The International Drug Control Treaties: How Important Are They to U.S. Drug Reform?

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The way the world looks at drug control is changing. There has been a growing awareness of the issue for the past decade, as well as increasing public outcry over what many see as a failure of the once popular “war on drugs.”

Nowhere is this battle more pronounced than in the so-called “marijuana wars,” which are slowly growing into an old-fashioned standoff between the states and the federal government. As of August 2012, seventeen states (and the District of Columbia) have passed laws legalizing medical marijuana, several states have introduced initiatives to legalize the use of recreational marijuana, and there are now two proposed federal bills designed to lift the ban on marijuana. The Gallup polls show that at least 70% of Americans support legalizing marijuana for medical use, and over 50% are now in favor of its legalization for recreational use as well.

With so much movement in the area and so much public support, many are asking: Why is the federal government so vehemently resisting the liberalization of a policy that seems to be inevitable? One of President Obama’s campaign promises was to leave the issue of medical marijuana to state governments. Indeed, his Administration first declared a policy of non-enforcement against medical marijuana dispensaries operating in full compliance with state laws. Over the past year, however, the Administration has backtracked, famously going after not only dispensaries, but also landlords, banks, media outlets and all but the sickest of patients taking advantage of the medical marijuana laws.

We tend to think of drug policy in domestic terms, attributing the policy to successive administrations; however, underlying domestic policies are three international treaties, to which the U.S. is signatory, that set strict limitations regarding the treatment of certain drugs within our country. Or do they?

While U.S. authorities are resistant to change in drug policy, more liberal marijuana laws seem to be sprouting up everywhere in countries around the world: Denmark, Spain, the UK, and now Uruguay and Colombia, to name a few. World leaders and former leaders across Europe and most recently, Latin America, have been speaking up in increasing numbers, all saying the same thing: It’s time for the world to start thinking about legalization.

To better understand how nations set their policies, it is essential to understand the international underpinnings. To this end, the New York City Bar Association’s Committee on Drugs & the Law formed a special subcommittee to study the implications of international law on domestic drug policy reform. We travelled to Vienna to attend the yearly sessions of the United Nations Commission on Narcotic Drugs in 2011 and 2012, and interviewed current and former diplomats and dignitaries working at the international level of drug control, in order to gain an understanding of the worldwide drug control system and its implications for domestic drug policy.

We found that, while everyone seems to have an opinion on drug reform, many of the legal analyses are limited in scope to domestic factors. Missing from even the most sophisticated analysis conducted in the U.S. is a discussion about the international legal system—as embodied in the three international drug control treaties. Through our work, we have grown to understand
the vast importance of these treaties in the world of international relations, as well as to domestic drug reform.

**The International Drug Control Treaties**

Americans in general have little awareness that the international drug treaties exist at all, and if they do, they have only vague notions of how the system works. Myths abound when it comes to drug laws in foreign countries—for example, many believe that marijuana is legal in Amsterdam (it’s not), or that the treaties don’t apply to the states (they do). It is clear, then, that any explanation of the system should start with the basics—the international drug control treaties.

**The 1961 Single Convention and its Progeny**

The 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol, forms the basis of the global drug control regime as it exists today, limiting use and possession of opiates, cannabis and cocaine, to “medicinal and scientific purposes.” (Recreational use is not permitted in any form under the Single Convention.) The 1971 Convention on Psychotropic Substances, enacted after an upsurge of drug use in the 1960s, added synthetic, prescription and hallucinogenic drugs to the list. The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances required member countries, for the first time, to criminalize possession for personal consumption.

The Conventions are legally binding under the 1969 Vienna Convention on the Law of Treaties: a country “may not circumscribe its obligations under the treaties by enacting a conflicting domestic law.” However, there is no international police force in place to force countries to fulfill their obligations. The International Narcotics Control Board’s enforcement powers are limited to “quiet diplomacy,” or “blaming and shaming.” In extreme cases, the INCB can recommend an embargo on all prescription medicines coming into or going out of a country. However, in our interview with former U.S. Assistant Secretary of State for Narcotics and current INCB member Melvyn Levitsky, he noted that this is “not a strong provision,” since, for humanitarian reasons, it is highly unlikely such a measure would ever be taken. (Ambassador Levitsky emphasized that his statements are his own personal opinions only and do not reflect the views of the INCB.)

*Why does all this matter in the U.S.?*

In the case of drug control, international law has more influence on domestic legislation than most Americans realize or, frankly, would want to admit. The federal Controlled Substances Act of 1970 was enacted in part to meet America’s obligations with respect to the scheduling system established in the Single Convention; there is a complex mechanism in place to ensure that the scheduling systems directly correspond, if not exactly mirror, one another.

Many would argue that the international treaties don’t legally apply to the states. Technically, it is true that treaties are concerned primarily with federal law, but this does not exempt state and local governments from the requirements of international law. While each state has its own drug laws and controlled substances acts, federal law generally preempts state law when it covers similar subject matter. And since the Supremacy Clause of our nation’s Constitution places international treaties on the same legal footing as federal law, both the Conventions and the federal drug laws preempt conflicting state law. So it could be said that while the international treaties do not, as a
legal matter, directly apply to the states, as a practical and political matter, they do. The result is that the federal government finds itself obliged to enforce federal law over state law in order to fulfill its international treaty obligations. This might explain, at least in part, why the Obama Administration is unwilling to bend on the issue—it simply may perceive no choice given the U.S.’s international obligations.

**Criticisms of the International Legal System**

For years, criticism of the system has been mounting. In June of 2011, the “Global Commission on Drug Policy,” an organization formed to “bring to the international level an informed, science-based discussion about humane and effective ways to reduce the harm caused by drugs to people and societies,” released a scathing report, crowning years of research by a multitude of organizations from almost every social discipline, stating, “The global war on drugs has failed …Fifty years after the initiation of the UN Single Convention on Narcotic Drugs … fundamental reforms in national and global drug control policies are urgently needed.”

Numerous international NGOs have likewise been increasingly vocal in their criticisms of the system, citing the monumental costs of the current policy, both economically and from a human rights perspective. Mike Trace, the former Deputy Drug Tsar of the U.K. who now serves as Chair of both the International Drug Policy Consortium (IDPC) and the Global Commission, pointed out to us the “clear contradictions between what the drug control treaties try to do, and what the various human rights treaties do.” Organizations such as IDPC, Transnational Institute, Harm Reduction Coalition, the Beckley Foundation, and Harm Reduction International lobby for drug control based on a public health model rather than on punitive sanctions.

Finally, and perhaps most striking, is the recent organization of Latin American heads of state, who, at this spring’s Summit of the Americas held at Cartagena, Colombia, confronted President Obama with evidence of the destruction caused by the current policy and implored him to consider regulation and commercialization as an option. Gustavo de Greiff, former Attorney General of Colombia and also former Colombian Ambassador to Mexico told us, “The majority of the representatives were for abandoning the actual strategy and replacing it with a regulation of production, commercialization, and consumption.” President Obama only reiterated that, in his view, “legalization is not the answer.”

**Trends for Compliance with the Treaties**

If the treaties are so counter-productive, and there is no real enforcement, then why does almost every country in the world remain signatory to and, for the most part, faithfully comply with them? Perhaps pressure from the United States (and fear of losing aid) is a major factor. But many experts point to the reputational aspect of international law: many countries do not want to be seen as uncooperative—in effect, “pariahs”—in the international community.

Many countries have reacted over the years by pushing the outer limits of what is technically allowable, or by broadly interpreting the language of the treaties. The treaties themselves allow a certain amount of flexibility in their interpretation. For example, while the 1988 Convention requires that countries make possession for personal consumption a criminal violation, the treaty does not specify what the punishment must be. Portugal’s “decriminalization” laws take advantage of this grey area and dictate that offenders are diverted to education classes, treatment sessions, or are given a fine. Holland continues to maintain laws on its books criminalizing possession of marijuana, but exercises a policy of non-enforcement when it comes to marijuana
sold in its infamous “coffee houses.” In the U.S., many argue that “medical use” is not defined in the treaties, and therefore medical marijuana is technically allowed (the INCB and the DEA do not share this view).

These measures—non-enforcement, decriminalization/depenalization, and medicalization—are known as “soft” challenges to the treaties. Until recently, the only challenges to the treaties have been “soft” challenges.

That is, until the Bolivian coca leaf reservation.

**The Bolivian Coca Leaf: Opening the Door for Wider Reform?**

The coca leaf has been used for centuries in Bolivia and other South American countries for medicinal, religious, and cooking purposes. The traditional chewing of the coca leaf, in particular, is at odds with the 1961 Convention, which banned the practice but allowed 25 years for it to be phased out. When the phase-out period expired, Bolivia not only did not halt the practice, but, in 2009, passed an amendment to its Constitution allowing four years for the Bolivian government to “denounce and … renegotiate the international treaties that may be contrary to the Constitution.” Bolivia formally applied to the Commission on Narcotic Drugs to amend the Single Convention to eliminate the ban on the coca leaf, but the amendment was rejected when 18 member countries objected to it (led, not surprisingly, by the U.S.). The Bolivian government then took the unprecedented step of formally withdrawing from the 1961 Single Convention. The withdrawal took effect in January 2012, at which time Bolivia filed a request to re-accede to the Convention with a reservation against the ban on the coca leaf and its traditional uses. Since the reservation must be permitted unless it is blocked by one-third of the member countries, many believe it may very well be successful.

This move by Bolivia is extremely significant in that it is the first “hard” challenge to the treaties in the history of UN drug control. It is also particularly significant to many in the U.S. as it may very well open the door to another “hard” challenge: marijuana regulation in the United States.

*What the Coca Leaf Means for Marijuana Reform*

The parallel between the Bolivian coca leaf and the U.S. marijuana situation is hard to deny: like the coca leaf in Bolivia, marijuana could be said to be deeply ingrained in the American culture (after all, haven’t three of our presidents—including President Obama—admitted to using it?).

At this point, several states have introduced “tax and regulate” legislation. On June 23, 2011, for the first time, a bill was introduced in the United States House of Representatives, H.R. 2306, the “Ending Federal Marijuana Prohibition Act of 2011,” which would remove marijuana from the Schedule I of the Controlled Substances Act.

While it could be argued that the state tax and regulate laws would not technically violate the treaties, the federal bill is another matter. If enacted, the law would most certainly place the United States in violation of its treaty obligations.

In the end, Bolivia withdrew from the Convention because it could not reconcile its domestic law with its international obligations. If a federal law were to pass in the United States that was irreconcilable with its treaty obligations, could the U.S. find itself in a similar position?
According to John Collins, Ph.D candidate in the Department of International History at the London School of Economics and an expert on the history of post-war drug control, the 1961 Single Convention itself was “the product of an extremely complex interplay of forces: geopolitical, economic, cultural, diplomatic, and personal.” One thing that is evident is that U.S. drug control is intertwined in some very complex ways with the international system as a whole. Viewed in this context, there may be some very real reasons that the Obama Administration appears staunchly opposed to even the most informal discussion about marijuana legalization.

Indeed, if marijuana is legalized, what will become of the treaties and the international system as a whole? The options for reform under the treaties as they stand today are limited. On the other hand, one could say that revision of the treaties, or even entry into a new treaty system, is inevitable given the eroding of the system by the “soft” challenges, and now the blatant “hard” challenges posed by the Bolivian coca leaf reservation and, especially, pending marijuana legislation in the U.S. After all, if the system stops working, isn’t it best to change the system? According to Melvyn Levitsky, “It’s perfectly legal within the international system to withdraw from the convention if there’s a way to do it.”

But if international drug control is such a bedrock of international relations, what else might change if those laws are reformed? To what extent would such changes affect our relationship with other countries—for example, the Russian Federation, currently a major influence in the Commission on Narcotic Drugs and staunchly opposed to legalization? What about China?

We may be about to find out. At the 55th Session of the UN Commission on Narcotic Drugs held in Vienna this past March, high-level member country delegates sat side by side with NGO representatives at a luncheon and, for the first time, politely debated the future of the Conventions. Mike Trace speculates that “quiet diplomacy” surrounding the marijuana issue may already be underway. Even Gustavo de Greiff said of the recent Summit of Americas meeting that he “had some dose of optimism … because it was the first time that the drug problem was publicly discussed by the highest public functionaries of the region.” At its glacial pace, the international system may at last be unraveling—and with it, possibly, the end to the “standoff” between the Administration and the drug reform community. What other changes are close behind?

As they say, change is never easy, but ever interesting. In the case of international drug control, reform could prove to be not so much mood-altering, as world-altering.

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August 2012