Cannabis reform, 'medical and scientific purposes' and the Vienna Convention on the Law of Treaties

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Abstract: Treaty interpretation has long been a subject of interest for international legal scholars. However, it is only in recent years that advocates for drug policy reform have taken up these questions. This article examines the proposition put forward by several authors that a legally regulated market in cannabis may be permissible under the international drug control treaties if considered as a policy 'experiment'. In this way, these authors contend that such measures conform to the general obligation of the Single Convention on Narcotic Drugs to limit uses of cannabis 'strictly to medical and scientific purposes'. Reviewing this position using the formal methods set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, we conclude the interpretation proposed is untenable. While we share with these authors the objective of wider drug policy reform, we find the arguments supporting this position weak, and based on absent, flawed or incomplete interpretive methodology.

Keywords: Cannabis, international drug control, Single Convention on Narcotic Drugs, Vienna Convention on the Law of Treaties, treaty interpretation, medical and scientific purposes

1. Introduction

Drugs and international law have long been intertwined. This has been the case since bilateral treaties for the regulation of the opium trade were agreed over one hundred and fifty years ago. Multilateral cooperation on drug control dates back more than a century, beginning in 1909 with the meeting of the International Opium Commission in Shanghai.[1] The recommendations produced by the Commission led to the second International Opium Conference in The Hague and the adoption

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[1] International Opium Commission, 'Report of the International Opium Commission: Vol. I - Report of the Proceedings' (North-China Daily News & Herald Ltd 1909).

of the 1912 International Opium Convention, the first truly multilateral treaty on drug control.[2] International cooperation on drugs was expanded with the founding of the League of Nations in 1920. Article 23(c) of the Covenant of the League of Nations 'intrust[ed] the League with general supervision over the execution of agreements with regard to traffic in...opium and other dangerous drugs',[3] and under its auspices new political and supervisory bodies were created and a number of drug treaties adopted, expanding the scope of international legal obligations in this area.[4] Excluding regional arrangements, over a dozen multilateral treaties and protocols have been adopted on this issue to date, including the three United Nations treaties that define the modern international drug control regime – the Single Convention on Narcotic Drugs of 1961, the Convention on Psychotropic Substances of 1971 and the Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.[5]

Beyond these three conventions, drug control is an issue that engages, and is often explicitly referred to, in a wider array of other international treaties, from the Convention on the Law of the Sea[6] to human rights treaties[7] to anti-terrorism treaties.[8] Despite these treaties and connections, international legal scholarship on drug policy has been limited when compared to other issues of global concern. In the last decade, however, the human rights consequences of drug control have exposed tensions between treaty regimes,[9] requiring scholars to move beyond examination of individual human rights issues to discussions of more general principles of public international law. More recently still, a number of jurisdictions have begun to move outside the strict prohibitionist framework enshrined in the drugs conventions to allow legally regulated markets in recreational cannabis production, sale and use. In this context, some have sought ways to reconcile these national developments with States' existing international drug control obligations. That discussion brings the theory and practice of treaty interpretation to the forefront of drug policy debates.

While treaty interpretation has long been a subject of interest for international legal scholars, it is only in recent years that advocates for drug policy reform have taken up these questions. This article offers some reflections on this small but growing body of literature. While increased

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[2] International Opium Convention (signed 23 January 1912) 1922 LNTS 189.
[3] Covenant of the League of Nations (adopted 28 April 1919) (Covenant) art. 23(c).
[4] International Opium Convention (adopted 19 February 1925) 81 LNTS 319.; Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (adopted 13 July 1931) 139 LNTS 303.; Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs (adopted 26 June 1936) 198 LNTS 301.
[5] Single Convention on Narcotic Drugs 1961 (as amended by the 1972 Protocol) (30 March 1961) 520 UNTS 7515.; 1971 Convention on Psychotropic Substances (21 February 1971) 1019 UNTS 14956.; UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (20 December 1988) 1582 UNTS 27627.
[6] Article 108, United Nations Convention on the Law of the Sea, 1833 UNTS 3; 21 ILM 1261, 1982; Article 17, Vienna Convention. On the intersections between drug control, the law of the sea and the European Convention on Human Rights, see *Medvedyev and others v. France*, Application No. 3394/03, 2010; and *Rigopoulos v. Spain*, Application No. 37388/97, 1999.
[7] Article 5(1)(e), European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, 213 U.N.T.S. 222, *as amended.;* Article 33, Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
[8] Preamble, International Convention for the Suppression of the Financing of Terrorism, 1999, 2178 U.N.T.S 197.
[9] See generally, Rick Lines, *Drug Control and Human Rights in International Law*, (Cambridge University Press, 2017).

scholarship on the interpretation of these long-standing, and in many ways outdated, agreements is necessary and welcome, in order for drug reform proposals to be credible, we must ensure the clarity of interpretive theory and method adopted. With this in mind, this article examines the proposition put forward by a number of writers that a legally regulated market in cannabis[10] may be permissible under the drug treaties if considered as a policy 'experiment'. Considered in this way, these authors contend that such measures conform to the general obligation of the Single Convention on Narcotic Drugs to limit uses of cannabis 'strictly to medical and scientific purposes'.

While each author addresses this question from a slightly different perspective, some adopting a more explicitly legalistic approach than others, each proposes an expanded and novel understanding of the norm as it has been typically applied within international drug control law and resulting State practice: in effect, a new interpretation of a key treaty provision. Several of these authors cite Article 31 of the Vienna Convention on the Law of Treaties within their analyses, indicating a desire to give their conclusions some international legal authority, even if in some cases their line of reasoning is not strictly legal in conception or execution. This article will review the main points put forward by each author and argue that, based on the formal methods set out in Articles 31 and 32 of the Vienna Convention, the interpretation they propose is untenable, and lacks adequate reflection on interpretive methodology. While we share with these authors the objective of wider drug policy reform, we find the arguments supporting their position weak, and based on absent, flawed or incomplete interpretive methodology, which we will expand upon below.

1.1 Working Around a General Obligation: From 'Medical and Scientific Purposes' to 'Policy Experiments'

One of the general obligations of international drug control law, set out in Article 4(c) of the 1961 Single Convention on Narcotic Drugs, is 'to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs'.[11] This objective is not a modern concept, and dates back to the dawn of the international drug treaty regime.[12] Article 9 of the 1912 Opium Convention, for example, speaks of the need 'to confine to medical and legitimate purposes the manufacture, sale, and use of morphine, cocaine and their respective salts'.[13] Similarly, article 5 of the 1925 International Opium Convention obligates States Parties to 'enact effective laws or regulations to limit exclusively to medical and scientific purposes

[10] For the purposes of this paper, we use the term 'legally regulated market' as shorthand to describe a policy environment that allows for legal production, transport, sale, possession and use of cannabis for recreational, cultural or religious uses.
[11] Single Convention on Narcotic Drugs, art. 4(c).
[12] See generally Lines, chap. 5.
[13] International Opium Convention (signed 23 January 1912) 1922 LNTS 189, art 9.

the manufacture, import, sale, distribution, export and use of the substances to which this Chapter applies'.[14]

This concept has therefore been central to international drug control law for over one hundred years, and is widely acknowledged as prohibiting legally regulated markets in controlled substances that allow for recreational, cultural or religious uses.[15] Key scholars of international drug control law have argued that limiting controlled drugs strictly to medical and scientific purposes constitutes the object and purpose of the regime. Boister, for examples, writes that 'the international multilateral conventions were established by the international community with the aim of preventing the non-scientific and non-medical production, supply and use of drugs while at the same time making them available for medical and scientific purposes'.[16] A number of States have specifically expressed the position that the object and purpose of the 1961 Convention is to limit the use of drugs to medical and scientific purposes.[17]

However, some recent literature proposes that legally regulated markets in cannabis or other drugs currently prohibited for these uses can be accommodated by way of treaty interpretation. This position hinges on the interpretation of the 'medical and scientific purposes' provisions found in the treaties.[18] In general, proponents of this position suggest that States may utilise the admittedly broad umbrella of the term 'medical and scientific purposes' to justify establishing regulated domestic markets for recreational and other purposes, while maintaining treaty compliance. As described by one report, 'The "scientific purposes" or "scientific research" exemption...offers an alternative avenue to justify legalizing cannabis for non-medical use. If [a State's] legalization scheme can be designed to conduct scientific research, it may be able to justify legalization under this exemption, while maintaining its obligations under the conventions.'[19] This is an attractive proposition for many drug policy reformers, as it offers a possible means of maintaining treaty compliance for a market – recreational – that is otherwise viewed as inconsistent with the drug conventions.

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[14] 1925 Opium Convention, art 5.

[15] See B. Leroy, M. Cherif Bassiouni and Jean-Francois Thony, 'The International Drug Control System', in M. Cherif Bassiouni (ed) *International Criminal Law, Volume I Sources, Subjects, and Contents* (3rd Ed) Martinus Nijhoff, 2008, pp. 855-905

[16] See Neil Boister, *Penal Aspects of the UN Drug Conventions* (Kluwer 2001), 1. See also Lines, chapter 5.

[17] See, for example, Permanent Mission of Italy to the United Nations, 'Italy: Objection to the Reservation contained in the in the communication by the Plurinational State of Bolivia' (28 December 2012) UN Doc No C.N.101.2013.TREATIES-VI.18 (Depository Notifications), 1.; Permanent Mission of the Kingdom of the Netherlands to the United Nations, 'Netherlands: Objection to the Reservation contained in the communication by the Plurinational State of Bolivia' (8 January 2013) UN Doc No C.N.101.2013.TREATIES-VI.18 (Depository Notifications), 1.; ermanent Mission of Ireland to the United Nations, 'Ireland: Objection to the Reservation contained in the in the communication by the Plurinational State of Bolivia' (9 January 2013) UN Doc No C.N.101.2013.TREATIES-VI.18 (Depository Notifications), 1.

[18] John Collins, 'Rethinking 'flexibilities' in the international drug control system—Potential, precedents and models for reforms', International Journal of Drug Policy (in press).; Fransciso Thoumi, 'Re-examining the 'Medical and Scientific' Basis for Interpreting the Drug Treaties: Does The 'Regime' Have Any Clothes?' in After the Drug Wars: Report of the LSE Expert Group on the Economics of Drug Policy (February 2016); Megan Fultz, Lisa Page, Alysha Pannu and Matthew Quick (with Steven J. Hoffman, ed.), Reconciling Canada's Legalization of Non-Medical Cannabis with the UN Drug Control Treaties (Global Strategy Lab, University of Ottawa, February 2017).

[19] Megan Fultz, Lisa Page, Alysha Pannu and Matthew Quick (with Steven J. Hoffman, ed.), Reconciling Canada's Legalization of Non-Medical Cannabis with the UN Drug Control Treaties (Global Strategy Lab, University of Ottawa, February 2017), p 11.

Francisco Thoumi suggests that because the treaties offer no concrete definition of 'medical and scientific purposes', it creates what he describes as a 'legal void' or 'legal gap'.[20] According to Thoumi, 'This...presents a logical dilemma since the terms 'medicine' and 'science,' that are the key determinants of the allowed drug uses, are not defined. Thus, it is logically impossible to know if any specific policy complies with the conventions and it is not possible to rule out any policy as 'unscientific.''[21] Thoumi's primary interpretive resource is the dictionary, noting that 'definitions of science provided by the most recognised dictionaries are extremely diverse'.[22] Based upon these divergent dictionary definitions, Thoumi concludes that 'The failure to define and clarify the term 'science' implies that there is no unique way to interpret the conventions. For instance, it may be logically possible to accept that the policies of Uruguay and the States of Colorado and Washington that have allowed non-medicinal and research uses of marijuana comply with the conventions if those policies are based on scientific evidence from both medicine and the social sciences.'[23] In his article, Thoumi makes no reference to the literature on treaty interpretation, and does not discuss the Vienna Convention on the Law of Treaties. That there are many ways to interpret the text is, of course, clear. However, a key issue is whether a given argument is sufficiently adherent to a clear interpretive method so as to be sufficiently persuasive.[24]

John Collins, an historian of the drug control system, reaches this same conclusion as Thoumi. Instead of dictionary definitions, however, Collins's argument is based largely on an historical review of how some States applied the term between 1909 and 1961, particularly in their colonial territories. From this starting point, Collins set out to challenges 'some existing legal interpretations of the treaties through recourse to historical precedents of flexible interpretation'.[25] Like Thoumi, Collins characterises the term 'medical and scientific' as being purposefully 'undefined',[26] demonstrating that States always intended room for policy experimentation, including the creation of legally regulated recreational markets under the banner of 'social scientific policy experimentation'.[27] Says Collins, 'The term 'medical and scientific' use was the treaty delineator between licit and illicit practices. However, it was a consistently shifting parameter determined by reigning cultural norms. The international control system of was a reflection of these norms, not a determinant. In the Single Convention the definition of 'medical and scientific' use was consciously left to member states to decide alongside broad scopes to implement national

[20] Thoumi, p. 20.
[21] Ibid, p. 21.
[22] Ibid p. 26.
[23] Ibid, pp. 26-27.
[24] John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' 23 *Harvard Human Rights Journal* 1, 2010, pp. 1-50.
[25] Collins, p. 1.
[26] Ibid p. 2.
[27] Ibid. p. 7.

regulations.'[28] Collins references the Vienna Convention to underpin his approach, but only selectively, stating that 'There is no single mechanism to define the boundaries of the treaties. Member states must instead decide whether the national regulatory systems they enact remain 'in good faith in accordance with the ordinary meaning' of the treaties, as mandated by the Vienna Convention on the Law of Treaties.'[29]

As with Thoumi, who Collins cites for support, there is no discussion of legal interpretive method or the literature surrounding it. Elsewhere, however, Collins's approach is explained more thoroughly. 'Rather than a legalistic interpretative focus on the international drug control treaties' he writes, his research 'looks to the historical processes, goals and ideas that shaped them.' In this way, Collins 'deviates from the practitioner-academic historiography of current policy discourse which utilises the conventions as a baseline for understanding state action and control efforts'.[30] However, clear problems arise when using purely historical methods and sources as a basis for interpreting treaties. As described by Anne Orford, 'Although international lawyers and historians at times look to the same texts from the past, the way the two disciplines approach such texts is quite different'.[31] Although Collins explicitly rejects a 'legalistic interpretive focus', he nonetheless seeks to draw legal conclusions, yet using non-legal archival methods and sources. Collins looks to long superceded treaties as 'precedent' for interpreting the modern drug conventions. State practice since the 1960s is omitted. The *travaux préparatoires* of the United Nations treaties are not discussed. The legal methodological problems with this are obvious, which takes nothing away from the quality of the original archival work as contextualist historiography.

A 2016 report issued by the UK All-Party Parliamentary Group on Drug Policy Reform also suggests scope for an 'expanded definition of "medical and scientific" via experimentation'.[32] Like Thoumi and Collins, the All-Party Parliamentary Group report notes 'there is not a clear and agreed definition of what the terms 'medical and scientific' can and cannot include'.[33] On that basis, the report states that 'If independent observers could conclude that a regulated market was indeed a scientific experiment that contributed to evidence based policy, then it could potentially be viewed as being within the parameters of the conventions if pursued for a defined period of time.'[34] The report notes that the Group had received advice from a barrister supporting this position, although the basis for such advice and the legal reasoning and method behind it is not presented.

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[28] Ibid, p. 7.
[29] Ibid, p. 6.
[30] John Collins, *Regulations and Prohibitions: Anglo-American Relations in Drug Control 1939-1964*, PhD Thesis, London School of Economics, 2015, pp. 20-21.
[31] Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law', International Institute for Law and Justice Working Paper 2012/2, New York University School of Law (2012), p. 2.
[32] All Party Parliamentary Group for Drug Policy Reform, Guidance on Drug Policy: Interpreting the UN Drug Conventions (2016), p. 19.
[33] Ibid, p. 3.
[34] Ibid, p. 19.

The report notes that that previous 'experiments in drug policy which although [were] initially resisted are now accepted within the framework of the Conventions', such as the provision of Heroin Assisted Treatment in Switzerland and the decriminalisation of possession of drugs for personal use in Portugal.[35] However, while it is true these policy developments were controversial in some quarters, neither represents a breach of treaty obligations, nor is analogous to the interpretive approach for cannabis the report proposes. The provision of prescribed heroin as a form of maintenance treatment is a clearly medical use of the drug: accessed under the authority of a licensed physician, provided to an individual based upon specific clinical criteria and administered by prescription. The International Narcotics Control Board, the treaty body that monitors State compliance with the regime, accepts prescribed heroin for the purpose of maintenance treatment as a legitimate use of the drug under the conventions.[36] Similarly, decriminalisation of possession for personal use is not a policy predicated on a creative interpretation of medical and scientific purposes, but rather is compliant with obligations under Article 3(2) of the 1988 drug convention, which allows various caveats that States may utilise to avoid applying criminal sanctions to individual people who use drugs. This again is a position accepted by the International Narcotics Control Board.[37]

The notion of an expanded definition of medical and scientific purposes has not remained within the confines of reports and journal articles. In recent testimony before a Canadian Parliamentary committee examining these issues, Prof Steven Hoffman made the same case. 'The treaties', he said, 'clearly allow that countries can make cannabis and other drugs available if it's for a scientific purpose. So one legal construction is that we can maybe think of this legalization effort as being one big, natural experiment: that is, assessing the intergenerational effects of cannabis legalization on people... that's the most creative workaround that I could come up with'.[38]

Hoffman's Parliamentary testimony draws upon research published by the University of Ottawa's Global Health Law Clinic, which proposes that cannabis legalisation may be permissible 'If [the] legalization scheme can be designed to conduct scientific research'.[39] The report, 'Reconciling Canada's Legalization of Non-Medical Cannabis with the UN Drug Control Treaties',

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[35] Ibid, p. 3.

[36] See, for example, International Narcotics Control Board, 'Report of the International Narcotics Control Board for 2017' (Vienna, 2018) UN Doc No E/INCB/2017/1, p 15.; International Narcotics Control Board, 'Availability of Internationally Controlled Drugs: Ensuring Adequate Access for Medical and Scientific Purposes. Indispensable, adequately available and not unduly restricted' (New York, 2016) UN Doc No E/INCB/2015/1/Supp. 1, para 254.

[37] See, for example, 'The Portuguese Approach and the International Drug Control Conventions', Statement of the President of the International Narcotics Control Board (INCB), Mr. Werner Sipp, presented at the reconvened fifty-eighth session of the UN Commission on Narcotic Drugs, Special event: 'A public health approach as a base for drugs policy: The Portuguese case' (Vienna, 9 December 2015) in which Mr Sipp reviews and affirms the Board's support for the legal compliance of Portugal's decriminalisation model.

[38] Steven Hoffman, Testimony before The Standing Senate Committee on Foreign Affairs and International Trade, Parliament of Canada (22 March 2018).

[39] Megan Fultz, Lisa Page, Alysha Pannu and Matthew Quick (with Steven J. Hoffman, ed.), Reconciling Canada's Legalization of Non-Medical Cannabis with the UN Drug Control Treaties (Global Strategy Lab, University of Ottawa, February 2017), p. 11.

cites the same 'ordinary meaning' passage of the Vienna Convention as does Collins to support their position (often misquoting the test as 'ordinary words'), but also refers to other sources.[40] For example, recourse to the *travaux préparatoires* as a supplementary method is referred to, but then not engaged with. The report merely states that 'The preparatory work of the treaty and the circumstances of its conclusion offer little guidance'.[41] However, in drawing this conclusion the report references only the Official Commentary on the Single Convention,[42] which offers only a summary of elements of the drafting history, when a review of the much more thorough Official Records[43] of the conference concluding the treaty shows extensive discussion of the term 'medical and scientific'. Other aspects of the methods set out in the Vienna Convention are not discussed, including the context within which the text sits, and subsequent practice.

1.2 Applying the Vienna Convention on the Law of Treaties to the question of 'medical and scientific' uses

The process of interpretation of international treaties is one which has been characterised as 'occup[ying] a prime position on the crossroads between law and politics'.[44] This is certainly an appropriate characterisation of the context of treaty interpretation within international drug control law, a regime that has historically evolved through the sometimes uncomfortable interplay of legal, political, moral and religious paradigms.[45] General rules of treaty interpretation are found under Articles 31—33 of the Vienna Convention on the Law of Treaties,[46] and provide authoritative guidance in these matters.[47] In particular, Articles 31 and 32 are generally agreed to reflect customary international law.[48]

Article 31

General rule of interpretation

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[40] Ibid, pp. 11-12.
[41] Ibid, p. 12.
[42] *Commentary on the Single Convention on Narcotic Drugs, 1961* (United Nations 1973).
[43] United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs, 'Official Records Volume I' (24 January-25 March 1961) UN Doc No E/CONF.34/24.; 'Official Records Volume II' (24 January-25 March 1961) UN Doc No E/CONF.34/24/Add. 1.
[44] Jean-Marc Sorel and Valerie Bore Eveno, 'Article 31: General rule of interpretation' in O Corten and P Klein (eds) The Vienna Convention on the Law of Treaties: A Commentary, Vol. I (Oxford University Press 2011) 807.
[45] Lines, chap. 3.
[46] Vienna Convention on the Law of Treaties (done at Vienna on 23 May 1969, entered into force on 27 January 1980) UNTS vol 1155, p 331, arts 31-33 (Vienna Convention).
47 See, for example, Golder v United Kingdom App no 4451/70 21 (ECtHR, 21 February 1975) paras 29-30.;Witold Litwa v Poland App no no. 26629/95 (ECtHR, 4 April 2000) paras 57-64.; Johnston and Others v. Ireland (1986) Series A no 112, para 51.; Lithgow and Others v. the United Kingdom (1986) Series A no 102, paras 47-48.
[48] International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi* UN Doc No A/CN.4/L.682 13 April 2006, para 427.

> 1. A treaty shall be interpreted 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.
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> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
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> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.
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> 4. A special meaning shall be given to a term if it is established that the parties so intended.
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> Article 32
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> Supplementary means of interpretation
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> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

In any process of interpretation, it is quite natural for different scholars to reach different conclusions. As described by Gardiner in his discussion of Articles 31 to 33 of the Vienna Convention, 'the difficult part of the art of treaty interpretation involves going beyond the rules themselves, that is the evaluation and judgement required in applying the rules to a particular treaty to produce an actual interpretation'.[49] Villiger notes that 'the process of eliciting the different meanings - and in particular the "correct" meaning - from the terms of a treaty is altogether a creative process leaving room for extra-legal considerations such as one's personal or cultural background'.[50] Gardiner concurs, noting that treaty interpretation is not a mechanical exercise, but one where 'the person giving meaning to the terms of a treaty introduces elements of subjectivity and creativity. Thus, judgement is a necessary component of the process.'[51]

However, while legal interpretation will always be open to difference of opinion, the process through which treaty interpretation takes place cannot devoid of clear methodology. The Vienna Convention presents a well-accepted approach. As shown above, Article 31 describes the 'General Rule of Interpretation', which includes a good faith reading of the text given its ordinary meaning in the light of its object and purpose. The context must also be considered, which includes the wider text in which the relevant clause sits, as well as other related international instruments agreed

[49] Richard Gardiner, 'The Vienna Convention Rules on Treaty Interpretation' in DB Hollis (ed) *The Oxford Guide to Treaties* (Oxford University Press 2012), p. 477.
[50] [50] Mark E Villiger, 'The Rules on Interpretation: Misgivings, Misunderstandingsm Miscarriage? The "Crucible" Intended by the International Law Commission" in E Cannizzaro (ed) *The Law of Treaties: Beyond the Vienna Convention* (Oxford University Press 2011) p. 106.
[51] Gardiner, p. 478.

between the Parties, any subsequent agreements and State practice and any relevant rules of international law. Significantly, the title of Article 31 is in the singular ('General Rule' rather than 'General Rules'), implying that all the interpretive elements contained within it must be applied collectively, rather than selectively, in order to arrive at a proper interpretive conclusion. The International Law Commission has long approached the methods in Article 31 as a 'single combined operation',[52] a view that has been adopted, for example, at the European Court of Human Rights.[53] When these sources cannot resolve the question, the Vienna Convention allows recourse under Article 32 to 'supplementary means' such as treaty drafting history and debates (the *travaux préparatoires*). As John Tobin notes, Articles 31 and 32 may be summarised as including various forms of interpretation: 'textual, contextual, teleological, and historical'.[54] In short, treaty interpretation is done by applying specific sources of law within a specific interpretive framework. To be sure, many interpretations can be put forward. It is not about finding 'the' definitive answer, but 'an' interpretation that is more persuasive than others, which must include its formal legal method.[55] Straying too far outside of formal methods, or 'cherry-picking' individual elements while excluding others, compromises any conclusions reached, which is where the above authors fall short.

2. Application to the Vienna Convention on Treaty Interpretation

Having reviewed the main arguments put forward by these authors, we will apply the Vienna Convention rules to this question and consider whether their expanded definition of medical and scientific purposes might form a convincing interpretive conclusion. Our objective here is not to conduct a comprehensive analysis using Vienna Convention rules, but rather to illustrate the clear limitations of the perspective advanced.

2.1 Article 31(1) - A treaty shall be interpreted 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

Article 31(1) of the Vienna Convention is cited by several of the authors above in support for their expanded definition of medical and scientific purposes, in each case limiting their commentary to

[52] International Law Commission, 'Draft Articles on the Law of Treaties with Commentaries', *Yearbook of the International Law Commission*, 1966, Vol. II, pp. 201 and 202.
[53] *Witold Litwa v Poland* App no no. 26629/95 (4 April 2000) para 58.; See also *Golder v United Kingdom* App no 4451/70 21 (21 February 1975) para 30. '…the process of discovering and ascertaining the true meaning of the terms of the treaty is a unity, a single combined operation'
[54] Tobin, p. 17.
[55] Ibid.

examining only the question of the 'good faith' interpretation of the 'ordinary meaning' of 'medical and scientific' purposes within the context of the drug control treaties. Central to consideration of Article 31(1) then is the question of object and purpose. As discussed above, key scholars of international drug control law, as well as a number of States Parties, have expressed the opinion that limiting controlled drugs strictly to medical and scientific purposes is itself the object and purpose of the regime. The question then becomes whether the content of this concept might be expanded to encompass legally regulated markets in cannabis.

In this context, it is clear that State practice contradicts the authors' selective use of the 'good faith' and 'ordinary meaning' test contained in Article 31 of the Vienna Convention. For the purposes of treaty interpretation, the ordinary meaning of a term is not how an individual or dictionary might define it, but rather how that term has been generally understood and applied by States and other relevant international and legal authorities in practice. Nowhere can we point to a single example where 'medical and scientific purposes' has been understood to embrace social policy experiments in legal cannabis markets. Nowhere in the *travaux préparatoires* do any States argue that 'medical and scientific purposes' be understood as allowing room for policy experimentation with legal regulation. Not one of the more than 180 countries that have ratified the drug conventions has issued a reservation declaring that they understand the term 'medical and scientific purposes' in this way. Therefore, when the authors suggest that a legally regulated market in recreational cannabis can be accommodated under the 'ordinary meaning' of 'medical and scientific purposes', they are in fact advocating for an *extraordinary* understanding of the meaning of the term as understood and applied in practice over the past sixty years.[56]

The report of the Global Health Law Clinic in Canada further expands on this question of ordinary meaning by reviewing the International Court of Justice in the 2014 case of *Australia v Japan*,[57] which examined the heated topic of whaling for 'scientific research'. A key question examined in the case is when and under what circumstances lethal harvesting of protected species may be permitted under the International Convention on the Regulation of Whaling in the name of scientific research.[58] Japan argued that it was acting within the terms of the convention in issuing permits to capture and kill protected whale species – whose meat was later sold into commercial markets as allowed in the treaty - because the harvesting was done for scientific research purposes. In the case, which hinges on whether the Japanese whaling programme met the threshold of the 'scientific purpose' exemption within the convention, the Court explored at length various

[56] Indeed, the authors seem to be arguing for a 'special meaning' to be given to 'scientific purposes', which is addressed by Article 31(4) of the Vienna Convention. Such meanings can be given to a term if it is shown that this was intended by the parties. As noted below, from the travaux, this would be a difficult task.

[57] International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, 'Whaling in the Antarctic' (Australia v. Japan: New Zealand intervening), Judgment of 31 March 2014.

[58] International Convention on the Regulation of Whaling (Washington, 2 December, 1946) 62 Stat. 1716; 161 UNTS 72.

definitions and applications of scientific research in reaching its conclusion that Japan was in breach of the treaty. The authors seek to apply the Court's reasoning in this case, and a four test definition of 'scientific research' introduced by Australia, as a basis to propose a legitimate framing of a 'scientific purpose' under the drug conventions that would allow for legal recreational markets in cannabis while maintaining treaty compliance.

There are obvious limitations to this line of reasoning. The two treaties address completely different subject matters, making a direct comparison of the definition and application of terminology within separate legal regimes problematic.[59] *Australia v Japan* tests only the narrow question of whether the legal threshold of the treaty provision on scientific research has been met. This is a very different matter to what is being proposed by the authors with regard to cannabis markets, in which they seek to create a legal rationale for a policy that would otherwise clearly be a treaty breach. In the context of whaling, a more accurate analogy would be whether an explicit policy of commercial harvesting of whaling of protected species (otherwise in contravention of the treaty) was in fact *allowable* as a 'scientific experiment'. This was not in any way the nature of the question addressed by the Court.

The most problematic part of the case for those proposing using a scientific exemption argument to justify legal cannabis markets is the reasoning of the Court's final judgment itself. Significantly, the Court did not find that the Japanese programme was 'unscientific', accepting that it 'involves activities that can broadly be characterized as scientific research'.[60] Rather, the Court concluded that the programme's design and implementation were not reasonable to meet its stated objectives, largely on the basis that the programme permitted the harvesting of many more protected 'high value' whales than could be justified by scientific necessity. Therefore, the programme could not be considered to meet the threshold of being 'for the purposes of scientific research'.[61] While the Global Health Law Clinic report focuses on the use of terminology in the decision, and how it might be applied in the context of cannabis policy, we draw a different inference from the judgment.

In *Australia v. Japan*, the Court essentially concludes that a State cannot manipulate a 'scientific' loophole as a way to breach a key treaty provision, in this case to camouflage a commercial whaling operation as scientific research.[62] In short, the 'purpose' of the Japanese programme was not scientific research (despite the Court's agreement that the programme bore scientific characteristics). The purpose was to harvest whale meat for the commercial market.

[59] It is worth recalling in this regard the reticence of the International Criminal Tribunal for the Former Yugoslavia in embracing 'too quickly and too easily concepts and notions developed in a different legal context'. *Prosecutor v Kunarac*, Case No. IT-96-23 and IT-23/1-A, 12 June 2002. ICTY Trial Chamber, 22 February 2001, para 471.
[60] International Court of Justice, 'Whaling in the Antarctic', para 227.
[61] Ibid.
[62] The question of whether the programme specifically constituted a 'commercial' operation was not one addressed by the Court, as it felt that making such a distinction was not necessary to assessing treaty compliance. International Court of Justice, para 230.

Labelling the programme as 'scientific research' was seen as a ruse to try and avoid a treaty breach, an attempt the Court rejected. In our estimation, this is the clear inference from the judgment, and has great significance to the question of a 'good faith' interpretation of the 'ordinary meaning' of the term 'scientific purpose'. In all the cases we examine above, the admitted *purpose* of their proposals is not truly scientific, but rather is explicitly a strategy to try and avoid questions of treaty compliance. All accept that legally regulated markets in recreational cannabis use are prohibited under the treaties, and propose the 'scientific experimentation' approach as a way to maneuverer around that fact. In effect, a strategic approach not far removed from what Japan was doing in its whaling programme. Given the Court's judgment, it is far from certain that it would not also consider a State using a scientific justification for recreational cannabis markets as a similarly illegal manipulation.

2.2 Article 31 (2): Context: Wider text within which the provision sits, including the preamble

In order to reach a persuasive and coherent interpretive conclusion on this question, it is imperative to look at the wider treaty context in which the phrase 'medical and scientific purposes' sits, and how cannabis is dealt with elsewhere, an exercise that none of the above commentators undertake. With regard to the first, it is suggested by the above authors that because the term 'medical and scientific purposes' is not defined within the treaties, it may therefore be widened to include social policy experimentation, such as legally regulated recreational markets. While it is true that 'medical and scientific purposes' is not included among the list of terms in the definitional provision at Article 1, within the terms of the treaties themselves it is quite clear that 'medical and scientific purposes' refers to the reason for the use of the drug, not the policy objective. This is apparent from a reading of the treaties as a whole. For example, the preamble of the 1961 Convention refers to medical and scientific 'use',[63] while elsewhere the treaty refers to 'consumption' for medical and scientific purposes.[64]

With regard to how cannabis is addressed, the 1961 Convention specifically articulates a difference between medical and non-medical use. This is found under Article 49 on 'Transitional Reservations', and which allows States to issue a reservation on the 'The use of cannabis, cannabis resin, extracts and tinctures of cannabis for non-medical purposes',[65] yet then requires that the 'use of cannabis for other than medical and scientific purposes must be discontinued as soon as possible but in any case within twenty-five years from the coming into force of this Convention'.[66] If the

[63] Single Convention on Narcotic Drugs, preamble.
[64] Ibid, art 1(1)(x); art 19(1)(a); art 21(1)(a).
[65] Ibid, art 49(1)(d).
[66] Ibid, art 49(2)(f).

treaty was indeed intended to allow scope for recreational, cultural or other non-medical cannabis use, why would it include a provision obligating States with extant traditional practices of recreational cannabis use to extinguish it, and thereafter limit use only to medical and scientific purposes? The simple answer would seem to be because these two types of cannabis use were not considered analogous, and that one could not be subsumed under the umbrella of the other. This is the approach mirrored in State practice and domestic criminal law in most countries of the world.

Cannabis is also specifically addressed in several provisions of the 1961 Convention, each one outlining structures for wider suppression. These include Article 22 on prohibiting cannabis cultivation and destroying plants, Article 28 on limiting cannabis production only to industrial and horticultural purposes while and preventing misuse and illicit traffic and Article 49 on phasing out traditional use. The preamble, meanwhile, refers to the 'evil' of addiction and the duty of States to 'combat this evil'. Drug abuse, it continues, requires 'universal action'.[67] These provisions do not describe a treaty context in which recreational cannabis production, sale and use was considered a legitimate interpretive option for States.

2.3 Article 31(3)(a) - Subsequent agreements of the parties

Together with the context, an interpretive conclusion must consider 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provision'. We highlight here the term subsequent agreements, as the arguments in favour of an expanded and non-restrictive application of 'medical and scientific purposes' do not account for the fact that the international drug control regime has grown more restrictive over time, not less. Thoumi, for example, reflects on the meaning text of the 1961 treaty using the Official Commentary that summarises the treaty drafting process,[68] while Collins looks at the practice of some States pre-1961. Yet for interpretive purposes, we have to look at what happened *after* the adoption of the treaties for guidance. To begin, we would note that there are no resolutions of the UN Commission on Narcotic Drugs nor the General Assembly supporting this interpretation of 'medical and scientific purposes'. Instead these reaffirm the present understanding of the regime as excluding such measures.

The 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances is particularly significant in this regard, though Collins argues that it 'provided little that was

[67] Ibid, preamble.
[68] Commentary on the Single Convention on Narcotic Drugs, 1961 (United Nations 1973).

radically new'.[69] On the contrary, it introduced international legal obligations for States to criminalise the entire drug market chain, beginning with cultivation/manufacturing all the way through to (in some circumstances) possession for personal use (the two previous drug treaties specifically avoided calling for 'criminal' sanctions, as the *travaux préparatoires* reflect). The very adoption of the 1988 Convention therefore affirms a restrictive interpretation of the regime that these authors seek to refute. The treaty was described by one US commentator as representing the 'internationalizing of the war on drugs',[70] and there is no doubt that the it requires States to implement a punitive criminalisation approach to drug suppression within national law, and to cooperate internationally towards this shared goal. In its obligation to criminalise the entire drug market chain, the treaty imposes the exact opposite legal framework to the open, flexible and experimental one these authors argue is allowed. This restrictive approach is one reflected in a myriad of consensus resolutions of the UN Commission on Narcotic Drugs and UN General Assembly, the Political Declarations and Plans of Action adopted in in 1998,[71] 2009[72] and the outcome document from the 2016 UN General Assembly Special Session on the world drug problem,[73] all of which weigh heavily against this argument.

It is also significant in this context that Article 3(2) of the 1988 Convention creates an obligation to 'to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption'.[74] While this provision includes important constitutional caveats that allow room for States to avoid the use of criminal penalties for possession for personal use, the fact that the convention generally mandates that States criminalise individuals who possess drugs for their own personal use severely undermines the suggestion that the treaties were intended to allow personal recreational or other use under an expansive understanding of 'medical and scientific purposes'. In fact, this 1988 provision represents an escalation in the severity of repression as a tool of drug control over time, and one targeted specifically at people who use drugs.

2.4 Article 31(3)(b) - Subsequent practice of the parties

[69] Collins, 'Rethinking Flexibilities', p.5 IJDP
[70] David P Stewart, 'Internationalizing The War on Drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' (1989-1990) 18 Denver Journal of International Law and Policy 387, 387.
[71] United Nations General Assembly, 'Political Declaration' (21 October 1998) UN Doc No A/RES/S-20/2.
[72] United Nations Commission on Narcotic Drugs, 'Political Declaration and Plan of action on international cooperation towards an integrated and balanced strategy to counter the world drug problem' in Report on the fifty-second session (14 March 2008 and 11–20) UN Doc No E/CN.7/2009/12.
[73] United Nations General Assembly, 'Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem', Thirtieth Special Session General Assembly New York, 19-21 April 2016.
[74] 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art 3(2).

Collins, as we have noted above, relies on earlier (pre-1961) State practice as an historical precedent to support his interpretive conclusions for the post-1961 treaties. Yet when it comes to interpreting treaty obligations, the central issue is what States did *after* ratifying the drug treaties. For decades, States Parties have adopted national legislation to comply with a restrictive interpretation of the drug conventions, in some cases even modelling their domestic laws on them. The vast majority of States use criminal laws to impose and enforce a restrictive interpretation of which practices are and are not permitted. This State practice has been consistent for decades. Millions of people are incarcerated each year on this basis of this shared interpretation. While national laws may vary slightly, in all but a tiny number of cases all of them understand the drug treaties to exclude precisely the kinds of legal flexibilities suggested, and is fatal to the claims made regarding a broad interpretation of 'medical and scientific purposes'.

*2.5 **Article 32 - The preparatory works***

As noted above, the report of the Global Health Law Clinic in Canada does refer to the preparatory works as a supplementary method, but does not in fact discuss the lengthy discussions on medical scientific purposes that took place, nor the wider discussions about the object and purpose of the regime, the specific cannabis provisions and so on. For example, during the plenipotentiary conference that concluded the text of the 1961 Convention, numerous delegations made reference to the medical and scientific provision. China commented that '[s]teady progress had been made towards the goal of limiting the use of narcotic drugs to medical and scientific purposes'.[75] The USSR described that '[c]areful supervision was also necessary to ensure that the drugs were used for medical and scientific purposes only', and that '[t]he success of international narcotics control depended entirely upon strict national control measures' to achieve this aim.[76] The above authors could perhaps find some support for their position in the *travaux*, but this would require an in depth analysis of the documents than appears to have been undertaken. From our experience, having both studied them, we suggest that such support will be difficult to find.

3. Conclusion

[75] 'United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs, Official Records Volume I' (24 January-25 March 1961) UN Doc No E/CONF.34/24, 135-141), p 13.
[76] 'United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs, Official Records Volume II' (24 January-25 March 1961) UN Doc No E/CONF.34/24/Add., p. 9.

The International Law Commission stated famously in 1966 that 'the interpretation of documents is to some extent an art, not an exact science'.[77] But while not an exact science, interpretation is not a mere process of conjecture either. In this article, we have examined the proposal made in recent literature proposing that legally regulated markets in recreational cannabis could be permitted under existing treaty obligations if that policy was labelled a 'scientific experiment'. Relying on various tests outlined under Articles 31 and 32 of the Vienna Convention on the Law of Treaties, we have sought to demonstrate the limitations of this proposal, and why we do not find it convincing. Our purpose in this exercise is not seek to end this line of discussion. Nor is it to to suggest that the Vienna Convention is the final word in interpretation, or to ignore the importance of realpolitik in this debate. Rather, although this article has focused on a single question, we hope it speaks to the need for, and value of, heightened rigour when it comes to questions of drug treaty interpretation and possible reforms.[78] In light of the politically charged nature of discussions regarding cannabis legalisation and the UN drug conventions, a refocusing on the principles of legal interpretation in treaty law could provide a common framework for interested parties to engage on questions of treaty evolution and reform.

[77] International Law Commission, 'Yearbook of the International Law Commission, vol II' (1966) UN Doc No A/CN.4/SER.A/1966/Add.1, p 218, para 4 (Yearbook vol II).

[78] As one relevant example, the International Narcotics Control Board recently asserted that the general obligation of the Single Convention to restrict controlled substances to medical and scientific purposes (Article 4(c)) is 'absolute' and has become a 'peremptory norm' of international law. In the Board's estimation, as a quasi-judicial treaty body, drug prohibition has become customary international law at the status of the prohibition of slavery. Yet the Board offered no reflections on the legal processes or analysis that might have led to this extreme conclusion. International Narcotics Control Board, Brief on the Conformity of Bill C-45, An Act Respecting Cannabis and to Amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts, as Passed by the House of Commons, November 27, 2017, Submitted to the Standing Committee on Foreign Affairs and International Trade, 13 April 2018, para 15.