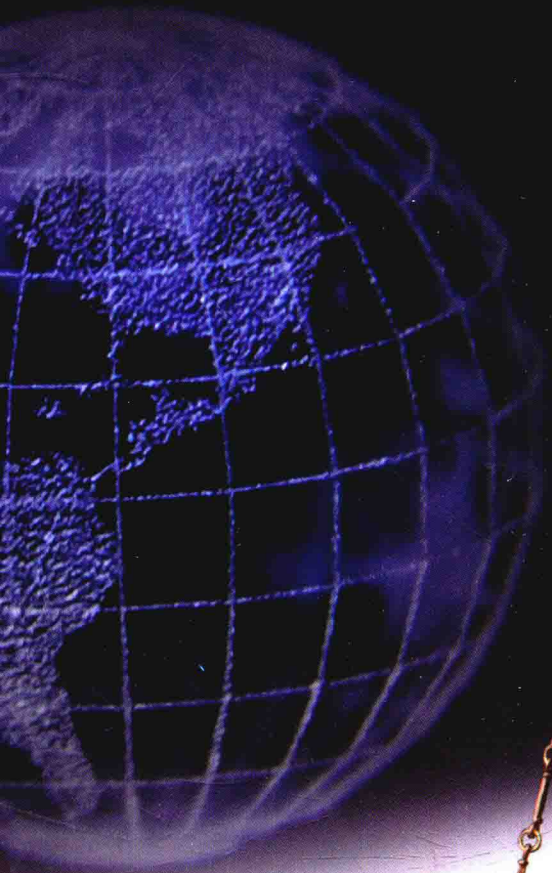
Crime and Global Judicial System

Casper Davis
Editor



Crime and Global Judicial System

Casper Davis
Editor

KOROS PRESS LIMITED
London, UK

Crime and Global Judicial System

Published by
Koros Press Limited
3 The Pines, Rubery B45 9FF, Rednal,
Birmingham, United Kingdom
Tel.: +44-7826-930152
Email: info@korospress.com
www.korospress.com

Originally Published in US by Nyx Academics LLC in 2012

ISBN: 978-1-78163-692-3

Editor: Casper Davis

Printed in UK

10 9 8 7 6 5 4 3 2 1

Crime and Global Judicial System

Preface

So far, the International Criminal Court has opened investigations into seven situations: the Democratic Republic of the Congo; Uganda; the Central African Republic; Darfur, Sudan; the Republic of Kenya; the Libyan Arab Jamahiriya and the Republic of Côte d'Ivoire. Of these seven, three were referred to the Court by the states parties, two were referred by the United Nations Security Council and two were begun *proprio motu* by the Prosecutor. The Court publicly indicted 26 people, proceedings against 24 of whom are ongoing. The ICC has issued arrest warrants for 17 individuals and summonses to nine others. Five individuals are in custody and are being tried while eleven individuals remain at large as fugitives. Proceedings against two individuals have finished following the death of one and the dismissal of charges against the other. As of end September 2010, the Office of the Prosecutor had received 8,874 communications about alleged crimes. After initial review, 4,002 of these communications were dismissed as "manifestly outside the jurisdiction of the Court".

International humanitarian law (IHL), often referred to as the laws of war, the laws and customs of war or the law of armed conflict, is the legal corpus that comprises "the Geneva Conventions and the Hague Conventions, as well as subsequent treaties, case law, and customary international law." It defines the conduct and responsibilities of belligerent nations, neutral nations and individuals engaged in warfare, in relation to each other and to *protected persons*, usually meaning civilians. The law is mandatory for nations bound by the appropriate treaties. There are also other customary unwritten rules of war, many of which were explored at the Nuremberg War Trials. By extension, they also define both the *permissive* rights of these powers as well as *prohibitions* on their conduct when dealing with irregular forces and non-signatories. Modern International Humanitarian Law is made up of two historical streams: the law of The Hague referred to in the past as the law of war proper and the law of Geneva or humanitarian law. The two streams take their names from a number of international conferences which drew up treaties relating to war and conflict, in particular the Hague

Conventions of 1899 and 1907, and the Geneva Conventions, the first which was drawn up in 1863. Both are branches of *jus in bello*, international law regarding acceptable practices while engaged in war and armed conflict. The Law of The Hague, or the Laws of War proper, "determines the rights and duties of belligerents in the conduct of operations and limits the choice of means in doing harm." In particular, it concerns itself with the definition of combatants, establishes rules relating to the means and methods of warfare, and examines the issue of military objectives. Systematic attempts to limit the savagery of warfare only began to develop in the 19th century. Such concerns were able to build on the changing view of warfare by states influenced by the Age of Enlightenment. The purpose of warfare was to overcome the enemy state and this was obtainable by disabling the enemy combatants. Thus, "(t)he distinction between combatants and civilians, the requirement that wounded and captured enemy combatants must be treated humanely, and that quarter must be given, some of the pillars of modern humanitarian law, all follow from this principle."

The massacre of civilians in the midst of armed conflict has a long and dark history. Selected examples include: Moses, speaking for the god of the Israelites, ordering the killing of all the Midianite women and male children; the massacres of the Kalingas by Ashoka in India, the massacre of some 100,000 Hindus by the Muslim troops of Timur (Tamerlane) or the Crusader massacres of Jews and Muslims in the Siege of Jerusalem (1099), to name a few examples drawn from a long list in history. Fritz Munch sums up historical military practice before 1800: "The essential points seem to be these: In battle and in towns taken by force, combatants and noncombatants were killed and property was destroyed or looted. In the 17th century, the Dutch jurist Hugo Grotius wrote "Wars, for the attainment of their objects, it cannot be denied, must employ force and terror as their most proper agents."

The book will be useful to all those who are concerned with the study, research and control of crime, be he be a judge, an academic lawyer or a researcher.

—Editor

Contents

Chapter 1

Controlled Substances Act (CSA)

The Controlled Substances Act (CSA) was enacted into law by the Congress of the United States as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. The CSA is the federal U.S. drug policy under which the manufacture, importation, possession, use and distribution of certain substances is regulated. The Act also served as the national implementing legislation for the Single Convention on Narcotic Drugs.

The legislation created five Schedules (classifications), with varying qualifications for a substance to be included in each. Two federal agencies, the Drug Enforcement Administration and the Food and Drug Administration, determine which substances are added to or removed from the various schedules, though the statute passed by Congress created the initial listing, and Congress has sometimes scheduled other substances through legislation such as the Hillory J. Farias and Samantha Reid Date-Rape Prevention Act of 2000, which placed gamma hydroxybutyrate in Schedule I. Classification decisions are required to be made on criteria including potential for abuse (an undefined term), currently accepted medical use in treatment in the United States, and international treaties.

History

The nation first outlawed addictive drugs in the early 1900s and helped lead international agreements regulating trade.

In 1969, President Richard Nixon announced that the Attorney General, John N. Mitchell, was preparing a comprehensive new measure to more effectively meet the narcotic and dangerous drug problems at the federal level by combining all existing federal laws into a single new statute. The CSA did not merely combine existing federal drug laws but changed the nature of federal drug law and policy, expanded the scope of federal drug laws and expanded federal police power enormously.

Part F of the Comprehensive Drug Abuse Prevention and Control Act of 1970 established the National Commission on Marijuana and Drug Abuse—known as the Shafer Commission after its chairman, Raymond P. Shafer—to study marijuana abuse in the United States. During his presentation of the commission's First Report to Congress, Shafer recommended the decriminalisation of marijuana in small amounts, saying,

The criminal law is too harsh a tool to apply to personal possession even in the effort to discourage use. It implies an overwhelming indictment of the behaviour which we believe is not appropriate. The actual and potential harm of use of the drug is not great enough to justify intrusion by the criminal law into private behaviour, a step which our society takes only 'with the greatest reluctance.

Rufus King notes that this stratagem was similar to that used by Harry Anslinger when he consolidated the previous anti-drug treaties into the Single Convention and took the opportunity to add new provisions that otherwise might have been unpalatable to the international community. According to David T. Courtwright, "the Act was part of an omnibus reform package designed to rationalise, and in some respects to liberalise, American drug policy." (Courtwright noted that the Act became, not libertarian, but instead repressionistic to the point of tyrannical, in its intent.) It eliminated mandatory minimum sentences and provided support for drug treatment and research. King notes that the rehabilitation clauses were added as a compromise to Senator Hughes, who favoured a moderate approach. The bill, as introduced by Senator Dirksen, ran to 91 pages. While it was being drafted, the Uniform Controlled Substances Act, to be passed by state legislatures, was also being drafted by the Department of Justice; its wording closely mirrored the Controlled Substances Act.

Since its enactment in 1970, the Act has been amended several times:

§ The Psychotropic Substances Act of 1978 added provisions implementing the Convention on Psychotropic Substances.

§ The Controlled Substances Penalties Amendments Act of 1984.

§ The Chemical Diversion and Trafficking Act of 1988 added provisions implementing the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

§ The Domestic Chemical Diversion and Control Act of 1993.

§ The Federal Analog Act.

Enforcement Authority

Proceedings to add, delete, or change the schedule of a drug or other substance may be initiated by the Drug Enforcement Administration (DEA), the Department of Health and Human Services (HHS), or by petition from any interested party, including the manufacturer of a drug, a medical society or association, a pharmacy association, a public interest group concerned with drug abuse, a state or local government agency, or an individual citizen. When a *petition* is received by the DEA, the agency begins its own investigation of the drug.

The DEA also may begin an investigation of a drug at any time based upon information received from laboratories, state and local law enforcement and regulatory agencies, or other sources of information.

Once the DEA has collected the necessary data, the Deputy Administrator of DEA, requests from HHS a scientific and medical evaluation and recommendation as to whether the drug or other substance should be controlled or removed from control. This request is sent to the Assistant Secretary of Health of HHS. Then, HHS solicits information from the Commissioner of the Food and Drug Administration and evaluations and recommendations from the National Institute on Drug Abuse and, on occasion, from the scientific and medical community at large. The Assistant Secretary, by authority of the Secretary, compiles the information and transmits back to the DEA a medical and scientific evaluation regarding the drug or other substance, a recommendation as to whether the drug should be controlled, and in what schedule it should be placed.

The medical and scientific evaluations are binding to the DEA with respect to scientific and medical matters. The recommendation on scheduling is binding only to the extent that if HHS recommends that the substance not be controlled, the DEA may not control the substance.

Once the DEA has received the scientific and medical evaluation from HHS, the DEA Administrator will evaluate all available data and make a final decision whether to propose that a drug or other substance be controlled and into which schedule it should be placed.

Under certain circumstances, the Government may temporarily schedule a drug without following the normal procedure. An example is when international treaties require control of a substance. In addition, 21 U.S.C. § 811(h) allows the Attorney General to temporarily place a substance in Schedule I "to avoid an imminent hazard to the public

safety". Thirty days' notice is required before the order can be issued, and the scheduling expires after a year; however, the period may be extended six months if rulemaking proceedings to permanently schedule the drug are in progress. In any case, once these proceedings are complete, the temporary order is automatically vacated. Unlike ordinary scheduling proceedings, such temporary orders are not subject to judicial review.

The CSA also creates a closed system of distribution for those authorised to handle controlled substances. The cornerstone of this system is the registration of all those authorised by the DEA to handle controlled substances. All individuals and firms that are registered are required to maintain complete and accurate inventories and records of all transactions involving controlled substances, as well as security for the storage of controlled substances.

Treaty Obligations

The Congressional findings in 21 U.S.C. §§ 801(7), 801a(2), and 801a(3) state that a major purpose of the CSA is to "enable the United States to meet all of its obligations" under international treaties - specifically, the 1961 Single Convention on Narcotic Drugs and the 1971 Convention on Psychotropic Substances. The CSA bears many resemblances to these Conventions. Both the CSA and the treaties set out a system for classifying controlled substances in several Schedules in accordance with the binding scientific and medical findings of a public health authority. Under 21 U.S.C. § 811 of the CSA, that authority is the Secretary of Health and Human Services (HHS). Under Article 3 of the Single Convention and Article 2 of the Convention on Psychotropic Substances, the World Health Organisation is that authority.

The domestic and international legal nature of these treaty obligations must be considered in light of the supremacy of the United States Constitution over treaties or acts and the equality of treaties and Congressional acts. In Reid v. Covert the Supreme Court of the United States addressed both these issues directly and clearly holding:

No agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution. Article VI, the Supremacy Clause of the Constitution, declares: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . ." There is

nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. These debates, as well as the history that surrounds the adoption of the treaty provision in Article VI, make it clear that the reason treaties were not limited to those made in "pursuance" of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect.

Footnote 31 It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights — let alone alien to our entire constitutional history and tradition — to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. Footnote 32 In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government, and they cannot be nullified by the Executive or by the Executive and the Senate combined. There is nothing new or unique about what we say here.

This Court has regularly and uniformly recognised the supremacy of the Constitution over a treaty. Footnote 33 For example, in Geofroy v. Riggs, 133 U. S. 258, 133 U. S. 267, it declared: "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorise what the Constitution forbids, or a change in the character of the government, or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent." This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that, when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null. Footnote 34 It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument.

According to the Cato Institute, these treaties only bind (legally obligate) the United States to comply with them as long as that nation agrees to remain a state party to these treaties. The U.S. Congress and the President of the United States have the absolute sovereign right to withdraw from or abrogate at any time these two instruments, in accordance with said nation's Constitution, at which point these treaties will cease to bind that nation in any way, shape, or form.

A provision for automatic compliance with treaty obligations is found at 21 U.S.C. § 811(d), which also establishes mechanisms for amending international drug control regulations to correspond with HHS findings on scientific and medical issues. If control of a substance is mandated by the Single Convention, the Attorney General is required to "issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations," without regard to the normal scheduling procedure or the findings of the HHS Secretary. However, the Secretary has great influence over any drug scheduling proposal under the Single Convention, because 21 U.S.C. § 811(d)(2)(B) requires the Secretary the power to "evaluate the proposal and furnish a recommendation to the Secretary of State which shall be binding on the representative of the United States in discussions and negotiations relating to the proposal."

Similarly, if the United Nations Commission on Narcotic Drugs adds or transfers a substance to a Schedule established by the Convention on Psychotropic Substances, so that current U.S. regulations on the drug do not meet the treaty's requirements, the Secretary is required to issue a recommendation on how the substance should be scheduled under the CSA. If the Secretary agrees with the Commission's scheduling decision, he can recommend that the Attorney General initiate proceedings to reschedule the drug accordingly. If the HHS Secretary disagrees with the UN controls, however, the Attorney General must temporarily place the drug in Schedule IV or V (whichever meets the minimum requirements of the treaty) and exclude the substance from any regulations not mandated by the treaty, while the Secretary is required to request that the Secretary of State take action, through the Commission or the UN Economic and Social Council, to remove the drug from international control or transfer it to a different Schedule under the Convention. The temporary scheduling expires as soon as control is no longer needed to meet international treaty obligations.

This provision was invoked in 1984 to place Rohypnol (flunitrazepam) in Schedule IV. The drug did not then meet the

Controlled Substances Act's criteria for scheduling; however, control was required by the Convention on Psychotropic Substances. In 1999, an FDA official explained to Congress:

> *Rohypnol is not approved or available for medical use in the United States, but it is temporarily controlled in Schedule IV pursuant to a treaty obligation under the 1971 Convention on Psychotropic Substances. At the time flunitrazepam was placed temporarily in Schedule IV (November 5, 1984), there was no evidence of abuse or trafficking of the drug in the United States.*

The Cato Institute's *Handbook for Congress* calls for repealing the CSA, an action that would likely bring the United States into conflict with international law, were the United States not to exercise its sovereign right to withdraw from and/or abrogate the Single Convention on Narcotic Drugs and/or the 1971 Convention on Psychotropic Substances prior to repealing the Controlled Substances Act. The exception would be if the U.S. were to claim that the treaty obligations violate the United States Constitution. Many articles in these treaties—such as Article 35 and Article 36 of the Single Convention—are prefaced with phrases such as "Having due regard to their constitutional, legal and administrative systems, the Parties shall . . ." or "Subject to its constitutional limitations, each Party shall . . ." According to former United Nations Drug Control Programme Chief of Demand Reduction Cindy Fazey, "This has been used by the USA not to implement part of article 3 of the 1988 Convention, which prevents inciting others to use narcotic or psychotropic drugs, on the basis that this would be in contravention of their constitutional amendment guaranteeing freedom of speech".

Schedules of Controlled Substances

Placing a drug or other substance in a certain Schedule or removing it from a certain Schedule is primarily based on 21 U.S.C. §§ 801, 801a, 802, 811, 812, 813 and 814. Every schedule otherwise requires finding and specifying the "potential for abuse" before a substance can be placed in that schedule. The specific classification of any given drug or other substance is usually a source of controversy, as is the purpose and effectiveness of the entire regulatory scheme.

"The term 'controlled substance' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in

subtitle E of the Internal Revenue Code of 1986." 21 U.S.C. § 802(6) Some have argued that this is an important exemption, since alcohol and tobacco are the two most widely used drugs in the United States. More significantly the exclusion of alcohol includes wine which is sacramentally used by many major religious denominations in the United States.

Alternatives to Scheduling

Recently, in a report published in *The Lancet Journal,* researchers have introduced an alternative method for drug classification in the UK. This new system uses a "nine category matrix of harm, with an expert Delphic procedure, to assess the harms of a range of illicit drugs in an evidence-based fashion." The new classification system suggested that alcohol and tobacco were in the mid-range of harm, while cannabis, lysergic acid diethylamide ("LSD") and MDMA ("Ecstacy") were all less harmful than the two legal drugs. This research is in line with a House of Commons of the United Kingdom report *Drug classification: making a hash of it?.*

Inconsistencies

The placement of some drugs or other substances is paradoxical: both morphine and fentanyl are in Schedule II, and heroin is in Schedule I. Fentanyl is approximately 80 times as potent as morphine, and heroin is around four times as potent as morphine. Morphine has been used by physicians for over 150 years. It is very addictive, however it is a very effective analgesic for providing relief from severe pain, so it is licensed for careful medical use. Heroin was introduced in the late 19th century and licensed the same way until it was banned in 1924. Fentanyl has been used for less than 50 years and has always been carefully restricted.

Schedule I Controlled Substances

"Placement on schedules; findings required:

Except ... The findings required for each of the schedules are as follows:

(1) Schedule I.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision."

No prescriptions may be written for Schedule I substances, and such substances are subject to production quotas by the DEA.

Under the DEA's interpretation of the CSA, a drug does not necessarily have to have the same abuse potential as heroin or cocaine to merit placement in Schedule I (in fact, cocaine is currently a Schedule II drug due to limited medical use):

> *When it comes to a drug that is currently listed in schedule I, if it is undisputed that such drug has no currently accepted medical use in treatment in the United States and a lack of accepted safety for use under medical supervision, and it is further undisputed that the drug has at least some potential for abuse sufficient to warrant control under the CSA, the drug must remain in schedule I. In such circumstances, placement of the drug in schedules II through V would conflict with the CSA since such drug would not meet the criterion of "a currently accepted medical use in treatment in the United States." 21 USC 812(b).*

Sentences for first-time, nonviolent offenders convicted of trafficking in Schedule I drugs can easily turn into *de facto* life sentences when multiple sales are prosecuted in one proceeding. Sentences for violent offenders are much higher.

Drugs in this schedule include:

§ gamma-Hydroxybutyric acid (GHB), which has been used as a general anaesthetic with minimal side-effects and controlled action but a limited safe dosage range. It was placed in Schedule I in March 2000 after widespread recreational use. Uniquely, this drug is also listed in Schedule III for limited uses, under the trademark Xyrem;

§ 12-Methoxyibogamine (Ibogaine)

§ Marijuana including the Cannabis plant and its THC. Controversy exists about the placement of Marijuana in Schedule I. Like some other drugs in schedule I, there have been no reported cases of THC overdose. *Main article: Removal of cannabis from Schedule I of the Controlled Substances Act.*

§ Heroin (Diacetylmorphine), which is used in some European countries as a potent pain reliever in terminal cancer patients, and as second option, after morphine. (It is about twice as potent, by weight, as morphine.). In the United Kingdom it is