

REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE
ALTERNATIVES FOR REGULATING THE USE OF NARCOTIC DRUGS AND PSYCHOTROPIC
SUBSTANCES AND FOR PREVENTING
DRUG DEPENDENCE, ESPECIALLY WITH RESPECT TO
MARIJUANA OR CANNABIS SATIVA

INTRODUCTION

On August 7, the Inter-American Juridical Committee decided to embark on a study of the aforementioned topic proposed by Dr. Fernando Gómez Mont Urueta, and to ask him to act as the corresponding rapporteur.

At the session held in March 2014, Dr. José Luis Moreno Guerra presented a study on the subject and a decision was then taken to give it further consideration.

At the request of Heads of State, members of our organization such as Colombia and Mexico, the Secretaries-General of the Organization of American States and the United Nations have provided opportunities for hemispheric and global reflection aimed at reviewing international legislation on the matter, now more than fifty years after it first entered into force (1961).

Experts on health, security, law, and economics, as well as former Heads of State and high-level national and international officials, have all taken part in the debate, to share their experiences and knowledge.

The Committee wishes to make the following observations:

I. LAWS CURRENTLY IN EFFECT

A) The international legal regime for the use of narcotic drugs, as well as for the prevention of drug dependence

The regulatory framework in effect is based on the following International Conventions signed at the United Nations:

- The Single Convention on Narcotic Drugs, of 1961;
- The Convention on Psychotropic Substances, of 1971;
- The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, of 1988.

The 1961 Single Convention on Narcotic Drugs repealed and replaced the treaties negotiated between 1912 and 1953. It also strengthened the international regime for control and re-organized its administration in the framework of the United Nations. It also regulated over 100 substances classified into four categories, each one subject to different and stricter levels of control than in earlier conventions. They included, first, the narcotic drugs produced from the *adormidera* (*poppy*), *coca* and *cannabis* plants and their respective derivatives and the raw materials used for their production, along with some synthetic drugs such as methadone. It should be stressed that this convention was amended in 1972 by a protocol which in essence broadened the powers of the organ of the United Nations in charge of its implementation.

Despite the adoption of the Single Convention of 1961, the use and abuse of drugs grew notably more intense all through the following decades, particularly in the more developed countries.¹ The increase was especially significant with regard to synthetic psychotropic substances created since World War II, such as amphetamines, barbiturates and lysergic acid.²

In order to control such substances, the Convention on Psychotropic Substances was adopted in 1971 to regulate, inter alia, stimulants, sedatives, tranquilizers and hallucinogens. All of these were classified, in a manner similar to the provisions of the Single Convention of 1961, according to four categories, depending on their capacity to cause addiction and abuse, and their therapeutic value. The Convention established detailed regulations governing international trade in psychotropic substances, including measures for the strict control of exports and imports.

The two previous conventions were supplemented in 1988 by the adoption of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which was designed mainly to strengthen national penal legislations and encourage international cooperation in fighting such activities. This Convention is essentially an instrument of international criminal law and was meant to harmonize national legislations that criminalize drugs. Under it, the Parties are obliged to establish and implement specific penal provisions aimed at suppressing illicit traffic in narcotic drugs and psychotropic substances. Those provisions establish measures for dealing with the issues involved in each of the various aspects of traffic in narcotic drugs and psychotropic substances. Provisions are therefore included that deal with illicit crops and the trade in chemicals, materials and equipment used to manufacture controlled substances, but also money laundering, seizure of assets, extradition, mutual legal assistance, and the remanding of documents relating to criminal proceedings.

The International Narcotic drugs Control Board is the quasi-judicial organ of the United Nations in charge of monitoring the three aforementioned treaties. Using a statistical information system, the Board supervises licit drug-related activities so as to ensure that there are adequate supplies for medical and scientific purposes and that no diversions are made to illicit channels.³ It also detects any deficiencies in national and international control systems related to the manufacture, traffic and illicit use of drugs and, whenever necessary, is authorized to ask governments for explanations in cases of apparent violation of the treaties, notify the United Nations Commission on Narcotic Drugs and the Economic and Social Council of such cases, and, finally, recommend to the Parties to the respective conventions that they stop importing or exporting drugs to the State in question.⁴

Article 3 of the United Nations Convention of 1988 clearly establishes the obligation of the Parties to classify as crimes in their respective domestic laws the various activities related to traffic in narcotic drugs and psychotropic substances, from production to consumption. Although subtle differences can be seen between this provision and similar provisions in the Single Convention of 1961 and the 1971 Convention, for the purposes of this chapter it suffices to refer only to the provision of the 1988 Convention, which subsumes the other two.

The above-mentioned Article 3 requires that the following activities, inter alia, be established as criminal offences:

1. The production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;

¹ Mitchell P. Roth, *Global Organized Crime*, ABS CLIO (Santa Barbara, Denver, Oxford: 2010), 25.

² Report of the International Narcotic drugs Control Board, United Nations (January 2009), E/INCB/2008/1, p. 2. http://www.incb.org/documents/Publications/AnnualReports/AR2008/AR_2008_Spanish.pdf

³ International Narcotic drugs Control Board, <https://www.incb.org/incb/es/about.html>

⁴ See articles 22 and 23, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, https://www.unodc.org/pdf/convention_1988_es.pdf

2. The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;
3. The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in 1. Above.

In the case of these crimes, the Parties will provide that sanctions be applied proportionate to their gravity, such as imprisonment or forms of deprivation of freedom, pecuniary sanctions and seizure of assets.

Furthermore, Article 3 itself requires criminal classification of various activities linked to the commission of the aforementioned offences, such as: the manufacture, transport or distribution of equipment, materials or of substances to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances; the laundering of assets derived from committing the referenced crimes and instigation to commit them or to illicitly use drugs or psychotropic substances. At the same time, the same provision contemplates various aggravating factors in respect of the aforementioned crimes as well as the establishment of long statutes of limitation and the impossibility of considering them as fiscal or political offenses.

Furthermore, according to the same article, each of the Parties, while maintaining their constitutional principles and the fundamental concepts of their juridical system, must adopt the necessary measures to establish as criminal offenses the possession, purchase or planting of narcotic drugs or psychotropic substances for personal consumption. This is contrary to the provisions of the Amended Convention of 1961 and the 1971 Convention. However, mitigating somewhat the severity of the 1988 Convention, the Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of an offence, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.

The aforementioned provision may be regarded as a safeguard clause within the regime described earlier, since the legal obligation of States to criminalize such conduct is subject to the condition that their constitutional principles and the fundamental concepts of their juridical system allow for criminalization. Accordingly, criminalizing these acts is not obligatory when the constitutional regime of each State recognizes the legal autonomy of users to decide on their personal consumption of narcotic drugs or psychotropic substances, and when it establishes for such cases the intervention of agencies other than those responsible for operating the criminal justice system/.

B) The International Legal Regime with respect to Organized Crime

Traffic in narcotic drugs and other psychotropic substances is an activity conducted transnationally and clandestinely.⁵ It is basically carried out using collective structures able to outsmart the State strategies used to intervene and suppress such criminal conduct.⁶ This is one of the reasons why in 2000 the United Nations drafted the United Nations Convention against Transnational Organized Crime.

This Convention requires criminalizing belonging to or collaborating with organizations carrying out criminal activities of a transnational nature, especially human trafficking, the illicit smuggling of migrants and activities relating to goods subject to regulatory controls such as arms, narcotic drugs and psychotropic substances or protected species of flora and fauna. Also, it proposes criminalizing civil servants' ties of collaboration and protection with these kinds of organization, as well as the assistance provided by financial and business managers, above all in respect of money laundering. The

⁵ United Nations Office on Drugs and Crime, *Transnational Organized Crime: The Globalized Illegal Economy*, available at: <http://wpfdc.org/blog/society/18692-transnational-organized-crime-the-globalized-illegal-economy>. Spanish: http://www.unodc.org/documents/mexicoandcentralamerica/TOC12_fs_general_ES_HIRES.pdf (consulted on August 14, 2014).

⁶ *Ibid.*

Convention also criminalizes acts that tend to obstruct the work of police, ministerial and judicial agencies in their fight against transnational organized crime.

At the same time, the Convention provides for a series of procedural measures to be incorporated by the signatory States in their domestic legal systems with a view to prosecuting and trying such organizations, as well as to facilitate international cooperation in this matter. Finally, the Convention establishes the obligation to adopt public policies to prevent the conditions that have led to the ongoing strengthening of these criminal organizations.

C) Human Rights legislation

The conventions described in the two preceding sections help States comply with their duty to protect the human rights of the people who live in their territories, their personal freedom and safety, due legal process and access to health. Hence it is worth analyzing those instruments in the light of international human rights law.

Both the Universal Declaration of Human Rights and the American Convention on Human Rights contain various provisions relating to principles concerning the protection of individuals vis-à-vis acts of the government, as well as the obligation of States to guarantee access by the public to satisfaction of basic needs in education, health, social protection, employment, housing, as well as the certainty of being able to lead their lives in a democratic, safe and sustainable environment.

The Universal Declaration of Human Rights recognizes the following fundamental rights:

1. The right to equality, human dignity and non-discrimination. (Art.1 and 2).
2. The right to life, freedom and “security of person.” (Art. 3).
3. Effective remedies against discrimination or infringement of their human rights (Art. 7 and 8).
4. To be submitted to criminal justice only in those cases provided for in legislation that is in effect prior to the acts committed, whenever these refer to limitations of personal rights and liberties meant to ensure the recognition of and respect for the rights and liberties of others, and to satisfy the just requirements of morality, public order and general welfare in a democratic society. In any case, the application of criminal laws will be subject to principles that guarantee due legal process under the premise of presumption of innocence (Art. 9, 10, 11, 12 and 26.2); and
5. Personal and family access to sanitary, medical, educational and social-protection services, as well as to employment and housing opportunities (Art. 25, 26 and 27).

All these rights are also found in in the American Convention on Human Rights (Art. 4, 5, 7, 8, 9, 24, 25, 26 and 32.2).

II. REVIEW OF LEGISLATION ON THE USE OF NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES, AND THE PREVENTION OF DRUG DEPENDENCE 50 YEARS AFTER ITS ENTRY INTO FORCE

The prohibitionist approach in this area has proved to be counter-productive in a number of important ways that need to be assessed with a view to either maintaining existing regulations or developing the potential benefits of new regulatory options that offset the costs to States of the current rules.

1. With respect to health, the evidence suggests that:

a) The prevalence of the global demand for narcotic drugs and psychotropic substances has not only not declined; on the contrary, over the past five decades,⁷ it has grown moderately but steadily. The main reasons for this growth are:

- a.1) The reason adduced to explain the demand for these substances by consumers, namely that they must be drug addicts, was far too simple. Several States are now increasingly inclined to allow recreational use of some of these substances and there is no evidence of a substantial increase in consumption patterns due to addiction. In some of these cases, similarities have been observed between the consumption patterns of psychoactive substances such as tobacco and alcohol, which are legally permitted, and some substances that are not legally recognized, such as *cannabis*.⁸
- a.2) The medical uses of narcotic drugs and other psychotropic substances have been underestimated, despite increasingly broader acceptance by the medical community. Indeed, a higher demand for controlled substances used under medical supervision has been observed in the treatment of problems related to human behavior.⁹
- a.3) The deep roots and robustness of traditional uses of narcotic drugs and psychotropic substances have been underestimated. The acceptance of these substances in certain cultures for curative or ritual purposes is something very difficult to modify.¹⁰

b) Regulatory obstacles to the use of these substances have encouraged the production of new synthetic products. In many cases this substitution poses higher risks to the health of users than the substances replaced.¹¹

c) Narcotic drugs or psychotropic substances with different potential effects on users are regulated in the same way. This is the case of marijuana, which is treated in the same way as cocaine, heroin or its derivatives. That gives rise to a “Gateway” effect, making it easier for users to switch drugs, as they can be obtained in the same (illegal) market. The trigger for such a switch is the vendor, not the substance itself.¹²

d) The clandestine use of certain injectable narcotic drugs or psychotropic substances encourages syringe reuse, which leads to the expansion of certain contagious diseases such as HIV/Aids.¹³

e) Forced drug-dependence treatment has shown poor results compared to voluntary treatment. Forced intervention is only justified to prevent immediate harm to problematic drug users themselves or to those around them.¹⁴

⁷ See “The Drug Problem in the Americas” Report of the Organization of American States (OAS) (2013), p.75.
http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-194/13

⁸ Clayton Mosher & Scott Akins, *Drugs and Drug Policy. The Control of Consciousness Alteration* [hereinafter, Mosher & Akins](California, London, New Delhi: SAGE Publications, 2007), 66.

⁹ E.g. http://www.abc.es/hemeroteca/historico-02-02-2005/abc/Sociedad/los-medicos-aceptan-recetar-cannabis-pero-temen-que-se-banalice-su-uso_20353571928.html (consulted on August 14, 2014).

¹⁰ David R. Bewley- Taylor, *The United States and International Drug Control, 1909- 1997* (London and New York: Pinter, 1999).

¹¹ *Ibid.*

¹² E.g. “Experts debate whether marijuana is a ‘gateway’ drug”, <http://www.abc2news.com/news/health/experts-debate-whether-marijuana-is-a-gateway-drug> (consulted August 14, 2014).

¹³ Judge James Gray, *Why our Drug Laws Have Failed and What We Can Do About It* (Philadelphia: Temple University Press, 2001), 190- 194 (about the “Needle Exchange Program”).

¹⁴ OAS Report, p.75.

f) The stigma created by prohibition hinders addicts' access to rehabilitation centers. In addition, the emphasis on a criminalization solution has deprived the medical and public health approach to the problem of both attention and resources.¹⁵

The potential of these centers to dissuade drug use and serve as an alternative for users who belong to or cooperate with criminal organizations has been underestimated.

2. With respect to security and democratic governance, the evidence shows that:

a) Suppression of the supply of narcotic drugs and psychotropic substances has created an opportunity for gains for criminal organizations that seek to evade regulatory controls through violence and corruption.¹⁶

b) The strengthening of criminal organizations has increased levels of violence against the agencies in charge of fighting them, their competitors or even gang members themselves. This has generated more insecurity than that attributed to drug users' criminal behavior.¹⁷

c) Criminal organizations grow stronger by diversifying their criminal activities in order to ensure sufficient control of territory to dissuade or obstruct the work of governmental agencies, neutralize their competitors by either eliminating or absorbing them, and subdue the population.¹⁸

d) In addition, incentives for subverting regulatory controls through corruption of police forces and ministerial or judicial authorities in charge of combating criminal organizations has weakened the democratic development of those institutions and the ability of States to consolidate conditions that allow the normal daily exercise of public freedoms and the fundamental rights of citizens.¹⁹

e) Finally, crime indices in prisons have been underestimated. Low-risk inmates, such as drug users and small retail traffickers, are recruited and trained by the criminal organizations to commit crimes, which has a multiplier effect of violence.²⁰

3. With respect to the promotion and protection of human rights, the evidence points to the following trends:

a) Constitutional courts are increasingly ruling that the decision to use narcotic drugs or psychotropic substances falls within the scope of the moral autonomy of adults and may only be criminalized when such use harms third parties or puts them at serious and immediate risk.²¹

b) Furthermore, there is a growing consensus that there is discriminatory treatment of users of illicit substances such as cannabis versus alcohol or tobacco users.²²

c) This has resulted in a change of approach ranging from the paternalism that sustains the prohibitionist regime toward one stressing consumer liability.

¹⁵ *Ibid.*

¹⁶ See Maurice Kugler, Thierry Verdier and Yves Zenou, "Organized crime, corruption and punishment, *Journal of Public Economics*" 89 (2005): 1639-1663.

¹⁷ See e.g. Ríos, Viridiana (2013a) "Why did Mexico become so violent? A self-enforcing violent equilibrium caused by competition and enforcement", in *Trends in organized crime*, June, vol. 16, 2, pp. 138-155.

¹⁸ See e.g. Ríos, Viridiana (2013a) See, e.g. Viridiana Ríos, <http://www.nexos.com.mx/?p=15461>

¹⁹ Mónica Serrano, *México: Narcotráfico y Gobernabilidad*, (México: COLMEX), 251; Jorge Chabat, "Narcotráfico y Estado: el discreto encanto de la corrupción", *Letras Libres* (September, 2005): 15.

²⁰ C. Pérez Correa, "Delitos contra la salud y el principio de proporcionalidad en México" [hereinafter, Pérez Correa 2013], in Jorge Vicente Paladines (coord.), *El equilibrio perdido: drogas y proporcionalidad en las justicias de América* (Quito: Defensoría Pública de Ecuador, 2013), 18.

²¹ See, e.g. *Sentencia No. C-221/94*, Corte Constitucional de Colombia (Bogotá: May, 1994), available at: <http://www.corteconstitucional.gov.co/RELATORIA/1994/C-221-94.htm>

²² Clayton J. Mosher and Scott Akins, "The Effects of Drugs" in *Drugs and Drug Policy*, (Thousand Oaks: SAGE, 2014), 67.

This has also resulted in a series of domestic public policies seeking to decriminalize the production, growing and distribution of narcotic drugs, such as *cannabis* for personal use. This is a growing trend (with some exceptions such as Uruguay).

d) The current approach has increased the prices of certain medicines to treat pain (and anxiety), which results in their being distributed unequally. As a result, some terminally ill patients face death in very different circumstances from others in the population who are admitted to hospital.

e) Finally, as mentioned earlier, the increase in violence has generated an atmosphere of insecurity that in turn fosters abuse of authority and the subjection of the population to the control of criminal organizations.²³

4. With respect to international cooperation, the evidence suggests that:

- a) A unequal share of costs and risks is borne by the States that get involved in the implementation of the existing regulatory framework, for the following reasons:
 - a.1) The incidence of violence is higher in producer and transit countries than in consumption countries.²⁴
 - a.2) Value added in end prices is lower in producer and transit countries than in consumption countries.²⁵
 - a.3) The production of narcotic drugs and psychotropic substances has increased in high-demand centers, except in the case of some substances that, for micro-climate reasons, can only be produced in certain parts of the world.²⁶ Even in these cases, the technological substitution of those substances by new synthetic products sustains the trend toward import substitution, thereby relativizing the difference between producer, transit and consumption countries.²⁷
- b) Different rules apply to personal narcotic drugs and psychotropic substance use in producer and transit countries than in the larger markets, such as Canada, the United States of America and the member states of the European-Union.²⁸ This has resulted in ambivalence and frustration in producer and transit countries.²⁹ The growing trend towards liberalizing recreational, medical and traditional uses of these substances has lowered the institutional incentives to absorb the costs of criminalizing the production and trafficking of narcotic drugs and other psychotropic substances.
- c) In the field of international law, some tension can be observed in the interpretation of several provisions. For example, contradictions can be seen between the obligation to criminalize the trafficking of narcotic drugs and the obligation to generate alternatives aimed at disrupting the activities of criminal organizations. There is also a contradiction between the obligation to criminalize the use of these substances and respect for the moral autonomy of individuals.

²³ See Kimberly Heinle, Octavio Rodríguez Ferreira, and David A. Shirk, *Drug Violence in Mexico Data and Analysis Through 2013*, University of San Diego (April, 2014).

²⁴ Julia Buxton, *The political economy of narcotic drugs: production, consumption and global markets*, (London, New York: Zed books, 2006), 110.

²⁵ For an example in the Middle East, see Buxton, 106.

²⁶ See Sergio Ferragut, *A Silent Nightmare: The bottom line and the challenge of illicit drugs* (Lexington: 2007), 53- 62.

²⁷ *Ibid.*

²⁸ Miguel Eduardo Cárdenas, *Narcotráfico: Europa, Estados Unidos, América Latina. rev.estud.soc.* [online]. 2008, n.30, pp. 124-126. ISSN 0123-885X.

²⁹ See e.g. Alfonso Daniels, "EE UU y la guerra contra las drogas en Latinoamérica", *Política Exterior*, Vol. 20, No. 112 (Jul. - Aug., 2006): 131-140, also available at: <http://www.jstor.org/stable/20645955> Accessed: 15-08-2014 16:28 UTC.

CONCLUSIONS

In light of the above, a change in the regulatory approach is proposed, based on the following:

- a) The list of narcotic drugs and other psychotropic substances needs to be revised, on the basis of scientific criteria, with a view to classify them according to the risk of personal use leading to violent behavior (psychotizing effect). Criminalization of their use should be based on this criterion only. With respect to their addiction potential, regulation should be based on medical and public health criteria.
- b) The right of (adult) consumers to decide whether or not to use said substances has to be recognized, provided that such use does not harm third parties or put them at certain risk.
- c) Users of those substances must be treated in a non-discriminatory manner vis-à-vis users of other substances that are currently permitted, such as alcohol and tobacco.
- d) Informative campaigns for consumers must be implemented, warning about the risks that the use of these substances poses for their health and personal performance.
- e) Regulation of the use of such substances should take a damage-control approach. Thus, separate markets should be generated for tolerated and non-tolerated substances, in an attempt to ensure that use of the former replaces use of the latter, thereby protecting consumers.
- f) In view of the persistent demand for these substances, policies need to be implemented that lean toward holding consumers liable for the impact of their use on public health and social protection systems. In particular, the adoption of special excise regimes is an alternative that has proved successful in the case of other substances.
- g) Consideration needs to be given to aligning the production of these substances and the various different regulations governing them with the demand for them, with a view to reallocating international regulation in such a way as to allow each State greater flexibility in setting its own domestic policies.
- h) It should be acknowledged that the existence of illicit markets generates violence and corruption. Therefore, regulatory alternatives must be sought so that these markets can become subject to democratic controls.
- i) In order to implement this change of approach and advance the international learning process it entails, consideration could be given to regulating the use of marijuana or *cannabis sativa*, for the following reasons:
 - h.1) Its addictive potential is lower than that of alcohol or tobacco.
 - h.2) The risk of overdosing is much lower than for alcohol or tobacco.
 - h.3) Scientific development has shown that it is increasingly indicated for a variety of medical uses.
 - h.4) The incidence of marijuana-induced criminal behavior is lower than that of alcohol.
 - h.5) Some studies indicate that the use of marijuana displaces use of more dangerous substances.
 - h.6) The higher demand for these types of substance is generated by the market.

- h.7) The production of this substance is relatively less complex and therefore takes place near the demand areas. It also allows for self-production scenarios.
- h.8) Its production has industrial uses other than its psychoactive effect.