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Policy Analysis

Canada, cannabis and the relationship between UN child rights and drug control treaties

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ABSTRACT

Article 33 of the UN Convention on the Rights of the Child requires States to take appropriate measures to protect children from illicit drugs 'as defined in the relevant international treaties'. Those treaties are the UN drugs conventions. Following cannabis legalisation, then, can Canada remain in compliance with the CRC while breaching treaties to which Article 33 expressly refers? This article investigates this question with reference to the drafting of the CRC and the drugs conventions, how the relationship between the two systems has been approached, and the practice of the UN Committee on the Rights of the Child from 1993-2015. While the CRC could offer an alternative framework through which to critically assess drug laws and policies, by and large it has operated so as to reinforce the drug control system. An interpretation of Article 33 in the light of Canada's cannabis reforms is proposed. Based on the text of the provision, the pacta tertiis rule, and the object and purpose of the provision, it decouples the CRC from the normative requirements of the drugs conventions.

Introduction

Cannabis legalisation came into effect in Canada on 17th October 2018, placing it in breach of two of the three international drug control treaties: the Single Convention on Narcotic Drugs 1961, and the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. There are flexibilities in these treaties with regard to criminal sanctions and other issues, but Canada is clearly moving beyond them in regulating the cannabis market for recreational purposes. Canada's non-compliance is not realistically in question (Lines and Barrett, 2018; Habibi and Hoffman, 2018; INCB, 2018; International Narcotics Control Board, 2018a; Bewley-Taylor et al., 2016). As Canada has stated to the UN Commission on Narcotic Drugs, 'Our Government recognizes that our new approach will result in Canada being in contravention of certain obligations related to cannabis under the UN drug conventions' (Government of Canada, 2018). For the purposes of this article, however, an issue is that the drugs conventions are not the only treaties in question. The Convention on the Rights of the Child (CRC) is directly engaged. Article 33 requires that

> 'States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances' (United Nations, 1989).

In this regard, it is worth recalling that the move to end the prohibition of cannabis was justified, inter alia, by the protection of children and youth, and human rights concerns, something that was made clear to the UN General Assembly in April 2016. 'Our approach to drugs must be comprehensive, collaborative and compassionate. It must respect human rights…' said Jane Philpott, Minister of Health at the time. 'In Canada, we will apply those principles with regard to marijuana. To that end, we will introduce legislation in the spring of 2017 that ensures we keep marijuana out of the hands of children….' (Government of Canada, 2016). Submissions to the Canadian Senate hearings on Bill C-45 addressed child rights issues (BC Representative for Children and Youth, 2018), and the above provision of the CRC was used at the oral hearings to challenge the Bill (Senate Standing Committee on Foreign Affairs and International Trade, 2018).

This article focuses on the linkage between Article 33 of the CRC and the 'relevant international treaties'. During the drafting of the CRC it was made clear that the UN drugs conventions were the treaties in question (UN Commission on Human Rights, 1988). The question is this: can Canada remain in compliance with the CRC while breaching treaties the to which Article 33 expressly refers? There is, after all, a strong presumption against normative conflict in international law (Shaw 2008, p. 66).

There will soon be an opportunity to consider this question in an

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official forum when Canada is again reviewed for its CRC compliance at the UN Committee on the Rights of the Child. While Uruguay was reviewed by the Committee after its cannabis legalisation process, the issue did not arise as Uruguay had drafted its report in 2013 before legalisation in 2014. Canada will therefore be the first CRC State party to report to the Committee on a legislative measure in breach of the drugs conventions in relation to its Article 33 obligations. A question is how the Committee will respond, and what this might mean for the Committee's view of the relationship between international child rights law and the UN drugs conventions.

This article begins by providing a short overview of the drafting of Article 33 of the CRC and its relationship to the drugs conventions in that process. It then discusses two opposing ways in which the relationship between the CRC and the UN drugs conventions has arisen in contemporary legal and policy debates (for a more comprehensive analysis see Barrett, 2018). This demonstrates an ongoing controversy about how Article 33 should be understood. The article goes on to introduce the periodic reporting process to the Committee on the Rights of the Child and the practice of the Committee to date, which has by and large reinforced the approach of the drugs conventions and the coupling of the two systems.

An interpretation of Article 33 in the light of Canada's cannabis reforms is proposed. Based on the text of the provision, the pacta tertiis rule, and the object and purpose of the provision, it decouples the CRC from the normative requirements of the drugs conventions. Rather than acting as a human rights rubber stamp on the drugs conventions (as the periodic reporting process shows has been the case) this approach allows the normative space for the CRC to operate as child rights-based framework against which drug policies should be scrutinised, including in post-prohibition scenarios.

Article 33 and its relationship to the drugs conventions

Children were all but ignored in the first decades of the international drug control system. They entered into drugs diplomacy as the tone in the international system shifted to the more punitive as the drugs situation slipped further out of control (Barrett, 2018, pp. 47-96). It was against this background that the first General Assembly resolution relating to young people and drugs was adopted in December 1971. According to the resolution, adopted in the year of the birth of the Nixon drug war, drug use was 'an especially serious threat to the youth of the world'. It called upon 'all States to enact effective legislation against drug abuse' to meet that threat, to put in place treatment and rehabilitation, and to impose 'severe penalties for those engaged in illicit drug-trafficking' as a means of protection (UN General Assembly, 1971; Lines, 2017 p. 68).

Earlier attempts to include children in the treaties of 1961 and 1971 had been rejected, because States were uncomfortable taking on board obligations that directed traditionally sovereign activity, because they did not know what to do, and because they worried that drugs 'propaganda' (prevention) could be harmful (Barrett, 2018, pp. 47-96). But by the 1980s, and despite the regime that had been put in place, the drug trade was larger and more violent than ever, and drug use was seen as having reached epidemic proportions, with ever younger people becoming involved. The answer to this was the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the most punitive drugs convention to date. The drugs threat, albeit a creation of the prohibitionist system, provided States with the political space to adopt a treaty much farther reaching than those previously adopted (Lines, 2017).

Children appear in the Trafficking Convention to indicate aggravating circumstances for which certain offences should be considered 'particularly serious' (Art. 3(5)(f)&(g)), and to introduce the criminalisation of incitement to use drugs for the first time in international law (Art. 3(1)(c)(iii)). More broadly, children appear in the preamble, where the drafters expressed their deep concern about

> 'the fact that children are used in many parts of the world as an illicit drug consumers market and for purposes of illicit production, distribution and trade in narcotic drugs and psychotropic substances, which entails a danger of incalculable gravity.'

The similarity to Article 33 is clear, with its dual focus on drug use and involvement in the drug trade. Through this preambular provision, which was introduced by Peru very late in the process (United Nations, 1991, para 152), a rationale is provided for the stringent provisions that follow, including the criminalisation of personal possession (Art. 3(2)). This is part of the role of treaty preambles, which becomes important for interpretive purposes. The protection of children was placed near the top of the preambular paragraphs to make clear its importance (United Nations, 1991, paras 164 & 165). But this, of course, was a treaty applying more stringent criminal laws to a system that was already in place. Children were included late in a regime that had developed without their needs in mind.

The CRC was adopted in 1989, mere months after the Trafficking Convention. The two treaties entered into force in 1990. The drugs issue is absent from all previous child rights declarations and all previous UN human rights declarations and treaties. The desire for a provision relating to drugs in the draft CRC had been expressed by States and NGOs from the earliest input in 1978 (International Federation of Women Lawyers, 1978), but it was not until 1982 that a draft provision was put forward by China (UN Commission on Human Rights, 1982, para 118). This was followed by an alternative NGO proposal in 1984, the year the first draft of the Trafficking Convention was submitted, and in which drug trafficking was described as a crime against humanity (UN General Assembly, 1984). It was 1986 before the working group for the draft CRC came to discuss what would become Article 33 (UN Commission on Human Rights, 1986). We need not discuss this process in depth here, but the key lesson from the negotiations is how brief and cursory they were, despite the fact that a new human rights provision was being adopted. No discussion was had as to what it might require of States (See Barrett, 2018, pp. 47-96; OHCHR, 2007)

What was made clear, however, was the connection to the drugs conventions. During the 1986 drafting session the Netherlands asked if the draft included 'all drugs' (UN Commission on Human Rights, 1986, para 78). The United States, for its part, felt that the provision should include reference to alcohol (Ibid, para 81). The wording of the drugs conventions then in force was adopted during technical review in 1988 to clarify the scope of the provision. This is clear from the use of 'narcotic drugs and psychotropic substances', and the word 'illicit' instead of 'illegal', both intended to reflect the drugs conventions. Both the Single Convention and the 1971 Convention were explicitly referred to as being the relevant conventions at the time (UN Commission on Human Rights, 1988).

For some, Article 33 and the UN drugs conventions are mutually reinforcing. Children have an explicit right to protection from drugs, after all, set out in a provision that references the drugs treaties directly. From there it is a simple to step to the kinds of measures required by the CRC. Moreover, as we have seen, Article 33 of the CRC and the preamble of the Trafficking Convention mirror each other, focusing on drug use and involvement in the drug trade. As Stere argues 'The drug conventions set out to ensure no illicit use, and to combat illicit production and trafficking. The CRC explicitly makes these three issues a mandatory special protection concern for children by all ratifying states parties' (Stere, 2014, p. 154). Sharing this view, Takahashi argues that Article 33 is 'not only a clear reference to the international drug conventions, but an unambiguous reaffirmation of states' obligations in drug control' (Takahashi et al., 2016 p. 63). Child rights and drug control are therefore part of the same system and the clearest example of the coherence between human rights and drug control. From this perspective, the CRC buttresses the drugs conventions and in doing so operates as the 'concrete benchmark' for human rights-oriented policy (Stere, 2014).

In 1998 the CRC was used to provide support for the now infamous call for a 'drug free world by 2008′ made at the 1998 General Assembly Special Session on the World Drug Problem (UNESCO and UN Drug Control Programme, 1998). Today, that vision is still explicitly set out by some States. Sweden's official policy, for example, makes clear where it stands: 'The UN Convention on the Rights of the Child recognises a child's right to grow up in a drug-free environment as a human right' (Ministry of Health and Social Affairs, 2015). The child's right to a drug free environment is therefore closely tied up with its long-standing policy goal of a drug free society, one shared by governments (e.g. Fordham, 2016) and NGOs (e.g. European Cities Against Drugs, 2012). Such a vision is obviously not commensurate with a legally regulated cannabis market, which Canada justifies on the basis of protecting children and youth.

The child's right to protection from drugs is therefore also seen as being in opposition to adult recreational use, and here we see a potential challenge for Canada if this view is adopted. As the INCB President has argued '…the exercise of the individual's rights and freedoms does not include the right to abuse drugs.' He continued, 'Children deserve special protection from drug abuse and from being involved in the production and distribution of drugs, as outlined in Article 33 of the Convention on the Rights of the Child. This treaty obligation should be respected at all times' (INCB, 2009). The child's right to protection, in other words, inevitably requires the limitations on the freedoms of others that the drugs conventions entail. According to Stere it 'defies logic' to think that the right to protection from drugs should not prevail (Stere, 2014, p. 156). The INCB has more recently condemned serious human rights abuses in drug control but is careful to distance these from the treaties or to accept fundamental human rights concerns about them (INCB, 2018a, p. 2).

The alternative view, one followed in the interpretive method below, is that the drugs conventions and Article 33 may well share certain subject matter, but they are different legal traditions and systems with different objects and purposes. Human rights law, from this perspective, must operate as a 'normative counterweight' to the drug control regime (Elliott et al., 2005). This speaks to an essential character of human rights law, and reflects resolutions to the effect that drug control must be carried out in full conformity with human rights (e.g. UN General Assembly, 2016, preamble). Article 33, from this view, is a lens into the child rights framework through which drug laws, policies and practices must be filtered for child rights compliance (Barrett and Tobin, 2019). This demands a dynamic and agile approach through which child rights law operates as check on State action. It should not act as a rubber stamp of existing approaches, which is a far more limiting view that equates child rights compliance within existing drug laws. Thus, while some would see a violation of Article 33 through the legalisation of cannabis, the alternative approach is less concerned with the coherence between the existing drug control regime and CRC, and more with demonstrably protecting children in the light of the object and purpose of Article 33. It makes no assumptions as to the best means to do so aside from basic rights-based principles that must be adhered to. It therefore foregrounds the transformative potential of human rights, as opposed to its being folded into the status quo.

This debate is not merely a question of scholars and NGOs in an abstract disagreement, as it now appears in diplomatic debates specifically in relation to cannabis. It arose prominently at the 61st session of the Commission on Narcotic Drugs in March 2018. Russia presented a draft resolution rooted in the CRC entitled 'Protecting children from the illicit drugs threat' (UN Commission on Narcotic Drugs, 2018). It explicitly raised concerns about cannabis reforms (and later chided Canada directly, see International Drug Policy Consortium, 2018a, 2018b), and linked the best interests of the child (Article 3 of the CRC) and Article 33 with the extant drug control system. It was a very controversial resolution, however, and was second to last of the eleven resolutions that year to reach the negotiating floor (the last and most controversial being Canada's resolution on stigma and drug use). Negotiations on the Russian resolution came only after a week's informal negotiations behind closed doors. A considerably watered-down resolution was ultimately adopted, and an informal record by the International Drug Policy Consortium indicates some of the controversy in the final stages (IDPC, 2018). But what we can certainly take from the experience is that today Article 33 is seen by some States as a bulwark against reform, and they are willing to deploy it in this fashion. For other States the simple association of the CRC with the existing drug control framework is unpopular in the light of contemporary policy shifts.

The periodic reporting process under the CRC

The UN Committee on the Rights of the Child is the independent treaty body tasked with overseeing compliance with the CRC and engaging in a constructive dialogue with States parties over time in this regard. Its equivalent in the drug control system is the International Narcotics Control Board. Pursuant to Article 43 of the CRC, States parties must submit a 'periodic report' every five years on their implementation of the Convention. There follows an oral hearing with the State delegation. Based on this and information from other sources, the Committee produces 'Concluding Observations'. This is a list of welcome developments and concerns, followed by a series of recommendations across thematic areas related to specific articles in the CRC. This process has been described as the 'backbone' of the UN human rights treaty system (O'Flaherty and T'Sai, 2011) and the issuing of Concluding Observations 'the single most important activity of human rights treaty bodies' (O'Flaherty, 2006, p. 27). The Concluding Observations represent authoritative, though non-binding, guidance on interpretation of the treaty and State compliance. States are expected to attend to the Committee's concerns and report on progress during the next review.

Through this process, the Committee has been reviewing States parties' reports on their implementation of the CRC since 1993. Canada was due to submit its combined fifth and sixth periodic reports to the Committee in July 2018 (Committee on the Rights of the Child, 2012, para 91). That report (which is late) should set out Canada's progress in implementing the CRC and its overall state of compliance. This will then be subject to review by the Committee, a process that usually takes a year or more from the date of submission. As part of this report, Canada will have to address its legislative changes under the relevant section on Article 33.

Article 33 and the practice of the Committee

Since the very first reports submitted to the Committee, Article 33 has been a consistent feature. As part of a wider research project a content analysis of all State party reports and all Concluding Observations relating to Article 33 from 1993–2015 has been conducted. This covers 70 sessions of the Committee and over 450 reporting processes relating to 193 States, with over 350 Concluding Observations relating to drugs having been issued. From that analysis a number of clear patterns emerge (Barrett, 2018). For present purposes the most relevant is the assumption of complementarity between the drugs treaties and the CRC by both the Committee and States parties. This association was clear from the outset. Sweden's first report (the second the Committee ever reviewed) equated Article 33 with the achievement of a drug free society (UN Committee on the Rights of the Child, 1992). The Committee had nothing to say about this. Since that time, the vast majority of States parties equate their criminal legal frameworks for drugs with the 'appropriate' legislative measures necessary to comply with Article 33. Canada is one of these, having reported its criminal drug laws in 1995 (UN Committee on the Rights of the Child, 1994) and again in 2002, by which time the Controlled Drugs and Substances Act had come into force (UN Committee on the Rights of the Child, 2003). Many States also report the stringency of their

penalties as further evidence of compliance up to and including the death penalty (Barrett, 2017a, 2017b). But beyond calls for children who use drugs to not be criminalised (e.g. UN Committee on the Rights of the Child, 2004a para 72, 2005 para 77(b), 2011a para 52(d)), the Committee has issued only one Concluding Observation to date challenging a criminal drug law. This was to Ukraine in 2011 where the Committee raised concerns about a forthcoming reform that would reduce quantities for a conviction for possession (UN Committee on the Rights of the Child, 2011b, paras 60, 61).

Criminalisation, of course, is the primary legislative method adopted globally, so it is to be expected that these would be reported. The issue here is the equation of such laws with CRC compliance and the absence of any critique or questioning about this by the Committee. Indeed, the Committee is more likely to welcome the adoption of a drug law or strategy, whatever its content. For example, the Russian Federation's drug strategies have been endorsed by the Committee multiple times (Committee on the Rights of the Child, 1999 para 38, 2005 para 76, 2014a para 5(c)). States have indicated to the Committee that they have ramped up enforcement or made their laws more stringent based on the Committee's recommendations (e.g. UN Committee on the Rights of the Child, 2014b para 165). There are no examples in the other direction.

Approximately half of all States parties have also reported their ratification of the drugs conventions with their Article 33 obligations. This is easily explained by the fact that the Committee requested this information in very early guidance on what States should include in their reports, thereby associating the two regimes from the outset (UN Committee on the Rights of the Child, 1996). Ratification of the drugs conventions was seen as an Article 33 requirement. More recently the Committee has reiterated this call in its General Comment on the child's right to health (Committee on the Rights of the Child, 2013, para 66). The clear implication, or assumption, is that the two regimes are complementary. But this is at best an open question.

Beyond this association of the two regimes, the Committee has also recommended that States parties seek the assistance of the International Narcotics Control Board 'in the light of Article 33' (e.g. Committee on the Rights of the Child, 2000 para 56, 2001 para 57). The INCB, of course, also reviews national drug policies and conducts missions to States parties to the drugs conventions with a view to monitoring compliance. Implicit in this recommendation is that CRC States parties should heed the recommendations of this other treaty body as a component of compliance with Article 33. By this assumption, what the INCB recommends would by definition be in line with CRC obligations. That places considerable trust in a body that is not known for its human rights work. We can in fact see the crossovers in the reports of both mechanisms. In 2009, for example, the CRC Committee recommended that the Democratic People's Republic of Korea (DPRK) strictly enforce its drug laws (Committee on the Rights of the Child, 2009, para 63). The State party had reported that its recent legislative changes had been undertaken on the advice of the INCB after its 2006 mission to the country. It had increased penalties to include indefinite detention (UN Committee on the Rights of the Child, 2006, para 242. See also International Narcotics Control Board, 2006 paras 463-466).

However, while one pattern in the Committee's work has been to associate the CRC with the drugs conventions and the legislative frameworks they require, another is that States are granted a very wide margin of discretion. This is usually appropriate when dealing with complex social policy, but consider the fact that the drug policies of Portugal (post-decriminalisation) and the Russian Federation were both welcomed during the same session in 2014 (Committee on the Rights of the Child, 2014a, 2014c). Whatever one may think of these two approaches, what is clear is that they are poles apart. What, then, is the substantive content of Article 33? The question now is whether that margin of discretion extends to an approach that would breach treaties the Committee has for two decades associated with Article 33, from its guidance for periodic reporting, to its Concluding Observations, to its General Comments.

The Committee's dilemma

How might the Committee approach Canada's reforms? Let us first consider the likely scenarios. One possibility, of course, is that the entire issue will be overlooked, either by omission or to avoid the question. Canada may not report it and no NGOs or others may raise it during the entire reporting process. This seems unlikely, being one of the most important developments in Canadian policy in recent years, made with the express intention of protecting children. The Committee may avoid the issue entirely. It has not focused much on drugs issues in its Concluding Observations to Canada in the past. This is a possibility, but hopefully this will not happen as this is important issue for the meaning and content of Article 33, and for the relationship between the CRC and other regimes. Let us suppose, then, that the issue is discussed between Canada and the treaty body monitoring compliance. The most important document is the Concluding Observations. Following the usual format these will certainly refer to welcome developments in general, and will raise concerns and make recommendations on specific issues. Thus, will the Committee raise a concern about the cannabis reforms? Will it welcome them? What will it recommend?

Whatever the Committee says will be a statement on its part about the relationship between the CRC and the drugs conventions. If, taking the INCB's lead, the Committee raises the concern that Canada is breaching the drugs conventions, the same association with the CRC that has gone before is being made. This is not impossible. In the past, for example, Committee members have challenged the Netherlands as being too liberal about drug consumption (Committee on the Rights of the Child, 2004b, para 81), and have pressed Jamaica to address the cultural use of cannabis (Committee on the Rights of the Child, 1995, para 47). As noted above, the Committee has asked States to follow the INCB's advice in the past. These, however, are all relatively old. More recently the Committee has begun recommending harm reduction measures for young people (e.g. Committee on the Rights of the Child, 2016, para 64) and therefore has entered into more controversial territory. If it welcomes the reforms due to Canada's stated aim of better protecting children the Committee will be saying, explicitly, that a State party can comply with Article 33 of the CRC even if this entails a breach of the drugs conventions. This would be a considerable shift, contradicting the long-standing request to report ratification of those very conventions as part of Article 33 compliance.

There is a more likely scenario than either raising concerns or welcoming the reforms. If a Concluding Observation is adopted on this issue, it may well simply 'note' the relevant reforms and, as a recommendation, ask Canada to report back on the effects of the legislation in its next report in five years' time. Indeed, this is probably the wisest approach. The blind welcoming of drug laws without scrutiny of their effects is something the Committee should avoid. And Canada has stated its commitment 'to measuring the health and social impacts' of its cannabis policies and has 'offered to share outcome data with other CND members' (Government of Canada, 2018). But, critically, even without expressly welcoming the law, this would also break the association with the drugs conventions. By this approach, legalising cannabis *may* be an 'appropriate measure' for the purposes of Article 33 if it delivers on its protective promises. That means that an 'appropriate measure' under the CRC *could* be one that violates the drugs conventions.

Whatever the approach the Committee takes (aside from avoiding the issue), it is entering into important interpretive territory, and into the relationship between the CRC and the drugs conventions. If past experience is a guide, however, then the Committee will not delve into its interpretive reasoning in its Concluding Observations. This is not the place for such discussions. But it should nonetheless consider its interpretive justification for whatever approach it does take. The issue may well (and should) arise in the meeting with the Canadian

delegation prior to the issuing of Concluding Observations. It may come up with other States parties or even with the International Narcotics Control Board, given its references to Article 33 in the past, and if its previous challenges to human rights mechanisms that question the drug control system are an indication (International Narcotics Control Board and UN Office on Drugs and Crime, 2010). The challenge for the Committee is clear: after almost twenty-five years of associating the two regimes, including in its guidance for periodic reporting, and despite the connection between the two in drafting, how could the Committee now justify decoupling them if it were to either welcome these changes or adopt a 'wait and see' approach?

Decoupling the regimes: an interpretive approach

I wish to offer an interpretive approach to the relationship between the CRC and the drugs conventions that addresses Canada's violation of the latter. The approach has three avenues: the ordinary meaning of Article 33, the pacta tertiis rule (that a treaty cannot bind third parties without consent), and teleological interpretation (i.e. a focus on realising the object and purpose of Article 33).

According to the Vienna Convention on the Law of Treaties (VCLT), any provision must be interpreted in good faith in the light of its ordinary meaning (Art. 31(1)). This begins with the text, so let us look again:

> 'States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances'

The key issues here are what is meant by the reference to the relevant international treaties, and what is meant by an 'appropriate measure'. In essence, do the drugs conventions indicate the kinds of legislative measures considered 'appropriate', or do they play some other role? When we read Article 33, what is clear is that the reference to the drugs conventions is intended to set out the substances from which children should be protected, and what counts as an illicit use of those substances. This derives from a straight reading of the text: 'the illicit use of narcotic drugs and psychotropic substances, as defined in the relevant international treaties'. They are not the source of the 'appropriate measures' to take. If the drugs conventions were referred to in order to indicate the kinds of measures adopted, it would have to have been worded differently, e.g. 'appropriate measures, as defined in the relevant international treaties, to protect children…' Moreover, despite the linkages we have seen through the periodic reporting process, the drafting history (to which we may turn as a supplementary means of interpretation pursuant to Article 32 of the VCLT) shows that the reference to the drugs conventions was to delimit the scope of Article 33 – i.e. which substances it covers.

There is a further, formal reason to take this approach to the text. There remain States parties to the CRC that are not parties to the drugs conventions. During the drafting process, moreover, the drugs conventions had far fewer States parties. The drafting of Article 33 began in earnest in 1986. But approximately thirty States parties to the Single Convention ratified after 1990. The Trafficking Convention, of course, had not yet been adopted. Moving forward, States may denounce one or all of the drugs conventions, as Bolivia did prior to reaccession with a reservation relating to coca (Room, 2012). During the intervening year Bolivia was party to the CRC but not the Single Convention.

Pacta tertiis nee nocent nee prosunt is a 'basic, classic rule' (Fitzmaurice, 2002, p. 38) of treaty law. The pacta tertiis rule, as set out in Articles 34 and 35 of the VCLT is that 'A treaty does not create either obligations or rights for a third State without its consent.'. Article 35 clarifies what consent requires. Third party obligations can only arise if the drafters of the treaty intended them to, and the third party 'expressly accepts that obligation in writing.' Thus, there is a general rule and therefore a strong presumption against creating third party obligations, rebuttable on very narrow grounds. There is no evidence for such grounds being met in this case. There was no discussion in the drafting of Article 33 that the parties intended the provision to bring with it the obligations of the drugs conventions, including for those that were not parties to them. No State that is not a party to the drugs conventions has so consented 'expressly in writing'. The mere ratification of the CRC as an implied consent is insufficient.

Instead we might take a teleological approach, internal to the CRC and, more so, internal to Article 33. Teleological interpretation is well known in international law, especially in human rights. It focuses on achieving the 'object and purpose' of a treaty or specific provisions within it. The object and purpose of the CRC is (arguably) to ensure the realisation of child rights. While the object and purpose of Article 33 is (again, arguably) to protect them from drug use and involvement in the drug trade. This, at least, flows from the text itself. If the drugs conventions do not determine the kinds of measures or legislative approaches deemed 'appropriate', then we may look to the object and purpose of Article 33 towards which appropriate measures must be directed. Thus, I have argued elsewhere, with John Tobin, for the basic test that 'appropriate measures' must be 'rights compliant' and 'evidence based' (Barrett and Tobin, 2019). The former standard relates to the application of the wider CRC framework to law, policy and practice, but also attention to the wider human rights implications of State action in protecting children from drugs. The latter speaks to whether the action take in fact protects children and if the State can show it. In short, how have the relevant laws and polices protected children, wherever these might sit on the spectrum from strict prohibition to legal regulation? In this regard we should recall Article 41 of the CRC, its 'more favourable protection clause'. It states that nothing in the CRC

'Shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or
(b) International law in force for that State.'

A question is whether the drugs conventions are more conducive to the realisation of the rights of the child than the CRC itself. Critically, that is an empirical question, once again rooted in the object and purpose of Article 33. To view it normatively, in the abstract, is simply to restate ones pre-existing preference for the answer.

The above approach, rooted in the text, pacta tertiis and the object and purpose of Article 33 seems to be a reasonable, and empirical, way forward, and supports a 'wait and see' approach to Canada's reforms. This approach allows the normative space for the CRC to operate as a critical check on State action, even in post-prohibition scenarios by freeing Article 33 from the strictures of and historical connection to the drugs conventions. If ending prohibition simply breaches the CRC, there is no more to say about the regulations from a child rights perspective. In the current reformist climate, this seems to severely limit what the CRC has to say about how to modernise our drug laws.

Conclusion

This article has aimed to draw attention to the CRC as another treaty engaged by drug law reform, and to the potential importance of Canada's next report to the Committee on the Rights of the Child. It has argued that despite an historical connection between the CRC and the drugs conventions, and a pattern of assuming complementarity in the work of the Committee on the Rights of the Child, the CRC does not carry the obligations (or strategies) of the drugs conventions with it. By an ordinary reading of Article 33 (supported by the travaux préparatoires) and combined with the pacta tertiis rule, the drugs conventions are referred to in Article 33 in order to delimit the scope of the provision, not to direct State action in line with extrinsic norms. The

CRC therefore creates obligations independent of the drugs conventions. A teleological approach, aiming to realise the object and purpose of Article 33 through 'rights compliant' and 'evidence based' measures, offers a more dynamic and forward-looking role than merely re-affirming strategies legalised in ageing treaties that are increasingly questioned.

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Conflict of interest

None.

References

Barrett, D. (2017a). International child rights mechanisms and the death penalty for drug offences. *Human Rights Law Review, 17*(2), 205–229.

Barrett, D. (2017b). The child's right to protection from drugs: Understanding history to move forward. *Health and Human Rights Journal, 19*(1), 263–268.

Barrett, D. (2018). *Drugs and the Convention on the Rights of the Child: Fragmentation, contention and structural Bias, PhD Thesis.* Stockholm University.

Barrett, D., & Tobin, J. (2019). Article 33: Protection from narcotic Drugs and psychotropic substances. In J. Tobin (Ed.). *Commentary on the UN convention on the rights of the child*. Oxford University Press.

BC Representative for Children and Youth (2018). *BC Cannabis regulation engagement* 2018 available at https://rcybc.ca/sites/default/files/documents/pdf/reports_publications/rcy_submission_re_cannabis_engagement.pdf.

Bewley-Taylor, D., et al. (2016). *Cannabis regulation and the UN drugs treaties: Strategies for reform.* Washington Office on Latin America, Global Drug Policy Observatory, Transnational Institute, Transform Drug Policy Foundation, Canadian Drug Policy Coalition, International Centre on Human Rights and Drug Policy.

UN Committee on the Rights of the Child (2000). *Concluding observations Suriname.* UN Doc No CRC/C/15/Add.130, 28 June 2000.

Elliott, R., et al. (2005). Harm reduction, HIV/AIDS and the human rights challenge to global drug policy. *Health and Human Rights, 8*(2).

European Cities Against Drugs (2012). International drugs conventions and the rights of the child. *Newsletter, 16* March 2012.

Fitzmaurice, M. (2002). Third parties and the law of treaties. In Max Planck (Vol. Ed.), *Yearbook of United Nations Law: vol. 6*, (pp. 37–137).

Fordham, A. (2016). Questioning the limits of reality – ASEAN reaffirms commitment to become drug-free. *International Drug Policy Consortium (Blog), 24* October 2016.

Government of Canada (2016). *Intervention by Jane Philpott at the UN General Assembly. Thirtieth Special Session, Official Records, 3rd Plenary Meeting 20th April 2016* UN Doc No A/S-30/PV.3.

Government of Canada (2018). *Intervention by Ambassador Heidi Hulan at the Reconvened 61st Session of the Commission on Narcotic Drugs, 25 June 2018.* available at https://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_61/Statements/61st_CND_2nd_ISM_25_June_2018_Statement_Canada.pdf.

Habibi, R., & Hoffman, S. (2018). Legalizing cannabis violates the un drug control treaties, but countries like Canada have options. *Ottowa Law Review, 49*(2), 427–460.

International Drug Policy Consortium (2018a). *CND Blog, 7 November 2018 'CND Intersessional meeting, 7 November 2018: Implementation of the international drug control treaties, international cooperation, synthetic opioids and inter-agency cooperation.* Intervention of the Russian Federation available at http://cndblog.org/2018/11/cnd-intersessional-meeting-7-november-2018-implementation-of-the-international-drug-control-treaties-international-cooperation-synthetic-opioids-and-inter-agency-cooperation/.

International Drug Policy Consortium (2018b). *CND Blog, 16 March 2018 'Committee of the Whole – Friday afternoon (L2 – Protecting children from illicit drug threat).* available at http://cndblog.org/2018/03/committee-of-the-whole-l2-protecting-children-from-illicit-drug-threat/.

International Federation of Women Lawyers (1978). *Letter from the International Federation of Women Lawyers to T. Van Boven, director, division of human rights.* 24 October 1978, UNOG archives, G/SO 214 (28).

International Narcotics Control Board (2006). *Report of the International Narcotics Control Board for 2006* UN Doc No E/INCB/2006/1, 2006.

International Narcotics Control Board (2009). *Statement by Professor Hamid Ghodse, President International Narcotics Control Board (INCB) at the high-level segment of the 52nd session of the Commission on Narcotic Drugs on 11 March 2009*.

International Narcotics Control Board (2018a). *Statement at fifth intersessional meeting of the 62nd session of the Commission on Narcotic Drugs.* 7 November 2018, available at https://www.incb.org/documents/Speeches/Speeches2018/INCB_President_5th_intersessional_CND.pdf.

International Narcotics Control Board (2018b). *Statement by the International Narcotics Control Board on the entry into force of Bill C-45 legalising cannabis for non-medical purposes in Canada.* 17 October 2018.

International Narcotics Control Board and UN Office on Drugs and Crime (2010). *Joint UNODC /INCB statement on the international drug control system and human health and human rights*.

Lines, R. (2017). *Drug control and human rights in international law.* Cambridge University Press.

Lines, R., & Barrett, D. (2018). Cannabis Reform, "medical and scientific purposes" and the Vienna convention on the law of treaties. *International Community Law Review, 20*(5), 436–455.

Ministry of Health and Social Affairs (2015). *Swedish drug policy: A balanced policy based on health and human rights*.

O'Flaherty, M. (2006). The concluding observations of the United Nations human rights treaty bodes. *Human Rights Law Review, 6*(1), 27–52.

O'Flaherty, M., & Tsai, P.-L. (2011). Periodic reporting: The backbone of the UN treaty body review procedures. In W. Schabas, & M. Cherif Bassiouni (Eds.). *New challenges for the UN human rights machinery: What future for the UN treaty body system and the human rights council procedures?* (pp. 37–56). Intersentia.

Room, R. (2012). Reform by subtraction: The path of denunciation of international drug treaties and reaccession with reservations. *The International Journal of Drug Policy, 23*(5), 401–406.

Shaw, M. (2008). *International law* (6th ed). Cambridge University Press.

Standing Senate Committee on Foreign Affairs and International Trade (2018). *Statement of Gwendolyn Landolt.* National Vice-President, REAL Women of Canada 19 April 2018.

Stere, R. (2014). Human rights and drug control: The importance of children's rights. In S. Takahashi (Ed.). *Human rights, human security and State security: The intersection* (pp. 145–160). Praeger.

Takahashi, S. (2016). *Human rights and drug control: The false dichotomy*. Hart Publishing.

UN Commission on Human Rights (1982). *Report of the open-ended informal working groups of the commission* UN Doc No E/CN.4/1982/30/Add.1, 15 March.

UN Commission on Human Rights (1986). *Question of a convention on the rights of the child* Report of the Working Group UN Doc No E/CN.4/1986/39, 13 March 1986.

UN Commission on Human Rights (1988). *Technical review of the text of the draft convention on the rights of the child, submission of the World Health Organization.* UN Doc No E/CN.4/1989/WG.1/CRP.1, 15 October 1988.

UN Commission on Narcotic Drugs (2018). *Protecting children from the illicit drugs threat.* UN Doc No E/CN.7/2018/L.2, 6 February 2018.

UN Committee on the Rights of the Child (1992). *Initial report of Sweden* UN Doc No CRC/C/3/Add.1 23 September 1992.

UN Committee on the Rights of the Child (1994). *Initial report of Canada* UN Doc No CRC/C/11/Add.3, 28 July 1994, para 357.

UN Committee on the Right of the Child (1995). *Summary records: Jamaica.* UN Doc No CRC/C/SR.197, 25 January 1995.

UN Committee on the Rights of the Child (1996). *Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under Article 44, paragraph 1 (b), of the Convention on the Rights of the Child* UN Doc No CRC/C/58, 20 November 1996.

UN Committee on the Rights of the Child (1999). *Summary records: Russian Federation.* UN Doc No CRC/C/SR.565, 30 September 1999.

UN Committee on the Rights of the Child (2001). *Concluding observations: Palau.* UN Doc No CRC/C/15/Add.149, 21 February 2001.

UN Committee on the Rights of the Child (2003). *Second periodic report of Canada* UN Doc No CRC/C/83/Add.6, 12 March 2003.

UN Committee on the Rights of the Child (2004a). *Concluding observations: Indonesia.* UN Doc No CRC/C/15/Add.223, 26 February 2004.

UN Committee on the Rights of the Child (2004b). *Summary records: Netherlands.* UN Doc No CRC/C/SR.928, 23 January 2004.

UN Committee on the Rights of the Child (2005). *Concluding observations. Russian Federation.* UN Doc No CRC/C/RUS/CO/3, 23 November 2005.

UN Committee on the Rights of the Child (2006). *Fourth periodic report of DPRK* UN Doc No CRC/C/PRK/4 15 January 2008.

UN Committee on the Rights of the Child (2009). *Concluding observations.* DPRK UN Doc No CRC/C/PRK/CO/4, 27 March 2009.

UN Committee on the Rights of the Child (2011a). *Concluding observations: Afghanistan.* UN Doc No CRC/C/AFG/CO/1, 8 April 2011.

UN Committee on the Rights of the Child (2011b). *Concluding observations: Ukraine.* UN Doc No CRC/C/UKR/CO/3-4, 21 April 2011.

UN Committee on the Rights of the Child (2012). *Concluding observations: Canada.* UN Doc No CRC/C/CAN/CO/3-4, 6 December 2012.

UN Committee on the Rights of the Child (2013). *General comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (art. 24).* UN Doc No CRC/C/GC/15, 17 April 2013.

UN Committee on the Rights of the Child (2014a). *Concluding observations. Russian Federation.* UN Doc No CRC/C/RUS/CO/4-5, 25 February 2014.

UN Committee on the Rights of the Child (2014b). *Third periodic report of Ghana* UN Doc No CRC/C/GHA/3-5, 6 August 2014.

UN Committee on the Rights of the Child (2014c). *Concluding observations: Portugal.* UN Doc No CRC/C/PRT/CO/3-4, 25 February 2014.

UN Committee on the Rights of the Child (2016). *General comment No. 20 on the implementation of the rights of the child during adolescence.* UN Doc No CRC/C/GC/20, 6 December 2016.

UN General Assembly (1971). *Youth and dependence-producing drugs.* UN Doc No A/RES/2859(XXVI), 20 December 1971.

UN General Assembly (1984). *Draft convention against traffic in narcotic drugs and*

psychotropic substances and related activities. UN Doc No A/RES/39/141, 14 December 1984.
UN General Assembly (2016). *Outcome document of the 2016 United Nations General Assembly Special Session on the world drug problem New York, 19-21 April 2016: Our joint commitment to effectively addressing and countering the world drug problem*.
UNESCO, UN Drug Control Programme (1998). *Youth charter for a twenty-first century free from drugs*.
United Nations (1989). *United Nations Convention on the Rights of the Child 1989.* GA res 44/25, annex, 44 UN GAOR Supp. No. 49 at 167, UN Doc No A/44/49, 1577 UNTS 3.
United Nations (1991). *United nations conference for the adoption of a convention against illicit traffic in narcotic drugs and psychotropic substances.* Vienna, 25 November-20 December 1988, Official Records, Vol. II, UN Doc No E/CONF.82/16/Add.1, 1991.
United Nations Office of the High Commissioner for Human Rights (OHCHR) (2007). *Legislative history of the Convention on the Rights of the Child, Vol. II*.