

CANNABIS REGULATION AND THE UN DRUG TREATIES

Strategies for Reform
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**BRIEFING
PAPER**



As jurisdictions enact reforms creating legal access to cannabis for purposes other than exclusively “medical and scientific,” tensions surrounding the existing UN drug treaties and evolving law and practice in Member States continue to grow. How might governments and the UN system address these growing tensions in ways that acknowledge the policy shifts underway and help to modernize the drug treaty regime itself, and thereby reinforce the UN pillars of human rights, development, peace and security, and the rule of law?

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CANNABIS REFORMS AND TREATY TENSIONS: THE “ELEPHANT IN THE ROOM”

Cannabis prohibition has not proven to be an effective strategy for reducing the extent of the illicit market or cannabis health harms. Rather, it has imposed heavy burdens on criminal justice systems, produced profoundly negative social and public health impacts, and created criminal markets supporting organized crime, violence, and corruption. The legal regulation of cannabis markets has therefore become an increasingly attractive policy option for countries to consider, creating obvious tensions within the prohibitionist United Nations drug control treaty framework. Cannabis is one of the psychoactive substances included within the UN drug control regime, based on three treaties: the 1961 Single Convention on Narcotic Drugs, the 1971 Convention on Psychotropic Substances, and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Current tensions arise from the decision to place cannabis under strict controls as part of the bedrock of the contemporary regime, the 1961 Single Convention. This states that, as with a range of other listed substances, “the production, manufacture, export, import, distribution of, trade in, use and possession” of cannabis should be limited “exclusively to medical and scientific purposes.”¹

Cannabis, the world’s most widely used illicit drug, is categorized within the Single Convention alongside cocaine and heroin.² This decision, taken more than 50 years ago, had very little to do with consideration of the available scientific evidence concerning relative health risks. Today the drug conventions are, on the surface, among the most widely adhered to of all UN instruments.³ This veneer of virtually universal support, however, masks a number of important considerations.

First, nations signed on to the Single Convention in an era dramatically different from the one

we live in today. The treaty was being drafted and negotiated during the 1940s and 1950s, consolidating the structures and philosophy of a series of multilateral drug control treaties dating back to 1912.⁴ This was a period when drug issues were of only marginal concern for many states, permitting a few nations to dominate proceedings and steer the development of the international control system in their preferred prohibition-oriented direction.

Authoritative studies suggesting that there was no need to impose international prohibition-oriented controls on cannabis were largely ignored. Rather, activist delegations and key individuals from within the international drug control bureaucracy itself were successful in privileging sensationalist “research” findings to gradually bring cannabis into the increasingly prohibition-focused multilateral control architecture. Pseudo-scientific, often racist, reports of cannabis’ links to insanity, crime, moral decline, and its role as a gateway to other drugs succeeded in demonizing the substance and its users.⁵

Remarkably, the World Health Organization’s (WHO) Expert Committee on Drug Dependence (ECDD), the body charged by the 1961 and 1971 Conventions with the scientific and medical review of scheduling proposals,⁶ has never engaged in a formal review of cannabis’ place within the Convention. As the Committee itself noted in 2014, “Cannabis and cannabis resin has not been scientifically reviewed by the Expert Committee since the review by the Health Committee of the League of Nations in 1935.”⁷

Second, dissatisfaction with the implications of cannabis’ status within the treaty system is not a new phenomenon. Numerous national and sub-national jurisdictions have questioned and increasingly moved away from the punitive prohibitions on

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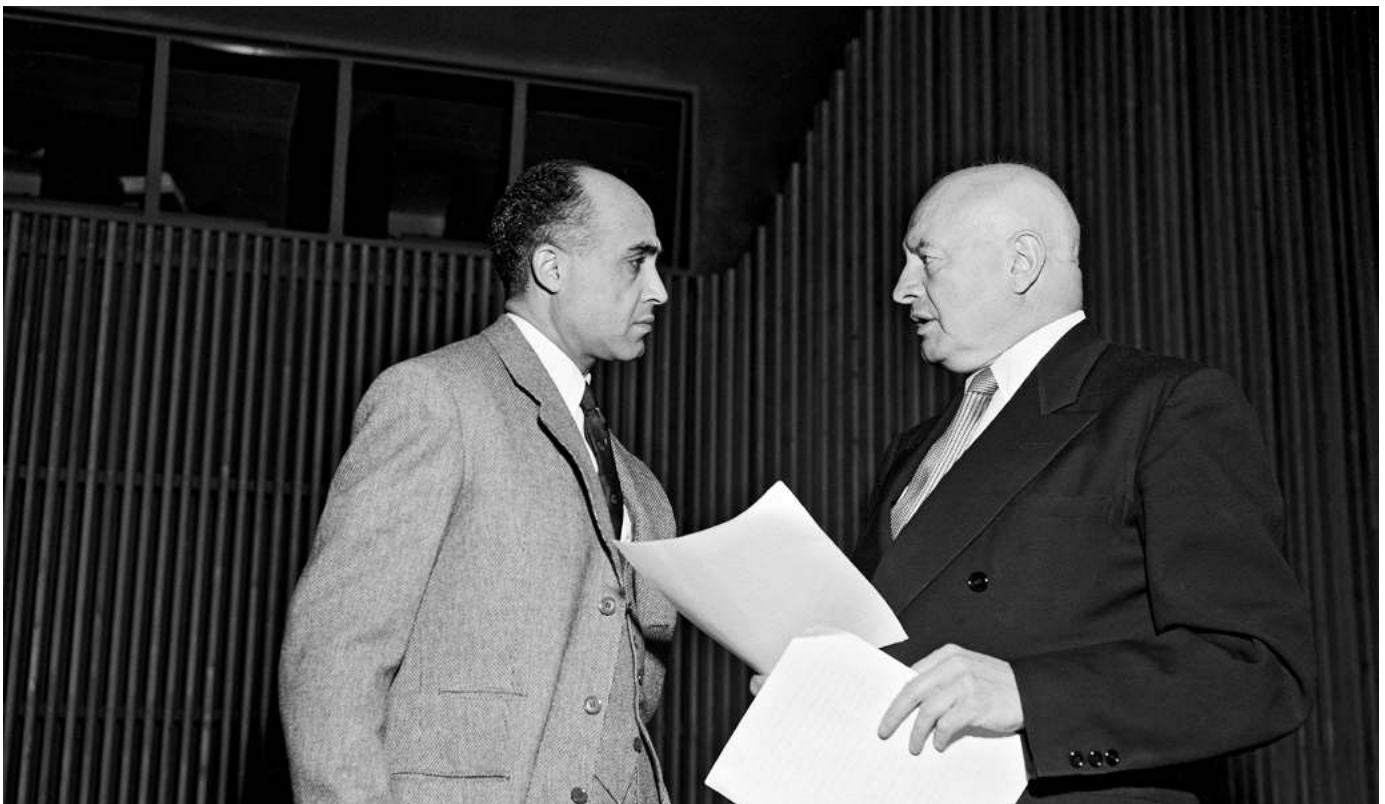
cannabis encouraged by the Conventions. This has manifested in successive waves of what might be regarded as “soft defection,” whereby authorities tried to remain within the flexibility afforded by the treaty framework,^{8,9} but deviate from the prohibitive norm at the heart of the regime.¹⁰

As early as the 1970s, and despite President Richard Nixon’s initiation of a “war on drugs,” a number of U.S. states formally decriminalized cannabis possession for personal use. At around the same time, Dutch authorities re-evaluated cannabis policies, leading to the development of the current cannabis “coffee shop” system. The International Narcotics Control Board (INCB, the “independent, quasi-judicial expert body” overseeing implementation of the treaties) has long criticized the Dutch model as falling outside the bounds of the Conventions (although without providing the detailed legal reasoning behind that criticism).¹¹

A second wave of reforms—which has been referred to as a “quiet revolution” of decriminalization—has

occurred more recently in several Latin American and European countries and within Australian states and territories.¹² In Spain, an increasingly popular local approach by cannabis users to bypass the problems of the illicit market has been the establishment of Cannabis Social Clubs.¹³ These are intended to provide a de facto source of legal supply operating informally on a small-scale, non-profit basis within a decriminalized model.

In addition, a range of medical cannabis systems has emerged in many parts of the world, notably in more than 20 U.S. states. These systems have often been the focus of INCB criticism. While the INCB is on firm ground regarding its criticisms related to the 1961 Single Convention’s requirements to establish national-level agencies in charge of medical cannabis, the INCB exceeds its mandate when questioning the medical usefulness of the substance. That said, the blurring of the lines in some jurisdictions between cannabis use for genuine medical purposes and for pseudo-medical and other uses has created a range of grey



Two of the delegates to the seventh session of the Commission on Narcotic Drugs exchanging views before a meeting: Mr. Saleh A. Mahmoud (left), of Egypt; and Mr. Harry J. Anslinger, of the United States. UN Photo/MB.

markets that do little for the image of cannabis as a medicine.¹⁴

Tensions also exist in relation to the traditional and religious use of cannabis. Acknowledging the challenges of eradicating the culturally and religiously ingrained use of cannabis within many societies, the Single Convention included a transitional reservation, allowing signatories to abandon such use gradually within 25 years of the Convention coming into force.¹⁵ With this deadline having quietly passed in 1989, it is clear that, unlike the more formalized policy shifts described above, many countries—particularly in the “global south”—are choosing to “turn a blind eye” to the cultivation and use prohibited under the Conventions.¹⁶ Furthermore, within the context of a greater appreciation of indigenous and religious rights, some countries, such as Jamaica, are finding themselves in an increasingly difficult position vis-à-vis the relationship between national legal instruments, the international drug control conventions, and other UN treaties on human and indigenous rights.¹⁷

Meanwhile at the multilateral level, recent sessions of the Commission on Narcotic Drugs (CND)—the UN’s central policymaking body on drug issues—have seen some Member States, including Argentina, the Czech Republic, Ecuador, and Mexico, call openly for a re-evaluation of some aspects of the current treaty framework.¹⁸

The tensions around cannabis within the treaty framework have come most dramatically to the fore in the Americas, with recent passage of laws that explicitly legalize and regulate cannabis for non-medical, non-scientific uses, a policy that is expressly forbidden by the UN drug treaties. Successful ballot initiatives in 2012 in the U.S. states of Colorado and Washington to establish legally taxed and regulated cannabis markets have been followed by initiatives in Alaska and Oregon. It is likely that other states, including California—the world’s seventh largest economy—will follow imminently.

At the national level, in December 2013, Uruguay became the first country in the world to legally regulate the cannabis market, with the passage of Law 19.172 granting the government control over the import, export, cultivation, production,

and sale of cannabis through the newly established Institute for the Regulation and Control of Cannabis (*Instituto de Regulación y Control del Cannabis*, IRCCA).¹⁹ Even more recently, Canada’s new government was elected in 2015 pledging to legalize and regulate cannabis for non-medical, non-scientific use, and announced at UNGASS that it will introduce legislation in Spring 2017.²⁰ And, with varying levels of political support, legislative proposals for cannabis regulation are also under consideration in Guatemala, Italy, Mexico, and Morocco.

Clearly, tensions in the treaty regime around cannabis are long-standing and growing. The international community, including the UN drug control bureaucracy, has been well aware of these tensions for some time. Indeed, in a much-remarked 2008 report, “Making Drug Control Fit for Purpose,” the Executive Director of the UN Office on Drugs and Crime (UNODC) wrote that “Cannabis is the most vulnerable point in the whole multilateral edifice. In the Single Convention, it is supposed to be controlled with the same degree of severity as cocaine and the opiates. In practice, this is seldom the case, and many countries vacillate in the degree of control they exercise over cannabis.”²¹

Since then, “soft defections” with regard to cannabis policy have given way to direct breaches of the Conventions’ ban on cannabis for non-medical or non-scientific purposes. As more jurisdictions appear likely to enact reforms to legalize and regulate adult use of cannabis, these treaty tensions have become the “elephant in the room” in key high-level forums, including the 2016 United Nations General Assembly Special Session (UNGASS) on drugs—obviously present, but studiously ignored. Different countries and international agencies have different reasons for seeking to avoid directly engaging the question of what to do about these tensions. But the kinds of treaty breaches that may have seemed merely hypothetical only a few years ago are already a reality today, and will not simply disappear. Governments and the UN system should give serious consideration to options for managing these policy shifts in ways that can help to modernize the drug treaty regime itself, and to thereby reinforce the UN pillars of human rights, development, peace and security, and the rule of law.

OPTIONS FOR MOVING FORWARD

A difficult dilemma has thus entered the international drug policy arena. There is no doubt that recent policy developments with regard to cannabis regulation have moved beyond the legal latitude of the treaties. Initiating a formal procedure to review or amend the current treaty framework, however, would not only immediately trigger an avalanche of political frictions with some of the most powerful countries in the world, but could even lead to unintended negative outcomes. Indeed, even as many governments continue to tout the supposed global consensus on drug policy, officials are quite aware of the significant and growing policy differences among drug treaty Member States; to the extent that a truly global consensus ever existed, it is now fractured, and there is no new consensus to take its place.

Under such conditions, it is not difficult to understand why many countries would prefer to avoid or delay confronting the treaty questions raised by cannabis regulation. Indeed, such concerns go far in explaining the attraction of the legally fallacious—but politically potent—stance that the drug treaties as they stand are flexible enough to accommodate the regulation of adult-use cannabis. Different countries have different reasons for finding appeal in the notion of treaty flexibility. During the March 2016 negotiations in Vienna of the UNGASS Outcome Document, different strands of support for the idea of flexibility converged around language declaring that new challenges “should be addressed in conformity with the three international drug control conventions, which allow for **sufficient flexibility** for States parties to design and implement national drug policies according to their priorities and needs...” (Emphasis added).²² The same language was able to serve different, even contradictory, purposes.

The wording of “sufficient flexibility” originates from the European Union (EU) common position on the UNGASS, where it was accompanied by

the EU’s commitment to “maintain a strong and unequivocal commitment to the UN conventions.”²³ For the EU then, flexibility applies to policies such as harm reduction, decriminalization of possession and cultivation of cannabis for personal use, and alternatives to incarceration, but certainly not to cannabis regulation, which the EU considers as falling outside the scope of policy options allowed under the treaties.

However, for governments for whom it would be politically convenient to maintain that cannabis regulation fits within the boundaries of the Conventions—especially the United States—“sufficient flexibility” could be read as covering cannabis regulation. During the negotiations, that paragraph also received support from countries at the other end of the policy spectrum, including Russia and China. After all, they argued, the Single Convention also says that “a Party shall not be, or be

deemed to be, precluded from adopting measures of control more strict or severe than those provided by this Convention” (article 39); the treaties therefore provide countries with “sufficient flexibility” to continue with forced treatment or the death penalty. Attempts to rein in that line of argumentation achieved only a vague

reference in the paragraph that national policies need to be consistent with “applicable international law.”

For countries like Jamaica or the Netherlands, implications of the term are very different. In those cases, where the principle of legal regulation enjoys broad political support, the fact that regulation would contravene international treaty obligations is considered an impediment for its implementation. As such, agreeing to language about “sufficient flexibility” amounts to taking a political stance *against* cannabis regulation, because, with a concern for international law, it is based on an understanding (an accurate understanding, and one shared by the INCB) that



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the UN drug conventions expressly disallow legal regulation.

Lest there be doubt about the INCB's views, INCB President Werner Sipp directly addressed the issue of flexibility in his keynote speech at the March 2016 session of the CND, as the UNGASS document was under negotiation. Some proponents of new laws that permit the non-medical use of cannabis, he said, "pretend that the flexibility of the conventions allows such regulations. In fact, the debate on flexibility is at the core of the general debate on future drug policy because it regards the possibilities and the limitations of the Conventions. Undoubtedly, there exists flexibility in the Conventions—but not in each and every respect." For example, Sipp explained, there is "no obligation stemming from the conventions to incarcerate drug users having committed minor offences," and they "provide for flexibility in the determination of appropriate sanctions." However, there is "no flexibility in the conventions for allowing and regulating any kind of non-medical use" (Emphasis in the original).²⁴ These declarations expanded upon Sipp's foreword to the INCB report for 2015, in which he wrote: "States parties to the treaties have a certain flexibility in their interpretation and implementation of the treaties, within the boundaries that they themselves set out and agreed upon during treaty negotiations."²⁵

The UNGASS document negotiators—in settling on language with such different and even contradictory meanings to different sets of countries—did achieve what most countries wanted: a way to avoid opening a debate on the adequacy of the treaties themselves.

The fact remains, however, that the accelerating process of national reforms has already moved cannabis policies beyond the boundaries of what the Conventions can legally accommodate. To move the debate forward, this paper aims to illuminate the available options for countries to ensure that their new domestic cannabis laws and policies are aligned with their international obligations, thereby modernizing the global drug control system in ways consistent with international law and the overarching purposes of the UN system.

Mindful of the political tensions that have been evident during the 2016 UNGASS process, it is important to emphasize that treaty reform does not necessarily require negotiating a new global consensus. This paper therefore distinguishes four categories of reforms, acknowledging that the different options are often overlapping and not necessarily mutually exclusive:

FOUR CATEGORIES OF REFORMS

- I. Treaty reform that applies to all signatory states, requiring consensus approval;
- II. Treaty reform that applies to all signatory states, requiring majority approval;
- III. Treaty reform that applies to a selective group of states; and
- IV. Treaty reform that applies to an individual state.



Above, cannabis as both a licit medical product and police evidence.

I. TREATY REFORM THAT APPLIES TO ALL SIGNATORY STATES, REQUIRING CONSENSUS APPROVAL

TREATY AMENDMENT

Any State party can notify the UN Secretary General of a proposed amendment, including the reasoning behind the move. The Secretary General then communicates the proposed amendment and the reasons for it to the State parties and to the Economic and Social Council (ECOSOC), which can decide to:

- Convene a Conference of all the Parties (COP) of the treaty to consider the amendment;
- Ask the Parties if they accept the amendment; or
- Take no action and wait to see whether any State party submits any objection.

In the event of no Party rejecting the amendment within 18 months (24 months for the 1988 Convention), the amendment is automatically accepted. In the case of the 1961 and 1971 Conventions, the amendment then immediately comes into force for all Parties (that is, no objections equals acceptance), while in the case of the 1988 Convention, the amendment only comes into force for those parties that “deposited with the Secretary-General an instrument expressing its consent to be bound by that amendment” (that is, explicit notification of acceptance is required).²⁶

In the event State parties register objections to a proposed amendment, ECOSOC can decide to:

- Still approve the amendment (in which case it would not be applicable to the objecting states);
- Reject it (if multiple objections are raised that argue convincingly that such an amendment would compromise the object and purpose of the treaty); or
- Convene a COP to consider the amendment.

In addition, ECOSOC may also submit proposed amendments to the General Assembly for consideration.²⁷ Moreover, the General Assembly

may itself take the initiative to convene a COP, and even has the power to discuss and adopt amendments to UN conventions by simple majority vote.

In theory, all three UN drug control conventions could be amended using these procedures. While many consider this to be a politically unlikely scenario for the foreseeable future, it is important to recall that the 1961 Single Convention was amended with the 1972 Protocol, after a COP was convened and agreed to substantial treaty changes. At that stage, the U.S. government argued that it was “time for the international community to build on the foundation of the Single Convention, since a decade has given a better perspective of its strengths and weaknesses.”²⁸ The latitude under the 1961 Single Convention with regard to alternatives to incarceration—which has been the focus of many recent debates—only exists due to a treaty amendment agreed in the 1972 Protocol.²⁹

For historical perspective, it is also useful to recall that many decisions in the process of negotiating the drug treaties were taken by majority vote. The false perception that the UN drug control system has always relied on full consensus is a more recent construct, intended to reinforce an image of universal agreement even as tensions were becoming ever more visible. Moreover, in the event that treaty amendments are approved, States can opt not to become part of the amended agreement. As the 1969 Vienna Convention on the Law of Treaties (VCLT) makes clear: “The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement.”³⁰ As such, States that do not wish to be bound by the treaty as amended may retain the older obligations.³¹

Most modern treaties, including the 2000 Transnational Organized Crime Convention (UNTOC), the 2003 Convention against Corruption (UNCAC), and the 2003 WHO Framework Convention on Tobacco Control (FCTC) have an inbuilt COP mechanism that requires them to undergo periodic reviews

and enables them to evolve and modernize if necessary. The international drug control treaty regime, however, with its roots predating the UN, lacks such a periodic review mechanism—which helps to explain its outdated nature and resistance to reform. The challenge of modernizing the drug control regime via a COP mechanism is further complicated by the fact that the regime consists of three separate treaties, all of which would require amendment. A more rational course of systemic evolution could be to try and resolve the inconsistencies between the 1961 and 1971 Conventions by merging them, together with the precursor controls under the 1988 Convention, into a new Single Convention that featured:

- A structured periodic review mechanism;
- An improved scheduling procedure, striking a

better balance between assuring availability of controlled substances for legitimate uses versus preventing abuse;

- A more tolerant and legally consistent approach to traditional, spiritual, and non-problematic social uses; and
- Incorporation of the other elements from the 1988 drug treaty into the subsequent treaties addressing organized crime and corruption, with which the 1988 drug treaty is already closely aligned.

Discussions on more substantive reforms of this nature have yet to occur formally, although they have been suggested in the Organization of American States' 2013 report *Scenarios for the Drug Problem in the Americas*.³²

II. TREATY REFORM THAT APPLIES TO ALL SIGNATORY STATES, REQUIRING MAJORITY APPROVAL

RESCHEDULING

As noted above, cannabis first entered the international drug control system under the League of Nations on dubious grounds, and its current placement in schedules I and IV of the Single Convention has never been properly reviewed by the WHO Expert Committee.³³ This is in itself sufficient reason to question on procedural grounds the legitimacy of the current classification of cannabis.

The 1961 Single Convention allows for the WHO or any State party to initiate, at any time, the modification process that could reschedule a specified drug or delete it from the Conventions. The WHO is the only body mandated to make scheduling recommendations, which must subsequently be agreed by the Commission on Narcotic Drugs (CND). Modifying schedules does not require consensus; these are the only decisions the CND takes by vote. New substances are routinely scheduled in this way, and the treaty system is thus constantly being modified.

In the case of cannabis, scheduled under the Single Convention, a rescheduling decision would be taken by a simple majority of its “members present and voting.”³⁴ Delta-9-THC (the main active ingredient in cannabis, or dronabinol, as the pharmaceutical extract is known), is scheduled as a ‘psychotropic substance’ under the 1971 Convention, where a rescheduling decision requires a two-thirds majority; in fact, dronabinol has been recommended for re-scheduling already several times by the WHO Expert Committee on Drug Dependence.³⁵

For cannabis, however, this process is further complicated by the fact that it (along with coca and opium) is also mentioned explicitly in specific articles within the 1961 and 1988 Conventions. Re-scheduling or de-scheduling cannabis may therefore not be sufficient to allow for fully regulated markets along the lines of the changes now being enacted in various jurisdictions today. Most likely, some form of amendment, modification, or reservation to those treaties would also be required.

III. TREATY REFORM THAT APPLIES TO A GROUP OF STATES

“INTER SE” TREATY MODIFICATION

The 1969 Vienna Convention on the Law of Treaties (VCLT) also allows for the option to modify treaties between certain parties only, offering in this context an intriguing and under-explored legal option somewhere between selective denunciation and a collective reservation (see below). According to Article 41 of the VCLT, “Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone,” as long as it “does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations” and it is not “incompatible with the effective execution of the object and purpose of the treaty as a whole.”³⁶

In principle, both conditions could be met. It would require that the agreement include a clear commitment to the original treaty obligations vis-à-vis countries not party to the *inter se* modification agreement, especially concerning prevention of trade or leakage to prohibited jurisdictions. All the provisions in the treaties—including those pertaining to cannabis—would remain in force vis-à-vis the treaty’s State parties that are not part of the *inter se* agreement. Over time, such an *inter se* agreement might evolve into an alternative treaty framework to which more and more countries could adhere, while avoiding the cumbersome (if not impossible) process of unanimous approval of amendments to the current regime.³⁷

In theory, modification *inter se* could be used by a group of like-minded countries that wish to resolve the treaty non-compliance issues resulting from national decisions to legally regulate the cannabis market, as Uruguay has already done, and Canada appears poised to do. Such countries could sign an agreement with effect only among themselves, modifying or annulling the cannabis control provisions of the UN conventions. This could also be an interesting option to explore in order to provide a legal basis justifying international trade between national jurisdictions that allow or tolerate

the existence of a licit market of a substance under domestic legal provisions, but for which international trade is not permitted under the current UN treaty obligations.

The drafters of the 1969 VCLT considered the option of *inter se* modification as a core principle for international law, and the issue was discussed at length at the International Law Commission in 1964: “The importance of the subject needed no emphasis; it involved reconciling the need to safeguard the stability of treaties with the requirements of peaceful change.”³⁸ From the very beginning, the evolutionary nature of treaties was seen as fundamental to the UN system—a system in which all Member States “undertake to respect agreements and treaties to which they have become contracting parties without prejudice to the right of revision,” according to the Egyptian delegate at the time. He underscored that it was therefore “equally important to ensure that arbitrary obstacles were not allowed to impede the process of change. There had been many instances in the past of States, by their stubborn refusal to consider modifying a treaty, forcing others to denounce it.”³⁹

A leading authority on international treaty law, Jan Klabbers, describes the *inter se* option as “perhaps the most elegant way out,” but also notes that though *inter se* modification is based on an ancient principle of international law, “practical examples are hard to come by.”⁴⁰ Indeed, it seems this is essentially uncharted legal territory, but a good case could be made that the increasing tensions between cannabis policy trends and the frozen drug treaty system provides a clear example of circumstances for which this exceptional option was designed and deemed to be of crucial importance. Indeed, though its use has been rare, the *inter se* option has been understood since the outset of the UN system as a means of reinforcing treaty regimes, not undermining them. Where regimes are exceptionally resistant to reform, and therefore liable to become brittle and antiquated, an option such as *inter se* modification could actually strengthen the regime by demonstrating that it is capable of modernization.

IV. TREATY REFORM THAT APPLIES TO INDIVIDUAL STATES

A. WITHDRAWING FROM THE TREATIES

In light of the outdated nature of the drug control treaties and the seemingly insurmountable procedural and political obstacles to modernizing them, the question is often raised why countries should not simply withdraw from the UN drug control treaty regime. The option exists for any signatory Member States to withdraw from the treaties via the process of denunciation; treaty exit would technically “solve” the problems of breach or non-compliance from a legal perspective.

However, a key reason reform-minded states may wish to remain party to the UN drug control treaties is that they also regulate the global trade in drugs for licit medical purposes, including substances on the WHO list of essential medicines. Inadequate access to controlled medicines is already a severe problem in most developing countries, and withdrawing from the INCB-administered global system of estimates and requirements operating under the UN drug control conventions could risk making it even worse.

For countries receiving development aid or benefitting from preferential trade agreements, denunciation would also risk triggering economic sanctions. Being State party to all three of the drug control conventions is a condition in a number of preferential trade agreements or for accession to the European Union. The U.S. government—though now more likely to be lenient towards cannabis reforms elsewhere due to the changes underway within U.S. borders—still maintains the disciplinary certification mechanism, and withdrawal from the drug control treaties altogether would almost certainly lead to decertification and sanctions. Denunciation can therefore have serious political and economic implications, especially for less powerful and poor countries. Even for countries that are less economically vulnerable, simply withdrawing from the drug treaties could carry the risk of reputational costs.

B. SELECTIVE DENUNCIATION

The 1969 VCLT stipulates that a historical “error” (Article 48) or a “fundamental change of circumstances” (*rebus sic stantibus*, Article 62) are valid reasons for a Member State to revoke its adherence to a treaty.⁴¹ However, recourse to the *rebus sic stantibus* doctrine and the option of “selective denunciation” are rarities in international law. The Beckley Foundation’s Global Cannabis Commission report concluded in 2008 that “taking this path might be less legally defensible than denunciation and reaccessions with reservations” (see below), which would have the same end result.⁴² And for a group of countries, the option of an *inter se* agreement seems to be the more elegant way out, with similar effect.

C. DENUNCIATION FOLLOWED BY RE-ACCESSION WITH A RESERVATION

At the moment of signing, acceding, or ratifying a treaty, states have the option to make reservations regarding specific provisions, as many countries in fact did in the case of all three drug control treaties.⁴³ Reservations or other formal unilateral “interpretive declarations” are meant to exclude or modify the legal effect of certain provisions of a treaty for the reserving state.

Under the procedure of treaty denunciation followed by re-accession with a reservation, a country can withdraw itself from the treaty entirely, with the intention of rejoining with specific reservations. In the case of the 1961 Convention, if one third or more State parties object, the country would be blocked from re-acceding.⁴⁴ Denunciation and re-accession with a reservation is recognized as a legitimate procedure, although its practice has been limited to exceptional cases.^{45, 46}

In the case of the drug treaties, there is a recent precedent: in 2011, Bolivia notified the Secretary General that it had decided to exit the Single

Convention, taking effect in January 2012, intending to re-accede with reservations regarding coca. The INCB condemned the move, and 15 countries—including every member of the G8—submitted formal objections. But the number of objections fell far short of the 62 (one third of all State parties to the Convention) that were needed to block Bolivia from re-acceding. In early 2013, Bolivia's re-adherence to the treaty was formally accepted, with reservations upholding the right to allow in its territory traditional coca leaf chewing, the use of the coca leaf in its natural state, and the cultivation, trade, and possession of the coca leaf to the extent necessary for these licit purposes. (Bolivia had initially tried to amend the treaties, but was blocked by a small number of objections.) The procedure thus successfully resolved the legal tensions, at least for Bolivia, between the 1961 Single Convention's obligation to abolish its indigenous coca culture, versus Bolivia's legal obligations under the 2007 UN Declaration on the Rights of Indigenous Peoples and its national Constitution to protect it.

A reservation by which a state would exempt itself from implementing the Convention's obligations for cannabis could therefore be attempted

following the same treaty procedure, but there are differences to be taken into account. The main legal issue relates to article 19 of the VCLT, which requires that a reservation must not be "incompatible with the object and purpose of the treaty." Those overall aims of the Single Convention are expressed in the preamble's opening paragraph regarding concern about "the health and welfare of mankind" and the treaty's general obligation to limit controlled drugs "exclusively to medical and scientific purposes." Making a reservation exempting a particular substance from the treaty's general obligation to limit drugs exclusively to medical and scientific purposes is explicitly mentioned in the Commentary on the Single Convention as an option that could be procedurally allowable, for coca leaf as well as for cannabis.⁴⁷ While the absence of any accompanying cautionary text seems to imply that exemption by means of a reservation of a specific substance from the general obligations would not in itself constitute a conflict with the object and purpose of the treaty as a whole, this would certainly be an important legal discussion to be had in the context of crafting reservations. The same issues would arise with an *inter se* agreement (see above), which comes close to a form of "collective reservation."



Coca is dried in Bolivia. Courtesy Sara Shahriari.

IMPLEMENTING CANNABIS REGULATION IN SITUATIONS OF TREATY NON-COMPLIANCE

The treaty reform options described above—with their varying procedural and political considerations—all assume a decision on the part of at least one State to proactively alter its relationship to the current treaties with respect to cannabis. States might opt to sidestep the treaty questions that arise in the context of their cannabis reforms, or assert that the changes underway within their countries are allowable under

the treaties as they stand, therefore denying that treaty reform options of any sort ought or need to be considered. Another option—acknowledging the fact of temporary non-compliance and working toward an eventual realignment of domestic law and treaty obligations—would open the door to deliberately pursuing some set of treaty reform options.

SIDE-STEPPING OR DENYING ISSUES OF NON-COMPLIANCE

The two States that have thus far proceeded with development and implementation of formal non-medical cannabis markets are the United States and Uruguay. Their situations are very different and they have provided contrasting commentaries on the implications of their moves, while both arguing that policy shifts within their borders do not put them in breach of the UN drug control conventions.

Uruguay has argued its policy is fully in line with the original objectives that the drug control treaties emphasized, but have subsequently failed to achieve—namely, the protection of the health and welfare of humankind. Uruguayan authorities have specifically argued that the creation of a regulated market for adult use of cannabis is driven by health and security imperatives and is therefore an issue of human rights. As such, officials point to wider UN human rights obligations that need to be respected, specifically appealing to the precedence of human rights principles over drug control obligations. As the first country courageous enough to take the step of regulating cannabis for all uses, it is enormously significant that Uruguay has explained its reform with reference to its overarching human rights obligations under international law.⁴⁸ Moreover, while reluctant to acknowledge its cannabis regulation model represents non-compliance with the drug treaties, Uruguay has noted that it creates legal tensions within the treaty system that may require revision and modernization. At the 2013 CND session, for example, Diego Cánepa, head of the Uruguayan delegation, declared: “Today more than ever we need the leadership and courage to discuss if a revision and modernization is required of the international instruments adopted over the last fifty years.”⁴⁹

U.S. officials, for their part, have argued that since the cultivation, trade, and possession of cannabis taking place in multiple U.S. states remain criminal offenses

under U.S. federal law, the federal government as State party to the Conventions is not in breach. This is despite the federal government’s decision to accommodate the state-level developments, provided they proceed within certain parameters.⁵⁰ A recent U.S. discourse, promoted by Ambassador William Brownfield (Assistant Secretary for International Narcotics and Law Enforcement Affairs), maintains that the extant treaty framework possesses sufficient flexibility to allow for regulated cannabis markets.⁵¹ This argument is strained by any reasonable understanding of the treaties and their overtly prohibitionist object and purpose—and appears to reflect political expediency rather than convincing legal reasoning.⁵² A good case can be made that the main objective of Ambassador Brownfield’s flexibility argument is to “prevent clear treaty breaches of state-level cannabis legalization initiatives from triggering an open international debate on treaty reform.”⁵³ Nevertheless, such a debate is now inevitable, not least since the INCB has made clear statements that both Uruguayan and U.S. cannabis regulation models are not in compliance with the treaties, and Brownfield has himself acknowledged the INCB’s authority in determining whether or not State parties are in compliance.⁵⁴

An argument has also been made (although not by any State parties) that legal regulation is possible within the bounds of the treaties by interpreting the Conventions’ “scientific purposes” language to include experimentation with alternative regulatory options, so long as these are researched. This, however, misunderstands the meaning of “scientific purposes” within the treaties, confusing the uses to which substances may be put with the scientific or evidence base for policy. It also takes the phrase out of its context, both within the article concerned and the treaty as a whole, contrary to basic Vienna Convention rules on interpretation.⁵⁵

PROCEEDING IN “PRINCIPLED NON-COMPLIANCE”

Rather than attempting to argue why legally regulating cannabis would not constitute a compliance problem with the 1961 and 1988 Conventions, States that wish to proceed with legal regulation could instead openly acknowledge that doing so would result in non-compliance. Crucially, this option requires that the State sets out its reasons for national policy reform, how this affects compliance, and in particular why this is necessary for the realization of other international legal and policy commitments. Moreover this situation of non-compliance should be seen and presented as temporary, with the aim of ensuring the realignment of the country’s new domestic laws and practice with its treaty obligations as part-and-parcel of the reform initiative. The State should, in parallel, request multilateral discussions to resolve the situation, for example through supporting an expert advisory group on the reform of the conventions,⁵⁶ and supporting a later Conference of the Parties (COP). Pending those developments, the State would carry on in conformity with its remaining commitments under the treaties, report as usual to the INCB, and report to the CND on the outcomes of its policies.

Clearly, open non-compliance with international legal obligations is not desirable, but all of the reform options set out in this paper are driven by necessity. The problem here is not that countries are opting for regulatory approaches. Rather, outmoded and unworkable treaty provisions are the problem that gives rise to the need for a temporary and transitional period of principled non-compliance. In this context the recognition of the fact that a State can no longer fully comply with the Conventions’ obligations regarding cannabis need not be seen as disrespect for the rule of law. To the contrary, it confirms that treaty commitments matter. Indeed, treaty non-compliance as domestic laws and practice change is a fairly common feature of regime evolution and modernization.⁵⁷ Waving away worries about non-compliance by resorting to dubious legal justifications is much more an expression of disrespect for international law. Many governments reforming their cannabis laws are doing so based on health, development, human rights, security, or other grounds, and out of a concern for the

international legal commitments made in these areas, the realization of which has been negatively affected by the implementation of the drugs conventions. As the Global Commission on Drug Policy has argued:

Unilateral defections from the drug treaties are undesirable from the perspective of international relations and a system built on consensus. Yet the integrity of that very system is not served in the long run by dogmatic adherence to an outdated and dysfunctional normative framework. The evolution of legal systems to account for changing circumstances is fundamental to their survival and utility, and the regulatory experiments being pursued by various states are acting as a catalyst for this process. Indeed, respect for the rule of law requires challenging those laws that are generating harm or that are ineffective.⁵⁸

Moreover, what we can now see is that it is not the case that States will face significant condemnation from the international community for cannabis reforms that are increasingly common practice across the world. Opting for reform and acknowledging non-compliance can help set the stage for treaty reform options that can be implemented collectively among like-minded States, such as the *inter se* option.



Cannabis drying in Morocco. Courtesy Pien Metaal.

TRANSITIONING TO AN INTERNATIONAL LEGAL REGIME SUPPORTIVE OF DRUG MARKET REGULATION

More and more States are acknowledging the powerful arguments for questioning the treaty-imposed prohibition model for cannabis control. As outlined here, the original inclusion of cannabis within the current international framework is the result of questionable procedures and dubious evidence. No formal review that meets currently accepted standards and scientific knowledge has ever taken place. For all these reasons, multiple forms of soft defection, non-compliance, decriminalization, and de facto regulation have persisted in countries where traditional use is widespread, and have since blossomed around the world to almost every nation or territory where cannabis has become popular in the past half century.

Decades of doubts, soft defections, legal hypocrisy, and policy experimentation have now reached the point where *de jure* legal regulation of the whole cannabis market is gaining political acceptability, even if it violates certain outdated elements of the UN conventions. Tensions are likely to further increase between countries pursuing regulatory approaches and those strongly in favor of defending the status quo as well as the UN drug control system and its specialized agencies.

In the untidy conflict of procedural and political constraints on treaty reforms versus the movement towards a modernized global drug control regime, the system will likely go through a further period of legally dubious interpretations and questionable justifications for growing numbers of national and sub-national reforms. And the situation is unlikely to change until a tipping point is reached and a group of like-minded countries is ready to engage in the challenge to reconcile the multiple and increasing legal inconsistencies and disputes.

The inevitability of further cannabis reforms looks set to be the issue that opens the debate around the UN drug control treaty system, and questions around potential regulation models for other drugs are likely

to appear on the table sooner or later. In fact, that debate has already started with regard to coca leaf and other psychoactive plants, and has regularly surfaced in the context of responses to New Psychoactive Substances (NPS). While the arguments driving the current dynamic towards cannabis regulation do not all apply in the same ways to other controlled substances, ongoing reforms focused on cannabis are not the end of the story, but are likely to act as the catalyst for reviewing the efficacy of the international drug control system for certain other substances as well. Such a situation must be taken into account as discussions around cannabis develop.

Indeed, the question now appearing on the international policy agenda is no longer whether or not there is a need to reassess and modernize the UN drug control system, but rather when and how. The question is if a mechanism can be found soon enough to deal with the growing tensions and to transform the current system in an orderly fashion into one more adaptable to local concerns and priorities, and one that is more compatible with basic scientific norms and modern UN standards. Key elements of an effective strategy for moving forward should include:

PROMOTING HIGH-LEVEL DIALOGUE ON RESOLVING THE TENSIONS BETWEEN EMERGING STATE PRACTICE AND OUTDATED AND COUNTERPRODUCTIVE TREATY OBLIGATIONS

States seeking to explore, develop, or actively implement cannabis regulation models will all face different legal and political challenges, domestically and internationally. Whatever reforms are undertaken, States should ensure that the issue is explored, rather than ignored, in key multilateral fora. Leadership from reform-minded States in promoting

this debate will be vital. There are a number of ways in which this dialogue can be informed and encouraged:

- Supporting proposals for an **expert advisory group** to consider issues around emerging challenges—including cannabis regulation—and modernization of the international drug control framework, and make recommendations to inform the UN debate in the lead up to 2019, when a new UN Political Declaration and Plan of Action are due to be adopted. Such proposals are already being actively promoted by a number of State parties.⁵⁹
- Proceeding with **formal mechanisms for reforming the treaty system**—such as amendment, modification, reservation options, or more substantive change. Even if not initially successful, such actions will both ensure the question of treaty modernization is meaningfully considered within established fora, and demonstrate the desire of reform-minded States to resolve tensions and potential non-compliance issues using established legal mechanisms.
- Convening **informal drug policy dialogues** or intergovernmental conferences for like-minded States to discuss shared concerns and dilemmas outside of the institutional framework of the UN and regional structures such as the OAS and EU, and perhaps prepare resolutions for consideration in the CND and other UN or regional fora.

PURSUING DOMESTIC REFORMS IN PARALLEL WITH MULTILATERAL DIALOGUE AND REFORM PROCESSES

Modernization of the treaty framework to accommodate the needs of reform-minded States is now seemingly inevitable as the number of dissenting States grows. Unless the treaty system can begin to prove itself capable of modernizing, it risks drifting into irrelevance, affecting not only those elements that are clearly outmoded and ripe for reform, but also elements upon which relative consensus still exists.

Achieving formal multilateral reforms, however, is likely to entail a difficult and protracted process. Until these are concluded, reforms in the short term are likely to involve multiple States moving into technical, transitional non-compliance. The challenges this raises can be minimized by:

- Avoiding sidestepping or denial of non-compliance by offering implausible legal justifications.
- Acknowledging temporary “principled non-compliance” and providing reasoning for doing so, rooted in the health and welfare of citizens, and wider UN Charter commitments.
- Actively promoting multilateral debate and reform efforts (as above) in parallel with domestic reforms.
- Establishing a cannabis regulation model⁶⁰ that clearly establishes public health and wellbeing as a central goal, operates under a national agency, and minimizes negative impacts for neighboring States.
- Ensuring a framework for comprehensive monitoring and evaluation with regular reporting to national legislatures and relevant UN agencies and other stakeholders.⁶¹

PURSUING COLLECTIVE ACTION

Any attempts to promote high-level dialogue, explore domestic reform, or achieve reforms of the multilateral framework will be facilitated by collective action of like-minded States working towards a common cause. By building on the diversity of the various countries, such an alliance of reform-minded States can lay the groundwork for a more effective approach to cannabis policy that, over time, can prove itself and attract more adherents. By working in coordination rather than in isolation, the initial reform-minded States can learn from one another and also provide leadership in opening the political space for other countries to move beyond prohibitionist approaches that have proven so detrimental to human health, development, security, and the rule of law itself.⁶²

RESOURCES

“Cannabis Policy: Briefing Note” (Canadian Drug Policy Coalition & Canadian HIV/AIDS Legal Network, 2015), <http://drugpolicy.ca/wp-content/uploads/2015/09/CDPC-Cannabis-Brief-Final-Web.pdf>

How to Regulate Cannabis: A Practical Guide (Transform Drug Policy Foundation, 2013), <http://www.tdpf.org.uk/sites/default/files/How-to-Regulate-Cannabis-Guide.pdf>

“International Law and Drug Policy Reform: Report of a GDPO/ICHRDP/TNI/WOLA Expert Seminar” (July 2015), <https://www.tni.org/en/publication/international-law-and-drug-policy-reform>

Taking Control: Pathways to Drug Policies That Work (Global Commission on Drug Policy, 2014), http://issuu.com/igarape/docs/global_commission_en/1?e=11406483/9986842

The Rise and Decline of Cannabis Prohibition (Transnational Institute & Global Drug Policy Observatory, March 2014), <https://www.tni.org/en/publication/the-rise-and-decline-of-cannabis-prohibition>



Second Opium Conference in Geneva, 1924-1925. Courtesy UNOG Library, League of Nations Archive.

ENDNOTES

- ¹ Article 4 General Obligations, *Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs*, New York: United Nations, available at https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Ebook/The_International_Drug_Control_Conventions_E.pdf.
- ² Cannabis has a double or composite classification within the Single Convention. Cannabis, cannabis resin, and extracts and tincture of cannabis are in Schedule I among substances whose properties might give rise to dependence and that present a serious risk of abuse and so are subject to all control measures envisaged by the Convention. Cannabis and cannabis resin are also listed in Schedule IV, along with some other substances listed in Schedule I, and are deemed especially dangerous by virtue of what are regarded to be their harmful characteristics, risk of abuse, and extremely limited therapeutic value. See D.R. Bewley-Taylor, *International Drug Control: Consensus Fractured*, Cambridge University Press, 2012, pp. 154-157.
- ³ There were 185 Parties to the Single Convention as of 31 March 2016, https://treaties.un.org/Pages/ViewDetails.aspx?s-rc=TREATY&mtdsg_no=VI-18&chapter=6&lang=en#1.
- ⁴ W. B. McAllister, *Drug Diplomacy in the Twentieth Century: An International History*, Routledge: London and New York, 2000.
- ⁵ For a detailed account of how cannabis came to be included within the international control framework see D. Bewley-Taylor, T. Blickman and M. Jelsma, *The Rise and Decline of Cannabis Prohibition. The History of Cannabis in the UN Drug Control System and Options for Reform*, Transnational Institute: Amsterdam/Global Drug Policy Observatory: Swansea, March 2014.
- ⁶ See C. Hallam, D. Bewley-Taylor & M. Jelsma, M., *Scheduling in the International Drug Control System*, Transnational Institute-International Drug Policy Consortium, Series on Legislative Reform of Drug Policies, No. 25, June 2014, https://www.tni.org/files/download/dlr25_0.pdf.
- ⁷ *Cannabis and cannabis resin: Information Document*, WHO Expert Committee on Drug Dependence, 36th Meeting, Geneva, 16-20 June 2014. Also see E. Danenberg, L.A. Sorge, W. Wieniawski, S. Elliott, L. Amato, and W.K. Scholten, 'Modernizing methodology for the WHO assessment of substances for the international drug control conventions', *Drug and Alcohol Dependence*, 2013, 131 (3): 175-181; available at <http://dx.doi.org/10.1016/j.drugalcdep.2013.02.032>.
- ⁸ For a discussion of flexibility within the drug control treaties see D. Bewley-Taylor and M. Jelsma, *The UN Drug Control Conventions: The Limits of Latitude*, Series on Legislative Reform of Drug Policies, No. 18, March 2012.
- ⁹ D. R. Bewley-Taylor, *International Drug Control: Consensus Fractured*. Cambridge University Press, 2012.
- ¹⁰ A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2007, p. 207.
- ¹¹ See <https://www.incb.org/incb/en/about.html>. On the INCB's position on the Dutch 'coffeeshops' and cannabis policies more generally see D. Bewley-Taylor, T. Blickman and M. Jelsma, *The Rise and Decline of Cannabis Prohibition. The History of Cannabis in the UN Drug Control System and Options for Reform*, Transnational Institute: Amsterdam/Global Drug Policy Observatory: Swansea, March 2014, pp. 32-42.
- ¹² A. Rosmarin and N. Eastwood, *A Quiet Revolution: Drug Decriminalisation Policies in Practice Across the Globe*, London: Release, 2012. Also, D.R. Bewley-Taylor, *International Drug Control: Consensus Fractured*, Cambridge University Press, 2012, pp. 157-190.
- ¹³ T. Blickman, *Cannabis Policy Reform in Europe: Bottom Up rather than top down*, Transnational Institute Series on legislative Reform of Drug Polices, No. 28, December 2014, <https://www.tni.org/files/download/dlr28.pdf>.
- ¹⁴ See D. R. Bewley-Taylor, *International Drug Control: Consensus Fractured*. Cambridge University Press, 2012, pp. 177-181.
- ¹⁵ Article 49, *Single Convention on Narcotic Drugs, 1961*; India, Nepal, Pakistan, and later Bangladesh made use of that transitional exemption with regard to cannabis.
- ¹⁶ See for example the situation in Morocco. D. Bewley-Taylor, T. Blickman and M. Jelsma, *The Rise and Decline of Cannabis Prohibition: The History of Cannabis in the UN Drug Control System and Options for Reform*, Transnational Institute: Amsterdam/Global Drug Policy Observatory: Swansea, March 2014, pp. 12-13. Also of note in this regard is India. Beyond the use of bhang that is permitted within the Single Convention, there remains widespread cultivation and use of cannabis within many parts of the country. See R. Bhattacharji, "View from the Ground: Heading for the Hills; Cannabis in Malana," Global Drug Policy Observatory, Swansea, Blog, <http://gdpo.swan.ac.uk/?p=365>.
- ¹⁷ For example, in a September 2015 report prepared as contribution to the 2016 UNGASS, the UN High Commissioner for Human

Rights noted that: “Indigenous peoples have a right to follow their traditional, cultural and religious practices. Where drug use is part of these practices, the right of use for such narrowly defined purposes should in principle be protected, subject to limitations provided for in human rights law.” https://www.unodc.org/documents/ungass2016//Contributions/UN/OHCHR/A_HRC_30_65_E.pdf.

- ¹⁸ See, for example, International Drug Policy Consortium, *The 2015 Commission on Narcotic Drugs and its Special Segment on Preparations for the United Nations General Assembly Special Session on the World Drug Problem: Report of Proceedings*, May 2015, <https://www.tni.org/files/publication-downloads/cnd-proceedings-report-2015.pdf>.
- ¹⁹ For a description of Uruguay’s cannabis regulation law, including its passage, contents, objectives, and challenges, see John Walsh and Geoff Ramsey, “Cannabis Regulation in Uruguay: An Innovative Law Facing Major Challenges,” *Journal of Drug Policy Analysis* (forthcoming).
- ²⁰ J. Philpott, “Plenary Statement for the Honourable Jane Philpott Minister of Health - UNGASS on the World Drug Problem,” Government of Canada, April 20, 2016, <http://news.gc.ca/web/article-en.do?nid=1054489>.
- ²¹ *Making drug control ‘fit for purpose’: Building on the UNGASS decade*, Report by the Executive Director of the United Nations Office on Drugs and Crime as a contribution to the review of the twentieth special session of the General Assembly, pp. 15-16, https://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_51/1_CRPs/E-CN7-2008-CRP17_E.pdf.
- ²² United Nations Economic and Social Council, E/CN.7/2016/L.12/Rev.1, 22 March 2016, <https://documents-dds-ny.un.org/doc/UN-DOC/LTD/V16/017/77/PDF/V1601777.pdf?OpenElement>.
- ²³ European Union, “Common Position on UNGASS 2016,” https://www.unodc.org/documents/ungass2016//Contributions/IO/EU_COMMON_POSITION_ON_UNGASS.pdf.
- ²⁴ Statement by Mr. Werner Sipp, President, International Narcotics Control Board (INCB), Fifty-ninth session of the Commission on Narcotic Drugs, 14 March 2016, http://www.incb.org/incb/en/news/speeches/2016/ungass_cnd.html.
- ²⁵ INCB, Report for 2015, 2 March 2016, Foreword, p. iv., https://www.incb.org/documents/Publications/AnnualReports/AR2015/English/AR_2015_E.pdf.
- ²⁶ Treaty amendments that are adopted through this procedure do not apply to parties that have registered objections in the case of the 1961 and 1971 conventions, or those that have not notified their explicit consent in the case of the 1988 Convention. 1961 Convention (as amended) Article 47; 1971 Convention Article 30; 1988 Convention, Article 31.
- ²⁷ In accordance with Article 62, paragraph 3 of the UN Charter.
- ²⁸ United Nations, “Memorandum of the United States of America Respecting its Proposed Amendments to the Single Convention on Narcotic Drugs, 1961,” E/CONF.63/10, in *United Nations Conference to Consider Amendments to the Single Convention on Narcotic Drugs*, 1961 Geneva, 6–24 March 1972: Official Records, vol. 1, New York: UN, 1974, pp. 3–4.
- ²⁹ Article 36 of the amended 1961 Convention reads: “Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers of drugs shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration.” The 1972 Amending Protocol also fine-tuned Single Convention provisions relating to the estimates system, data collection and output, while strengthening certain other law enforcement provisions including on extradition, and the functioning of the INCB. See: D. Bewley-Taylor and Martin Jelsma, “Regime change: Re-visiting the 1961 Single Convention on Narcotic Drugs,” *International Journal of Drug Policy*, Volume 23, 2012, pp. 72–81.
- ³⁰ Article 40.4, *Vienna Convention on the Law of Treaties*, 23 May 1969, http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.
- ³¹ The status of States’ accession to the 1961 Single Convention and the 1972 Protocol was provided in the INCB Report for 2015, p. 9, paragraph 50: “Following the accession of Afghanistan, as at 1 November 2015, the number of States parties to the 1961 Convention as amended by the 1972 Protocol was 185. Prior to that accession, Afghanistan had been a party to the Single Convention on Narcotic Drugs of 1961 in its unamended form. Chad is now the only State party to the 1961 Convention that has not yet acceded to the 1972 Protocol. Only 11 States have yet to accede to the 1961 Convention as amended: 2 States in Africa (Equatorial Guinea and South Sudan), 2 in Asia (State of Palestine and Timor-Leste) and 7 in Oceania (Cook Islands, Kiribati, Nauru, Niue, Samoa, Tuvalu and Vanuatu).”
- ³² OAS, *Scenarios for the Drug Problem in the Americas*, 2013 http://www.oas.org/documents/eng/press/Scenarios_Report.PDF.
- ³³ E. Danenberg, L.A. Sorge, W. Wieniawski, S. Elliott, L. Amato, W.K. Scholten, “Modernizing methodology for the WHO assessment of substances for the international drug control conventions,” in *Drug and Alcohol Dependence*, Volume 131, Issue 3, pp. 175–181,

1 August 2013, <http://dx.doi.org/10.1016/j.drugalcdep.2013.02.032>.

³⁴ United Nations Office on Drugs and Crime, E/CN.7/2014/10, 2014, p. 18.

³⁵ For more details on scheduling, see: Christopher Hallam, Dave Bewley-Taylor & Martin Jelsma, "Scheduling in the international drug control system," Series on Legislative Reform of Drug Policies No. 25, TNI/IDPC June 2014.

³⁶ Article 41, *Vienna Convention on the Law of Treaties*, 1969, http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

³⁷ M. Jelsma, "UNGASS 2016: Prospects for Treaty Reform and UN System-Wide Coherence on Drug Policy," *Journal of Drug Policy Analysis*, 2016, <http://www.degruyter.com/view/j/jdpa.ahead-of-print/jdpa-2015-0021/jdpa-2015-0021.xml>. According to a commentary on the 1969 VCLT, "Due to the conflicting interests prevailing at an international level, amendments of multilateral treaties, especially amendments of treaties with a large number of parties, prove to be an extremely difficult and cumbersome process; sometimes an amendment seems even impossible. It may thus happen that some of the States Parties wish to modify the treaty as between themselves alone." See Dörr, Oliver, and Kirsten Schmalenbach, eds., *Vienna Convention on the Law of Treaties: A Commentary*, London and New York: Springer Heidelberg Dordrecht, 2012, p. 719.

³⁸ International Law Commission (ILC), "Summary Record of the 745th Meeting: 15 June 1964," A/CN.4/SR.745, in: *Yearbook of the International Law Commission: 1964*, vol. 1, New York: UN, 1965, p. 144, paragraph 49.

³⁹ *Ibid.*, paragraph 53.

⁴⁰ J. Klabbers, "Treaties, Amendment and Revision," in *Max Planck Encyclopedia of Public International Law*, December 2006, pp. 1084-1089, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1483>

⁴¹ According to one commentary, "[I]f the fundamental situation underlying treaty provisions becomes so changed that continued performance of the treaty will not fulfil the objective that was originally intended, the performance of those obligations may be excused." See M. Leinwand, 'The International Law of Treaties and United States Legalization of Marijuana', *Columbia Journal of Transnational Law*, Volume 10, 1971, pp. 413-441.

⁴² R. Room, W. Hall, P. Reuter, B. Fischer, S. Lenton, and A. Feilding, (convener), *Cannabis Policy: Moving Beyond Stalemate*, Global Cannabis Commission, The Beckley Foundation, 2008, p. 155.

⁴³ Reservations can be found in the UN Treaty Collection database, <https://treaties.un.org/>.

⁴⁴ The 1988 Convention does not contain specific rules for reservations and is therefore governed by the general rules established in the 1969 Vienna Convention on the Law of Treaties, specifically articles 19-23, which do not establish a threshold of objections. Usually that means that reservations are accepted without having any effect for objecting State parties.

⁴⁵ L.R. Helfer, "Not fully committed? Reservations, risk and treaty design," *Yale Journal of International Law*, Volume 31, 2006.

⁴⁶ There have also been examples of States lodging "late reservations" after having already adhered to a treaty without first withdrawing from it. The issuing of such "late reservations," a procedural shortcut compared to the process of first withdrawal and then re-acceding with a new reservation, has been subject to debate among legal scholars and in the UN International Law Commission because it contravenes basic rules for reservations established by the Vienna Convention. The current practice of the UN treaty depository is to allow late reservations only if no other State parties object; even a single objection would block a late reservation from taking effect.

⁴⁷ United Nations, *Commentary on the Single Convention on Narcotic Drugs*, 1961, New York, 1973, p. 476.

⁴⁸ In 2015, Uruguay co-sponsored a UN Human Rights Council resolution calling upon the UN High Commissioner for Human Rights (UNHCR) to prepare a report "on the impact of the world drug problem on the enjoyment of human rights." Uruguay's contribution to UNHCR's preparations laid out the country's stance regarding the primacy of human rights: "We reaffirm the importance of ensuring the human rights system, underscoring that human rights are universal, intrinsic, interdependent and inalienable, and that is the obligation of States to guarantee their priority over other international agreements, emphasizing the international drug control conventions." See Junta Nacional de Drogas, *Impact of the World Drug Problem in the exercise of Human Rights*, 15 May 2015, <http://www.wola.org/sites/default/files/Drug%20Policy/AportedeROUalaUNGASS2016enDDHHENG.pdf>.

⁴⁹ Commission on Narcotic Drugs, *Intervención del Jefe de Delegación de Uruguay*, 56° Período de Sesiones de la Comisión de Estupeficientes, Prosecretario de la Presidencia del Uruguay, 11 March 2013.

⁵⁰ See memo from Deputy US Attorney General James M. Cole, August 2013, <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

- ⁵¹ “Fatal Attraction: Brownfield’s Flexibility Doctrine and Global Drug Policy Reform,” The Huffington Post, 11 November 2015, http://www.huffingtonpost.co.uk/damon-barett/drug-policy-reform_b_6158144.html.
- ⁵² For more in-depth discussion of the U.S. stance that the treaties are flexible enough to encompass legal regulation of cannabis, see Wells Bennett and John Walsh, “Marijuana Legalization is an Opportunity Modernize International Drug Treaties,” Brookings and WOLA, October 2014, <http://www.brookings.edu/~media/research/files/reports/2014/10/15-marijuana-legalization-modernize-drug-treaties-bennett-walsh/cepmmjlegalizationv4.pdf>.
- ⁵³ See M. Jelsma, ‘UNGASS 2016: Prospects for Treaty Reform and UN-System-Wide Coherence on Drug Policy,’ *Journal of Drug Policy Analysis*, <http://www.degruyter.com/view/j/jdpa.ahead-of-print/jdpa-2015-0021/jdpa-2015-0021.xml>.
- ⁵⁴ “Trends in Global Drug Policy,” Roundtable with William R. Brownfield, U.S. Assistant Secretary of State, 8 March 2016. In reply to a reporter’s question, Brownfield pointed to the INCB as the body authorized to judge whether or not a country’s policy is in compliance with the conventions: “If you are asking me do I believe certain governments have perhaps come very close to moving out of compliance with the conventions, probably so. But that is not my determination to make, nor is it the determination of the United States Government. This is the determination of the United Nations body, the International Narcotics Control Board, that was established for this specific purpose.” <http://fpc.state.gov/254116.htm>. The INCB mandate in this regard only applies to the 1961 and 1971 Convention. The 1988 Convention does not have any monitoring body; disputes about interpretation should be settled through consultation between the State parties themselves or ultimately could be brought to the International Court of Justice for decision (article 32).
- ⁵⁵ See, for example, All Party Parliamentary Group for Drug Policy Reform, “Guidance on Drug Policy: Interpreting the UN Drug Conventions,” https://www.unodc.org/documents/ungass2016/Contributions/Civil/APPG_for_Drug_Policy_Reform/Guidance_print_copy.pdf. Also see John Collins, “Development First: Multilateralism in the Post-‘War on Drugs’ Era,” and Francisco Thoumi, “Re-examining the ‘Medical and Scientific’ Basis for Interpreting the Drug Treaties: Does the ‘Regime’ Have Any Clothes,” in London School of Economics, *After the Drug Wars: Report of the LSE Expert Group on the Economics of Drug Policy*, pp. 9–29, <http://www.lse.ac.uk/IDEAS/publications/reports/pdf/LSE-IDEAS-After-the-Drug-Wars.pdf>.
- ⁵⁶ See TNI “UNGASS 2016: Background memo on the proposal to establish an expert advisory group,” November 2015, https://www.unodc.org/documents/ungass2016/Contributions/Civil/Transnational_Institute/Background_memo_November_UNGASS_2016_final.pdf.
- ⁵⁷ J.K. Cogan, “Noncompliance and the International Rule of Law,” *Yale Journal of International Law*, Vol. 31, 2006, pp. 189–210.
- ⁵⁸ Global Commission on Drug Policy, *Taking Control: Pathways to Drug Policies That Work*, 2014, <http://www.gcdpsummary2014.com>.
- ⁵⁹ For example, in May 2105, Jamaica also called for the establishment of an “expert advisory group” during the “UN General Assembly High-Level Thematic Debate in Support of the Process towards the 2016 UNGASS,” <http://www.undrugcontrol.info/images/stories/documents/JamaicaStmt-HLTD-NY07052015.pdf>. Similarly, as part of its August 2015 input to the UNGASS process, Uruguay called for the creation of a “consultative group of experts,” http://www.infodrogas.gub.uy/images/stories/pdf/uy_ungass_2016_esp-eng.pdf. And during the 59th session of the CND in March 2016 Colombia called for the creation of an “expert-level group,” https://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_59/Statements/08_Colombia_English.pdf.
- ⁶⁰ See S. Rolles, G. Murkin, “How to Regulate Cannabis: A practical guide,” Transform Drug Policy Foundation, 2014 <http://www.tdpf.org.uk/sites/default/files/How-to-Regulate-Cannabis-Guide.pdf>.
- ⁶¹ For a discussion of monitoring and evaluation frameworks, see “Evaluating Cannabis Legalization,” WOLA/ACLU, March 14, 2016. http://www.wola.org/commentary/evaluating_cannabis_legalization
- ⁶² For a discussion of like-minded groups within international relations and drug policy more specifically, see D. R. Bewley-Taylor, “Towards revision of the UN drug control conventions: Harnessing like-mindedness,” *The International Journal of Drug Policy*, Volume 24, Issue 1, January 2013, pp. 60–68.



ABOUT THE CONTRIBUTING ORGANIZATIONS

THE CANADIAN DRUG POLICY COALITION (CDPC) is a national coalition of organizations and individuals working to improve Canada’s approach to drugs and global drug policy. It is a partner project with the Faculty of Health Sciences at Simon Fraser University, Vancouver, Canada. (www.drugpolicy.ca)

THE CANADIAN HIV/AIDS LEGAL NETWORK promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research and analysis, advocacy and litigation, public education and community mobilization. (www.aidslaw.ca)

THE GLOBAL DRUG POLICY OBSERVATORY (GDPO), based at Swansea University, UK, aims to promote evidence and human rights based drug policy through the comprehensive and rigorous reporting, monitoring and analysis of policy developments at national and international levels. (www.swansea.ac.uk/gdpo)

THE INTERNATIONAL CENTRE ON HUMAN RIGHTS AND DRUG POLICY (HRDP), established in 2009, is dedicated to developing and promoting innovative and high quality legal and human rights research and teaching on issues related to drug laws, policy and enforcement. Since 2011, the HRDP has made its home at the Human Rights Centre at the University of Essex. (www.hr-dp.org)

MEXICO UNITED AGAINST CRIME (MUCD) is a non-profit organization working in favour of citizen security, legality and justice. In over 19 years of work we have provided assistance to thousands of victims, consolidated the nation’s largest Culture of Lawfulness Programme, and became a leading organization in the global drug policy debate. (www.mucd.org.mx)

TRANSFORM DRUG POLICY FOUNDATION (TDPF) is a UK based drug policy think tank operating globally from offices in London, Bristol, and Mexico City. Through its research, policy analysis and advocacy work, Transform aims to promote humane and effective systems of legal drug regulation. (www.tdpf.org.uk)

THE TRANSNATIONAL INSTITUTE (TNI) Drugs & Democracy programme has been analysing the trends in the illegal drugs market and in drug policies globally since 1996. The programme has gained a reputation worldwide as one of the leading international drug policy research institutes and as a serious critical watchdog of UN drug control institutions. (www.tni.org/en/work-area/drugs-and-democracy)

WASHINGTON OFFICE ON LATIN AMERICA (WOLA) is a leading research and advocacy organization advancing human rights in the Americas. We envision a future where public policies protect human rights and recognize human dignity, and where justice overcomes violence. (www.wola.org)

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Photo Credit

Front page, a cannabis plant in a legal grow facility in Colorado, United States. Jessamine Bartley-Matthews/WOLA.

To contact the authors, please email info@wola.org.