

The green wave hits Europe

Recent cannabis regulation initiatives in Europe

SIDE EVENT @65th session of the Commission on Narcotic Drugs

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Tuesday, 15 march | 9am - 9.50am [CET]

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Cannabis regulation and the International and European frameworks

Tom Blickman (Transnational Institute)

The unprovoked and unjustified aggression of Russia against Ukraine in violation of international law underlines the importance of international law as one of the main instruments to maintain peaceful international relations.

Too many times I have heard fellow drug policy reformers say that we should just ignore the UN drug control conventions as it does not allow for the legal regulation of recreational cannabis.

Unfortunately, countries that actually HAVE legally regulated recreational cannabis also have not taken steps to address the issue and now we see Russia condemning THOSE countries to undermine international law. Deplorable and hypocrite, but we have warned many times that not addressing the issue would make legalising countries vulnerable.

And while I agree that the UN drug control treaties are out of date and are not fit for purpose, I strongly disagree that ignoring them is the right solution. International law is a fragile but important construction, and ignoring it, will hurt us all.

This is why TNI, with our partners such as the Global Drug Policy Observatory and the Washington Office on Latin America, have repeatedly organised side events here at the CND and have presented

our research on how to find a way to implement reform and legally regulate cannabis in compliance with the mechanisms, rules and regulations of international law.¹

We have outlined several options for countries that want to legally regulate cannabis. Amending the conventions would be one, but that is under the present conditions with conflicting views on the global level, a diplomatic nightmare and practically impossible. Simply withdrawing from the convention would be another, but that would have serious consequences. Being State party to all three of the drug control conventions is a condition in a number of preferential trade agreements or for accession to the European Union, for instance.

There are two more realistic options:

One is withdrawing from the 1961 Single Convention followed by re-accession with a specific reservation regarding cannabis which is recognized as a legitimate procedure. This is the procedure used by Bolivia regarding the traditional use of coca leaves. Bolivia had initially tried to amend the treaties, but was blocked by a small number of objections.

At the time of Bolivia's re-accession, 18 countries—including every member of the G8— submitted formal objections to Bolivia's re-accession with a reservation on coca, but the number of objections fell far short of the 62 (one third of all State parties to the 1961 Single Convention) that were needed to block Bolivia from re-acceding in early 2013.

Among those that objected were the United States, Canada, Germany and the Netherlands, which, with the benefit of hindsight, might now regret that objection as it can potentially be used to allow for the legal regulation of cannabis. That said, it is quite easy to withdraw that objection by writing an official letter to the Secretary General, as one of the other objectors, Mexico, has already done.

To strengthen a withdrawal and re-accession with a reservation the procedure could also be initiated by a group of like-minded countries; a group that continues to grow and now includes Uruguay, Canada, the United States, Mexico, Germany, the Netherlands, Switzerland, Luxembourg, Malta, all countries that have regulated or intend to regulate recreational cannabis.

However, in our opinion even a better option exist and that is the inter se procedure for treaty modification, as provided by Article 41 of the 1969 Vienna Convention on the Law of Treaties, a procedure specifically designed to find a balance between treaty regime stability and the need for change in absence of consensus.²

Just as with a collective procedure of withdrawal with re-accession, a group of like-minded could modify, between them, their obligations under the treaty regarding cannabis and allow for a legally regulated recreational cannabis market, while maintaining their obligations towards the countries that are not part of the inter se agreement.

1 See for instance: *Cannabis Regulation and the UN Drug Treaties*
http://druglawreform.info/images/stories/documents/cannabis%20regulation%20and%20the%20un%20drug%20treaties_june%202016_web.pdf

2 See: *Balancing Treaty Stability and Change: Inter se modification of the UN drug control conventions to facilitate cannabis regulation*
http://druglawreform.info/images/stories/documents/Stability_Change-Inter_Se_Modification_GDPO-TNI-WOLA_March_2018.pdf

The developments among EU Member States also puts the spotlight on EU legislation regarding cannabis. That became very clear when Luxembourg's Minister of Justice, Sam Tanson, confirmed in October 2021 that although a full legalisation of cannabis – as envisaged in the coalition agreement of 2018 – is still planned, it was temporarily postponed due to, among other things, "legal obstacles at the European level".³ ["The health crisis has reminded us of our vulnerability. The country can quickly find itself isolated if a neighbouring country decides to close its borders. The Schengen area is not to be ignored," she said.⁴]

The biggest obstacle in this respect is the Framework Decision 2004/757/JHA "laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking",⁵ which stipulates in Article 2(1) that each Member State shall take the necessary measures to ensure that "the cultivation of opium poppy, coca bush or cannabis plant" and a number of other intentional acts, such as selling or possessing drugs, are punishable "when committed without right".

The reasoning that if a country regulates recreational cannabis by law it will be "within right" sounds appealing, but ignores the fact that all EU countries also ratified the UN Conventions – this is even a precondition within the EU – in which legal regulation of recreational cannabis is not allowed, but must be limited exclusively to medical and scientific purposes. In other words, in order to claim that the regulation of recreational cannabis would be allowed by national law, EU countries need to address the prohibition of recreational cannabis enshrined in the UN treaties.⁶

The correlation between the UN conventions and EU legislation is something that cannot be untangled easily. That said, the *Cannabiskontrollgesetz* (CannKG; Cannabis Control Act)⁷, a bill that had been introduced by the Greens in the German *Bundestag* in 2018, but was rejected in October 2020, tried to address the issue already.

Since the intention of the rejected bill very much covers the intended reform by the new government, it is to be expected that the reasoning on the compatibility with the UN drug control conventions and European Union law in the rejected Cannabis Control Act will be followed by the

3 *Government scales back legal cannabis plans in policy revamp*, The Luxembourg Times, 22 October 2021; <https://www.luxtimes.lu/en/luxembourg/government-scales-back-legal-cannabis-plans-in-policy-revamp-61729fe4de135b923640140b>

4 *Ouvertures sur le cannabis : «Une solution insuffisante»*, Le Quotidien, 26 October 2021; <https://lequotidien.lu/politique-societe/ouvertures-sur-le-cannabis-une-solution-insuffisante/>

5 Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking; <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004F0757>

6 Adding to the confusion, in other language versions of the Framework Decision, which all have equal status, "without right" is more properly translated as "without justification" (Dutch) or "without due authorisation" (German) or "cannot be legitimised" (French). That seems to open the possibility of applying discretion when the enforcement of laws are considered; for instance the expediency principle if that is part of a country's legal system. See: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:32004F0757> The expediency principle in the Dutch national legal framework allows discretion by prosecutor's offices not to prosecute if it is expedient or convenient, or otherwise serving the public interest, a practice which is formalised through national guidelines. It is the basis of tolerated sales in Dutch coffeeshops.

7 Drucksache 19/819, *Entwurf eines Cannabiskontrollgesetzes (CannKG)*, Deutscher Bundestag, 19. Wahlperiode, 20 February 2018; <https://dserver.bundestag.de/btd/19/008/1900819.pdf> See section VI: *Vereinbarkeit mit dem Recht der Europäischen Union und völkerrechtlichen Verträgen* (Compatibility with European Union law and international treaties), pp. 44-46.

current government. The bill rightly states that "there is little doubt that a system such as the Cannabis Control Act, which allows cannabis to be sold in licensed outlets for adult recreational consumption is not compatible with the international prohibition regime at this stage". It then proposes to resolve the issue following the example of Bolivia with regard to the traditional use of coca leaves which is also not allowed under the 1961 UN Single Convention.

An important difference between the UN drug control conventions and EU drug legislation is that formal complaints procedures and sanction mechanisms have a much stronger basis under EU law. The article 14 procedure⁸ of the 1961 Single Convention on Narcotic Drugs is used scarcely to give political weight to the dialogue between the INCB and countries that do not comply with their treaty obligations, but in practice it has never led to economic sanctions or to a dispute before the International Court of Justice, an option in principle available under the treaties.

The effective application, implementation and enforcement of EU law is a responsibility entrusted to the European Commission by Article 17(1) of the Treaty on European Union. In comparison with the INCB, the EC can more easily initiate infringement procedures following complaints about compliance with EU law from other EU member states (or even from citizens, businesses or other stakeholders).⁹ Such complaints can also more easily lead to a dispute procedure at the Luxembourg-based Court of Justice of the European Union (CJEU), and ultimately to the possibility of economic sanctions or fines to force member states to comply with EU law. As we have seen in the case of Poland and the rule of law.

That said, the EC never initiated an infringement procedure against the Netherlands for its coffeeshop system. The Netherlands argued strongly in favour of an exception under Article 2(2) for the behaviour of those involved that was "exclusively intended to provide for their personal use as defined by national law". With the necessary legal gymnastics – as the Netherlands hoped at the time – not only use and possession, but also the sale/purchase of small quantities for personal use in coffeeshops could be maintained under this heading.

Nevertheless, EU member states have a stronger impetus to find a way to find a solution in compliance with international law, and since the UN drug control conventions are so intertwined with EU law, a stronger impetus to tackle the issue at the United Nations either through a withdrawal/re-accession with a reservation or an inter se modification with a group of like minded countries.

It is high time to take international law seriously, and we trust that Germany and other like minded countries that claim to hold international law in high esteem, will finally do so.

Thank you for your attention.

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Some TNI publications on inter se and regulating cannabis and the UN drug control conventions:

8 The role of the Board in monitoring compliance and ensuring the execution of the provisions of the 1961 Convention and the 1971 Convention; https://www.incb.org/documents/Publications/AnnualReports/AR2020/Supplement/08_AR2020_supp_VI_role_of_the_Board.pdf

9 Infringement procedure by the European Commission; https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en

- *Regulating Drugs: Resolving Conflicts with the UN Drug Control Treaty System*
<https://jied.lse.ac.uk/articles/10.31389/jied.23/>
- *Balancing Treaty Stability and Change: Inter se modification of the UN drug control conventions to facilitate cannabis regulation*
http://druglawreform.info/images/stories/documents/Stability_Change-Inter_Se_Modification_GDPO-TNI-WOLA_March_2018.pdf
- *Cannabis Regulation and the UN Drug Treaties*
http://druglawreform.info/images/stories/documents/cannabis%20regulation%20and%20the%20Un%20drug%20treaties_june%202016_web.pdf