norway, and Sweden and was adopted in December 1995. It has 81 Parties.

⁶ Article 43 of the CRC was amended in 1995 and the amendment has 144 Parties.

- Convention on the Rights of Persons with Disabilities (CRPD) of 2006-191 States Parties.
- International Convention for the Protection of All Persons from Enforced Disappearance (CPED) of 2006-72 States Parties.

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is monitored by the Committee on the Elimination of Racial Discrimination (CERD).

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has the Committee on the Elimination of Discrimination against Women (CEDAW) as its treaty body. CEDAW has one Optional Protocol which was adopted in October 1999 and has 115 Parties.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is monitored by the Committee against Torture (CAT), a body of 10 independent experts. CAT has one Optional Protocol which was adopted in December 2002, and it has 93 Parties. The OP established for its States Parties an additional body, namely the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT). The Subcommittee is a new type of treaty body within the UN human rights system. "It has a preventive mandate focused on a proactive approach to preventing torture and ill treatment."⁷

The implementation of the Convention on the Rights of the Child (CRC) is monitored by the Committee on the Rights of the Child (CRC) composed of 18 independent experts. The Convention has three Optional Protocols which will be discussed later in the text.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)'s implementation is monitored by the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW).

The Convention on the Rights of Persons with Disabilities (CRPD) is monitored by Committee on the Rights of Persons with Disabilities (CRPD). The Convention has one Optional Protocol which was adopted in December 2006 and has 106 Parties.⁸

International human rights law establishes relations, namely rights and obligations at at least three levels: states-individuals, inter-state obligations and interindividual. Human rights treaties imply responsibilities and duties not only for States but also for human beings towards other human beings. There is a tendency to emphasize more the rights holder aspect of human rights than the duty bearer one which could lead to a quite utopian image of the regime and at unrealistic expectations on the side of the claimants.

This last type of relationship is probably the least discussed in the human rights literature, but it is a fundamental aspect of the regime, and it has an existential importance for children's rights. The differences between children and adults in terms of their physical and psychological development are undeniable. Children's special and dependent status makes the implementation and the respect for their rights fully contingent on adults' will and interests. This special condition might also generate impediments when children are in the position of seeking remedies for violations of

⁷Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, <https://www.ohchr.org/en/treaty-bodies/spt>.

⁸ The status of ratification is indicative for 2024, as reported by United Nations Treaty Collection. https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=_en.

their rights or acting as human rights defenders. In children's case the significance of and often reiterated international commitment to creating new futures for all children will have a meaning only if adults wish for it, and it will have the meaning that adults want it to have.

These aspects are extremely relevant for the present discussion on human rights and drug policy. This is a clear example where such a partial image of human rights-the claimant part- is presented to promote an implicit or explicit claim to an in-existent right-the right to use illicit drugs. Dealing with human rights involves in general, and despite the stated universality, indivisibility, interdependence and interrelatedness of all rights and fundamental freedoms, finding and maintaining a complicated balance between various legitimate and licit interests and prioritizing limited resources. However, in the discussions of the international human rights and drug policy nexus we have seen for the last decade the acceptance of a discourse that completely ignore or deform human and children rights and prioritize certain adults' preferences. This discourse is meant to, eventually, force the acceptance of a right that has not been adopted via the accepted legal routes, and most probably, to justify the transfer of economic gain to the state or private entities levels despite the detrimental effects of illicit drugs use *per se*.

The Convention on the Rights of the Child and its Optional Protocols

General

As human beings or persons, children are theoretically entitled to all the human rights that adults have under international law. Nonetheless, the international community decided that children should have a designated international legal instrument transcending different legal and cultural traditions and meant to establish common minimum standards for every child "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"⁹, applicable in all prospective States Parties' legal systems.

30 years after the adoption of the 1959 UN Declaration of the Rights of the Child, and after more than ten years of intense deliberations, the General Assembly of the United Nations unanimously adopted in 1989 the Convention on the Rights of the Child (CRC),¹⁰ the fastest and the most widely ratified international human rights instrument.¹¹ This eleven years of consultations and deliberations led to the adoption of "the most innovative human rights instrument to be drafted by the international community."¹² Within six years,¹³ 190 out of the then 192 United Nations Member

⁹ Convention on the Rights of the Child, Preamble.

¹⁰ The Convention on the Rights of the Child was unanimously adopted by the General Assembly of the United Nations by its resolution 44/25 of 20 November 1989.

¹¹ The Convention on the Rights of the Child entered into force on 2 September 1990, in accordance with article 49(1). https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en

¹² UNICEF, *Role of UNICEF in the Implementation of the Convention on the Rights of the Child*, E/ICEF/1991/L.7, 6 February 1991, p.5. In UNICEF, International Child Development Centre, Innocenti Occasional Papers, Child Rights Series, Number 2, James R. Himes, "Implementing the United Nations Convention on the Rights of the Child: Resource Mobilization and the Obligations of the States Parties", November 1992.

¹³ The pace of ratification for the CRC has no precedent. By comparison, the two 1966 Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights needed more than ten years to get the minimum number of ratifications (35) for entering into force.

States, had ratified the CRC. At present the Convention on the Rights of the Child has 196 States Parties,¹⁴ with only the United States as a non-ratifier country.

The Convention on the Rights of the Child is the only UN human rights convention supplemented by three Optional Protocols which expand children's protection. As UNICEF explains the word "optional" often indicates that "the obligations included by these instruments are more demanding than those in the original convention, so States must independently choose whether or not to be bound by them."¹⁵ The three OPs of the CRC are:

1. The Optional Protocol on the sale of children, child prostitution and child pornography (OPSC) was adopted in May 2000, and it entered into force in January 2002. OPSC has 178 States Parties, including the United States. It was adopted with the aim to significantly amplify and strengthen the protection of children from the worst forms of exploitations. As the UNICEF's OPSC Handbook states the "main premises of the OPSC are that all children must be protected, that such exploitation is criminal in nature, and that the perpetrators must be identified and punished."¹⁶

2. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OPAC) aims at strengthening the protection of children during armed conflicts and to legally raise the minimum age of voluntary recruitment of children in armed conflict from 15 years to 18 years. It was also adopted in May 2000, and it came into force in February 2002. At present, it has 173 States Parties.¹⁷

3. The Optional Protocol on a Communication Procedure (OPIC)'s purpose is to give children better access to justice by establishing the right of a child or of a group of children to appeal to the UN's international mechanism if the national legal system fails in providing remedies for the violation of their rights under the CRC and its OPs, and it aims to increase States Parties' accountability. Besides receiving direct communications, OPIC gives the CRC Committee the mandate of conducting inquiry procedures in case of serious or systematic violations of rights by State Parties to the Convention or to the ratified Optional Protocols. Before the adoption of OPIC, CRC was the only UN human rights convention lacking a communication procedure. OPIC was adopted in December 2011, and it entered into force in 2014. A decade after its adoption it has 52 States Parties, and it has generated a growing body of children's rights jurisprudence.

As it is the case for the other eight UN human rights conventions, when a State ratifies the Convention on the Rights of the Child or its Optional Protocols, it becomes a State Party to the Convention or to the OPs and it assumes an obligation under international law to implement them. Implementation is the process whereby States Parties assume the legal responsibility to adopt within their domestic legal order all appropriate measures to ensure the respect, the protection, and the fulfilment of all rights in the Convention and the OPs for all children living within their territories.

¹⁴ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en.

¹⁵ UNICEF, *Strengthening the Convention on the Rights of the Child: Optional Protocols Protecting children in armed conflict, from sale and sexual exploitation, and allowing children to submit complaints*, <https://www.unicef.org/child-rights-convention/strengthening-convention-optional-protocols>.

¹⁶ UNICEF Innocenti Research Centre, *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, 2009, p. viii.

¹⁷ The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict was also ratified by the United States.

Structure of the Convention

The Convention on the Rights of the Child has a Preamble¹⁸ and 54 articles, and it is divided in three parts. Part I comprises Arts. 1 – 41 which are substantive articles guaranteeing the whole spectrum of economic, social, cultural, civil, and political rights for children. Four of these articles were identified by the Committee on the Rights of the Child as the general principles of the Convention. Article 33 is a substantial provision, and it belongs to Part I.

Part II contain Arts. 42-45 and deals mainly with the establishment, membership, and the mandate and the functions of the CRC's treaty body, the Committee on the Rights of the Child, and with the reporting cycle of the States Parties. Article 45 provides for international co-operation with other entities aiming of fostering the effective implementation of the Convention.

Part III covers signatures, ratification and entering into force of the Convention and procedures as amendments, reservations, and denunciation.

The Merits and Innovations of the Convention on the Rights of the Child

One of the major merits of the Convention on the Rights of the Child is that it changed the legal status of the child from being an object in need of sole protection and charity to an individual and autonomous rights holder.

The Convention on the Rights of the Child completely changed the legal philosophy of child rights, by acknowledging the principle of evolving capacities of the child, that differentiate among a quite heterogenous group, and the participation principle that allows children's involvement and give children an active role in their own development. The Convention legally establishes children's right to participate in decisions affecting their own lives and their futures, and implicitly in shaping their communities. Theoretically, with the adoption of CRC, the child stopped being seen in legal terms as a passive "object" of protection, one having no interests, no opinions, or rights out of the parents' will. This philosophy constitutes the cornerstone of the Convention on the Rights of the Child and is legally established by Article 12 on participation and the right to be heard and by Article 5 on evolving capacities.

The CRC is an innovative instrument in many other regards. One innovation of the CRC is the establishment as a legally binding human right provision the preservation of identity that relies on the right to a name and nationality, and can be considered a mean to prevent statelessness, stipulated under Article 8.

The Convention on the Rights of the Child is also the first human rights convention to "contain a specific reference to disability as a prohibited ground for discrimination and a specific article dedicated to the rights of children with disabilities Art. 23.¹⁹ Before 2006, when the Convention on the Rights of Persons with Disabilities

¹⁸ According to Max Planck Encyclopedias of International Law [MPIL], a Convention preamble "Both bilateral and multilateral treaties may contain a preamble enumerating the contracting States involved in their conclusion. A treaty's preamble defines, in general terms, the purposes and considerations that led the parties to conclude the treaty. Generally a preamble consists of a sequence of secondary clauses (considérants) that commence with words such as 'Recognizing', 'Recalling', 'Mindful', 'Emphasizing', 'Conscious of', etc.", <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1456>.

¹⁹ Geraldine Van Bueren, *The Committee on the Rights of the Child in Langford*, Queen Mary University of London, School of Law Legal Studies Research Paper No. 37/2009, p.6. Art. 2. The other treaty bodies have

was adopted, the CRC was the only international legal instrument which recognised and protected the rights of children with disabilities.

The Convention on the Rights of the Child is the only international human rights instrument that makes direct reference to illicit drugs in Article 33. This provision is mirrored in an almost identical form by Article 28 of the African Charter on the Rights and Welfare of the Child adopted one year later in 1990.²⁰

Other innovations of the CRC are the inclusion of a right to “physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts”²¹ stipulated by Art.39 and the rights of the child in the context of child justice systems addressed by Art. 40.

The Committee on the Rights of the Child

When ratifying the Convention on the Rights of the Child, States Parties assume the obligation to promote, protect and implement the rights stipulated by the Convention in their respective territories. They also accept the authority of the treaty body to monitor their progress in achieving the realization of these obligations. The same applies in relation to the Optional Protocols of most of the human rights conventions, and of the CRC.

In accordance with article 43 of the CRC, the Committee on the Rights of the Child was set up in 1991 and its members began their term of office on 1 March of the same year. The mandate and the functions of the Committee on the Rights of the Child are stipulated by CRC Articles 43, 44 and 45. As is the case with all the other eight treaty bodies, the CRC Committee is a quasi-judicial body not a court. This means that its decisions, conclusions, and recommendations are not directly enforceable but are highly relevant for the interpretation of the convention they represent.

Except the Concluding Observations that the Committee is issuing for States Parties' Reports, of relevance for treaty interpretation is the adoption of the General Comments on specific articles or themes of the Convention. The General Comments are meant to provide authoritative guidance to States Parties and to the relevant stakeholders for understanding, operationalizing the CRC, and in guiding their child related activities. As of April 2024, the Committee has adopted 26 General Comments and a concept note on accesses to justice and effective remedies. Some General Comments addressed issues as children's rights and the environment with a focus on climate change, children rights in relation to digital environment, international migration, children in street situation, harmful practices, etc. Other General Comments focused on specific CRC articles, e.g., Article 3 on best interest of the child, Article 24 on right to enjoyment of the highest attainable standard of health which was also discussed in the context of adolescent's health, Article 31 on the right to play, recreational activities and cultural life, Article 19 on children's freedom from any form

considered disability under the 'other status' provision see See Wouter Vandenhoe, Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies, (Antwerpen/Oxford, Intersentia 2005) pp.170-172,

²⁰ African Charter on the Rights and Welfare of the Child Article 28 states “States Parties to the present Charter shall take all appropriate measures to protect the child from the use of narcotics and illicit use of psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the production and trafficking of such substances.” https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf.

²¹ The Convention on the Rights of the Child, Article 39.

of violence, Article 12 on right to be heard, etc. Issues as child justice system or juvenile justice and the right to health were discussed on several occasions. The Committee issued several joint General Comments with other treaty bodies. It initiated this unique practice among the UN treaty bodies in 2014 when it adopted a Joint general Recommendation/General Comment with the Committee on the Elimination of Discrimination against Women on harmful practices. In 2017 adopted two similar documents together with the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. However, it is relevant for the present discussion to note that the Committee never issued a General Comment on Article 33.

Also, of relevance in the Committee's range of activities that proved rather influential in the interpretation process, despite its more practical aim of organizing the reporting cycle and the content of States Parties' initial and periodic reports, is the issuance of the reporting guidelines. The reporting guidelines adopted by the Committee are meant "to facilitate a more structured discussion" with the States Parties, and "to ensure reports are comprehensive and presented in a uniform manner". For this purpose, the guidelines group the articles in clusters "according to content and in a logical order."²² Their relevance in the interpretation process is best illustrated by the elevation of four CRC Articles as the four general principles of the Convention on the Rights of the Child in the reporting guidelines.

The Principles of the Convention on the Rights of the Child

As mentioned above, the Convention on the Rights of the Child's text does not separate the four articles in any obvious way. The decision to confer such status to the Articles 2, 3, 6 and 12 of the Convention belongs to the CRC Committee. These four articles were declared general principles in the guidelines for periodic reporting adopted in October 1996. The criteria used by the Committee for choosing only these four articles, and not others, as the guiding principles are not clear or have been explained. The Convention contains other provisions with principal character, for example the evolving capacities principle stipulated by Article 5. However, this selection was largely accepted, and the four general principles became one of the most prominent features of the CRC.

According to Jean Zermatten the four principles of the Convention on the rights of the Child "are paramount, impossible to circumvent, and which govern the application of the entire Convention...We can understand well that without these pivotal provisions, the Convention would not be effective, would likely be discriminatory and would offer only an empty enumeration of rights, like a list of claims, without providing the means for its application...the primary keys which turn the locks of the CRC system."²³

The four CRC principles are:

Article 2- non-discrimination.

Article 3- best interests of the child.

Article 6- life, survival, and development.

Article 12- participation and respect for the views of the child.

²² Committee on the Rights of the Child, Working methods, <https://www.ohchr.org/en/treaty-bodies/crc/rules-procedure-and-working-methods>.

²³ Jean Zermatten *The Best Interests of the Child Literal Analysis, Function and Implementation*, Institut International des Droits de l'Enfant, Working Report 2010, p. 3.

CRC Article 33

As above mentioned, the Convention on the Rights of the Child is the only international human rights treaty to include a provision that refers to illicit drugs, namely Article 33.

According to CRC Article 33 “States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to:

1. protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties
2. to prevent the use of children in the illicit production and trafficking of such substances.²⁴

Lack of reservations or declarations on Article 33

In international law the presence of reservations on certain provision of a treaty is considered a mean of diluting that certain article or if several articles are the subject to reservations by many States Parties the whole instrument is weakened.

It should be noted that none of the 196 States Parties to the Convention on the Rights of the Child made any reservation or interpretative declarations on Article 33.²⁵ Professor Geraldine Van Bueren stated in relation to Article 23 “The social justice facets of article 23 are strengthened by the absence of any reservations or declarations to it by any of the Convention’s states parties and is particularly valuable to children with disabilities living in poverty as the disability treaty has not yet entered into force.”²⁶ On same line of reasoning, one can assess that the absence of reservations on Article 33 should reinforce the legal, social, political and justice facets of Article 33.

The position and cluster of Article 33

The physical position of Article 33 in the Convention`s text has limited relevance in the attempt to understand its content, but it is not completely irrelevant. D’Costa and Liefwaard consider that “the order in which the articles appear is to a large degree influenced by the revised Polish proposal for the CRC that became the working document in the drafting process.”²⁷ However, a certain logic beyond the revised Polish draft can be observed. For example, the articles including a limitation clause, namely Article 13 on freedom of expression, Article 14 on freedom of thought, conscience and religion, and Article 15 on freedom of association and to freedom of peaceful assembly are placed in succession. Articles 30 on children belonging to minority or indigenous groups, Art. 32 on child labor, Art. 33 on illicit drugs, Art. 34 sexual exploitation, Art. 35 on abduction, sale and trafficking, Art. 36 on other form of exploitation, Art. 37 on torture, inhuman treatment and detention, Art. 38 on armed

²⁴ The Convention on the Rights of the Child, Article 33.

²⁵ United Nations Treaty Collection,

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en.

²⁶ Geraldine Van Bueren, *The Committee on the Rights of the Child in Langford*, Queen Mary University of London, School of Law Legal Studies Research Paper No. 37/2009, p.6.

²⁷ Bina D’Costa and Ton Liefwaard, *Human Rights and Children*, Background Paper, 17th Informal ASEM Seminar on Human Rights, Sofia, Bulgaria, 2017, p.

conflict, Art. 39 on recovery and reintegration and Article 40 on child justice system are all special protection measures. There is here a clear logical sequence. Article 33 belongs to this sequence, and it is set between two special protections provisions one dealing with economic exploitation and hazardous forms of work and the other with sexual exploitation and sexual abuse.

However, of relevance is the way the Committee on the Rights of the Child dealt with this provision in its reporting guidelines. The initial set of guidelines for initial reports CRC/C/5 of 1991 place Article 33 under the cluster special protection measures in the under-cluster (c) children in situations of exploitation, including physical and psychological recovery and social reintegration.²⁸ Same logic is followed in the reporting guidelines for periodic reports CRC/C/58 of 1996.²⁹ The first revised version for periodic reports CRC/C/58/Rev.1 of 2005 also placed Article 33 under the Special Protection cluster along with Arts. 22, 30, 32, 34, 35, 36, 37 (b)-(d), 38, 39 and 40.³⁰ This logic and placement is to be found in the list provided in the Working Methods of the Committee.³¹ It is also coherent with the Preparatory Works of the Convention and, as above indicated, with the physical position of this Article in the Convention`s text. Nonetheless, starting with the second revision of the guidelines for periodic reports in 2010, the Committee decided to split Article 33 in two parts belonging to two separate clusters. The first part of Article 33, called “measures to protect children from substance abuse”³² is placed under the cluster “Disability, basic health and welfare.” The second part of Article 33, the use of children in the illicit production and trafficking of narcotic drugs and psychotropic substances belongs to the cluster “Special protection measures.”³³ The same logic and partition are found in the latest revision of the reporting guidelines for periodic reports of 2014. The main problem with this partition is that Article 33 is losing any identity and purpose and its content is absorbed by two other provisions Article 24 on right to health and Art. 32 the right to protection from economic exploitation and from hazardous work.

Analysis of Article 33

The meaning and the content of this provision is quite straightforward. It was adopted by consensus in 1986 in a quite fast pace and it did not generate many discussions or major alterations in terms of its content. As mentioned, after the adoption of the Convention on the Rights of the Child, Article 33 was not the subject

²⁸ Committee on the Rights of the Child, General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties Under Article 44, Paragraph 1(A) of the Convention, Adopted by the Committee at its 22nd meeting (first session) on 15 October 1991, CRC/C/5, p.7.

²⁹ Committee on the Rights of the Child General Guidelines Regarding the Form and Contents of Periodic Reports to Be Submitted by States Parties Under Article 44, Paragraph 1 (B), of the Convention, adopted by the Committee at its 343rd meeting (thirteenth session) on 11 October 1996, CRC/C/58, p.35 and C. Children in situations of exploitation, including physical and psychological recovery and social reintegration

³⁰ Committee on the Rights of the Child, General Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties Under Article 44, Paragraph 1 (B), of the Convention Adopted by the Committee at its Thirty-Ninth Session On 3 June 2005, CRC/C/58/Rev.1, p.17.

³¹ Committee on the Rights of the Child, Working methods, <https://www.ohchr.org/en/treaty-bodies/crc/rules-procedure-and-working-methods>.

³² Committee on the Rights of the Child, Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child, 25 November 2010, p. 7.

³³ Ibid, p. 9.

of any reservations. This obviously indicates that the issue of protecting children from illicit drugs was deemed as such relevance that it was included in the Convention on its own merits, and the matter was not considered controversial. This is confirmed by the adoption, one year later, of a provision with almost identical content, namely Article 28 of the African Charter on the Rights and Welfare of the Child.

One important aspect for the present discussion to be deducted from the legislative history of the Convention on the Rights of the Child is that the present form of Article 33 branched from the article that was mainly dealing with health, namely Article 12 as contained in document A/C.3/36/6 of the 1983 revised Polish draft.³⁴ However, the proposition to adopt a distinct article concerning protection from “sources of serious damage to children’s health other than disease and malnutrition”³⁵ including “domestic violence; use of drugs of whatever kind; harmful labour; traditional practices affecting health”³⁶ was put forward in 1984 by the International Federation of Women in Legal Careers. The protection from illicit drugs was formulated, at that stage, as “combating of drug abuse and, in particular, the use by children of drugs of whatever kind”³⁷ In 1985 China proposed a completely separated article dealing only with illicit drugs. By 1986 the Working Group was working on Article 18bis that was a distinct provision from the right to health and from the right to protection from economic exploitation and hazardous work, which were dealt with by separate provisions. It is of interest that the above-mentioned splitting of Article 33 by the Committee in 2010 brings the provision to a stage it has considered and rejected by the CRC drafters. The normal tendency of the treaty bodies is to expand the scope and the protections provided by a certain human rights provision. In the Article 33’s case the Committee decided to do the reverse.

The same tendency is to be observed in relation to the substances covered by Article 33. In this case the Committee has mixed various substances covered by completely different legal regimes despite the explicit text of the provision. The legislative history of the Convention on the Rights of the Child shows that there was a proposition of the United States to include other drugs, as alcohol, but it was not accepted in the final version of Article 33.

Due to the Committee’s lack of involvement with this provision, the meaning of Article 33 was declared controversial and too vague or broad by external actors. The interpretative space that the Committee left void has been mainly occupied by the NGOs promoting drug control reform. These two trends led to interpretations of Article 33 that are absurd and will eventually push this provision into dissolution.

As previously discussed, the General Comments issued by the CRC Committee have the function of clarifying the normative content of Convention’s provisions. However, in the absence of such a Comment the Committee’s Concluding

³⁴ Office of the High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child: Part II*, United Nations, 2007, ‘1982 report of the Working Group to the Commission on Human Rights’, UN Doc. No. E/CN.4/1983/30/Add.1, para. 118 p. 709.

³⁵ Office of the High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child: Part II*, United Nations, 2007, International Federation of Women in Legal Careers, UN Doc. No. E/CN.4/1984/WG.1/WP.4, p. 709.

³⁶ Office of the High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child: Part II*, United Nations, 2007, International Federation of Women in Legal Careers, UN Doc. No. E/CN.4/1984/WG.1/WP.4, p. 709.

³⁷ Office of the High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child: Part II*, United Nations, 2007, International Federation of Women in Legal Careers, UN Doc. No. E/CN.4/1984/WG.1/WP.4, p. 709.

Observations should be informative if a line of reasoning or an underlining philosophy can be deduced from these. Unfortunately, the way how the Committee dealt with Article 33 is leading to more confusions than clarifications. Therefore, as an ultimate mean, one can look at the interpretation of other CRC articles relevant in this context. Such a perspective should not allow the isolation of one provision and giving it an interpretation that is completely foreign to the object and purposes of the Convention.

“States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures”

The introductory part of Article 33 “shall take all appropriate measures” is to be found in 6 instances in the Convention on the Right of the Child:

-Article 2- non-discrimination paragraph 2 on which States Parties are requested to “take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.”³⁸

-Article 18 on parental responsibilities and state assistance, paragraph 3 “States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.”³⁹

-Article 27 on adequate standard of living paragraph 3 “ States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing”⁴⁰and paragraph 4 “States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.”⁴¹

-Article 39 on recovery from trauma and reintegration “States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”⁴²

“Shall take” in all these instances does not have an optional connotation, on contrarily. The modal “shall” expressing an obligation is used 156 times in the CRC, actually there is no substantial CRC article where it is absent. “Appropriate measures” also indicate that States Parties have an obligation to resort to the most relevant measures leading to the realisation of the right in question. In Article 33 case “appropriate measures” cannot mean adopting reactive measures and ignoring the

³⁸ Convention on the Rights of the Child, Article 2.

³⁹ Convention on the Rights of the Child, Article 18.

⁴⁰ Convention on the Rights of the Child, Article 27.

⁴¹ Convention on the Rights of the Child, Article 27.

⁴² Convention on the Rights of the Child, Article 39.

protection and the prevention aspects, but it should mean adopting the measures that are the most conducive to protect and to prevent.

The expanded introductory phrase “shall take all appropriate measures, including legislative, administrative, social and educational measures” is found in almost identical form in CRC Article 19 on protection from violence, abuse, and neglect. The two Articles share more commonalities than this phrase, for example Michael Freeman was placing article 19, 32, 33 and 34 under the same category “Rights requiring protective measures, including measures to protect children from economic and sexual exploitation, to prevent drug abuse and other forms of neglect and abuse”.⁴³ As indicated by the *United Nations Secretary-General's Study on Violence against Children*⁴⁴, by the WHO Fact sheet N°150⁴⁵, and by CRC General Comment No. 13 on the right of the child to freedom from all forms of violence⁴⁶, Article 19 and Article 33 have a direct relation.

The General Comment No. 13 was published by the CRC Committee in April 2011. Part IV of the Commentary provides a legal analysis of Article 19 indicating, inter alia, that States Parties should interpret “shall take...” and “all appropriate legislative, administrative, social and educational measures” as follows: “‘Shall take’ is a term which leaves no leeway for the discretion of States parties. Accordingly, States parties are under strict obligation to undertake ‘all appropriate measures’ to fully implement this right for all children.”⁴⁷ The same spirit and strength leaving no latitude or room for manoeuvre is assessed by The Committee in relation to the legal term “shall assure” in Article 12.⁴⁸ There is no apparent reason why “shall take” should not be interpreted in the same way in the case of CRC Article 33.

The Committee also indicates in the General Comment No.13 some general direction on the interpretation of the term “appropriate” stating “appropriate” “refers to the broad range of measures cutting across all sectors of Government, which must be used and be effective in order to prevent and respond to all forms of violence. ‘Appropriate’ cannot be interpreted to mean acceptance of some forms of violence.”⁴⁹ Correspondingly, in the context of Article 33 “appropriate” would logically refer to a complex and multi-sectoral set of measures which would prevent and protect children from illicit drugs use and prevent their involvement in the production and trafficking of such substances, and cannot be interpreted to mean the normalization or acceptance of these phenomena.

⁴³ Michael Freeman, *Whither Children: Protection, Participation, Autonomy?* MANITOBA LAW JOURNAL, p. 318.

⁴⁴ Paulo Sérgio Pinheiro, Independent Expert for the United Nations, Secretary-General’s Study on Violence against Children, *World Report on Violence against Children*, 2006. The Study indicates parents or caregivers substance abuse as one of the factors contributing to violence against children, p. 66 and 68. It also indicates that childhood experience of violence leads to drug abuse, p. 64-65.

⁴⁵ Similar findings are indicated in the WHO Fact sheet N°150, August 2010, Child maltreatment. <http://www.who.int/mediacentre/factsheets/fs150/en/index.html>.

⁴⁶ Committee on the Rights of the Child, General Comment No. 13 (2011) on article 19: The right of the child to freedom from all forms of violence, CRC/C/GC/13, 17 February 2011, paragraphs 20 (b), 43 (a,vii), (b, 11) and 72 (g).

⁴⁷ Committee on the Rights of the Child, General comment No. 13, The right of the child to freedom from all forms of violence, 2011, para 37, p.14.

⁴⁸ Committee on the Rights of the Child, General comment No. 12. The right of the child to be heard, CRC/C/GC/12, 2009, p.8.

⁴⁹ General Comment No. 13 (2011) on article 19: The right of the child to freedom from all forms of violence, CRC/C/GC/13, 17 February 2011, paragraph 39.

“Protect children from the illicit use of narcotic drugs and psychotropic substances”

The term “protect” is an essential concept of the Convention on the Rights of the Child. It is found in 29 instances in the Convention text. CRC stipulates that the child should be protected against/from:

- all forms of discrimination or punishment- Article 2;
- illegal deprivation of identity- Article 8;
- arbitrary or unlawful interference with his or her privacy or unlawful attacks on his or her honour and reputation- Article 16;
- from information and material injurious to his or her well-being- Article 17;
- all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child- Article 19;
- child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment-Article 20;
- appropriate protection and humanitarian assistance for child who is seeking refugee status or who is considered a refugee- Article 22;
- economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development- Article 32;
- all forms of sexual exploitation and sexual abuse-Article34,
- all other forms of exploitation prejudicial to any aspects of the child's welfare- Article 36;
- protection and care of children who are affected by an armed conflict-Article 38;

Article 3 paragraph 2 provides that the child has the right to protection and care as it is necessary for his/her well-being.

“Protection” is a basic concept of the human rights regime and a central one for the Convention on the Rights of the Child.

The concept of protection is almost always conceived with a negative connotation, namely protection against a certain treat or harm. As proved by the above list, in most of the cases where the term “protection” is used a certain threat is indicated, for example discrimination, illicit drugs use, exploitative labour, etc. The only exception is Article 3 (2) where the concept has a broader sense, and it is stipulated as a positive right. The concept of protection implicitly involves prevention, as it is explicitly stated in the Committee’s General Comment No.13 when explaining what “protective measures” should mean as “The Committee emphasizes in the strongest terms that child protection must begin with proactive prevention of all forms of violence as well as explicitly prohibit all forms of violence. States have the obligation to adopt all measures necessary to ensure that adults responsible for the care, guidance and upbringing of children will respect and protect children’s rights. Prevention includes public health and other measures to positively promote respectful child-rearing, free from violence, for all children, and to target the root causes of violence at the levels of the child, family, perpetrator, community, institution and society. Emphasis on general (primary) and targeted (secondary) prevention must remain paramount at all times in the development and implementation of child protection systems. Preventive

measures offer the greatest return in the long term. However, commitment to prevention does not lessen States' obligations to respond effectively to violence when it occurs."⁵⁰ Such approach and guidance would perfectly fit Article 33. It would be difficult to understand why children would need lesser protection in relation to illicit drugs than any other special protection measures. Therefore, the term "protect" cannot be interpreted in any way that will show tolerance towards the use of narcotic drugs and psychotropic substances, or encourage legislation and policies that could lead to, have the effect, or ignore the increase levels of illicit drug use in a States Parties territory's child population.

"Illicit use"⁵¹

The term "illicit use" is linked to the language used in the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol, the Convention on Psychotropic Substances of 1971, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. The CRC *Legislative History* indicates that the final wording using specifically the term "use" not "abuse" emerged after the draft of Article 33 was submitted in 1988 for technical review to the United Nations Narcotic Drug Division, to the World Health Organization (WHO), and to UNICEF.⁵²

At the 1988 technical review of the provision the Narcotic Drugs Division recommended the change of the language to conform with the terminology used in the "the international treaties in question".⁵³ Therefore, the word "illicit" replaced the term "illegal", that was used in the previous drafts. The three UN drug conventions use the term "illicit" to define the purpose of use. In this context, any "use" becomes "illicit" as soon as it serves any other purpose than medical or scientific.

CRC Article 33 stipulates that every child must be protected from "illicit use". It should be noted that during the drafting process, the word "abuse" was used in the Article 33 draft text until 1986, when it was changed with/to "use".⁵⁴

Vienna Convention on the Law of Treaties (VCLT) Article 31 stipulates that legal interpretation of treaty texts shall be done "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."⁵⁵ The Convention on the Rights of the Child does not provide any

⁵⁰ Committee on the Rights of the Child, General comment No. 13, The right of the child to freedom from all forms of violence, 2011, para. 45, p.18.

⁵¹ The author's views on this issue have been discussed in Roxana Stere, *Human Rights and Drug Control: The Importance of Children's Rights*, in Saul Takahashi ed, *Human Rights, Human Security, and State Security. The Intersection*, Praeger Security International, 2014, Vol. I.

⁵² Office for United Nations High Commissioner for Human Rights, *Legislative History of the CRC*, Volume I, 709-711.

⁵³ Office of the High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child: Part II*, United Nations, 2007, comment taken from *E/CN.4/1989/WG.1/CRP.1*, page 37, p.711.

⁵⁴ Office for United Nations High Commissioner for Human Rights, *Legislative History of the CRC*, Volume I, 709-11, section C point 4 ff.

⁵⁵ Vienna Convention on the Law of Treaties, Article 31.

definitions relevant to the language used in Article 33, therefore the rule of ordinary meaning should be used. The terms “use” and “abuse” have different ordinary meanings. In terms of illicit drugs, “abuse” has a more complex meaning than “use”; as qualitative indicators would be needed to establish “abuse”, whereas “abuse” would only apply after some stages of “use”. It seems that various UN or regional entities use complex indicators when they are talking about terms like “problematic use”, “misuse”, “abuse”, etc. “Use” of illicit drugs on the other hand, is unambiguous, whereby one or more instances of illicit drug consumption constitute “use”.

Article 33, by its very wording, impose an obligation to protect children from any use of illicit drugs. There is consistency between this aim and the depiction of illicit drugs in the preambles of the UN drug conventions, where drugs are, *inter alia*, described as an evil to the individual/ and to mankind, and their objective to adopt measures restricting the use of such substances to medical and scientific purposes.

In conclusion, the meaning of Article 33, by its wording, is that States Parties shall take all measures deemed appropriate, including legislative, administrative, social, and educational measures to ensure that children do not use illicit drugs. The Convention on the Rights of the Child clearly signals an anti-drug stance. States Parties should keep in mind this aim when undertaking the abovementioned measures. Policymaking should be clearly articulated in favour of this protection goal. An enabling environment for children shall be created where they are not put at risk of drug consumption.⁵⁶

“Narcotic drugs and psychotropic substances”

Article 33 text concerns “the illicit use of narcotic drugs and psychotropic substances.” That refers according to the ordinary meaning of the terms to the controlled substances cover by Single Convention of Narcotic Drugs of 1961 as amended by the 1972 Protocol and the Convention of Psychotropic Substances of 1971. The Single Convention deals with narcotic drugs and Articles 1, 2 and 3 are clear which substances are included or how substances are scheduled.⁵⁷ The 1971 Convention Article 1 clarifies what is meant by term psychotropic substances and Article 2 deals with substances not yet dealt with under international control and how new substances could be added to any of the Schedules of the Convention.

The CRC Committee often mixes alcohol and tobacco in when it addressed Article 33. This expansion has a logic as both alcohol and tobacco are psychoactive substances. However, as the *Commentary on the Convention on Psychotropic Substances of 1971* indicated in relation to Article 2 Scope of Control of Substances (4) refers to both tobacco and alcohol in paragraphs 9-11 but both substances were considered not-suitable objects for control by the Convention.

⁵⁶ Stephan Dahlgren & Roxana Stere, “The Protection of Children from Illicit Drugs – A Minimum Human Rights Standard A Child-Centred vs. a User-Centred Drug Policy”, Fri Förlag in cooperation with World Federation Against Drugs, the Swedish Society for Sobriety and Social Upbringing and the Swedish Carnegie Institute, Stockholm 2012, 17-18, in Roxana Stere, *Human Rights and Drug Control: The Importance of Children’s Rights*, in Saul Takahashi ed, *Human Rights, Human Security, and State Security. The Intersection*, Praeger Security International, 2014, Vol. I.

⁵⁷ https://www.unodc.org/pdf/convention_1961_en.pdf

“As defined in the relevant international treaties”

It is of relevance in this context the comment made in 1988 technical review by World Health Organization (WHO) in relation to Article 33, namely “This provision is of relevance to the World Health Organization, in that it aims at protecting the child from illegal use of narcotic and psychotropic substances as defined in the relevant international treaties, i.e. the “Single Convention of Narcotic Drugs”, 1961, and the “Convention of Psychotropic Substances”, 1971. The World Health Organization has an important role to play in the operation of these two Conventions.”⁵⁸ At the time when the present form of Article 33 was drafted, the only “relevant international treaties” in force were the amended Single Convention of 1961 and the 1971 Convention. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was adopted in December 1988 and entered into force in November 1990 the same year when the Convention on the Rights of the Child enter into force.⁵⁹

However, the 1988 Convention becomes relevant for Article 33 in context of Article 41 which stipulates that “Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child, and which may be contained in:

- (a) The law of a State party; or
- (b) International law in force for that State.”⁶⁰

Among others, the aim when adopting/drafting the 1988 Convention was to have a treaty against illicit traffic in narcotic drugs and psychotropic substances “which considers the various aspects of the problem as a whole and, in particular, those not envisaged in existing international instruments”. This purpose is also stated in the last paragraph of the Preamble of the ‘88 Convention.⁶¹ One such aspect is clear as the ‘88 Convention is the only of the three UN Conventions to address children.

The 1988 Convention is certainly an example of CRC Article 41’s application, as it is mirroring in its second preambular paragraph Article 33 and it refers to children in sub-paragraphs (f) and (g) of Article 3(5). Also, the first preambular paragraph of the 1988 Convention also refers to the adverse effect of illicit drugs on economic, cultural, and political foundations of society⁶² and in the seventh paragraph to the determination to “eliminate the root causes of the problem of abuse of illicit drugs, including the illicit demand for such drugs and substances and the enormous profits derived from illicit traffic.”⁶³ The preamble of a convention is not legally binding, but are relevant is stating the purpose of the instrument. This is obvious in the second paragraph of Article 31 of the Vienna Convention on the Law of the Treaties stating that “The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes”.⁶⁴

⁵⁸ Office of the High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child: Part II*, United Nations, 2007, taken from document E/CN.4/1989/WG.1/CRP.1, page 37, p.712.

⁵⁹ The Convention on the Rights of the Child entered into force in accordance with article 49(1) on 2nd of September 1990.

⁶⁰ Convention on the rights of the Child, Art. 41.

⁶¹ Final Act of The United Nations Conference for The Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

⁶² United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, Preamble, first paragraph.

⁶³ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988,

⁶⁴ Vienna Convention on the Law of the Treaties, Article 31 (2).

It is obvious that in the context of Article 33 the relevant framework comprises the three UN drug conventions and the ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) which is universally ratified.⁶⁵ The ILO Convention 182 Article 3 defines the use, procurement or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties as one of the worst forms of child labour, and aim to prohibit and eliminate this as a matter of urgency.⁶⁶ Article 3 ILO 182 also directly refers to the relevant international treaties. The ILO Convention 182 is supplemented by Recommendation No. 190 adopted in 1999.

The Committee on the Rights of the Child indicated the relevance of the three UN drug Conventions in Relation to Articles 33 and 24 when recommended States Parties to ratify the international drug control conventions in its 2013 General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health Art. 24.⁶⁷

To prevent the use of children in the illicit production and trafficking of such substances

This part of CRC Article 33 is neither much discussed nor contested. As above mentioned, the concern for the involvement of children in the illicit production and supply of narcotic drugs and psychotropic substance is also expressed in the 1988 Convention and directly addressed by the unanimously adopted ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 1999 Article 3. Even though this issue is addressed by three of the most ratified multilateral treaties in/of international law, there is no clear picture based on data of how many children are involved in such detrimental activities. Often the explanation given for this data paucity is “the hidden nature of such activities.”

Of interest in this context is that after the splitting of the Article 33 by the CRC Committee in its 2010 reporting guidelines, the part referring to the use of children in the illicit production, supply and trafficking of narcotic drugs and psychotropic substances remained under the special protection cluster. However, the interest in this part of the provision and in clarifying its proportions and impact seems inexistent. The Annexes of the latest two revisions of the reporting guideline for periodic reports that 2010 and 2014 reporting guidelines, request States Parties to “include, where appropriate” statistical information and disaggregated data following the clustering logic of the periodic reports. None of these two latest Annexes include any requirement for the States Parties to insert data on the involvement of children in illicit production and trafficking of illicit drugs under Article 33. This begs the question on the overall interest in this area.

Article 33 and the CRC Optional Protocols

⁶⁵ As it is the case with the CRC among the international human rights conventions, the ILO Convention 182 had the fastest pace of ratification among the international labor regime.

⁶⁶ ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999), Art. 3.

⁶⁷ General comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), CRC/C/GC/15, April 2013.

The main aim of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography is to supplement and fortify the provisions of the Convention on the Rights of the Child and to reinforce States Parties obligation to protect children against all forms of sexual exploitation and abuse, to criminalize all acts of sale of children, the use of a child for prostitution and the production, distribution, intentional possession and advertising of child pornography and to protect the rights and interests of child victims.

The Preamble of OPSC states in its first paragraph the purpose of the instrument, namely “in order further to achieve the purposes of the Convention on the Rights of the Child and the implementation of its provisions, especially articles 1, 11, 21, 32, 33, 34, 35 and 36, it would be appropriate to extend the measures that States Parties should undertake in order to guarantee the protection of the child from the sale of children, child prostitution and child pornography”.⁶⁸ It also correlates the aimed success in eliminating the sale of children, child prostitution and child pornography by adopting “adopting a holistic approach, addressing the contributing factors, including underdevelopment, poverty, economic disparities, inequitable socio-economic structure, dysfunctioning families, lack of education, urban-rural migration, gender discrimination, irresponsible adult sexual behaviour, harmful traditional practices, armed conflicts and trafficking in children”.⁶⁹

The links between Article 33 and the aim and spirit of OPSC are obvious and therefore the OPSC drafters mentioned this provision in its Preamble. This is exactly the form and content of the OP that 178 States Parties ratified. The same logic can be seen in the list of issues covered by in Article 3 International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

Articles 43, 44 and 45 of the Convention on the Rights on the Child establishes and elaborates the mandate of the Committee as treaty body, Article 12 of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography is also establishing the Committee’s mandate in relation to this instrument, in particular its role in the reporting process on OPSC. None of these articles give the treaty body the authority to remove any parts of the treaty or the of the optional protocol’s text. Despite this, the Committee decided in its OPSC guidelines to remove Article 33 from the list of articles that the OPSC is intended to further implementation of and should report on. This removal has no obvious explanation and except going beyond the Committee’s mandate is incoherent with CRC Articles 41 and OPSC Article 11 which are indicating a tendency to expand the scope of the protections and embrace provisions that are more conducive to the realization of the rights of the child in the law of States Parties and in international law and not to restrict the rights included in CRC and its Optional Protocols.

The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OPAC) is not making direct reference to the issues addressed under Article 33 or to the article itself. But the involvement of children in armed conflict and use of illicit drugs and the involvement of children in the supply side of controlled substances are often correlated and sometimes mentioned in the Committee’s Concluding Observations on States Parties reports.

⁶⁸ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, Preamble first paragraph.

⁶⁹Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, Preamble seventh paragraph.

Conclusion

Taking in consideration the context and the time when the Convention on the Rights of the Child was adopted and the simple fact that no scientific data indicates that children and the society at large would benefit of narcotic drugs and psychotropic substances use, it is rather difficult to interpret Article 33 as anything else than an anti-drugs stance. Regardless of how dynamic or innovative interpretation is applied, this provision cannot mean just reacting to the use of illicit drugs without completely separating this provision from its context- the CRC and its Optional Protocols. Article 33 was removed by default from the Preamble of the Optional Protocol on the sale of children, child prostitution and child pornography and therefore rendered irrelevant in the context of this instrument. It was split in two parts by the Committee on the Rights of the Child in the latest reporting guidelines and reverted to a pre-adoption stage, a move that soon will make its existence irrelevant. However, in its present form and according to an ordinary meaning of the terms interpretation in the context of the instrument it belongs, it cannot mean anything else than what protection and prevention mean for the rest of the CRC Articles.

Of course, if the society decided that other interests as the “right” of adults to take drugs takes precedence, Article 33 can be amended or the whole Convention can be denounced. CRC Article 50 and Article 52 deals with these scenarios and their procedural details. Accepting any other solutions that circumvent the legal path could have consequences for any other parts of the CRC, the Convention itself, or for any other international legal instrument.