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A New International Legal Regime for a New Reality in the War Against Drugs

Guillermo J. Garcia Sanchez*

“We are only asking coherence: you cannot criminalize and legalize at the same time.”

Felipe Calderon, Former President of Mexico

“It is confusing for our people to see that, while we are losing lives and investing resources in the fight against drug dealers, in the consuming countries people are promoting initiatives like the one in California to legalize the production, the selling and the consumption of marijuana.”

Juan Manuel Santos, President of Colombia¹

On October 27, 2010, the presidents of Mexico and Colombia presented a joint critique on the tendency of U.S. states to decriminalize the consumption of “soft” drugs.² In an interview with BBC reporter Stephen Sackur, when asked if he thought U.S. states were not meeting their responsibilities to fight drugs, former Mexican President Felipe Calderon responded, “Yes, in these particular matters they don’t.”³ President Calderon’s comments are not only moral recriminations; they also have several legal implications.

The United States, along with 184 other nations, is a ratifying party to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

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¹ Alonso Urrutia, *La Jornada: EU debe ser congruente en sus acciones contra el narco: Calderón*, LA JORNADA (Oct. 27, 2010), <http://www.jornada.unam.mx/2010/10/27/politica/002n1pol>. (translated from Spanish) (last visited Jan. 12, 2017).

² *Id.* (The declarations were made at the 12th Summit of the Tuxtla Mechanism for Cooperation and Development in Cartagena de Indias, Colombia on Oct. 26, 2010.)

³ *HARDtalk: Interview with Felipe Calderon* (BBC World News broadcast Oct. 27, 2010).

of 1988 (the “1988 Convention”).⁴ This international treaty was negotiated under one basic assumption—that the success of the anti-drug regime requires not only that producing countries stop actors from exporting drugs, but also that consuming countries enforce penalties on their consumers. Article 3.2 mandates that each party to the Convention “establish as a criminal offense under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption.”⁵ It is a basic principle of economic theory that as long as there is demand, supply will follow. This, in effect, means that to successfully prevent drug activity, both supply and demand must be targeted. Arguing that one side—exporting or importing countries—holds sole responsibility for stopping drug activity would contradict the general principle of law that “no one is obliged to do the impossible” (*ad impossibilia nemo tenetur*).

In 1978 Eduardo Jiménez de Aréchaga, a former judge of the International Court of Justice (“ICJ”), classified the fight against drugs as a possible example of a *jus cogens* norm.⁶ He believed that since 1912, when the first opium convention was signed, there was universal recognition that states were obliged to work against the production, trafficking, and consumption of drugs.⁷ Twenty years after Judge Aréchaga’s statement, the slogan of the 1998 Special Session of the United Nations General Assembly on the matter—“A Drug-Free World – We Can Do It”—appeared to confirm his views.⁸ If Judge Aréchaga’s argument was correct, then the Convention codified “rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect.”⁹

The problem with characterizing the fight against drugs as a peremptory norm is that this stance also recognizes the possibility that the norm is not set in stone: *Jus cogens* norms are created through practice and universal state recognition. Thus, the constant violation of a peremptory norm, when considered universal, could eventually emerge as a new *jus cogens* rule. The only way to escape this problem is to assume the naturalist position that what elevates a norm to *jus cogens* is the “particular nature of the subject-matter with which it deals.”¹⁰ But who is empowered to determine that a rule, such as the

⁴ For a full list of the ratifying parties, see the *Depositary*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=VI-19&chapter=6&clang=_en (last visited Jan. 8, 2017).

⁵ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3.2, Dec. 20, 1988, 1582 U.N.T.S. 95.

⁶ See Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 HAGUE RECUEIL 1, 64–67 (1978).

⁷ The world’s first international drug control treaty, the International Opium Convention, was passed in the Hague in 1912. International Opium Convention, Jan. 23, 1912, 8 L.N.T.S. 188.

⁸ U.N. General Assembly, Twentieth Special Session: A Drug-Free World: We Can Do It (June 8–10, 1998), <http://www.un.org/ga/20special/>.

⁹ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 510 (7th ed. 2008)

¹⁰ *Report of the International Law Commission of 1966*, 2 Y.B. Int’l L. Comm’n 169, 247–49, U.N. Doc. A/6309/Rev.1.

fight against drugs, is, by its nature, a peremptory norm? The international system does not have a central authority to determine what in the “particular nature” of certain norms makes them peremptory. Certainly in the case of the fight against drugs, the consensus is even less clear.

Indeed, in recent years, a group of countries that signed the 1988 Convention has decriminalized the consumption of certain drugs. European nations like the Netherlands, Portugal, Uruguay, Spain, and Switzerland have adopted health-oriented policies to combat drug use instead of focusing on the prosecution of consumers. A similar trend is emerging in the United States, where a number of states no longer consider the possession of small quantities of marijuana a crime.¹¹ Surprisingly enough, former presidents of Brazil, Colombia, and Mexico who once courageously fought drug trafficking in producing countries have applauded these policies: “The war on drugs has failed Prohibitionist policies based on eradication, interdiction and criminalization of consumption simply haven’t worked.”¹² The invitation for a serious debate on the issue was even echoed in a 2013 report by the Organization of American States on regional drug policy.¹³

These facts invite the question of whether the current, growing decriminalization of soft drugs constitutes the emergence of a new customary rule that could modify the old treaty regime. International legal theory and tribunals recognize that a uniform and consistent practice, along with an *opinio juris* or the state’s “feeling” that it is following a norm, is needed before the international community can assert the emergence of a new custom. Nevertheless, two unsettled matters of international law affect the process of recognizing a new customary practice. First, there is no clear theory on how to identify

¹¹ These states include California, Nevada, Oregon, Colorado, Washington, Nebraska, Mississippi, New York, Massachusetts, Maine, Connecticut, Maryland, Rhode Island, Vermont, Delaware, and Alaska, as well as the District of Columbia. Extent of decriminalization varies in each case, but the common element is the absence of incarceration for possession of small amounts and the imposition of fines instead. See Andrew Ferguson, *The United States of Amerijuna*, TIME MAGAZINE (Nov. 22, 2010), at 34. For an updated version after the 2016 election see States That Have Decriminalized - NORML.org - Working to Reform Marijuana Laws, <http://norml.org/aboutmarijuana/item/states-that-have-decriminalized>. (last visited Jan. 12, 2017).

¹² Fernando Henrique Cardoso, Cesar Gaviria & Ernesto Zedillo, *The War on Drugs is a Failure*, WALL STREET J. (Feb. 23, 2009), <http://www.wsj.com/articles/SB123535114271444981>. Curiously enough, two of these presidents, Zedillo and Cardoso, were in power during the 1998 Special Session focused on the idea that the world could end drug consumption. Former Mexican President Vicente Fox Quesada has also spoken out on decriminalization: “We should consider legalizing the production, distribution and sale of drugs. . . . Radical prohibition strategies have never worked.” *Drug Addiction, Organized Crime and Security*, VICENTE FOX QUESADA BLOG (Aug. 7, 2010), <http://blogvicentefox.blogspot.com/2010/08/drogadiccion-crimen-organizado-y.html> (translated from Spanish) (last visited Jan. 8, 2017).

¹³ OAS, OAS - ORGANIZATION OF AMERICAN STATES: DEMOCRACY FOR PEACE, SECURITY, AND DEVELOPMENT (2009), http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-194/13 (last visited Nov. 18, 2015).

the subjective element of customary international law.¹⁴ Second, there is no rule regarding the amount of time and the level of contradictory practice needed for a new international regime to be born.¹⁵

Regarding the first point, the *opinio juris* is defined as a “sense of legal obligation.”¹⁶ In the words of the ICJ, “[states] must feel that they are conforming to what amounts to a legal obligation.”¹⁷ Do the current decriminalizing states violate the 1988 Convention because lawmakers believe that there is a new rule of customary international law? No official system exists for discerning the “feeling” of states. The ICJ has said feeling can be “deducted from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions.”¹⁸ With regard to the fight against drugs, in the past fifteen years states’ declarations have slowly changed their tone, moving from the unanimous “A Drug Free World – We Can Do It” to “Isn’t time to review the global strategy against drugs?”¹⁹ The actions and declarations in this case are as contradictory as the practice itself. Yet, there appears to be a common sentiment among most of the states: discontent with the current regime. Decriminalizing countries have shown it through their open violation of the treaty; some producing countries have done it by questioning the unequal burden of the obligations.

The cost of waiting for this new practice to become a customary norm could be too high for countries that suffer the most from the consequences of drug trafficking. Certain producing states still consider the old rule to be a valid obligation and are engaged in a costly war against drugs. The U.S.–Mexico cannabis market is a clear example of this contradictory practice. The U.S. government affirms that 60% of Mexican cartels’ income comes from the selling of marijuana.²⁰ Cartels use their revenues—around \$13 billion—to corrupt institutions, buy sophisticated weapons, and fight the government.²¹ As a consequence, in the past eight years 100,000 people have been killed, 25,000 disappeared, 45,000 soldiers are policing the streets, the Mexican government is spending \$9 billion dollars a year to fight cartels, and many areas of Mexico are more dangerous

¹⁴ Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).

¹⁵ Michael Wood, *Formation and Evidence of Customary International Law, Address to the International Law Commission, Geneva, 30 July 2012*, 12 L. & PRAC. INT’L CTS. & TRIBUNALS 273 (2013).

¹⁶ Brownlie, *supra* note 9, at 8.

¹⁷ North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), 1969 I.C.J. 4, 44, ¶ 77 (Feb. 20).

¹⁸ Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. Unites States), 1986 I.C.J. 1, ¶ 188 (June 27). *See also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 73.

¹⁹ Juan Manuel Santos, President of Colombia, Inaugural Speech at the 12th Summit of the Tuxtla Mechanism: *¿no es hora de revisar la estrategia global frente a las drogas?* (Oct. 26, 2010) (fragments of the speech available at <http://www.nacion.com/2010-10-26/EIPais/UltimaHora/EIPais2568603.aspx>).

²⁰ Office of National Drug Control Policy, The White House, *National Drug Control Strategy* 36 (2006).

²¹ *Id.* The report specifies that \$8.5 billion comes from marijuana trafficking and \$13.8 billion comes from illegal drug trafficking overall.

than war zones. Surprisingly, at the same time, many U.S. states have decriminalized marijuana consumption. In less than sixteen years, twenty-eight states and the District of Columbia have legalized it for medical purposes, and seven have legalized its recreational consumption.²² Moreover, the latest reports show that 51% of the American population favors its legalization.²³ Even President Barack Obama announced that the federal administration would not continue wasting resources by prosecuting individuals or trying to overturn the trend in those states that have legalized its recreational use.²⁴ On the contrary, he relied on the old premise of Justice Louis Brandeis that one of the characteristics of federalism and U.S. democracy is that states can serve as laboratories of “novel social and economic experiments without risk to the rest of the country.”²⁵ The U.S. cannabis market is calculated to be worth \$14 billion, with millions of potential clients for the cartels that have caused so much damage in Mexico.²⁶

In essence, the 1988 Convention created an international regime in which producing and consuming states had clear obligations. Today, the practice of some states and the inability of others to comply are shaking its foundations. As Professor Michael Glennon has stated, “No legal regime can endure if the most important proscriptions that it imposes are capable of being revised through violation by its creatures.”²⁷ Violation of the 1988 Convention is not yet so massive that it could overturn the entire treaty.²⁸ But the current tendency is disastrous for some states that cannot face the challenge of fighting the power of drug cartels without corresponding efforts in consuming countries.

Perhaps producing countries should accelerate the fall of the old regime and work to replace the battered legal structure. They could look for the consensus to relieve them of

²² The states that have legalized marijuana for recreational purposes are California, Maine, Massachusetts, Nevada, Washington, Colorado, and Oregon. Ferguson, *supra* note 10, at 32. See also Christopher Ingraham, *Marijuana Wins Big on Election Night*, WASHINGTON POST (Nov. 8, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/11/08/medical-marijuana-sails-to-victory-in-florida/>.

²³ Lydia Saad, *Majority Continues to Support Pot Legalization in U.S.*, GALLUP.COM (Nov. 6, 2014), <http://www.gallup.com/poll/179195/majority-continues-support-pot-legalization.aspx> (last visited Jan. 8, 2017).

²⁴ Ingraham, *supra* note 22. For a previous similar declaration, see Niraj Chokshi, *Obama on Marijuana Legalization: 'My Suspicion Is That You're Gonna See Other States Start Looking at This'*, THE WASHINGTON POST (Jan. 22, 2015), <https://www.washingtonpost.com/blogs/govbeat/wp/2015/01/22/obama-on-marijuana-legalization-my-suspicion-is-that-youre-gonna-see-other-states-start-looking-at-this/> (last visited Jan. 8, 2017).

²⁵ *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (arguing that a state may, “if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”).

²⁶ Katie Sola, *Legal U.S. Marijuana Market Will Grow To \$7.1 Billion In 2016*, FORBES (Apr. 19, 2016), <http://www.forbes.com/sites/katiesola/2016/04/19/legal-u-s-marijuana-market-will-grow-to-7-1-billion-in-2016-report/>. (last visited Jan 12, 2017)

²⁷ MICHAEL GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTION AFTER KOSOVO* 127 (2011).

²⁸ See Michael Glennon, “Why the Security Council Failed,” *FOREIGN AFFAIRS*, May/June 2003 (describing displacement of old laws through violations).

the treaty obligations that keep them trapped on the wrong side of the equation. They could seek to turn current trends to their advantage by authoring a framework in which they could export the products that today are internationally forbidden (or are supposed to be), and they could use their comparative advantage in production to generate economic development domestically. In fact, the trend is already starting. In Mexico the Supreme Court recently allowed four individuals to produce and consume marijuana for personal purposes because the Court considered the legislation that prohibited it contrary to human dignity of these individuals.²⁹ The global “war” on drugs could shift to a “war” on the irresponsible consumption of drugs in which the main players are no longer law enforcement agencies but health-oriented institutions led by the World Health Organization. Going further, the international community could stop focusing on production and trafficking chains and shift international attention toward fighting the negative effects of transnational crime more generally, targeting problems like corruption, drug lords’ impunity, money laundering, and illegal trafficking of weapons and human beings.

International norms are instruments of self-restraint that shape state behavior. When their objectives become obsolete, however, new agreements should take their place. After twenty-three years under the latest international agreement, drug consumption has risen, production has increased, and some states remain helpless against the power of organized crime fueled by drug money.³⁰ The substantial evidence that the anti-drug regime has been ineffective suggests that international law on this matter should be reexamined. Consuming states are already doing it through practice. Producing states, instead of adhering to the dogma of the current regime, should spearhead the creation of a new paradigm that is more to their advantage.

²⁹ Elisabeth Malkin & Azam Ahmed, *Ruling in Mexico Sets Into Motion Legal Marijuana*, NEW YORK TIMES (Nov. 4, 2015), <http://www.nytimes.com/2015/11/05/world/americas/mexico-supreme-court-marijuana-ruling.html> (last visited Jan. 8, 2017).

³⁰ UNITED NATIONS OFFICE ON DRUGS AND CRIME, USE OF DRUGS WORLD DRUG REPORT (2015).