



Report
TNI / IDPC Expert Seminar
The Future of the UN drug conventions
Prague January 25-26, 2012

Introduction

As the debate on drug policy and law reform gathers momentum on the international stage, the failings of the three UN drug control conventions (1961¹, 1971² and 1988³) have come into stark relief. Criticisms of the global drug control regime established by the drug treaties have now entered the mainstream public discourse and political debate, encouraged by high profile reports, notably that released by the Global Commission on Drug Policy in 2011.⁴ Since that report, the discourse on more far reaching reforms, (including possibilities for regulated markets for certain currently prohibited drugs) that would necessitate reform of the conventions, has moved from former heads of State that formed the backbone of the Global Commission, to some sitting heads of State in a number of Latin American countries.

Caution is necessary in interpreting the political backdrop to some of these statements by some of those sitting heads of State which may reflect other political agendas, including an intention to lever funding or other concessions from the US, more than a genuine ambition to reform international drug control policies. At the same time there has been a growing appreciation that 'soft defections' (explored in more detail below), moves away from the more punitive prohibitionist tenets of the conventions, are not without practical and political costs, creating additional impetus for the dialogue on convention revision. Nevertheless, discussions around treaty reform that would allow or facilitate a wider spectrum of approaches to drugs have assumed a degree of urgency yet to be matched by high level engagement of either member States or the relevant UN bodies. The task of fostering this process has inevitably fallen to civil society groups, and the Prague expert seminar, convened by the International Drug Policy Consortium (IDPC) and the Transnational Institute (TNI) is part of this ongoing process.

The expert seminar is the fifth in a series of expert discussions on drug policy funded by the European Commission Drug Prevention and Information Programme and the Open Society Institute. The series is designed to feed into moments of opportunity for policy and law reform at national and international level with detailed technical analysis. The first in the seminar series was on the classification of controlled substances⁵, the second on

1 Single Convention on Narcotic Drugs, http://www.incb.org/pdf/e/conv/convention_1961_en.pdf

2 Convention on Psychotropic Substances, http://www.incb.org/pdf/e/conv/convention_1971_en.pdf

3 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, http://www.incb.org/incb/en/convention_1988.html

4 Global Commission on Drug Policy (2011), *War on Drugs*, <http://globalcommissionondrugs.org/Report>

5 Horwood, G. (2011), *TNI Expert Seminar on the classification of controlled substances*, Amsterdam, 10th December 2009, <http://www.druglawreform.info/images/stories/documents/classification-expert-seminar.pdf>

threshold quantities⁶ the third on proportionality in sentencing for drugs offences⁷ and the fourth on herbal stimulants and legal highs⁸. All seminars have been convened under Chatham House Rule to ensure confidentiality and to allow participants a free exchange of ideas.⁹

This report has been divided up under key headings that reflect the structure of the days' discussions, with a summary of key points and conclusions at the end.

- Exploring the technical and bureaucratic dimension of convention reform
- The political calculus: Dealing with sub-optimality
- How to constructively frame the debate on convention reform
- Potential drivers of change / avenues for progress
- Lessons from Latin America
- Lessons from Bolivia
- The role of Europe
- Discussion and Conclusions

Exploring the technical and bureaucratic dimension of convention reform

A starting point for the seminar discussions was the consideration of various options for reforming the treaties, which were presented and discussed in some detail, albeit without any firm agreement on the analytical framework. The main questions that structured the discussions were: what wiggle room is available within the conventions; what are the limits for wiggle room; and what possible steps can be undertaken to move a reform agenda ahead. The presenter divided the various options for reform into those that are believed to be technically feasible but politically impossible, options that are technically possible but not very promising, options that are more promising in the longer term, and options that offer potential for positive reform in the shorter term.

Firstly a set of options was outlined that whilst technically possible, were, currently at least, probably impossible in any practical sense. These included:

- **Modification/Amendment:** The conventions system contains mechanisms for the conventions to be amended. However, the need for unanimous consent means that dissenting unwilling States could easily prevent any move towards more flexible or liberal regimes. Bolivia, for example, attempted to amend the 1961 Convention on this issue of coca chewing before taking the denunciation re-accession route discussed below, but was thwarted by objections from the US and others.¹⁰

6 Harris, G. (2011), *TNI/EMCDDA Expert Seminar on Threshold Quantities, Lisbon, 20th January 2011*, <http://www.druglawreform.info/images/stories/documents/thresholds-expert-seminar.pdf>

7 Harris, G. (2011), *TNI/IDPC Expert seminar on proportionality of sentencing for drug offences, London, 20th May 2011*, http://druglawreform.info/images/stories/documents/IDPC-TNI_Proportionality_Report_FINAL.pdf

8 Harris, G. (2011), *TNI/IDPC Expert Seminar on Herbal Stimulants and Legal Highs, Amsterdam, 31st October 2011*, <http://druglawreform.info/images/stories/documents/report-legal-highs-amsterdam.pdf>

9 *When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed*". <http://www.chathamhouse.org/about-us/chathamhouserule>

10 See: Jelsma, M. (2011), *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, <http://druglawreform.info/images/stories/documents/dlr11.pdf>

- **Termination:** If enough States denounce (withdraw from) a convention, it is terminated. The thresholds for this to occur differ between conventions. It is 40 for the 1961 and 1971 Conventions – which would involve the highly improbable event of more than 140 States denouncing it. The 1988 Convention has no termination clause.
- **Falling into disuse:** There is the possibility that a convention could *'wither on the vine'* through disuse – becoming an irrelevance even if technically still in place. A historical example of such a process was the prohibition of 'trade spirits' in sub-Saharan Africa by conventions from 1890 and 1919.
- **Removing particular drugs from coverage:** This would require a proposition from the World Health Organisation (WHO) Expert Committee on Drug Dependence followed by a decision of the UN Commission on Narcotic Drugs (CND) and would also be subject to review by the UN Economic and Social Council (ECOSOC) upon the request of a Party. This route does not require consensus: the CND votes on WHO scheduling recommendations for the 1961 Convention by simple majority, while the 1971 Convention requires a two-thirds majority (an affirmative vote of at least 35 members of the Commission). An ECOSOC review procedure would require a simple majority to confirm or reject the CND decision. Whilst definitely not unthinkable in the cases of coca leaf or cannabis, for example, political opposition would be difficult to overcome under current circumstances in which powerful defenders of the status quo such as the USA, Russia and Japan are likely to successfully mobilise a majority behind them.

A second set of options was then explored. These were deemed to be more possible, but *'not promising'*. They involve the action of a State or States acting in parallel, and include:

- **Denunciation of one or more conventions, without re-accession:** It was observed that whilst there was a 5% rate of this occurring in recent decades with convention accessions more generally,¹¹ it has not happened with any of the three drug conventions.
- **Passing of national legislation that conflicts with and supersedes convention obligations:** This however only works in a few countries (like the US) where national laws have equal primacy with treaties. It was noted that this was an approach that could be problematic in terms of precedent setting, i.e. it could have negative consequences in other issue areas and compliance to other conventions.
- **Post-ratification reservation:** it is possible for reservations to a treaty to be included post ratification. However, whilst this has happened it has uncertain legal status; a 'cleaner' mechanism to achieve a reservation is to denounce and re-accede with a reservation (*see Bolivia discussion below*).

Proposed as a potentially more promising long-term avenue for reform was the option of **superseding an existing convention with a new convention (or conventions)**. It was suggested that this could happen in number of ways:

- The older convention (or conventions) could be denounced in the course of adopting a new one. This would be the cleaner path but politically difficult (to get dissenting unwilling States on board)

¹¹ Helfer, L.R. (2005) Exiting treaties. *Virginia Law Review* 91:1579-1648.

- Alternatively a new convention could be adopted with the old convention remaining in place¹² – accepting that there would be some (potentially problematic) conflicts between the two. For a particular State that had acceded to both – the most recent takes priority, although they would be bound by the old convention if dealing with a second State that had not adopted the new one. This needs not be too problematic if international control provisions are maintained, while conflicting provisions in a new convention concern domestic arrangements only (or potentially bilateral arrangements between reform States). It seems less clear, however, how such issues could play out in international law – it would be uncharted territory in many respects.

In terms of what a new treaty could contain, a range of possibilities were suggested. Some ‘minimum fixes’ could include readopting the three conventions, but effectively removing the punitive criminal sanctions against possession for personal use (similar to the decriminalisation models being adopted in Europe and Latin America), or doing the above and additionally allowing internal domestic regulated markets for one or more drugs (e.g. cannabis or coca).

The acute practical difficulties of achieving such change were noted. More specifically, the potential for reform will only be possible if a coalition of the willing can reach a consensus on:

- The need for changes
- A new strategy
- The content of a new comprehensive international convention.

Such a new convention would have to define the new Rule of Law and also modernise the mandates and functioning of the bodies that oversee the implementation of the conventions, the CND, the International Narcotics Control Board (INCB), the WHO and the UN Office on Drugs and Crime (UNODC). It would be impossible to conduct such a reform process without organising an international conference, and any convention would have to be established through existing mechanisms and mandates.

It was additionally noted that the international community is very conservative. The States have the last word in these two steps processes: signatures at the governmental level and ratifications at the parliamentary level. If a majority of States does not ratify the new convention, this agreement cannot proceed. In such processes, the negotiation method is based on consensus and compromise. The question then is: how can the inevitable difficulties be addressed? These will include:

- the international agreement on the necessity to organise such a conference
- the way to agree on a common purpose and frame
- the content of the preparatory work and documents
- the adoption of a consistent text by a majority.

Whilst the battleground of such processes will be political, the challenge will be to achieve it through a highly technical legal process with many potential pitfalls.

¹² See: Room et al., *Cannabis Policy: Moving beyond Stalemate*, 2010

A second possibility would be the construction of a new convention specific to one or more drugs. The obvious model for this is the Framework Convention on Tobacco (FCTC)¹³ which potentially provides a template for something similar regarding cannabis control for domestic markets including its supply, but maintaining present international controls.¹⁴ The framework convention approach to dealing with issues of transnational concern is becoming increasingly popular in international law making and might provide a more workable model. Using the FCTC as a template may be productive both in terms of the health orientation of any new convention and the framework or umbrella convention approach to providing a platform for the incremental development of later conventions (or protocols) or national legislation based on the principles declared within the convention.¹⁵ The very detailed provisions in the drug conventions could also be replaced with more general obligations and take into account different cultural approaches to drugs to replace the 'Western' prejudice in the current conventions.

A third, more far reaching option would be a new 'Single Convention' that would replace the current three (in a similar way to how the 1961 Convention was intended to replace the various preceding international agreements of the League of Nations). Elements of a new Single Convention could include:

- Bringing alcohol and tobacco into the system along with other drugs – establishing more consistency in terms of drug regulation, management and law
- Encouraging and guiding strong regulatory control of domestic markets
- Including a principle of *comity*: the legal courtesy principle of recognising and respecting the decisions of other nations about domestic regulation or prohibition of certain drugs. The idea is that countries should not act in a way that demeans the laws or judicial decisions of other countries, and that other jurisdictions will reciprocate the courtesy shown to them.

An interesting footnote to the discussion on a possible new single convention was the observation that in the late 1980s the Soviet Union had in fact suggested a unified convention to create a single tool that removed some of the contradictions between the three. This plan did not progress and indeed there are few, if any examples of conventions being rewritten in the way being suggested.

In the short term a more promising way for States to achieve reforms domestically is denunciation from a given convention, followed by re-accession with reservations.¹⁶ This can be done by a single State or by States acting in parallel. There are clear recent precedents in other conventions, for example:

- Guyana and Trinidad & Tobago in 1998-9 about death penalty restrictions in the International Covenant on Civil & Political Rights

13 World Health Organisation, *WHO Framework Convention on Tobacco Control*, <http://www.who.int/fctc/en/>; Shibuya, K., Ciecierski, C., Guindon, E., Bettcher, D.W., Evans D.B. & Murray, C.J.L (2003), 'WHO Framework Convention on Tobacco Control: Development of an evidence based global public health treaty', *British Medical Journal*, **327**: 154-157

14 See the Draft Framework Convention on cannabis Control, pp. 1591-191 in: Room et al., *Cannabis Policy: Moving beyond Stalemate*, 2010

15 See: Aust, A. (2007), *Modern treaty law and practice* (Cambridge University Press), p. 122

16 Room, R. (2012) Reform by subtraction: The path of denunciation of international drug treaties and reaccession with reservations. *International Journal of Drug Policy*, online early view, <http://dx.doi.org/10.1016/j.drugpo.2012.04.001>

- Sweden in 2002 on the Convention on multiple nationality obligations.

A rarely noted observation is that there are already many reservations to the drug conventions in place – 33 States for the 1961 Convention, 30 for the 1971 Convention, and 35 for the 1988 Convention, and objections to such reservations are rare (none have been rejected regards the drug conventions). There are also a number of additional State ‘declarations’ of how a particular provision will be interpreted. These include¹⁷ a number of countries that have reservations regarding the authority of the International Court of Justice, the status of Israel, or domestic constitutional issues: the US for example has an ‘understanding’ on the 1988 Convention that: “*Nothing in this Treaty requires or authorises legislation or other action by the United States of America prohibited by the Constitution of the United States*”.

The US also has a reservation on the 1971 Convention on traditional use of peyote (that in some respects echoes the Bolivian call on traditional use of coca): “*In accord with paragraph 4 of article 32 of the Convention, peyote harvested and distributed for use by the Native American Church in its religious rites is excepted from the provisions of article 7 of the Convention on Psychotropic Substances*”.

The denunciation and re-accession with reservations route remains relatively rare in international law. This path has been recently taken by Bolivia with respect to the ban on the traditional uses of the coca leaf in the 1961 Convention. The Convention required the abolition of the traditional coca-leaf chewing be abolished within 25-five years. Since the 1961 Convention entered into force in December 1964, the 25-year phase-out scheme ended in 1989. However, coca use was never phased out. It is the first time that a course of action such as that initiated by Bolivia has been taken for any of the drug conventions – perhaps marking some sort of watershed. The approach however is not without its technical and political challenges.

- For the 1961 and 1971 Conventions reservations on a few specified articles are allowed without requiring the consent of other parties. For the other articles, a reservation is accepted, unless objected to by a third of State parties, “*it being understood however that States which have objected to the reservation need not assume towards the reserving State any legal obligation under this Convention which is affected by the reservation*”. All reservations thus far have been accepted, but in the theoretical case that a third or more of State parties would object and a reservation would be rejected, the reserving nation would have to weigh the political importance of being a party to the convention against the relevance of the policy issue at stake behind the reservation.
- There is no specific procedure for reservations or objections to them established under the 1988 Convention. Therefore, objections to reservations made by parties can only be argued on the basis of the general principle laid down in the 1969 Vienna Convention on the Law of Treaties that reservations cannot be “*incompatible with the object and purpose of the treaty*”.

There are various other reforms that could potentially be furthered by a denunciation and re-accession with a reservation process. These include an unambiguous permission for countries to decriminalise the cultivation and possession of drugs for personal use. The

¹⁷ For details on drug conventions reservations and declarations see UN Treaty Collection website <http://treaties.un.org/Pages/Treaties.aspx?id=6&subid=A&lang=en>

1988 Convention already includes an escape clause saying that ‘*subject to its constitutional principles and the basic concepts of its legal system*’ each party should criminalise purchase, cultivation and possession of controlled drugs for personal consumption. Countries therefore do not need to have a reservation in place in order to decriminalise such acts, as long as they can argue it on the basis of domestic legal principles. Ambiguity has persisted around this issue for many years, however, mainly because of questionable interpretations by the INCB who regularly accused countries introducing decriminalisation of possession for personal use or allowing the establishment of drug consumption rooms, of violating the conventions. A reservation on the specific wording in the 1988 Convention requiring such acts to be ‘*criminal offences*’ (Art. 3 §2) would help to resolve this ambiguity. This could be based around the wording adopted by the Swiss on this issue when they acceded.¹⁸ A broader reservation might additionally be required against the 1961 and 1971 Conventions requiring these acts be (somewhat less specifically) ‘*punishable offences*’ in order to end the ambiguity once and for all. A clear precedent is also provided by the Netherlands in relation to the 1988 Convention regarding the coffee shop system that uses the clause of the conventions that allows States to apply constitutional principles and basic concepts of their legal systems in the case of possession, purchase and cultivation of controlled drugs for personal consumption, but additionally made an explicit reservation on the particular paragraph (Art. 3 §6) that intends to restrict the existing discretionary legal powers of parties. It is potentially an example that countries could follow, notably Denmark which has a local cannabis law reform initiative in play (the City Council of Copenhagen wants to decriminalise cannabis consumption and supply to government controlled selling points and the Council proposed following this route as well).¹⁹ As a footnote it is also interesting to note that the 1961 Convention does not require any controls of cannabis leaf, only of the “*flowering or fruiting tops of the cannabis plant*” and of resin. This provides regulatory space for the ‘*bhang*’ shops in some Indian states, and also an interesting possibility for establishing a legal market in lower strength cannabis leaves that would not violate the letter of the conventions.

Viewed more broadly the denunciation and re-accession with reservation course is also essentially a ‘*reform by subtraction*’, rather than a more positive, constructive or creative process. This limits its potential in the longer term even if, in the short term, it can usefully highlight tensions in the system or fractures in the consensus. It may therefore act as a precursor for more substantive paradigm shifts or regime change in the longer term. It was also suggested that the denunciation and re-accession with reservation route might not be the best path to reform where there was a wider need to introduce flexibility in the system to allow for cultural variations in drug cultures and responses to them.

The political calculus: Dealing with sub-optimality

18 Reservation concerning article 3, paragraph 2 :

Switzerland does not consider itself bound by article 3, paragraph 2, concerning the maintenance or adoption of criminal offences under legislation on narcotic drugs.

Reservation concerning article 3 , paragraphes 6, 7 and 8:

Switzerland considers the provisions of article 3, paragraphs 6, 7 and 8 as binding only to the extent that they are compatible with Swiss criminal legislation and Swiss policy on criminal matters.

Source: United Nations Treaty Collection http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en#EndDec

19 See: Blickman, T. (2012), ‘Copenhagen wants controlled cannabis shops; Regulating the cannabis market after a failed attempt to re-criminalise’, TNI weblog, <http://www.druglawreform.info/en/weblog/item/3100-copenhagen-wants-controlled-cannabis-shops>

On becoming a party to a convention, all States accept a degree of sub-optimality; they never get exactly what they want, but they perceive the benefits to outweigh the disadvantages. The flexibility within the global drug prohibition regime allows States to reduce sub-optimality via soft defections. This is where States defect from the prohibitive ethos (or norms) at the heart of the regime, but remain within the letter (if not the spirit) of the conventions system.²⁰

For most States such a '*sufficing strategy*', in other words managing the sub-optimality to the best effect via soft defection, has worked well, or at least adequately enough to dissuade them from more substantive challenges. The Netherlands, for example has arguably paid a high political cost in the international arena for its liberal cannabis policy. It was suggested, for example, that Dutch diplomats might consider their political capital expended, and as a consequence be over-cautious on other issues for fear of further rocking the boat.

Further attempts to reduce sub-optimality would require hard defections – of the kind that only Bolivia has so far undertaken. Depending on the outcome of the Bolivian attempt, until now a strong case can be made that to most countries the costs (reputational, political, geopolitical, etc.) are currently seen to exceed any potential benefits.

A major barrier is that the strength of the conventions and the conventions system rests in significant part on their universality, and there is therefore a powerful political force in place pushing against any action that undermines it. A cost-benefit analysis needs to be made for States considering any such challenges to the drug conventions. At the international level, this means weighing up the political costs of breaking the '*Vienna consensus*' against any domestic gains from proceeding with a particular action (such as a reservation). Regarding the Bolivian amendment and subsequent withdrawal, the US and the INCB specifically invoked the universality issue, suggesting that Bolivia's call for reform was somehow opening a Pandora's Box threatening the integrity of the conventions.

An additional consideration is the danger of unilateral action setting as a hazardous precedent regarding adherence within the wider UN conventions system – for example adherence to human rights and non-proliferation conventions where the need for universality remains paramount. It was noted, however, that human rights and many other conventions are routinely breached by States that have signed and ratified them, and in the main they get away with it with relatively little diplomatic or reputation damage.

Therefore, another option for States seeking to diverge from the convention provisions is to simply ignore the aspects of the drug conventions giving them concerns, and absorb the largely symbolic flak they would get at the CND and from the INCB. It was argued, however, that opting for ignoring the conventions would conflict with the basic principle of international law that 'agreements must be kept' (*pacta sunt servanda*), as stipulated in the [1969 Vienna Convention on the Law of Treaties](http://www.un.org/ilc/publications/publications.aspx?id=1), requiring that "every treaty in force is binding upon the parties to it and must be performed by them in good faith". This would also continue the *status quo* and hamper the push for reform. On the other hand, if a

²⁰ See also: Bewley-Taylor, D. & Jelsma, M. (2012), *The UN drug control conventions: The limits of latitude*, Series on Legislative Reform of Drug Policies Nr. 18, (<http://www.druglawreform.info/images/stories/documents/dlr18.pdf>). The authors provided a draft version as reading material for the seminar.

critical mass of countries ignored significant parts of the conventions, that could, in itself, be an incentive to redraft them.

Cumulatively these considerations are likely to create a very high threshold for signatory States to risk undertaking such action. The Bolivian move remains unique in the 50 years of conventions and whilst it may represent the first, or at least most visible crack in the consensus, in terms of a hard defection, the cost-benefit analysis appears to remain strongly weighed against such an action – even if some recent developments suggest this situation may be beginning to change.

Also important to note is that the patchwork of almost 100 reservations already in place indicates the conventions are in many respects less like the impenetrable rock of common perception but more usefully described as ‘*Swiss cheese*’ – especially when the multiple instances of *soft defections* from the letter and spirit of the conventions are included in the overview. It is not difficult to see the consensus around the drug conventions as already under significant pressure, and likely to prove unsustainable in the longer term.

How to constructively frame the debate on convention reform

At the moment, the perceived costs of a regime change are still larger than the gains of convention revision. So far the strategy of soft defection has been a sufficing strategy but hard defection will eventually be necessary if a country or a group of countries want a more substantial change of the regime. In order to overcome the perceived costs of such a step, the key practical challenges for a country that opts for a fundamental change are to show that change is possible, and then gain support for convention revision. Then the question becomes: how can States be convinced that the benefits of a convention revision exceed the costs, and attempt to bridge the gap between where most States are now and the technicalities of convention reform? In such a case, there is a crucial need at the international level to build support for like-minded groups of States willing to push for reform, as well as exploring which particular mechanism for reform might be the most appropriate.

Clearly different approaches will be attractive to different States for different reasons. An important first step is merely to demonstrate that a paradigm shift, a change in the global drug policy control regime, is possible. It has been noted, for example, that the 1961 Convention marked a significant break with the commodity control focus of the earlier League of Nations conventions it replaced. Rather than simply codifying provisions of the previous conventions, it extended existing controls in a number of areas, including both production and consumption. For instance, the 1961 Convention broadened the purview of the regime to include the cultivation of plants grown as raw material for the production of natural narcotic drugs. Recalling this history of the Single Convention should do much to remove the misplaced aura of sacred immutability that currently shrouds the contemporary UN convention framework.²¹

Specific revisions can be purely technical, relating for example, to inconsistencies within the regime in relation to scheduling, including cannabis. Illustrating this approach for example, consider the conclusion of a previous TNI seminar:²²

21 See: Bewley-Taylor, D. & Jelsma, M. (2011), *Fifty Years of the 1961 Single Convention on Narcotic Drugs: A Reinterpretation*, Series on Legislative Reform of Drug Policies Nr. 12, <http://www.druglawreform.info/images/stories/documents/dlr12.pdf>

“the discrepancies between scheduling and current scientific knowledge is insurmountable unless the parameters [are] completely changed. The scheduling of controlled substances at the UN level is so rife with tensions and inconsistencies that it has almost reached the point, if it has not already, where the system is unworkable, obsolete, and counterproductive”.

Another possible technical objection could relate to drug conventions coming into conflict with other conventions or legal norms – for example conventions on indigenous rights (regarding coca) or human rights (regarding disproportionate penalties, coerced treatment and access to essential medicines).

Another option for framing of a reform discourse would be performance criteria; in other words highlighting the regime’s failure to achieve its core objectives and its generation of myriad counterproductive impacts.²³ Whilst these unintended consequences are explored in detail elsewhere, it is notable that the key themes of the critique (including criminogenic impacts, and marginalisation of health and human rights) were contained within the 2008 *Fit for Purpose* paper authored by the former UNODC Executive Director, Antonio Maria Costa.²⁴

Potential drivers of change and avenues for progress

- **Unpredictable events and system shocks**

There is a possibility that tensions between federal governments and state governments could force the issue in unpredictable ways. The most prominent example of these tensions is presented by the ballot initiatives to legalise and regulate non-medical and medical cannabis in several US states. One such initiative, 2010’s Proposition 19 in California was only narrowly defeated in 2010 (53.5% voting “No” and 46.5% voting “Yes”) and there are at least two similar efforts – in Washington state and Colorado, on the ballots for November 2012. Should one of these ballots pass, it would push the global drug policy regime into uncharted territory, as the US Federal government, fully signed up to the conventions, is forced into a clash with State governments. It is worth noting that the initiatives themselves do not have a clear plan for UN convention engagement – indeed they seem to have largely ignored international legal issues, choosing instead to simply see how the issues play out if and when the time comes. The INCB is of the clear view that:

“The international drug control treaties must be implemented by States parties, including States with federal structures, regardless of their internal legislation, on their entire territory. While all States have different legal systems and legal traditions, the Board wishes to remind the States parties of the basic principles of

22 Horwood, G. (2010), *TNI Expert Seminar on the Classification of Controlled Substances*, Amsterdam, 10th December 2009, <http://www.undrugcontrol.info/images/stories/documents/classification-expert-seminar.pdf>

23 See www.counthecosts.org

24 Costa, A.M. (2008), *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, E/CN.7/2008/CRP.17, <http://www.unodc.org/documents/commissions/CND-Session51/CND-UNGASS-CRPs/ECN72008CRP17.pdf>

international law enshrined in the provisions of articles 27 (on the irrelevance of internal law) and 29 (on the application of the treaty on the entire territory of the party) of the 1969 Vienna Convention on the Law of Treaties.”

However, its options for responses, beyond essentially finger wagging, appear very limited, and the key battle is likely to be between state and federal power structures.

Whilst it is likely that, if passed, implementation of such laws could be tied up in various legal challenges for some years, it could nonetheless ultimately bring some of the current legal grey areas into focus by forcing the issue centre stage. It would be presumptuous, however, to assume that the outcome of this would be positive for those parties willing to change. Such debates, and legal outcomes, can work in both directions. It was suggested that the US response (in terms of convention integrity – see above) to Bolivia's attempts to remove coca leaf chewing from the conventions may have been a pre-emptive attempt to frame the narrative for the looming domestic storm over cannabis.

Other unforeseen shocks to the drug control regime could also emerge. One suggestion was that the growing and seemingly unstoppable challenges from new psychoactive substances ('legal highs') could also force the pragmatic development of new structures that necessitate regulation approaches rather than blanket prohibition (as happened in New Zealand regarding BZP for example). Upcoming regulation and legislation on legal highs on national and multilateral level can be considered as the barometer for the future of the conventions as they might seek a different route than mere prohibition.

It was also noted that whilst treaty reform remains problematic, a *reorientation* towards public health led approaches and increased tolerance, that could be a precursor to longer term reform, is perhaps less so. Notably, the UNODC itself is a relatively new entity that reflected a reorientation towards crime and security issues. A health reorientation could also take place – with reforms at the INCB and a greater role for the WHO perhaps – without the need for new conventions.

- **Groupings of like-minded States**

The possibility for a group of like-minded States operating in concert is more likely to succeed in achieving reform than unilateral action²⁵ (especially if not by a superpower). The concept of '*strength in numbers*' is a simple one, and in the context of the CND, the potential for an '*alternative consensus*' has potential to force change in the manner that a rogue State defector does not. In terms of building towards more constructive progress, fostering of such likeminded groupings is an obvious focus of activity for civil society. A number of possible groupings (within which there may be some overlap) were suggested:

- **A traditional and religious uses group** – most obviously the Andean coca growing and consuming countries
- **A Latin American group** – related to the above but with a wider concern on conflict, security, development and corruption issues (see below)

25 Bewley-Taylor, D., *Towards revision of the UN drug control conventions The logic and dilemmas of Like-Minded Groups*, , Series on Legislative Reform of Drug Policies Nr. 19, March 2012
<http://www.undrugcontrol.info/en/publications/legislative-reform-series-/item/3251-towards-revision-of-the-un-drug-control-conventions>

- **A cannabis regulation interest group** – a potentially broad alliance of North and South American, European, and scattered others
- **A technical issues group** – with shared concern for inconsistencies (e.g. problems with scheduling)
- **A system wide coherence group** – concerned with conflicts between drug enforcement and other convention commitments to protect human rights, access to essential medicines and HIV prevention.
- **A constitutional reform group** – countries that have recognised that drug control conventions violate their constitutions, specifically regarding possession for personal use. This group could even include the US at some point should the cannabis ballot initiatives lead all the way to the Supreme Court.

Lessons from Latin America

As the continent that arguably carries the heaviest burden of the unintended impacts of the global drug control regime, Latin America has, unsurprisingly perhaps, become a crucible for the reform debate in recent years. Linking the illicit drug trade (for both domestic markets and supply for markets in North America and Europe) to violent crime has become a fixed part of the political discourse – with much of the blame aimed at North America. As the superpower status of the US as global hegemon has diminished, and some Latin American economies have grown in strength and confidence, the potential for challenges to what for many on the continent is increasingly seen as an imperialist project has grown with it.

Any fledgling regional reform movement, however, still faces significant challenges from the febrile political environment and often hostile popular media; recently two progressive national drug coordinators lost their jobs (in Peru and Brazil) demonstrating that even in progressive left-leaning governments, having different views on drug policy remains problematic, internally, let alone publicly.

However, the tone of the debate is shifting. In 2010, the Tuxtla initiative (a regional gathering of State representatives – including heads of State) expressed concern about the potential impacts of California’s Prop. 19 on Latin America. A 2011 statement, endorsed by 11 State representatives including 8 heads of State²⁶, stated that:

*“What would be desirable would be a significant reduction in the demand for illegal drugs. Nevertheless, if that is not possible, as recent experience demonstrates, the authorities of the consuming countries ought then to explore the possible alternatives to eliminate the exorbitant profits of the criminals, including regulatory or market oriented options to this end. Thus, the transit of substances that continue provoking high levels of crime and violence in Latin American and Caribbean nations will be avoided”.*²⁷

26 Presidents of Guatemala, Alvaro Colom; Honduras, Porfirio Lobo; Mexico, Felipe Calderon; Nicaragua, Daniel Ortega; Panama, Ricardo Martinelli; the Dominican Republic, Leonel Fernandez; and the First Vice President of Costa Rica, Alfio Piva Messer. Also present were the Foreign Ministers of Belize, Wilfred Elrington; Colombia, Maria Angela Holguin; and El Salvador, Hugo Martinez. Chilean President Sebastián Piñera was also present as a special guest.

27 Original Spanish text here: <http://saladeprensa.sre.gob.mx/index.php/es/comunicados/912-sre>

Whilst this statement was not widely reported, it may retrospectively be seen as a signal of the shifting political sands. Violence and security concerns are evidently the driving force (rather than drugs per se). Even to the more conservative leaders it is clear that an enforcement led 'war' is unwinnable. However, as yet progress in the reform debate, beyond statements such as the Tuxtla declaration, remains largely uncoordinated and leaderless. Unsurprisingly then, change is proceeding at different speeds across the continent – for example:

- Argentina is a strange mix of conservative and progressive forces on drug policy reform – but its courts have moved decisively to decriminalisation of personal possession and use, and at the political level changes can also be expected.
- Colombia is in the middle of a back and forth constitutional battle between the Parliament and the Supreme Court on the decriminalisation question. President Santos has made a series of clear statements – perhaps the boldest ever by any sitting head of State – on the failings of the current paradigm and the need for an international forum on alternatives including legalisation/regulation. He has also made it clear that he does not want Colombia to take the initiative, and has also taken opposing repressive measures internally.
- In Ecuador, at the end of 2008, President Correa initiated an important constitutional reform which amounts to decriminalisation of possession for personal consumption. Drug consumption is now considered as a public health issue and, in reference to people who use drugs, “*in no case will criminalisation be permitted nor will persons’ constitutional rights be violated*”. In addition the constitutional assembly issued a one-time amnesty to small scale drug ‘mules’²⁸ – but has not followed up yet with legislation, which is part of a broader reform of the criminal code. Drug policies are framed as a security issue – often defaulting to more familiar populist tough talking.
- President Pérez Molina of Guatemala, despite his hawkish pre-election rhetoric, has recently made statements around the legalisation debate that closely echo those of Santos. Like Santos, however, these sentiments have yet to coalesce into concrete action domestically or regionally.

Lessons from Bolivia

As detailed above Bolivia has become the first country to withdraw from one of the drug conventions; following its failure to win support for a proposed amendment to the 1961 Single Convention that would lift the ban on coca leaf chewing. Bolivia has applied for a re-accession with a reservation on the relevant articles regarding traditional use of coca. The reservation will be approved unless there are substantial objections: if one-third of all parties oppose the reservation (62 countries), it will be rejected – this is believed to be unlikely. Widespread ignorance of the minutiae of withdrawal/re-accession/reservation processes, paired with general disinterest in the coca issue, can be assumed for many member States.

28 Metaal, P. (2009), *Pardon for mules in Ecuador, a sound proposal*, TNI Series on Legislative Reform of Drug Policies Nr. 1, <http://www.druglawreform.info/images/stories/documents/dlr1.pdf>

Whilst Bolivia has courted political controversy on some fronts it is important to note that they actually proceeded from calls for reform within established conventions mechanisms. Other countries with the same phenomena that simply ignore the conventions have not attracted the same degree of political flak – in some respects providing a perverse incentive to simply ignore the conventions in relation to coca.

The tactical planning of responses to Bolivia's failed previous attempt to amend the 1961 Convention should probably not be overestimated: two or three countries appear to have had a plan whilst others simply went along with them.

Whilst Bolivia was acting unilaterally, they did receive support – although that was not required in the procedure – from the GRULAC countries (excluding Mexico), and elsewhere (including European countries such as Spain) – with the US leading a 'friends of the conventions' group in opposition.²⁹ So far, occasional like-minded groups opposing alterations to a perceived weakening of the control regime have been more successful than those trying to change it. That said, a pro status quo coalition failed to block what might be called the Interpretative Statement twenty-six (IS-26) group who joined in making a stand on harm reduction at the High Level Segment at the CND in 2009 and shattered the cherished '*Vienna consensus*' on the final Political Declaration and Action Plan adopted at the meeting.

The reaction to the Bolivian amendment needs to be seen in the wider political context, specifically the shifting sands of regional geopolitics that underlie the increased assertiveness in Latin America, particularly towards the US. In many respects the tactical planning from Bolivia itself should also not be overestimated. Whilst ground-breaking internationally, the move was driven in significant part by domestic politics – coca growers are an important electoral base for President Morales, a coca grower himself and the president of the coca grower unions. For Bolivia, the cost-benefit analysis shifted in favour of a hard defection, one that takes the global drug control regime into new and essentially uncharted territory. However, this chapter in the history of the conventions is still unfinished and it is therefore difficult to predict what lessons will be learnt in the longer term or whether it will prove to be a decisive moment in convention reform.

The role of Europe

Whilst there are many examples of substantial reforms in individual European States (particularly in the areas of harm reduction, decriminalisation, and cannabis policy) it was suggested that we should not expect any imminent attempt from the European Union (EU) and the European Commission (EC) member States to challenge the global paradigm or push for convention reform.

- EU politics are currently dominated by the economic crisis, governance issues, and political splits between countries in the North and South. In this context there is no appetite for a confrontation with the major powers over the drugs issue.

29 For further reading see: International Drug Policy Consortium (2011). *IDPC Advocacy Note – Bolivia's legal reconciliation with the UN Single Convention on Narcotic Drugs* <http://www.druglawreform.info/images/stories/documents/IDPC-advocacy-bolivia-july2011.pdf>; List of opposing and supporting countries: <http://www.undrugcontrol.info/en/issues/unscheduling-the-coca-leaf/item/1184-objections-and-support-for-bolivias-coca-amendment>

- Global politics can be seen as tilting away from the Western powers: the loss of authority following the wars in Afghanistan and Iraq, a marginal role in the Arab spring, and economies being diminished in relative terms compared to emerging economies, most notably the BRIC countries (Brazil, Russia, India and China).
- The Justice and Home affairs portfolio at the EC that held the drugs brief has been split – the new portfolio for justice including fundamental rights now holds the drugs coordination brief. The new leadership has shown little appetite to link human rights and drugs issues, and little interest in the wider societal issues relating to drugs. Public health policy briefs are also predominantly a national issue, rather than a primary mandate of the European institutions. Interest in more progressive drug policy debate tends to be driven by individuals and is often cyclical – but is currently at a low point.
- The EC takes decisions on a collegiate basis: rather like the CND it is a big and unwieldy institution, the need for consensus between the 27 members, often with divergent positions, can lead to stasis. The chance of more far reaching reform proposals coming out of the Horizontal Drug Group (HDG)³⁰ on drug law reform appear slim. Moreover, the Standing Committee on Operational Cooperation on Internal Security (COSI) – a Council body with a mandate to facilitate, promote and strengthen the coordination of EU States' operational actions in the field of internal security – is gaining prominence in the field of drug supply reduction and is posing a potential threat to the balanced approach in the HDG.
- The new European External Actions Service (EEAS) that addresses security matters has had teething problems and in the short term at least does not offer obvious avenues for active engagement.

The unlikelihood of European political institutions taking up the reform baton at the present time does not, however, preclude more active engagement from individual member States. The support of certain member States for the Bolivian initiative – despite US pressure – indicates that, as in all multilateral groupings, viewpoints are heterogeneous. Arguably, previous trends towards convergence on harm reduction and decriminalisation may even be going into reverse. Nonetheless, political support from Europe, even if from individual States rather than the EU/EC, could still be important, for example in backing any emerging Latin American coalition activities in the future at key international forums such as the G20 or the CND.

As with the US cannabis ballot initiatives, localised initiatives in Europe (such as the Spanish cannabis clubs³¹ or moves towards cannabis regulation in Copenhagen) could

30 The EU Horizontal Working Party on Drugs, usually referred to as the “Horizontal Drug Group” (HDG) is the committee for drug policy falling under the European Council, the main inter-governmental decisional body of the European Union with legislative power. The HDG consists of delegations from the member States (generally composed of one representative of the Ministry for Health and one of the Home Office, Justice Ministry or Foreign Ministry). Also represented are the European Commission, the European Monitoring Centre for Drugs and Drugs Addiction (EMCDDA), Europol and the European Agency for the Evaluation of Medicinal Products.

31 See: Barriuso Alonso, M. (2011), *Cannabis social clubs in Spain: A normalizing alternative underway*, TNI Series on Legislative Reform of Drug Policies Nr. 9, <http://www.tni.org/sites/www.tni.org/files/download/dlr9.pdf>

also see bottom up challenges to the spirit and letter of the conventions – that might force high level engagement in the wider structural debate.

Since the Lisbon Treaty – the Treaty on the Functioning of the European Union (TFEU)³² – the EU has extended its mandate, in particular regarding judicial cooperation in criminal matters and police cooperation. Decisions in the European Council no longer need consensus but can be reached by majority vote with due regard for subsidiarity and proportionality between European and national competences. With regard to reducing drug-related health damage, including information and prevention, the EU complements member States' actions. The Lisbon Treaty gave the European Parliament the right to approve the budget, extending its legislative powers. It now has a say on how the money is spent. However, it is as yet unknown how this will play out and how the Parliament will engage on the issue.

The EU needs to develop a new European Drugs Strategy and new framework decisions or directives on drug trafficking and new psychoactive substances. The current Commission seems to consider the issue mostly from a security and law enforcement approach since that fits better in its new mandate. The recently adopted Communication "Towards a stronger European response to drugs" defines the Commission's priorities in relation to drug policy and sets the scene for a major revision of the EU legislative framework on drugs (notably on criminal sanctions for drug trafficking offences, control of new psychoactive substances, rules to prevent the diversion of drug precursors, confiscation of criminal assets and money laundering).³³ Article 83 (1) TFEU – the only one referring to drug trafficking – allows for the establishment of minimum rules on the definition of criminal offences and sanctions in the area of particularly serious crime with a cross-border dimension, among which it explicitly includes drug trafficking. There are also other factors that might come into play, for instance the fact that Commission and the Parliament are not competent regarding the 1961 and 1971 Conventions. However, the EU is a signatory of the 1988 Convention.

Discussion and Conclusions

The technicalities of convention reform are an important part of the discussion but arguably subservient to the wider political discourse. Until sufficient political will exists, substantive reform of the UN drug conventions will not be possible, despite growing recognition that the current drug control regime is not working. For this to occur the political calculus will need to shift so that the cost-benefit analysis for individual States moves decisively in favour of proactive engagement. At this point the technicalities of the reform process will play out along their own natural course guided by the various bureaucratic legal mechanisms and political/diplomatic dynamics.

It has taken 50 years before the first serious defection (Bolivia) from the regime has occurred, and even this (still in process) sought only to achieve a fairly minor realignment, rather than more substantive challenge to the current repressive paradigm. Some argued that in a rapidly changing political environment with a likelihood of unanticipated system

32 Treaty on the Functioning of the European Union (TFEU); <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>

33 See: Communication COM (2011) 689, *Towards a stronger European Response to Drugs*; http://ec.europa.eu/justice/anti-drugs/files/com2011-6892_en.pdf

shocks, speculation over how the technicalities of such a challenge could play out may be little more than navel gazing in the short term at least.

Any high level activity, for example at the CND, comes from the domestic discourse in the first place. This is where high level change begins – and clearly an important role for civil society engagement as well local authorities that have to deal with the negative consequences of the global drug control regime, either through influencing domestic policy makers or continuing to work on changing the wider public discourse on drug policy via the media. Another key strand of work involves engaging a wider NGO audience whose work is affected by drugs but who have not traditionally engaged in the reform debate.

Civil society also has a crucial role in shaping the reform narrative that will ultimately inform high level decision making. Several dimension of this process were identified. Firstly there is a need to reinforce understanding of the basic cost-benefit analysis associated with continued support for the current drug policy regime. Challenging domestic governments to acknowledge the high costs of a punitive enforcement led strategy (particularly at a time of economic crisis) and relating them to the largely counterproductive impacts of current strategies is important.

Secondly it is important to ensure that the reform narrative is one of modernisation and making the conventions *'fit for purpose'*. This will involve introducing a degree of flexibility for States or State groupings to explore currently restricted options, but doing so in ways that preserve the shared consensus around the need to maintain public health, security and development, and also necessary controls around trade issues and medical drugs. As the former UNODC Executive Director suggested in 2008 in his before mentioned *Fit for Purpose* discussion paper:

"There is a spirit of reform in the air, to make the conventions fit for purpose and adapt them to a reality on the ground that is considerably different from the time they were drafted".

This process of reframing the shared purpose of international drug control can then support the process of building a coalition of reform-oriented States who will ultimately lead the necessary reform activities in the relevant high level forums.

There are some concrete gaps in knowledge that might help to discuss the conventions system. One of those is the fact that the conventions are not adhered to that universally as is often claimed. Many signatory States have made reservations and declarations of interpretation. It would be useful to show the complete list of these exceptions from the conventions, as well as a list of all States that silently ignore parts of one of the conventions, to nuance the *'Vienna consensus'* that presupposes a wide agreement regarding international drug control.

The cornerstone of the conventions system used to be health but has shifted to control over time. There is, however, a growing consensus that control and, in particular, a law enforcement approach is not effective, counterproductive and has led to serious negative consequences. The current EC initiative on drug supply indicators might help to get a better insight on the effectiveness and negative consequences of supply oriented

policies.³⁴ Transform's Count the Costs initiative³⁵ and TNI's Systems overload study on drug laws and prison overcrowding in Latin America³⁶ are good examples on civil society initiatives that address the issue.

There are clear tensions between the drug control and human rights conventions. In the CND human right issues are dismissed by some member States, while the INCB remains silent on the issue, despite the fact that the Vienna Convention on the Law of Treaties requires that international conventions (and therefore the drug conventions) be interpreted alongside other international legal instruments. Making sure that human rights are truly incorporated in global drug control is a clear and powerful instrument to humanise the system.

There are also movements towards a different cannabis control regime in different parts of Europe and Latin America, often instigated by local or regional governments as well as well organised civil society groups. History shows that most reforms in drug policy come bottom up from local authorities that have to deal with concrete problems and run into the limitations of the conventions. To bring these different new cannabis control initiatives together might bring about a more concentrated effort to change policies in Europe and Latin America and might lead to a 'cannabis spring'. A potential way forward is to study the costs and benefits of various cannabis regulation models. What would a possible successful alternative cannabis control model look like?

Finally, although the political level is needed to change policies, the issue needs to be depoliticised in the sense that it should not be owned by either progressive or conservative political groups. Instead, a common ground has to be found on meaningful reform. Only then can governments act as the real 'friends of the conventions'. Vested interests of government bureaucracies dependent on drug control funding need not to be underestimated as a possible spoiler in the process.

Steve Rolles³⁷, Rapporteur, May 2012

34 See the report on the First European conference on drug supply indicators, a joint initiative to develop sustainable options for monitoring drug markets, crime and supply reduction activities, held on 20–22 October 2010, Brussels: http://ec.europa.eu/justice/anti-drugs/files/drug-supply-conference-conclusions_en.pdf

35 www.countthecosts.org

36 <http://www.druglawreform.info/en/publications/systems-overload>

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