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POLITICS AND FINITE FLEXIBILITIES: THE UN DRUG CONTROL CONVENTIONS AND THEIR FUTURE DEVELOPMENT

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Domestic policy choices concerning the non-medical use of cannabis are generating increased interest in what has been usefully called the global drug prohibition regime.[1] Commentators are questioning whether the UN-based treaty system can accommodate national policy approaches that deviate from the regime's prohibitive ethos. As tension around cannabis "legalization" builds it becomes ever more urgent to relieve systemic pressure, a process to which *inter se* treaty modification may be key.

Back to Basics

A full understanding of the current situation relative to the regime's legal parameters requires a return to basics. A reading of the 1961 Single Convention on Narcotic Drugs[2] shows that the use and possession of cannabis should not be allowed except for medical and scientific purposes, that parties are requested to prevent its "misuse," and to take all practicable measures for the prevention of its "abuse." Often overlooked, closer examination reveals that "use" of drugs was consciously omitted from articles of the conventions listing drug-related acts requiring penal measures. There is no doubt that the treaties do not oblige any penalty (criminal or administrative) to be imposed for consumption per se.[3] Yet, working on the principle that consumption is somewhat difficult without an individual possessing a specific substance, the conventions are more restrictive regarding not only possession, but also purchase and cultivation for personal consumption. Article 33 of the Single Convention states that parties shall "not permit the possession of drugs except under legal authority" (and then only for medical and scientific purposes) and Article 36 obliges parties to make possession a punishable offence. Crucially, regarding the obligation to criminalize possession, a distinction is made between possession for personal use and that for trafficking. According to Neil Boister's forensic analysis of the penal aspects of the drug control treaties, the thrust of the Single Convention's punitive provisions is the prohibition of drug trafficking. This allows little interpretative doubt that Parties must criminalize possession in that context. Nevertheless, it "does not appear that article 36(1), obliges Parties to criminalize possession of drugs for personal use."[4] Here, the Convention's focus on the

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[1] Peter Andreas & Ethan Nadelmann, Policing the Globe: Criminalization and Crime Control in International Relations 38 (2006).

[2] Single Convention on Narcotic Drugs, Mar. 30, 1961, 520 UNTS 7515 (as amended by the 1972 Protocol).

[3] UN Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, Dec. 20, 1988, 1582 UNTS 95.

[4] Neil Boister, Penal Aspects of the UN Drug Conventions 81 (2001).

suppression of trafficking can be seen as an affirmation that countries are not obliged in terms of Article 36 to criminalize simple possession under the 1961 Convention.[5] The subject is treated similarly in the 1971 Convention on Psychotropic Substances.[6]

Evolution and Complications

As the global drug prohibition regime evolved, circumstances became more complex. Indeed, Article 3 of the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances repeats in slightly broader language the provisions of Article 36 of the Single Convention and Article 22 of the 1971 Convention. Importantly, Article 3(2) of the 1988 Convention adds the important clause

> Subject to its constitutional principles and the basic concepts of its legal system, each party shall adopt such measures as may be seen necessary 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 contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

Although the language is more restrictive and might be regarded as reducing the flexibility of the earlier treaties, a persuasive legal case can be made that this important article still leaves significant scope for deviation from the punitive approach. "Subject to its constitutional principles and basic concepts of its legal system," represents a clear "escape clause." Drawing again on Boister's analysis, it implies that "any latitude existing under this Convention does not result exclusively from the Convention but also from the constitutional and other legal principles of each country." Accordingly, "Parties would not violate the Convention if their domestic courts held criminalization of personal use to be unconstitutional,"[7] and consequently are not obliged to establish possession for personal use to be a criminal offence. A strong case can also be made that a party need not make cultivation for personal use a criminal offense either. Moreover, the article allows for alternatives to conviction or punishment for offences related to personal use and other offences "of a minor nature," albeit restricting and strongly discouraging national discretionary powers related to illicit trafficking offences of a more serious nature.[8]

Decriminalization's Quiet Revolution

While perhaps not always at the center of the invariably politicized domestic decision-making processes relating to the so-called "world drug problem," such flexibility provides the international legal foundations for the wide array of non-punitive policy approaches towards the possession of a range of controlled substances for personal use in evidence today. From an international relations perspective, these can be seen to contribute to the twin processes of normative attrition and regime weakening. To be sure, the contemporary policy landscape is increasingly heterogenous. And in relation to cannabis, recent policy shifts represent only the latest manifestations of approaches operating within the boundaries of some countries since the 1970s. The complex contemporary mosaic comprises various models of depenalization and decriminalization, including *de jure* and *de facto* approaches,

[5] United Nations, Commentary on the Single Convention on Narcotic Drugs, 1961, UN Sales No. E.73.XI.1, at 112 (1973).

[6] Convention on Psychotropic Substances, Feb. 21, 1971, 1019 UNTS 14956.

[7] Boister, *supra* note 4, at 125.

[8] United Nations, Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, UN Doc. E/CN.7/590, at 85-89 (1998).

at both the national and subnational levels. It is fair to say that—driven by a diverse range of imperatives, including concerns over policing costs, commitments to individual freedoms, and a growing appreciation of the myriad harms caused by criminal justice responses—a clear trend is identifiable. When looking at the scope of policy shifts, there is much to be said for the view that a "Quiet Revolution" towards drug decriminalization has been underway across the globe.[9]

Legalization and the Limits of Flexibility

Current views on decriminalization, particularly those of the watchdog of the conventions, the International Narcotics Control Board (INCB or Board), are difficult to understand without reference to the emergence of a more critical threat to regime stability: a gradual trend towards the adoption of legally regulated markets for non-medical adult cannabis use. Driven by a variety of imperatives, Uruguay, a significant number of U.S. states, and most recently Canada have embraced various forms of cannabis "legalization."[10] While able to gradually absorb and ultimately endorse normative shifts around decriminalization, the Board has remained resolutely and energetically opposed to regulated cannabis markets. At times, its enthusiasm to defend the current shape of the regime has exceeded the robustness of its legal reasoning.[11] Yet, the Board's more general argument that, unlike decriminalization, legally regulated markets for non-medical and non-scientific cannabis use are beyond the limits of the drug control treaties is entirely valid.

The conventions certainly leave considerable room for maneuver at the national level and permit easing of criminal sanction requirements. Yet the limits of flexibility are also clearly established and finite as the Board's most recent Annual Report accurately highlights.[12] Moreover, as it has pointed out numerous times since 2012, where federal governmental structures exist, obligations apply to the entirety of parties' territories.[13]

Untidy Legal Justifications

In repeating this refrain, the Board clearly has the United States in mind. The country has invested probably more effort than any other over the past century to influence the design of the international drug prohibition regime and to enforce its almost universal adherence. Consequently, the discrepancy between the application of federal and state law is exactly what has been deployed by the central U.S. government to defend the awkward position in which it finds itself vis-à-vis its treaty obligations. As with its other legal positions on the issue, including that on dynamic interpretation, the justification is easily contestable. Uruguay is similarly hesitant to openly admit treaty breach, although for different reasons. Cognizant of the potential geopolitical and reputational consequences of explicitly breaching one of the most widely adhered-to international regimes, Uruguayan authorities continue to defend their country's position by referring to other legal obligations, including human rights principles derived from elsewhere within the broader UN system. These obligations, Montevideo argues, must take precedence where they come into conflict with drug control imperatives. Further, the government claims its policy decision is fully in line with the core objective sought, yet sorely missed, by many aspects of the drug control treaties—the protection of the health and welfare of humankind. Both are useful, yet not entirely convincing

[9] Niamh Eastwood et al., A Quiet Revolution: Drug Decriminalisation Across the Globe (2016).

[10] Int'l Narcotics Control Bd., Report of the International Narcotics Control Board for 2019, UN Doc. E/INCB/2019/1 (2020)

[11] John Walsh & Martin Jelsma, *In Bid to Intimidate Canada on Cannabis Regulation, INCB is Reckless and Wrong*, Transnat'l Inst. (May 7. 2018)

[12] Int'l Narcotics Control Bd., *supra* note 10, at 79

[13] *See, e.g.*, *id.* at 112.

arguments. Indeed, accompanying such legitimizing explanations, there is acknowledgement of the legal contentions and—unlike in Washington—a view that some facets of the regime require formal revision and modernization. Where the United States and Uruguay are concerned, the result is what colleagues and I have referred to as "untidy legal justifications."[14] Since 2012/13 these have proven effective at deflecting criticism. They are, however, unlikely to form the basis of a permanent and widely accepted fix.

Such a reality has given rise to a cluster of interpretive ventures seeking to expand flexibility and accommodate the operation of legally regulated cannabis markets within the boundaries of the conventions. Among these has been the view that the practice can be made treaty compliant if, exploiting the regime's inherent plasticity around the definition of "medical and scientific purposes," it is labelled a "scientific experiment." Critique of this assessment based on the Vienna Convention on the Law of Treaties (VCLT) concludes that the interpretation is untenable, with the supporting arguments "weak, and based on absent, flawed or incomplete interpretative methodology."[15] Other attempts to justify the operation of regulated cannabis markets within the confines of the extant system are equally questionable. That said, Canada's stance on the issue arguably renders such musings redundant.

Canadian Breach

Admission by Canadian officials in 2018 that the government's then-proposed approach would "result in Canada being in contravention of certain obligations relating to cannabis under the UN drug conventions" has also done much to increase tensions within and further undermine the stability of the regime.[16] With the United States and Uruguay operating as the only errant nations within the Commission on Narcotic Drugs (CND), the politically motivated state of denial and business-as-usual façade in Vienna—the home of the UN drug control apparatus—had been sustainable, if increasingly surreal. However, the honest and open admission of a potential treaty breach by a G-7 and Commonwealth state with a reputation for defending the rules-based international order has upped the ante and brought the ongoing existence of a cannabis induced legal netherworld under increased scrutiny. This has been the case despite, or even because of, the Canadian admission that it was "definitely open to work[ing] with treaty partners to identify solutions that accommodate different approaches to cannabis within the international framework."[17]

State and System Hostility

From a member state perspective, the Russian Federation in particular has grown ever more belligerent in its criticism of Canada. Paradoxically, mindful of Moscow's foreign policy adventurism beyond the realm of drug policy, this has included recourse to the sanctity of international law. It is plausible to suggest that, driven by a range of political and geopolitical imperatives, Russia's keen interest in the issue—including gathering other equally hostile member states behind it—means that Canada's state of temporary non-compliance is likely to be more uncomfortable and short-lived than initially hoped for in Ottawa. Pressure on Canada has also increased as

[14] David Bewley-Taylor et al., The Rise and Decline of Cannabis Prohibition: The History of Cannabis in the UN Drug Control System and Options for Reform 69 (Transnational Institute and Global Drug Policy Observatory, 2014).

[15] Rick Lines & Damon Barrett, *Cannabis Reform, "Medical and Scientific Purposes" and the Vienna Convention on the Law of Treaties*, 20 Int'l Community L. Rev. 436 (2018).

[16] Neil Boister & Martin Jelsma, *Inter se Modification of the UN Drug Control Conventions: An Exploration of its Applicability to Legitimise the Legal Regulation of Cannabis Markets*, 20 Int'l Community L. Rev. 458 (2018).

[17] *Id.*

Russian diplomats, with support from Japan and China, encourage the INCB to invoke the "nuclear option" within its somewhat limited armory.[18] This is an option that the Board probably needs little prodding to deploy in order to—inevitably in vain—persuade Canada to row back and deter other states from following suit. With much of its leverage depending upon "name and shame" mechanisms, Article 14 of the Single Convention initiates a process that can lead the Board to recommend that Parties instigate an embargo on the import and export of medical drugs to a state deemed to be seriously endangering the aims of the Convention.

Whither the Regime?

Mindful of the glacial pace of systemic change within the UN and international law in general, it seems unlikely that we will witness substantive formal change to the drug control regime any time soon. Having indicated ongoing support for many aspects of the regime, state withdrawal over cannabis may be seen as disproportionate. Nonetheless, as more countries move towards legally regulated markets, including among others Luxembourg and perhaps, after a referendum in October 2020, New Zealand, the pressure on the system will only increase. Slow-burn local policy experiments are currently underway in Switzerland and the Netherlands and any changes in U.S. federal statutes that accommodate state-level legalization would also add another dimension. And, unlike the regime response to the steady pivot towards some form of decriminalization by many parties, a combination of clear limits of flexibility within the conventions and concerted systemic and member state opposition means that growing engagement with regulated markets cannot be absorbed within the current architecture. In the short or even medium term, where international law is concerned, states are likely—in their different ways—to continue to violate the regime, either candidly or with obfuscations. These practices are familiar across a range of transnational policy domains but do little for the integrity of the rule-based international order more generally. It is open to question, however, how long Parties will be willing or able to occupy such a state of legal limbo. This is an especially poignant dilemma for a state like Canada in the face of a now widely acknowledged crisis of multilateralism, which Canada will not wish to exacerbate. Within this context, an even stronger case can be made that states that have moved, or intend to move, towards legal regulation of cannabis are obliged to explore options to reconcile policy choices with international law.

Options Beyond Consensus

As observation of debates and attendant divisions at the CND suggest, reaching a new global consensus necessary to amend the conventions to allow for regulated cannabis markets is not realistic in the foreseeable future, if ever. This leaves a limited number of options for formal regime revision not requiring the consent of all parties. Removing cannabis from the regime is technically possible, but politically unlikely. In procedural terms—and under exceptional circumstances—late reservations are also possible, if controversial. Moreover, denunciation and re-accession with a new reservation is feasible. Having unsuccessfully attempted to amend the Single Convention in relation to the coca-leaf, this was the route taken by Bolivia in 2013. The only other option remaining is *inter se* treaty modification.[19] Although regarded by some to be a venture on to "wonky territory,"[20] this procedure is provided for by the VCLT and arguably has several advantages.

Under an *inter se* agreement, a group of like-minded states could, under certain conditions, collectively create a new sub-treaty framework just for cannabis and modify their obligations under the drug control conventions with

[18] *See, e.g.*, David Bewley-Taylor, *Drug Diplomacy*, Jane's Intelligence Rev. 36 (October 2019).

[19] Boister & Jelsma, *supra* note 16, 456–92.

[20] Vince Sliwoski, *International Cannabis: Breaking the Law, Staying Honest*, Harris Bricken Canna Law Blog (Sept. 6, 2019).

effect among themselves. Rather than a unilateral "one-shot" strategy, it would enable like-minded countries to build a formal governing structure for the regulation of non-medical cannabis markets that could evolve over time as more nations join. This would allow policy reforms on the country level, while fragmenting, but not undermining international law. When considering cannabis as a legal commodity, an *inter se* agreement could also open the possibility of international trade between regulated licit markets, including traditional cannabis producing countries in the Global South. Moreover, beyond their value in helping to justify temporary non-compliance, some see the combination of positive human rights obligations with *inter se* treaty modification as a "supreme combination."[21] Certainly the utilization of what can be usefully understood as intersecting regime complexes across a range of issue areas, particularly human rights and health, offers a potentially productive approach for moving beyond the finite flexibility of the regime and towards what Boister has called a "multispeed drug control system"[22] operating within the boundaries of international law. Amidst increasing divisions on how to deal with the "world drug problem," this appears to be the regime's only viable future.

[21] P.H. van Kempen & M. Fedorova, *Regulated Legalization of Cannabis Through Positive Human Rights Obligations and Inter se Treaty Modification*, 20 Int'l Community L. Rev. 493 (2018).

[22] Neil Boister, *Waltzing on the Vienna Consensus on Drug Control? Tensions in the International System for the Control of Drugs*, 29 Leiden J. Int'l L. 409 (2016).