

I. The principle of proportionality and drug-related offences

1. Over 95 per cent of the Member States of the United Nations are now parties to the international drug control conventions. The conventions contain the basic legal structure, obligations, tools and guidance that are needed for all States to achieve the main aims of the international drug control system: controlled universal availability of narcotic drugs and psychotropic substances for medical and scientific purposes only; prevention of drug abuse, drug trafficking and other forms of drug-related crime; and the undertaking of effective remedial action when prevention does not fully succeed. As such, the conventions constitute the world's agreed proportionate response to the global problems of illicit drug abuse and trafficking and the world's agreed legal framework for international drug control.

2. The conventions set minimum standards only. If those standards are met and not undermined, each State has discretion to transpose the provisions of the conventions into domestic law and practice in line with its own legal system and principles. Each State can also apply more strict or severe measures if it considers them desirable or necessary for the protection of public health and welfare or for the prevention and suppression of illicit traffic.

3. There are wide differences between countries and regions in community tolerance or intolerance towards drug-related offences and offenders, and those differences have an impact on the way the conventions are implemented. Penalties for similar offences may seem severe in some places, but lenient in others. Also the nature and extent of the drug problem appears to vary from one country or region to another.¹ States therefore attempt to address the drug problem based on their perception of the reality and extent of the problem, as well as on the resources available for addressing it. Some States target major drug traffickers and dismantle their networks, while others deal only with small cases. People who divert internationally controlled substances to illicit markets may avoid sanctions in one place but go to prison and lose their business in another. A prominent citizen may be

reprimanded for systematically laundering drug money, while a poor person in the same country may be jailed for shoplifting. Some States imprison drug-abusing offenders without providing any treatment or rehabilitation. Others provide both treatment and rehabilitation, with or without prison.

4. Some of the differences in national approaches to dealing with offenders, protecting public safety and repairing any harm caused to victims and the community flow from the different legal systems of the States parties to the conventions. They in turn reflect underlying differences concerning, for example: (a) how best to deal with unlawful behaviour by offenders; (b) how best to promote a sense of responsibility on the part of offenders and their acknowledgement of the harm they have done to victims and the community; (c) how best to deter them and others from offending in the future; (d) what constitutes "fair punishment"; (e) when and in what circumstances to separate offenders from society; and (f) how best to rehabilitate them. Ultimately, the differences reflect what comes from the depths of each country's culture and value system about drug-related behaviour, crime, punishment and rehabilitation.

5. Some of the differences have a positive impact on the implementation of a convention; for example, they may encourage new and improved ways to reduce drug-related crime, drug abuse and repeat offending. Other differences may have the reverse effect; for example, they may give rise to perceptions of profound injustice, generate tension or confusion between countries, hamper international cooperation or simply limit the range of problem-solving options considered by a Government – particularly if it considers that its own national drug control system is better than those of other countries or that little can be learned from others. The conventions permit some of the differences, but also set clear limits on them. The conventions do not, for example, allow a party to choose whatever interpretation of a provision suits its particular culture, value system or view of proportionality, in order to justify policies and practices that may undermine the aims of the conventions. The International Narcotics Control Board, in line with its mandate under the conventions, has expressed its views on several occasions when

¹ Due to factors such as whether it is mainly a drug-producing, transit or consumer country or region, the prevalence of drug abusers, the types of drugs abused, and other variables such as crime rates.

such cases were brought to its attention and will continue to do so whenever appropriate.

6. Proportionality has also become an important issue in its own right since the Board first touched on that issue in its 1996 review of drug abuse and the criminal justice system.² Eleven years later, there is still much room for improvement. The Board has chosen the principle of proportionality and drug-related offences as its special theme for the present report to put greater focus on the issue and to help improve the proportionality of responses by States to drug-related offences, so that the implementation of the conventions can be even more effective.

A. The principle of proportionality

7. Transposing the international drug control conventions into domestic law is subject to the internationally recognized principle of proportionality. The principle requires a State's response to anything that may harm peace, order or good governance to be proportionate. In a narrower, criminal justice sense, the principle permits punishment as an acceptable response to crime, provided that it is not disproportionate to the seriousness of the crime. Variants of the broad principle are often enshrined in States' constitutions, with specific rules set out in more detailed national law. International and regional human rights instruments³ and crime prevention and criminal justice instruments often develop or set the standards.

8. The principle of proportionality has ancient origins. Its first recorded formulations date back over 4,000 years. One of the earliest was the Code of Hammurabi, with its rules of retributive justice to curb excessive punishment by victims or the State ("an eye for an eye", "a tooth for a tooth" and "a bone for a bone"). Some punishments applied equally to all wrongdoers. Others depended on the respective status of the wrongdoer and the victim in Mesopotamian society: if the victim was "socially superior", punishment could be excessive but within fixed limits; if the victim was an "equal", the punishment could be

no worse than the crime; and if the victim was "socially inferior", fixed compensation could be specified. Since the introduction of the Code of Hammurabi, there have been considerable developments, particularly regarding how to better make the offender accountable, restore public peace, remedy the victim's loss or the damage and, when appropriate, ultimately enable the rehabilitation and social reintegration of the offender.

9. Whether or not a State's response to drug-related offences is proportionate depends in turn on how its legislative, judicial and executive arms of government respond in both law and practice. For example:

- (a) Is the particular response necessary?
- (b) To what extent can the response result in the achievement of the desired objectives?
- (c) Does the response legitimately go beyond what is needed?
- (d) Does the response comply with internationally accepted norms concerning the rule of law?⁴
- (e) When the offences have international aspects, is there effective international casework cooperation between the regulatory, law enforcement, prosecution and judicial services of all the countries concerned, for example, in obtaining relevant intelligence and evidence, tracing and ultimately confiscating criminal wealth and returning fugitives of justice? If the answer to the above questions is no, justice may not be done, making the response to the offending manifestly disproportionate.

10. In the Board's view, whether or not the principle of proportionality is satisfied in any State's drug-related casework depends on whether or not the cases are dealt with fully in accordance with the conventions and the rule of law.

² *International Narcotics Control Board Report for 1996* (United Nations publication, Sales No. E.97.XI.3), paras. 1-6, 21-31 and 36-37.

³ For example, the Universal Declaration of Human Rights (General Assembly resolution 217 A (III)).

⁴ These include the absolute supremacy of laws seeking to achieve good over the arbitrary power of individuals and institutions; upholding law and order; the equality and accountability of everyone before the law for every act done without legal justification; well-functioning courts providing predictable and efficient judgements; and upholding the rights and duties of individuals under the country's constitutional law.

B. Proportionality and the international drug control conventions

11. As indicated in paragraph 1 above, there is now almost universal adherence to the international drug control conventions. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988⁵ is the most recent, most specific and most prescriptive of those conventions. It is mainly designed to promote more clarity, homogeneity and effective implementation by law enforcement, prosecution and judicial services of States in dealing with drug-related crime at the national and international levels. Proportionality is an important principle in effectively implementing the provisions of the conventions. As formal legal agreements, the conventions reflect compromises (in some cases, compromises reached after long, hard-fought negotiation) on the essential mandatory measures and actions that parties to the conventions are required to take and the results that they are expected to accomplish. The fact that so far over 95 per cent of all States have chosen to become parties to the conventions is evidence that those binding legal instruments represent a proportionate response to global drug problems. Some of the main proportionality provisions of the conventions encourage and facilitate proportionate responses by States to drug-related offences. Other provisions seek to limit disproportionate responses. The main proportionality provisions are discussed below.

12. To ensure that narcotic drugs and psychotropic substances are indeed available for medical and scientific purposes only, States must control all drugs under international control with different levels of strictness, depending on the therapeutic usefulness, public benefits and risks associated with their use. Accordingly, the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol⁶ and the Convention on Psychotropic Substances of 1971⁷ each classifies the drugs to which it applies into four groups, for which it respectively provides four general control regimes of differing strictness. The convention schedule in which a drug is listed determines the particular control regime governing the drug, which the

parties must then apply. The manufacture, distribution or use of or trade in drugs classified as having little or no therapeutic value and liable to cause the most serious health and social problems if abused must be prohibited or very strictly controlled. For drugs classified in other groups, the greater their therapeutic value and the less serious the problems resulting from their abuse, the less strict the controls that apply to them.

13. The conventions generally require parties to establish a wide range of drug-related activities as criminal offences under their domestic law but permit parties to respond to them proportionately. The 1988 Convention covers drug-related activities not specifically envisaged in the earlier treaties, such as the organization, management and financing of drug trafficking, money-laundering, trafficking in precursor chemicals, and a range of other enabling, facilitating or supporting activities. The 1988 Convention also generally requires States to establish as a criminal offence the possession, purchase or cultivation of drugs for non-medical personal consumption.

14. In requiring parties to establish as offences certain drug-related activities, the conventions permit parties to define all offences and defences using the framework and terminology of their national legal systems. Subject to the convention limits summarized below, parties are also permitted to deal with offenders in conformity with their own national laws. This includes (again, subject to those limits), the different legal, moral and cultural traditions reflected in those laws.

15. The 1988 Convention requires parties to take a range of special measures to ensure that offences of a serious kind or nature are not committed with impunity.⁸ Perpetrators should not be treated more leniently than reasonably justified or are not able to escape justice entirely. Because serious offences typically pose significant risks to public health and safety, and offenders profit from the misery of others, parties must deal with serious offences more severely and extensively than offences of a less grave nature. For such serious offences, the 1988 Convention requires parties to make the commission of such

⁵ United Nations, *Treaty Series*, vol. 1582, No. 27627.

⁶ *Ibid.*, vol. 976, No. 14152.

⁷ *Ibid.*, vol. 1019, No. 14956.

⁸ In the present chapter, "serious offence" means any offence referred to in article 3, paragraph 1, of the 1988 Convention.

serious offences liable to sanctions that take into account the grave nature of those offences, such as imprisonment, other forms of deprivation of liberty, pecuniary sanctions and confiscation. By way of exception or qualification, if all the facts and circumstances surrounding the commission of such an offence nevertheless indicate that it is an appropriate case of a minor nature, the 1988 Convention permits parties to provide alternatives to conviction or punishment, such as education, rehabilitation or social reintegration.

16. To help ensure that serious offence cases have serious consequences in all countries and not just in some, the 1988 Convention seeks to limit the possibility of unduly lenient responses to serious offences and offenders. For example, it requires parties to ensure that their courts take into account aggravating circumstances when sentencing offenders. The circumstances listed are illustrative, not exhaustive.⁹ Any discretionary powers to prosecute those offences must be exercised to maximize the effectiveness of law enforcement and with due regard to deter their commission. Parties must ensure that courts and other competent authorities bear in mind the serious nature of those offences and any aggravating circumstance when considering early release or parole of convicted offenders. Where prosecution for a serious offence must take place within a fixed period after the commission of the offence, the time limit must be longer if the alleged offender has evaded the administration of justice.

17. The 1988 Convention seeks to put an end to safe havens abroad for persons committing serious drug-related crimes. It requires parties to establish wide extraterritorial jurisdiction to make offenders accountable for serious offences wherever they are committed; to confiscate wealth derived from such offences, wherever those offences have been committed and wherever such wealth is held; to give and receive assistance from each other in serious offence investigations, prosecutions and judicial proceedings; and to investigate serious offences

⁹ They include factors such as involvement in the offence of any organized criminal group to which the offender belongs, the use of violence or arms, any victimization or use of minors, and commission of the offence in or around places used by students or children for education, sports or social activities.

committed at home or abroad (with the other States' agreement) using, for example, controlled delivery,¹⁰ undercover operations,¹¹ joint investigation teams and maritime cooperation.¹²

18. The conventions differentiate sharply between offences related to drug trafficking and offences related to personal use of illicit drugs and between offences committed by drug abusers and those committed by others. Under the 1988 Convention, drug abusers who commit offences may be required to undergo treatment, education, aftercare, rehabilitation or social reintegration, in addition to being convicted or punished, providing that the facts and circumstances surrounding the commission of the offence indicate it to be an offence of a minor nature. However, with offences involving the possession, purchase or cultivation of illicit drugs for the offender's personal use, the measures can be applied as complete alternatives to conviction and punishment, and none of the convention obligations referred to in paragraphs 15-17 above apply to such offences. As such, the conventions recognize that, to be truly effective, a State's response to offences by drug abusers must address both the offences and the abuse of drugs (the underlying cause).

¹⁰ Controlled delivery is the investigative technique of allowing illegal or suspicious consignments of, for example, illicit drugs (sometimes other substances are substituted for the illicit drugs), to pass out of, through or into one or more countries with the knowledge or under the supervision of their competent authorities with a view to identifying those involved in the commission of serious offences.

¹¹ Undercover operations involve allowing law enforcement to operate covertly outside their agencies (for example, buying illicit drugs) but under the supervision of their competent authorities with a view to catching persons committing serious offences.

¹² Maritime cooperation is used to address the problem of drug smuggling by sea, with a view to allowing the authorities of an intervening State to board and search a vessel when there are reasonable grounds to suspect that it is engaged in trafficking; if evidence is found, the intervening State may be authorized to take appropriate action with respect to the vessel and the persons and cargo on board.

C. Proportionate prosecution, sentencing and alternatives

19. Prior to the adoption of the 1988 Convention, some States were considered safe havens for traffickers or their criminally derived wealth. The agreed aims of the 1988 Convention include giving urgent attention and the highest priority to the suppression of drug trafficking as an international criminal activity, eliminating the main incentive for it by depriving traffickers and their helpers of the large financial profits and wealth generated by it and coordinated action to eradicate it (a collective responsibility of States). Central to achieving those aims is the proportionate use of the penalties and sanctions referred to in the convention, such as deprivation of liberty, non-custodial penalties (for example, fines) and sanctions (for example, confiscation). The convention aims to ensure that the measures will be implemented more strictly against those whose authority, functions, share of profits and criminal culpability are considered the most serious. As control, authority, profit-sharing and overall criminal culpability diminish down the line and the scope of operations is reduced from the international level to the national and local (community) levels, the penalties and sanctions may progressively be reduced to the end-user. The convention treats end-users as accountable criminal offenders and, as indicated in paragraph 18 above, in terms of penalties and sanctions, treats offences related to personal use as less serious offences than offences related to drug trafficking.

20. The growing complexity and international scale of serious crime have forced criminal justice officials to fundamentally rethink traditional approaches and processes and expand their case disposal options. Other factors behind that development have been the demand for new, better and more flexible ways to deal with growing socio-economic phenomena such as drug abuse and the recognition that criminal law alone cannot adequately control all criminal activities associated with drug abuse. Growing backlogs in justice system casework, overcrowded prisons, human rights concerns and demand for government services to make better use of resources have added to the pressure.

21. As a result, most societies now expect that anyone accused of a crime will be dealt with

proportionately and in full compliance with the rule of law and human rights standards. To that end, appeal courts are increasingly correcting injustice and curbing excessive punishment in most countries. More authorities now prioritize their casework so that not only street offenders, but also crime bosses whose hands never touch the trafficked drugs are brought to justice. More States enable their authorities to apply a range of custodial and non-custodial sanctions for drug-related offences to fit the particular crime and the particular offender, rather than operate on the basis of "one size fits all". Those sanctions may be correctional, restorative or both.

22. Some States have also changed their laws, practices or procedures to help their criminal justice systems to achieve more effective case outcomes and not just more efficient case processing; to become more forward-looking; to be more focused on problem-solving and reducing future offending, instead of being focused on punishment alone; to be more interest- or need-based, instead of being just rights-, claim- or case-oriented; and to be more interdependent and collaborative in working with other authorities, agencies and communities affected by cases. Those reforms have helped to make responses to some offences more proportionate, particularly certain lower-level offences committed by drug abusers. Nevertheless, disproportionate responses remain; some examples in relation to drug-related offences are described below.

Prisons

23. According to data collected between the beginning of 2004 and the end of 2006, over 9.2 million people are held in penal institutions throughout the world for criminal offences, whether drug-related or not, mostly as pretrial detainees but also as sentenced prisoners. Prison population rates vary widely between countries and regions from the global average of 139 per 100,000 total population. In most countries, prison occupancy rates exceed available prison capacity. In most countries, the prison population is growing; in some countries, however, it has fallen.¹³

¹³ Roy Walmsley, *World Prison Population List*, 7th ed. (London, International Centre for Prison Studies, Kings College, 2006).

24. The international drug control conventions require parties to make the commission of serious offences liable to sanctions such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation – sanctions that take into account the grave nature of those offences. The list of sanctions is illustrative (not exhaustive) and alternative (not cumulative). The conventions do not oblige parties to make the commission of a specific offence liable to imprisonment, another offence liable to a fine, another liable to confiscation or yet another liable to all three. They rightly leave the choice to States because criminal responsibility and the scale, severity and impact of different offences always vary according to the facts and circumstances of each case.

25. In meeting the conventions' aims of suppressing illicit drug trafficking and depriving those involved of the profits, a sanction such as imprisonment will be appropriate in many cases, but it may be inappropriate in others. For example, the organization, management and carrying out of large-scale trafficking in illicit drugs and precursors, money-laundering and related serious offences should normally result in substantial prison sentences and confiscation. However, there is no universal moral instinct about what is right or wrong when it comes to punishment in less serious cases. The conventions expressly permit but do not oblige each party to punish an offender if its domestic authorities consider the offence an appropriate case of a minor nature or, in the case of a drug-abusing offender, if the offence is the possession, purchase or cultivation of illicit drugs for personal use. Thus, provided the minimum convention requirements are met, the decision to make any such offence punishable in those circumstances, particularly by imprisonment, is left to the discretion of each State.¹⁴

26. Nevertheless, many States do impose unconditional imprisonment on drug abusers for such lesser offences, and such offenders typically account for a significant proportion of the growing prison

population in some of those countries. Contrary to the United Nations standards and norms in crime prevention and criminal justice, (in particular, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules))¹⁵ young drug offenders and first offenders are sent to prison not as a last resort but as a first resort; young prisoners are not kept separate from adult prisoners, nor are untried offenders kept separate from sentenced prisoners; places where prisoners live or work may be overcrowded and have poor lighting, ventilation, sanitation or hygiene facilities; and the services of at least one qualified doctor and adequate pharmaceutical supplies and psychiatric services may not be available. Moreover, unless closely supervised, prisons can become markets for illicit drugs and consequently increase the scale and severity of drug abuse, as well as the incidence of HIV and other diseases. Governments have a responsibility to reduce the availability of illicit drugs in prisons, provide adequate services for drug offenders (whether in treatment services or in prison) and minimize the possibility of some penal institutions functioning unintentionally as informal learning centres from which inmates leave with greater criminal expertise than when they entered.¹⁶

Proportionality and prosecution decision-making

27. When the Board addressed implementation issues with drug abuse and the criminal justice system in its report for 1996,¹⁷ some of its suggestions and recommendations indirectly touched on decisions of whether to investigate and prosecute a drug offence case or to dispose of it in some other way. Those decisions are among the most important and sensitive to be made. Each has an impact on the proportionality of a State's response to drug offences in general and to each offence and offender in each particular case.

¹⁴ For example, under United States federal law, unlawful possession of illicit drugs for a defendant's own use is subject to mandatory minimum terms of imprisonment under 21 U.S.C. § 844(a). In Brazil, under Law No. 11.343 of 23 August, 2006, a person who unlawfully buys, holds, stores, transports or carries illicit drugs for personal use is subject to warning, educational measures, community service and, in certain cases, fines, but not imprisonment.

¹⁵ General Assembly resolution 40/33, annex.

¹⁶ For example, paragraph 9 of the Basic Principles for the Treatment of Prisoners (General Assembly resolution 45/111, annex) states that prisoners should have access to the health services available in the country without discrimination on the grounds of their legal situation.

¹⁷ *Report of the International Narcotics Control Board for 1996 ...*, paras. 22 and 24.

28. Under the basic legal system of some countries, all offences must be automatically prosecuted if there is enough evidence (strict legality systems). Police must report all cases to prosecutors, and prosecutors refer all prosecutable cases to the courts. In other countries, the police may have some discretion about possible further action,¹⁸ though those police powers are not always used.¹⁹ Some States that did not previously allow discretion now do so.²⁰ Prosecuting or judicial authorities have wider discretion to take no further action, initiate or divert from prosecution or take other action, such as reducing charges or discontinuing prosecution (expediency systems). If they decide not to prosecute, they can impose conditions on offenders.²¹ If those conditions are not met, prosecution may resume. Many ministries of justice and prosecution services and some international organizations have issued decision-making guidelines for prosecution and diversion-related decisions.

29. There are advantages and disadvantages to both discretionary and non-discretionary prosecution systems. Non-discretionary prosecution systems can be simpler to operate, give more consistent and predictable case outcomes and reduce the risk of corruption. As all cases must be prosecuted, however, minor cases can drive up costs, overload the justice system and divert resources from cases with potentially higher impact. Discretionary systems give flexibility to deal with cases cost-effectively with higher overall impact. But uncontrolled discretion can reduce predictability and consistency and tempt decision makers not to prosecute when they should.²² Discretion can also lead to systematic administrative non-enforcement action²³ or legislative action to curb administrative or judicial discretion and ensure more strict or uniform interdiction and sentencing of offenders.²⁴ Both discretionary and non-discretionary systems can produce disproportionate outcomes.²⁵

¹⁸ Prosecution-related decisions are taken not just on the basis of evidence of a prosecutable case, but also after carefully weighing all relevant factors for and against prosecution, which normally include the nature and seriousness of the offence, the interests of any victims and the wider community and the circumstances of the offender. The relevance and weight given to each factor normally depend on all the facts and circumstances of each case.

¹⁹ As in, for example, Finland and Sweden, perhaps because of the perceived deterrent effect of prosecution and the higher level of social sanction against drug abuse (European Monitoring Centre for Drugs and Drug Addiction, *Prosecution of Drug Users in Europe: Varying Pathways to Similar Objectives* EMCDDA Insights Series, No. 5 (Luxembourg, Office for Official Publications of the European Communities, 2002), p. 20).

²⁰ In Belgium, for example, the principle of expediency has operated since its introduction in 1998. In practice, the police exercise discretionary powers to divert drug users from the system at the earliest point in Germany, the Netherlands, Portugal and Spain, stipulating that the public prosecutor, taking into account the criminal policy guidelines of the Minister of Justice and the Board of Prosecutors-General, must decide the expediency of prosecution (European Monitoring Centre for Drugs and Drug Addiction, *Prosecution of Drug Users in Europe ...*, pp. 20 and 86-87).

²¹ For example, to refrain from using illicit drugs, frequenting specified kinds of places or associating unnecessarily with specified persons and to undergo medical, psychiatric or psychological treatment, including treatment for drug dependency.

²² For example, due to corruption or to avoid either paperwork or the painstaking forensic work that effective investigation, prosecution and trial entail.

²³ In the Netherlands, for example, the police do not normally investigate cases involving possession of cannabis for personal use, as possession of cannabis in small quantities is tolerated in coffee shops, in certain conditions.

²⁴ In the United States, for example, there is the Sentencing Reform Act of 1984. The United States Congress enacted mandatory minimum sentencing laws, under which judicial authorities must order fixed sentences for those convicted of offences largely involving drug and weapons and for recidivist offenders, regardless of culpability or other mitigating factors. Mandatory drug sentences are determined on the basis of three factors: the type of drug, the weight of the drug mixture (or the alleged weight in conspiracy cases) and the number of prior convictions. Judges are unable to consider other important factors such as the offender's role, motivation and the likelihood of recidivism. A defendant may reduce the mandatory minimum by providing the prosecutor with "substantial assistance" (information that aids the Government in prosecuting other offenders).

²⁵ For example, in a discretionary system, a government leader caught accepting bribes from a drug trafficker may keep the bribes and escape prosecution because improper pressure is brought to bear on the decision maker. In a non-discretionary system, a student caught experimenting with drugs may forfeit his or her future professional career if the law offers no options other than arrest, pretrial detention, prosecution and

30. All responses to drug-related offences by States must comply with the conventions and not result in any weakening of the implementation of the conventions. Whether States have discretionary or non-discretionary prosecution systems, the minimum convention requirements should be met in all cases. For the response to be proportionate in the context of the international drug control conventions, prosecutable serious offence cases should in general be prosecuted, unless the circumstances indicate that a case is of a minor nature. If it is a case of a minor nature or a case involving an offence related to personal use, it should be either prosecuted or conditionally disposed of using alternatives to formal trial and adjudication. Any discretionary decision of whether or not to prosecute should be governed by a legal or regulatory framework that guides the exercise of discretion to ensure fairness and consistency, so that all people are equal before the law and are treated equally when suspected of committing a criminal offence.

Proportionate sentencing and alternative disposal of drug-related casework

31. The nature and severity of the penalties and sanctions applied by a State are therefore critical in assessing whether the principle of proportionality is satisfied in the State's response to drug-related offences in general or to any particular case. As indicated in paragraphs 13-18 above, trafficking-related offences must be treated as offences of a grave nature, with sanctions that adequately reflect the seriousness of those offences. The international drug control conventions do not specify what precise procedure or process each party should follow or what particular penalty, sanction or alternative to apply to a particular offender in a particular case. Providing the aims and requirements of the conventions are met, States can generally use their own processes and procedures and apply the different penalties, sanctions and alternatives they determine – according to their own laws, moral and cultural traditions, legal systems and the facts and circumstances of each case.

32. The internationally recognized United Nations standards and norms in the treatment of prisoners, alternatives to imprisonment, the use of force by the police, juvenile justice and the protection of victims provide useful guidance for States in deciding what

unconditional prison.

custodial and non-custodial penalties and sanctions to adopt and apply, for what offences, to which offenders, in what circumstances and at what stage of the criminal justice process. The United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)²⁶ are the agreed international standards in setting and appropriately applying penalties, sanctions and non-custodial alternatives, and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)²⁷ deal specifically with those and other issues in the juvenile justice context.²⁸

33. At the pretrial stage, the Tokyo Rules provide that, where appropriate and compatible with the legal system, the police, prosecution service or other authorized agency should be empowered to discharge the offender if they consider it is unnecessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. Criteria should be developed within each legal system to guide decisions on appropriateness of discharge or determination of the proceedings. For minor cases, the prosecutor may impose suitable non-custodial measures, as appropriate (rule 5.1). Pretrial detention should be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim. Alternatives to pretrial detention should be employed at as early a stage as possible and pretrial detention should last no longer than necessary (rule 6.2).

34. At the sentencing stage, the authorities may dispose of cases by custodial sentence or, where appropriate, a non-custodial alternative. For custodial sentences and fines for serious drug-related offences, a range of variable severity is often set – usually with a maximum and sometimes also with a mandatory minimum. The penalties and sanctions may vary according to the specific drug or class of drugs used, along the lines of the calibrated risk-benefit drug classification system of the conventions (see

²⁶ General Assembly resolution 45/110, annex.

²⁷ General Assembly resolution 40/33, annex.

²⁸ This may require innovative risk management. For example, where a suspect has no readily identifiable place of residence, the community may be able to take greater responsibility for ensuring that he or she complies with the release conditions and does not flee from justice.

paragraph 12 above), so that higher penalties and sanctions apply for strictly controlled drugs and lower ones for less strictly controlled drugs. To be reliable and fair, quantity-based sentencing systems must be supported by appropriate technical facilities and adequate financial and human resources.

35. Non-custodial sanctions at the sentencing stage under the Tokyo Rules include deprivation of liberty while the offender continues to live in the community.²⁹ Economic sanctions and monetary penalties such as fines may be imposed, which if unpaid may lead to imprisonment. Finally, at any stage, non-custodial sanctions may include verbal sanctions such as admonition, reprimand and warning.

36. The demand for Governments to be more effective in their drug control work is difficult to meet, especially when resources are limited. In some countries, justice, health-care, education and social systems often struggle to provide basic public services. There may not be enough courts, judges, lawyers, support staff or equipment to promptly and

independently confirm that each detention is lawful and appropriate and that each offender is either tried within a reasonable period or released. The trial court may lack access to legislation, case law, information to guide sentencing and other basic materials. If the trial eventually takes place, offenders might be without a defence lawyer. If a prison sentence is imposed, community care standards might not be followed in the prison. If imprisoned drug-abusing offenders are returned to the community, they might pose an even greater criminal threat and become even more problematic drug abusers. Meanwhile, many of the United Nations standards and norms in crime prevention and criminal justice, particularly those outlined in paragraph 26 above, may manifestly not be met.

D. Equality before the law

37. Equality before the law is a universal human right.³⁰ As everyone has duties to the community, article 29 of the Universal Declaration of Human Rights permits the exercise of human rights and freedoms to be limited, but only by law, solely for the purpose of securing due recognition of the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

38. Due respect for universal human rights, human duties and the rule of law is important for effective implementation of the international drug control conventions. Non-respect for them can prejudice the ability of the criminal justice system to enforce the law, can lead to discriminatory disproportionate responses to drug offending and can undermine the conventions.³¹ Presented below, is a review of several

²⁹ For example, a sentence may be imposed and recorded but suspended for a specified time. An offender may also be conditionally discharged (that is, acquitted and not punished), provided that he or she complies with certain conditions: the offender may be allowed to continue to live in the community under the supervision of a judicial authority, probation service or other similar body, provided that he or she attends a certain course, therapy or treatment programme. A decision may be taken not to pass sentence on condition that the offender undertakes some action, such as undergoing treatment for alcoholism or drug addiction or receiving psychological counsel. The offender may be placed under house arrest and obliged to live in a certain place (normally his or her place of residence) under the supervision of a specialized agency and cannot change his or her place of residence, work or education without the permission of the supervising body. Curfews and other restrictions may be imposed on the offender's travel, movement or right to associate with particular individuals. Restrictions may be placed on other rights, such as the right to take up certain types of employment or to occupy specific positions in government. The judge may order the offender to work without compensation, usually in an agency or organization, for the benefit of the community. The court may also direct an offender to spend a fixed number of hours each day in an attendance centre for a specified period undertaking a structured programme to address his or her offending behaviour in a group environment.

³⁰ Universal Declaration of Human Rights, articles 7 and 10; and International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI), annex), articles 2, 3 and 26.

³¹ For example, if human rights are not properly respected by the police, public trust may erode to the point that proactive community policing initiatives against local drug problems become impossible. The loss of cooperation and vital information from the community may reduce the ability of the justice system to successfully disrupt the operations of the drug trafficking groups involved.

situations where some drug offenders can be treated more or less equally than others before the law.

Higher-level offenders

39. Because of their resources, some powerful drug criminals have been able to compromise justice systems. In its report for 1996, the Board touched on how that could lead to a sense of injustice in the community and undermine public confidence in the criminal justice system.³² In too many places, such powerful drug crime figures can easily cross borders, cover their tracks, set different justice systems against each other and kill, bully and corrupt in the process.

40. Bringing to justice powerful drug traffickers and dismantling their networks are resource-intensive, painstaking and dangerous undertakings. The traffickers are usually careful never to touch the drugs and are difficult to convict unless they are caught red-handed. The cases can be complex to investigate; they often involve transactions made abroad in an effort to disguise or hide wealth derived from drug trafficking. Strong laws targeting criminal associations and conspiracies are usually needed to ensure the conviction of the persons involved and the confiscation of their criminally derived wealth. Such cases can also require substantial international law enforcement and justice system cooperation because of all the sensitive intelligence, evidence and operational action needed for success. By comparison, smaller cases involving drug trafficking are typically more easily proved and less ably defended than cases involving major drug traffickers. Add to all that demands on justice systems to be more accountable for their budgets and performance, and the result can be strong pressure on the authorities to focus more on low-level offenders and less on persons higher up in the drug trafficking chain.

41. A month before he was killed in Medellin, the Colombian drug dealer Pablo Escobar was ranked as one of the richest men in the world. At the height of his power, his Medellin cartel controlled 80 per cent of the world's cocaine market and was estimated to be receiving billions of dollars annually from its cocaine operations. Escobar ruthlessly applied a strategy of *plata o plomo* (accept a bribe or face assassination) to

intimidate politicians, government officials and judges. Anyone viewed as a threat was executed. As a result, hundreds were killed; some were killed by Escobar himself. In 1991, Escobar reached an agreement with the Colombian authorities whereby, in return for turning himself in and discontinuing his drug trafficking activities, he would: receive a guarantee that he would not be extradited to the United States of America; and he would spend five years in a prison in Colombia that he would build for himself. After pictures of his luxurious prison residence were published, Escobar escaped, fearing that he would be extradited to the United States. Without the agreement, Escobar might never have been held accountable in any way for his actions. Colombia's drug control efforts have accomplished much since then. Although now only of historical significance, the Escobar case typifies some of the major problems still faced by many States in bringing to justice powerful drug traffickers and their supporters.

42. In Afghanistan, drug warlords still operate with relative impunity. Afghanistan produces some 92 per cent of the world's illicit opium,³³ and has a virtual monopoly over the world's illicit market for opiates, valued at billions of dollars.³⁴ Attempts to hold Afghanistan's drug traffickers and their foreign partners accountable have been mainly limited to domestic and international security efforts and some international law enforcement efforts. Those efforts have been hampered within Afghanistan by the security situation, lack of effective control in several important parts of the country beyond the capital and compromises made in the system of justice. But political and security responses or alliances alone cannot be effective against major drug traffickers, their operations and their assets. As a result, little has been achieved in efforts to counter drug trafficking in Afghanistan. The Board has, in its reports, urged those supporting Afghanistan to increase their assistance to the country to achieve greater success.

³² *Report of the International Narcotics Control Board for 1996 ...*, para. 4-6.

³³ *World Drug Report 2007* (United Nations publication, Sales No. E.07.XI.5), fig. 13.

³⁴ UNODC estimated the global illicit market for opiates, measured at wholesale prices, to be US\$ 20.6 billion in 2003 (US\$ 64.8 billion measured at retail prices) (*World Drug Report 2005* (United Nations publication, Sales No. E.05.XI.10), vol. 1, p. 17).

43. A number of other countries have difficulty holding accountable major drug traffickers. Experience has shown that all major drug traffickers, including those who are warlords, take sophisticated steps wherever needed to distance themselves from their crimes and their ownership of wealth.

44. In the Board's view, when a State cannot fully deal with the situation in its entire territory concerning major drug traffickers, much more could be done by all other States in which the traffickers hide their criminally derived wealth. Those States could take collective responsibility and, together with the trafficker's home State, take steps to trace, freeze, seize and ultimately confiscate such wealth, regardless of where in the world it is held. That would require determined, secure and well-coordinated action by their law enforcement, financial and criminal justice authorities, particularly in sharing intelligence and evidence with States in a position to take effective action to confiscate such wealth. States might also give consideration to sharing such confiscated property with other parties, pursuant to article 5, paragraph 5 (b) (ii), of the 1988 Convention.

Lower-level offenders

45. In its report for 1996, the Board called on Governments to take a more strategic approach to tackling drug trafficking, in order to prevent their justice and prison systems from being overloaded by low-level offender casework and to ensure that major drug trafficking operations were disrupted and put out of business.³⁵ At the time, the Board noted that many law enforcement agencies did not have the resources or skills to do more than apprehend street sellers and individual drug abusers, leaving intact the structure, financing and management of the illicit drug production chain. Eleven years later, that still appears to be the case in many countries.

46. Appropriate enforcement of the law in cases involving minor offences can also prevent minor crime from escalating into major crime (the "broken window principle").³⁶ However, enforcing the law against

minor offenders only is contrary to the conventions, and contrary to the principle of proportionality.

Celebrity drug offenders

47. More people than ever before can now routinely follow, through the media, the behaviour of well-known public figures from the world of sport or the entertainment industry or the performing arts. In general, the more iconic a person is in his or her culture and the more dramatic the behaviour, the higher the level of interest of the media and the public.

48. When such celebrities use illicit drugs, they break the law. Depending on how the authorities respond in the case, the media reports and associated Internet chatter often reflect or generate perceptions that the system has treated the celebrity concerned, by virtue of his or her celebrity status, more leniently than others.

49. Celebrity drug offenders can profoundly influence public attitudes, values and behaviour towards drug abuse, particularly among young people who have not yet taken a firm and fully informed position on drug issues. Cases involving celebrity drug offenders can also profoundly affect public perceptions about the fairness and proportionality of the response of the justice system, especially if there is a less lenient response to similar or lesser offences committed by non-celebrities.

E. Teamwork involving the justice and health-care systems

50. The principle of proportionality applies to all aspects of a country's response to drug abuse problems, including the prevention and treatment of drug abuse. When prevention and treatment do not succeed and drug abusers come into contact with the criminal justice system, proportionality requires an interdisciplinary response. Although drug addiction is a recognized medical condition brought on by use, it is not a legal excuse for committing crime.

51. An addicted person will do almost anything, even commit crime, to obtain the drug. Therefore, responses

³⁵ *Report of the International Narcotics Control Board for 1996 ...*, para. 6.

³⁶ The "broken window principle" became a metaphor for a successful strategy to prevent vandalism, by fixing the crime problems when they are still small, before the problems escalate. According to the principle, if a vandal

who breaks a window is caught and made to repair the broken window within a short time, say, within a week, the vandal is much less likely to break more windows or do further damage.

by States need to address both the offending and the drug abuse (the underlying cause). Anything less does not meet the aims and requirements of the conventions and does not satisfy the principle of proportionality.

52. Drug-related crime committed by drug abusers needs to be addressed in an integrated and individualized way:³⁷ integrated because such crime is inextricably linked to drug abuse; and individualized because there is no single treatment that is appropriate for all individuals. No single justice system measure can prevent reoffending. No justice, health-care, education, social or employment system alone has the remit or resources to deliver both; however, by working together with all relevant actors in the public, private and community sectors, it can be done. It is best done when there are clear and detailed guidelines for action that are integrated and coordinated vertically, as well as horizontally, among the various actors.

53. In the Board's view, the work and impact of drug treatment courts, as one example, confirm the value of the integrated approach with certain types of offences and offenders that justice and health-care systems agree are appropriate for diversion to treatment. Drug treatment courts aim to stop drug abuse and related criminal activity of offenders through court-directed treatment and rehabilitation programmes. Eligible participants undergo treatment and rehabilitation programmes instead of traditional final sanctions such as imprisonment. The programmes demand a high level of accountability on the part of the offender, and potential participants often prefer imprisonment, as it is the less demanding alternative. The court's multidisciplinary team (from the justice and health-care systems), led by the judge, oversees each participant's progress throughout the programme. Programme compliance is objectively monitored by

³⁷ In its report for 1996, the Board reiterated that drug abuse must be dealt with simultaneously from the different perspectives of law enforcement, prevention, treatment and rehabilitation. The Board expressed its belief that increased cooperation between the judicial, health and social authorities is a necessity to provide a bridge between the penal and health systems and called on Governments to examine more closely the alternatives to prison developed in different parts of the world, bearing in mind the different legal philosophies and systems (*Report of the International Narcotics Control Board for 1996* ..., paras. 24 and 26).

frequent substance-abuse testing. Compliance is rewarded and non-compliance is sanctioned. Relapse into drug abuse is not usually punished because some relapse can occur on the long journey towards sustained recovery. However, any dishonesty on the part of the offender about relapse is sanctioned. Such sanctioning may be in the form of a very short custodial sanction aimed at helping the offender to focus on and address any lingering failure to take responsibility for his or her own recovery – a key obstacle to making real progress towards sustained recovery. Successful completion may lead to suspension or dismissal of the criminal case, a non-custodial sentence or probation. Repeat offending or other serious programme non-compliance usually leads to expulsion, and the offender is then dealt with in the traditional manner in the criminal justice system.

54. In a growing number of countries,³⁸ courts apply key principles in court-directed treatment and rehabilitation programmes. The courts do not all operate the same way, and what works best in one place may not work in another. Some are separate, newly established courts, while others are existing courts with specially adjusted procedures. There is no single, universal model, and they have evolved in different forms to suit different needs, legal systems, localities and available resources. Key differences include eligibility to participate, when the case is diverted, and programme outcomes; however, the core characteristics are the same.

55. Applying the principles of drug treatment courts increases the cost of dealing with drug-abusing offenders (because of the court's monitoring of programme compliance), and the cost of treatment. However, evaluation of the work and impact of such courts shows that they are generally better at retaining drug-abusing offenders in treatment and at reducing recidivism and are often more cost-effective than other alternatives.³⁹ Success factors appear to include effective judicial leadership of the drug treatment court team; strong interdisciplinary team collaboration, with

³⁸ For example, in Australia, Barbados, Bermuda, Brazil, Canada, Chile, Ireland, Jamaica, New Zealand, Norway, Trinidad and Tobago and the United States.

³⁹ United States, Government Accountability Office, *Adult Drug Courts: Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes*, GAO report GAO-05-219 (Washington, D.C., 2005).

each team member maintaining professional independence; among the team members from the justice system, good knowledge of addiction, treatment and recovery; among the team members from the health-care system, good knowledge of criminality; an operational manual for consistency and efficiency; clear criteria for the eligibility of participants, with objective screening of potential participants; detailed assessment of each potential participant; fully informed and documented consent of each participant to be admitted to the drug treatment court programme; speedy referral of participants to treatment and rehabilitation following arrest; swift, certain and consistent sanctions for programme non-compliance and rewards for compliance; ongoing programme evaluation and willingness to make improvements; sufficient, sustained and dedicated drug treatment court funding; and changes in the underlying substantive or procedural law, if necessary or appropriate.

56. Treatment, rehabilitation and reintegration of drug-abusing offenders are effective and sustainable only when well tailored to ensure the offender's recovery and non-recidivism. The Board notes that programmes for the treatment of drug abuse need careful policy consideration, clearly articulated programme objectives and a built-in evaluation component. The programmes need to include relapse prevention and aftercare following primary treatment. Success will also depend on the expertise of those conducting the programmes, the availability of places in suitable facilities and close cooperation between the criminal justice and health agencies. Adequate resources need to be allocated to maximize the chances of success. Treatment services for drug abuse should also be made available within the prison system.⁴⁰

57. The Board notes that although the provision of treatment for drug abusers on a voluntary basis is desirable, such treatment does not need to be voluntary to be effective. Strong motivation can facilitate the treatment process. The Board has emphasized that a drug-abusing offender's encounter with the criminal justice system can provide a valuable opportunity to motivate the person to undergo treatment.⁴¹ The conventions permit the courts to use their authority and sanctioning powers creatively in an appropriate case to

help retain an offender in treatment, improve the prospects of the treatment succeeding and strengthen public safety by reducing the offenders drug abuse and propensity to reoffend. Finally, the Board notes the good results achieved in some countries where the justice and health-care systems cooperate closely to provide mandatory treatment for drug abusers in prisons.

F. Recommendations

58. The international drug control conventions encourage and facilitate proportionate responses by States to drug-related offences and offenders. Disproportionate responses undermine the aims of the conventions and undermine the rule of law.

59. While many countries have made progress since the Board last addressed proportionality issues in its report for 1996, more remains to be done, particularly in targeting and dismantling major drug trafficking organizations. In several countries, there is a need to better balance law enforcement efforts, so that lower-level offenders do not bear the brunt of justice while higher-level offenders are not brought to trial.

60. In order to ensure more effective implementation of the conventions, the Board recommends that Governments that have not already done so should take the following measures:

(a) *Law enforcement.* Governments should ensure that law enforcement and justice systems give high priority to investigating, prosecuting and convicting those who control, organize, manage or provide production for major drug trafficking organizations. Services to counter money-laundering are also important in this regard. While close attention should also be paid to street-level trafficking and to crimes involving possession of illicit drugs, they should not be the only focus of law enforcement and judicial action;

(b) *Assets of crime.* Governments should ensure that appropriate legislation is in place to allow authorities to freeze and seize property and assets of drug traffickers and that the authorities give priority to such action. Cooperation among States and asset-sharing in cross-border cases should be emphasized in order to effectively dismantle the operations of major drug trafficking organizations;

⁴⁰ *Report of the International Narcotics Control Board for 1996 ...*, paras. 29-31.

⁴¹ *Ibid.*, para. 30.

(c) *Alternative sentencing.* Governments should consider widening the range of custodial and non-custodial options for drug-related offences by illicit drug users so that authorities can respond proportionately to the circumstances of each case. In some cases drug courts focusing on persons who frequently relapse into high-risk lifestyles and mandatory treatment programmes can offer drug-abusing offenders effective alternatives to imprisonment;

(d) *Penal and health-care systems.* Governments should widen the availability of health-care programmes and treatment programmes for drug abuse in prisons, many of which have been shown to be quite cost-effective and useful in decreasing recidivism. It is of the utmost importance that access to illicit drugs in prisons be terminated;

(e) *Offences by public celebrities.* The authorities of criminal justice and treatment programmes should ensure that public celebrities who violate drug laws are made accountable for their offences. Cases involving drug-abusing celebrities who are treated more leniently than others breed public cynicism and may lead to youth adopting a more permissive attitude towards illicit drugs;

(f) *Mutual legal assistance.* Governments should review and, if necessary, revise their laws, policies, procedures, resource allocations, priorities and infrastructures regarding international justice system cooperation. The practical results should be that States receiving requests for international justice system cooperation or assistance dealt with those requests as quickly, thoroughly and usefully as they would want their own requests to be treated by States. Requests should be limited to the essential assistance needed, so as not to unreasonably burden the receiving State that has to execute the request. To improve the quality, speed and effectiveness of the request-making process, the Board recommends that Governments, when appropriate, should make use of the Mutual Legal Assistance Request Writer Tool and the forthcoming extradition request writer tool of UNODC, as well as the UNODC guides on best practices in extradition, mutual legal assistance and confiscation casework;

(g) *Resources.* Governments should review their drug-related casework priorities, practices and procedures to ensure that resources for law

enforcement, prosecution, court, and prison and correctional facilities are adequate for proportionate, effective action against drug-related crime. Governments should also consider increasing their support to help Governments of developing countries to enable their justice and health-care systems to deal more effectively with their drug-related offence casework;

(h) *Information policies.* Governments should ensure that the public and the media have access to facts and statistics concerning the use of the criminal justice system in response to drug trafficking and drug abuse. It is particularly important that the public be informed about effective treatment programmes for drug abuse and that health authorities make information widely available concerning the means and methods of treatment in order to encourage recidivist offenders to enter such programmes.

61. In the light of the recommendations made in its report for 1996 and the recommendations above, the Board calls on Governments to comprehensively review the responses by their legislative, judicial and executive arms of government to drug-related offences, in order to ensure that they are proportionate, and to make appropriate changes to correct any shortcomings. The Board would appreciate receiving feedback from States on any such changes.