Drug decriminalization and international law

Brief submitted to the Health Canada
Expert Task Force on Substance Use

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Key points

- Canada has the latitude under the UN drug control conventions to fully decriminalize possession (and purchase and cultivation) of drugs for personal consumption ("simple possession").
- There is no obligation to impose other punitive sanctions for simple possession.
- Decriminalization and the removal of other punitive sanctions is in keeping with Canada's human rights obligations.

1. Overview of the UN drug control conventions

- The three UN drug control conventions are primarily oriented toward an approach of requiring States that are party to them to prohibit various activities in relation to various substances and to punish those prohibited activities. Importantly, however, as discussed further below, those obligations are subject to significant caveats and exceptions, and must also be interpreted in light of other international legal obligations, including in relation to human rights. This gives States Parties some important room to manoeuvre, including removing criminal and other punitive sanctions for possession, purchase and cultivation for personal consumption.

- The following are the relevant provisions of the ***Single Convention on Narcotic Drugs of 1961***, in relation to the drugs covered under its schedules:

  Article 4: General obligations

  > *The parties shall take such legislative and administrative measures as may be necessary: […]*
  >
  > *(c) Subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs;*

  Article 33: Possession of drugs

  > *The Parties shall not permit the possession of drugs except under legal authority.*

  Article 36: Penal provisions

  > *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.

- The ***Convention on Psychotropic Substances of 1971*** says the following, in relation to the different schedules of substances it covers:

  Article 5: Limitation of use to medical and scientific purposes

  2. Each Party shall… limit by such measures as it considers appropriate the manufacture, export, import, distribution and stocks of, trade in, and use and possession of, substances in Schedules II, III and IV to medical and scientific purposes.

  Article 22: Penal provisions

  1.(a) Subject to its constitutional limitations, each Party shall treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention, and shall ensure that serious offences shall be liable to adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty.

- Finally, the ***UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988*** is primarily aimed at trafficking, as the name suggests. It contains general provisions that require states to criminalize possession for the purpose of various activities related to trafficking, but also a specific, narrower and much more limited provision regarding criminalizing possession (and purchase and cultivation) for personal consumption. It says the following:

  Article 3: Offences and sanctions

  1. *Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:*

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

     (ii)The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;

     (iii)The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in (i) above; […]

  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 a criminal offence 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.*

2. Explicit provisions for *alternatives* to conviction and punishment for simple possession

- It is important to keep in mind the stated concern in the drug control conventions for "the health and welfare of mankind," which is the very opening of the preamble to the *1961 Convention*), which obviously includes the health and welfare of people who use drugs. In keeping with well-settled legal rules of treaty interpretation, this must inform the interpretation of the prohibition-oriented provisions of the Conventions. In addition, this concern is reflected in some provisions that temper, albeit inadequately, the punitive aspects of the conventions:

    - The *1961 Convention* requires the government to "to give special attention to and take all practicable measures to provide treatment, education, aftercare, rehabilitation and social reintegration of drug users" (Article 38). In addition, even though there a State may determine that it is "necessary" to make possession (other than for medical and scientific purposes) a "punishable offence," the Convention also says that measures for treatment, care and support of people who use drugs may be provided "either as an alternative to conviction or punishment or in addition to conviction or punishment" (Article 36.1).

    - The *1971 Convention* contains the same obligation as the 1961 Convention to "take all practicable measures" for the care, treatment and social reintegration of people who use drugs (Article 20), and also the same provision allowing for measures of treatment, care, rehabilitation and social reintegration "as an alternative to conviction or punishment" (Article 22).

    - As explained in the section below, under the *1988 Convention*, there is no obligation to treat possession, purchase or cultivation for personal consumption as criminal offences (or as subject to other punitive sanctions). Even if a State does choose to impose such sanctions, again the Convention expressly provides that a state may provide for "measures for the treatment, education, aftercare, rehabilitation, or social reintegration" of the offender, "either as an alternative to conviction or punishment, or in addition to conviction or punishment" (Article 3.4)

- In summary, under all three treaties, States are explicitly declared to have the flexibility to adopt laws and policies that focus more on treating drug use and dependence as health issues, including providing alternatives to criminal (or other) convictions and penalties, including in cases of simple possession, purchase and cultivation.

3. No treaty requirement to criminalize or punish simple possession

3.1 No requirement to resort to criminal legislation

- The first point to note is the specific language used in each of the three treaties in imposing obligations on States Parties to take measures controlling various drug-related actions and generally limiting the use of drugs to medical or scientific purposes. Recalling the passages reproduced in the overview above:

    - In the case of the ***1961 Convention***, the State's obligation is to take "such legislative and administrative measures as may be necessary" to limit use, possession and other activities to medical or scientific purposes. There is no obligation to legislate *criminal or administrative sanctions* in relation to these activities – i.e., a State may determine that such

responses are not "necessary," which in theory is a high bar to clear. Should the State conclude that it *is* necessary to use the criminal law or other sanction, then it is obliged under the Convention to take such measures, and then to treat breaches of those measures as "punishable offences." However, even then there is no obligation to impose a particular punishment for breaches, only to ensure that "serious offences" are subject to "adequate punishment" such as deprivation of liberty – and it is up to the State to define both of these categories.

- Similarly, in the case of the ***1971 Convention***, the State's obligation is to take "such measures as it considers appropriate" to limit use, possession and other activities to scientific or medical purposes. Again, there is no obligation under this treaty to legislate criminal or administrative sanctions in relation to these activities – i.e., a State may choose to criminalize or otherwise punish possession for personal consumption if it considers this "appropriate", but it is not required to do so. *If* the State has decided to control possession by law or regulation, then it is obliged to treat action contrary to such law or regulation as a "punishable offence." But again, even then there is no obligation to impose a particular punishment; the obligation is simply to ensure that "serious offences" are subject to "adequate punishment" such as deprivation of liberty – which, again, the State has the leeway to define.

- Unlike the wording of the 1961 and 1971 conventions, the ***1988 Convention*** does specifically refer to an obligation to make certain actions a "criminal offence." But as discussed further below, the specific article regarding possession, purchase or cultivation for personal consumption comes with numerous caveats and limitations in its wording – which ultimately have the effect, now widely recognized, of not requiring States Parties to impose criminal penalties.

3.2 Domestic "constitutional limitations" on obligations under the conventions

- The **1961 and 1971 Conventions**, although they require states to impose restrictions on the manufacture, export, import, distribution, use and possession of the controlled substances, also say that a state's obligations under the conventions are "subject to its constitutional limitations":

1961 Convention

Article 36.1(a) states this caveat right up front:

> *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 (...) shall be punishable offences when committed intentionally…' [emphasis added]*

Article 36.4 reinforces the point that domestic law takes priority:

> *Nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a*

Party. [emphasis added]

Commentary:

The official Commentary to the 1961 Single Convention makes it clear that the issue of criminalizing personal possession was a point of contention among States in the negotiation of the treaty and that the convention ultimately adopted does not impose such an obligation.[1] In fact, the Commentary states explicitly that constitutional limitations "can free a Party from all obligation to punish an action mentioned in article 36, paragraph 1."[2]

1971 Convention

Article 22.1(a) prefaces any obligation to criminalize (or otherwise punish) with the caveat:

Subject to its constitutional limitations, each Party shall treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention (…)

Article 22.5 again underscores the discretion of the State party in shaping its domestic law:

Nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.

Commentary:

The official Commentary to the 1971 Convention is less than definitive, but the following points can be gleaned from it. First, given the wording and structure of the Convention and its schedules of substances, possession for personal consumption of at least certain substances scheduled under the Convention is "in no event" a punishable offence. Second, "there may be a legitimate difference of opinion" about whether possession (of other substances) for personal consumption must be made a punishable offence, but even if it were, there would be no obligation on the State to treat it as a serious offence, and the State could even limit its response "to only censuring or admonishing" the offender without any other measures such as fines or deprivation of liberty. (It is also noted that the subsequent practice of States may end up answering this question.) Interestingly, the Commentary specifically notes that a State is not required to consider it a "serious" offence when someone who is a drug "abuser" possesses a small quantity for sale in order to be able to support their own dependence or "for supplying a friend without consideration."[3]

[1] *Commentary on the Single Convention on Narcotic Drugs*, Prepared by the Secretary-General in accordance withparagraph 1 of Economic and Social Council resolution 914 D (XXXIV) of 3 August 1962, paras 4.17 – 4.21.

[2] Ibid., para. 4.21.

[3] *Commentary on Convention on Psychotropic Substances*, UN Doc. E/CN.7/589, paras 22.5-22.18.

- The **1988 Convention**, unlike the two preceding conventions, does specifically address the issue of possession (and purchase and cultivation) for personal consumption.

  Article 3.2 reads as follows:

  > *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 a criminal offence 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.*

  Article 3.11 again underscores the discretion of States in their implementation of the obligation in domestic law:

  > *11.Nothing contained in this article shall affect the principle that the description of the offences to which it refers and of legal defences thereto is reserved to the domestic law of a Party and that such offences shall be prosecuted and punished in conformity with that law.*

- Article 3.2 of the 1988 Convention is sometimes misrepresented as requiring States to criminalize simple drug possession. However, it is now widely accepted that this is incorrect.

  - First, it misinterprets the wording of the provision. A careful reading of Article 3.2 reveals that it only creates, at most, an obligation to criminalize possession, purchase or cultivation for personal consumption *"contrary to the provisions of" the 1961 and 1971 Conventions*. As noted above, States may choose not to prohibit possession, purchase or cultivation for personal consumption under those earlier conventions, on the basis that it does not accord with their constitutional principles. Article 3.2 of the 1988 does not impose an additional, broader, free-standing obligation to criminalize possession, purchase or cultivation for personal consumption. This is an important, upfront limitation embedded in the very formulation of the obligation in the 1988 Convention.

  - **Second, and perhaps more importantly is the significant caveat: as with the earlier 1961 and 1971 Conventions, any obligation under Article 3.2 is explicitly stated to be "subject to its constitutional principles."** In fact, the provision in the 1988 Convention goes even further, adding reference to "the basic concepts of its legal system," which suggests that even non-constitutional legal precepts could also be a basis on which to decline to criminalize possession, purchase, or cultivation for personal consumption. This is referred to as a "safeguard clause" in the official Commentary to the 1988 Convention.[4] This reconfirms that states have the right to determine their own approach to possession, purchase and cultivation for personal consumption in accordance with their own constitutions and laws.

[4] *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*, UN Doc. E/CN.7/590 (1988), paras. 3.65-66 and 2.10.

Constitutional principles and basic concepts of the legal system, including human rights

- Basic principles of Canadian criminal law – some of which also find expression as constitutional norms – include such principles as respect for individual liberty and personal autonomy, using the criminal law as a measure of last resort (principle of *ultima ratio*), and ensuring proportionality in the imposition of penalties. These themselves offer good bases on which to refrain from, e.g., criminalizing (or otherwise punishing) simple possession for personal consumption (and possibly for other activities related to drugs).

- Canada's constitutional principles, written and unwritten, include those human rights embodied in the *Canadian Charter of Rights and Freedoms* (the interpretation of which is informed by Canada's human rights obligations under international law as well). Such *Charter* norms applicable to Canada's drug laws include the following:

    - the rights, under s. 7 of the *Charter*, to not be deprived of **life**, **liberty** or **security of the person** "except in accordance with the principles of fundamental justice," which means, among other things, that the state cannot infringe these rights with measures that are **arbitrary**, that are **overbroad**, or that are **grossly disproportionate** in their negative effects on rights in comparison to the purported benefit they seek to achieve – which has already lead courts, in the Insite case, to order the government to remove the risk of criminal prosecution where it would interfere with access to the health service that is a supervised consumption site;[5]

    - the right to **privacy**, which, while not explicit in the constitution, has nonetheless been rooted in courts' interpretation of various *Charter* provisions, including the s. 7 rights to liberty and security of the person;

    - the right to **equality** (before and under the law, and to equal protection and equal benefit of the law) without discrimination based on various grounds, including sex, race, ethnic origin, colour, and disability (which includes "addiction" or drug dependence), among others, under s. 15 of the *Charter*; and

    - the right to **freedom from cruel and unusual treatment or punishment**, under s. 12 of the *Charter*, which has been used repeatedly by Canadian courts to strike down certain over-reaching aspects of drug laws, including presumptions about intent to traffic[6] and mandatory minimum sentences for trafficking in at least some circumstances.[7]

- Recall that UN Member States, including Canada, have repeatedly and unanimously affirmed that obligations in relation to drug control must be carried out in conformity with States' human rights obligations under international law. They have done so in multiple resolutions at both the UN Commission on Narcotic Drugs and at the UN General Assembly, including in the 'outcome document' of the most recent GA special session on 'the world drug problem' in 2016. In fact, the 2018 anti-stigma resolution at the UN Commission on Narcotic Drugs, spearheaded by Canada, expressly reiterates this point about drug control measures conforming to international human rights obligations, while also expressly "*recognizing* that marginalization, stigmatizing attitudes, discrimination and fear of social, employment-related or legal repercussions may

[5] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44.

[6] *R. v. Oakes*, [1986] 1 SCR 103.

[7] *R v. Lloyd*, 2016 SCC 13.

dissuade many who need help from accessing it and lead those who are in stable long-term recovery from a substance use disorder to avoid disclosure of their status as a person in recovery from addiction."[8] Canada's own declarations and initiatives at the UN point the way to decriminalizing simple possession.

- It is welcome that States themselves have declared that their drug control measures must be in conformity with their human rights obligations. Such resolutions are further recognition of the basic legal point that, in the event of irreconcilable conflict, **states' human rights obligations supersede their obligations under the UN drug control conventions**. The UN Charter states that the protection and promotion of human rights is one of the fundamental purposes of the United Nations, as is promoting "solutions of international economic, social, health, and related problems" (Article 55), and all UN Member States, all of whom are bound by the Charter, "pledge themselves to take joint and separate action" to achieve this purpose (Article 56). (Controlling drugs, including through the use of criminal and other punitive sanctions, features nowhere in the UN Charter.) The UN Charter further explicitly states that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter prevail." (Article 103). It is, therefore, incumbent upon on all UN member states – as they themselves have reaffirmed repeatedly – to ensure that in implementing their obligations under the drug control conventions, they give effect to their human rights obligations (including under other, human rights treaties which they have ratified). This must, at the bare minimum, mean using the flexibility found in the drug control conventions to respect, protect and fulfil human rights – and where it is demonstrated, or reasonably foreseeable, that drug control measures (e.g., criminalizing simple possession) infringe human rights, they must take legislative and other measures to remedy that infringement.

- The key conclusion: Uniform measures and responses to drugs are not required under the UN drug control conventions. States have discretion to determine the policies they wish to adopt, in line with the constitutional principles and basic concepts of their own domestic legal systems, including respecting and protecting human rights, including but not limited to the human rights of people who use drugs. This includes the latitude to decriminalize at least simple possession, and arguably beyond.

4. Recommendations to provide alternatives to punishment and to decriminalize

- It is now accepted that States who are parties to the UN drug control conventions have the freedom to decriminalize simple possession. Even the International Narcotics Control Board (INCB), the "guardian of the treaties" on drug control, has grudgingly accepted, with reference to Portugal's legislative amendments in 2001, that "the practice of exempting small quantities of drugs from criminal prosecution is consistent with the international drug control treaties."[9]

[8] UN Commission on Narcotic Drugs, "Promoting non-stigmatizing attitudes to ensure the availability, access and delivery of health, care and social services for drug users," Res. 61/11 (2018).

[9] INCB, *Report of the International Narcotics Control Board for* 2004, UN Doc. E/INCB/2004/1 (2005), para. 538. The INCB has been inconsistent over the years on this point, despite the clear wording of the 'safeguard clauses' in the treaties, but in any event the matter now appears to be settled despite its prevarications. The approach is reminiscent of the INCB's repeated mischaracterizations over the years of the supposed illegality under the Conventions of various harm reduction measures. Such a misinterpretation that was the basis for criticisms of Canada and certain other countries for their implementation of supervised consumption services, but was eventually put to rest, including by a legal opinion from within the legal affairs secretariat of the UN

Numerous countries or sub-national jurisdictions have decriminalized simple possession to varying degrees, either via supreme court rulings or legislative reforms – including Canada, albeit so far in relation only to cannabis.[10] In fact, decriminalization of simple possession is now being explicitly recommended by various UN actors.

- **Independent UN human rights experts** appointed by States have urged States to decriminalize, including successive UN Special Rapporteurs on the right to health [11] and the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment.[12] **UN human rights treaty bodies** have increasingly raised concerns about the adverse human rights consequences of punitive drug policies – including in recommendations specifically directed to Canada in their recent periodic reviews of Canada's implementation of its human rights treaty obligations.

    - In 2016, the **UN Committee on the Elimination of Discrimination against Women**:

        - stated that it was concerned about "the excessive use of incarceration as a drug-control measure against women and the ensuing female over-population in prison" as well as "the significant legislative and administrative barriers women face to access supervised consumption services";
        - called on Canada to "reduce the gap in health service delivery related to women's drug use, by scaling-up and ensuring access to culturally appropriate harm reduction services"; and
        - called on Canada to repeal "mandatory minimum sentences for minor, non-violent drug-related offences."

    - In 2017, the **UN Committee on the Elimination of Racial Discrimination** (CERD):

        - expressed its concern about the disproportionately high rate of incarceration of Indigenous peoples and African-Canadians; and
        - called for "evidence-based alternatives to incarceration for non-violent drug users."

  Beyond just removing mandatory minimum sentences and providing alternatives to incarceration, it is self-evident that removing criminalization (and other punitive sanctions) for simple possession – and possibly other activities currently criminalized, such as trafficking small quantities of drugs, or possessing small quantities for this purpose – would also serve as an 'upstream' intervention to reduce legislative barriers to health services for people who use

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Drug Control Programme (the precursor to UNODC) that in fact such measures were within the flexibility afforded by the conventions.

[10] Talking Drugs, "Drug Decriminalisation Across the World," https://www.talkingdrugs.org/drug-decriminalisation.

[11] See, for example, Anand Grover, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN General Assembly, 65th Session, UN Doc A/65/255, August 6, 2010; Anand Grover, *Submission to the Committee against Torture regarding drug control laws*, October 19, 2012; Anand Grover, *Open letter by the Special Rapporteur on the right of everyone to the highest attainable standard of mental and physical health, Dainius Pūras, in the context of the preparations for the UN General Assembly Special Session on the Drug Problem (UNGASS)*, to UNODC Executive Director Yury Fedotov, December 7, 2015.

[12] Juan E. Méndez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN General Assembly, 22nd Session, UN Doc A/HRC/22/53, February 1, 2013.

drugs and reduce incarceration, including of women and Black and Indigenous people. It would, therefore, be a measure responsive to the recommendations of these two human rights treaty bodies.

- In 2017, 12 UN agencies – including the WHO, UNAIDS, the UN Development Program (UNDP), the Office of the High Commissioner for Human Rights (OHCHR), UN Women and others – issued a ***Joint Statement on Ending Discrimination in Healthcare Settings*** that urged all countries to decriminalize simple possession.[13]

- In November 2018, all UN agencies adopted a **common position of the UN system**[14] encouraging the decriminalization of simple possession, in which they:

  > **Acknowledge that the conventions allow for sufficient flexibility for countries to design and implement national drug policies according to their priorities and needs**, consistent with the principle of common and shared responsibility and applicable international law; […]
  >
  > Acknowledge that the international drug control conventions, international human rights treaties and other relevant instruments and the 2030 Agenda are complementary and mutually reinforcing. National drug control programmes, strategies and policies should be designed and implemented by States in accordance with their human rights obligations; […]
  >
  > We, therefore, commit to stepping up our joint efforts and supporting each other *inter alia*: […]
  >
  > **To promote alternatives to conviction and punishment in appropriate cases, including the decriminalization of drug possession for personal use**, and to promote the principle of proportionality, to address prison overcrowding and overincarceration by people accused of drug crimes, to support implementation of effective criminal justice responses that ensure legal guarantees and due process safeguards pertaining to criminal justice proceedings and ensure timely access to legal aid and the right to a fair trial, and to support practical measures to prohibit arbitrary arrest and detention and torture; […]
  >
  > To **call for changes in laws, policies and practices that threaten the health and human rights** of people;

- Finally, the **International Guidelines on Human Rights and Drug Policy**, first released in 2019 and endorsed by several UN agencies, including UNDP, WHO, UNAIDS and OHCHR, conclude that, in keeping with the right to privacy, the right to the highest attainable standard of health, and to the right to freedom of thought, conscience and religion:

  > "States may… utilise the available flexibilities in the UN drug control conventions to decriminalise the possession, purchase, or cultivation of controlled substances for personal consumption."

[13] World Health Organization et al (2017), *Joint United Nations statement on ending discrimination in health care settings,* https://www.who.int/news/item/27-06-2017-joint-united-nations-statement-on-ending-discrimination-in-health-care-settings

[14] United Nations Chief Executives Board, *United Nations system common position supporting the implementation of the international drug control policy through effective inter-agency collaboration*, UNCEB, 2nd Session, Annex 1, UN Doc. CEB/2018/2, January 18, 2019.

5. Decriminalization beyond simple possession: supply-side offences

- While there is no obligation under the three UN drug control conventions to criminalize possession, purchasing or cultivation of drugs for personal consumption, the same cannot be said as easily when it comes to relaxing prohibitions on the supply side (beyond scientific and medical uses). At first glance, decriminalizing other activities on the supply side – e.g., trafficking of a small quantity or possession for the purpose of such trafficking – would contravene the drug control conventions. While an argument can be made that there is more flexibility than may appear at first glance, it is more contentious than decriminalizing on the demand side.

- There are sound public health, human rights, and fiscal arguments to also decriminalize trafficking of limited quantities or possessing such quantities for the purpose of trafficking. Given the wording of the drug control Conventions, much would turn on how Canada chooses to interpret the "constitutional principles" and "basic concepts" of its legal system as providing a basis for removing criminal penalties; this is an option to be explored. In theory, a state could determine that criminalizing such activities, at least in relation to small quantities, does not accord with its constitutional principles or basic concepts of its legal system – and take the position that on this basis, it is refraining from treating that conduct as criminal.

- In fact, Uruguay, some US states, and Canada have already determined, for sensible reasons, to legally permit and regulate the sale of cannabis within certain parameters. The predominant view is that such measures are in breach of the UN drug control conventions – even if, of these three countries, only Canada, to its credit, has so far been prepared to admit directly that it is in a position of non-compliance.[15]

- Nonetheless, aside from whether States are obliged by the drug control conventions to criminalize supply-side activities, there is some room to manoeuvre within the wording of the conventions on to at least relax the criminal law response to supply-related drug offences:

    - The *1988 Convention*, which focusses on trafficking, does say in Article 3.4(a) that States must impose, on activities such as producing, selling, offering for sale, etc. contrary to the 1961 and 1971 Conventions,[16] and possession for any of those purposes, "sanctions which take into account the grave nature of these offences."

    - However, it also goes on to say in Article 3.4(c) that, notwithstanding this, "in appropriate cases of a minor nature," a state "may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare." (Note it is clear from the wording that this applies even in the case where the person is not a 'drug abuser.')

    - States have the discretion to determine what constitutes a case "of a minor nature." This is reinforced by Article 3.11, which, as noted above, goes on to say that nothing in

[15] To the best of our knowledge, Uruguay has made general political statements – including in response to criticism by the INCB – that it is not in breach of its obligations to criminalize the supply of drugs because it is acting in keeping with its human rights obligations, which supersede the drug control treaties. This is a defensible position, but does not appear to have publicly released any detailed legal argument to this effect.

[16] As noted above, those two earlier conventions qualify the obligation on a state to punish such activities as 'subject to its constitutional limitations', but these have not generally been invoked so far as a basis of decriminalizing such supply-side activities.

Article 3 affects the principle that it is up to the State's own domestic law to "describe" the offences and any legal defences to them, and that prosecution and punishment of offences must conform to that domestic law.

- As already noted above, there is similar wording in each of the 1961 and 1971 Conventions regarding the flexibility States have in deciding which offences (that they have decided to define as such in their criminal law) they will treat as "serious" and what constitutes the "adequate punishment" to be imposed in the event of a conviction.

- In sum, even where States may be required under the drug control conventions to treat supplying drugs (other than for medical or scientific use), and possessing them for that purpose, as criminal offences, they still have wide latitude when it comes to determining the penalty to be imposed in such cases – and there is no requirement to impose convictions or punishment in every instance. In practical terms, this flexibility could and should be explored by Canada to remove any serious sanction for small-scale trafficking or possession for the purpose of trafficking.

6. Reservations to the treaties: a legal option

- Finally, recall that all the UN drug control conventions include provisions allowing for States to formally enter "reservations" to specific provisions or aspects of the treaty. A reservation has the effect that a State becomes a party to a treaty with a caveat that excludes or modifies the application of a specific provision of the treaty to that State.

- As outlined above, it is well established that no such process is required for Canada to decriminalize possession (or purchase or cultivation) for personal consumption. This flexibility is already found within the conventions and there is no treaty breach in doing so.

- But decriminalizing other activities on the supply side – e.g., trafficking of a small quantity or possession for the purpose of such trafficking – would likely contravene the drug control conventions. Much would turn on how Canada chooses to interpret the "constitutional principles" and "basic concepts" of its legal system as providing a basis for this more expansive removal of criminal penalties; this is an option to be explored.

- Ultimately, if Canada concluded such further decriminalization were warranted, in keeping with its constitutional principles and the basic concepts of its legal system, but that such measures would be at odds with its obligations under the UN drug control conventions, Canada could withdraw from one or more of the treaties, as deemed necessary, and re-accede to them with the appropriate reservation to the relevant provisions that were identified as the barrier.

7. Conclusion

In summary, under international law, Canada has both important latitude under the drug control conventions, and important obligations under human rights treaties it has ratified. It can and should use that latitude in the realm of drug control to better respect, protect and fulfil the human rights it has pledged to uphold, and which are also embodied to various degrees in its own constitution. It can and should do so by removing all criminal and other punitive sanctions for the simple possession, purchase and cultivation of drugs for personal consumption, and by removing significant criminal penalties for at least small-scale trafficking and related activities.