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Regulated Legalization of Cannabis through Positive Human Rights Obligations and *Inter se* Treaty Modification

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Abstract

Although the UN narcotic drugs conventions do not allow states parties to legalize cannabis cultivation and trade for recreational use, there are possibilities for states to do so anyhow while staying within the boundaries of international public law. A first option concerns positive human rights obligations, *i.e.* obligations that require states to take measures in order to offer the best protection of human rights. If a state convincingly argues that with cannabis regulation positive human rights obligations to protect society can be more effectively achieved than under a prohibitive approach, the priority position of human rights obligations over the drugs conventions can justify such regulation. The second option regards the modification of the drugs conventions through an *inter se* agreement on cannabis regulation between certain of the states parties only. The positive human rights approach and the *inter se* possibility can strengthen each other and are a supreme combination.

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Keywords

cannabis – human rights positive obligations – inter se modification – rules of precedence – integral obligations – systemic integration – UN drugs control

1 Introduction

Within different contexts and for varied reasons, an increasing number of jurisdictions are considering or have already adopted the regulation – through legalization, decriminalization or policy based tolerance – of cannabis cultivation and trade for the recreational user market.¹ The United Nations (UN) narcotic drug conventions – particularly: the UN 1961 Single Convention on Narcotic Drugs² as amended by the 1972 Protocol³ and the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances^{4, 5} – oppose such developments. The drug control system is concerned with the “health and welfare of mankind” and of “human beings”⁶ and has two fundamental concrete goals. It aims to ensure that narcotic drugs are available for medical use and for scientific purposes.⁷ At the same time, it aims to guarantee that the use of narcotic drugs is exclusively restricted to those medical and scientific purposes.⁸ As far as the circulation of narcotic drugs for non-medical

1 See INCB, *Report of the International Narcotics Control Board for 2017* (United Nations, 2018) pp. 35–36, 67–68 and 72–74, naming the Bahamas, Canada, Colombia, Jamaica, the Netherlands, Paraguay, Peru, Saint Kitts and Nevis, Uruguay and the USA, and pp. 59, 78 and 103, where general remarks are made about South America and Europe (INCB annual reports are further referred to as: INCB Report [year]). These and other countries are also discussed in Martin Jelsma, Neil Boister, David Bewley-Taylor, Malgosia Fitzmaurice & John Walsh, *Balancing Treaty Stability and Change: Inter se modification of the UN drug control conventions to facilitate cannabis regulation* (GDPO Policy Report 7, March 2018) pp. 1–43 at 3–6.

2 United Nations, *Single Convention on Narcotic Drugs* New York, 30 March 1961, 520 *UNTS* 151, in force 13 December 1964.

3 *Protocol Amending the Single Convention on Narcotic Drugs*, 1961, Geneva, 25 March 1972, 976 *UNTS* 3, in force 8 August 1975.

4 UN, *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Vienna, 20 December 1988, 1582 *UNTS* 95, in force 11 November 1990.

5 Of only secondary importance to the cannabis discussion is a third convention, *i.e.* the 1971 UN Convention on Psychotropic Substances, Vienna, 21 February 1971, 1019 *UNTS* 175, in force 16 August 1976.

6 See Preambles to the Single Convention (*supranote* 3) and the Illicit Traffic Convention (*supranote* 4), respectively.

7 See Preamble to the Single Convention.

8 See also United Nations, *Commentary on the Single Convention on Narcotic Drugs, 1961* (New York: 1973) p. 110.

and non-scientific purposes is concerned, it seems hard to argue that the object and purpose of the conventions is not to ban such circulation completely.⁹ In the light of this goal and from the internal perspective of the multi-layered system of obligations in the UN narcotic drugs conventions, there is no legal room for any form of regulated permission of the cultivation or trade of cannabis with a view to supplying the recreational user market.¹⁰ However, this does not necessarily mean that it is impossible for states to permit cannabis cultivation and trade through regulated legalization of cannabis in national law within the boundaries of international public law. This article discusses two possibilities for states that can mutually reinforce each other.

The first option concerns positive human rights obligations, *i.e.* obligations that require states to take measures in order to guarantee fundamental human rights of individuals. Regulated permission of cannabis cultivation and trade may offer better possibilities for states to protect human rights interests than a prohibitive approach. Section 2 therefore explains how states – on the basis of their positive human rights obligations that follow from the right to health, the right to life, the right to physical and psychological integrity (the right not to be subjected to inhuman treatment) and the right to privacy – can be obligated to permit, under regulation, cannabis cultivation and trade for recreational use if such regulation ensures a better protection of these rights than a prohibitive drug policy as prescribed by the drugs conventions. With this in mind, in section 3 we discuss whether states can or must prioritize their obligations under international human rights law over their obligations under the drugs conventions. It concludes that where these regimes interfere, positive human rights obligations have priority. The article then goes on to discuss the second option: section 4 evaluates the possibility of *inter se* modification of the UN narcotic drugs conventions within the conditions set out in Article 41 of the Vienna Convention on the Law of Treaties (VCLT). In doing so, we will argue that the positive human rights approach and *inter se* modification can be of value to each other in legalizing cannabis cultivation and trade for recreational use within the framework of international public law.

9 For an elaborate exposition, see P.H.P.H.M.C. van Kempen & M.I. Fedorova, *International Law and Cannabis I. Regulation of Cannabis Cultivation for Recreational Use under the UN Narcotic Drugs Conventions and the EU Legal Instruments in Anti-Drugs Policy* (forthcoming 2018).

10 See also for example Krzysztof Krajewski, "How flexible are the United Nations drug conventions?", 10 *International Journal of Drug Policy* (1999) pp. 329–338 at 329; David R. Bewley-Taylor, "The Contemporary International Drug Control System: A History of the UNGASS Decade", in John Collins (ed.), *Governing the Global Drug Wars* (2012) pp. 49–55 at 50.

2 International Positive Human Rights Obligations as a Basis for Regulating Cannabis

Arguments underlying pleas for regulated legalization of cannabis cultivation and trade for recreational use often relate to the interests of individual and public health, the safety of individuals and crime control. The essence of these arguments is that regulation of the recreational cannabis market can better protect these interests than a prohibitive and repressive approach. Interestingly, the umbrella of human rights also covers interests of health, safety and crime control. The right to enjoy the highest attainable standard of physical and mental health, the right to life, the right to physical and psychological integrity and the right to privacy are the source of the so-called positive human rights obligations for the fulfilment of the stated interests. Positive obligations require states to intervene actively rather than to refrain from acting, as is the case with negative obligations. Positive human rights obligations thus legally require states to take measures in order to protect fundamental human rights.

In this section we will highlight how, within which limits and under what conditions the regulated legalization of cannabis can indeed be considered a positive human rights obligation.¹¹ The findings are primarily based on the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹² and the jurisprudence of the Committee on Economic, Social and Cultural Rights (CESCR); the International Covenant on Civil and Political Rights¹³ (ICCPR) and the jurisprudence of the Human Rights Committee (HRC); and the opinions and commentaries of other specialized UN authorities, such as the UN Special Rapporteur on the right to health. In addition, the (Revised) European Social Charter (ESC),¹⁴ as well as the considerations about it of the European Committee of Social Rights (ECSR) and the European Convention

11 See for a comprehensive analysis of relevant international human rights provisions, case law, official reports and memoranda as well as literature, from which the following is derived, chapter 2 in P.H.P.H.M.C. van Kempen & M.I. Fedorova, *International Law and Cannabis II. Regulation of Cannabis Cultivation and Trade for Recreational Use: Positive Human Rights Obligations versus UN Narcotic Drugs Conventions* (forthcoming 2018).

12 UN, *International Covenant on Economic, Social and Cultural Rights* (New York) 16 December 1966, 993 *UNTS* 3, in force 3 January 1976.

13 UN, *International Covenant on Civil and Political Rights* (New York) 16 December 1966, 999 *UNTS* 171, in force 23 March 1976.

14 Original *European Social Charter*: Turin, 18 October 1961, 529 *UNTS* 89, *ETS* 35; Revised *ESC*: Strasbourg, 3 May 1996, *ETS* 163.

on Human Rights¹⁵ (ECHR) and the corresponding case law of the European Court of Human Rights (ECtHR) have been analysed.

2.1 *Examples of Pro-regulation Arguments that are Potentially Relevant to Positive Human Rights Obligations*

For the applicability of positive human rights obligations, it is required that the regulation of cannabis cultivation and trade should protect interests that are relevant from the perspective of human rights. Before explaining this relevance, it is important to underline that we do not question or assess the empirical validity of all of these arguments. We conduct a legal analysis on the basis of the hypothesis that all these arguments are valid on their merits and thus only assess whether there is room for regulation if these arguments were to be valid.

One interest that is at the core of many arguments in favour of cannabis regulation is that such regulation would positively affect individual and public health.¹⁶ In international law, the concept of ‘health’ is a broadly interpreted, multi-dimensional construction containing both biophysical and psychological elements. The right to health and the obligations that arise from it for states are not limited to health care as such, but incorporate all factors that affect the health of individuals and the public at large.¹⁷ A policy on drugs or cannabis can therefore be important to the concept of ‘health’ in the right to health. The most elaborate general provision on this right is Article 12 ICESCR, which guarantees “the rights of everyone to the enjoyment of the highest attainable standard of physical and mental health.” From this ambitious and result-oriented wording it follows that states are obliged to choose policies and other measures that they can effectively implement, taking into account available resources, and that best guarantee the right to health of individuals and society.¹⁸ This obligation imposes a need to continually strive for a higher level of protection and is by nature boundless in this respect.

15 EU, *European Convention on Human Rights* (Rome) 4 November 1950, 213 UNTS 221, 312 ETS 5.

16 UN High Commissioner for Human Rights, Study on the impact of the world drug problem on the enjoyment of human rights (A/HRC/30/65, 2015) para 24–30; see also the extensive overview in Joanne Csete *et al.*, “Public health and international drug policy”, 387 *The Lancet* 10026 (2016) pp. 1427–1480.

17 *E.g.* CESCR, General Comment No. 14 (2000): ‘Right to Health’ (E/C.12/2000/4), para 4, 9, 10, 11; ECSR, *Digest of the Case Law of the European Committee of Social Rights* (Council of Europe, 2008) pp. 81–88.

18 Cf. Article 2 ICESCR.

Within the scope of the right to health a plethora of all sorts of obligations arises.¹⁹ Next to negative obligations to respect individuals' control over their own body and health, there are numerous positive obligations, including regulation and policies, budget availability, promotional activities, implementation of monitoring measures, identifying the health indicators and criteria, and measures that enable individuals and communities to realize their right to health.²⁰ It follows that regulation of cannabis for recreational use is within the sphere of influence of the right to health in Article 12 ICESCR and Article 11 ESC. Moreover, the broad scope of obligations ensuing from the right to health, as interpreted by the CESCR and the ECSR, means that the arguments presented in favour of cannabis regulation and that relate to individual and public health – assuming their validity – are all in principle relevant for these obligations under the right to health. This relates to arguments that defend that through regulation authorities would better be able to, for example, safeguard the quality of cannabis; monitor the quality of the cannabis chain in general; protect the health of juveniles through a stricter control on the ban of juvenile cannabis consumption; protect the health of residents who suffer from negative consequences of home cultivation and illegal nurseries, which include a direct risk of seriously harmful infections (such as *Legionella*), unsafe wiring of the electrical installations and the ensuing risk of fire; separate the soft drugs and hard drugs markets and thus prevent users to slide down the slippery slope towards hard drugs; and on balance increase public health through regulated availability of cannabis as a less risky alternative stimulant as compared to alcohol or tobacco.²¹

Although more nuanced, a similar conclusion can be drawn with regard to many of the arguments that relate to the protection of the life, physical and mental integrity and privacy of individuals. Arguments related to reduction of peripheral crime as well as the protection of the health and lives of individuals from murder, manslaughter, death by negligence due to, for example, hemp nursery fires and/or harmful infections, and the prevention of overdoses or the contraction of fatal diseases resulting from the use of hard drugs – by separating the soft drugs and hard drugs markets – are all relevant from the perspective of the positive obligation to protect the right to life (Articles 6 ICCPR and

19 CESCR General Comment No. 14, *supra* note 17, para 1; ECSR Digest, *supra* note 17, pp. 81–88.

20 *Ibid*, para 9, 36; ECSR Digest, *supra* note 17, p. 84.

21 See for the inventory of arguments the several sources mentioned in for example *supra* note 1 and 9.

2 ECHR²²). For the obligations ensuing from the right to physical and mental integrity (Articles 7 ICCPR and 3 ECHR²³), arguments related to reducing peripheral crimes, such as grievous bodily harm and severe burns and severely harmful infections, are relevant. For the right to privacy (Articles 17 ICCPR and 8 ECHR²⁴), it is relevant that regulation of cannabis is assumed to lead to reduction of peripheral crime (assault and threats) and protection of the residents' environment through reduction of substantial nuisance and damage (such as caused by serious levels of stench, noise, flooding, fire and harmful infection), if there is a substantial and fairly direct limitation of the enjoyment of one's private life.

The finding that arguments pro regulation of cannabis cultivation and trade for recreational use are relevant from the perspective of human rights is only the first step towards the applicability of positive human rights *obligations* – the second step is taken next.

2.2 *Regulated Legalization as a Positive Human Rights Obligation*

None of the aforementioned human rights instruments – *i.e.* the ICESCR, ESC, ICCPR and ECHR – do resist regulated permission of the cultivation of and trade in cannabis for recreational use by adults.²⁵ That is, if and insofar as that drug policy *de facto* guaranteed individual and public health and the protection against violations of life, physical and psychological integrity and privacy better than a more prohibitive drug policy. The Human Rights Committee even explicitly advocates a drug policy based on individual and public health

22 See e.g. HRC, General Comment No. 6 (1982): "Right to Life" (HRI/GEN/1/Rev.9, Vol. 1) paras 3–5, and more elaborately, with many references, HRC, General comment No. 36: "Article 6 ICCPR on the right to life", Revised draft prepared by the Rapporteur (CCPR/C/GC/R.36/Rev.7, 2017) paras 4 and 22–35 (especially 30); see for the ECHR e.g. *Osman/The UK*, ECtHR (GC) 28 October 1998, no. 23452/94, paras 115–116; *Brincat/Malta*, ECtHR 24 July 2014, no. 60908/11, paras 103–117; *Ciechońska/Poland*, ECtHR 16 June 2011, no. 19776/04, paras 59–67; A.E.M. Leijten, *Core Rights and the Protection of Socio-Economic Interests by the European Court of Human Rights* (2015) pp. 351–359.

23 See e.g. HRC, General Comment No. 20 (1992): "Prohibition of torture and inhuman treatment" (HRI/GEN/1/Rev.9, Vol. 1) para. 2; D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley (eds.), *Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights* (2014) pp. 274–277.

24 See e.g. HRC, General Comment No. 16 (1988): "Right to privacy" (HRI/GEN/1/Rev.9, Vol. 1) para. 1; *Georgel and Georgeta Stoicescu/Romania*, ECtHR 26 July 2011, no. 9718/03, para 48–49, and with further references Harris, O'Boyle, Bates & Buckley, *supra* note 23, pp. 523, 532–536.

25 This is, however, different as regards juveniles; see ECSR Digest, *supra* note 17, p. 97. See also Article 33 of the Convention on the Rights of the Child.

and rejects a “zero tolerance” drug policy.²⁶ Even though states are required to discourage the use, production and marketing of substances such as narcotic drugs,²⁷ this does not necessarily have to take place through prohibition or repression.

The core question is therefore whether a drug policy that permits the cultivation of and trade in cannabis for recreational use is an acceptable and possibly even required vehicle for implementing the right to health, the right to life, the right to physical and psychological integrity (the right not to be subjected to inhuman treatment) and/or the right to privacy, if and insofar as that drug policy de facto guaranteed the protection of these rights better than a more prohibitive drug policy? In answer to this question, two alternative legal scenarios need to be assessed.²⁸ The first is that a state not only may regulate cannabis for recreational use, but indeed must do so pursuant to its positive human rights obligations under these rights (may and must). The second is that a state may and can implement the positive human rights obligations under these rights by regulating cannabis for recreational use, but is in fact not obliged to do so (may, can, not obliged). An important condition with both scenarios is that cannabis regulation protects the discussed human rights interests better than a prohibitive drug policy.

In relation to the right to health, we find the first scenario (may and must) the best defensible option, in principle. A crucial fundament to this conclusion is that under this right, states are obliged to use “all appropriate means” with which they can fully realize “the highest attainable standard of health”.²⁹ The obligation to implement the right to health is unlimited in the sense (1) that it has no ceiling (full realization of the highest attainable standard) and (2) that all measures that contribute to realizing the convention rights must be deployed if that is actually possible for the state (all appropriate means). This obligation to achieve results follows explicitly from Article 12 ICESCR as well as the case law of the CESCR and the ECSR.³⁰ States have “a specific and continuing obligation to move as expeditiously and effectively as possible towards

26 HRC, Concluding Observations (Georgia) (CCPR C/GEO/CO/4, 2014) under C.

27 See CESCR General Comment No. 14, *supra* note 17, para 9, 15, 36, 51; ECSR Digest, *supra* note 17, p. 84. See also, e.g., Ben Saul, David Kinley & Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights* (2014) p. 1031, 1060–1061.

28 For a much more elaborate analysis, see sections 2.3.12(ii) in Van Kempen & Fedorova (2018 II), *supra* note 11.

29 Article 12 in combination with Article 2 ICESCR.

30 See e.g. CESCR General Comment No. 14, *supra* note 17, para 1, 33; ECSR, Conclusions 2013 on the ESC (The Netherlands) (2014) under: Article 11; *International Federation of Human Rights Leagues (FIDH)/Greece*, ECSR 23 January 2013, no 72/2011, para 144. See also ECSR Digest, *supra* note 17, p. 81. For more general characterisation of obligations ensuing

the full realization” of the right to health.³¹ To achieve the highest attainable standard of health, states must take all reasonable and effective measures that are at their disposal.³² Relevant new knowledge and developing insights may play a role in this. Importantly, a state is primarily responsible for considering which measures or steps, given the specific circumstances in the state, are the most appropriate so as to fulfil its human rights obligations (principle of primarity).³³ This applies to all human rights obligations, including the obligation to achieve progressively the full realization of the right to health.³⁴ If a state in accordance with the requirement of “pacta sunt servanda”³⁵ genuinely believes and demonstrates that regulated permission of the cultivation of and trade in cannabis for recreational use best protects individual and public health, that state therefore meets its obligation under the convention to achieve “the highest attainable standard” of health by introducing such regulation. People’s participation and democratic decision making process – which are relevant factors when ascertaining what the ‘most appropriate means’ are for a state to take in order to realize the right to health³⁶ – reinforce the assumption that the policy of regulation is indeed the most appropriate and effective measure that the state is required to take. We conclude that if regulated permission of cannabis cultivation and trade for recreational use is the most appropriate and

from the ICCPR, see CESCR, General Comment No. 3 (1990): The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant) (E/1991/23) para 1.

31 CESCR General Comment No. 14, *supra* note 17, para 31.

32 *Ibid*, para 2, 30–45, 52. See also, among other sources, Office of the United Nations High Commissioner for Human Rights, *Economic, Social and Cultural Rights. Handbook for National Human Rights Institutions* (UN/OHCHR, 2005) pp. 10–12; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, Report A/69/299 (2014) para 3; Saul, Kinley & Mowbray, *supra* note 27, pp. 1041–1049. See also ECSR Digest, *supra* note 17, p. 15.

33 This term is coined by Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (2009) pp. 5–6.

34 CESCR General Comment No. 14, *supra* note 17, para 42, 53; CESCR General Comment No. 3, *supra* note 30, para 4; ECSR, Conclusions XX-3 (2014) on the ESC (Denmark), under: Article 6; *International Federation of Human Rights (FIDH)/Belgium*, ECSR 18 March 2013, no 75/2011, para 54; ECSR Digest, *supra* note 17, p. 14.

35 See Article 26 VCLT: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” See also *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ 25 September 1997, *I.C.J. Reports* 1997, p. 7 at 78–79, para 142; Daniel Davison-Vecchione, “Beyond the Forms of Faith: Pacta Sunt Servanda and Loyalty”, 16 *German Law Journal* 5 (2015) pp. 1163–1190 at 1166.

36 CESCR General Comment No. 14, *supra* note 17, para 11, 17 and 54; *Marangopoulos Foundation for Human Rights (MFHR)/Greece*, ECSR 6 December 2006, no 30/2005, para 205 and 216. See also Special Rapporteur on health, Anand Grover, *supra* note 32, para 3; John Tobin, *The Right to Health in International Law* (2012) p. 111.

effective measure to safeguard the highest attainable standard of individual and public health in a country, it can be seen as an obligation arising from the right to health to adopt such regulation, provided a number of criteria that we will discuss later are met.

Also in relation to the rights to life, physical and psychological integrity and privacy we ultimately conclude that the first scenario (may and must) can in principle be best defended, although this is less straightforward than with regard to the right to health. The reason for this is that states do not have an obligation with the rights in the ICCPR and the ECHR to achieve “full realization”, only an obligation to “respect and to ensure” or “secure” these rights, to protect them effectively at the level and in the manner required by the HRC and the ECtHR. To that end, the states parties are required to take (all) measures that are “necessary” and “appropriate” to achieve the required level of protection.³⁷ If regulated legalization of cannabis for recreational use is an effective policy with which this level of protection can be best achieved, this policy could qualify in principle as an appropriate measure and thus fall within the scope of positive human rights obligations under the discussed rights. Yet, the question remains whether a state *must* implement such a policy. Given the margin of appreciation that states have in the implementation of ‘appropriate’ measures, the answer depends on one’s perspective on the interpretation of state *obligation*. Again, two approaches can be defended. In both cases, the assumption applies that the state, in accordance with its primary responsibility to decide which measures are most appropriate to fulfil the positive obligation of protection, taking into account the specific circumstances in the state (the principle of primarity), draws the conclusion, in good faith (“pacta sunt servanda”) and with sufficient substantiation, that regulated permission of cannabis for recreational use is the best way to fulfil the positive obligations of protection of the rights regarding life, physical and psychological integrity and privacy.

The first perspective assumes that states are only obliged to take appropriate measures within a certain “margin of appreciation” (discretionary space).³⁸ The scope of the human rights obligation is thus determined by this margin of appreciation. Within the margin, the state can choose one of the possible approaches (‘appropriate steps’) that fulfils the positive obligation of protection,

37 See Articles 2 ICESCR and 1 ECHR. See also HRC, General Comment No. 31 (2004): ‘General Legal Obligation’ (CCPR/C/21/Rev.1/Add.13) para 14; *Sargsyan/Azerbaijan*, ECtHR (GC) 16 June 2015, no 40167/06, para 129; *Assanidze/Georgia*, ECtHR (GC) 8 April 2004, no 71503/01, para 147.

38 On the margin of appreciation, see with further references *e.g.* Andrew Legg, *The Margin of Appreciation in International Human Rights Law. Deference and Proportionality* (2012) pp. 5–6; Harris, O’Boyle, Bates & Buckley, *supra* note 23, pp. 14–17.

but it is not required to implement a certain approach. So if, for example, the margin leaves room for approach A (preventing 100 unlawful convention breaches) and for approach B (preventing 75 unlawful breaches), from this perspective the state is not required to choose the more effective A over the less effective B. With this first perspective, it can be argued that regulated permission of cannabis cannot qualify as a positive obligation, not even if this were the most effective way to fulfil the obligation of protection, since the state would within its margin of appreciation still be completely free to opt for the less effective prohibitive approach.

The second perspective emphasizes that the state is required to take those appropriate measures that actually fulfil the positive obligation of protection most effectively (approach A above). With this perspective, the margin of appreciation does not determine the scope of the obligation but functions as an instrument to get states to implement the most effective measures, given the particular – social, moral, political, economic etc. – constellation of that state. This gives states a certain freedom to escape – when motivated – from implementing measures that are experienced as unattractive or impossible given the state's constellation. States act in perfect accordance with this perspective if they adopt measures that are the most effective for them on the basis that they are required to. This means that regulated permission of cannabis cultivation and trade can qualify as a positive obligation, if this permission can contribute to the realization of the rights to life, physical and psychological integrity and/or privacy more effectively than a prohibition. That a state under its 'margin of appreciation' could nevertheless argue that it, considering its constellation, has reasons to opt for a less effective approach does not affect this observation in any way.

Although the first perspective is probably closer to the way positive obligations and the "margin of appreciation" function in practice, we believe that the second perspective can be defended best within the framework of the human rights conventions. Four arguments are relevant to this. First, the 'object and purpose' of these conventions is to protect human rights effectively. Unqualified freedom for states to settle for less effective approaches than they could realize (approach B over A in the above example) does not fit this 'object and purpose'. Secondly, the jurisprudence of both the HRC and the ECtHR shows that states must take all necessary or appropriate measures so as to secure and protect the convention rights.³⁹ One may wonder whether measures that are less effective in preventing unlawful breaches of convention rights still qualify as "appropriate" on essentially the same basis as achievable and more

39 See *supra* note 37.

effective measures. Thirdly, the first perspective ignores the rationale and purpose of the “margin of appreciation”. With positive obligations, it is primarily aimed at being able to determine what – in the light of the constellation of the state – the “appropriate steps” are to meet the obligation to secure convention rights. Even if a state adopts less than optimal measures and in doing so remains within the margin, this is still only allowed to the extent that the state presents compelling reasons for doing so.⁴⁰ Finally, in accordance with the principle of primarity, the state has the primary responsibility to decide which measures are most appropriate to fulfil the positive human rights obligations taking into account the specific circumstances of that state. This implies that if a state in accordance with the principle of “pacta sunt servanda” genuinely believes and convincingly argues that regulated legalization of the cultivation of and trade in cannabis for recreational use is the best way to guarantee the health and safety of individuals and to prevent crime, that state therefore in implementing that policy first and foremost meets the obligation to secure the convention rights (of course: in as far as these rights cover these interests). If such regulation has the support of a large part of society and comes about after democratic decision-making, it reinforces the assumption that this policy and those measures are indeed the appropriate steps that the authorities must take.

2.3 *Positive Human Rights Obligations Presume a Framework of Five Cumulative Conditions*

The above exploration implies five primary conditions that positive human rights obligations impose on regulated legalization – or any other form of regulated permission – of cannabis cultivation and trade for recreational use.

1. Regulated legalization should protect interests that are relevant from the perspective of positive human rights obligations (requirement of relevance). Otherwise, the potential applicability of such obligations is out of the question.
2. Next to relevance, the requirement of substantiated greater effectiveness must be fulfilled in order for the relevant positive human rights obligations to be applicable. To this end, the state should substantiate that the regulation of cannabis cultivation and trade for recreational use provides for a more effective protection of human rights than a prohibitive policy

40 See e.g. *Söderman/Sweden*, ECtHR (GC) 12 November 2013, no 5786/08, para 78–117 (the state’s arguments do not convince the Court); *Kotov/Russia*, ECtHR (GC) 3 April 2012, no 54522/00, para 131 (the State’s justification is one of the factors to lead the Court to assume that there is no infringement of positive obligations).

that is prescribed by the drugs conventions. Without this greater effectiveness, no obligation under human rights law can arise. The substantiation of this greater effectiveness should in turn be based on genuine analysis, argumentation and considerations that are convincing and that are, as far as possible, based on available scientific and other research data.

3. Regulated legalization must be based on people's participation and democratic-decision making. With that the state will be able to ascertain what the most effective available means for the best realization of its positive human rights obligations are in accordance with the so-called principle of primarity. Because every society has its own constellation and idiosyncrasies, the most effective approach in one state does not necessarily work in another state. This means that if regulated permission of cannabis cultivation and trade for a certain state would qualify as an obligation under the discussed rights, this does not automatically apply to other states as well.
4. When a state proceeds with regulation of cannabis cultivation and trade, it must respect human rights protection in other states and the primary responsibility of these other states to decide on the best policy within their jurisdictions. The regulating state should thus make sure to enforce its regulation to such a degree that other states are not confronted with negative consequences, most importantly with the illegal export from the regulating state. The protection offered in that sense to other states should not be less – and preferably even more effective – than that offered under the prohibitive approach that fully accords with the UN drugs control system. Therefore, the state should create a closed system and/or chain for cultivation, trade and possibly also use of cannabis within the state or between like-minded states.
5. In case of legalization, a state should create a policy of discouragement, limitation and increased public awareness of the risks associated with recreational use of cannabis.⁴¹ This is necessary not only to ensure that the national drugs policy adequately protects human rights; the right to health itself creates an obligation to that end. When developing such a policy of discouragement, the state needs to consider what measures are most effective.

⁴¹ See *supra* note 28.

3 Priority of Positive Human Rights Obligations over UN Narcotic Drug Convention Obligations

It follows that there is a strong, and indeed the strongest, case to be made for regulated permission of cannabis to qualify as a positive human rights obligation under certain conditions. When this is the case, the state's human rights obligations interfere with its obligations under the drugs conventions. On the basis of our analysis of particularly the Vienna Convention on the Law of Treaties (VCLT),⁴² the Charter of the United Nations (UN Charter),⁴³ the case law of the International Court of Justice (ICJ), the work of the International Law Commission (ILC) and the pertinent relevant commentaries and literature, we conclude that in case of such interference positive human rights obligations can provide national governments with sufficient room under public international law to derogate from the UN drug control system.⁴⁴ The main arguments on which we base our conclusion that positive human rights obligations have priority over the drug conventions obligations are presented below. Notably, none of these arguments is by itself indispensable for this conclusion, which would still hold if one or several of these arguments fell by the wayside.

3.1 *Formal Priority Position of Positive Human Rights Obligations*

Although the classic rules about determining precedence – that is the *lex specialis* rule (speciality), the *lex posterior* and *prior* rules (temporality) and the *lex superior* rule (the importance of the interest at stake) – have only limited value when resolving the interference between human rights and drugs conventions obligations, there are several important arguments that support the position of formal priority of human rights obligations.

While establishing the “same subject matter” proves to be an important obstacle to the applicability of Article 30 VCLT, an analogous application of this provision to the cannabis issue supports the prevalence of human rights conventions over the drug control conventions. In this respect, it is relevant that Article 14(2) of the Illicit Traffic Convention explicitly states that measures against illicit cannabis cultivation “shall respect fundamental human rights”. Moreover, the preparatory work for both the Single Convention and the Illicit Traffic Convention contains several references to human rights that

42 Vienna Convention on the Law of Treaties (Vienna) 23 May, 1969, 1155 *UNTS* 331, in force 27 January 1980.

43 Charter of the United Nations, San Francisco, 26 June 1945, 1 *UNTS* XVI, in force 24 October 1945.

44 See for a much more comprehensive analysis, from which the following is derived, chapter 3 in Van Kempen & Fedorova (2018 11), *supra* note 11.

implicitly or explicitly suggest state's awareness of the importance that the obligations under the drugs conventions should not violate human rights.⁴⁵ Besides, according to the monitoring bodies of the drugs control system, *i.e.* the International Narcotics Control Board (INCB) and the Commission on Narcotic Drugs (CND), implementation and execution of that system must be carried out in accordance with human rights norms and must promote such norms.⁴⁶

The relevance of the *lex superior* rule to the cannabis issue is also expressed by virtue of Article 103 of the UN Charter, which stresses that the obligations under the UN Charter prevail over other obligations. Although the exact scope of Article 103 is not absolutely clear or without controversy,⁴⁷ considering that the concept of "obligations under the Charter" must be interpreted rather broadly⁴⁸ and in the light of the preamble and the text of the many Charter provisions referring to human rights,⁴⁹ the object and purpose of the UN Charter and the case law of the International Court of Justice about it,⁵⁰ we conclude that those provisions create obligations for the member states, to respect and observe human rights.⁵¹ Accordingly, pursuant to Article 103

45 See e.g. United Nations, "Conference for the adoption of a Single Convention on Narcotic Drugs. New York – 24 January–25 March 1961, Official Records, Volume I" (E/CONF. 34/24) pp. 196–197; 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, Volume I" (E/CONF. 82/16) pp. 18 (para 101), 25 (para 200), 26 (para 201) and 34 (para 45).

46 See the references to the INCB and the CND in the next section.

47 See e.g. Rain Liivoja, "The Scope of the Supremacy Clause of The United Nations Charter", 57 *International and Comparative Law Quarterly* (2008) pp. 583–612 at 584–585; Robert Kolb, "Does Article 103 of the Charter of the United Nations Apply Only to Decisions or Also to Authorizations Adopted by the Security Council?", 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004) pp. 21–35 at 21.

48 See Rain Liivoja, *supra* note 47, pp. 588–589; Robert Kolb, *supra* note 47, pp. 21–35; A. Paulus & J.R. Leiß, 'Article 103', in B. Simma *et al.* (eds.), *The Charter of the United Nations* (2012) pp. 2110–2137 at 2116 and 2124–2125, with a reference to case law of the ICJ.

49 See Article 1(3) on the objectives of the UN and Articles 13(1)(b), 55(c), 56, 62(2), 68 and 76(c) on the duties of the General Assembly, the member states, ECOSOC and the trusteeship system.

50 See, e.g. *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ 24 May 1980, *I.C.J. Reports* 1980, p. 3 at 42 (para 91); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ 21 June 1971, *I.C.J. Reports* 1971, p. 16 at 46 (para 92) and 57 (para 131).

51 See also H. Lauterpacht, *International Law and Human Rights* (1968 (1950)) pp. 147–148. Cf. e.g. Security Council Resolution 2170 (S/RES/2170, 2014); Security Council Resolution 1456 (S/RES/1456, 2003).

UN Charter, those human rights obligations prevail over other obligations from other international agreements that conflict with them.⁵² Whereas obligations from the drugs conventions do not fall within the scope of Article 103, that is the case for the *negative* obligations to respect the rights regarding health, life, physical and psychological integrity and privacy from the UDHR, the ICESCR and the ICCPR. It can be argued convincingly that this also applies to the positive obligations arising from these rights that may be relevant for the regulated permission of cannabis cultivation and trade. The International Court of Justice recognizes on several occasions that an international instrument is “not static, but [...] by definition evolutionary”.⁵³ This then also has to apply to the Charter.⁵⁴ As a result, the meaning of formulations it contains also depends on legal and social developments. By now, positive obligations are undeniably part and parcel of positive international human rights law, including the ICCPR, whether one agrees with it or not.⁵⁵ In this light, the general references in the Charter to ‘human rights and fundamental freedoms’ presently comprise positive obligations as well. That is, if the obligation may be assumed to qualify as a solid obligation under a relevant convention, such as the ICESCR or the ICCPR. Positive obligations to protect actively interests regarding the health and safety of individuals and the prevention of crime have been embedded so firmly in the international human rights jurisprudence and thereby in the human rights system, that this is indeed the case in our view. Those obligations then unconditionally prevail over obligations from the drugs conventions pursuant to Article 103 UN Charter.

52 Special Rapporteurs on globalization and its impact on the full enjoyment of all human rights, J. Oloka-Onyango and Deepika Udagama, Progress report (E/CN.4/Sub.2/2001/10, 2001) para 58; Jordan J. Paust, “Human Rights on the Battlefield”, 47 *The George Washington International Law Review* (2015) pp. 509–561 at 519–520, 530–531; Seung Hwan Choi, “‘Human Dignity’ as an Indispensable Requirement for Sustainable Regional Economic Integration”, 6 *Journal of East Asia and International Law* (2013) pp. 81–105 at 87, 90–91; Destaw A. Yigzaw, “Hierarchy of Norms: The Case for the Primacy of Human Rights over WTO Law”, 38 *Suffolk Transnational Law Review* (2015) pp. 33–68 at 62–64; E.H. Riedel & J.-M. Arend, “Article 55 (c)”, in B. Simma *et al.* (eds.), *The Charter of the United Nations* (2012) pp. 1565–1602 at 1573.

53 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ 21 June 1971, *I.C.J. Reports* 1971, p. 16 at 31 (para 53) (on the Covenant of the League of Nations); see also *The Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ 25 September 1997, *I.C.J. Reports* 1997, p. 7 at 67–68 (para 112).

54 According to A. Peters, ‘Article 25’, in B. Simma *et al.* (eds.), *The Charter of the United Nations* (2012) pp. 787–854 at 824.

55 For a critical stance on this, see P.H.P.H.M.C. van Kempen, “Four Concepts of Security – A Human Rights Perspective”, 13 *Human Rights Law Review* (2013) pp. 1–23.

The ESC and the ECHR do not play a direct part here, for they are not part of UN law. Nevertheless, recognition in these instruments of the rights to health, life, physical and psychological integrity and privacy supports their universality. Moreover, it follows from the case law of the ECtHR that human rights obligations under the ECHR have a similar absolute validity and that the ECHR is a relevant factor for the obligation of UN organs to respect human rights.⁵⁶ It is plausible that this also applies in principle to the ESC, bearing in mind that this convention has the same formal status as the ECHR.

3.2 *Substantive Priority Position of Positive Human Rights Obligations*

From a more substantive approach of the *lex superior* rule – which acts not so much as a formal rule of priority but rather as a principle for interpretation and consideration – the thing that matters most is that human rights, unlike the drugs conventions, have a special status. To be sure, this special status does not mean that human rights norms have absolute priority in the sense that they are automatically to be given hierarchical precedence beyond the art. 103 UN Charter priority rule or when they have *jus cogens* status. Rather, they have a special weight on the basis of substantive criteria in relation to other international norms, which has to be taken into account when interpreting these norms or resolving conflicts between them.

The special weight of human rights is firstly reflected in the rationale and the main purposes of the principal public international law organizations, such as the UN and the Council of Europe (CoE).⁵⁷ In addition, within the system of international law, the special position of human rights norms is reflected by the fact that human rights mentioned in the UDHR (including all four rights central to this article) are generally considered to belong to customary law,⁵⁸ that human rights are perceived by their nature as *erga omnes* and ‘integral

56 *Al Jeddah/The UK*, ECtHR (GC) 7 July 2011, no 27021/08, para 102, confirmed in *Nada/Switzerland*, ECtHR (GC) 12 September 2012, no 10593/08, para 171–172.

57 See the Preamble and Articles 1(3), (1)(b), 55(c), 56, 62(2) and 76(c) UN Charter and Article 1 CoE Statute.

58 See e.g. L.B. Sohn, “The Human Rights Law of the Charter”, 12 *Texas International Law Journal* (1992) pp. 129–140 at 131–134, and also with further references Riedel & Arend, *supra* note 52, pp. 1578–1579; Richard B. Lillich, “The Growing Importance of Customary International Human Rights Law”, 25 *Georgia Journal of International and Comparative Law* (1995–1996) pp. 1–30. See different Bruno Simma & Philip Alston, “The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles”, 12 *Australian Year Book of International Law* (1988–1989) pp. 82–108, but they do eventually qualify universal human rights as “general principles” of international law (cf. Article 38(1) ICJ Statute).

obligations'⁵⁹ and, admittedly more indirectly, by the fact that most *jus cogens* norms are human rights (although the positive obligations deriving from the four relevant rights do not have the status of *jus cogens* norms in our view). Moreover, the special status of human rights can be derived from specific provisions in general agreements as well as from international case law.⁶⁰ That special status extends to positive human rights obligations.⁶¹

It is also important that authorities such as the UN General Assembly,⁶² the INCB,⁶³ the CND⁶⁴ and the Special Rapporteur on the right to health⁶⁵ as well as the Special Rapporteurs on globalization and its impact on the full enjoyment of all human rights⁶⁶ are all of the opinion that the drugs conventions

59 See *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain, Second Phase)*, 1CJ 5 February 1970, *I.C.J. Reports* 1970, p. 3 at 32 (para 33–34), and ILC, “Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law”, finalized by Martti Koskenniemi (A/CN.4/L/682, 13 April 2006) paras 385, 391. See also, e.g., Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (2000) p. 135; Dinah Shelton, “Hierarchy of Norms and Human Rights: Of Trumps and Winners”, 65 *Saskatchewan Law Review* (2002) pp. 301–331 at 307; Catherine Brölmann, “Law-Making Treaties: Form and Function in International Law”, 74 *Nordic Journal of International Law* (2005) pp. 383–404; Joost Pauwelyn, “A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?”, 14 *European Journal of International Law* 5 (2003) pp. 907–951 at 933–934 for example; M. Craven, “Legal differentiation and the concept of the human rights treaty in international law”, 11 *European Journal of International Law* (2000) pp. 489–519.

60 See e.g. Article 60(5) VCLT, Article 21(3) Statute of the International Criminal Court, and Article 50(1)(b) ILC Draft articles on Responsibility of States for Internationally Wrongful Acts. And furthermore: *Al-Saadoon and Mufdhi/The UK*, ECtHR 2 March 2010, no 61498/08, para 127–128; *Al-Dulimi and Montana Management Inc./Switzerland*, ECtHR (GC) 21 June 2016, no 5809/08, para 139–149.

61 See section 3.7.9 in Van Kempen & Fedorova (2018 11), *supra* note 11.

62 See e.g. UN General Assembly Resolution 66/183, “International cooperation against the world drug problem”, adopted 66th plenary meeting on 19 December 2011 (A/RES/66/183, 2012) paras 2 and 14(a).

63 INCB Report 2017, pp. 44 (no 250) and 45 (no 258), and also e.g. INCB Report 2015, p. iv; INCB Report 2014, p. iii, 1 (nos 1–2) and 8–9 (nos 35–38); the importance of respecting human rights was given more prominence for the first time by the INCB in INCB Report 2007, p. 2 (no 7), p. 5 (nos 20–21) and p. 9 (nos 37–38).

64 See e.g. CND Resolution S-30/1 (A/RES/S-30/1, 2016) Annex; CND Resolution 56/16 (E/CN.7/2013/14, 2013) preamble; CND Resolution 58/4 (E/CN.7/2015/15, 2015) preamble.

65 Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, Report A/65/255 (2010) para 10.

66 Special Rapporteurs on globalization and its impact on the full enjoyment of all human rights, J. Oloka-Onyango and Deepika Udagama, Progress report (E/CN.4/Sub.2/2001/10) para 58, and Final report (E/CN.4/Sub.2/2003/14) Annex, para 6.

may only be implemented with due regard for human rights.⁶⁷ Insofar as this specifically concerns measures to prevent and eradicate, among other things, illicit cannabis cultivation, this also follows from Article 14(2) of the Single Convention. The Special Rapporteur on the right to health makes it clear that in the event of a conflict between human rights obligations and obligations under drugs conventions, the former take precedence.⁶⁸ There is no reason to assume that this would not also apply for the positive obligations which are relevant to the cannabis issue. On the contrary, these positive obligations happen to have found solid recognition under the general human rights conventions and therefore belong to these convention systems, in other words ‘human rights and fundamental freedoms’.

4 From Positive Human Rights Obligations to *inter se* Modification of the UN Narcotic Drugs Conventions

In case of interference between positive human rights obligations and obligations arising from the drug control system, the former thus have priority. This means that if regulated legalization of cannabis cultivation and trade is genuinely based on positive human rights obligations, according to international law the drugs conventions system will need to be interpreted and applied in such a way that a state can proceed with that regulation. The question is how the interference between the human rights and the drug control obligations should be dealt with. Several approaches are conceivable. A state could choose to legalize cannabis in national law in conformity with its positive human rights obligations without changing its formal relation with the UN narcotic drugs conventions. It may also opt for legalization after, for instance, denunciation and re-accession with new reservations. However, a more attractive alternative from the perspective of international law and international relations is presented by Boister & Jelsma. They argue that a possible option for effecting compatibility of the reform of domestic cannabis laws with the reforming state party’s commitments under the UN narcotic drug conventions is

67 See also, for example, Human Rights Council, “Contribution to the implementation of the joint commitment to effectively addressing and countering the world drug problem with regard to human rights”, Resolution 37/L.41 (A/HRC/37/L.41, 2018); UN Sub-Commission for the Prevention of Discrimination and the Protection of Minorities, Resolution 1998/12 (E/CN.4/Sub.2/RES/1998/12) para 1.

68 Special Rapporteur on health, Anand Grover, *supra* note 65, para 10.

the conclusion of *inter se*⁶⁹ agreements among like-minded parties permitting cannabis cultivation and trade for recreational use.⁷⁰

Article 41 of the VCLT recognizes the possibility to conclude agreements to modify multilateral treaties between certain of the parties only. According to section 1 of this provision, two or more of the parties to a multilateral treaty may conclude such an agreement if “(a) the possibility of such a modification is provided for by the treaty; or (b) the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.” Since the UN narcotic drugs conventions do neither expressly nor implicitly prohibit *inter se* agreements in general, these are in principle allowed provided that they meet the conditions of Article 41(1)(b) VCLT.⁷¹ We assert that so called *inter se* modification would offer the best solution to normalize the interference between positive human rights obligations and obligations arising from the drug control system in case multiple states favour the option to regulate cannabis cultivation and trade for recreational use, but amendment of the UN narcotic drugs conventions is not a realistic option.

4.1 *The Potential Value of inter se Modification for the Positive Human Rights Obligations Approach*

Whereas positive human rights obligations under international law can provide room for states to opt for regulated legalization of cannabis cultivation and trade, they do not in itself resolve the interference between human rights obligations and obligations under the UN narcotic drug conventions.⁷² This means that if a state were to choose to regulate cannabis in national law in conformity with its positive human rights obligations without changing its formal relation with the UN narcotic drugs conventions, the interference between the different obligations would remain ‘hanging in the air’. This is a less attractive option from the perspective of several international law principles that are discussed below. *Inter se* modification can function as a suitable instrument

69 The term *inter se* means: among or between themselves; see *Black’s Law Dictionary* (Free Online Legal Dictionary, 2nd Ed).

70 See in this journal Neil Boister & Martin Jelsma, “Inter Se Modification of the UN Drug Control Conventions: An Exploration of its Applicability to Legitimise the Legal Regulation of Cannabis Markets” 20:4–5 *International Community Law Review* p. 458.

71 Boister & Jelsma, *supra* note 70, p. 467.

72 Cf. Jelsma, Boister, Bewley-Taylor, Fitzmaurice & Walsh, *supra* note 1, pp. 1–43 at 1 and 11.

to resolve the interference in line with the content and purport of these principles. It can do so by establishing an international framework within which states can effectuate their positive human rights obligations that are relevant for the international drugs control system.

4.1.1 The Importance of Achieving Harmony through Systemic Integration

In the event of interference between international norms, international law calls for harmonizing the norms as much as possible.⁷³ Of particular relevance in this respect are the presumption against conflict, the presumption of compatibility and the principle of systemic integration. The presumption against conflict ties in with the idea that states normally do not intend to enter into agreements that conflict with other obligations.⁷⁴ At the heart of the presumption against conflict lies the notion of a coherent and consistent legal system. The assumption is that the norms, conventions and subsystems within international law are compatible, in other words in harmony with each other. That compatibility is not always evident and will need to be achieved through interpretation in cases that do not immediately conform to this idea.⁷⁵ The principle of systemic integration comes into play with that interpretation. The primacy of the principle of systemic integration stems from the system of international law, has a strong foundation in legal practice and international case law, and is expressed in Articles 31(1) and 31(3)(c) of the VCLT.⁷⁶

When applying the harmonization approach, several important axioms apply. The first basic rule is that the interpretation must take place from within current international law. Although the will of the parties at the time of the creation of an international instrument is an essential interpretative tool, it is necessary to interpret and apply this instrument in the framework of the entire

73 See elaborately, with further references, sections 3.8 and 3.9 in Van Kempen & Fedorova (2018 11), *supra* note 11.

74 ILC, "Report 58th Session. Chapter XI. Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law" (A/61/10, 2006) p. 414, (para 251(19)); Sarah Joseph, *Blame it on the WTO?: A Human Rights Critique* (2011) p. 47; Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law relates to Other Rules of International Law* (2003) pp. 240–241.

75 Cf. Paulus & Leiß, *supra* note 48, p. 2118.

76 ILC Report Fragmentation (Koskenniemi), *supra* note 59, paras 410–480. Cf. *e.g.*, *Al-Adsani/The UK*, no 35763/97, ECtHR (GC) 21 November 2001, para 55; *Hassan/The UK*, no 29750/09, ECtHR (GC) 16 September 2014, para 77.

legal system that is in force at the time of interpretation.⁷⁷ That is the more so if concepts used in the convention are open or evolutionary in character⁷⁸ or if they concern ‘integral’ or ‘normative’ conventions.⁷⁹ Current international law includes at any rate the positive obligations regarding the rights to health, life, physical and psychological integrity and private life, all of which are relevant to the cannabis issue. Furthermore, the interpretation of law can be partly dependent on for example social, economic and technical developments.⁸⁰ In our opinion, this implies that if there are clear data indicating that obligations under the drugs conventions are less effective than is assumed, this must play a part in deciding on the content and scope of the drugs conventions pursuant to international law.

A second axiom holds that to arrive at systemic integration, one must look for common objectives (“object and purpose”) in the interfering norm systems⁸¹ or whether they seek to protect shared values.⁸² Thus, an *inter se* agreement to modify the drugs control system relative to cannabis must connect to these shared objectives and values. Extensive commonality between the interfering regimes can be seen on an abstract level: both the subsystem of human rights and that of the drug control system seek to promote the health and welfare of mankind and of human beings and acknowledge the primary importance of human rights thereto. The INCB emphasizes:

77 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ 21 June 1971, *I.C.J. Reports* 1971, p. 16 at 31, para 53. See also *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ 25 September 1997, *I.C.J. Reports* 1997, p. 7 at 67–68, para 112; *Award in the Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, 1AA 24 May 2005, *Reports of International Arbitral Awards* xxvii, pp. 35–125 at 66–67 (para 57–60). See also Campbell McLachlan, “The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention”, 54 *International and Comparative Law Quarterly* (2005) pp. 279–320 at 282–284, 316–319.

78 ILC Report Fragmentation (58th Session), *supra* note 74, pp. 415–416, para 22–23.

79 Brölmann, *supra* note 59, pp. 393–394.

80 See *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, ICJ 13 July 2009, *I.C.J. Reports* 2009, p. 213 at 244, para 70–71; ILC Report Fragmentation (58th Session), *supra* note 74, pp. 415–416, para 23.

81 Cf. Article 31(1) VCLT. See also ILC Report Fragmentation (Koskenniemi), *supra* note 59, paras 95 and 97.

82 See Ahmad Ali Ghouri, “Determining Hierarchy Between Conflicting Treaties: Are There Vertical Rules in the Horizontal System?”, 2 *Asian Journal of International Law* 2 (2012) pp. 235–266.

The drug control system is a balanced system, driving towards improving public health and welfare, based on the underlying principles of proportionality, collective responsibility and compliance with international human rights standards. Implementing this system means putting the health and welfare of mankind at the core of drug policies, applying comprehensive, integrated and balanced approaches to elaborating drug control policy, promoting human rights standards, giving higher priority to prevention, treatment, rehabilitation and the reduction of the negative consequences of drug abuse, and strengthening international cooperation based on shared responsibility.⁸³

On a more concrete second level, there is a less perfect commonality between purposes, but it is by no means absent. For example, both subsystems require discouragement of drug and/or cannabis use and fighting serious drug and/or cannabis related crime (by definition, these concern illicit acts taking place outside any regulatory framework). On the most concrete third level of purposes, the subsystems are diametrically opposed: the UN narcotic drugs conventions' assertion – that follows from its preambles, text, multi-layered framework of obligations, system of international cooperation, and preparatory work – that the risks of recreational drugs for public health are best combated by a prohibitive and repressive approach, is completely at odds with regulated permission of cannabis cultivation and trade because of positive human rights obligations to protect individuals' health, safety and security. The strong and more limited commonality on the first and second levels of abstraction can help harmonizing the strong interference on the third, most concrete level.

A third and last axiom signifies that an interpretation of the interfering norms where both systems retain optimal effect is preferred.⁸⁴ This is why it is important to see how much justice can be done to the obligations under the drugs conventions in addition to and under regulated permission of cannabis cultivation and trade.

4.1.2 Inter se Modification in Order to Protect the System of International Law

Although it is possible to take the aforementioned principles and axioms into consideration in national legislation that regulates cannabis cultivation and trade, such legislation will surely not result in the harmonization of the interfering treaty regimes on an international level. To some extent, this also is

83 INCB Report 2015, p. iv. See further *supra* note 63.

84 See also, with further references, Paulus & Leiß, *supra* note 48, p. 2118.

true for late reservations and for new reservations after denunciation and re-accession, since such solutions will primarily address the individual state only. When an appropriate result cannot be achieved through reinterpretation of the UN narcotic drug conventions and the amendment of these instruments is politically not a realistic option, both of which seem to be the case presently, at the international level only *inter se* modification can offer a somewhat general and continuous solution to the interference. Precisely because of the more general nature of *inter se* modification, it moreover offers the best guarantee that in a situation of interference between different treaty regimes or obligations, the quality (*i.e.*, clarity, consistency, coherence and determinativeness), the authority (*i.e.*, enforceability and validity) and the legal force (*i.e.*, obligatoriness and stringency) of the system of international law can be maintained.⁸⁵ Through *inter se* modification, it is possible to design a consensus-driven⁸⁶ framework of positive international law within which states have to remain when legalizing cannabis. It may thus prevent that individual states blatantly ignore their treaty obligations or deal with the interference between treaty obligations in completely different ways, thereby obscuring the relationship between the treaty regimes, causing even further fragmentation of international law, and undermining legal certainty, the authority and the binding force of international law. Furthermore, the possibility for states to become party to an *inter se* agreement should avoid that states feel obliged to formally adhere to the UN narcotic drug conventions, while they in practice strongly deviate from particular obligations thereunder, as currently is the situation in, for example, Canada, the Netherlands, Uruguay and several jurisdictions in the USA.⁸⁷

4.1.3 Inter se Modification in Order to Protect the UN Drugs Control System

In case states are to legalize cannabis in order to give effect to their positive human rights obligations, *inter se* modification could be more particularly useful to prevent needless prejudice to the – quality, authority and legal force of the – UN narcotic drug conventions. With a view to achieving harmony between human rights and the drugs control system through systemic

85 Cf. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ 30 November 2010, *I.C.J. Reports* 2010, p. 639 at 664 (para 66). Cf. also, *e.g.*, Jutta Brunnée & Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2010); Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, “The Concept of Legalization”, 54 *International Organization* 3 (2000) pp. 401–419.

86 Boister & Jelsma, *supra* note 70, p. 491.

87 See *supra* note 1.

integration of the treaty regimes, an *inter se* agreement could first of all confirm the main purposes of the drug control system that do not conflict with the legalization of cannabis for reasons of human rights protection. These purposes include the health and welfare of mankind, the discouragement of narcotic drugs use and the prevention and repression of serious narcotic drugs related crime. An *inter se* agreement could furthermore help to safeguard the obligations under these conventions that do not interfere with human rights obligations. Indeed, it is possible and therefore necessary to keep the drug control system fully operational with respect to a number of crucial points.⁸⁸ First, a state's decision to regulate cannabis cultivation and trade for the recreational use must not have more harmful – but preferably more beneficial – effects on other countries than a prohibitive policy that is fully compliant with the drugs conventions. Secondly, any cannabis cultivation and trade that is not part of the regulatory framework will have to be deemed illicit and must therefore be combated pursuant to the drug control system, *i.e.* by criminalization, prosecution, administrative prohibitions and seizure. Thirdly, recreational cannabis use in general – pursuant to Article 38 of the Single Convention and to the right to health⁸⁹ – will have to be discouraged. Finally, the regulatory framework will need to comprise, among other things, a licensing system for cultivation, production, distribution and trade of cannabis, as well as an effective system of supervision and inspection of persons and organizations which are involved in the cultivation, distribution and trade. This regulatory framework could well be designed along the lines of the UN narcotic drugs conventions' system of estimates.⁹⁰ Considering the importance of the principle of systemic integration in international law, all four points could and should be implemented and secured in an *inter se* agreement.

4.1.4 Inter se Modification in Order to Formalize the Correct Position of Human Rights in the UN Drugs Control System

Article 14(2) of the Illicit Traffic Convention confirms that the measures adopted to prevent illicit cultivation and eradication of cannabis plants “shall respect fundamental human rights”, and the INCB holds more generally that “Drug control action must be consistent with international human rights standards”.⁹¹ Still, the “relationship between drug control and human rights and

88 The following is based on the analysis in sections 3.10.3 and 3.12 in Van Kempen & Fedorova (2018 II), *supra* note 11.

89 See *supra* note 27.

90 See Articles 12–21bis Single Convention. See also Commentary Single Convention, *supra* note 8, p. 263 (no 1) and also p. 155 (no 1–2) and p. 221 (no 1).

91 INCB Report 2015, p. 6 (no 36); see further *supra* note 63.

the implications of that relationship for national responses to the world drug problem⁹² is by no means sufficiently addressed in the UN narcotic drugs conventions nor in the jurisprudence of the INCB. *Inter se* modification of these conventions could play a significant role in that regard. An *inter se* agreement could codify the relationship between international human rights law and the UN narcotic drug control system, in which human rights obligations have priority over drug treaty obligations. It would furthermore strengthen the international system of human rights protection, for it would emphasize the various ways in which both negative and positive human rights obligations are of crucial importance to the drug control system. Moreover, an *inter se* agreement could confirm the state's primary responsibility for implementing their international obligations in a manner that best fits the circumstances in that state's jurisdiction.⁹³ This can apply to their obligations under both the drugs conventions and human rights instruments.

4.2 *The Potential Value of the Positive Obligations Approach for inter se Modification*

The recognition of *inter se* agreements under international law provides states with an instrument to modify treaties to which they are a party, though only to some extent. An *inter se* agreement on cannabis regulation would clearly amount to *contra legem* modification, *i.e.* would constitute the reversal of obligations under the UN narcotic drugs conventions.⁹⁴ A crucial question is then whether such an *inter se* agreement could meet the conditions of Article 41(1)(b) of the VCLT. This means that the agreement must not affect the other parties in their rights and obligations under the treaty nor is it allowed to be incompatible with the effective execution of the object and purpose of the treaty as a whole. As we will address below, there are in fact some issues with meeting those conditions, all of which could be overcome through positive human rights obligations. We assert that the position that an *inter se* agreement on cannabis regulation is permissible under international law can be defended most solidly if states genuinely and convincingly argue that such regulation more effectively serves the interests of health and safety of individuals and the prevention of crime according to their positive human rights obligations. Since human rights obligations have priority over obligations under the drugs conventions, states can in principle even effectuate that priority position without meeting the conditions of Article 41(1)(b) of the VCLT. However, states should

92 INCB Report 2017, p. 44 (no 249).

93 See *supra* section 2.2.

94 See in the same fashion Boister & Jelsma, *supra* note 70, p. 461.

rather strive to harmonize the interfering treaty regimes as much as possible through systemic integration.⁹⁵ The positive human rights approach can give legitimacy, legality and substance to an *inter se* agreement on cannabis regulation. That way, the agreement may be acceptable and even attractive to more drugs convention parties. As stated above, this approach protects legal certainty, the authority and the binding force of international law.⁹⁶

4.2.1 The Overall Effective Execution of the Object and Purpose of the UN Narcotic Drugs Conventions

Determining the object and purpose of a treaty is not an exact science. Moreover, relative to probably every treaty it is possible to find arguments against any object and purpose determination one could come up with. This is because treaties are the result of compromise, contain multi-interpretable terms and often include differentiations, exceptions or systemic inconsistencies that may or may not be intended. Indeed, this also applies to the UN narcotic drug conventions.⁹⁷ However, what clearly does belong to the object and purpose of these conventions is the complete ban on circulation of narcotic drugs for non-medical and non-scientific use, considering⁹⁸ the preambles, the text of the articles, the multi-layered framework of obligations, the system of international cooperation, and the preparatory work of the Single Convention and the Illicit Traffic Convention. It seems that this applies *a fortiori* to narcotic drugs that are derived from the cannabis plant, the coca bush or the opium poppy, since these are expressly and more specifically regulated in these conventions. Cannabis (resin) is also included in both Schedule I and Schedule IV of the Single Convention. That means that the narcotic drug cannabis comes under the strictest regime the Convention provides for. The objective of this classification was to encourage states to apply the strictest control measures to cannabis.⁹⁹ As a result, it would be difficult to argue that a reservation under drug conventions that were to allow the state to legalize recreational cannabis

95 See *supra* section 4.1.1.

96 See *supra* section 4.1.2.

97 See several examples in Boister & Jelsma, *supra* note 70, p. 470 who even go so far as to speak of the “uncertain status of cannabis” in the Single Convention.

98 In conformity with Article 31 VCLT and Guideline 3.1.5.1 of the ILC Guide to Practice on Reservations to Treaties (included in ILC, “Report 63rd Session”, A/66/10/Add.1, 2011); see also ILC, Tenth report on reservations to treaties by Mr. Alain Pellet, Special Rapporteur (A/CN.4/558 and Add.1–2, 2005) para 81, with references to ICJ case law.

99 See David R. Bewley-Taylor & Martin Jelsma, “Regime change: Re-visiting the 1961 Single Convention on Narcotic Drugs”, 23 *International Journal of Drug Policy* (2012) pp. 72–81 at 76 and 77.

would not be “incompatible with the object and purpose of the treaty” according to Article 19 first sentence and under (c) VCLT.¹⁰⁰

However, a key question is whether this also excludes the possibility of an *inter se* agreement on cannabis regulation. That is not necessarily the case since under the Vienna Convention, the conditions for *inter se* agreements are less stringent than they are for reservations. There is a logic to this. Whereas a reservation has significance for all other states parties to the treaty whether they appreciate it or not, an *inter se* agreement only applies between the states parties that are in favour of it.¹⁰¹ According to Article 41(1)(b)(ii) of the VCLT, *inter se* modification may not relate to a provision, derogation from which is incompatible with “the effective execution of the object and purpose of the treaty as a whole”.¹⁰² This implies a two-step test. First, it must be considered whether the *inter se* modification infringes on “the object and purpose of the treaty as a whole” (instead of being only contrary to subsidiary objectives that do not belong to the overall object and purpose). If this is not the case, the condition of section (b)(ii) does not obstruct that modification. However, if – and only if – that interference with the “object and purpose” does occur, the second step of the test must still be taken. This means that it needs to be assessed whether the modification will also contravene “the effective execution” of the object and purpose of the treaty “as a whole” (thus, it must bear on the treaty’s overall effectiveness). The fact that Article 41(1)(b)(ii) requires this second step becomes particularly evident when one compares this provision with Article 19(c) VCLT, the text of which does not encompass such a requirement.

As for the first step: what is the object and purpose of the UN narcotic drug conventions “as a whole”? Is that only the health and welfare of mankind and of human beings,¹⁰³ because each of the more concrete primary goals of the conventions (availability of narcotic drugs for medical and scientific use, and eradication of drugs for recreational purposes) applies only to parts of the conventions? If that is the case, one could argue that an *inter se* agreement on cannabis regulation would be in conformity with Article 41(1)(b)(ii) of the VCLT if such modification would serve the health and welfare of mankind at least as adequately as the drugs conventions do. To us it seems that this puts too much

100 See also section 4.2.3 in Van Kempen & Fedorova (2018 1), *supra* note 9.

101 David S. Jonas & Thomas N. Saunders, “The Object and Purpose of a Treaty: Three Interpretive Methods”, 43 *Vanderbilt Journal of Transnational Law* 3 (2010) pp. 565–609 at 575.

102 The wording and construction of the equally authentic French, Spanish and Russian texts is very much the same and does not give rise the different conclusions than we reach hereafter.

103 See *supra* section 1.

weight on the “as a whole” clause. From a linguistic point of view, we find it hard to ascertain what the difference between the object and purpose of “the treaty” and of “the treaty as a whole” could be, since the phrase “the treaty” already implies that it is about the entirety of the treaty as one object. This approach also forces the “object and purpose” to be reduced to an abstraction with little specificity. Indeed, the “health and welfare of mankind” can be seen as the overall purpose of many treaties. There is also little evidence that “object and purpose” in Article 41 VCLT is intended to have a meaning significantly different from that in Article 19 (reservations) and Article 31 (interpretation) for example.¹⁰⁴ So we assert that an *inter se* agreement on cannabis regulation would interfere with a primary aspect of the object and purpose as a whole.

Yet, there is still the second step of the test, for which the “as a whole” clause is of much more significance in our view. The mere fact that a modification interferes with an objective that belongs to the object and purpose of the treaty as a whole does not by itself mean that that interference also obstructs the effective execution as a whole. For the following reasons it is not obvious that an *inter se* agreement on cannabis regulation would actually – not just in theory – jeopardize the conventions’ overall effective execution, i.e. would undermine the drugs control system as such. Such agreement would first of all only modify treaty obligations as regards cannabis and not involve all other substances. Moreover, even for cannabis the treaty obligations will not be done away with since, these can remain applicable for illegal cannabis, i.e. cannabis cultivation and trade taking place outside of the regulatory framework of the legalization. The constriction that the effective execution must be viewed “as a whole” furthermore seems to suggest that the strengthening of the effective execution of other convention goals by that same modification can counterbalance the weakening through *inter se* modification of the effective execution of the conventions relative to cannabis. If that is the case, it would be relevant when states parties to the *inter se* agreement could validly claim that they are actually better placed to discourage the use of drugs and to fight crime relative to other more harmful drugs effectively, for instance because regulated cannabis legalization will divide the different drugs markets. Meanwhile, it is of importance to note that the overall effective execution is also protected under the condition that *inter se* modification must not affect the other parties in their rights and obligations under the treaty (Article 41(1)(b)(i) VCLT).

104 Cf., e.g., *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ 28 May 1951, *I.C.J. Reports* 1951, p. 15–30 at 21; ILC Guide to Practice on Reservations to Treaties and commentaries, *supra* note 98, p. 410 (no 4).

Taking into consideration¹⁰⁵ also that the obligations under the UN narcotic drugs conventions neither enjoy *erga omnes* status nor qualify as ‘integral obligations’,¹⁰⁶ we find that it can be argued that an *inter se* agreement on cannabis regulation is possible within the limitations of Article 41(1)(b)(ii) VCLT. However, since much depends on the interpretation of the phrase “as a whole” it seems also possible – albeit less convincingly – to argue the opposite.

Therefore, if *inter se* modification with a view to allowing cannabis regulation were to be considered contrary to Article 41(1)(b)(ii) VCLT, the priority position of positive human rights obligations could legally validate and legitimize states to conclude such an *inter se* agreement anyway. The positive human rights approach would in addition offer a legal fundament to *inter se* modification that aims to result in a drug control system that more generally secures the interests in individual and public health, the safety of individuals’ environment and crime prevention, while leaving more latitude to states to decide how to realize this in the best possible way relative to cannabis. We emphasize that positive human rights obligations as such neither demand nor oppose cannabis regulation; they just require a policy that serves these interests best. Positive human rights obligations encompass a framework for that, by imposing five primary conditions on regulated legalization.¹⁰⁷ These can help prevent states from unnecessarily or even unlawfully disregarding their obligations under the UN narcotic drugs conventions. That framework can serve as a blueprint for an *inter se* agreement, thereby offering states the opportunity to assess how to achieve the best implementation of their positive human rights obligations concerning the aforementioned interest, whether it is through regulation or prohibition of cannabis. Actually, all of this equally applies if one considered that cannabis regulation on the contrary is reconcilable with Article 41(1)(b)(ii) VCLT. In that case, the positive human rights approach would still offer legality, legitimacy and a substantive framework to the agreement. Recalibration of the “object and purpose” of the drug control system in the light of human rights obligations would moreover help to achieve harmonization between cannabis regulation and the remaining opposing obligations under the drugs conventions.

105 See K. Odendahl, “Article 41”, in Oliver Dörr & Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties, A Commentary* (2012) pp. 719–727 at 725; Anne Rigaux & Denys Simon, ‘Article 41. Agreements to modify multilateral treaties between certain of the parties only’, in O. Corsten & P. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary, Volume I* (2011), pp. 986–1008 at 1003–1005 (para 35–39).

106 See para 3.7.9.xii in Van Kempen & Fedorova (2018 11), *supra* note 11; see also Boister & Jelsma, *supra* note 70, pp. 475–482.

107 See *supra* section 2.3.

4.2.2 Unfavourable Effects on the Rights or Obligations of Other States Parties

The condition under Article 41(1)(b)(i) VCLT that *inter se* modification must not prejudice the other states parties' rights or add to their burdens¹⁰⁸ largely overlaps with the human rights requirement that legalization of cannabis by a state may not have negative consequences for other states.¹⁰⁹ The main concern in this regard will be that "lack of control or defective control in one country or territory appears to endanger the effectiveness of control in another country or territory", as the Commentary to the Single Convention holds.¹¹⁰ An *inter se* agreement on cannabis regulation will always have to secure, on account of both the UN narcotic drugs conventions and human rights obligations, that states parties to the agreement guarantee a closed system and/or chain for cultivation, trade and possibly also use of cannabis in the sense that cannabis cannot leak away to illegal markets abroad. This will more indirectly mean that illegal cannabis cultivation and trade (that is thus outside the regulatory framework) must continue to be combated in accordance with the conventions. It actually follows directly from Article 41(1)(b)(i) VCLT that this is necessary in case of international illegal trafficking.

Then there are obligations under the UN narcotic drug conventions that are not backed up by human rights obligations but still need to be complied with on behalf of Article 41(1)(b)(i) VCLT. For example, all states to the *inter se* agreement will have to fully honour their obligations to the parties to the drugs conventions – especially to all non-parties to the agreement – to afford mutual assistance and co-operate in order to prevent and combat international illegal trafficking.¹¹¹ This should not be a problem. It is nonetheless the question whether this is also the case relative to the obligation in Article 4(c) of the Single Convention to "co-operate with other States in the execution of the provisions of this Convention". The provision is put in rather general terms and could therefore also be read as an obligation to cooperate where drugs trafficking does not at all have an international aspect. The same lack of specificity is present in, for instance, Article 35(b) and (c) as well as in the Preamble to the Single Convention, which states that "universal action calls for international co-operation".

108 ILC, "Draft Articles on the Law of Treaties with commentaries", *Yearbook of the International Law Commission* (1966, vol. II) p. 235 (para 2).

109 See *supra* section 2.3.

110 Commentary Single Convention, *supra* note 8, p. 178 (no 1).

111 See, e.g. Article 35(e) Single Convention and throughout the Illicit Traffic Convention, the purpose of which, according to Article 2(1) is to promote co-operation relative to illicit traffic in narcotic drugs with "an international dimension".

However, the Commentary to these Articles discusses their meaning in relation to international trafficking exclusively.¹¹² Furthermore, the Single Convention and the Illicit Traffic Convention do not contain any provisions that are expressly about cooperation or assistance regarding trafficking of a solely national dimension. Finally, relative to the procedure of Article 14 of the Single Convention (concerning measures by the INCB to ensure the execution of provisions of the Convention), the Commentary states that the Board will hardly be in a position to apply the procedure if “failure to comply with the treaty provisions has only a domestic impact”.¹¹³ This too underscores that trafficking that remains national does not interfere with rights or obligations of other states parties.

Furthermore, it will have to be presumed that Article 41(1)(b)(i) VCLT only intends to frustrate *inter se* modification if the unfavourable effects on the rights or obligations of other parties are actual and not just theoretical and have a certain degree of intensity.¹¹⁴ Therefore, we very much doubt that it would suffice to argue, for example, that an *inter se* agreement on cannabis regulation affects rights because it broadcasts a message that is not in line with the message of non-acceptance of cannabis that states through the drugs conventions have agreed to signal universally. This is even more doubtful since the requirement of substantial actual effect also implies that non-parties to the *inter se* agreement that assert that their rights and obligations are actually affected by it have to substantiate that claim. The burden of proof is on the state that asserts a fact, whether claimant or respondent, as this is a well-established rule in both national and international law.¹¹⁵ Less obvious in our view is that Article 41(1)(b)(i) VCLT does not apply if states parties were to claim that *inter se* modification will bear on the working of the estimate system in the Single Convention and will affect their rights therein as it will force them to revisit their position.¹¹⁶ They will either have to allow that the system shall henceforth include cannabis that is within the regulatory framework or they will have to tolerate that the system can no longer be accurate on

112 Commentary Single Convention, *supra* note 8, pp. 109–110 (nos 6–8) and 419–421 (nos 1–8).

113 Commentary Single Convention, *supra* note 8, p. 178 (no 1).

114 Cf. the practice on Article 34 VCLT (“A treaty does not create either obligations or rights for a third State without its consent.”), as is described in *e.g.* A. Proelss, “Article 34”, in Oliver Dörr & Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties, A Commentary* (2012) pp. 605–654 at 612–619.

115 See *e.g.* Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (1996) pp. 116–117.

116 Boister & Jelsma, *supra* note 70, pp. 462–463.

cannabis that is legally in circulation within certain jurisdictions. Even so the question remains, however, whether this could qualify as a sufficiently intense effect on their rights.

Anyhow, again the positive human rights approach is of specific value if non-parties to the *inter se* agreement could argue with some justification that the agreement affects rights and obligations that are solely based on the UN narcotic drugs conventions. In as far as the violation of Article 41(1)(b)(i) VCLT results from the implementation of positive human rights obligations through the *inter se* modification, the priority position of these obligations over the obligations in the drugs conventions can legally validate and legitimize the agreement. Moreover, here too the human rights framework can be used to attain systematic integration of the regulated legalization of cannabis into the UN drugs control system. For example, the human rights obligation to discourage the use, production and marketing of narcotic drugs – and thus cannabis – can help to curtail negative effects for other states parties.¹¹⁷

5 Conclusion

Notwithstanding the UN narcotic drugs conventions, international public law leaves states room – within limits – for regulated legalization of the cultivation of and trade in cannabis for recreational use. If a state genuinely believes and convincingly argues that with cannabis regulation positive human rights obligations that concern individual and public health, safety and crime control can be more effectively realized than under a prohibitive approach, the priority position of human rights obligations over the drugs conventions can justify such regulation. Apart from this it seems well arguable that in order to allow cannabis regulation within national jurisdictions, the UN narcotic drugs conventions can be modified between certain of the states parties only within the conditions of Article 41 of the VCLT. This is possible by conclusion of an *inter se* agreement on cannabis regulation between states parties that are of the opinion that states must be given the possibility to legalize cannabis. The positive human rights approach and the *inter se* possibility can strengthen each other and seem to be a supreme combination. Because of their priority position, positive human rights obligations can further legally validate and legitimize an *inter se* agreement on cannabis regulation. Human rights furthermore offer a substantive framework for the content of such agreement,

117 See more elaborately on possibilities for integration para 3.10 in Van Kempen & Fedorova (2018 11), *supra* note 11.

for example by requiring that states discourage use, production and marketing of cannabis. Simultaneously, an *inter se* agreement that is based on and stays within the positive human rights framework would be of significant help in granting human rights a place at the core of the drugs control system. Then the system can really advance the health and welfare of mankind and of human beings, which is the primary objective of the UN narcotic drugs conventions.