

**Next**

**Vivian  
Stein**

**Generation**

**International  
Law and  
Legalisation  
and Decriminal-  
isation of  
Illicit Drugs**

**Nr. 9**



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## **Next Generation**

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# International Law and Legalisation and Decriminalisation of Illicit Drugs

Vivian Stein\*

*The three UN drug conventions comprehensively and almost universally regulate the dealing with illicit drugs worldwide. Although the treaties are prohibitive, more and more member states seek to liberalise their national drug policies and implement depenalisation, decriminalisation or even legalisation schemes.*

*The article explores member states' possibilities and limitations under the current treaty framework by giving an overview of their obligations, contractual exceptions and means under general public international law.*

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## List of Abbreviations

1972 Protocol	Protocol amending the Single Convention on Narcotic Drugs, 1961, signed in Geneva, 25 March 1972
APPGDPR	All Party Parliamentary Group for Drug Policy Reform
Art.	Article
BVerG	Federal Constitutional Court (Bundesverfassungsgericht) (Germany)
D.C.	District of Columbia
Diss.	Dissertation
DRIP	United Nations Declaration on the Rights of Indigenous Peoples, signed in New York, 13 September 2007
e.g.	exempli gratia
ed.	edition/editor
eds.	editors
et al.	et alii
etc.	et cetera
f./ff.	following page(s)/marginal note(s)
i.e.	id est
ibid.	ibidem
ICCPR	International Covenant on Civil and Political Rights, signed in New York, 16 December 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights, signed in New York, 16 December 1966
ICJ	International Court of Justice
INCB	International Narcotics Control Board
International Convention for Regulation of Whaling	International Convention for the Regulation of Whaling, signed in Washington D.C., 2 December 1946
Jr.	Junior
n	footnote
N	Marginal note
No.	Number
Psychotropics Convention	Convention on Psychotropic Substances, 1971, signed in Vienna, 21 February 1971
s.n.	sine nomine
Single Convention	Single Convention on Narcotic Drugs, 1961, signed in New York, 30 March 1961

Trafficking Convention	United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed in Vienna, 20 December 1988
UN/UNO	United Nations (Organisation)
UN Charta	Charter of the United Nations, signed in San Francisco, 26 June 1945
UNODC	United Nations Office on Drugs and Crime
Universal Declaration of Human Rights	Universal Declaration of Human Rights, signed in Paris, 10 December 1948
US/USA	United States (of America)
v.	versus
Vienna Convention on the Law of Treaties (VCLT)	Vienna Convention on the Law of Treaties, signed in Vienna, 23 May 1969

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## I. Introduction

International law's role in addressing the modern trafficking of illicit drugs, i.e., as outlined in the UN drug conventions, those drugs which are not intended for medical and scientific purposes, is pivotal.<sup>1</sup> Much of this significance stems from the inherently international nature of the drug trade, where these substances often traverse multiple countries before reaching their final consumers.<sup>2</sup> Recognising the inadequacy of purely domestic regulations to combat this complex issue,<sup>3</sup> the international community has continuously tightened the net of international treaties regulating the subject matter since the Shanghai Opium Commission in 1909.<sup>4</sup> This development has culminated in the adoption of the three nearly universally ratified UN drug conventions that extensively regulate every aspect of drug-related matters today: The 1961 "Single Convention on Narcotic Drugs" (Single Convention),<sup>5</sup> the 1971 "Convention on Psychotropic Substances" (Psychotropics Convention), and the "United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances" of 1988 (Trafficking Convention).<sup>6</sup>

All three of these treaties impose extensive obligations on their member states, requiring them to prohibit and even criminalise multitudinous activities related to the production, trade, and usage of those drugs, which is best seen in the Trafficking Convention, the strictest of the accords.<sup>7</sup> Thus, the treaties also constrain member states in their ability to implement individual, more liberal drug policies.<sup>8</sup> The broad participation suggests that the consensus of the entire international community is carrying these constraints.<sup>9</sup> However, an

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<sup>1</sup> Art. 4(c) Single Convention; Art. 5 Psychotropics Convention. The Trafficking Convention differentiates between licit and illicit drug uses, referring to the classifications of the prior two conventions (Art. 1(m) and 3(1) and (2) Trafficking Convention).

<sup>2</sup> ROOM/REUTER, 86; for Mexico specifically see BROUWER et. al., 709 ff.

<sup>3</sup> See STEWART, 387.

<sup>4</sup> See for a detailed description of the historic development BÖLLINGER, 282; HABIBI/HOFFMANN, 435; NOLL, 17; LINES/BARRETT, 437; STEWART, 388 f.

<sup>5</sup> The Single Convention was amended by the "Protocol Amending the Single Convention on Narcotic Drugs 1961" in 1972 (1972 Protocol).

<sup>6</sup> See also HALL, 1211.

<sup>7</sup> BEWLEY-TAYLOR, Challenging the UN drug control conventions, 171.

<sup>8</sup> KRAJEWSKI, 329.

<sup>9</sup> Of the 193 UN-member states (UN, about us) currently, 154 are parties to the Single Convention (UN Treaty Collection, Single Convention, 1) and even 186 in its amended form (UN Treaty Collection, Single Convention amended, 1). The Psychotropics Convention has 184 parties (UN Treaty Collection, Psychotropics Convention, 1), and the Trafficking Convention has a staggering 191 (UN Treaty Collection, Trafficking Convention, 1).



increasing number of countries, such as (but not limited to) the Netherlands, Portugal, Bolivia, Uruguay, and certain states in the USA, have nevertheless opted for more liberal drug policies regarding the recreational and traditional uses of drugs.<sup>10</sup> The motivations behind these policy choices are as plentiful as they are manifold, reaching from scepticism about the efficacy of criminalisation in combating drug trafficking<sup>11</sup> to a perceived incompatibility of drug criminalisation with modern human rights law and findings on public health.<sup>12</sup> Fiscal arguments, such as the high policing cost of prosecuting personal drug use,<sup>13</sup> and the desire for better consumer protection through regulating and controlling the substances, also play a role.<sup>14</sup>

Leaving aside the validity of those arguments, the question arises whether the current UN drug control framework and international law permit a less prohibitive approach towards the illicit use of drugs or whether the prospect of a more liberal national drug policy is only a pipe dream that could not come true. To answer this question, this paper will analyse the possible strategies for liberalising drug policies, the obligations under UN drug conventions to prohibit and criminalise drugs, and their compatibility ([Chapter II](#)). Next, the paper explores the so-called “escape clauses” and other contractual exceptions to assess their suitability to facilitate a more liberal drug policy ([Chapter III](#)). Finally, possible exceptions under conventional public international law and possible modifications of the obligations under the treaties between selected parties will be discussed ([Chapter IV](#)).

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<sup>10</sup> BEWLEY-TAYLOR, *Politics*, 287; HABIBI/HOFFMANN, 434 f.; INCB, *Report 2019*, iv, 100; SEDDON, 314 f.; HALL, 1210; see also IGLESIAS/SALADÍAS/ROSS.

<sup>11</sup> HALL, 1211; HAUG, 41; JENSEN/GERBER/MOSHER, 101; similarly WILKINS/SCRIMGEOUR, 334.

<sup>12</sup> HABIBI/HOFFMANN, 432.

<sup>13</sup> BEWLEY-TAYLOR, *Politics*, 287; EASTWOOD/FOX/ROSMARIN, 9 ff.; SEDDON, 313.

<sup>14</sup> WILKINS/SCRIMGEOUR, 334.

## II. Liberalising National Drug Policies in the Light of the Obligations under the UN Drug Conventions

### A. Forms of Liberalised National Drug Policies

States can choose between four policy archetypes when deciding how to address illicit drugs overall, any specific substance or drug-related behaviour. These options include criminalisation, the most restrictive approach (and the one endorsed by the UN drug conventions),<sup>15</sup> depenalisation, decriminalisation, and legalisation.<sup>16</sup> Which system a state decides upon depends on various factors, the most pivotal being whether the state considers drug-related crime primarily an international or a domestic issue.<sup>17</sup> While these systems provide a foundational framework for national drug policies, they allow for (and sometimes require) customisation and the pursuit of tailored approaches, such as providing support to individuals suffering from addiction or introducing rules to mitigate possible adverse consequences of drug use, e.g., provisions on driving under the influence of legal cannabis.<sup>18</sup> Hence, choosing a system is only the first step towards a national drug policy and additional regulations must be imposed.<sup>19</sup>

#### 1. Depenalisation

The premise of depenalisation is drug criminalisation, where both the supply and demand side of drugs remain illegal, and various criminal offences further fortify those prohibitions, including penalisation of possession and acquisition of drugs for personal consumption, i.e., consumer offences.<sup>20</sup> Depenalising systems, however, do not enforce these provisions to their full extent, and the severity of the ensuing sanction is either reduced, e.g., by refraining from imprisonment, or the state forgoes imposing any criminal sanction.<sup>21</sup> Offenders

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<sup>15</sup> BEWLEY-TAYLOR, Challenging the UN drug control conventions, 171; KRAJEWSKI, 329.

<sup>16</sup> For all see KRAJEWSKI, 329; SEDDON, 322.

<sup>17</sup> ROOM/REUTER, 86.

<sup>18</sup> See ROOM/REUTER, 86.

<sup>19</sup> HAUG, 42.

<sup>20</sup> FISCHER/DADEGAN-BUENO/BODEN, 558; HABIBI/HOFFMANN, 444; KRAJEWSKI, 330; FÉLIX/PORTUGAL, 121; UNLU/TAMMI/HAKKARAINEN, 17. One country famously following this approach is the Netherlands with its “gedoogbeleid” policy, which tolerates possession, acquisition, and selling for personal use to a certain extent (STEVENS et al., 31; MACCOUN/REUTER, 69).

<sup>21</sup> For all see FÉLIX/PORTUGAL, 121; KRAJEWSKI, 330; UNLU/TAMMI/HAKKARAINEN, 17; HABIBI/HOFFMANN, 444; GREENWALD, 2.

may, however, still suffer from adverse consequences of being sentenced for a criminal offence, such as having a police record or facing probation issues.<sup>22</sup> Moreover, alternative sanctions and measures, both criminal and non-criminal, such as administrative fines and participation in education programs, may be imposed on the offenders.<sup>23</sup> Literature often refers to depenalisation as “de facto legalisation”,<sup>24</sup> which may be misleading considering the possible (system-dependent) consequences for the individual mentioned above.

One notable advantage of a depenalisation policy is that it often does not require any revision of a state’s existing criminal law framework,<sup>25</sup> making it a more straightforward approach than decriminalisation or legalisation. Governments often justify their leniency with either the principle of opportunity or utilitarian principles,<sup>26</sup> arguing that they employ their limited resources more efficiently when allocating them to fighting drug traffickers instead of individual consumers.<sup>27</sup> While depenalisation is typically discussed in the context of drug consumers, it is worth noting that, in theory, it could also be applied to the supply side of the drug trade.

Both depenalisation and decriminalisation treat drugs as illegal substances, resulting in significant similarities in their potential to achieve specific political objectives. Hence, those factors will be jointly examined in the upcoming subchapter.

## 2. Decriminalisation

Like depenalisation, decriminalisation categorises drugs and drug-related activities, including consumer offences, as illegal. The systems, however, diverge significantly regarding the consequences of an infraction.<sup>28</sup> In the case of decriminalisation, the legislator formally eliminates those prohibitions from criminal law, resulting in transgressions being addressed outside of the criminal justice system.<sup>29</sup> Labelling decriminalisation as “de jure legalisation”, as is often done due to the call for legal reform,<sup>30</sup> can be misleading. Despite being illustrative of the differences in policy implementation compared to depenali-

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<sup>22</sup> FÉLIX/PORTUGAL, 121; see also UNLU/TAMMI/HAKKARAINEN, 17.

<sup>23</sup> FISCHER/DADEGAN-BUENO/BODEN, 558.

<sup>24</sup> KRAJEWSKI, 330; MACCOUN/REUTER, 71.

<sup>25</sup> STEVENS et al., 31.

<sup>26</sup> For an in-depth discussion see Chapter [III.A.1.b\)\(2\)](#).

<sup>27</sup> KRAJEWSKI, 330; UNLU/TAMMI/HAKKARAINEN, 17.

<sup>28</sup> For all see FÉLIX/PORTUGAL, 121; GREENWALD, 2; KRAJEWSKI, 330; HABIBI/HOFFMANN, 444.

<sup>29</sup> KRAJEWSKI, 330; GREENWALD, 2; FÉLIX/PORTUGAL, 121; STEVENS et al., 31.

<sup>30</sup> GREENWALD, 2; FÉLIX/PORTUGAL, 121; STEVENS et al., 31.

sation, the term is very imprecise, neglecting potential negative consequences for the individual: Under the system of decriminalisation, the state may still impose alternative, non-penal forms of punishment, such as civil penalties, or administrative sanctions,<sup>31</sup> on the consumer and employ measures to guide him or her towards health or social support structures.<sup>32</sup> For a system to be considered truly decriminalised, the alternative sanctions imposed must, however, not be of such a severity that they, de facto, still amount to criminal sanctions.<sup>33</sup>

Although harm reduction measures are not inherently tied to specific policy systems,<sup>34</sup> decriminalisation offers states a more flexible framework to focus on drug use's medical and social implications instead of criminal ones.<sup>35</sup> This distinction sets it apart from the depenalisation regime to some extent, even if only slightly. It is important to emphasise that both systems deem illicit drugs prohibited substances and, therefore, do not allow for legal, regulated, and controlled markets, which makes health protection, e.g., in the form of age restrictions<sup>36</sup> or full quality and safety control of the wares, impossible.<sup>37</sup> Moreover, the violence and crime related to the black market cannot be resolved.<sup>38</sup>

### 3. Legalisation

Legalisation is the most permissive stance a state can adopt towards drugs, where it makes them a legally fully permitted substance.<sup>39</sup> This process entails the removal of all sanctions or prohibitions, criminal or otherwise, related to both the supply and demand side of the formally illicit substances.<sup>40</sup> Under legalisation, the drug trade operates on a legal market,<sup>41</sup> allowing for state oversight and regulation through measures such as licensing traders, price

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<sup>31</sup> This can for instance be observed in the Czech Republic (STEVENS et al., 31; see also KRAJEWSKI, 330).

<sup>32</sup> One country following this approach is Portugal (STEVENS et al., 31; HABIBI/HOFFMANN, 432).

<sup>33</sup> Defining universal criteria thereto would go beyond the scope of this paper. For a European context, guidelines can, for instance, be found in European Court of Human Rights, Case of Engel and Others v. The Netherlands, Judgment of 8 June 1976.

<sup>34</sup> HUNT et al., 2.1.

<sup>35</sup> Compare FISCHER/DADEGAN-BUENO/BODEN, 559; KRAJEWSKI, 330.

<sup>36</sup> ALBRECHT, 569; see also MACCOUN/REUTER, 66.

<sup>37</sup> SEDDON, 322; see also ALBRECHT, 569.

<sup>38</sup> See SEDDON, 322; ALBRECHT, 569.

<sup>39</sup> KRAJEWSKI, 329; HABIBI/HOFFMANN, 444; UNLU/TAMMI/HAKKARAINEN, 17, 19.

<sup>40</sup> FÉLIX/PORTUGAL, 121; GREENWALD, 2; FISCHER/DADEGAN-BUENO/BODEN, 560.

<sup>41</sup> FISCHER/DADEGAN-BUENO/BODEN, 558; KRAJEWSKI, 330.

management or introducing age restrictions.<sup>42</sup> Thus, legalisation effectively eradicates the black market for the legalised substance, mitigating its adverse side effects and relieving law enforcement of the burden of prosecuting single consumers.<sup>43</sup> Moreover, it allows for better consumer protection through quality and purity controls of the drugs<sup>44</sup> and permits better harm reduction measures as the inhibition to getting help is lowered.<sup>45</sup> Lastly, from a fiscal perspective, legalisation opens avenues to tax the revenues generated by the drug trade<sup>46</sup> and increases the state's economic capacity in general.<sup>47</sup>

## **B. The Obligations under the UN Drug Conventions**

The three UN drug conventions contain penal and non-criminal legal provisions governing all drug-related activities, the former not differentiating between soft and hard drugs.<sup>48</sup> It is important to note that these contractual clauses are not self-executing, which means they require adoption into national law and do not become directly applicable upon treaty ratification.<sup>49</sup> Consequently, the national legal framework ultimately determines whether any activity relating to the regulated substances is permissible for the individual.<sup>50</sup>

### **1. The Single Convention on Narcotic Drugs (1961)**

The Single Convention on Narcotic Drugs opened for signature in 1961<sup>51</sup> and was created in response to the surge in drug consumption since the 1950s and its expansion to previously unaffected areas.<sup>52</sup> It aimed at addressing the overly complicated and sometimes not fully gapless treaty systems in place be-

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<sup>42</sup> HAUG, 42; KLEINMAN/ZISKIND, 274; see also MACCOUN/REUTER, 63.

<sup>43</sup> KLEINMAN/ZISKIND, 273.

<sup>44</sup> BENFER et al., 163.

<sup>45</sup> MACCOUN/REUTER, 63.

<sup>46</sup> BEAN, 118, with further comments on concrete issues connected to drug taxation in practice.

<sup>47</sup> KLEINMAN/ZISKIND, 273; MACCOUN/REUTER, 66.

<sup>48</sup> KRAJEWSKI, 330.

<sup>49</sup> This can, for instance, be seen in Art. 4(a) Single Convention. This provision obliges the states to implement the treaty provisions into their national law. The provision is only declaratory in nature, however, states face this obligation under any international treaty (Commentary Single Convention, 108; see also Commentary Trafficking Convention, 52; NOLL, 20; BEWLEY-TAYLOR, Challenging the UN drug control conventions, 174; KRAJEWSKI, 331.

<sup>50</sup> MACCOUN/REUTER, 63.

<sup>51</sup> LANDE, 776.

<sup>52</sup> SEDDON, 316.

forehand<sup>53</sup> and exclusively applies to specific plant-based drugs, namely those derived from cannabis, the coca bush, and opioids.<sup>54</sup> The convention's self-proclaimed objective is to combat the "evil" incorporated by narcotic drugs for the individual, society and economy through international cooperation while preserving access to the regulated substances for medical and scientific purposes.<sup>55</sup> The drafters of the Single Convention focussed on controlling the supply side of illicit drug trafficking.<sup>56</sup> While criminalising illicit drug-related actions was not their primary goal, the obligation to introduce criminal norms served as one means to achieve the convention's objectives.<sup>57</sup>

Article 36(1)(a) Single Convention (which was not altered by the Protocol amending the Single Convention)<sup>58</sup> obliges the member parties to "*adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention*" will be subject to penalisation by introducing corresponding criminal offences for intentionally committed (or at least attempted, see Art. 36(2)(1)(ii)) acts. The ensuing punishment should be adequate and, in the case of serious offences, must also include forms of imprisonment,<sup>59</sup> whereby both the adequacy and the penal nature of the introduced norms must be understood in the context of the individual state's national criminal law system.<sup>60</sup>

#### a) *Actions Related to or Involved in Drug Trafficking*

The explicitly enumerated behaviours in Art. 36(1)(a) Single Convention encompass all actions associated with trafficking in illicit drugs, from the drug's production to its handing over to the final consumer.<sup>61</sup> Given the unambiguous wording of the provision, it does not surprise that there appears to be a con-

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<sup>53</sup> LANDE, 777 ff.

<sup>54</sup> Art. 2(1), 25 ff. Single Convention and Schedules I-IV (for specific drugs derived from these plants); see also HALL, 1211.

<sup>55</sup> Preamble Single Convention; see also LINES, 111, 115; Commentary Single Convention, 110; BOISTER, *Waltzing on the Vienna Consensus*, 392.

<sup>56</sup> HABIBI/HOFFMANN, 437; KRAJEWSKI, 331.

<sup>57</sup> LINES, 114; see also KRAJEWSKI, 331.

<sup>58</sup> See also BOISTER, *Penal Aspects*, 76.

<sup>59</sup> Art. 36(1)(a) Single Convention.

<sup>60</sup> Commentary Single Convention, 429; NOLL, 25.

<sup>61</sup> See BOISTER, *Penal Aspects*, 77.

sensus that the convention requires states to criminalise all acts relating to or involved in the supply side of drugs for non-medical or scientific, i.e., recreational or traditional, uses.<sup>62</sup> As a result, the Single Convention effectively prohibits legally regulated markets for illicitly used drugs, thus preventing any international law-compliant legalisation or decriminalisation efforts.<sup>63</sup>

#### b) *Actions Related to Individual Consumption*

The convention's drafters intentionally omitted to list the use of illicit drugs in the catalogue of enumerated behaviours in Art. 36(1)(a) Single Convention and the states are, as a result, not obligated to criminalise the mere consumption of drugs.<sup>64</sup>

The act of possession must be understood in light of the relevant national legal framework, but usually constitutes some form of conscious control over a thing and is achieved by either growing the drugs<sup>65</sup> or receiving them for free or against payment from another party – all actions which, prima facie, fall under the behaviours enumerated by the Single Convention.<sup>66</sup> Hence, while not being directly intended to address drug consumption, the provision is phrased in a way that at least suggests that the obligation to penalise may extend to the final consumer,<sup>67</sup> who inevitably acquires and possesses the illicit drugs before he uses them.<sup>68</sup>

#### (1) *Obligation to Penalise*

The UN accepts interpreting Art. 36(1)(a) Single Convention in the abovementioned way, as many governments have done, leading them to criminalise drug consumption, at least indirectly, by penalising drug possession and acquisition.<sup>69</sup> However, the UN also recognises interpretations excluding consumer

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<sup>62</sup> BOISTER, *Penal Aspects*, 81, 85; KRAJEWSKI, 331; NOLL, 19.

<sup>63</sup> Similarly KRAJEWSKI, 332.

<sup>64</sup> BEWLEY-TAYLOR, *Politics*, 285; BOISTER, *Waltzing on the Vienna Consensus*, 393; *Commentary Single Convention*, 111; BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 12; NOLL, 25.

<sup>65</sup> Art. 36(1)(a) Single Convention differentiates between various actions, hoping to encompass all possible steps and processes required to obtain a regulated substance. Further legal definitions of the listed activities can be found in Art. 1(n) ff. Single Convention (BOISTER, *Penal Aspects*, 79).

<sup>66</sup> See also BOISTER, *Penal Aspects*, 80, 82 ff.

<sup>67</sup> KRAJEWSKI, 332.

<sup>68</sup> See ALBRECHT, 680; *National Drug Strategy*, 29; KRAJEWSKI, 332.

<sup>69</sup> *Commentary Single Convention*, 428, 112 ff.; KRAJEWSKI, 332; ALBRECHT, 680; *National Drug Strategy*, 29.

behaviours from the scope of application of Art. 36(1)(a) Single Convention<sup>70</sup> and a strong case can be made to support this reading of the provision:

A systematic interpretation places Art. 36 in a part of the convention dealing chiefly with drug trafficking,<sup>71</sup> and the provision explicitly indicates those rules solely applicable to drug abusers (Art. 36(1)(b) Single Convention), thus suggesting a clear separation of the trafficker and consumer side.<sup>72</sup> As the preamble shows, it is also part of the Single Convention's purpose to fight drug trafficking mainly,<sup>73</sup> and while preambles are not binding, they are crucial to treaty interpretation.<sup>74</sup> One might refute that drug consumption furthers drug trafficking by generating incentives, as has been done later in the Trafficking Convention,<sup>75</sup> but there is no indication in the treaty that the drafters of the Single Convention had these considerations in mind. Equally important is the omission of drug use in Art. 36 Single Convention: It would create a glaring contradiction to the treaty's deliberate wording if an obligation to criminalise drug consumption were to be introduced through the backdoors of possession and acquisition.<sup>76</sup> Considering these arguments, it does not surprise that the by now (justly) prevailing consensus is that Art. 36(1)(a) Single Convention does not mandate a criminalisation of actions solely relating to personal consumption.<sup>77</sup>

Consequently, states are not bound to penalise the production, acquisition by cultivation or transaction, and possession of illicit drugs for personal consumption, allowing for depenalisation and decriminalisation of those actions by the consumer at a minimum. The general clause at the end of Art. 36(1)(a) Single Convention allows states to criminalise the consumer side; however, the provision hinders neither of the two liberalisation policies.<sup>78</sup> Whether a full legalisation of consumer activities would also be compatible with the Single

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<sup>70</sup> Commentary Single Convention, 428, 112 ff. The commentary also gives a summary of the preparatory works, showing that the decision to only cover trafficking-related offences was a conscious one. See also INCB, Report 2021, 54.

<sup>71</sup> HABIBI/HOFFMANN, 443.

<sup>72</sup> KRAJEWSKI, 333; also recognising the deliberate separation of those two aspects and with further explanations on the consequences for extradition, etc.: Commentary Trafficking Convention, 81 f.

<sup>73</sup> Preamble Single Convention.

<sup>74</sup> BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 10 f.; BEWLEY-TAYLOR, Politics, 386; ZITT, 529.

<sup>75</sup> See Chapter [II.B.3](#).

<sup>76</sup> See BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 10 f.; BEWLEY-TAYLOR, Politics, 386; ZITT, 529.

<sup>77</sup> See PIETH, 135 f.; BEWLEY-TAYLOR, Politics, 385; BOISTER, Penal Aspects, 80; KRAJEWSKI, 333; NOLL, 19.

<sup>78</sup> See also Commentary Single Convention, 427 f.; PANICKER, 8.



Convention depends on whether the treaty obligates the states to prohibit the abovementioned behaviours.

## (2) *Obligation to Prohibit*

One of the provisions demanding prohibition of drug-related behaviours is Art. 4(c) Single Convention, which tasks states with taking those legislative and administrative measures necessary to “[s]ubject to the provisions of this Convention, limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs”.<sup>79</sup> This obligation is further bolstered by Art. 33 Single Convention, which requires states to only allow drug possession under legal authority, i.e., with some prior sanctioning.<sup>80</sup> This limitation of the possible utilisations of regulated substances to purely medical and scientific purposes is essential to the Single Convention.<sup>81</sup> Another crucial point is that “use” in the context of this provision also includes the actual consumption of the regulated substances.<sup>82</sup>

Unlike Art. 36 Single Convention, Art. 4(c) is not limited to trafficking-related activities and refers to possession, use and production for legal and illegal purposes, as well as for personal consumption.<sup>83</sup> Consequently, parties must introduce administrative or legal measures to at least prohibit the acquisition of regulated substances for personal consumption, their simple possession, and the use itself. The selection of those “necessary” measures lies within the parties’ discretion,<sup>84</sup> and no provisions except for Art. 36 demand a criminalisation. The states are, however, bound to interpret Art. 4(c) Single Convention in good faith and thus are limited in their choice (or lack thereof) of measures.<sup>85</sup> The bona fide interpretation entails ensuring that the treaty is understood in a manner aligning with the parties’ intention when establishing it, and which does not yield the provisions to be without any effect.<sup>86</sup> As a result, effective

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<sup>79</sup> HABIBI/HOFFMANN, 440; LEINWAND, 418.

<sup>80</sup> Commentary Single Convention, 402; KORDS, 31.

<sup>81</sup> HABIBI/HOFFMANN, 440; LEINWAND, 418.

<sup>82</sup> Commentary Single Convention, 111.

<sup>83</sup> Commentary Single Convention, 112; see also for the prohibition of regulated domestic markets for illicit uses ROOM, Roadmaps to Reforming, 6; HABIBI/HOFFMANN, 444 f.; INCB, Report 2016, 31.

<sup>84</sup> ZITT, 531.

<sup>85</sup> Art. 31(l) Vienna Convention on the Law of Treaties; see also DÖRR, VCLW-Commentary, Art. 31 N 5.

<sup>86</sup> ICJ, Case concerning the arbitral award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment of 12 November 1991, N 69 f.; REINHOLD, 61.

prohibition measures must be chosen and implemented concerning the acquisition, possession and use of illicit drugs. Ineffective alibi provisions for appearance's sake would not suffice.

This way, Art. 4(c) and 33 Single Convention prevent legalising the regulated substances for recreational or traditional uses.<sup>87</sup> Depending on their legal framework, the states may introduce decriminalisation and depenalisation schemes to soften their existing drug policies. However, the newly introduced systems must refrain from undermining the prohibitive approach of the Single Convention.<sup>88</sup> Drawing the line here is challenging. Considering the supply-focused approach of the convention and the limits of Art. 4(c), the decisive factor should be whether the liberative undertaking leads to the demand side factually being treated as legal.

## 2. The Convention on Psychotropic Substances (1971)

In reaction to the increased recreational use of psychotropic substances, i.e., substances stimulating the central nervous system,<sup>89</sup> in the 1960s,<sup>90</sup> and to bring those drugs under the international drug control scheme, the Convention on Psychotropic Substances was created in 1971.<sup>91</sup> Similar to the Single Convention, the treaty primarily targets illicit trafficking in regulated substances and strives to limit their use to licit, i.e., medical and scientific purposes,<sup>92</sup> and thus is also prohibitive.<sup>93</sup> Being directed primarily at manufacturing, instead of cultivating states<sup>94</sup> and dealing with the significant differences in danger emanating from the regulated substances, the convention's control measures are often more lenient than the Single Convention's.<sup>95</sup> However, the covenant still employs criminal law to further its aims. Art. 22(1)(a) of the Psychotropics Convention demands parties "*treat as punishable offences [...] any action contrary to a law or regulation adopted in pursuance of its obligations*

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<sup>87</sup> INCB, Report 2021, 53; Commentary Single Convention, 113; BEWLEY-TAYLOR/JELSMA, 17; NOLL, 41 ff.; THOUMI, Policy Options, 81; WALSH/JELSMA, 267 f.; LINES/BARRETT, 439 f.; KRAJEWSKI, 332; KORDS, 31.

<sup>88</sup> KRAJEWSKI, 332.

<sup>89</sup> BOISTER, Suppression, 55.

<sup>90</sup> THOUMI, Policy Options, 78.

<sup>91</sup> BOISTER, Suppression, 55; CHATTERJEE, 456.

<sup>92</sup> Preamble Trafficking Convention.

<sup>93</sup> LINES, 117; BEWLEY-TAYLOR, Politics, 386; CHATTERJEE, 456; similarly FEIDLING, 197.

<sup>94</sup> The global south, where the producing states of cannabis, opioids and coca bushes are primarily to be found, was politically considerably weaker, which is reflected in the extent of the obligations cultivating countries face (LEHNER, 26).

<sup>95</sup> BOISTER, Suppression, 55 f.

under this Convention". Unlike Art. 36(1)(a) Single Convention, the provision does not enumerate specific offences but instead defers to national legislation adopted in the convention's implementation,<sup>96</sup> which necessitates further treaty analysis.

a) *Actions Related to or Involved in Drug Trafficking*

The obligations defining the cornerstones of producing, acquiring, possessing, and using psychotropic and hallucinogen substances are laid out in Art. 5 and 7 of the Psychotropics Convention.<sup>97</sup> The provision draws distinctions between drugs in different schedules, meaning lists of specific regulated chemical substances ordered by their harmfulness and the scope of control they should be subjected to.<sup>98</sup>

The use of substances in Schedule I must be prohibited for any other than scientific and limited medical purposes, and their possession, manufacture, trade and distribution requires an additional prior licence,<sup>99</sup> leaving no room for liberalisation efforts. Substances in Schedules II-IV are regulated less strictly. While also being restricted to medical and scientific purposes,<sup>100</sup> the parties may choose the means of ensuring this restriction and the introduction of prior authorisation for possession is only desirable but not mandatory.<sup>101</sup> Regardless of the national control measures, parties may not permit the possession, trade in or use of the regulated substances in Schedules II-IV for other than licit purposes (Art. 5(2)), though, and must secure the provisions implemented for this purpose with criminal provisions.<sup>102</sup>

As neither trafficking-related activities nor a legalised and regulated market could fulfil the requirements of licit use, the Psychotropics Convention leaves no room for legal liberalisation of the supply side of hallucinogens and psychotropics. Solely depenalisation measures may be considered.

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<sup>96</sup> See BOISTER, *Suppression*, 97. Like all the other conventions, the Psychotropic Convention is not self-executing. The drafters emphasised this point for the penal provision in Art. 22(5) Psychotropics Convention.

<sup>97</sup> For substances in Schedule I Art. 5(1) and 7 Psychotropics Convention, for substances in the Schedules II-IV Art. 5(2) and (3).

<sup>98</sup> See UNODC, 1.

<sup>99</sup> Art. 5(1) in conjunction with Art. 7(1) and (2) Psychotropics Convention.

<sup>100</sup> Art. 5(2) Psychotropics Convention.

<sup>101</sup> Art. 5(3) Psychotropics Convention.

<sup>102</sup> Art. 22(1)(a) Psychotropics Convention.

b) *Actions Related to Individual Consumption*

The question arises whether the penal provision in conjunction with Art. 5 and 7 of the Psychotropics Convention demands a criminalisation of drug acquisition and possession for personal consumption, as well as of the consumption itself – something even the states could not agree upon when drafting the treaty.<sup>103</sup>

The wording of Art. 22(1)(a) Psychotropics Convention does not preclude such an interpretation,<sup>104</sup> as neither Art. 5 nor 7 distinguishes between acquisition or possession for trafficking or consumption purposes, and they even include the “use” of the regulated substances. The evident similarities to the earlier convention, particularly, regarding their purposes, strongly suggest that such an obligation to penalise the consumer does also not exist for this treaty<sup>105</sup> – and both scholars and the UN agree that Art. 22(1)(a) only applies to drug trafficking offences.<sup>106</sup> Consequently, even though possession, as well as the acquisition and use of all regulated drugs for personal consumption, are acts contrary to the Psychotropics Convention, they do not fall under the scope of application of Art. 22(1)(a), as they do not relate to drug trafficking.<sup>107</sup>

Hence, states are not bound to criminalise consumer offences regarding hallucinogens and psychotropic substances. They may not be legalised, as non-penal rules demand their prohibition.<sup>108</sup> States may, however, decriminalise or depenalise acquisition and possession for personal consumption if their existing legal framework criminalises those actions.<sup>109</sup>

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<sup>103</sup> Commentary Trafficking Convention, 80.

<sup>104</sup> Commentary Trafficking Convention, 349.

<sup>105</sup> BEWLEY-TAYLOR, Politics, 386; BOISTER, Suppression, 97 f.; Commentary Psychotropics Convention, 349; KRAJEWSKI, 331, 333; ALBRECHT, 680; National Drug Strategy, 29; for a detailed analysis of the arguments for this interpretation see Chapter [II.B.1.b\)\(1\)](#).

<sup>106</sup> See BOISTER, Suppression, 97 f., 100; Commentary Psychotropics Convention, 26. The Psychotropics Convention defines illicit traffic as the “*manufacture of or trafficking in psychotropic substances contrary to the provisions of this Convention.*” (Art. 1(j) Psychotropics Convention).

<sup>107</sup> Compare BOISTER, Suppression, 99 f.; Commentary Trafficking Convention, 350; KRAJEWSKI, 333; The parties may, however, still criminalise acquisition and possession for personal consumption, as well as the use itself, if they wish so (Commentary Trafficking Convention, 351).

<sup>108</sup> For all see also BOISTER, Suppression, 98; KRAJEWSKI, 332; FEIDLING, 198.

<sup>109</sup> See explanations in Chapter [II.B.1.b\)\(2\)](#); see also KRAJEWSKI, 333.

### 3. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)

In 1988, the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was opened for signature, marking the final shift of international drug control toward a US-style war on drugs.<sup>110</sup> In an effort to suppress illicit drug trafficking more effectively, the convention broadened the range of criminal provisions applicable to narcotics, psychotropic substances, and hallucinogens under the UN drug control framework. This expansion was deemed necessary to address better, among other things, the threats posed by drugs to the “health and welfare of human beings” – something that the prior conventions have been considered wanting.<sup>111</sup> One specific concern was the widespread possession of drugs by the young population in the 1970s and 80s and their perceived higher risk of becoming criminals due to drug abuse.<sup>112</sup>

To fight the traffic of illicit drugs, the convention (unlike the prior ones) aims at suppressing both its supply and demand side, as the former was considered a prerequisite for the latter by the treaty’s drafters.<sup>113</sup> Art. 3 Trafficking Convention, one of its cornerstones,<sup>114</sup> lists those criminal offences, implicitly differentiating between the supply and demand side of drug trafficking.<sup>115</sup>

#### a) *Actions Related to or Involved in Drug Trafficking (Art. 3(1)(a))*

Under Art. 3(1)(a)(i) and (ii) Trafficking Convention, parties are obliged to criminalise several behaviours which comprise all acts involved in producing, selling, transporting or distributing illicit drugs.<sup>116</sup> The treaty refers to the prior two conventions for defining when such an act is illicit.<sup>117</sup> This provision does not impose any new obligations but is supposed to ensure a consistent inter-

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<sup>110</sup> KRAJEWSKI, 331.

<sup>111</sup> For all see Preamble Trafficking Convention; Commentary Trafficking Convention, 1, 14; BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 10; similarly PIETH, 138 f.

<sup>112</sup> ROOM, Roadmap to Reforming, 6; HABIBI/HOFFMANN, 437; BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 11.

<sup>113</sup> See KRAJEWSKI, 331; STEWART, 402; see also HABIBI/HOFFMANN, 441; ROOM/REUTER, 85; MOFFITT/MALOUF/THOMPSON, 132.

<sup>114</sup> STEWART, 393.

<sup>115</sup> Commentary Trafficking Convention, 48 f.; see also BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 4; KRAJEWSKI, 334 f.

<sup>116</sup> See also BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 4; STEWART, 387 f.

<sup>117</sup> See also Commentary Trafficking Convention, 51 f.; BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 4.

national policy regarding licit and illicit drug uses and limits the application of this paragraph to trafficking offences.<sup>118</sup>

Hence, there is no room for a more liberal policy for the supply side of drug trafficking.<sup>119</sup> Additional hurdles for a regulated market would further arise from Art. 3(1)(c)(i) Trafficking Convention, a money laundering offence, which demands criminalisation of acquisition, possession or use of property which was obtained with a trafficking offence.<sup>120</sup> Banking procedures for the income the drug trade generates would not be legally permissible.<sup>121</sup>

b) *Actions Related to Individual Consumption (Art. 3(2))*

Art. 3(2) Trafficking Convention demands parties to criminalise “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”. Unlike the prior two conventions, the Trafficking Convention explicitly demands the criminalisation of drug acquisition and possession for personal consumption<sup>122</sup> and, therefore, indirectly, necessarily also criminalises the use of all regulated substances.<sup>123</sup>

Despite the seemingly unambiguous wording of the provision, according to the UN, some authors and states still argue that it does not demand the criminalisation of consumer offences: In the preparations of the treaty, the Bolivian representative claimed the scope still must be limited to penalising the same acts as under the prior two conventions, as the Trafficking Convention refers to them.<sup>124</sup> The UN rightly questions this interpretation, stating that the reference should only link to the substances and forms of their licit and illicit uses described in the treaties.<sup>125</sup>

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<sup>118</sup> Commentary Trafficking Convention, 51 ff.; another intention behind Art. 3(1)(a) Trafficking Convention was to send a message to the South American countries to adhere to the prohibitions laid out in the Single Convention (BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 4).

<sup>119</sup> See Chapters [II.B.1.a\)](#) and [II.B.2.a\)](#).

<sup>120</sup> On Art. 3(1)(c)(i) Trafficking Convention see also Commentary Trafficking Convention, 62 ff.; BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 3.

<sup>121</sup> BOISTER, *Waltzing on the Vienna Consensus*, 407.

<sup>122</sup> See also PIETH, 139; BEWLEY-TAYLOR, *Politics*, 386.

<sup>123</sup> Commentary Trafficking Convention, 80; see also ALBRECHT, 680; National Drug Strategy, 29; KRAJEWSKI, 332.

<sup>124</sup> For all see Official Records Trafficking Convention. The records neither contain any further citations to indicate who these alleged authors may be nor list other states than Bolivia.

<sup>125</sup> Commentary Trafficking Convention, 81.

Another stance taken is interpreting the entire treaty as a trafficking convention in the sense of the 1961 and 1971 conventions, still only addressing the supply side.<sup>126</sup> These authors ignore not only the unambiguous wording and purpose of the provision but also its political background: Art. 3(2) Trafficking Convention was introduced to better include the interests of the producing states, i.e., the developing countries in South America and Asia, which would otherwise have to stem most of the burden of drug prevention, while the consuming states, i.e., the developed countries of Europe and North America, would not have to introduce any (or only few) measures.<sup>127</sup>

Consequently, the Trafficking Convention demands the criminalisation of all actions related to illicit drugs, including the acquisition and possession for personal use, with the sole exception of the actual consumption (which is factually dependent on possession and acquisition, however).<sup>128</sup> Hence, legalisation and decriminalisation are incompatible with the 1988 Trafficking Convention. The International Narcotics Control Board, the organ guarding the UN drug conventions, recognises the possibility of depenalising the possession or acquisition of small quantities of drugs for personal possession.<sup>129</sup> This approach will be further explored in Chapter [III.A.1.b\)\(2\)](#).

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<sup>126</sup> National Drug Strategy, 31; WOLTRING, 19; ALBRECHT, 663; see also further explanations on this opinion in KRAJEWSKI, 331.

<sup>127</sup> BOISTER, *Waltzing on the Vienna Consensus*, 393; KRAJEWSKI, 334; *Commentary Trafficking Convention*, 78 ff.; PIETH, 135; see also ALBRECHT, 681; SPROULE/ST-DENIS, 269.

<sup>128</sup> Of same opinion e.g., PIETH, 138; KRAJEWSKI, 334.

<sup>129</sup> INCB, Report 2004, 80; see also HABIBI/HOFFMANN, 444.

### III. Escape Clauses and Other Contractual Exceptions

The UN drug conventions must be implemented into the member states' various domestic legal orders. So-called escape or flexibility clauses were introduced to cushion the lack of consensus about precise definitions acceptable to the various legal systems and, particularly, caution by some to use criminal law against individual drug users.<sup>130</sup> These escape clauses are specific contractual provisions that allow for increased flexibility when implementing the treaty in the context of a specific legal order<sup>131</sup> and which may provide the basis for a more liberal national drug policy. Another means by which a state may gain leeway for a more liberal drug policy can stem from the interpretation of the UN drug conventions themselves.

The following chapter explores the possibilities and limits of escape clauses and treaty interpretation to form a basis for an international law conform liberalisation effort.

#### A. Escape Clauses in the UN Drug Conventions

Art. 36(1)(a) Single Convention and Art. 22(1)(a) Psychotropics Convention subject the states' obligation to criminalise the behaviours associated with the supply-side of drug trafficking to the parties' "constitutional limitations". Art. 3(2) Trafficking Convention submits the commitment to criminalise supply and demand-side related behaviours under a state's "constitutional principles" and "basic concepts of its legal system". These provisions are escape clauses introduced to allow for a smoother integration of the UN drug conventions into domestic legal orders.<sup>132</sup>

Neither the UN drug conventions nor the literature define the requirements for invoking one of the escape clauses. This paper, therefore, will fill this gap and suggest the requisite elements for the escape clauses to be applicable.

#### 1. Existence of a Relevant Domestic Legal Source

The escape clauses refer to domestic legal provisions or principles preventing the state from fulfilling its obligation to criminalise drug-related behaviours.

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<sup>130</sup> Commentary Trafficking Convention, 71 f., 81; BOISTER, *Waltzing on the Vienna Consensus*, 393; see also HOHNERLEIN, 599; STEWART, 393; BEWLEY-TAYLOR, *Politics*, 286.

<sup>131</sup> HABIBI/HOFFMANN, 442 f.

<sup>132</sup> HABIBI/HOFFMANN, 442 f.



a) *Constitutional Limitations*

The trafficking offences of the Single Convention and the Psychotropics Convention are subjected to a state's "constitutional limitations". While literature does not define the terms or differentiate between limitations and principles, it seems to imply that a conflict with any applicable constitutional rule without any further requirements, e.g., on material importance, should suffice for an escape clause to apply.<sup>133</sup> This interpretation seems convincing, as any constitutional requirement prohibiting the criminalisation of illicit trafficking in drugs would necessarily set a constitutional boundary, i.e., limitation, to any implementation of said offence.

Consequently, any constitutional rule will suffice to allow for the decriminalisation of trafficking in illicit drugs to the extent of the conflict with the UN drug conventions. The non-criminal provisions on acquisition, possession and use are not subjected to escape clauses, wherefore legalisation of drug trafficking or a regulated market is not possible under this escape clause.

b) *Constitutional Principles*

The wording of the escape clause in the Trafficking Convention is only applicable to consumer and subsidiary supportive offences (Art. 3(1)(c) and 3(2) Trafficking Convention) and deviates from the prior two treaties, demanding a constitutional principle. The UN recognises that this particular clause may also form the basis for decriminalising consumer offences<sup>134</sup> and it is often named the legal basis for liberalisation endeavours.<sup>135</sup> However, the exact content of this escape clause leaves room for interpretation.

Principles differ from legal rules. A principle may be described as a broader and abstract guideline of values which informs the introduction and application of legal rules and provides a framework for legal reasoning.<sup>136</sup> On the other hand, legal rules are directives that specifically, immediately and precisely dic-

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<sup>133</sup> See e.g., FULTZ et al., 10; PARDO, 728.

<sup>134</sup> Commentary Trafficking Convention, 82 f.; The UN shifts here from an opinion expressed in Commentary Single Convention, 113, where the organisation stated that constitutional limitations would generally not be a sufficient basis to refrain from criminalising an act described in Art. 36(1) Single Convention. Of same opinion BOISTER, Penal Aspects, 125; BEWLEY-TAYLOR, Politics, 286.

<sup>135</sup> BEWLEY-TAYLOR, Politics, 286 f.

<sup>136</sup> ÁVILA, 40; JACKSON, Methodologies, 60 ff.

tate specific behaviours and may be followed with clear consequences in the case of disobedience.<sup>137</sup>

While the UN Commentary does not address the deviation from the terminology of the first two conventions, considering the purpose of the Trafficking Convention, it seems plausible that its escape clause should be measured to a higher standard. Consequently, only the violation of principles may form the basis of a liberative policy under the name of this escape clause.<sup>138</sup>

The suitability of a specific principle depends on its role in a nation's law. Nevertheless, several principles may prove particularly successful. The following list is, however, by no means exhaustive and, depending on constitutional phrasing and the national legal order, the described phenomena may also or only fall under one of the other escape clauses.

#### (1) *Principle of Proportionality*

Many legal orders know some form of the principle of proportionality, an instrument that also exists in international law,<sup>139</sup> making it an ideal candidate for an analysis with universal value. Variations in the details and the value of the principle in the national legal orders are to be expected, though,<sup>140</sup> and an individual evaluation remains crucial.

In the context of drug offences, the principle of proportionality may be applied to instruct the court when defining the adequate punishment for a specific offence,<sup>141</sup> or it may be used to instruct or bind the legislator when introducing criminal norms.<sup>142</sup> The latter purpose is of higher value when assessing the principle's usability to liberalise drug policy. It can serve to weigh the legislative act of criminalising drugs for personal consumption and the interests to be protected

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<sup>137</sup> ÁVILA, 40; JACKSON, *Methodologies*, 60 ff.

<sup>138</sup> Of other opinion without giving reasoning for allowing any constitutional norm BOISTER, *Penal Aspects*, 125.

<sup>139</sup> LAI, 1, 3; HERMERÉN, 373; JACKSON, *Constitutional Law*, 3094; The principle of proportionality is also anchored in several international human rights treaties, e.g., in Art. 29(2) of the Universal Declaration of Human Rights.

<sup>140</sup> HERMERÉN, 373 f.

<sup>141</sup> LAI, 2. The INCB recognises the standard of proportionality but only refers to it regarding the severity of the punishment, not the question, whether there should be criminal consequences at all (INCB, Report 2007, 3).

<sup>142</sup> LAI, 2.

by it, in this case, the aims of the UN drug conventions,<sup>143</sup> against the interest of the drug user not to be punished for his actions and freely consume drugs.<sup>144</sup>

(a) *Sustainability*

For an act to be proportional, there must first be some form of sustainability of the measure in question, meaning it must be suitable to fulfil the legitimate purposes of the UN drug conventions.<sup>145</sup> Here, one might argue two points: firstly, whether the approach of the UN drug conventions fights trafficking in any meaningful way and contributes to the health and welfare of humankind,<sup>146</sup> and secondly, whether prohibiting the individual from using drugs is a legitimate purpose.<sup>147</sup>

(i) *Suitability*

Regarding the first question, the states must rely on empirical data. Here, a strong case can be made for the UN drug conventions not only not furthering public health but even being harmful to the health of drug users, e.g., by encouraging the unsafe use of drugs and by depriving people dependent on the availability of the regulated substances, particularly cannabis and opioids, for medical purposes, from access to them.<sup>148</sup> Additionally, the criminalisation-based war on drugs failed to produce sufficient effects on drug trafficking.<sup>149</sup>

Hence, states can successfully claim criminalisation of consumer offences to violate their constitutional principle of proportionality, as the measure is not suited to fulfil the UN drug convention's aims.

(ii) *Legitimate Purpose*

Here, the question of when criminal law may legitimately be employed must be raised. The Anglo-American legal traditions rely on the harm principle to determine this.<sup>150</sup> It stipulates that states may only compel individuals to spe-

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<sup>143</sup> See Chapters [II.B.1](#), [II.B.2](#) and [II.B.3](#); see also LAI, 1.

<sup>144</sup> See for the explanations on proportionality LAGODNY, 281.

<sup>145</sup> COTTIER et al., 5.

<sup>146</sup> A claim often made when states consider a more liberal drug policy, see Chapter I. For the purposes of the UN drug conventions see Chapters [II.B.1](#), [II.B.2](#) and [II.B.3](#).

<sup>147</sup> BÖLLINGER, 291.

<sup>148</sup> GODLEE/HURLEY, 1.

<sup>149</sup> FELLINGHAM et al., 78; HALL, 1211; HAUG, 41; JENSEN/GERBER/MOSHER, 101.

<sup>150</sup> HOLTUG, 357; EGE/STARK, 249.

cific behaviours and, therefore, only employ criminal law if the behaviour in question may cause harm to others.<sup>151</sup> In the German-speaking legal tradition, this task is fulfilled by the so-called theory of the protection of legal goods,<sup>152</sup> demanding that a behaviour must only be criminalised if it violates a so-called legal good.<sup>153</sup> A legal good is an object, value or interest of a third person or the general public worthy of protection by a criminal norm.<sup>154</sup> Given a sufficient constitutional basis, both principles may also serve as constitutional principles in their own right. The author suspects the principles produce similar results but will proceed to analyse only the legal good theory, as it predominates in the author's legal tradition, and a discussion of both principles exceeds the scope of this article.

Regarding the health-protection aspect of Art. 3(2) Trafficking Convention, it is essential to note that according to the legal good theory, self-destructive behaviour should not be criminalised.<sup>155</sup> An informed consumer can act as an emancipated and independent person, and neither needs protection nor punishment for exposing himself to possible adverse health consequences through drug consumption.<sup>156</sup> Furthermore, there is no general obligation to keep healthy, which would need to be protected by criminal law.<sup>157</sup> The German Constitutional Court countered this, claiming that even with acquisition and possession for personal consumption, there remains a danger of the drugs getting to the public, particularly juveniles, generating a risk to public health.<sup>158</sup> This argument, however, seems questionable: If the drugs are only transferred for the personal consumption of another competent person, the same legal good principle would prevent criminalisation. In the case of the substance getting to minors in individual cases, it would be more suitable for the behaviour to be sanctioned under a provision addressing the administration of harmful substances to children.

Concerning the convention's second purpose, to fight drug trafficking, the argument may be raised that consumers would generate more drug trafficking by inciting it, and that consumers indirectly support the criminality surrounding drug trafficking.<sup>159</sup> This argument holds, at least for the acquisition of-

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<sup>151</sup> HOLTUG, 357; EGE/STARK, 249, both with further references.

<sup>152</sup> MAEDER/NIGGLI, 447; WOHLERS/WENT, 289; BÖLLINGER, 289 f.; EGE/STARK, 241.

<sup>153</sup> MAEDER/NIGGLI, 447.

<sup>154</sup> FIOKA, 143 f.; MAEDER/NIGGLI, 447; see also WOHLERS/WENT, 290.

<sup>155</sup> KRAJEWSKI, 335 f.

<sup>156</sup> JUNGBLUT, 282; on the question of self-determined acting see also WOHLERS/WENT, 295.

<sup>157</sup> Compare WOHLERS/WENT, 295.

<sup>158</sup> BVerfG, Beschluss der 3. Kammer des Zweiten Senats vom 29. Juni 2004, N 43 f., 47.

<sup>159</sup> As described (but not advocated) in BÖLLINGER, 290. The author then proceeds to describe the unconvincing counterargument that traffickers otherwise would simply trade in other

fences. Hence, the permissibility of decriminalisation depends on how crucial this indirect influence is considered in the individual state.<sup>160</sup>

Consequently, the requirement of a legitimate purpose for criminal offences may allow for decriminalisation or depenalisation of consumer offences, depending on the state's understanding of the theory of legal goods.

(b) *Necessity*

The question of necessity aims to answer whether a milder alternative would be just as effective in achieving the same goal without being so restrictive on the affected individual's rights and freedoms.<sup>161</sup> Hence, if a state can reasonably claim that other measures protect public health and security just as well without limiting access to the regulated substances, this would free it from its obligations under Art. 3(2) Trafficking Convention.

While studies on these questions are not always conclusive, they seem to indicate that the possible harm done by drugs to public health is not negatively influenced by decriminalisation and that the availability of drugs has a more substantial influence on consumption rates than the national policy system.<sup>162</sup> Based and dependent on this information (or comparable, reasonably well-founded assumptions), a state can justify opting for alternative, non-criminal sanctions or lifting sanctions altogether, allowing for both decriminalisation and depenalisation. These measures may also be complemented with harm reduction measures, i.e., alternative measures to feather the adverse effects of drug consumption to protect public health better.<sup>163</sup>

(c) *Proportionality in a Narrow Sense*

The last requirement of the principle of proportionality is proportionality in a narrow sense, meaning that when weighing the affected legal goods against each other, the protected one prevails.<sup>164</sup> Considering that one individual's

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prohibited things, such as weapons and that a decriminalisation of consumer offences would, therefore, not affect public security.

<sup>160</sup> Coming to a result allowing for decriminalisation is not unheard of: The Colombian Constitutional Court did rule against a law criminalising the personal possession of cannabis in a similar case to the German one (Colombian Constitutional Court, Sentencia No. C-221/94; see also KRAJEWSKI, 336).

<sup>161</sup> LAGODNY, 280 f.; COTTIER et al., 5; LAI, 1; see also BÖLLINGER, 292 f.

<sup>162</sup> HUGHES/STEVENS, 1000; REINARMAN/COHEN/KAAL, 836; see also BÖLLINGER, 292 f.

<sup>163</sup> MARLATT, 779, 785; NADELMANN, 88.

<sup>164</sup> COTTIER et al., 5; BÖLLINGER, 293.

contribution to drug trafficking and, therefore, the harm done is insignificantly minor, whereas the possible consequences of criminal prosecution for the individual may not be, decriminalising or depenalising consumer offences can be justified under the principle of proportionality.<sup>165</sup>

Consequently, the principle of proportionality offers states various connecting points which allow for decriminalisation by adapting the national law and depenalisation by refraining from prosecuting minor cases of acquiring or possessing drugs for personal consumption.

## (2) *Prosecutorial Discretion*

Another principle often invoked is the so-called principle of opportunity, also known as the principle of expediency, which forms the basis for the infamous Dutch drug policy.<sup>166</sup> This principle operates under the premise that drug possession and acquisition for personal consumption is and remains illegal. The state, however, refrains from prosecuting those offences if such a prosecution would not be in the public interest.<sup>167</sup> This public interest is constituted by the state's resources to fight any criminal behaviour being limited and better used fighting the more serious drug trafficking offences.<sup>168</sup> The compatibility of the approach with the Trafficking Convention was explained by stating that the convention only demands criminalisation but does not elaborate on its extent, an argumentation which may be extended to all the UN drug policies.<sup>169</sup>

### (a) *Relationship with Art. 3(6) Trafficking Convention*

Art. 3(6) of the Trafficking Convention seemingly precisely addresses this principle when it demands that “*any discretionary legal powers under their [the parties’] domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement in respect of those offences, and with due regard to the need to deter the commission of such offences.*”

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<sup>165</sup> Of the same opinion KÖHLER, 3; PIETH, 135.

<sup>166</sup> BOISTER, *Waltzing on the Vienna Consensus*, 402, 405; HOFMANN, 194; PIETH, 131; SILVIS, 44; HOHNERLEIN, 599; KRAJEWSKI, 336. The exact terminology depends on the legal order in question.

<sup>167</sup> For all see SAGEL-GRANDE, 38 ff.; KRAJEWSKI, 336; SILVIS, 44; BOISTER, *Waltzing on the Vienna Consensus*, 402; DLEŠTÍKOVÁ, 2.

<sup>168</sup> KEMMEN/PFEFFER/VON ROBERTUS, 177; HOFMANN, 194; PIETH, 131; BOISTER, *Waltzing on the Vienna Consensus*, 402.

<sup>169</sup> KRAJEWSKI, 336; PIETH, 142 with further mentionings.

The UN commentary does not consider the principle of opportunity when discussing the article, commenting only on allowing for plea bargains, with a view on the US system.<sup>170</sup> Hence, it neither explicitly includes nor excludes the principle of opportunity. PIETH interprets the provision as the principle's expressive recognition, as its exact purpose is to maximise the results of prosecution by allowing states to focus on serious crimes,<sup>171</sup> which seems convincing considering the provision's precise wording.

Art. 3(6) Trafficking Convention limits prosecutorial discretion with its "effectiveness" and "deterrence" requirements. As non-prosecution of consumer offences neither deters potential consumers nor makes the prosecution of those particular offences more effective by factually holding it, exercising discretionary powers in these cases would only be possible if these effects could also benefit the prosecution of other than the immediately committed type of offences. As the UN wants to allow the application of Art. 3(6) Trafficking Convention in the context of turning minor criminals into informants,<sup>172</sup> offence-identity is not required.

#### *(b) Limits of the Exercise of Prosecutorial Discretion*

While the principle of opportunity offers the possibility for drug policy liberalisation in a manner even sanctioned by the INCB,<sup>173</sup> its application is limited by the interpretation of the conventions in good faith, which entails the obligation to interpret treaties in a way that they do not lose all meaning.<sup>174</sup> It is often believed that this principle applies to consumer offences and selling small quantities of drugs.<sup>175</sup> The commercial drug supplier, however, directly partakes in illicit drug trafficking. That decriminalisation of sellers also leads to an increase in illicit trafficking can be seen from the experiences in the Netherlands<sup>176</sup> – something the UN drug conventions actively strive to prevent.

Therefore, an extension of the opportunity principle to the supply side of the drug trade would only be justified in the light of a good faith interpretation if the trafficking-related crime is so high that it would not allow for the prose-

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<sup>170</sup> Commentary Trafficking Convention, 93 f.; see also PIETH, 141.

<sup>171</sup> PIETH, 142.

<sup>172</sup> Commentary Trafficking Convention, 94.

<sup>173</sup> INCB, Report 2004, 74.

<sup>174</sup> KRAJEWSKI, 336; HOFMANN, 195; INCB, Report 2004, 74; BOISTER, *Waltzing on the Vienna Consensus*, 394; REINHOLD, 49 ff.; HOHNERLEIN, 599.

<sup>175</sup> See e.g., HOFMANN, 195.

<sup>176</sup> GRUND/JOOST, 133.

cution of small-scale sellers.<sup>177</sup> This result is regrettable, as the Dutch policy to only tolerate drug supply under certain conditions, including the respect for a minimum age of the consumer,<sup>178</sup> would allow for some of the benefits otherwise only to be had on a legal market.

### (c) *Implementation into National Policy*

The principle of opportunity can be applied in individual cases or generally to every offender of drug-consumption offences fulfilling predefined requirements.<sup>179</sup> For the most efficient depenalisation scheme under the principle of prosecutorial discretion, the drug consumer should be treated under a general and uniform policy, defining the quantities a person may acquire or possess.

### (3) *Conflict with National Fundamental Rights*

Sometimes, it has been argued that the criminalisation of consumer offences would interfere with fundamental national rights. The results of those domestic proceedings vary, however. To illustrate, the German<sup>180</sup> and Columbian Constitutional Courts<sup>181</sup> came to opposite results on whether the right to personal freedom prohibits the criminalisation of possession of cannabis for personal consumption. However, other proceedings under the right to privacy were successful in South Africa<sup>182</sup> and Alaska,<sup>183</sup> whereas a case on freedom of religion was dismissed again in South Africa.<sup>184</sup> While those cases are undoubtedly intriguing to study, they are also decided solely on a national law level.<sup>185</sup>

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<sup>177</sup> Of different opinion PIETH, 138 f.

<sup>178</sup> PIETH, 131.

<sup>179</sup> KRAJEWSKI, 337.

<sup>180</sup> BVerfG, Beschluss des Zweiten Senats vom 9. März 1994, N 119; see also HOHMANN/MATT, 41.

<sup>181</sup> Columbian Constitutional Court, Sentencia No. C-221/94; see also HEINZE/ARMAS-CASTAÑEDA, 7; PAHL, 1.

<sup>182</sup> Constitutional Court of South Africa, *Minister of Justice and Constitutional Development and Others v. Prince; National Director of Public Prosecutions and Others v. Rubin; National Director of Public Prosecutions and Others v. Acton and Others* (2018), N 58; see also LUBAALE/MAVUNDLA, 821.

<sup>183</sup> Supreme Court of Alaska, 537 P.2d 494 (1975), 511; see also BRANDEIS, 175.

<sup>184</sup> Constitutional Court of South Africa, *Prince v. President of the Law Society of the Cape of Good Hope* (2002), N 111; see also LUBAALE/MAVUNDLA, 822 f.

<sup>185</sup> For a more extensive overview over the relevant court decisions up to 2001 see BOISTER, *Penal Aspects*, 125 f. n 228.



c) *Basic Concepts of a State's Legal System*

The last safeguard clause<sup>186</sup> only exists regarding the consumer offences of Art. 3(2) Trafficking Convention, the “basic concepts of a state’s legal system” exception. This clause rarely seems to find itself the subject of debate or interpretation. The reasoning behind introducing this escape clause is comparable (if not identical) to the constitutional principles.<sup>187</sup> The alignment of the rationale for introducing this escape clause with that of “constitutional principles” strongly implies that, within the context of this convention, principles and concepts should be regarded as synonymous<sup>188</sup> and are also connected to the conformity of criminalisation with fundamental rules of national law.<sup>189</sup>

The difference to the constitutional principles, hence, only lies in the legal source: Basic concepts may stem from statutory law, judicial precedents, or practice<sup>190</sup> and can find their basis in all levels of the hierarchy of norms. Consequently, a claim of incompatibility with any non-constitutional legal principle may allow for decriminalising consumer-related offences.<sup>191</sup> An incompatibility with a simple norm, however, would not suffice.

## 2. Conflict between the Relevant National and Contractual Provisions

The second requirement is that the relevant national provision or principle referred to in the escape clause prevents the state from fulfilling its obligation to criminalise the drug-related behaviour in question,<sup>192</sup> meaning an actual conflict of norms exists. A conflict exists when the state cannot simultaneously fulfil its obligation under the convention and the domestic legal norm, and all efforts to achieve a justifiable result under harmonious interpretation have failed.<sup>193</sup>

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<sup>186</sup> Commentary Trafficking Convention, 71 f.

<sup>187</sup> See Commentary Trafficking Convention, 71 f.; STEWART, 393; BOISTER, *Waltzing on the Vienna Consensus*, 393.

<sup>188</sup> While not stated this way explicitly, BOITEUX/PELUZIO/SOUZA, 13 seem to also be of this opinion.

<sup>189</sup> BOISTER, *Waltzing on the Vienna Consensus*, 406.

<sup>190</sup> Commentary Trafficking Convention, 72.

<sup>191</sup> Similarly BOITEUX/PELUZIO/SOUZA, 13; BOISTER, *Penal Aspects*, 125 f. The UN does not agree with this approach regarding this escape clause (INCB, *Report 1994*, 52; see also BOISTER, *Penal Aspects*, 127).

<sup>192</sup> See BOISTER, *Waltzing on the Vienna Consensus*, 406 f.

<sup>193</sup> JENKS, 426; VRANES, 395.

### 3. Time of the Conflict

The UN drug conventions do not state whether the conflict between the national law and the UN drug conventions must have already existed at the time of accession to the treaty. As a rule, Art. 27 of the Vienna Convention on the Law of Treaties stipulates that a conflict with national law does not justify the violation of a contractual obligation,<sup>194</sup> a principle having its roots in the tenant of “pacta sunt servanda”.<sup>195</sup> The rule should ensure that states only enter into any treaties they can realise under their national law and prevent them from undermining their obligation through an adaption of their national law.<sup>196</sup>

This principle would, indeed, be undermined if the escape clauses in the UN drug conventions were given any other effect. A temporally flexible interpretation would effectively deprive the penal provisions of any binding effect, violating the obligation to fulfil treaties in good faith (Art. 19 Vienna Convention on the Law of Treaties). Consequently, to liberalise their national drug policy under any escape clause, a state must have a conflicting qualified national rule or principle in place at the time of accession to the treaty.

## B. Remedies under Contract Interpretation

Not only escape clauses but also contract interpretation may be a means to a more flexible drug policy. The most promising approaches will be discussed in the next sub-chapter.

### 1. Licit Usages: Medical and Scientific Uses

According to Art. 4(c) Single Convention and Art. 5(2) and Art. 7(a) Psychotropics Convention (which Art. 3(2) Trafficking Convention references to define licit drug uses) parties are obliged to limit the use of the regulated substances to medical and scientific purposes. Therefore, the question must be asked whether it would be possible to interpret those terms to allow for the acquisition, possession, and trading of drugs to be licit, i.e., that they constitute a medical or scientific use and, therefore, are permissible.<sup>197</sup> While it is to be as-

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<sup>194</sup> BOISTER *Waltzing on the Vienna Consensus*, 405; see also VILLIGER, Art. 27 N 4. The rule also has a basis in customary international law and remains applicable to states that do not have ratified the Vienna Convention on the Law of Treaties (VILLIGER, Art. 27 N 11).

<sup>195</sup> SCHMALENBACH, *VCLT-Commentary*, Art. 27 N 1; VILLIGER, Art. 27 N 4; similarly HOHNERLEIN, 596.

<sup>196</sup> VILLIGER, Art. 27 N 12.

<sup>197</sup> FULTZ et al., 11; LINES/BARRETT, 440.

sumed that both treaties use the same definition for those terms,<sup>198</sup> they do not define them. This was not an oversight by the treaty drafters but rather intentional. The terms should be understood in their respective context, may have a different meaning under different circumstances,<sup>199</sup> and, lacking a contradictory general and uniform state practice,<sup>200</sup> can be interpreted flexibly.<sup>201</sup> There is no mention of a prohibition of using those clauses for liberalisation efforts,<sup>202</sup> and it also seems not to be categorically excluded by the conventions themselves.<sup>203</sup>

a) *Medical Uses*

When discussing medical uses, treating health conditions must be the starting point of the definition,<sup>204</sup> whereby the UN also recognises veterinarian and dental purposes<sup>205</sup> and traditional, non-Western medical practices.<sup>206</sup> In the context of traditional uses, this interpretation may, consequently, allow for the exercise of traditional healing methods involving regulated substances. From the standpoint of conventional medicine, the interpretation permits supplying incurable drug addicts with a minimal dose necessary for survival<sup>207</sup> and may well justify limited distribution in medically supervised withdrawals. A legalisation of other consumer offences may, however, not be achieved.

An important factor in the health risks of drug consumption lies in the uncertain origin and composition of black-market wares.<sup>208</sup> A legalised market would be able to introduce quality control and thus preventatively help maintain the consumer's health. While preventative medical applications must be permissible, this argument would overextend the interpretation. The prevention does not relate to a medical condition but to harm-minimisation regarding the risky behaviour of an otherwise healthy person.

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<sup>198</sup> Commentary Psychotropics Convention, 140.

<sup>199</sup> For all see Commentary Single Convention, 111; Commentary Psychotropics Convention, 140; COLLINS, 108 f., 113; THOUMI, Medical and Scientific Basis, 23; LINES/BARRETT, 441.

<sup>200</sup> Commentary Single Convention, 111.

<sup>201</sup> BEWLEY-TAYLOR, Harm Reduction, 484; LINES/BARRETT, 441; COLLINS, 108; THOUMI, Medical and Scientific Basis, 20.

<sup>202</sup> LINES/BARRETT, 448.

<sup>203</sup> Similarly THOUMI, Medical and Scientific Basis, 20.

<sup>204</sup> FULTZ et al., 11.

<sup>205</sup> Commentary Psychotropics Convention, 140; Commentary Single Convention, 111.

<sup>206</sup> Commentary Single Convention, 111; Commentary Psychotropics Convention, 141; THOUMI, Medical and Scientific Basis, 21.

<sup>207</sup> THOUMI, Medical and Scientific Basis, 20; BEWLEY-TAYLOR, Harm Reduction, 484.

<sup>208</sup> BABOR et al., 102.

b) *Scientific Uses*

THOUMI defines science in the context of the UN drug conventions as the attainment of knowledge using contemporary scientific techniques, encompassing systematic and organised observation, logical deduction, and empirical experimentation, with the added requirement that the research outcomes must be pertinent to the drug policy.<sup>209</sup> This definition is supported by the, admittedly not directly applicable, ICJ judgment on whether Japan violated the International Convention for the Regulation of Whaling by whaling for primarily commercial reasons under the guise of scientific research.<sup>210</sup> Australia (uncontestedly) claimed that scientific research must apply appropriate means to follow achievable objectives and aim to contribute to knowledge relevant to the convention.<sup>211</sup> In an extensive evaluation, considering inter alia the number of whales killed and the commercial use of the whales' meat, the court found Japan to be in breach of the convention.<sup>212</sup> Both THOUMI and the ICJ correctly demand the application of appropriate means to answer a scientific question.

However, the author of this article disagrees with the research being limited to drug policy-related questions in the context of the UN drug conventions. Firstly, such an interpretation has no basis in the text of either of the conventions. Secondly, this would effectively prohibit any research for medical uses of the regulated substances unless directed at their placement within the various Schedules, thus effectively working against the availability of drugs as medicines.

Consequently, provided the research question is formulated correctly, the scientific use clause permits the legalisation of drugs and the establishment of regulated markets. This is contingent, however, on the research being aimed at yielding discernible outcomes and not primarily targeting commercial goals,<sup>213</sup> which can only be achieved by undertakings that are at least geographically and temporally restricted. Therefore, this exception is no suitable long-term

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<sup>209</sup> THOUMI, *Medical and Scientific Basis*, 23.

<sup>210</sup> ICJ, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment of 31 March 2014, N 42 ff.; see also LINES/BARRETT, 450.

<sup>211</sup> ICJ, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment of 31 March 2014, N 74.

<sup>212</sup> ICJ, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment of 31 March 2014, N 73 ff.; 228 ff.; see also LINES/BARRETT, 450 f.

<sup>213</sup> Similarly for all see LINES/BARRETT, 440 f., 450, who state that the actual use and not the policy objective behind the use should be decisive. This also is, in the end, a result of Art. 19 of the Vienna Convention on the Law of Treaties (LINES/BARRETT, 445).

solution for a liberal drug policy.<sup>214</sup> However, the results thusly acquired could be used as a basis for argumentation for permanent decriminalisation or depenalisation, e.g., under the principle of proportionality.<sup>215</sup>

## 2. Leniency towards Drug Abusers as a Measure of Harm Reduction

All three UN drug conventions contain special provisions regarding the punishment of “drug abusers”. There are, however, significant differences between the first two and the Trafficking Convention. The Single Convention (Art. 36(1)(b)) and the Psychotropics Convention (Art. 22(1)(b)) with identical wording allow for measures like treatment, education, rehabilitation, or social reintegration, either additional to, or instead of a conviction or punishment of a drug abuser. The Trafficking Convention, on the other hand, intends these measures in the case of trafficking offences (as are prescribed under the first two treaties) only in addition to punishment or conviction, except for minor cases (Art. 3(4)(b) and (c)) and extends its application to all offenders.<sup>216</sup> The provision dealing with consumer offences is equivalent to the ones addressing trafficking offenders under the first two treaties.

The idea behind this leniency towards drug abusers lies in wanting to encourage them to get help and not be deterred by fear of prosecution.<sup>217</sup> While this approach may prove beneficial for abusers, particularly with the considerably increased risks of infections with bloodborne disease for drug addicts in prison,<sup>218</sup> these articles are a poor basis for a liberalisation attempt. It may be compatible with the first two conventions to introduce general decriminalisation or depenalisation schemes for trafficking offences committed by drug abusers. This would, however, create a potential risk of the unwanted consequence of drug abusers being recruited into drug trafficking and not be possible under the Trafficking Convention at all.

A depenalisation or decriminalisation regime may, however, be introduced for consumer offences under said convention by exchanging criminal punishment of the offender for participation in one of the programs, as mentioned earlier, with the additional possibility of administrative fines. Such an approach

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<sup>214</sup> Nevertheless, Portugal used this clause to base its decriminalisation regime upon which by now seems to be mostly accepted as being in accordance with the UN drug conventions (APPGDPR, 3).

<sup>215</sup> See Chapter [III.A.1.b\(1\)](#).

<sup>216</sup> The reasoning behind this decision lies in the realisation that drug abuse and trafficking is not only a medical and social problem of abusers (Commentary Trafficking Convention, 87).

<sup>217</sup> BOISTER, *Waltzing on the Vienna Consensus*, 392.

<sup>218</sup> CLARK/DOLAN/FARABEE, 223.

would, however, be more difficult to uphold in the case of repeated offences. That may be why the author did not find any mention of such an approach in the literature or state practice.

## IV. Remedies outside the UN Drug Conventions

The last chapter analyses whether any instruments under ordinary public international law allow states to liberalise their national drug policy.

### A. Reservations

A reservation is a unilateral declaration a party makes when entering a treaty, allowing it to modify or exclude specific provisions of the agreement in its application to them.<sup>219</sup> By doing so, the state alters its obligations and rights under the convention in question,<sup>220</sup> making it, in principle, a valid option to enable a more liberal drug policy under the conventions.<sup>221</sup> As almost all states are members of the UN drug conventions,<sup>222</sup> this process, in most cases, requires denouncing the treaty whose obligations should be altered, as the reservation must be made at the time of accession.<sup>223</sup> The contractually provided reservations are considered an alternative, allowing a post-ratification reservation.<sup>224</sup>

#### 1. Transitional and other Contractually Permitted Reservations

Both the Single Convention and the Psychotropics Convention contain provisions for introducing specific predefined reservations. Those reservations have the advantage that they can be raised without the consent of any of the other contract parties.<sup>225</sup>

The Single Convention, uniquely among the UN drug conventions, features transitional reservations that permit the quasi-medical use of opium, opium smoking, and cannabis if these practices were traditional and allowed prior to joining the convention.<sup>226</sup> These reservations do, however, not provide a sufficient basis for a permanent drug policy, as they are limited to a maximum

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<sup>219</sup> EDWARDS JR., 363; HABIBI/HOFFMANN, 451 f.; KOH, 71; see also Art. 2(1)(d) Vienna Convention on the Law of Treaties.

<sup>220</sup> KOH, 71; HABIBI/HOFFMANN, 452.

<sup>221</sup> ROOM, 402.

<sup>222</sup> See [n.9](#).

<sup>223</sup> ROOM, 402; see also Commentary Single Convention, 476.

<sup>224</sup> HABIBI/HOFFMANN, 452 f.

<sup>225</sup> Art. 50(3) Single Convention e contrario; Art. 32(3) Psychotropics Convention e contrario; ROOM, 402.

<sup>226</sup> Art. 49(1) and (2)(a) Single Convention.

duration of 25 years.<sup>227</sup> Furthermore, only the traditional use covered by the reservation may be permitted next to licit uses during this time, hence not allowing for the liberalisation of recreational uses.<sup>228</sup> Additionally, both the Single Convention and the Psychotropics Convention allow for “other reservations” which are not subjected to a time limit<sup>229</sup> but are not related to any provisions allowing for a liberalisation of the national drug policy (see Art. 50(2) Single Convention, Art. 32(2) Psychotropics Convention).

The Psychotropics Convention, furthermore, allows for reservations about wild-growing plants on a state’s territory that fall under Schedule I and permits their use for traditional magical or religious uses (Art. 32(4) Psychotropics Convention). Consequently, the contractually provided reservations may be easy to implement but are, eventually, of limited helpfulness in justifying a liberal and permanent drug policy, allowing only for traditional uses of psychotropic and hallucinogen substances under Schedule I to be legalised.

## 2. Reservations not Provided for in the Conventions

Both the Single Convention and the Psychotropics Convention allow other, not contractually provided reservations, required the accessing state informs the Secretary-General, and there is no objection of one-third of the convention’s members in question within twelve months.<sup>230</sup> The Trafficking Convention, on the other hand, does not contain any provisions on reservations whatsoever, nor does the preparatory work, wherefore the general rules of the Vienna Convention on the Law of treaties are applicable.<sup>231</sup>

The exiting and re-entering of a convention to make a reservation is possible under the Vienna Convention on the Law of Treaties, while sometimes being criticised for undermining the consensus by cherry-picking provisions after having entered into the contract.<sup>232</sup> The effects are, however, identical to those newly entered into the treaty.<sup>233</sup> Hence, a state must leave the treaty under the

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<sup>227</sup> See Art. 49(2)(d) and (f) Single Convention; see also Commentary Single Convention, 467; BOISTER, *Waltzing on the Vienna Consensus*, 399.

<sup>228</sup> Commentary Single Convention, 467.

<sup>229</sup> Commentary Single Convention, 467.

<sup>230</sup> Art. 50(3) Commentary Single Convention; Art. 32(3) Psychotropics Convention; see also HABIBI/HOFFMANN, 27; ROOM, 403.

<sup>231</sup> SPROULE/ST-DENIS, 291 f.

<sup>232</sup> HELFER, 372 f.; HABIBI/HOFFMANN, 452 f.

<sup>233</sup> HABIBI/HOFFMANN, 452.



observance of the relevant provisions<sup>234</sup> and declare the reservation upon re-entering at the time of the signature, accession, or ratification.<sup>235</sup>

For a contractually not-provided reservation to be permissible, it must also be compatible with the objective and purpose of the affected treaty.<sup>236</sup> Keeping in mind that the foremost purpose of all UN drug conventions is to combat the “evil” of drugs and limit them to licit uses,<sup>237</sup> complete legalisation of both recreational and traditional uses of all regulated substances would evidently not be within the boundaries of this limitation. If liberalisation only affects selected substances, particularly those of limited danger to the user’s health, such a reservation would not completely defy the treaty’s purpose. Hence, exiting and re-entering the conventions with reservations is a valid option to allow for a more liberal drug policy.<sup>238</sup> States should remember, though, that while the required number of vetos has yet stopped no such undertaking,<sup>239</sup> it is frowned upon by the INCB, which considers it a threat to the international drug control system<sup>240</sup> and may result in a loss of international reputation.<sup>241</sup>

## B. Conflicts with Human Rights Obligations

The question also must be raised whether the obligations to criminalise drug consumption under the UN drug conventions violate human rights in a manner relevant to the obligations under the treaties, leading to the prior one prevailing over the latter. One basis for such a priority might be Art. 103 of the UN Charta, which states that obligations under the Charta prevail in case of conflict<sup>242</sup> with another obligation under public international law (including the UN drug conventions).<sup>243</sup> Art. 56 in conjunction with Art. 55(c) of the UN Charta

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<sup>234</sup> Art. 46 Single Convention, Art. 29 Psychotropics Convention or Art. 30 Trafficking Convention; see also ROOM, 402.

<sup>235</sup> Art. 49 (1) and 50(2) Single Convention; Art. 32(2) Psychotropics Convention. Bolivia was the first state to take this step and thusly adapt its obligations under the Single Convention to allow for the traditional cultivation of the coca bush, a practice of its indigenous people (ROOM, 402; BOISTER, Waltzing on the Vienna Consensus, 399).

<sup>236</sup> ROOM, 404.

<sup>237</sup> See Chapters [II.B.1](#), [II.B.2](#) and [II.B.3](#), and the preambles of the three conventions.

<sup>238</sup> Similarly for all BEWLEY-TAYLOR, Politics, 289; SPROULE/ST-DENIS, 291; BOISTER, Waltzing on the Vienna Consensus, 400.

<sup>239</sup> HABIBI/HOFFMANN, 454; in the case of Bolivia (n 235) there were only fifteen (BOISTER, Waltzing on the Vienna Consensus, 400).

<sup>240</sup> INCB, Report 2012, 37; see also ROOM, 405; ZITT, 543.

<sup>241</sup> ARP, 155; HABIBI/HOFFMANN, 453.

<sup>242</sup> For the definition see Chapter [III.A.2](#).

<sup>243</sup> COLLINS, 113; BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 6; RAFFEINER, 45.

oblige member states to promote “universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion”, hence the observance of human rights qualifies as an obligation under the Charta.<sup>244</sup> Here, any positive human rights obligation suffices.<sup>245</sup> Consequently, the second option, whether human rights constitute *ius cogens*, i.e., a peremptory, universally recognised, and non-derogable norm of international law from which the states may not deviate by contract,<sup>246</sup> can be left open.<sup>247</sup>

Therefore, the human rights most likely affected by criminalisation will be explored in the next sub-chapters.<sup>248</sup> For a conflict to be present, the harmonious interpretation of both obligations must be impossible.<sup>249</sup> The fact that some states implement the conventions in a manner leading to human rights violations, as often happens,<sup>250</sup> does not suffice if the treaties do not explicitly require the violation.

## 1. Right to Health (Art. 12 ICESCR)

Art. 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) obliges states to recognise “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, a right similarly secured in Art. 25(1) of the Universal Declaration of Human Rights. Next to its defensive aspect, the provision demands states to provide for the necessary health care systems so that everybody can lead a healthy life.<sup>251</sup> This obligation may be affected by the significant restrictions on the availability and use of drug-based medications in many countries because of the UN drug conventions.<sup>252</sup>

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<sup>244</sup> COLLINS, 113; BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 5; APPGDPR, 4.

<sup>245</sup> VAN KEMPEN/FEDOROVA, 495.

<sup>246</sup> RAFFEINER, 45, 50 f.

<sup>247</sup> BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 6 seem to think it a viable option, though. This is also the approach Uruguay has taken when justifying its drug policy, deviating from the Trafficking Convention (COLLINS, 113; BOISTER, Waltzing on the Vienna Consensus, 403; BEWLEY-TAYLOR, Politics, 287).

<sup>248</sup> A conflict is, of course, also dependent on the specific human right applying to the state in question at the relevant time. Particularly the UN human rights treaties enjoy great participation, though (LINES, 81).

<sup>249</sup> See Chapter [III.A.2](#); see also International Law Commission, 178; HABIBI/HOFFMANN, 447; JENKS, 451; LINES, 81.

<sup>250</sup> Compare GROVER, 8; BOISTER, Waltzing on the Vienna Consensus, 397.

<sup>251</sup> GOSTIN, 29; KINNEY, 1470 f.

<sup>252</sup> BOISTER, Waltzing on the Vienna Consensus, 396; HAUG, 40 f.; BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 7 f.

However, this is a case of state practice leading to human rights violations, as the conventions aim to secure the availability of the regulated substances for medical purposes and contain rules on how they can be made available to patients.<sup>253</sup> While they are restrictive, they allow for medical uses within limits. Hence, the implementation in some countries is flawed, leading to a lack of availability. Other criticisms relate to the horrendous conditions some patients must endure during forced rehabilitation<sup>254</sup> or the heightened risk of being exposed to blood-borne disease in prison as a person with a substance use disorder,<sup>255</sup> the latter risk being increased even more by mass incarceration in some countries.<sup>256</sup>

The UN drug conventions allow for rehabilitation programs. However, they do not demand them to be held in a manner harmful to the drug user's health. On the contrary, the treatment clauses are intended to further the user's health by curing him from his addiction.<sup>257</sup> As discussed in the prior chapters, the conventions also offer a plethora of options for decriminalising and depenalising consumer offences, and they do not demand imprisonment as a punishment. Thus, not only do those two suspected violations fall away, but the last criticism, that the conventions deter people with addiction from getting help due to fear of prosecution,<sup>258</sup> may be addressed as well.

Another approach would be to argue that the criminalisation of drugs contributes to most of the health issues related to black market drugs and claim that legalisation is the better way to ensure the population's health.<sup>259</sup> This approach is bound to fail, though, for two reasons: That another approach is more suitable to further public health does not mean the first one violates the human right in question, and secondly, this would only be suitable for drugs with limited to no adverse effects on the user's health. The latter question falls, however, into a margin of appreciation of the state.<sup>260</sup>

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<sup>253</sup> See e.g., Art. 9 Psychotropics Convention; Art. 21 Single Convention.

<sup>254</sup> BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 7 f.; WAYNE, 1211; LINES, 7; for an illustration see Human Rights Watch.

<sup>255</sup> CLARK/DOLANT/FARBEE, 223; BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 9. This constellation is also relevant for Art. 12(2)(c), the obligation to prevent epidemics (BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 7).

<sup>256</sup> BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 8; see also WAYNE, 1211.

<sup>257</sup> For all see LINES, 96.

<sup>258</sup> HABIBI/HOFFMANN, 446; BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 7.

<sup>259</sup> VAN KEMPEN/FEDOROVA, 497.

<sup>260</sup> For all see VAN KEMPEN/FEDOROVA, 502 f.

While there seems to be a strong correlation between states choosing a punitive interpretation of the treaties and severe human rights violations,<sup>261</sup> the treaties can be interpreted and applied in a manner that does not infringe on the right to health. This fundamental right, therefore, does not give a sufficient basis for a legalisation.

## 2. Right to Privacy (Art. 17 ICCPR)

The human right to privacy (which may well also be invoked as a fundamental right under the constitutional principles escape clause) protects against “*arbitrary or unlawful interference with [one’s] privacy, family [or] home[...]*” (Art. 17(1) International Covenant on Civil and Political Rights (ICCPR)). It is also guaranteed in Art. 12 of the Universal Declaration of Human Rights. Some authors claim that prohibiting drug consumption in the confines of the home would constitute such an arbitrary limitation.<sup>262</sup> They construct this by arguing that no societal interest would cover this prosecution of consumer offences committed in private, and therefore, the prohibition would not be justified.<sup>263</sup> Furthermore, they argue that punitive measures should not be applied to self-harming behaviours.<sup>264</sup>

The arguments presented strongly resemble the considerations typically invoked in the discourse surrounding the legal good theory (or harm principle),<sup>265</sup> albeit articulated within the framework of a different legal premise. Hence, it is no surprise that this approach is faced with the same issue: Even if the drugs are only acquired and possessed for use in the home, there still is the indirect influence of these actions on illicit trafficking in drugs, which is not limited to the private sphere. States may conclude that with small amounts of drugs being acquired and possessed, this influence is negligible, and a prohibition would, due to disproportionate interference with human rights, constitute a violation.<sup>266</sup>

As a conflict with human rights affects the criminal provisions and those on possession in general, such a stance allows for legalising those consumer actions. An extension to the supply side of drug trafficking or the justification of

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<sup>261</sup> GROVER, 8; BOISTER, *Waltzing on the Vienna Consensus*, 397; HABIBI/HOFFMANN, 446; similarly LINES, 96.

<sup>262</sup> BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 11.

<sup>263</sup> BEWLEY-TAYLOR/JELSMA, 6; BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 13; see also BOISTER, *Penal Aspects*, 125.

<sup>264</sup> BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 13.

<sup>265</sup> See Chapter [III.A.1.b\)\(1\)\(a\)\(ii\)](#).

<sup>266</sup> Compare Chapter [III.A.1.b\)\(1\)\(a\)\(ii\)](#).

a legalised market, however, would overextend the possibilities under this human right because only the prohibition of consumption is contrary to human rights. There is no right to drug consumption per se resulting from the right to privacy.

### 3. Rights of Indigenous Peoples to Traditional Uses of Drugs

Other human rights concerns relate to the rights of indigenous peoples who use the regulated substances for religious or other traditional purposes.<sup>267</sup> Art. 3 of the United Nations Declaration on the Rights of Indigenous Peoples (DRIP) recognises the right to self-determination, which explicitly includes the right to determine their cultural development and maintain their existing customs.<sup>268</sup> Art. 8 DRIP adds to this, codifying the right not to be subjected to the destruction of their culture.<sup>269</sup> Also, Art. 27 ICCPR guarantees members of ethnic or religious minorities the enjoyment of their culture and practice of their religion, and similar guarantees can be found in Art. 15 of the ICSCR and other human rights treaties.<sup>270</sup> Thus, the human rights framework creates a clear obligation to protect the traditions of indigenous peoples.<sup>271</sup>

As seen in this article, the UN drug conventions, as a rule, only leave limited room for the use of drugs for traditional purposes. The Psychotropics Convention allows for a reservation regarding traditional uses of substances in Schedule I, and Art. 3(1) and (2) Trafficking Convention refer to this prior treaty to define the scope of actions that must be criminalised. Hence, no violation of those rights is found here concerning the substances in Schedule I.

The situation is different, however, for substances in Schedules II-IV and particularly for the Single Convention, whose regulated substances are often used for traditional purposes in South and Middle America.<sup>272</sup> The Single Convention only allows for a transitional reservation limited to 25 years, obligating parties to criminalise those substances in the end and abolishing traditional uses after the period (Art. 49 Single Convention).<sup>273</sup> Indeed, the UN sees it as one of its outstanding achievements to rid itself of exceptions for traditional uses existing in the treaties before the Single Convention and eradicate

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<sup>267</sup> BURGER/KAPRON, 269; BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 17.

<sup>268</sup> BURGER/KAPRON, 273.

<sup>269</sup> BURGER/KAPRON, 274.

<sup>270</sup> See LINES, 103; BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 15 ff.

<sup>271</sup> LINES, 103.

<sup>272</sup> LINES, 102.

<sup>273</sup> Chapter [IV.A.1](#); see also INCB, Report 2007, 108; LINES, 102.

them.<sup>274</sup> The medical use clause would only allow for legalising traditional medical, not religious practices.<sup>275</sup> Consequently, a state party is obligated to criminalise all other traditional uses unless it can claim a conflict with its constitutional or basic legal principles,<sup>276</sup> in which case decriminalisation and depenalisation would be possible. The substances remain prohibited.

Notwithstanding the flexibilities, one of the explicit purposes of the Single Convention is to eradicate all traditional uses without exceptions.<sup>277</sup> As traditional uses usually are limited to a select few substances and the risk to the public from such a practice is limited, leaving little room for public interest in the infringement, such a purpose must necessarily violate the human rights of indigenous peoples to follow their traditions. This assessment holds particularly true for the Single Convention, which aimed at indiscriminatorily suppressing all traditional uses.

Consequently, human rights prevail in this conflict over the obligation to prohibit and criminalise the drugs if used for traditional or religious purposes, and legalisation is possible.

### C. Individual Agreements between Member States

Another possible way to achieve compatibility between a more liberal drug policy and the UN drug conventions might be so-called inter se modifications or treaties.<sup>278</sup> This instrument is a means of altering or changing specific provisions among a select group of parties to a treaty through mutual agreement, also provided for in Art. 41 of the Vienna Convention on the Law of Treaties.<sup>279</sup> Thus, those parties could agree upon the legality and allow for the production, trade and possession of the substance in question amongst themselves.<sup>280</sup> This modification is, however, only limited to the parties of the modifying agreement. The modifying states still face the “normal”, unaltered obligations towards the other members of the original treaties.<sup>281</sup> For such a treaty to be considered permissible, the option of inter se modification must either be explicitly addressed within the treaty (Art. 41(1)(a) Vienna Convention on the Law

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<sup>274</sup> Commentary Single Convention, 110.

<sup>275</sup> Chapter [III.B.1.a](#).

<sup>276</sup> BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 12.

<sup>277</sup> METAAL, 29 f.; BOITEUX/PELUZIO CHERNICHARO/SOUZA ALVES, 15 f.

<sup>278</sup> VAN KEMPEN/FEDOROVA, 511 f.

<sup>279</sup> VAN KEMPEN/FEDOROVA, 511 f.; HABIBI/HOFFMANN, 454.

<sup>280</sup> See JELSMA et al., 7; BEWLEY-TAYLOR, Politics, 289 f.

<sup>281</sup> For all see HABIBI/HOFFMANN, 454; VAN KEMPEN/FEDOROVA, 511 f.; BOISTER/JELSMA, 460.

of Treaties), which is not the case in the UN drug conventions, or the requirements of Art. 41(1)(b) must be fulfilled.<sup>282</sup>

## 1. Requirements

Firstly, the treaty in question must not exclude modifications, either in general or regarding the adjustments the parties wish to implement (Art. 41(1)(b)).<sup>283</sup> This requirement is fulfilled as the UN drug conventions do not address this issue.<sup>284</sup>

The second requirement is that the modification does not affect the other parties in the “enjoyment of their rights” under the treaty or affect them in performing their own obligations (Art. 41(1)(b)(i)).<sup>285</sup> Consequently, two questions must be raised: Do the states have a right towards a specific behaviour from another state in its own territory, and would such an undertaking have a concrete effect on the obligations of the other states to fight drug trafficking?<sup>286</sup>

According to JELSMA and BOISTER, the states have a legitimate interest in seeing the UN drug policies’ prohibitory approach applied in other states to ensure the system’s effectiveness. However, they also maintain that the legalisation of specific substances in certain states does not undermine the entire system, and therefore, there is no universal right to criminalise all substances in all states.<sup>287</sup> They state that such an obligation could also not be constructed from another legal source, as the limitation of drugs to licit uses is neither anchored in *ius cogens* nor considered immutable under the UN drug conventions. Therefore, the modification does not affect the treaty’s other parties’ rights.<sup>288</sup> This conclusion seems to hold true, considering that other instruments closer to the text of the treaties also allow for the exemption of certain substances from criminalisation. Therefore, the treaties do not preclude an *inter se* agreement for specific drugs.

The second question must be answered individually, particularly assessing how the legalisation would affect the level of drug criminality in all other member states, as this may not exceed the level to be expected when the modifying states follow a prohibitory system as prescribed by the UN drug conventions.<sup>289</sup>

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<sup>282</sup> See also VAN KEMPEN/FEDOROVA, 512; BOISTER/JELSMA, 460.

<sup>283</sup> See also VAN KEMPEN/FEDOROVA, 512; BOISTER/JELSMA, 460.

<sup>284</sup> VAN KEMPEN/FEDOROVA, 512.

<sup>285</sup> See also HABIBI/HOFFMANN, 454.

<sup>286</sup> BOISTER/JELSMA, 467 f., 479.

<sup>287</sup> For all see BOISTER/JELSMA, 479 f.

<sup>288</sup> For all see BOISTER/JELSMA, 481.

<sup>289</sup> BOISTER/JELSMA, 467 f.

## 2. Conformity with the Purpose of the UN Drug Conventions

Lastly, the modifying agreement must also be compatible with the execution and purpose of the treaty as a whole (Art. 41(1)(b)(ii) Vienna Convention on the Law of Treaties). The purpose of the UN drug conventions is laid out in their preambles. It summarises to fighting the evil of drugs to further the welfare and health of humankind by combatting drug trafficking while securing the availability of the regulated substances for medical and scientific purposes.<sup>290</sup>

Such a limitation of drugs to licit purposes would be impossible if all regulated substances were legalised with an inter se agreement.<sup>291</sup> The regulation of specific substances may, however, be tackled this way when such an undertaking may be beneficial to the health and welfare of society and better protect against the adverse effects of illicit drug trafficking,<sup>292</sup> making it a suitable tool for the legalisation, decriminalisation or depenalisation of specific substances.<sup>293</sup>

## 3. Possible Issues

Modifying treaties with inter se agreements is not well-researched, and examples of such undertakings are few, negatively affecting legal certainty.<sup>294</sup> Inter se agreements do not preclude the negative effects of a treaty breach, making such an undertaking risky.<sup>295</sup>

## D. Unilateral Withdrawal

The last means by which a state can free itself from the obligations under the conventions is by simply leaving them.<sup>296</sup> While quickly executed, such an endeavour would bring about serious consequences in practice, including a severe loss of reputation and international regard,<sup>297</sup> leaving it an option in theory only.

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<sup>290</sup> Preamble Single Convention; Preamble Psychotropics Convention; Preamble Trafficking Convention; see also Chapters [II.B.1](#), [II.B.2](#), and [II.B.3](#), as well as JELSMA et al., 3; BOISTER/JELSMA, 469.

<sup>291</sup> BOISTER/JELSMA, 470.

<sup>292</sup> See JELSMA et al., 9; BOISTER/JELSMA, 479.

<sup>293</sup> Of same opinion e.g., BOISTER/JELSMA, 490; BEWLEY-TAYLOR, Politics, 289.

<sup>294</sup> BEWLEY-TAYLOR et al., 11; BEWLEY-TAYLOR, Politics, 289.

<sup>295</sup> BOISTER/JELSMA, 451.

<sup>296</sup> HOHNERLEIN, 599 f.; for the specific provisions regulating this procedure see Chapter [IV.A](#).

<sup>297</sup> HOHNERLEIN, 600; ROOM, 402.



## V. Conclusion

To summarise, all three UN drug conventions require their member states to criminalise the supply side of illicit drugs, leaving no room for decriminalisation and only allowing for depenalisation. Regarding the obligation to criminalise the demand side, the ensuing obligations are more diverse: Members of the Single Convention are not required to criminalise any consumer offences but must prohibit all actions relating to drug consumption, including the actual drug use itself. The Psychotropics Convention similarly prohibits any drug-related behaviour while not demanding the criminalisation of consumer offences. The first two treaties do not allow for legalisation but decriminalisation and depenalisation of consumer offences. The Trafficking Convention, on the other side, explicitly demands the criminalisation of acquisition and possession for and the actual use of drugs, leaving only room for depenalisation.

The treaties contain several escape clauses to allow for a more flexible approach towards the obligation to introduce criminal norms. The Single Convention's and Psychotropics Convention's charge to criminalise trafficking offences is thereby subjected to a state's constitutional limitations, meaning any constitutional norm that would be irreconcilable with such a criminal provision. The Trafficking Convention subjects its consumer offences to a state's constitutional principles, i.e., fundamental concepts or rules that guide the foundation and interpretation of the law, and its basic legal principles. The latter are principles that are provided for by non-constitutional legal sources. Often invoked under these escape clauses are the principles of proportionality, the principle of prosecutorial discretion, and the violation of national fundamental rights, all of which bear great potential to free a state from its obligation to criminalise the possession and acquisition of drugs for personal possession to some extent. The application of all escape clauses is subjected to the condition that the relevant domestic legal source already existed at the time of treaty accession. No escape clause allows for full legalisation, however, as the obligations to prohibit all activities related to drug trafficking and use are not subjected to such flexibilities.

Alternatively, means of treaty interpretation may be employed by states to liberalise their national drug policy to a limited extent. One way is to frame the policy decision in a manner that allows classifying the drug use as licit, i.e., medical or scientific. While there is no way of a medical, legal drug use exceeding addiction therapy or traditional medical uses, under the scientific uses, temporally and geographically limited liberalisation efforts may be justified. To

avoid the reproach of breaching the principle of good faith interpretation and, thus, the treaty, the collection of data must be the actual purpose of the undertaking. Hence, this procedure would only provide limited possibilities. Of similarly limited helpfulness is the attempt to employ the provisions allowing for treatment instead of or additional to punishment. Only the first two conventions allow for a replacement of punishment with therapy options for drug trafficking offences, and their use would give wrong incentives to drug traffickers. The Trafficking Convention offers the same possibility for consumer offences, hence (only) allowing for a depenalisation scheme.

Public international law offers promising options for drug policy liberalisation. One such means is making reservations, by which states can modify the treaty obligations applicable to them. The Single Convention knows a transitional reservation, allowing for a 25-year legalisation of traditional uses before introducing criminalisation. The Psychotropics Convention allows for a reservation for magical and traditional uses of domestic plants under Schedule I, which may also be made after ratification. For all other reservations, the Vienna Convention on the Law of Treaties rules apply, meaning *inter alia*, that only reservations for specific substances are possible, as there would otherwise be a conflict with the treaties' purposes. As these reservations can only be made when entering a treaty, exiting and re-entering is the method for states already members of the UN drug conventions. For members re-accessing the first two conventions, there is also the requirement of no veto by one-third of the treaties' parties.

States can further claim a violation of the rights of indigenous peoples, as the treaties leave little room for traditional uses or rely on the right to privacy. These violations of human rights lead to a disapplication of the UN drug conventions' provisions based on Art. 103 UN Charta. Hence, even legalisation would be possible. In the first case, this entails trade and consumption, in the latter, only consumption. Lastly, states can also form an *inter se* agreement, deciding amongst themselves on the liberalisation of specific substances, as long as this does not adversely affect the other member states of the convention.

The UN drug convention system operates under the notion that all activities related to illicit drugs must be and remain criminalised. As this paper has shown, this obligation is not as absolute as prohibitionists sometimes like to see it. There is, however, the fact that most instruments allow for only decriminalisation or depenalisation, with very few exceptions. Therefore, while some liberalisation policies can be introduced in compliance with international law, reforming parties must put the bitter truth of the limitations under the UN drug conventions in their pipe and smoke it: Full legalisation cannot be achieved without treaty reform.

## Next Generation

The three UN drug conventions comprehensively and almost universally regulate the dealing with illicit drugs worldwide. Although the treaties are prohibitive, more and more member states seek to liberalise their national drug policies and implement depenalisation, decriminalisation or even legalisation schemes. The article explores member states' possibilities and limitations under the current treaty framework by giving an overview of their obligations, contractual exceptions and means under general public international law.

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