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The UN drug control conventions

The Limits of Latitude

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Faced with a complex range of drug related problems, a growing number of nations are exploring the development of nationally appropriate policies that shift away from the prohibition-oriented approach that has long dominated the field but is losing more and more legitimacy. In so doing, such countries must pay close attention to the UN based global drug control framework of which practically all nations are a part.[2] This briefing paper outlines the international legal drug control obligations, the room for manoeuvre the regime leaves open to national policy makers and the clear limits of latitude that cannot be crossed without violating the treaties. It also covers the vast grey area lying between the latitude and limitations, including the legal ambiguities that are subject to judicial interpretation and political contestation. The paper applies the traffic light analogy to drug law reform in order to divide ongoing policy changes and emerging proposals into three categories regarding their legal tenability:

red, stop or challenge the conventions;

orange, proceed with caution; and

green, please proceed.

The present system of worldwide drug control is based upon three international conventions. These are the 1961 Single Convention on Narcotic Drugs, as amended by

KEY POINTS

- Decriminalization of possession, purchase and cultivation for personal use operates reasonably comfortably inside the confines of the UN drug control conventions
- Harm reduction services, including drug consumption rooms, can operate lawfully under the drug control treaty system
- There is greater scope to provide health care or social support instead of punishment for people caught up in minor offences related to personal use or socio-economic necessity
- All controlled drugs can be used for medical purposes, including heroin prescription and 'medical marijuana'; what constitutes medical use is left to the discretion of the parties
- The INCB often increases tensions around interpretations instead of resolving them, though the Board should be guided 'by a spirit of co-operation rather than by a narrow view of the letter of the law'
- There are limits of latitude; a legal regulated market for non-medical use of cannabis or any other scheduled drug is not permissible within the treaty framework
- Legal tensions exist with other international legal obligations such as those stemming from human rights or indigenous rights
- Growing doubts and inherent inconsistencies and ambiguities provide legitimate ground for demanding more space for experimentation with alternative control models than the current systems allows

the 1972 Protocol, the 1971 Convention on Psychotropic Substances and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[3] In 1968, under the provisions of the Single Convention, the International Narcotics Control Board (INCB) was created as the 'independent and quasi-judicial monitoring body' [4] for its implementation. The mandate of the INCB was subsequently strengthened, within clearly defined limits, under the 1972 protocol[5] and extended to also monitor compliance of the 1971 Convention and to oversee the precursor control system established under the 1988 Convention.

Like their predecessors, this group of multilateral conventions was established by the international community with the objective of limiting the production, supply and use of narcotic and psychotropic drugs to medical and scientific purposes. The 1961 and 1971 Conventions each place more than 100 controlled substances in four schedules according to their perceived therapeutic value and liability to abuse. Annexed to the 1988 Convention are two tables listing precursors, reagents and solvents, frequently used in the illicit manufacture of narcotic drugs or psychotropic substances.

As Neil Boister, an expert on the penal provisions of the conventions notes, 'While the substance of the drug control conventions is complex, their function is simple. They provide the legal structure for an international system of drug control by defining control measures to be maintained within each state party to these conventions and by prescribing rules to be obeyed by these Parties in their relations with each other.' These rules can be categorized by two principal methods of achieving drug control. These are commodity control (the definition and regulation of the *licit* production, supply and consumption of drugs) and penal control (the suppression through criminal law of *illicit* production, supply and consumption.)[6] The conventions therefore operate with the intention of creating an appropriate balance between penal sanctions, the degree of real and/or potential harm associated with specific drugs and their therapeutic usefulness.

The overarching concern for the 'health and welfare of mankind' expressed within the conventions' preambles, required a dual goal: reducing the availability of drugs to prevent abuse and addiction that 'constitutes a serious evil for the individual and is fraught with social and economic danger to mankind', while at the same time ensuring adequate availability because their medical use is 'indispensable for the relief of pain and suffering'.[7] The global control system, established with that twin purpose, effectively ended the large-scale diversion of narcotic drugs like cocaine and heroin from pharmaceutical sources to illicit channels. However, it was unable to prevent the resulting rapid expansion of illicit production that began supplying the non-medical market instead.[8] The tensions resulting from the inherent duality exacerbated as the system evolved based on the implicit principle that reducing availability for illicit purposes could only be achieved through the penal enforcement of predominantly prohibition oriented supply-side measures. The tightening of drug laws, escalation of law enforcement efforts and an actual 'war on drugs' against the illicit market, over time distorted the balance at the expense of the other side of the coin.[9]

COMPLIANCE AND DEVIATION

Within this treaty framework, Parties to the conventions are afforded a certain degree of latitude in the formulation of national drug control policies. The conventions are not self-executing, thereby constituting a system of indirect control. That is to say that while they impose obligations on states to apply international law, their provisions are not directly or immediately applicable from the international treaty nor therefore enforceable by a UN body. Rather, states themselves must first incorporate treaty

provisions within domestic law. This legal reality combines with two other important and complementary factors to generate a certain amount of domestic policy space within the prohibitive parameters of the treaty framework. First, like all multilateral instruments seeking widespread acceptance, the drug control conventions are the products of political compromise and are consequently 'saturated with textual ambiguity'.[10] Second, as in other fields of international concern, interpretation of the drug control treaties must be seen as an art not a science.[11] Quite detailed guidance for interpretation is provided for each treaty in an official Commentary, and proceedings of the Conferences of the Parties, where the conventions were negotiated, have been published providing further information about the intentions of the drafters and the arguments used in debates to reach the compromises (or in several instances majority voting) of the finally agreed wording. The interpretive practice of the parties is another important source of determining the margins of interpretation of ambiguous terms. Flexible interpretations of certain treaty provisions by states parties that remain uncontested by other parties will over time become part of the acceptable scope for interpretation. Resolutions or political declarations adopted by the UN Commission on Narcotic Drugs (CND), the Economic and Social Council (ECOSOC) or the General Assembly can also play a significant role in this regard.

All those sources combined with the texts of the conventions themselves do provide clear indications for what constitutes an interpretation in good faith and respect of the 'object and purpose' of the treaty; both crucial considerations in relation to the Vienna Convention on the Law of Treaties.[12] Still, within those margins, subjective analysis of many clauses within the conventions creates a certain flexibility ('room for manoeuvre' or 'wiggle room') for individual Parties when formulating domestic policies.[13] Consequently, as well as defining clear limitations, the conventions also provide a degree of latitude for policy choices at the national and subnational level.

The purpose of this paper is to outline the legal parameters within which governing authorities can operate when formulating drug policy. It is not our intention here to engage in discussion of the merits or otherwise of policies that utilize the latitude within the extant system. Rather, we examine ongoing drug law reforms and proposals emerging in policy debates in order to classify them into three areas:

Policies that are clearly not permissible within the current treaty framework; pursuing them will at some point require changes in the treaty regime.

Policy choices that deviate from punitive-prohibition, and which, despite being regarded in breach of the conventions by the INCB can be robustly defended as working within the boundaries.

Policies that deviate from punitive-prohibition but are generally regarded as operating reasonably comfortably inside the confines of the UN drug control conventions

Before discussing these different cases, it is first necessary to clarify a few points of definition. First, to understand the latitude within and restrictions of the treaties it is essential to break down drug offences into two types; those relating to trafficking or commercial activities and those associated with personal use. Under the former heading, activities include possession with intent to supply commercially, as well as cultivating producing, supplying, trafficking on a commercial basis. Beyond possession, offences relating to personal use include cultivation, production, purchase and even importation for personal use as well as social supply or the sharing of drugs. The importance of these distinctions will become clear as the discussion unfolds.

For the purposes of this paper, we use the term punitive-prohibition to refer to policy regimes whereby the possession, cultivation or production, importation, sale and distribution of any amount of controlled substances for non-medical and non-scientific purposes are treated as criminal offences. Inherent flexibility within the drug control conventions notwithstanding, such an approach remains at the core, or put another way defines the spirit, of the existing international framework. Inclusion of the prefix punitive is important because, as the existence of 'wiggle room' suggests, a range of less- or non-punitive policy options with regard to personal use can operate more or less comfortably within the prohibition-oriented architecture of the present UN treaty based system. Deviation from the prohibitive ethos of the conventions, what elsewhere has been called the 'softening' of prohibition or 'soft defection' from the global drug prohibition regime,[14] have involved a number of processes described as 'decriminalization' and 'depenalization.'

These are often confusing terms describing approaches that exist as part of a continuum spanning a range of policies from punitive-prohibition to legal regulation.[15] Confusion within both the policy literature and public debate is the result of a number of factors stemming principally from a lack of universally agreed definition. This is compounded by their frequent and incorrect use as synonyms and different meanings across languages. A number of overlapping analytical frameworks incorporating 'depenalization' and 'decriminalization' have been developed to demarcate policy choices that move away from punitive-prohibition yet arguably remain within the overarching prohibitive parameters of the conventions.[16] For the sake of clarity and without claiming to conclude this debate, this brief follows the definitions used by the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) to classify policies that exploit the plasticity of the conventions in the following fashion.[17]

Decriminalization is regarded as the elimination of a conduct or activity from the sphere of criminal law. As such, the term, which is most commonly used in reference to consumption related offences, refers to legal contexts where the sanctions associated with certain acts are of an administrative character or have been abolished altogether. In this situation, other (non-criminal or civil) laws can regulate the conduct or activity that has been decriminalized.

Depenalization, on the other hand, is considered the maintenance but *relaxation* of the penal sanction provided for by the criminal law. Depenalization can refer to consumption related offences, which may be dealt with through referral schemes or alternative sanctions for offenders who are found to be drug dependent, but also to small-scale trading. The approach involves the reduction or elimination of custodial penalties, but crucially the specific conduct or activity remains a criminal offence. The existing diversity of policy choices may not always fit neatly within these definitions, but such a delineation is useful for the following discussion.

PERMISSIBLE POLICY OPTIONS WITHIN THE CURRENT TREATY FRAMEWORK

Softening punitive-prohibition vis-à-vis drug consumption

Variations of depenalization and decriminalization are at the heart of consumption-oriented policies that deviate from punitive-prohibition yet are widely accepted to operate within the confines of international law. Practices at national and subnational levels relate principally to two connected, but not necessarily contingent, policy approaches; tolerance towards the possession of drugs for personal use and interventions aiming to reduce the associated harm especially with injecting drug use, or what can be referred to as the harm reduction approach.

DRUG CONSUMPTION

The primary general obligation of the UN drug control treaty system is laid down in article 4 of the Single Convention, saying that "parties shall take such legislative and administrative measures as may be necessary ... to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs". This general obligation notwithstanding, the legality of tolerant approaches to drug consumption, owes much to the fact that there is no specific obligation to criminalize the use of drugs per se within any of the conventions.

To be sure, a close reading of the treaties reveals a legal disconnect between some general prohibition-oriented obligations and any mandatory penalization of certain forms of conduct, notably use. Indeed, drug 'use' is not mentioned in the penal provisions of the Single Convention (article 36) and the 1971 Convention (article 22) or in article 3 (Offences and Sanctions) of the 1988 Convention. This relates firstly to the fact that the treaties do not require countries to 'prohibit' any of the listed substances themselves. There were failed attempts during the treaty negotiations to introduce prohibition for the strictest categories, namely substances included in Schedule IV of the 1961 Convention (especially cannabis)[18] and those in Schedule I of the 1971 Convention. The treaties do not make any distinction between legal and illegal drugs and the term 'illicit drug' does not appear in the text of the conventions. Instead the treaties establish a system of strict legal control of the production and supply of all scheduled drugs for medicinal and scientific purposes, while introducing sanctions to counter the illicit production and distribution of those same substances for other purposes.

The 1961 Convention only requires the prohibition of use of Schedule IV drugs if the Party determines that doing so is 'the most appropriate means of protecting the public health and welfare' within its national situation (article 2 §5 b). The 1971 Convention applies stronger wording than its predecessor by prohibiting all use of Schedule I drugs except for scientific and 'very limited' medical purposes (articles 5 and 7) without reference to whether doing so would be considered to be the 'most appropriate means' of protecting public health.

The term 'prohibition' can be confusing in this regard as it usually refers to forbidding something by act of law, to explicitly 'outlaw' a certain conduct. Here, however, it seems to be used in the general meaning of 'not permitting', basically introducing the obligation of treaty parties to discontinue any schemes where non-medical use was formally authorised. It does not re-appear in the treaty where it spells out the obligations in terms of penal measures. The 'use' of drugs was consciously omitted from the articles that list the drug-related acts for which penal measures are required. There is no doubt, therefore, that the UN conventions do not oblige any penalty (criminal or administrative) to be imposed for consumption per se. This is pointed out clearly in the *Commentary* to the 1988 Convention in relation to its article 3: 'It will be noted that, as with the 1961 and 1971 Conventions, paragraph 2 does not require drug consumption as such to be established as a punishable offence'.[19] Case closed.

POSSESSION AND CULTIVATION FOR PERSONAL USE

Drug consumption, however, is predicated upon possession, and the 1988 Convention rather 'approaches the issue of non-medical consumption indirectly by referring to the intentional possession, purchase or cultivation of controlled substances for personal consumption.' [20] All the conventions are more precise in this regard, but one way or another there is still considerable flexibility within the treaties' legal parameters. Article 33 of the Single Convention makes it clear

that Parties shall 'not permit the possession of drugs except under legal authority' (and then only for medical and scientific purposes) and article 36 §1 obliges Parties to make possession a punishable offence. Crucially, in relation to the obligation to criminalize possession a distinction is made between possession for personal use and that for trafficking. According to Boister, the thrust of the Convention's penal provisions is the prohibition of illicit drug trafficking, and therefore there is little interpretative doubt that Parties are obliged to criminalize possession for that purpose. But it 'does not appear that article 36(1), obliges Parties to criminalize possession of drugs for personal use.' [21] The Convention's focus on the suppression of trafficking can be seen as an affirmation that countries are not obliged in terms of article 36 to criminalize simple possession under the 1961 Convention. This view is also bolstered by the drafting history of article 36 which was originally entitled 'Measures against illicit traffickers.'[22] Since it is based closely upon the earlier instrument, a similar situation exists in relation to the 1971 Convention.

Circumstances became more complex with the introduction of the 1988 Convention. Article 3 repeats in slightly broader language the provisions of article 36 of the Single convention and article 22 of the 1971 Convention. However, it also states, in paragraph 2,

> Subject to its constitutional principles and the basic concepts of its legal system, each party shall adopt such measures as may be seen necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

Even though the language is more restrictive and might be regarded as reducing the flexibility of the earlier treaties, a persuasive legal case can be made that the article 3 §2 still leaves significant scope for deviation from the punitive approach.[23] Such an interpretation can be based upon the overall character of the Convention, that it is an instrument focused predominantly on trafficking, in which demand side issues are only marginally dealt with and under distinctly different provisions. For example, only drug trafficking shall be treated as a serious offence (article 3 §4a and §7) and, as with the provisions of the earlier treaties, Parties can provide alternative sanctions, such as treatment, for those committing drug offences who are found to be also using drugs (article 3 §4b,c,d).

Most importantly, however, the opening phrase of article 3 §2, 'Subject to its constitutional principles and basic concepts of its legal system', represents a clear 'escape clause'. It implies that 'any latitude existing under this Convention does not result exclusively from the Convention but also from the constitutional and other legal principles of each country'. Consequently, 'Parties would not violate the Convention if their domestic courts held criminalization of personal use to be unconstitutional',[24] and for that reason cannot establish possession for personal use to be a criminal offence. Further, the article allows for non-prosecution via a number of routes including expediency or public interest principles, even though it restricts the application of such national discretionary powers when it relates to trafficking offences.

As a result, a country might rule that, in line with its own national circumstances, it is not within the interest of society to prosecute for drug possession for personal use, that the right to privacy overrules state intervention regarding what people consume or possess in their private homes, or that self-destructive behaviour – be it consumption of potentially harmful substances or other behaviour up to suicide – shall not be subject to punishment. These justifications have been put forward respectively in the Netherlands, Alaska and Germany with regard to possession of cannabis for per-

sonal use. More recently, in Latin America the Argentinean Supreme Court ruled that the section of the 1989 drug law that criminalized drug possession was unconstitutional.[25] The nature of this 'escape clause', by referring not only to constitutional principles but also to basic concepts of national legal systems, represents a relative rarity within international law.[26] And as these and other examples show, it has been utilized by a range of authorities to create more policy space and yet remain within the confines of the treaty framework.[27] Thus, even after the widespread acceptance of the 1988 Convention and its coming into force in 1990, a significant degree of room for manoeuvre at the national level in relation to drug consumption has been retained.

As a brief overview of soft defecting states reveals, there is a wide variety of national and subnational non-punitive consumption-oriented policies that take advantage of the existing latitude within the conventions. For instance at the subnational level, dating from the 1970s a significant number of states within the USA have depenalized the possession of cannabis for personal use.[28] More recently in Australia, a similar process has taken place in Victoria, New South Wales, Queensland and Tasmania.[29] Other states and territories in Australia have decriminalized cannabis possession via the application of non-criminal punishments with jurisdictional variations existing in accordance with different threshold quantities.[30]

A complex picture also exists in Europe at the national level, owing much to differences in the application of threshold quantities. While the European Union (EU) has tried to harmonise sentencing guidelines for trafficking offences, an attempt to find a common definition to distinguish between possession for personal consumption and intent to traffic failed: '[T]he notion of unified thresholds was ultimately dismissed as unworkable due to the fact that many countries use the distinction between possession and trafficking to enable them to penalize low level offences.' [31] Enormous differences continue to exist in the EU. Spain, for example, does not consider possession of drugs for personal use a punishable offence at all, criminal nor administrative, though the absence of a clear legal distinction can in practice still bring people who use drugs into trouble. In the Netherlands or Germany, possession for personal use remains 'de jure' a criminal offence, but 'de facto' guidelines are established for police, prosecutors and the courts to avoid imposing any punishment, including fines, if the amount is insignificant or for personal consumption. In yet other states like the Czech Republic, possession of drugs for personal use is no longer a criminal offence, but those caught with small amounts can be deferred to treatment services if required, or administrative sanctions may be applied.[32]

Probably the best-known example in the latter category is Portugal, which decriminalized use of all drugs in 2001. Portuguese officials were careful to ensure that the new policy remained within the 'mainstream of international drug policy' and that, utilizing the existing flexibility within the conventions, they did not break the letter of the law. The new National Strategy document declared that it was consistent with the provisions of the 1988 Convention in adopting the strategic option of decriminalizing drug use as well as possession and purchase for this use. It was the Portuguese view that the replacement of criminalization with mere breach of administrative regulations maintained the international obligation to establish in domestic law a prohibition of those activities and behaviours.[33]

Although initially hostile, the INCB in 2005 accepted that the Portuguese policy was legitimate inasmuch as drug possession was still prohibited, but sanctions fell under administrative rather than criminal law, acknowledging that 'the practice of exempting small quantities of drugs from criminal prosecution is consistent with the international drug control treaties'.[34]

In response to recent policy developments in Latin America, in 2010 the INCB strongly criticized the governments of Argentina, Brazil and Mexico (and indeed even US states) for 'the growing movement to decriminalize the possession of controlled drugs' which had to be 'resolutely countered'.[35] But a year later, the INCB report abstained from critique on the growing practice of decriminalization of possession for personal use, perhaps indicating that the INCB has finally given up its legally untenable opposition. The general treaty obligation to 'limit exclusively to medical and scientific purposes' the use and possession of drugs still stands, but there is no binding legal obligation for nations to prohibit possession for personal consumption under their domestic criminal laws if it contradicts a basic principle of national law.

To what extent the general obligation requires specific provisions under administrative law to 'not permit' such acts, remains open for interpretation. The 1961 *Commentary* seems to leave little space for deviation where it says in reference to articles 4 and 33 that parties 'must prevent the possession of drugs for other than medical and scientific purposes by all the administrative measures which they are bound to adopt under the terms of the Single Convention, whatever may be their view on their obligation to resort to penal sanctions or on the kind of punishment which they should impose' and that 'the obligation of Parties not to permit the possession of drugs except under legal authority requires them to confiscate drugs if found in unauthorized possession, even if held solely for personal consumption'.[36] This may well be an area where state practices over time have expanded the scope for interpretation beyond what was originally foreseen at the time of drafting the treaty and its *Commentary*.

The US state of Alaska is an interesting case in this regard. In 1975 an Alaskan Supreme Court ruling (*Ravin v State)* barred the state from criminalizing possession and use of cannabis within an individual's home in line with its constitution's privacy provisions. As Boister notes, the 'State Supreme Court decided that the relative insignificance of cannabis consumption as a health problem in Alaskan Society meant that there was no reason to intrude on the citizen's right to privacy by prohibiting possession of cannabis by an adult for personal consumption at home'.[37] A 1990 voter initiative recriminalized simple possession, but an Alaskan Court of Appeals decision in 2003 (*Noy v State*) challenged the constitutionality of this vote and ruled that 'Alaska citizens have the right to possess less than four ounces of marijuana in their home for personal use.'[38]

While there remains confusion around the application of the law by police authorities, the state consequently permits possession of small amounts of cannabis for personal use without any criminal or civil penalty. Alaska represents an example – other examples are Uruguay and Spain – where possession of cannabis for personal use is not a punishable offence at all, criminal or administrative. There does remain a tension of course between Alaskan state and US federal law since while the possession of less than four ounces of cannabis within an adult's home is essentially 'legal' under state law, it is not under federal law. Thus, as observed by the attorney who argued the 2003 case, 'We are moving into an area where a state constitution grants greater freedom than the US Constitution.' [39]

Exactly the same latitude that the treaty regime allows for possession for personal use applies to cultivation, as the conventions do not make any distinction between 'possession' or 'cultivation' for personal use. Similar difficulties as with possession arise in national jurisdictions regarding the legal distinction between cultivation for personal use and cultivation with intent to supply. The decision as to whether to apply quantitative thresholds, to require other proof to establish the intent to traffic, or to

leave it to the discretion of the judge to make the distinction, is also left by the conventions entirely into the hands of national authorities. As a consequence, legal reforms that have included decriminalization, depenalization or exemption from prosecution for cultivation of cannabis for personal use (however that is defined under domestic law) are allowed under the same conditions that apply to possession for personal use.

In Spain this has enabled the development of *cannabis social clubs* which cultivate cannabis for personal use on a collective basis.[40] A similar cooperative model based on the decriminalization of cultivation for personal use is currently under consideration in Uruguay. Another legitimate example was the decree in Laos that allowed elderly people to cultivate a small plot of opium for personal use. This exemption was abandoned when the government, after a decade of significant decline in opium cultivation, prematurely declared Laos to be 'opium free' in 2006.

HARM REDUCTION IN THE UN SYSTEM

Discussions surrounding the spirit of the conventions are prominent in relation to a range of policies aiming to reduce the harm of problematic drug use, especially injecting drug use. Much like the terms depenalization and decriminalization, there is a great deal of debate and confusion concerning the term harm reduction and harm reduction policies. Here it is used primarily to refer to a number of specific health-oriented interventions; such as opioid substitution or maintenance programmes, needle and syringe exchange, heroin prescription and drug consumption rooms. Although some disagreement remains, a legal case can be made that all these approaches operate lawfully within the letter and spirit of the drug control treaties.[41] As discussed earlier, although the preamble to conventions explicitly expresses a broad concern for the 'health and welfare' of humankind, engagement with harm reduction is defensible primarily due to a combination of specific clauses and related ambiguities within the treaties. Further, as with the discussion above, the non-self executing nature of the conventions leaves some room for interpretation at the national level and consequently presents signatory nations with a certain degree of freedom when formulating domestic policies aiming to reduce the harmful consequences for people who use drugs and for society as a whole.

Significantly, both the Single Convention and the 1971 Convention allow for the production, distribution or possession of controlled substances for 'medical and scientific purposes.' Guaranteeing sufficient availability for all licit purposes is a prime objective of the treaties. The lack of a clear definition of the term 'medical and scientific purposes' within the treaties, provides considerable interpretative autonomy. The framers of the Single Convention left signatory nations a certain amount of leeway since the expression will have different meanings at different times and indeed within different nations and cultures.[42] Moreover, all three treaties do give states the discretion to provide measures of treatment, education, aftercare, rehabilitation, and social reintegration as alternatives, or in addition to, criminal penalties for offences of a minor nature. In fact, the Commentaries for the 1961 and 1971 Conventions and for the 1972 Protocol Amending the Single Convention all mention maintenance programmes within their opinions on what constitutes treatment and justified medical use of controlled drugs.[43]

The 1988 Convention also allows State Parties a certain degree of scope in the implementation of harm reduction interventions in that it obliges parties to adopt appropriate demand reduction measures 'with a view to reducing human suffering' based on recommendations of specialized UN agencies such as the World Health Organization (WHO) (article 14 §4). Consequently, as Richard Elliot and colleagues

note, the 'current international law on drug control is not entirely hostile toward harm reduction' but 'relies on exceptions, caveats, or particular interpretations of the treaties whose overriding purpose is prohibition'.[44] In effect, zero-tolerance is hardwired into the UN drug control system while harm reduction operates through glitches in the software.

The pursuit of harm reduction interventions via such glitches, however, undoubtedly gained more traction after 1998 and the adoption of the soft law UN Political Declaration on the Guiding Principles of Drug Demand Reduction. Under the heading of Guiding Principles, the Declaration states, 'Demand reduction shall: (i) Aim at preventing the use of drugs and at reducing the adverse consequences of drug abuse.' Later this is reiterated under the heading of 'Tackling the Problem,' where it is noted that that 'Demand reduction programmes should cover all areas of prevention from discouraging initial use to reducing the negative health and social consequences of drug abuse.' [45] The Action Plan developed to implement the Guiding Principles on Demand Reduction also commits countries themselves to offer '…the full spectrum of services, including reducing the adverse health and social consequences of drug abuse for the individual and for society as a whole'; [46] a phrase that has become central to the endeavours of harm reduction oriented states within the Commission on Narcotic Drugs (CND). Indeed, it has been consistently cited in CND and GA resolutions relating to the issue since 1998.

Legal justification for harm reduction interventions can also be found in the shape of an important yet still officially unacknowledged 2002 report by the Legal Affairs Section (LAS) of the then UN International Drug Control Programme (UNDCP).[47] *Flexibility of treaty provisions as regards harm reduction approaches* was the result of an INCB request for the LAS to explore the legality of a number of harm reduction measures in relation to the conventions. While the INCB is mandated to monitor treaty compliance for the 1961 and 1971 Conventions, the Board lacks the required legal expertise to perform that function competently, which was the reason for the request for the legal advice of the specialized section of UNODC's predecessor in this delicate matter. Most of the INCB members have a technical pharmacological background relevant for the Board's other function, which is to ensure that adequate supplies of drugs are available for medical and scientific uses through administering a global system of estimates and requirements.

The conclusions of the legal experts were unequivocal: most harm reduction measures do not contravene the treaties and 'it could easily be argued that the Guiding Principles of Drug Demand Reduction provide a clear mandate for the institution of harm reduction policies that, respecting cultural and gender differences, provide for a more supportive environment for drug users.' After a close reading of all three conventions and the related commitments made by Parties under the 1998 Political Declaration, the internal LAS document details multiple arguments that justified 'Needle or Syringe Exchange,' 'Substitution and Maintenance Treatment,' and 'Drug-injection rooms' under the terms of the treaties.

Recognizing the symmetry between this view and the UN's aspirations for systemic coherence, it also notes that such conclusions are in line with the UN system paper *Preventing the Transmission of HIV among Drug Users.* This was endorsed on behalf of the Administrative Committee on Coordination (ACC) by the High Level Committee on Programmes in 2001 and published in 2002.[48] In addition, the LAS document notes that the existence of new threats like the 'growing rates of intravenous HIV transmission of serious illness' require that 'governments come up with new strategies to cope'. 'It could even be argued' it contin-

ues, 'that the drug control treaties, as they stand, have been rendered out of synch with reality, since at the time they came into force they could not have possibly foreseen these new threats'.[49] The LAS concluded that the Board possessed 'a broad enough mandate under the Conventions to review these policies and their implementation, and in cases in which *irrefutable* breaches to the Conventions are found, to act on its findings and seek out a remedy for the problem' (emphasis added).[50]

A political battle has raged on in the context of the 10-year review of the 1998 Declaration and Action Plan,[51] and a few countries still block the use of the term harm reduction in CND resolutions that require consensus. Frustration over the failure to agree on a clearer mandate for harm reduction in the new 2009 Political Declaration and Action plan, especially given its relevance for HIV prevention, led a group of 26 countries formally issuing an interpretive statement to express their dissent.[52] Meanwhile, the legality of basic harm reduction services has become virtually uncontested within the UN system and by an expanding majority of nations.

CONTESTED POLICY OPTIONS WITHIN THE CURRENT TREATY FRAMEWORK

The Art of Interpretation

It is the notion of *irrefutable* breach that brings us to a number of policy options that currently remain contested within the context of the UN drug control treaties. Mindful of the interpretative art inherent within approaches to all types of international law, irrefutability is on occasions a problematic concept. Where there are varying interpretations of international law, one would expect solid legal arguments to be made on both sides. Furthermore, as the LAS document suggests, where a policy is deemed to be in irrefutable breach, it should be the role of the INCB as a watchdog of the treaties to seek to resolve the legal tension rather than merely condemn countries for perceived non-compliance.[53] With these ideas in mind, we focus here upon the disputed status of Drug Consumption Rooms (DCRs), medical marijuana, and the Dutch coffee shop system. Although key areas of dispute rather than an exhaustive list, these examples reveal that in most instances opposition by the INCB is not beyond challenge.

DRUG CONSUMPTION ROOMS

While reluctantly acknowledging, if not at times actively supporting, the legitimate existence of substitution treatment and needle exchange (and making limited comment on heroin prescription), the INCB consistently argues that DCRs do run counter to the provisions of the conventions.[54] For example in its Report for 1999, it was stated that,

> The Board believes that any national, state or local authority that permits the establishment and operation of drug injection rooms or any outlet to facilitate the abuse of drugs (by injection or any other route of administration) also facilitates illicit drug trafficking…By permitting drug injection rooms, a Government could be considered to be in contravention of the international drug control treaties by facilitating, aiding and/or abetting the commission of crimes involving illegal drug possession and use, as well as other criminal offences, including drug trafficking.[55]

Subsequent reports have followed a similar line, with the focus of specific attention variously directed towards Australia, Canada, Germany, 'member states of the European Union', Switzerland, the Netherlands, Luxembourg, Spain and Norway.[56] Significantly, one of the report recommendations for 2006 stressed that 'The Board reiterates its position that, insofar as they are facilities where persons can abuse with impunity drugs acquired on the illicit market, such rooms contravene the most fundamental principle of the international drug control treaties: drugs should be used only for medical and scientific purposes.' [57]

Most jurisdictions that have introduced or contemplated, DCRs diligently and fully lay out the justification for their belief that the facilities are not contrary to the conventions.[58] In Germany in 1993, for example, the Chief Public Prosecutor carried out a major inquiry prior to the establishment of facilities. The conclusion was that DCRs were compatible with the conventions as long as they did not permit the sale, acquisition or passing on of drugs and that they were genuinely hygienic and risk reducing with adequate care and control.[59] Similar conclusions were reached in other states establishing DCRs including the Netherlands in 1996,[60] and Australia in 1999.[61] In 2000, the Swiss Institute of Legal and Comparative Law noted that,

> The texts of the relevant international conventions do not provide any guidance on the question of whether or not public injecting rooms are in fact conducive to the rehabilitation and social integration of drug addicts in the short term and to the reduction of human suffering and the elimination of financial incentives for illicit trafficking in the long term. The actual practice of the State Parties in this respect could provide some guidance, if it is substantially uniform. If not it must be concluded that States Parties retain the freedom to make their own policy choices on the tolerance of Fixer-Stubli [DCRs].[62]

More recently, in a British Colombia Supreme Court decision in 2008, Justice Ian Pitfield ruled that Vancouver's *INSITE* facility, which had been operating under a temporary exemption of the Controlled Drugs and Substances Act (CDSA) since it opened in 2003, could remain open despite calls from Canada's Attorney General and the Harper Government to close it down. Pitfield ruled that the CDSA was in fact 'unconstitutional' when applied to clients of *INSITE*, because the centre offered life-saving medical services and denying access would be a deprivation of a right guaranteed under Section 7 of the Canadian Charter of Rights and Freedoms. During the case, Canada argued that being 'empowered to prohibit the possession of controlled substances without regard for the circumstances because of their dangerous nature and the state's compelling interest in controlling their use, an interest shared by the world and *formalized in international treaties*' (emphasis added) meant that the CSDA was not 'offensive to the principles of fundamental justice.' Pitfield's position was that 'Canada's claims are not immune to challenge. International Treaties cannot undermine or override domestic constitutional law and Parliament's obligation to ensure that its laws comply with the Charter.' [63] Having been upheld by the British Colombia Court of Appeal in 2010, the decision was upheld in September 2011 by the Canadian Supreme Court. [64] In response, the INCB arguably overstepped its mandate in commenting upon the relationships between state, federal and international law. In its Report for 2011, the Board invoked a dubious 'hierarchy of norms' to argue that the Supreme Court's decision on *INSITE* was in error because 'the provisions of internal law cannot be invoked to justify non-compliance with provisions of the international drug control treaties to which a State has become a party' and called upon 'all States parties to take the steps necessary to ensure full compliance with the international drug control treaties on their entire territory.' [65] However, the general 'hierarchy of norms' is difficult to uphold in the case of treaty provisions that only oblige a party to take certain measures explicitly 'subject to its constitutional principles and the basic concepts of its legal system'. As noted elsewhere in relation to previous statements within this contentious legal zone, 'it is highly debatable whether or not it is the Board's place to question constitutional arrangements within sovereign states.' [66]

Considering the existence of legal rulings and detailed reports from within nation states justifying DCRs together with the conclusions of the LAS advice to the INCB

mentioned above from within the UN itself, it is certainly difficult to argue that the Board's position is beyond reproach. The Board itself has not even attempted to respond with substantiated legal arguments to the detailed defence of the legality of DCRs. The LAS document's conclusion regarding DCRs was that 'it seems clear that in such cases the intention of governments is to provide healthier conditions for IV [intravenous] drug abusers, thereby reducing their risk of infection with grave transmittable diseases and, at least in some cases, reaching out to them with counselling and other therapeutic options. Albeit how insufficient this may look from a demand reduction point of view, it would still fall far from the intent of committing an offence as foreseen in the 1988 Convention.' [67]

MEDICAL MARIJUANA

A similar situation currently exists in relation to the INCB's opposition to medical marijuana schemes such as those operating at the state level in the USA. In this instance, the Board's opposition is based upon two very distinct arguments. One of these can be easily contested, the other, however, appears to have considerable legal legitimacy.

First, the Board questions the medical usefulness of marijuana. In its report for 2003, it notes that the conventions leave the definition of the term 'medical and scientific purposes' up to the parties.[68] This point is crucial for the existence of latitude within the conventions. Yet, the INCB has also placed the onus on governments 'not to allow its medical use unless conclusive results of research are available indicating its medical usefulness'.[69] As an earlier TNI brief pointed out, 'It is not up to the Board to decide whether scientific results are "conclusive" nor whether cannabis has medical usefulness. It is neither within their mandate nor their competence'.[70] In fact, at the UN level such mandate has been given to the WHO as far as it concerns scheduling recommendations under the 1961 and 1971 Conventions, and subsequently the decision falls within the remit of national medicine regulatory agencies. The CND acknowledged its medical usefulness when it adopted in 1991 the WHO recommendation to re-schedule dronabinol, a pharmaceutical formulation of an active ingredient of cannabis, Delta-9-tetrahydrocannabinol (THC), from Schedule I to the much less stringent Schedule II of the 1971 Convention.[71]

Despite a lack of mandate or competence there are many examples of the INCB casting judgment on the issue. In 2005, concern for the effectiveness of medicinal cannabis was an issue raised in a letter from the Board to the Dutch government.[72] More recently, while again venturing into the realm of the 'medical usefulness' of cannabis, the Board's 2009 critical comments upon the use of vending machines to dispense medical marijuana in California once again demonstrated its willingness to encroach on the constitutional politics of a sovereign state.[73] There is little doubt that the Board's opposition on grounds of medical usefulness is extremely weak not only because there is no universally accepted position on the issue but also because it is not within the INCB's remit to comment and the WHO has taken another position in its recommendations regarding dronabinol.[74]

The INCB's second point of contention is, however, more valid. As noted in its report for 2008, the Board also regards certain medical marijuana schemes to be in violation of article 28 of the Single Convention. This 'stipulates specific requirements that a Government must fulfil if it is to allow the cultivation of cannabis, including the establishment of a national cannabis agency to which all cannabis growers must deliver their total crops'.[75] Indeed, the cultivation and distribution of cannabis for medicinal purposes is only permitted under strict state control and requires a government agency with the 'exclusive right of import-

ing, exporting, wholesale trading and maintaining stocks'; 'Only cultivators licensed by the Agency shall be authorized to engage in such cultivation.' Put simply, the Convention requires that, where medical marijuana schemes are in operation, a government agency, or agencies, must award all licences and take 'physical possession' of all crops.[76] Most countries allowing medical marijuana, such as the low key programme established in the Netherlands in 2003, have introduced and abide by the required structures and procedures.[77] However, this is clearly not the case within well publicized schemes operating at the subnational level in US states like California. As such, the INCB's doubts on the legality of this point are legitimate.[78] Indeed, in the US the tension between the federal government's treaty responsibilities and state's rights within the federal system on this issue, provide a taste of the profound tensions arising in attempts to create a regulated market for recreational cannabis use at the state level, as referenda in several states are trying to achieve.

DUTCH COFFEE SHOPS

The INCB has also long claimed that the Dutch coffee shop system operates in contravention to the drug control treaties. It is well known that the Netherlands pursues what is still probably the world's most tolerant approach to the recreational use of cannabis, including the limited retail sale of the drug. Under the present arrangement the possession of cannabis remains a statutory offence, but the government employs the 'expediency principle', and has issued guidelines on the use of discretionary powers that assign the 'lowest judicial priority' to the investigation and prosecution of cannabis for personal use. The guidelines further specify the terms and conditions for the sale of cannabis in authorized coffee shops, whereby the sale of up to 5 grams of cannabis per transaction is tolerated and the coffee shop is permitted to hold up to 500 grams of the drug. The INCB contest the legality of Dutch cannabis policies and has challenged the authorities in both its Annual Reports and in letters to the Dutch officials.[79] In its 1997 Annual Report, for instance, the Board went so far as to claim that the coffee shop system constituted 'an activity that might be described as indirect incitement',[80] basically accusing the Dutch authorities to be complicit in the crime of promoting illicit drug use. On occasions such hostility has also helped to influence the nature of debate within the CND. For example, the Board's comments on cannabis in its Report for 2001 undoubtedly prompted those states favouring a prohibitive reading of the conventions to introduce a resolution concerning 'leniency' towards drug use in some countries at the 2002 CND session.[81]

Dutch authorities and analysts confidently argue that their law and implementation strategy are permitted under the treaties. The provisions in the Single and the 1988 Convention that require criminalization of cannabis cultivation, possession and trade for non-medical purposes are met in Dutch legislation in the Opium Act. The 1988 escape clause allowing states to apply constitutional principles and basic concepts of their legal systems in the case of possession, purchase and cultivation for personal consumption was also highlighted in a reservation made by the Netherlands at the time of signing. In a 2006 return letter responding to INCB questions, Dutch authorities clarified their position on cannabis by stating that according to the Dutch Opium Act it is 'illegal to bring into or outside the territory of the Netherlands; to prepare, treat, process, sell, supply, provide or transport; to possess; or manufacture a drug,' including cannabis. The *use* of cannabis, however, is not an offence under Dutch law and none of the treaties require that it be treated as such.

In jurisdictions such as The Netherlands that follow the expediency principle (a discretionary option that allows public prosecution to refrain from prosecution if it is in the public interest to do so), it is possible to

meet the letter of the international conventions by *de jure* establishing cultivation, possession and trade of cannabis as criminal offences (even for personal use), while allowing *de facto* legal access to cannabis for non-medical purposes by deciding not to prosecute such illegal acts under specified circumstances. There is no doubt that this falls comfortably within the acknowledged treaty latitude when it concerns cultivation, purchase and possession for personal use (falling under article 3 §2).

Whether it can be extended to sale and possession of quantities for commercial trading purposes (as *de facto* permitted in the coffee shop system), is questionable given the treaty obligation to make such offences (falling under article 3 §1), 'liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation' (article 3, §4, a). The 1988 Convention specifically intended to limit the applicability of the expediency principle, by saying that parties 'shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement measures in respect of those offences, and with due regard to the need to deter the commission of such offences' (article 3, §6). The Netherlands therefore made an explicit reservation on that particular paragraph in order to fully preserve its discretionary powers and to ensure that signing the 1988 Convention would not affect its legal justification for the coffee shops.

While this line of argumentation indeed can be defended based on the letter of the treaties combined with the reservation The Netherlands made under the 1988 Convention, it is clearly stretching the art of interpretation to its limits. Questions can be legitimately raised as to whether the coffee shop system can be regarded as a faithful implementation of the prohibitive spirit of the treaties and the general obligation that 'parties shall take such legislative and administrative measures as may be necessary ... to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs'.

Another relevant question is whether the same argumentation could also allow supplies to the coffee shops, in order to solve the 'back door problem' that the model has struggled with from the start. The Dutch government consistently refuses to permit any experiments with legally controlled cultivation, claiming that it is not permissible under the UN Conventions. However, given the fact that the legal justification for the coffee shop model as it exists today cannot only be based on the flexibility the treaties allow for consumption-related offences, but includes applying the expediency principle to distribution and trade, it is difficult to find a reason why the same discretionary power could not be applied to the cultivation of cannabis to supply the coffee shops under certain conditions. It would mean stretching the art of interpretation a little further but within the same limits.

Some judicial experts in The Netherlands go even further, arguing that the treaty concept of 'medical purpose' could be interpreted as broadly as to include any policy measures, including a legal regulation of the cannabis market, that can be justified on the basis of its positive contribution to public health , since that is the primary aim of the treaty.[82] While such a position could be argued on the basis of the fact that the Conventions leave the decision about what constitutes 'medical use' to countries, the *Commentary* does not seem to support such a broad interpretation.[83] It is not unthinkable that state practices could expand the scope for interpretation in this direction in the future, but such space is clearly not yet established.

IMPERMISSIBLE POLICY OPTIONS WITHIN THE CURRENT TREATY FRAMEWORK

Regulated markets for non-medical purposes

As discussed above, there remains a certain amount of debate and legal uncertainty regarding the flexibility of some aspects of the conventions. Nonetheless, there is widespread agreement on the rigidity of some of its other provisions. For example, it is difficult to find a flexible interpretation of the obligation laid out in the Single Convention that 'Coca leaf chewing must be abolished' within 25 years (article 49, the deadline expired in December 1989). It was due to this inflexibility on the issue of coca chewing that the Plurinational State of Bolivia sought to amend the treaty. After this attempt failed, Bolivia felt obliged – on June 29th, 2011 – to denounce the Convention; a procedure that came to effect on the 1st of January 2012. A few days before that, Bolivia presented the reservation it requires to reconcile its various national and international legal obligations before becoming a full treaty member again. Bolivia reserves the right to allow traditional coca leaf chewing in its territory and the consumption and use of the coca leaf in its natural state in general, as well as the cultivation, trade and possession of the coca leaf to the extent necessary for these licit purposes. The reservation will be accepted unless one-third or more of the parties object to it within a one year period.

The Bolivian decision has been strongly condemned by the INCB and has generated concern about setting a precedent that other countries might follow for resolving their own legal tensions with the drug control Conventions, for example on cannabis policy.[84] The INCB called on the international community to 'not accept any approach whereby Governments use the mechanism of denunciation and re-accession with reservation, in order to free themselves from the obligation to implement certain treaty provisions. Such approach would undermine the integrity of the global drug control system', warning Bolivia 'to consider very seriously all the implications of its actions in this regard'.[85]

There is also very limited room to relax what are deemed to be trafficking and commercial supply related offences. Only 'in appropriate cases of a minor nature the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare' (1988 Convention, article 3, §4, c). The earlier treaties had allowed such alternatives for 'drug abusers', but the 1988 Convention did significantly 'widen the scope of application to drug offenders in general, whether drug abusers or not.' [86] The fact that the definition of what constitutes a 'minor nature' is left to the discretion of national authorities, leaves considerable room for manoeuvre to apply principles of proportionality in national sentencing guidelines. Yet, while punishment may be moderated or even avoided for minor offences, there is no doubt that production and supply for non-medical and non-scientific purposes have to be criminalized and that such offences, by default, are to be regarded as grave and therefore be met with sanctions of imprisonment and confiscation.

Regardless of the inherent ambiguity within and subjective interpretation of the conventions, all Parties are required to remain true to the UN drug treaties in line with the 1969 Vienna Convention on the Law of Treaties. As alluded to above, among other things this obliges Parties to interpret treaties in good faith and respect the 'object and purpose' of the conventions.[87] These find their most explicit expression within article 4 (c) of the Single Convention, which determines its overarching philosophy and normative character and thus, as its bedrock instrument, of the entire treaty system itself. It should be recalled that as a

'General Obligation,' the article obliges signatory nations, 'to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.'

According to both the spirit and the letter of the conventions, while permitted to 'soften' the criminal sanction requirements in various ways, governing authorities cannot create a legally regulated market, including the supply, production, manufacture or sale of presently controlled drugs, for non-medical and non-scientific, or put another way recreational, purposes. Proscriptions laid out in the conventions clearly prevent authorities from creating a legal market for cannabis or any other currently scheduled drug along the lines of models developed for alcohol and tobacco.[88]

Further restrictions on movement towards the creation of a regulated market for cannabis stem from its status within the Single Convention. Like coca leaf and opium poppy, as well as being listed within the Convention's schedules, cannabis is mentioned specifically in several articles. While rescheduling a substance would generate more policy space on the consumption side, it would not immediately alleviate restrictions in relation to cultivation. Also amendments of certain articles would be required to generate more latitude to experiment with models of legal regulation.

CONCLUDING REMARKS

Consumption-oriented variations of depenalization and decriminalization, including schemes in which possession, purchase and cultivation for personal use are no longer punishable offences, operate reasonably comfortably inside the confines of the UN drug control conventions. The same holds true for healthcare services, 'reducing the adverse health and social consequences of drug abuse for the individual and for society as a whole', such as substitution or maintenance treatment, the provision of clean needles and syringes, and drug consumption rooms. The fact that some state parties, and in specific cases also the INCB, reject certain practices or refuse to accept the terminology of 'harm reduction', does not immediately deny the legality of such interventions, as convincing legal cases have been made by other state parties and UN agencies that these approaches can operate lawfully under the drug control treaty system. Some have even argued they *must* be implemented according to international law more broadly.

There is also latitude in the treaties which allows parties to provide social support instead of punishment for those caught up in minor drug offences out of socio-economic necessity and the lack of alternative livelihood options. The 1988 Convention introduced the provision to allow health or social services 'as alternatives to conviction or punishment' for offences of a minor nature, not only in cases where the offender is dependent on drugs, but for anyone involved in minor drug offences.[89] This compensates for the stricter provisions in the treaty that call for harsher penalties for more serious offences and allows for greater scope than currently utilised to introduce proportionality principles in sentencing for low-level drug offences such as small-scale cultivation, street dealing or courier smuggling. This provides a legal basis for alternative development programmes with subsistence farmers, and it could also be applied to micro-traders, a group for which this policy option is rarely considered.

The conventions primary objective is to ensure adequate availability and access to all controlled drugs for medical and scientific purposes, including those substances which were thought to have limited medical usefulness. Since the decision about what constitutes medical use is largely left to the discretion of the parties, the legality of heroin prescription and 'medical marijuana' cannot be contested as long as such

schemes fulfil the requirements of state control as detailed in the conventions. Now that an increasing number of states are approving cannabis for medical use, a review of its classification becomes ever more urgent.

Zero-tolerance regarding non-medical use is hard-wired into the UN drug control system, while to a considerable extent all these deviations from the punitive prohibitionist approach have to operate through glitches in the software. Tensions about interpretations therefore undeniably and unavoidably persist but these indicate that the drug control conventions 'have been rendered out of synch with reality', given the widespread acceptance and ever increasing existence of both decriminalization and harm reduction policy practices. Such tensions are even more apparent in emerging large scale and openly tolerated cannabis markets, be they dispensaries, social clubs or coffee shops. Amidst all this, the INCB, in its capacity of watchdog of the treaties has played a most unhelpful role. The Board often triggers and increases tensions instead of facilitating a constructive dialogue to try to ease or resolve them, contradicting its remit 'to maintain friendly relations with Governments, guided in carrying out the Conventions by a spirit of co-operation rather than by a narrow view of the letter of the law'.[90]

It should be clear that while the UN drug control conventions contain a degree of flexibility, including areas of both –almost- general agreement and interpretative contestation, there are definite limits of latitude. Arguments to challenge those legal limitations imposed by the contemporary treaty system and to support the opening of a policy debate about its modernisation can come from a number of different directions.[91] For instance, an important issue to consider is the legal conflict with other international legal obligations such as those stemming from the human rights field, the right to health and indigenous rights; an area of concern that the case of Bolivia and the Single Convention's position on coca is bringing to the fore. Scientifically outdated or inconsistent provisions, especially with regard to the scheduling system, are other reasons to support a critical revision of the current regime.[92] And, significantly, a persuasive case can also be made in relation to the object and purpose of the current treaty framework itself. Questions can be raised whether the zero-tolerance and punitive principles behind it are indeed the best approach for the benefit of the health and welfare of humankind, about why the system failed so miserably in securing access to essential medicines, and to what extent it has been an obstacle to effective HIV prevention. Recent years have also seen mounting evidence regarding its ineffectiveness in reducing the scale of the illicit market in spite of mass incarceration and huge investments in drug law enforcement; a phenomena compounded by a range of negative consequences relating to the violence, corruption and conflict that comes with the existence of the very same illicit market that the control regime has created.[93]

Given these growing doubts and misgivings, it is now more than legitimate for policy makers or civil society to demand more space for experimentation with alternative control models than the current systems allows. After 100 years of international drug control and half a century of the existence of the UN treaty system, the inherent paradoxes, inconsistencies, ambiguities and tensions are surely worthy of serious re-evaluation. ●

NOTES

1. Dave Bewley-Taylor is a Senior Lecturer, Department of Political and Cultural Studies, College of Arts and Humanities, Swansea University, UK. Martin Jelsma coordinates the Drugs & Democracy programme at the Transnational Institute (TNI) in the Netherlands. An initial draft of this paper was distributed for the TNI/International Drug Policy Consortium (IDPC) Expert Seminar on the Future of the UN Drug Control Treaties, 25-26 January 2012, in Prague. The authors are grateful for comments received during the meeting and afterwards. Special thanks go to Genevieve Harris (including for allowing to apply the traffic light analogy that she first used in a conference presentation) and Neil Boister for their comments, and to Ann Fordham for editing. The usual caveat applies with any errors being the sole responsibility of the authors.

2. As of November 2011, 184 states were Parties to the Single Convention, as amended by the 1972 Protocol, and 183 and 185 nations were Parties to the 1971 and 1988 Conventions respectively. See for status of all drug control treaties: http://treaties.un.org/Pages/Treaties.aspx?id=6&subid=A&lang=en

3. *Single Convention on Narcotic Drugs*, 1961, March 30, 1961, 520 U.N.T.S. 204; *Protocol Amending the Single Convention on Narcotic Drugs*, 25 March 1972, T.I.A.S No 8118, 976 UNTS 3; *Convention on Psychotropic Substances, 1971*, 32 U.S.T. 543, T.I.A.S. 9725, 1019 U.N.T.S. 175; *Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*, U.N. Doc. E/CONF.82/15 (1988), reprinted in 28 I.L.M. 493.

4. Self-definition of the INCB used on their website, see www.incb.org/incb/mandate.html

5. The INCB is 'subject to the restrictions imposed upon its authority by that treaty. The Board may e.g. not recommend remedial measures to an individual government without its consent'. *Commentary on the Protocol amending the Single Convention on Narcotic Drugs*, 1961, 1972, p.12.

6. See Neil Boister, *Penal Aspects of the UN Drug Conventions*, Kluwer Law International, 2001, pp.1-4

7. See the preambles of all the conventions, but particularly the Single Convention. While preambles are not legally binding, they do provide an overview of the spirit of an international instrument.

8. The diversion of other pharmaceutical drugs to illicit channels continues to be a serious problem, particularly with the non-medical use of potent opiate painkillers such as oxycodone and hydrocodone nowadays overtaking the size of the heroin market in several countries. See for example Gregory Bunt, *The Prescription Opiate Arms Race*, The Huffington Post, 9 January 2012, which includes links to several relevant reports, http://www.huffingtonpost.com/gregory-bunt-md/prescription-drug-abuse_b_1181993.html

9. For an analysis of the negative effect of the Single Convention and the operation of the INCB on the availability of analgesic drugs see A. L. Taylor, 'Addressing the Global Tragedy of Needless Pain: Rethinking the United Nations Single Convention on Narcotic Drugs', in: *Journal of Law, Medicine & Ethics*, Winter 2007, pp. 556-570

10. Boister, Penal Aspects, op. cit. p. 22

11. M. Akehurst, *A Modern Introduction to International Law*, (London: George Allen and Unwin, 1982), p. 164, and A. Aust, *Modern Treaty Law and Practice*, (Cambridge University Press, 2007), p. 230

12. Article 31 (1) of the 1969 Vienna Convention on the Law of Treaties declares that a treaty shall be interpreted in 'good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

13. N. Dorn and A. Jamieson, *Room for Manoeuvre; Overview of comparative legal research into national drug laws of France, Italy, Spain, the Netherlands and Sweden and their relation to three international drug conventions*, (London: DrugScope, 2000).

14. See R. Room et al, *Cannabis Policy: Moving Beyond Stalemate* (Beckley Foundation Press-Oxford University Press, 2010); D. Bewley-Taylor, 'The 2009 Commission on Narcotic Drugs and its high level segment: More cracks in the Vienna consensus', *Drugs and Alcohol Today*, 9 (2), 7-11 and *International Drug Control: Consensus Fractured* (Cambridge University Press, Forthcoming April 2012).

15. C. Reinarman and H. G. Levine (eds.), *Crack In America: Demon Drugs and Social Justice*, (University of California Press, 1997), p. 322

16. See for example, B. de Ruyver, G. Vermeulem, T. Vander Beken, F. Vander Laenen and K. Geenens, *Multidisciplinary Drug Policies and the UN Drug Treaties*, (Antwerpen/ Apeldoorn,

Netherlands: Maklu, 2002), pp. 24-8, Mirjam van het Loo, Stijn Hoorens, Christian van 't Hof and James P. Kahan, *Cannabis Policy, Implementation and Outcomes*, RAND Europe, 2003, p. 10; Mike Hough, Hamish Warburton, Bradley Few, Tiggey May, Lan-Ho Man, John Witton and Paul J. Turnball, *A Growing Market: The Domestic Cultivation of Cannabis*, JRF Drug and alcohol research programme, 2003, p. 2; R. Pacula, R. MacCoun, P. Reuter, J. Chriqui, B. Kilmer, K. Harris, L. Paoli and C. Schafer, 'What does it Mean to Decriminalize Marijuana? A Cross-Cultural Empirical Examination', *Advances in Health Economics and Health Services Research,* 16 (2005), 347-369; D. McDonald, R. Moore, J. Norberry, G. Wardlaw, and N. Ballenden, *Legislative Options for Cannabis in Australia*, (Canberra: Australian Government Publishing Service, 1994), pp. 37-69; and Room et. al., *Cannabis Policy*, op. cit., pp. 78- 80

17. EMCDDA, *Illicit Drug Use in the EU: legislative approaches*, Lisbon 2005, p. 12

18. D. Bewley-Taylor and M. Jelsma, 'Regime Change: Re-visiting the 1961 Single Convention on Narcotic Drugs,' *International Journal of Drug Policy*, Vol. 23, Issue 1, 2012.

19. E/CN.7/590. *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, given in Vienna on 20 December 1988*, (New York: United Nations, 1998), p. 82.

20. Ibid.

21. Boister, *Penal Aspects*, op. cit., p.81

22. See Commentary on the Single Convention on Narcotic Drugs, 1961, (New York: United Nations, 1973), p. 112.

23. See for example R. Elliott, et al, 'Harm Reduction, HIV/AIDS, and the Human Rights Challenge to Global Drug Control Policy', p. 114, R. Elliott, I. Malkin and J. Gold, *Establishing Safe Injection Facilities in Canada: Legal and Ethical Issues*, (Montreal: Canadian HIV/AIDS Legal Network, 2002), p. 31; and Legislating for Health and Human Rights: Model Law on Drug Use and HIV/AIDS, pp. 11-12; UNODC, *2008 World Drug Report*, (Vienna, 2008), p. 206. Also see Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, p. 83.

However, as Boister notes, 'given the ambiguities surrounding the delimitation of lawful conduct under the earlier conventions…it is not easy to discern what conduct is rendered unlawful by article 3 (2)…The precise material delimitation of the scope of article 3 (2) requires careful investigation of the classification and attendant obligations of each particular substance under the earlier conventions'. See Boister, *Penal Aspects*, pp. 127-8

24. Boister, *Penal Aspects*, op. cit., p. 125

25. See *Mexico and Argentina enact drug decriminalization; US policy increasingly out of step*, TNI Brief, August 2009, http://www.tni.org/inthemedia/mexico-and-argentina-enact-drug-decriminalization-us-drug-policy-increasingly-out-step

26. International law, while often subject to constitutional principles, provides that states cannot invoke procedures of their domestic legal system as a justification for not complying with international rules. This has been stated in the Permanent Court of International Justice as well as other courts and is laid out in Article 27 of the 1969 Vienna Convention of the Law of Treaties ('A Party [to a treaty] may not invoke the provision of its internal law as a justification for its failure to perform a treaty.') (A. Cassese, *International Law*, Oxford University Press, 2005, pp. 217-218 and A. Aust, *Modern Treaty Law and practice*, op. cit., p. 179). As a reinforcing clause to Article 26 ('Every treaty in force is binding upon the parties and must be performed in good faith') of the 1969 Vienna Convention, this fundamental principle of international treaty law (*pacta sunt servanda*) seems to explain the explicit incorporation of an escape clause in relation to the primacy of national jurisdictions within 3 (2) in the 1988 Convention. As Boister notes, the article was the 'net result' of discussions between so-called producer and consumer states, or between the 'South' and the 'North', over responsibility for the drugs problem. Consumer states, including the US, were concerned that the creation of a personal use offence 'would be impractical' and 'require Parties to render expensive and time consuming legal assistance to relatively minor offences." (Boister, *Penal Aspects*, op. cit., p. 124.)

27. See Boister, *Penal Aspects*, op. cit., p. 125 footnote 228

28. Oregon, California, Colorado, Ohio, Maine, Minnesota, Mississippi, New York, Nebraska, Connecticut, Louisiana, Massachusetts, New Jersey, Nevada, Vermont, Wisconsin, West Virginia. See Room et al, *Cannabis Policy*, pp. 85-86

29. R. L. Pacula et al, *What Does it Mean*, op. cit., 2004

30. South Australia, the Australian Capital Territory, the Northern Territory and Western Australia.

31. Charlotte Walsh, 'On the Threshold: How relevant should quantity be in determining intent to supply?, *International Journal of Drug Policy*, 19 (2008) 479-485

32. Only very few countries (Sweden, Latvia and Cyprus) exercise the option to impose prison sentences for possession of small amounts. For an overview of policies see Tom Blickman and Martin Jelsma, 'Drug Policy Reform in Practice: Experiences with Alternatives in Europe and the US,' *Nueva Sociedad*, No. 222, July-August 2009 (English Version). Although categorized differently, also see Room et al. *Cannabis Policy*, op. cit.

33. Mirjam Van Het Loo, Ineke Van Beusekom, and James P. Kahan, 'Decriminalization of Drug Use in Portugal: The Development of a Policy,' *Annals of the American Academy of Political and Social Science*, Volume 582, Cross-National Drug Policy, July 2002, p. 54 & 57

34. INCB, *Report of the International Narcotics Control Board for 2004* (New York: United Nations, 2005), p. 80

35. Transnational Institute & Washington Office on Latin America, *UN's International Narcotics Control Board's Annual Report oversteps mandate and interferes with countries' sovereignty*, Press release, February 24, 2010, http://www.tni.org/sites/www.tni.org/files/pr240210.pdf

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65. See INCB, *Report of the International Narcotics Control Board for 2011*, (New York: United Nations, 2012), p. 39, paragraphs 289 & 290.

66. International Drug Policy Consortium, *Response to the 2009 Annual Report of the International Narcotics Control Board* (London: IDPC, 2010), p. 9. ,

67. INCB, *Flexibility of Treaty Provisions* , op. cit., p. 5.

68. INCB, *Report of the International Narcotics Control Board for 2003*, op. cit., p. 37. Furthermore, while some clauses within Article 2 Paragraph 5 of the Single Convention might be read as limiting the use of medical marijuana to research purposes only, inclusion of the phrase 'in its opinion' on two occasions confirms that Parties are within their rights to permit the use of marijuana for medical purposes.

69. INCB, *Report of the International Narcotics Control Board for 2002*, (New York: United Nations, 2003), p. 67

70. Transnational Institute, *The Erratic Crusade of the INCB*, TNI Drug Policy Briefing 4, February 2003.

71. WHO, *WHO Expert Committee on Drug Dependence, Thirty-Fourth Report* (Geneva: World Health Organization, 2006), pp. 2–3

72. D. Bewley-Taylor, *The Need for Increased Transparency: The Country Correspondence of the International Narcotics Control Board*, International Drug Policy Consortium Briefing Paper (London: IDPC, 2010), p. 5 www.idpc.net/sites/default/files/library/INCB%20Transparency%20Briefing.pdf

73. INCB, *Report of the International Narcotics Control Board for 2008*, (New York: United Nations, 2009) p. 66

74. It is worth noting that at the 2009 CND Resolution 52/5 'Exploration of all aspects related to the use of cannabis seeds for illicit purposes' requested the WHO Expert Committee on Drug Dependence to provide an 'updated' report on cannabis. http://www.incb.org/pdf/e/narcotics/questionnaires/CND_Resolution-English_52_5.pdf While 'subject to the availability of extrabudgetary resources' and consequently still pending, such a report is likely to add some clarity to the debate on the medical usefulness of the drug.

75. INCB, *Report of the International Narcotics Control Board for 2008,* op. cit., p. 66

76. Paragraph 3 of Article 23, which focuses on National Opium Agencies and to which Article 28 on the Control of Cannabis refers, notes that 'The governmental functions…shall be discharged by a single government agency if the constitution of the Party concerned permits it'.

77. See D. Ballotta, H. Bergeron and B. Hughes, 'Cannabis Control in Europe', in S. R. Sznitman, B. Olsson and R. Room (eds.), *A Cannabis Reader: Global Issues and Local Experiences*, EMCDDA Monographs 8, Vol. I (Luxembourg: Publications Office of the European Union, 2009), p. 112. Other limited schemes operate in Spain, Germany, Austria, Israel, Finland and Italy. Until recently under the Medical Marijuana Access Regulations of 2001 Canadian authorities met the requirements of the Single Convention. This position, however, has been altered to make the regulation of the drug a commercial matter as with any other controlled medicine.

78. Interestingly, while never apparently flagged up by the INCB, a disconnect in regard to article 28 remains within the operation of the 'Investigational New Drug (IND) compassionate access program' set up in the US federal government in the late 1970s. Since it was closed to new patients in 1992 the numbers on the programme have dwindled. Nonetheless, with the licensing agency being the Drug Enforcement Administration and the University of Missouri taking responsibility for cultivation, the scheme technically operates in contravention of the Single Convention.

79. See International Drug Policy Consortium, *The International Narcotics Control Board: Current Tensions and Options for Reform*, IDPC Briefing Paper Number 7, 2008, p. 11

80. INCB, *Report of the International Narcotics Control Board for 1997* (New York: United Nations, 1998), paragraph 28.

81. See, *European Cannabis Policies Under Attack*, TNI Briefing, April 2002 http://www.tni.org/archives/drugsungass-docs_canattack; and David R. Bewley-Taylor, International Drug Control, op. cit., pp. 200-206.

82. Y. Buruma, professor of criminal law and criminology and recently appointed to the Dutch Supreme Court, elaborated this interpretation as a member of a drug policy commission for the Dutch social democratic party, the PvdA. In his opinion, public health interests and medical purposes aimed at individuals in the treaties do not stand that far apart. This interpretation is not uncommon in international law, according to Buruma: the European Human Rights Court applies it as well. For an unofficial English translation, see: http://www.drugtext.org/Law-and-treaties/european-integration-and-harmonization.html

83. See for example Commentary on the Single Convention, op. cit., p. 111.

84. See Martin Jelsma, *Lifting the ban on coca chewing, Bolivia's proposal to amend the 1961 Single Convention*, TNI Series on legislative reform of drug policies Nr. 11, March 2011; and International Drug Policy Consortium, *Correcting a historical error: IDPC calls on countries to abstain from submitting objections to the Bolivian proposal to remove the ban on the chewing of the coca leaf*, IDPC Advocacy Note - January 2011

85. UNIS/NAR/1114, *International Narcotics Control Board Regrets Bolivia's Denunciation of the Single Convention on Narcotic Drugs*, INCB press release, 5 July 2011

86. Commentary on the 1988 Convention, op. cit., p. 87.

87. See http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

88. For a discussion of alternative models for regulated drug supply see Stephen Rolles, *After the War on Drugs: Blueprint for Regulation*, (Bristol: Transform Drug Policy Foundation, 2009)

89. The 1988 Convention specifies what constitutes a 'minor offence' by listing a number of aggravating circumstances in article 3 §5, such as the use of violence or arms, involvement in organized crime, recidivism, offender holding a public office, involvement of minors, offending in penal institutions or in the proximity of schools. Absence of those factors in cultivation, production and trafficking offences, and any personal consumption-related offences, would fall under the category of minor offences. See Commentary 1988, op. cit. pp. 89-93

90. Commentary on the Protocol amending the Single Convention on Narcotic Drugs, 1961, 1972, pp. 11

91. See D. Bewley-Taylor, *Towards revision of the UN drug control conventions: The Logic and Dilemmas of Like-Minded Groups*, TNI/IDPC Series on Legislative Reform of Drug Polices, nr. 19, March 2012

92. See D. Bewley-Taylor and M. Jelsma, 'Regime Change', op. cit.

93. See for example Global Commission on Drug Policy, *War on Drugs, Report of the Global Commission on Drug Policy*, 2011; European Commission, *A report on Global Illicit Drugs Markets. 1998-2007*, editors: P. Reuter (RAND) and F. Trautmann (Trimbos Institute), 2009; E/CN.7/2008/CRP.17, *Making drug control 'fit for purpose': Building on the UNGASS decade*, UNODC, 7 March 2008; and TNI, *Rewriting history. A response to the 2008 World Drug Report*, Drug Policy Briefing nr. 26, June 2008

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Evaluation and Prospects of International Drug Control

The year 2011 marked the 50th anniversary of the 1961 Single Convention on Narcotic Drugs and 2012 the 100th anniversary of the The International Opium Convention signed in The Hague in 1912. The international drug control framework that has developed since then is based on a restrictive interpretation of the UN drug conventions is often a barrier to innovative and effective drug policies. Objective and open debate is hampered by polarized ideological positions of a 'war on drugs' versus legalization. This dichotomy obscures the fact that much experience has been gained regarding more innovative and less repressive approaches.

This joint project led by the Transnational Institute (TNI) and the International Drug Policy Consortium (IDPC) aims to generate discussion and support effective and humane approaches through a series of expert seminars, informal dialogues and specific briefings on the future of the UN drug control conventions, legislative issues and alternative control measures. The project aims to promote an evidence-based and best practice approach to policy making in the field of drugs resulting in more humane and effective policies.

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