

Annotated relevant quotes from the UN *Conventions* and the official *Commentaries*

Decriminalization: room for manoeuvre under the UN Conventions

Single Convention on Narcotic Drugs, 1961

Article 36, Penal Provisions, paragraph 1:

a) Subject to its constitutional limitations, each Party shall 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, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

b) Notwithstanding the preceding subparagraph, when abusers of drugs have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of article 38.

Under the 1961 Convention, all penal provisions are subject to constitutional limitations, including cultivation, trafficking and possession. Moreover, “*when abusers of drugs have committed such offences,*” thus including possession for personal consumption or acquisitive crimes to finance personal use, countries may provide health and social care “*as an alternative to conviction or punishment.*” Article 38, referred to under paragraph b, only obliges Parties to “*take all practicable measures for the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved*” and to “*gain an understanding of the problems of abuse of drugs and of its prevention.*”

Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988

Article 3, paragraph 2:

"Subject to its constitutional principles and the basic concepts of its legal system each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, 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."

The official *Commentary* to the 1988 Convention clarifies: “*It will be noted that, as with the 1961 and 1971 Conventions, paragraph 2 does not require drug consumption as such to be established as a punishable offence. Rather, it approaches the issue of non-medical consumption indirectly by referring to the intentional possession, purchase or cultivation of controlled substances for personal consumption. In contrast to the position under the 1961 and 1971 Conventions, however, paragraph 2 clearly requires parties to criminalize such acts unless it would be contrary to the constitutional principles and basic concepts of their legal systems to do so.*” (§ 3.95, p. 82). This means that if the Supreme Court of a country, in this case Argentina, decides that punishing people for possession of drugs for personal use is against its Constitution, there is no obligation at all to establish it as a criminal offence. Argentina is acting in full compliance with the 1988 Convention to decriminalize possession of drugs for personal consumption now that it has been established that it violates its constitutional principles.

INCB mandate

Under the 1961 and 1971 Conventions, the International Narcotics Control Board (INCB) may raise with any Government any question related to the aims of the treaties with the discrete aim to engage in dialogue (Commentary 1972 Protocol, § 10, p. 13). The international community, however, has never given the INCB any mandate to monitor compliance with the 1988 Convention unless it relates to its specific regulatory competence under Article 12 on preventing the diversion of precursors. In article 22, which defines the functions of the Board under the 1988 Convention, its mandate is, according to the Commentary, *“more restricted than those of the parallel articles in the 1961 and 1971 Conventions. Not only are the Board’s powers thereunder limited to matters within its competence as defined by the Convention (rather than extending to the provisions of the 1988 Convention as a whole), but also [...] the Board does not retain the right under article 22 itself that it has under the other conventions to call the attention of the parties, the Council and the Commission to the matter.”*

Explaining the more restricted 1988 mandate, the Commentary refers to the discretion required already from the Board under the 1961 and 1971 Conventions: *“It is clear such discretion will certainly be called for under the 1988 Convention, where certain articles deal with matters that can be of a highly political character”* (§ 22.11, p. 378). The differences arose *“no doubt because of the very different character of the latter Convention, dealing as it does with matters of criminal law and its enforcement that go beyond the scope of the earlier conventions into areas touching more closely on the sovereignty and jurisdiction of States”* (§ 22.2, p. 374).