

POLICY COMMENTARY

Regulating Drugs: Resolving Conflicts with the UN Drug Control Treaty System

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There are good reasons to legally regulate drugs markets, rather than persist with efforts to ban all non-medical uses of psychoactive substances. Regulated cannabis and coca markets are already a reality in several countries, with more likely to follow. But ignoring or denying that such policy shifts contravene certain obligations under the UN drug control treaties is untenable and risks undermining basic principles of international law. States enacting cannabis regulation must find a way to align their reforms with their international obligations. Reaching a new global consensus to amend the UN drug control conventions so as to accommodate cannabis regulation is not feasible for the foreseeable future, and the options that do not require consensus are limited. For countries choosing to regulate cannabis, notwithstanding the drug treaty provisions intended to disallow such a step, a proactive way forward would combine: (1) providing evidence of the ineffectiveness and negative consequences of the prohibitionist approach; (2) underscoring the inconsistencies and historical errors embedded in the treaty regime, and the political and procedural obstacles to its modernization; (3) explaining the shift to regulation with arguments of citizens' health and safety, and justifying it with an appeal to human rights obligations; (4) acknowledging that regulation contravenes certain drug treaty provisions and arguing that a limited period of 'respectful non-compliance' is unavoidable; and (5) preparing to resolve the legal conflict by submitting new reservations or by elaborating a new agreement among like-minded countries on the basis of the *inter se* procedure for treaty modification, as provided by Article 41 of the 1969 Vienna Convention on the Law of Treaties.

Keywords: cannabis; regulation; *inter se* treaty modification

Introduction

The 1961 Single Convention on Narcotic Drugs obliges States under Article 4 'to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs' listed in its schedules. Despite objections raised by several southern countries with centuries-old traditions, all non-medical uses of coca, cannabis and opium were banned. According to Article 49, '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 the Single Convention. The treaty came into force in 1964, therefore the transitional period permitted under Article 49 ended in 1989; the only countries to avail themselves of the transitional period for cannabis were Bangladesh, India, Nepal and Pakistan. Without a proper review by the World Health Organization (WHO), cannabis was placed under the Single Convention's strictest control schedules I and IV (Bewley-Taylor, Blickman & Jelsma 2014: 18–25). The scheduling system in place today still carries the marks of the colonial interests, cultural biases and racist sentiments prevalent at the time of its design (Global Commission on Drug Policy 2019: 13).

The 1961 treaty provisions were reinforced under Article 3 of the 1988 Trafficking Convention, obliging States to 'establish as criminal offences under its domestic law' illicit cultivation, production, trade and possession, and to make such offences 'liable to sanctions which take into account the grave nature of these offences' such as imprisonment, fines, confiscation and eradication. Implementing these treaty obligations

has led to the criminalization and imprisonment of tens of millions of people around the world, with racial minorities and other vulnerable communities suffering disproportionate impacts from repressive enforcement. New target dates for 'eliminating or reducing significantly the illicit cultivation of the coca bush, the cannabis plant and the opium poppy' were set for 2008 and again for 2019.

Rather than persist with attempts to eliminate illicit markets, numerous jurisdictions are choosing to legally regulate cannabis. Beginning in 2012, 11 U.S. states plus the District of Columbia have approved ballot initiatives or passed laws to regulate non-medical cannabis, and Uruguay (2013) and Canada (2018) have approved national cannabis regulation laws. Within the United States—where already one in four residents live in states that have chosen to regulate adult use cannabis—more state ballot initiatives are being planned, and more state legislatures are considering cannabis regulation bills. At the federal level, reform has remained elusive. But there is growing bi-partisan support in Congress to fix the mismatch between the new state-level regimes and prohibitionist federal law. Substantive revisions to federal law appear inevitable, and may even come into view ahead of the 2020 U.S. presidential and congressional elections.

These new regimes are contributing to fresh debate elsewhere in the world. Cannabis regulation is on the agenda of Mexico's new government, and in New Zealand the governing coalition committed to a ballot initiative in 2020 on whether to legalize non-medical cannabis. The Dutch government will be permitting local experiments in regulated cannabis production to supply the 'coffeeshops' where purchase and use is tolerated, similar experiments are expected to take place in Switzerland, and multiple regulatory proposals have emerged at municipal and regional levels in other European countries (Blickman, Sandwell & Putri 2019). The CARICOM Regional Commission on Marijuana recently concluded that the prohibitionist regime 'is not fit for purpose,' recommending 'significant changes to the laws of the region to enable the dismantling of this regime [...] that has proven to be ineffective, unjust and caused more harm than it sought to prevent' (CARICOM 2018: 62). It would be prudent to anticipate that the choice to regulate will become a trend and spread to more jurisdictions.

Limits to Treaty Latitude

The legal regulation of drugs markets for non-medical purposes clearly contravenes international drug treaty obligations. The treaties afford certain latitude, providing room for manoeuvre for policy makers, including decriminalization of possession of drugs for personal use and implementation of harm reduction services such as drug consumption rooms and heroin prescription. States can also provide, in cases of a minor nature, alternatives to criminal sanctions, such as rehabilitation, social reintegration or rural development. The International Narcotics Control Board (INCB or Board)—the 'independent and quasi-judicial monitoring body for the implementation of the United Nations international drug control conventions' (INCB 2018a)—has a history of promoting overly restrictive interpretations of the treaties, creating unwarranted impediments to policies widely recognized to fit comfortably within the treaty confines (Bewley-Taylor 2012). In recent years the Board has started to modify its rigid positions against harm reduction and decriminalization, and to argue that the treaties need to be implemented in full compliance with human rights obligations. But the INCB has consistently maintained the position that legal regulation of cannabis for non-medical use contravenes core obligations and the object and purpose of the treaty regime, as there are limits to the treaties' latitude, and one of the clearest limits is that regulated access to non-medical cannabis—or to any of the other over 300 substances within the treaties' purview—is out of bounds (INCB 2019: 25, 62).

Arguments that regulation could be permissible under a flexible interpretation of the treaties lack a persuasive legal basis. For example, in the wake of state-level votes to regulate cannabis, the U.S. government has maintained that it is not in breach of treaty obligations because cannabis remains prohibited under federal law, and has referred to the treaties' recognition of constitutional limitations (Bennett & Walsh 2014). But the clause in several treaty articles that they are subject to constitutional principles and basic concepts of domestic law applies only to a limited set of provisions; to escape from the obligation to criminalize possession, purchase or cultivation under the 1988 Convention, for example, constitutional limitations can only be invoked for offences related to personal use. Moreover, the 1961 Single Convention specifically applies 'to all non-metropolitan territories for the international relations of which any Party is responsible' (Article 42) while the 1969 Vienna Convention on the Law of Treaties (VCLT) stipulates that 'a treaty is binding upon each party in respect of its entire territory' (Article 29). The INCB has taken direct aim at the U.S. arguments denying non-compliance, asserting that 'if sub-national Governments have taken measures towards legalizing and regulating the non-medical use of cannabis, despite federal law to the contrary' then such developments are 'in violation of the international drug control legal framework' (INCB 2017).

Some authors have creatively proposed that a legally regulated market in cannabis may be permissible as a policy 'experiment' under a flexible interpretation of 'medical and scientific purposes' (All Party Parliamentary Group for Drug Policy Reform 2015; Thoumi 2016; Collins 2017; Hoffman 2017). But legal examination of such proposals has convincingly found the arguments to be untenable and 'based on absent, flawed or incomplete interpretive methodology' (Lines & Barrett 2018). However well-intentioned such attempts may be, and in spite of the absence in the treaty text itself of a clear definition of the terms 'medical' and 'scientific', the suggested reinterpretations cannot withstand legal scrutiny.

Treaty Tensions on the Rise

While the political and diplomatic anxiety surrounding this debate is real, the legal tensions must be acknowledged and addressed with due respect for international law. There can be no doubt that the existing instances of legal regulation are out of compliance with provisions of the UN drug treaties. As more jurisdictions move in this direction, treaty tensions will increase. The limits of flexible interpretations have been reached and overstretching them with legally dubious arguments would undermine basic principles of international law. States that intend to move towards legal regulation, or that have already done so, are therefore obliged to explore other options to reconcile such policy changes with their obligations under international law.

As the first country to regulate cannabis for non-medical uses, Uruguay has justified its reform by contending that market regulation is fully consistent with the drug control treaties' overarching concern for the health and welfare of humankind. Uruguayan authorities have argued that the country's regulatory approach is driven by health and security imperatives, and is therefore a human rights issue. In the event of a conflict between human rights obligations and drug control requirements, officials maintain, Uruguay is bound to give priority to its human rights obligations (JND 2015: 3). Appealing to States' positive human rights obligations provides a powerful rationale for market regulation (Van Kempen & Fedorova 2018). But grounding regulation in human rights arguments does not, in itself, erase the problem of drug treaty breach. Uruguay has expressed its willingness to discuss the treaty tensions around cannabis regulation, but—especially after the harsh initial response from the INCB President—decided not to engage in that step on its own (INCB 2013).

Canada has likewise maintained that its new cannabis law is consistent with the drug treaties' concern for human health and welfare. But Foreign Minister Chrystia Freeland, appearing in May 2018 before Canada's Senate, acknowledged that cannabis regulation does entail 'contravening certain obligations relating to cannabis under the three UN drug conventions', adding, 'we need to be open about that'. Freeland affirmed that Canada's government is 'definitely open to working with treaty partners to identify solutions that accommodate different approaches to cannabis within the international framework' (Freeland 2018). In October 2018, when Canada's law took effect, the INCB accused Canada of having 'contributed to weakening the international legal drug control framework and undermining the international rules-based order' (INCB 2018b). Other than implying that Canada should move to annul its new law, the Board offered no suggestions as to how Canada might reconcile its decision to regulate cannabis with its international legal obligations.

Potential Paths Forward

Reaching a new global consensus to revise or amend the UN drug control conventions to accommodate regulated markets for substances controlled under these treaties does not appear to be a viable scenario for the foreseeable future. Only a few options are available that do not require the consent of all treaty parties.

Rescheduling

The WHO Expert Committee on Drug Dependence (ECDD) is mandated to recommend whether and how to differ drugs under the treaties, and the Commission on Narcotic Drugs (CND) can adopt the WHO's recommendations by a simple or two-thirds majority vote (for the 1961 and 1971 conventions respectively). In January 2019, the WHO presented the recommendations arising from the first critical review of cannabis it has ever undertaken (WHO 2019). The WHO has recommended removing cannabis from Schedule IV (acknowledging medical usefulness), but also retaining it in Schedule I, which is reserved for substances that are 'highly addictive and liable to abuse'. Within the CND, States have raised numerous questions about the WHO evaluation process and recommendations, and voting on the recommendations seems unlikely to occur before 2020. In any case, removing cannabis from the treaty schedules altogether does not appear to be on the horizon (Walsh, Jelsma, Blickman & Bewley-Taylor 2019).

Reservations

There have been instances of states submitting reservations after having ratified a convention, a practice referred to as 'late reservations', which can be permissible under exceptional circumstances but remains controversial (ILC 2011; Swaine 2006). Bolivia has successfully applied the procedure of denunciation of the 1961 Single Convention and subsequent re-accession with a new reservation regarding the coca leaf, a procedure permitted under the terms of the treaty and—again under exceptional circumstances—easier to defend than a 'late reservation' (Helfer 2006).

Inter Se Modification

The only other remaining option is *inter se* treaty modification, allowed under Article 41 of the VCLT, a procedure specifically designed to find a balance between treaty regime stability and the need for change in absence of consensus. According to a VCLT legal commentary: 'Due to the conflicting interests prevailing at an international level, amendments of multilateral treaties, especially amendments of treaties with a large number of parties, prove to be an extremely difficult and cumbersome process; sometimes, an amendment seems even impossible. It may thus happen that some of the States Parties wish to modify the treaty as between themselves alone' (Dörr & Schmalenbach 2012: 719).

Such an *inter se* modification agreement is permissible when 'the modification in question is not prohibited by the treaty and (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; or (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.' It is difficult to argue that the UN drug control treaty regime embodies an 'absolute' prohibition principle, comparable to, for example, the absolute nature of the prohibition of torture under international law from which derogation by means of reservation or *inter se* modification obviously would not be permissible. There is no evidence in state practice and *opinio iuris* that the treaty-based drugs prohibition has achieved the status of customary international law, much less joined the ranks of the elite sub-set of 'peremptory norms' that qualify as *ius cogens* (Boister & Jelsma 2018: 482). Using the *inter se* mechanism in the case of cannabis regulation could therefore not be used by other States as a precedent to justify modifying amongst themselves basic human rights obligations.

The idea that the rights of other treaty parties would inevitably be affected by an increased flow of cannabis from regulated markets into countries not party to the *inter se* agreement is also very questionable. The drug control system is plainly ineffective in preventing international illicit trafficking, and a strictly controlled legal regulated market is likely to prove more capable in preventing the illicit export of cannabis from regulated jurisdictions in comparison to the current situation. Thus, 'a legally regulated market in parties to the *inter se* agreement may well benefit non-parties to the agreement instead of harming them' (Boister & Jelsma 2018: 480).

Conclusion: Regulating Cannabis and Upholding International Law

As a path forward for a like-minded group of countries committed to regulating cannabis and to upholding international law, *inter se* treaty modification would offer a safety valve for collective action to adjust a treaty regime frozen in time such as the UN drug control conventions. It would require that the like-minded agreement includes a clear commitment to the original treaty aim to promote the health and welfare of humankind and to the original treaty obligations vis-à-vis countries not party to the *inter se* agreement. Taking recourse to this not-often used mechanism will surely be contested, but in the absence of realistic alternatives, the *inter se* option is 'perhaps the most elegant way out' (Klabbers 2006: 1086).

An *inter se* agreement would also open the possibility of international trade between regulated licit markets, enabling small farmers in traditional Southern producing countries to participate and diminishing the risk of a corporate capture of the emerging licit markets. Closed national systems of regulation are unlikely to fully replace existing illicit markets that are partly dependent on international trade to accommodate product variety and quality, cultural diversity and consumer preferences.

Implementing the *inter se* mechanism will require careful consultations during a temporary period of non-compliance. Entering such a period of transitional 'respectful non-compliance' is justifiable in combination with the explicit goal of formally altering the relationship to the treaty obligations that States can no longer meet. Appealing to positive human rights obligations can complement and reinforce the legitimacy of temporary non-compliance while exploring the option of a reservation or negotiating an *inter se* modification agreement. Moreover, in tandem, *inter se* treaty modification and the positive human rights approach 'can strengthen each other and seem to be a supreme combination' (Van Kempen & Fedorova

2018: 525). Explicit references to full human rights compliance in an *inter se* agreement on cannabis regulation would also underscore that the application of the VCLT *inter se* procedure for this purpose would in no way provide a precedent allowing for other States to derogate from fundamental human rights obligations.

A collective response offers a markedly better path forward than ignoring or denying treaty breach and provides a more promising approach than the scenario of multiple unilateral reservations and legally dubious treaty re-interpretations. The circumstances in which the UN drug control treaty regime finds itself today—systemic challenges and inconsistencies, increasing polarisation and legal tensions, inconceivability of consensus-based solutions—merit a careful consideration of the legitimacy and feasibility of an *inter se* solution.

Competing Interests

The authors have no competing interests to declare.

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