

UNGASS 2016: Prospects for Treaty Reform and UN System-Wide Coherence on Drug Policy

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Improving Global Drug Policy: Comparative Perspectives and UNGASS 2016

EXECUTIVE SUMMARY

Key Findings

- In April 2016, the United Nations (UN) will dedicate, for the third time in its history, a Special Session of the General Assembly (UNGASS) to review the performance of the UN drug control system and provide an opportunity for improving the UN's normative guidance and legal and institutional framework.
- Initiatives taken at UNGASS 1990 to develop a UN system-wide coherent drug policy failed dramatically over the following decade.
- UNGASS 1998 supported the quixotic goal of a drug-free world by setting 2008 as the target to “eliminate or significantly reduce” the global illicit drugs market.
- Rather than admitting that progress toward the target had not been made, United Nations Office on Drugs and Crime has promoted a “containment” hypothesis, claiming the “undeniable success” of a century of international drug control.
- Present divides in global drug policy preclude any significant progress on a new UNGASS political declaration through consensus-driven negotiations.
- Controversial issues like cannabis regulation and treaty reform are unlikely to appear prominently on the UNGASS 2016 agenda.
- Legal arguments denying conflict between cannabis regulation and the strictures of the UN conventions are counterproductive.
- By stretching the treaty-flexibility approach beyond the legally defensible, the United States is reverting to selective adherence to international law based on political expedience.

Policy Recommendations

- The drug control conventions lack built-in review mechanisms to enable the system's evolution, but there are several treaty reform options that do not require consensus, such as the rescheduling of substances.
- Modifications *inter se* may offer an attractive interim option for like-minded countries to legitimize legal regulation of the cannabis market under international law by modifying the treaty only between themselves.
- An expert advisory group should be established to review the UN drug control architecture, system-wide incoherence, treaty inconsistencies, and legal tensions regarding cannabis regulation.
- The Civil Society Task Force should be supported in its efforts to ensure meaningful participation from nongovernmental organizations in the UNGASS 2016 process.
- Member states should heed Ban Ki-moon's urgent plea that they use UNGASS 2016 “to conduct a wide-ranging and open debate that considers all options.”

Acronyms and Abbreviations

ACC	Administrative Committee on Coordination
CEB	Chief Executives Board for Coordination
CND	Commission on Narcotic Drugs
COP	Conference of the Parties
ECOSOC	Economic and Social Council
EU	European Union
ILO	International Labor Organization
INCB	International Narcotics Control Board
NGO	Non-governmental organization
OAS	Organization of American States
ODCCP	Office for Drug Control and Crime Prevention
OIOS	United Nations Inspector General's Office of Internal Oversight Services
SWAP	System-Wide Action Plan on Drug Abuse Control
UN	United Nations
UNAIDS	Joint and Co-sponsored United Nations Program on Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome
UNDCP	United Nations International Drug Control Program
UNDP	United Nations Development Program
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNICEF	United Nations Children's Fund
UNGASS 1990	1990 Special Session of the United Nations General Assembly on Drug Abuse
UNGASS 1998	1998 Special Session of the United Nations General Assembly on the World Drug Problem
UNGASS 2016	2016 Special Session of the United Nations General Assembly on the World Drug Problem
UNODC	United Nations Office on Drugs and Crime
WHO	World Health Organization

Introduction

This paper explores key lessons from the 1990 Special Session of the United Nations General Assembly on Drug Abuse (UNGASS 1990) and the 1998 Special Session of the United Nations General Assembly on the World Drug Problem (UNGASS 1998), and tracks subsequent policy events and trends.¹ It discusses the wide array of increasing tensions and cracks in the “Vienna consensus,” as well as systemic challenges and recent treaty breaches. Various options for treaty reform are explored and the following questions are considered: Given policy developments around the world this past decade, what outcomes can the 2016 Special Session of the United Nations General Assembly on the World Drug Problem (UNGASS 2016) have in terms of a new political compromise? How can UNGASS 2016 contribute to more system-wide coherence where previous attempts failed? Can UNGASS 2016 realistically initiate a process of modernizing the global drug control system and breathe oxygen into a system risking asphyxiation? Finally, is there a chance that treaty reform options will be discussed at all, or do today’s political realities still block possible future regime changes?

Historical Background on UNGASS

The Security Council or a majority of United Nations (UN) member states can convene a Special Session of the UN General Assembly to discuss issues of particular importance at the highest political level. Twenty-nine such special sessions have been held in the history of the United Nations. Two of these, in 1990 and 1998, were devoted to drug issues. A third special session on drugs was planned to take place around the 2019 target date established by the 2009 Political Declaration “to eliminate or reduce significantly and measurably” illicit cultivation and production

of drugs as well as illicit demand and drug-related health and social risks.² At the request of Mexico, Colombia, and Guatemala, the General Assembly decided in December 2012 to advance the date and convene a special session in the first half of 2016, now scheduled for April 19-21.

Special sessions are meant to draw worldwide attention to particular issues, create political momentum, and rally broad support for certain changes in the way the international community addresses a global problem. The primary goal of UNGASS 1990, the first special session on drugs, was to give impetus to the implementation of the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This third UN drug control convention sought to close some legal loopholes left by the two previous instruments: the 1961 UN Single Convention on Narcotic Drugs and the 1971 UN Convention on Psychotropic Substances. Both had aimed to ensure adequate availability of controlled drugs for medical and scientific purposes, while ending the diversion from licit pharmaceutical production to the illicit market. But the designed control model proved inadequate to confront the worldwide expansion of the illicit production and trade that was triggered as a result. UNGASS 1990 adopted a political declaration to “protect mankind from the scourge of drug abuse and illicit trafficking,” proclaimed the period from 1991 to 2000 the UN Decade Against Drug Abuse, and adopted a 100-point Global Program of Action. It concluded that the functioning of the UN drug control structure needed to be reviewed “for the purpose of identifying alternative structural possibilities” and that attention should be given to “coherence of actions within the United Nations drug-related units and coordination, complementarity and non-duplication of all drug-related activities across the United Nations system.”³ The most direct result

¹ The author would like to express his sincere thanks to Vanda Felbab-Brown and Harold Trinkunas of the Brookings Institution for their detailed comments on a first draft, to Ann Fordham for comments on an early incomplete draft, and to David Aronson for editorial support throughout the writing process.

² United Nations Economic and Social Council (ECOSOC), *Commission on Narcotic Drugs: Report of the Fifty-Second Session (14 March 2008 and 11-20 March 2009)*, E/CN.7/2009/12 (New York: United Nations, 2009), 37-44, www.undocs.org/E/CN.7/2009/12.

³ UN General Assembly Resolution S-17/2, *Political Declaration and Global Program of Action Adopted by the General Assembly at its Seventeenth Special Session, Devoted to the Question of International Co-operation Against Illicit Production, Supply, Demand, Trafficking and Distribution of Narcotic Drugs and Psychotropic Substances*, A/RES/S-17/2 (February 23, 1990), paragraphs 93-4, <http://www.undocs.org/A/RES/S-17/2>.

operations. As the “communist threat” waned, the U.S. justified its global military infrastructure by making the Pentagon the lead agency for international drug-interdiction operations. In many countries, military and law enforcement drug control budgets and prison populations expanded exponentially.

This increasingly aggressive approach triggered serious doubts in Latin American and European countries. Most of the latter had opted for a radically different policy direction, initiating more pragmatic harm reduction approaches for their consumption-related problems, shifting away from criminalization towards a health-based approach, and concurrently more effectively addressing the HIV epidemic driven by heroin injection. European countries were uncomfortable with operations such as aerial spraying or military eradication of coca and opium poppy fields, and preferred approaches more in line with the objectives and human rights principles underlying their overall development cooperation strategy.

Latin American countries, the main theater of the escalating “war on drugs,” began to seek a more balanced approach. They insisted that the North, which included both Europe and the U.S., accept responsibility for fueling the global illicit drug trade through its seemingly insatiable drug habit. Moreover, they asked that the global North demonstrate the political resolve to substantially reduce drug demand; tighten controls over precursors diverted from the chemical industry in order to illicitly produce cocaine, heroin, amphetamines and ecstasy; impose effective state controls over deregulated financial markets facilitating drug-money laundering; tighten controls over the small-arms trade providing crime groups unlimited access to powerful firearms; and provide funding for alternative livelihood opportunities for small farmers dependent on the cultivation of crops used for illicit drug production. All of this had been largely neglected in the design of the UN drug control regime.

The outcome of UNGASS 1998 was a political compromise between these positions. It agreed to pursue the quixotic goal of a drug-free world within 10 years, while recognizing the need for a more

balanced approach and shared responsibility. It thus adopted some basic principles of demand reduction and gave more emphasis in the resulting action plan to alternative development, precursor control, and money laundering. While avoiding the term “harm reduction,” the UNGASS 1998 outcome also agreed to reduce the negative consequences of drug use.

As the outcomes of the previous two UNGASSs on drugs demonstrate, the primary focus of such high-level events has been on the performance of the UN system itself with the aim of improving the normative guidance and the legal and institutional framework of the UN to effectively deal with the issue. In both 1990 and 1998, an advisory group was established to recommend a course of action to the United Nations. Despite the political limitations imposed on their mandates and composition, the groups’ recommendations played an important role in the deliberations and outcomes. In both cases the issue of a UN system-wide approach was given high priority on the UNGASS agenda, and the importance of a comprehensive strategy and involvement of all relevant agencies was confirmed in the final documents.

UNGASS 1990: Seeking Common Ground

The thrust of UNGASS 1990, the first special session on drugs, was to enhance the efficiency of the UN system itself:

Concerned over the world’s worsening drug problem, the United Nations General Assembly called for a group of independent experts to be established for up to one year to help the Secretary-General strengthen the response of the United Nations to the problem. In April 1990, 15 international experts were selected from Hungary, India, Italy, Jamaica, Malaysia, Mexico, Morocco, Nigeria, Peru, Sweden, Thailand, Turkey, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. The Group of Experts, representing all regions of

the world, was chosen for personal expertise in respective disciplines, and not as spokesmen for Governments.⁵

The group's conclusions greatly influenced the report on UNGASS 1990 of then Secretary-General Javier Pérez de Cuéllar: "The new dimensions taken on by the drug menace would necessitate a more comprehensive approach to international drug control and a more coordinated structure in this field in order to enable the United Nations to play the central and greatly increased role necessary for countering this threat."⁶ The strengthened and unified drug control structure in Vienna was to "collaborate closely with the United Nations system of organizations, regional organizations, as well as governmental, intergovernmental and non-governmental organizations in the fulfillment of its responsibilities."⁷

The first half of the proclaimed UN Decade Against Drug Abuse (1990-2000) was still marked by considerable amenability to discussing the divergence of opinions and finding new common ground. By mid-decade when asked to recommend "appropriate adjustments" to the existing control regime, the INCB responded: "It does not appear necessary to substantially amend the international drug control treaties at this stage, but some technical adjustments are needed in order to update some of their provisions."⁸ It noted that "shortcomings should be eliminated," which meant reassessing the way the 1961

Convention had dealt with traditional drug use and calling for a scientific review by the World Health Organization (WHO) of the value and risks of coca chewing and the drinking of *mate de coca*.⁹ The INCB was "confident that the CND, on the basis of scientific evaluation, [would] resolve such long-standing ambiguities, which have been undermining the conventions."¹⁰ The WHO had already established in 1990 its Program on Substance Abuse and in the years thereafter initiated ambitious studies on coca/cocaine and cannabis; however, the results clashed with the drug control ideology of the dominant powers starting to take more control over the Vienna part of the UN system.¹¹

In 1995, then UNDCP Executive Director Giorgio Giacomelli suggested in a report to the CND, based on the inputs from the INCB and an ad-hoc advisory group, that "a more detailed study of the implications of decriminalization and of harm reduction campaigns, as suggested by the advisory group, might well produce new perspectives leading to unexpected solutions."¹² Regarding the shortcomings and inconsistencies in the conventions, Giacomelli pointed out that a simplified procedure was already built into the conventions, which allowed for any state party to submit amendment proposals to the UN secretary-general. These amendments would come into force automatically if no country objected within 18 months of circulation (a procedure tried unsuccessfully by Bolivia in 2009, see below). He also proposed

⁵ UN General Assembly, *Enhancement of the Efficiency of the United Nations Structure for Drug Abuse Control: Report of the Secretary-General: Addendum, A/45/652/Add.1* (24 October 1990), 4, www.undocs.org/A/45/652/ADD.1. The Group of Experts was chaired by Ambassador Jorge Montaña (Mexico) while he was Mexico's Permanent Representative to the United Nations in New York (1989-1992). After serving as Ambassador to the United States (1993-1995), Representative to the Organization of American States (OAS) Multilateral Evaluation Mechanism (2001-2004), and a member of the International Narcotics Control Board (2009-2013), Montaña returned to the post of Ambassador to the United Nations in 2013. He currently plays a pivotal role in preparations for UNGASS 2016.

⁶ UN General Assembly, *Enhancement of the Efficiency of the United Nations Structure for Drug Abuse Control, A/45/652*, paragraph 1.

⁷ *Ibid.*, paragraph 10.

⁸ International Narcotics Control Board (INCB), *Report of the International Narcotics Control Board for 1994*, E/INCB/1994/1 (New York: UN, 1995), paragraph 21, sections (b) and (c), http://www.incb.org/documents/Publications/AnnualReports/AR1994/AR_1994_E.pdf.

⁹ INCB, *Effectiveness of the International Drug Control Treaties: Supplement to the Report of the International Narcotics Control Board for 1994*, E/INCB/1994/1/Supp. 1 (New York: UN, 1995), 11.

¹⁰ *Ibid.*

¹¹ Martin Jelsma, "Drugs in the UN System: The Unwritten History of the 1998 United Nations General Assembly Special Session on Drugs," *International Journal of Drug Policy* 14, no. 2 (2003): 188-90.

¹² ECOSOC, *Follow-up to the Results of High-Level Plenary Meetings at the 48th Session of the General Assembly to Examine the Status of International Cooperation Against the Illicit Production, Sale, Demand, Traffic and Distribution of Narcotic Drugs and Psychotropic Substances: Implementation of General Assembly Resolution 48/12: Report of the Executive Director*, E/CN.7/1995/14 (February 1, 1995), paragraph 45.

convening another “group of experts to review the adequacy of existing definitions in the 1961 and 1971 conventions, with particular reference to various cannabis and coca leaf products.”¹³

The possibility that these openings could lead to a progressive evolution of the international drug control system faded away at the 1996 CND and the high-level United Nations Economic and Social Council (ECOSOC) meeting in June that same year, when only a minority of member states were willing to speak out and actively support reform-oriented proposals.¹⁴ Despite those members’ very vocal support at the 1996 meetings, the consensus-based modus operandi of the CND easily rejected exploring any alternatives or evolution of the system. All of the contentious issues—harm reduction, decriminalization, coca, cannabis, and possible changes in the treaty regime—were neutralized and deleted from the UNGASS 1998 agenda, a process not dissimilar to what is happening at the time of writing of this paper in the preparations for UNGASS 2016. As summarized in the UN press release on the outcomes of the 1996 CND session, all reforms that were labeled as “legalization of drugs” would inevitably lead to an expansion in drug abuse and were incompatible with the conventions:

There was almost unanimous opposition to the legalization of drugs, with participants pointing out that States which had legalized the non-medical use of drugs had experienced an expansion in drug abuse. Experiments in a few countries involving the controlled distribution of heroin to addicts were called into question. The majority spoke out against the decriminalization of drugs, believing that doing so would mean giving in to drug trafficking and would elevate the

consumption of illicit drugs to the same level as legal drugs. If drugs were legalized, the success of current prevention policies would deteriorate drastically. Some participants drew attention to the contradictory policies of the international community regarding drugs, and stressed that a common strategy was indispensable. It was stated emphatically that the legalization of the non-medical use of drugs was not compatible with the international drug Conventions and would make it impossible to solve the drug problem. One proposal called for the UNDCP to undertake a study on the implications of decriminalization and harm reduction campaigns in countries in which those policies had been adopted. However, others objected, inasmuch as such use was prohibited under the Conventions.¹⁵

The Struggle for System-Wide Coherence

In order to bring all existing UN mandates onboard, the General Assembly had requested the elaboration of a UN System-Wide Action Plan on Drug Abuse Control (SWAP). An evaluation report in 1996 by Secretary-General Boutros-Boutros Ghali stated that the “various exercises to develop and update such a plan proved inadequate, however, and served little useful purpose.”¹⁶ A special Subcommittee on Drug Control within the secretary-general’s high-level coordination mechanism, the Administrative Committee on Coordination (ACC), was therefore requested to step in and to try to transform the SWAP idea to a functioning operational model.¹⁷

In 1997, a lively discussion ensued at the ACC subcommittee session in Vienna from which “a consensus emerged that SWAP was an important tool for

¹³ Ibid., paragraph 46, section (c).

¹⁴ Jelsma, “Drugs in the UN System,” 186-8.

¹⁵ United Nations Information Service (UNIS), “Commission on Narcotic Drugs, Vienna, 16 - 25 April,” press release, SOC/NAR/740, April 29, 1996, <http://www.un.org/press/en/1996/19960429.socna740.html>.

¹⁶ UN General Assembly, *Implementation of the United Nations System-Wide Action Plan on Drug Abuse Control: Report of the Secretary-General*, A/51/129 (May 14, 1996), <http://www.un.org/documents/ga/docs/51/plenary/a51-129.htm>.

¹⁷ Ibid.

retaining and improving inter-agency collaboration in drug control activities, but that it needed to be more realistic in terms of field operations so as to ensure that it acted to guide the programming process.¹⁸ At the same meeting, UNDCP offered to undertake an evaluation of the SWAP process, following the outcomes of UNGASS 1998. At UNGASS 1998, the Group of 77 (representing developing countries) and China drew “particular attention to the importance of strengthening coordination within the United Nations system.”¹⁹ The Group of 77 also stated that “additional effort also needs to be made to bring the System-wide Action Plan from being an effective mechanism of problem definition to one of coordination of activities.”²⁰

The ACC released a statement for UNGASS 1998, which referred to the ongoing UN reform process, the UN Development Assistance Framework, and the crosscutting nature of the drugs issue. The statement reaffirmed the appropriateness of the UN system to tackle the issue: “Given that the global and multifaceted nature of the drug problem necessitates a holistic and balanced approach, we firmly believe that the United Nations system is well placed to offer a wide range of expertise, which can be drawn upon to create synergies among our agencies.”²¹ The post-UNGASS evaluation of the SWAP efforts by UNDCP produced a report highly critical of the “failures to make a real strategic planning tool out of SWAP.”²² It also questioned the role of UNDCP itself, recommending that it should

ensure that “drug issues are taken into account in United Nations coordination mechanisms” and that UNDCP “contribute more to inter-agency collaboration.”²³

A few months later the ACC Subcommittee on Drug Control discussed and approved a UN-system position paper on HIV prevention—an important issue on which to get Vienna in line with the rest of the UN system before UNGASS 2001 on HIV/AIDS—and began outlining an effective framework for inter-agency cooperation on all drug-related issues. One of the ideas proposed was that “a global United Nations Development Program (UNDP) Human Development Report on drugs could be prepared. This would be the product of all agencies’ work on the subject.”²⁴ Before a draft framework could be finalized, however, a review of the ACC coordination mechanism itself then led to the decision that “all existing subsidiary bodies should cease to exist by the end of the year,” predicating the end of the entire ACC structure including its Subcommittee on Drug Control. The ACC’s role was taken over by the Chief Executives Board for Coordination (CEB) and permanent subsidiary bodies were terminated. As the ACC concluded at its final meeting in 2001: “Lead agency arrangements are an effective means of strengthening inter-agency consultative processes, instilling a greater sense of ownership, tapping the relevant competencies of the system, and enhancing the substantive content of inter-agency cooperation.”²⁵ With regard to drug control, the lead agency was UNDCP.

¹⁸ United Nations Administrative Committee on Coordination (ACC), *Consultative Committee on Programme and Operational Questions (CCPOQ): Report of the ACC Subcommittee on Drug Control at its Fifth Session (Vienna, 29 September-1 October 1997)*, ACC/1997/17 (January 7, 1998), paragraph 22, www.undocs.org/ACC/1997/17.

¹⁹ Makarim Wibisono, “Statement by H.E. Dr. Makarim Wibisono, Permanent Representative of the Republic of Indonesia, Chairman of the Delegation of Indonesia and on behalf of the Group of 77 and China before the 20th Special Session of the United Nations General Assembly on the World Drug Problem,” The Group of 77 at the United Nations, last modified June 9, 1998, <http://www.g77.org/Speeches/060998.htm>.

²⁰ Ibid.

²¹ UN General Assembly, *Review of the International Drug Control Regime: Strengthening United Nations Machinery for Drug Control*, A/S-20/3 (May 6, 1998), paragraph 3, www.undocs.org/A/S-20/3.

²² United Nations International Drug Control Program (UNDCP), *Evaluation of the United Nations System-Wide Action Plan on Drug Abuse Control: Evaluation Report* (Vienna: UN, 1999), paragraph 30.

²³ Ibid., recommendations 5 and 6.

²⁴ ACC, *Report of the ACC Subcommittee on Drug Control on its Seventh Session (Paris, 15-17 September 1999)*, ACC/1999/17 (November, 17 1999), paragraph 17, www.undocs.org/ACC/1999/17.

²⁵ ACC, *Summary of the Conclusions of the Administrative Committee on Coordination at its Second Regular Session of 2001, United Nations Headquarters, New York 19 and 20 October 2001*, ACC/2001/5 (December 11, 2001), paragraphs 22-3, www.undocs.org/ACC/2001/5.

With the principal coordinating entity entrusted with designing a framework for UN system-wide coherence abolished, the CND was invited by the Executive Director of UNDCP to provide guidance on how to proceed.²⁶ The deferral of responsibility to the CND as the central policymaking body within the United Nations system dealing with drug-related matters, and to UNDCP as the lead agency for implementation, effectively blocked any new initiatives. For the next decade, Vienna proved to be the perfect burial ground for UN system-wide coherence on drug policy.

The change is perhaps best expressed by how the CND itself described this handover of responsibility: “The initiatives aimed at strengthening the framework for inter-agency cooperation and coordination within the United Nations system were commended as a means of improving the funding position of UNDCP, as well as enhancing the work of the Commission and the International Narcotics Control Board, with a view to strengthening the United Nations machinery for drug control.”²⁷ In other words, all the efforts of the 1990s UN Decade Against Drug Abuse devoted to setting up a UN system-wide drug control strategy were narrowed down at the turn of the century to further strengthen the Vienna-based triangular drug control structure of the CND, INCB, and UNDCP (now UNODC).

UNGASS 1998: Strengthening the UN Drug Control Machinery

Such an outcome was implicitly predicted by the expert group convened by Secretary-General Kofi Annan to advise UNGASS 1998: “In recent years, the

trend had been for the Commission to move from a technical entity towards a more political one... The situation was undermining the role of the Commission as the principal United Nations policy-making body on drug control.”²⁸ The expert group, established to analyze how to “strengthen the United Nations machinery for international drug control,”²⁹ met twice before UNGASS 1998 and once thereafter. In its 1999 final report the group also concluded that the SWAP “failed to meet its objectives, as highlighted in a recent unfavorable evaluation” and recommended that “UNDCP should consult the Joint and Co-sponsored United Nations Program on Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome (UNAIDS), the United Nations Children’ Fund (UNICEF), the International Labor Organization (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO) and other interested agencies in dealing more effectively with the world drug problem.”

The report stressed that, “given the important function of the United Nations Development Program (UNDP) in promoting economic and human development, as well as its special role as coordinator and catalyst within the United Nations system, a significant increase in cooperation between UNDCP and UNDP is indispensable for the success of drug control.”³⁰ Issues that had come up in the early 1990s search for “appropriate adjustments,” such as reassessing treaty definitions or reviewing results of harm reduction and decriminalization practices, were deliberately kept outside the group’s remit. Instead, the terms of reference specified that the expert group’s recommendations on “strengthening the United

²⁶ ECOSOC, *Strengthening the United Nations Machinery for Drug Control, Report of the Executive Director*, E/CN.7/2000/8 (December 24, 1999), paragraph 9, www.undocs.org/E/CN.7/2000/8.

²⁷ ECOSOC, *Commission on Narcotic Drugs: Report on the Forty-Third Session (6-15 March 2000)*, Supplement no. 8, E/CN.7/2000/11 (New York: UN, 2000), paragraph 147, www.undocs.org/E/CN.7/2000/11.

²⁸ ECOSOC, *Strengthening the United Nations Machinery for Drug Control: Report on the Meeting of the High-Level Expert Group to Review the United Nations International Drug Control Programme and to Strengthen the United Nations Machinery for Drug Control, Held at Vienna from 22 to 24 April and from 29 June to 3 July and in New York from 26 to 30 October 1998*, E/CN.7/1999/5 (December 7, 1998), www.undocs.org/E/CN.7/1999/5.

²⁹ ECOSOC, *Review of the United Nations International Drug Control Programme: Strengthening the United Nations Machinery for International Drug Control: Commission on Narcotic Drugs, 40th session (Vienna, 18-27 March 1997)*, draft resolution, E/CN.7/1997/L.6/Rev.1 (March 24, 1997).

³⁰ ECOSOC, *Strengthening the United Nations Machinery for Drug Control*, E/CN.7/1999/5.

Nations machinery for international drug control” should be done “within the scope of the existing international drug control treaties.”³¹ The United States and the United Kingdom also ensured at that time that the adjective “independent” was deleted from the draft resolution that had originally called on the secretary-general to “convene a small group of independent experts to undertake a comprehensive review of how the efforts against illicit drugs have evolved within the United Nations system.”³² In fact, the group of “thirteen high-level experts” ended up comprising the entire extended bureau of the CND acting as the preparatory committee for UNGASS 1998, and included no independent academics, experts from civil society, or representatives of affected populations.³³

In their final report, the group of experts concluded that “while assessing the adequacy of the treaties fell outside the scope of [their] mandate, there were several critical issues affecting the international drug control regime that needed to be dealt with as a matter of priority.”³⁴ They specifically noted the shortcomings of the CND “to fulfil its treaty functions,” the debate over heroin prescription, the absence of system-wide coherence, and the need to strengthen inter-agency collaboration.³⁵ Thus in spite of the restrictive mandate, the politically negotiated composition, and the absence of independent experts or civil society representatives, the group still managed to identify a number of key structural weaknesses in the UN drug control system that needed to be addressed. But this was not to be. Instead, the UN drug control system came increasingly under U.S. and

Russian influence and near monopoly control over the issue was given to UNDCP and the INCB in Vienna. As explained above, there was no longer a UN coordinating mechanism that could have held them accountable.

A remnant of the openings in the UN debate still appeared in the first *United Nations World Drug Report*, a flagship UNODC publication seeking to provide a comprehensive analysis of the state of the global illicit drug trade. Released just before UNGASS 1998, it devoted a full chapter to the “Regulation-Legalization Debate,” written, as stated on the back cover, in the spirit of going “beyond the rhetoric normally surrounding the issue” and challenging the prevailing drug control mantra of that time: “In recent years there has been increasing criticism that the resources poured into the ‘war on drugs’ have been badly spent; and that the international drug control regime, instead of contributing to the health and welfare of nations, may have aggravated the situation.”³⁶ And it remarked tellingly: “Laws—and even the international Conventions—are not written in stone; they can be changed when the democratic will of nations so wishes it.”³⁷ But despite this daring language, the doors to systemic reforms had already been shut for UNGASS 1998 and the following decade only saw a further narrowing of the political parameters of the UN-level drug policy debate.³⁸

The Broken Vienna Consensus

In 1997, UNDCP and the UN Crime Prevention and Criminal Justice Department were brought togeth-

³¹ ECOSOC, *Review of the United Nations International Drug Control Programme*, E/CN.7/1997/L.6/Rev.1.

³² ECOSOC, *Commission on Narcotic Drugs: Report on the Fortieth Session (18-25 March 1997 and 3 and 4 December 1997)*, E/1997/28/Rev.1 (New York: UN, 1998), 3, 74, www.undocs.org/E/1997/28/REV.1.

³³ UNIS, “Secretary-General Kofi Annan Appoints High-Level Experts to Review Progress of United Nations Efforts against Illicit Drugs,” press release, UNIS/NAR/627, March 9, 1998, http://www.unodc.org/unodc/en/press/releases/press_release_1998-03-09_2.html. The Commission on Narcotic Drugs (CND) Bureau consists of a geographically rotating and annually elected chair, three vice-chairs, and a rapporteur; the Extended Bureau also includes representatives of the five regional groups, the EU and the G77 and China. See “Commission on Narcotic Drugs: Bureau and Extended Bureau,” UNODC, http://www.unodc.org/unodc/en/commissions/CND/Bureau/Bureau_Index.html.

³⁴ ECOSOC, *Strengthening the United Nations Machinery for Drug Control*, E/CN.7/1999/5, 12, paragraph 34.

³⁵ Jelsma, “Drugs in the UN System,” 191.

³⁶ UNDCP, *World Drug Report* (Oxford and New York: Oxford University Press, 1997), 184-201.

³⁷ Ibid.

³⁸ David Bewley-Taylor, *International Drug Control: Consensus Fracture* (New York: Cambridge University Press, 2012).

er under the umbrella of the Office for Drug Control and Crime Prevention (ODCCP). Its first executive director, Pino Arlacchi, reoriented UNGASS 1998 toward the reaffirmation of traditional policy approaches, allowing little space for difficult questions or discordant voices. Arlacchi championed the UNGASS 1998 slogan “A drug-free world—We can do it!”³⁹ exemplified in his support for questionable projects like the Strategy for Coca and Opium Poppy Elimination program with its goal of eradication by 2008, and a mycoherbicide program in which pathogenic fungi were developed with UNDCP support to destroy coca and opium poppy cultivation in Central Asia and Latin America.⁴⁰ After an avalanche of criticism, UNDCP withdrew from the mycoherbicide research project before a biological front in the war on drugs could begin. After UNGASS 1998, the UN Inspector General’s Office of Internal Oversight Services (OIOS) was called in to investigate allegations of mismanagement, nepotism, and possible fraud. The devastating findings mentioned, among a myriad of sins, that Arlacchi prohibited free exchange of views among his staff, censored the second *World Drug Report* in 2000, and claimed successes on the drugs front “beyond the limits of credibility.”⁴¹

Despite Arlacchi’s forced demission in December 2001, the following decade was characterized by further politicization of the Vienna triangle and retreat into ideological positions increasingly more isolated from the rest of the UN system. The OIOS recommendations led to organizational restructuring, which included the full merger in 2002 of the drugs and crime departments into the UN Office on Drugs

and Crime, as it is still called today. But the stark polarization of the two main policy trends, the escalation of the war on drugs and the more pragmatic approach of decriminalization and harm reduction, created paralysis at the UN.⁴² Under increasing stress in self-imposed hermitic conditions, the isolated Vienna triangle tried to maintain the fragile consensus.

The first years of the new millennium were characterized by intense and vehement U.S. pressure against drug policy reforms, particularly harm reduction. Highly dependent on U.S. funding at the time, the UNODC initially gave in and started removing references to harm reduction from its publications and website.⁴³ In one of the lowest points in the troubled history of UN system-wide coherence on drug policy, both the INCB President Philip Emafo and the UNODC Executive Director Antonio Maria Costa (who had replaced Arlacchi) questioned the legitimacy of harm reduction, including needle and syringe exchanges.⁴⁴ Their position was all the more striking given that a 2001 UNGASS on HIV/AIDS had adopted a Declaration of Commitment declaring that “harm reduction efforts related to drug use” and “expanded access to [...] sterile injecting equipment” should be ensured by 2005.⁴⁵ A 2002 memorandum prepared by the UNODC legal section at the request of the INCB, explicitly defending the legality of harm reduction measures, was kept secret from member states. One of the reasons might have been its conclusion that it “could even be argued that the drug control treaties, as they stand, have been rendered out of synch with reality.”⁴⁶

³⁹ “Main Page: General Assembly Twentieth Special Session: World Drug Problem (8-10 June 1998),” UNDCP, <http://www.un.org/ga/20special/>.

⁴⁰ Martin Jelsma, *Fungus Versus Coca, UNDCP and the Biological War on Drugs in Colombia*, Transnational Institute (TNI) Briefing Paper (TNI, 2000), <http://www.tni.org/node/66368/1586>.

⁴¹ ECOSOC, *Report of the Office of Internal Oversight Services on the Triennial Review of the Implementation of the Recommendations Made by the Committee for Programme and Coordination at its Thirty-Eighth Session on the In-depth Evaluation of the United Nations International Drug Control Programme*, E/AC.51/2001/4 (May 4, 2001), <http://www.undocs.org/E/AC.51/2001/4>.

⁴² David Bewley-Taylor and Martin Jelsma, *Breaking the Impasse: Polarisation and Paralysis in UN Drug Control*, Drugs and Conflict Debate Paper, no. 5 (Amsterdam: TNI, 2002), <http://www.undrugcontrol.info/en/un-drug-control/cnd/item/2178-breaking-the-impasse>.

⁴³ TNI, *The United Nations and Harm Reduction*, Drug Policy Briefing, no. 12 (Amsterdam: TNI, 2005), <http://www.undrugcontrol.info/images/stories/brief12.pdf>.

⁴⁴ See TNI, *The United Nations and Harm Reduction*, which quotes Emafo in a December 2002 interview and Costa from a letter to Robert Charles (U.S. Assistant Secretary of State for International Narcotics and Law Enforcement Affairs) in November 2004 on this issue.

⁴⁵ UN General Assembly Resolution S-26/2, *Declaration of Commitment on HIV/AIDS*, A/RES/S-26/2 (August 2, 2001), www.undocs.org/A/RES/S-26/2.

⁴⁶ International Narcotics Control Board (INCB), *Flexibility of Treaty Provisions as Regards Harm Reduction Approaches (Decision 74/10)*, E/INCB/2002/W.13/SS.5 (September 30, 2002), paragraph 35, <http://www.tni.org/sites/www.tni.org/archives/drugsreform-docs/un300902.pdf>.

A broad campaign in defense of harm reduction in 2005 produced strongly worded editorials in leading U.S. newspapers: the *New York Times* referred to “a triumph of ideology over science, logic and compassion” and demanded that the “United States should refrain from such attacks—and members of Congress should call off their budding witch hunt.” Similarly, the *Washington Post* urged the U.S. government “to end this bullying flat-earthism.”⁴⁷ Similarly, the 2005 session of the CND turned into an unprecedented open rebellion against the U.S. zero-tolerance “war on drugs” ideology. Here was the first serious and openly visible crack in the Vienna consensus. During the thematic debate, delegates from around the globe stood up to defend the overwhelming evidence that harm reduction measures were effective against the spread of HIV. In a marked shift from previous years, the European Union (EU) presented a unified position on the issue and strongly endorsed harm-reduction approaches.⁴⁸

The crack in the consensus widened at the 10-year review of UNGASS 1998 outcomes. Resorting to a forceful instrument of diplomacy, a group of 26 countries, including Germany, the United Kingdom, Bolivia, Australia, Poland, Portugal, Norway, the Netherlands, and Switzerland, made an interpretative statement. This left no doubt that they were unwilling to adopt a new political declaration in 2009 without registering on the record their strong support for harm reduction and their objection to the fact that the term had again been deleted in the final version.⁴⁹ The United States, Russia, Japan, Sri Lanka, Colombia, and Cuba expressed objection to the statement.⁵⁰

Desperate to maintain at least a semblance of unity, the United States claimed “consensual agreement had been reached on the Political Declaration and Plan of Action” that “breathed new life into the international drug control treaties.”⁵¹ Japan also argued that “no impression of division among delegations with respect to phrasing should be given, as the term in question should be read in accordance with the three international drug control conventions, from which it was not possible to deviate.”⁵²

The relationship between drug control and human rights was another issue subject to a fierce debate at the CND in 2008. In response, Uruguay threatened to call for a vote—which would have been the first of its kind—in protest against watering down an already weakened draft to a meaningless consensus. That first CND resolution on drugs and human rights was only adopted after long and difficult negotiations, and the result was merely wording that reflected the logic of the UN Charter: that there is a need for and a consistency in the “promotion of human rights in the implementation of the international drug control treaties.”⁵³ Similarly, the resolution invoked the theoretically self-evident but rarely applied principle that UNODC “work closely with...the United Nations human rights agencies.”⁵⁴

A third contentious issue was the UNGASS 1998 target to “develop strategies with a view to eliminating or reducing significantly the illicit cultivation of the coca bush, the cannabis plant and the opium poppy by the year 2008 ” and similar targets for demand reduction, synthetic drugs, and control of precursors.⁵⁵

⁴⁷ “Ideology and AIDS,” editorial, *New York Times*, February 26, 2005, http://www.nytimes.com/2005/02/26/opinion/26sat1.html?_r=0; and “Deadly Ignorance,” *Washington Post*, editorial, February 27, 2005, <http://www.washingtonpost.com/wp-dyn/articles/A56611-2005Feb26.html>.

⁴⁸ TNI, *The United Nations and Harm Reduction – Revisited: An Unauthorised Report on the Outcomes of the 48th CND Session*, Drug Policy Briefing, no. 13 (Amsterdam, TNI, 2005), <http://www.undrugcontrol.info/images/stories/brief13.pdf>.

⁴⁹ ECOSOC, *Commission on Narcotic Drugs: Report on the Fifty-Second Session*, E/CN.7/2009/12. The statement interprets the term “related support services” used in the 2009 Political Declaration and Plan of Action as “harm reduction measures.” The statement was delivered by Germany, speaking on behalf of Australia, Bolivia, Bulgaria, Croatia, Cyprus, Estonia, Finland, Georgia, Greece, Hungary, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Saint Lucia, Slovenia, Spain, Switzerland, and the United Kingdom.

⁵⁰ ECOSOC, *Commission on Narcotic Drugs: Report on the Fifty-Second Session*, E/CN.7/2009/12, paragraphs 157-63.

⁵¹ *Ibid.*, paragraph 161.

⁵² *Ibid.*, paragraph 163.

⁵³ ECOSOC, *Commission on Narcotic Drugs: Report on the Fifty-First Session (28 November 2007 and 10-14 March 2008)*, E/CN.7/2008/15 (New York: UN, 2008), 32-3, resolution 51/12, www.undocs.org/E/CN.7/2008/15.

⁵⁴ *Ibid.*

⁵⁵ UN General Assembly Resolution S-20/2, *Political Declaration*, A/RES/S-20/2 (June 10, 1998), paragraphs 14, 17, 19, www.undocs.org/A/RES/S-20/2.

One could hardly ignore the elephant in the room: that none of those targets were being met. In fact, it was difficult to develop a credible discourse that any progress had been achieved at all. Nonetheless, acknowledging failure was a politically unacceptable admission for most governments. Halfway through the 10-year period, at the midterm review in 2003, UNODC had released a progress report under the title, “Encouraging Progress Towards Still Distant Goals.”⁵⁶ In 2008, when the deadline arrived, UNODC claimed that the international community in fact had made “significant progress over the past 10 years,” although it did concede—in an understatement of monumental proportion—that “in a number of areas and regions, Member States have not yet fully attained the goals and targets agreed in the Political Declaration.”⁵⁷

UNODC’s research section, meanwhile, was struggling to justify claims of encouraging and significant progress with data and market-trend analysis in the annual *World Drug Reports*. With all the graphs in the reports consistently showing upward or at best stable trends, UNODC resorted to smoke and mirrors to obfuscate the finding that over the course of the decade the world drugs situation had not improved by any means of measurement or indicator. Under political pressure to provide countries with some form of evidence that the international drug control system was working, UNODC constructed the “containment” hypothesis, first presented in the 2006 edition of the *World Drug Report*. While acknowledging that the statistics did not indicate the imminent elimination of the global illicit drugs market, UNODC maintained that the international drug control system was

a nonetheless significant success story when looking at it from a historic perspective. After all, opium production in China alone was much higher a century ago than the total of global illicit production today; and the drug control regime had contained the illicit drugs problem at a level far below that of the global markets for alcohol and tobacco. Contrary to alarmist media stories that “drugs are everywhere” and that the “drug problem is out of control,” the preface claims, “worldwide statistical evidence points to a different reality: drug control is working and the world drug problem is being contained.”⁵⁸

Two years later, the containment hypothesis was further developed in the 2008 *World Drug Report*. Antonio Maria Costa referred in his preface to the “impressive achievement” and “undeniable success” of a century of international drug control, pointing to the fact that illicit drug use has been contained to less than 5 percent of the world’s adult population, while tobacco or alcohol are used by at least one quarter of the world’s adult population and cause millions of deaths every year. According to Costa, in the “absence of the drug control system, illicit drug use may well have reached such levels, with devastating consequences for public health.”⁵⁹ The containment hypothesis, built on, at best, dubious evidence,⁶⁰ well served its political purpose to avoid admitting that the system was not working and that alternative approaches therefore warranted serious consideration. A new Political Declaration was thus adopted in 2009, with no call to alter the basic course of action and yet once again setting another 10-year target, now for 2019, “to eliminate or reduce significantly and measurably” the illicit drugs market.⁶¹

⁵⁶ UNODC, “Encouraging Progress Towards Still Distant Goals”: Progress Report by the Executive Director as a Contribution to the Mid-term (2003) Review of UNGASS, UNDOC/ED/2 (April 8, 2003), http://www.drugpolicy.org/docUploads/who_2003_04_08.pdf.

⁵⁷ ECOSOC, *The World Drug Problem: Fifth Report of the Executive Director*, E/CN.7/2008/2 (February 21, 2008), 1, www.undocs.org/E/CN.7/2008/2.

⁵⁸ UNODC, *World Drug Report 2006* (Vienna: UN, 2006), 1, http://www.unodc.org/pdf/WDR_2006/wdr2006_volume1.pdf.

⁵⁹ UNODC, *World Drug Report 2008* (Vienna: UN, 2008), 1, http://www.unodc.org/documents/wdr/WDR_2008/WDR_2008_eng_web.pdf.

⁶⁰ UNODC, *Political Declaration and Plan of Action on International Cooperation Towards an Integrated and Balanced Strategy to Counter the World Drug Problem: High-level Segment, Commission on Narcotic Drugs, Vienna, 11-12 March 2009* (New York, UN, 2009), 14, paragraph 36, <http://www.unodc.org/documents/ungass2016/V0984963-English.pdf>.

⁶¹ UNODC, *Political Declaration and Plan of Action on International Cooperation Towards an Integrated and Balanced Strategy to Counter the World Drug Problem: High-level Segment, Commission on Narcotic Drugs, Vienna, 11-12 March 2009* (New York, UN, 2009), 14, paragraph 36, <http://www.unodc.org/documents/ungass2016/V0984963-English.pdf>.

Even while proclaiming the “containment” a success and reaffirming the prohibitionist principles of the international drug control system, UNODC did acknowledge that the control system had had severe unintended consequences: “too many people in prison... too much emphasis on illicit crop destruction, and too few resources for development assistance to farmers.”⁶² The UNODC 2008 “Fit for Purpose” discussion paper contained a genuine appeal to “humanize our drug control regime,” and called for a less repressive approach and a stronger focus on health and development.⁶³ Bucking U.S. and Russian pressure, it embraced the concept of harm reduction and underscored the importance of human rights protection in drug control. It emphasized that “the *Charter of the United Nations* takes priority over all other instruments” and went as far to say that there was “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.”⁶⁴

The “Fit for Purpose” paper was presented as a conference room paper expressing the view of the executive director in the hopes that “that these assertions will inform the debate and be treated as a contribution to the thought, reflection and discussion that will unfold over the next several months.”⁶⁵ The status of the document allowed those who disagreed to ignore it. As it did not form part of the official CND documents for the UNGASS review process, member states were not required to express their opinion about it or to negotiate its contents. Still, it gave a clear message that continuing to defend the status quo was not sustainable for much longer: the Vienna consensus was breaking apart and change was unavoidable.

The appointment in July 2010 of the experienced Russian diplomat Yuri Fedotov as the new UNODC executive director initially gave rise to worries about increased Russian political influence over the Vienna drug control agencies. The Russian Federation had begun to play an increasingly active role in international drug control, partly triggered by an increase in its domestic injecting opiate use, for which the Putin government blamed Afghanistan and the North Atlantic Treaty Organization’s failure to control the booming opium cultivation and heroin trade there. Russian drug policy rejected any form of harm reduction, methadone treatment included, and advocated for more aggressive eradication and interdiction operations abroad. In Fedotov’s discussion paper for the 2014 CND review, however, he indicated that he would continue his predecessor’s “Fit for Purpose” viewpoint and defended a more health-centric, development- and human rights-based approach, acknowledging that there “continue to be challenges in the implementation of the international drug control conventions which should be openly recognized and discussed.”⁶⁶ Fedotov underscored the importance to “reaffirm the original spirit of the conventions, focusing on health,” stating that the “conventions are not about waging a ‘war on drugs’ but about protecting the ‘health and welfare of mankind,’” and that they “cannot be interpreted as a justification—much less a requirement—for a prohibitionist regime.”⁶⁷

From Soft Defections to Systemic Breaches

The “UNGASS decade,” 1998-2008, is thus characterized by what scholar David Bewley-Taylor calls “growing systemic tensions.”⁶⁸ As he aptly writes:

⁶² ECOSOC, “*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 20th Special Session of the General Assembly, E/CN.7/2008/CRP.17 (May 7, 2008), 12, http://dofa.org/assets/docs/un_harm_reduction.pdf.

⁶³ Ibid., 12-14.

⁶⁴ Ibid., 18, 13.

⁶⁵ Ibid., 3.

⁶⁶ UNODC, *Contribution of the Executive Director of the United Nations Office on Drugs and Crime to the High-level Review of the Implementation of the Political Declaration and Plan of Action on International Cooperation Towards an Integrated and Balanced Strategy to Counter the World Drug Problem, to be Conducted by the Commission on Narcotic Drugs in 2014*, UNODC/ED/2014/1 (December 6, 2013), 14, <http://www.unodc.org/documents/hlr/V1388514e.pdf>.

⁶⁷ Ibid.

⁶⁸ David Bewley-Taylor, “The Contemporary International Drug Control System: A History of the UNGASS Decade,” in *Governing The Global Drug Wars*, LSE Special Report SR014, ed. John Collins and Nicholas Kitchen (London: LSE IDEAS, London School of Economics and Political Science, 2012), 49-55, <http://eprints.lse.ac.uk/47122/1/Governing%20the%20global%20drug%20wars%28published%29.pdf>.

“Increasingly dissatisfied with the punitive approach promoted by the conventions, a significant number of regime members engaged in a process of ‘soft defection.’ Rather than quitting the regime, these states deviated from its prohibitive norm, and exploited plasticity within the treaties, while technically remaining within their legal boundaries.”⁶⁹

By 2013, these cracks in the consensus developed into outright breaches. Particularly in the Americas, the drug policy debate has taken on an unprecedented dynamic in recent years. Driven by increasing pushback against the U.S. “war on drugs” model, the 2012 Cartagena Summit of the Americas gave the Organization of American States (OAS) a mandate to explore possible alternative drug policy scenarios for the hemisphere. The resulting reports and ensuing debate mark a historic shift in the region. The subsequent June 2013 OAS General Assembly in Guatemala adopted the Antigua Declaration which “encourage[d] the consideration of new approaches to the world drug problem in the Americas based on scientific knowledge and evidence” and declared that “drug policies must have a cross-cutting human rights perspective consistent with the obligations of parties under international law.”⁷⁰ The wording “new approaches” came to play a crucial role in the subsequent deliberations about UNGASS 2016. Similar to the early 1990s, it indicated that current policies could be challenged, that alternatives should be discussed, and that some countries were no longer willing to simply reaffirm the status quo.

Bolivia’s unprecedented withdrawal in 2011 from the 1961 Single Convention and subsequent re-adherence in 2013 with a reservation on the coca leaf (detailed below), as well as the decisions in the U.S.

states of Washington and Colorado in November 2012 to legalize the production and sale of cannabis without a medical recommendation, and the decision of Uruguay in December 2013 to legally regulate the cannabis market from “seed to sale” are all strong signs that the international drug policy consensus is irreparably broken and that policy practices—at least in the Americas—have started to move beyond the earlier stage of “soft defections” to systemic breaches.

Beyond the Americas, at the international level the increasing divergence of views led to seven months of tedious political negotiations before a Joint Ministerial Statement could be adopted by consensus at the March 2014 high-level session of the CND, yet another mid-term review to measure progress against the targets for 2019.⁷¹ During that process, a number of countries and non-governmental organizations (NGOs) tried hard to push the envelope further regarding harm reduction and human rights, including proportionality of sentences and abolishing the death penalty for nonviolent drug offenses. Yet the adoption of more progressive language on those issues was blocked. As resistance from the U.S. had softened, influenced by domestic policy changes, Russia began leading the opposition, supported by traditionally strongly prohibitionist countries like Japan, Iran, Pakistan, Cuba, and China. Additional allies were found in countries like Canada, South Africa, and Peru.⁷² The polarized positions over issues like the death penalty, harm reduction, decriminalization, and “new approaches” led to prolonged negotiations, boding darkly for preparations for UNGASS2016.

This stalemate in the CND will not be easy to resolve in the year left in the run-up to UNGASS 2016. Several countries, weary of reliving the motions that led

⁶⁹ Ibid., 51.

⁷⁰ Organization of American States (OAS), General Assembly Declaration, *Declaration of Antigua Guatemala “For a Comprehensive Policy Against the World Drug Problem in the Americas”* (June 7, 2013), paragraphs 2, 10, http://www.oas.org/en/media_center/press_release.asp?sCodigo=S-010.

⁷¹ UNODC, *Joint Ministerial Statement of the 2014 High-Level Review by the Commission on Narcotic Drugs of the Implementation by Member States of the Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem* (New York: UN, 2014), http://www.unodc.org/documents/commissions/CND/Joint_Ministerial_Statement/V1403583_E_ebook.pdf.

⁷² For a list of country statements made at the March 13-14, 2014 High-Level Segment of the CND, see “Commission on Narcotics Drugs: Fifty-Seventh Session – High Level Segment,” UNODC, http://www.unodc.org/unodc/en/commissions/CND/session/57_Session_2014/CND-57-Session_HLS-Statements.html; and for unofficial summaries of other statements see the *CND Blog*, www.cndblog.org, a project run by the IDPC with the New Zealand Drug Foundation and the International Association for Hospice & Palliative Care (IAHP).

to the disappointing Ministerial Statement in 2014, are considering turning UNGASS 2016 into a global moment of reflection rather than launch into an exercise that would result in a similarly hollow consensus document. Such a scenario might provide genuinely open debate in which all options for the future could be discussed and a process agreed upon to prepare for a next high-level meeting to be convened in 2019 or 2020. By that time drug policy realities will have further evolved, possibly creating more favorable conditions for a reform-oriented agenda and outcome.

Conversely, those defending the status quo propose that the CND “produce a short, concise and action-oriented document” for adoption at UNGASS 2016, “consisting of a set of operational recommendations aimed at strengthening the implementation” of the 2009 Political Declaration and Action Plan.⁷³ This would eschew the consideration of “new approaches.” Divisive issues such as cannabis regulation and treaty reform would be off limits in the debate, meaning UNGASS 2016 would just rubber stamp existing drug control strategies with perhaps a few marginal adjustments. After long negotiations, the CND agreed in March 2015 to define the intended outcome of UNGASS 2016 more broadly in terms of a “short, substantive, concise and action-oriented document comprising a set of operational recommendations, based upon a review of the implementation of the 2009 Political Declaration and Plan of Action, including an assessment of the achievements as well as ways to address longstanding and emerging

challenges in countering the world drug problem,” still, of course, “within the framework of the three international drug control conventions and other relevant United Nations instruments.”⁷⁴

The “Integrity” of the Treaty System

Despite the broken Vienna consensus and the evident systemic breaches, publicly questioning the foundations of the UN drug control system and calling for treaty reform is still taboo. Many government officials off-the-record admit frankly that the drug control treaties are now an obstacle for further policy reforms, “rendered out of synch with reality,”⁷⁵ and that there is a need to make them “fit for purpose and adapt them to a reality on the ground that is considerably different from the time they were drafted.”⁷⁶ But in recent years only six countries (Bolivia, Argentina, Uruguay, Guatemala, the Czech Republic, and Ecuador) have dared to challenge the UN drug control conventions in formal statements at the CND and call for opening the debate on treaty revisions.

A first litmus test for treaty reform was the Bolivian proposal in 2009 for an amendment to the 1961 Single Convention, which argued that the obligation to abolish the traditional practice of coca chewing constituted a violation of the rights of indigenous peoples.⁷⁷ In response, the U.S. convened an informal “group of friends of the Convention” to defend the treaty regime’s “integrity,” and managed to rally the G-8 behind its position that any treaty change

⁷³ ECOSOC, *Draft Resolution Submitted by the Chair: Special Session of the General Assembly on the World Drug Problem to be Held in 2016*, E/CN.7/2015/L.11 (February 9, 2015), paragraph 5, www.undocs.org/E/CN.7/2015/L.11.

⁷⁴ ECOSOC, *Commission on Narcotic Drugs: Report on the Fifty-Eighth Session (5 December 2014 and 9-17 March 2015)*, Advance Unedited Version, E/2015/28, E/CN.7/2015/15 (New York: United Nations, 2015), 5, http://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_58/E2015_28_ADVANCE_UNEDITED_VERSION.pdf.

⁷⁵ INCB, *Flexibility of Treaty Provisions as Regards Harm Reduction Approaches (Decision 74/10)*, E/INCB/2002/W.13/SS, paragraph 35.

⁷⁶ ECOSOC, “*Making Drug Control ‘Fit for Purpose’: Building on the UNGASS Decade*,” E/CN.7/2008/CRP.17, 13.

⁷⁷ ECOSOC, *Single Convention on Narcotic Drugs, 1961, As Amended by the Protocol Amending the Single Convention on Narcotic Drugs, 1961 (New York, 8 August 1975): Proposal of Amendments by Bolivia to Article 49, Paragraphs 1 (c) and 2 (e)*, E/2009/78 (May 15, 2009), www.undocs.org/E/2009/78.

⁷⁸ The 18 countries were the G-8 countries (the United States, the United Kingdom, France, Italy, Germany, the Russian Federation, Japan, and Canada) plus Sweden, Denmark, Singapore, Slovakia, Estonia, Bulgaria, Latvia, Malaysia, Mexico, and Ukraine. The principal argument was most clearly spelled out in the Swedish objection, that “the Bolivian proposal pose[d] the risk of creating a political precedent and might directly infringe on the international framework for the fight against drugs which would send a negative signal.” “Objections and Support for Bolivia’s Coca Amendment,” TNI, <http://www.druglawreform.info/en/issues/unscheduling-the-coca-leaf/item/1184-objections-and-supportfor-bolivias-coca-amendment>.

be rejected; in 2011, a total of 18 countries effectively blocked the amendment.⁷⁸ Bolivia subsequently withdrew from the Single Convention only to re-accede a year later with a new reservation exempting it from the treaty's provisions against the coca leaf.⁷⁹ The INCB strongly condemned Bolivia's "unprecedented step" and warned that:

While the denunciation itself may be technically permitted under the Convention, it is contrary to the fundamental object and spirit of the Convention. If the international community were to adopt an approach whereby States parties would use the mechanism of denunciation and reaccession with reservations, the integrity of the international drug control system would be undermined and the achievements of the past 100 years in drug control would be compromised.⁸⁰

Despite objections again from the G-8, and also several unexpected objections from allies, in January 2013 the UN Secretariat formally accepted Bolivia rejoining the treaty with its reservation on the coca leaf.⁸¹ As amendments apply to all parties, they require almost unanimous consent; whereas a reservation only applies to the country submitting it and can only be rejected if more than one-third of the parties object to it. Despite Bolivia's successful maneuver, the episode demonstrated that any proposal challenging the conventions would be met with considerable

opposition from the INCB as well as from a powerful group of countries defending the status quo.⁸²

But more dissident voices arose. At the 2012 session of the CND in Vienna, Argentina's Minister of Health Juan Manzur asked: "In light of the results, hasn't the time come to start an open debate on the consistency and effectiveness of some provisions in these treaties?"⁸³ In 2013 Diego Cánepa, head of the Uruguayan delegation, declared: "Today more than ever we need the leadership and courage to discuss if a revision and modernization is required of the international instruments adopted over the last fifty years."⁸⁴ That same year Guatemala and the Czech Republic made similar statements, as did Ecuador in 2014.⁸⁵

A concerted effort is being made to keep the contentious treaty revision issue off the UNGASS 2016 agenda and to preserve the façade of the global consensus. UN political declarations and CND resolutions, including those defining the mandate and objectives for the UNGASS, are uniformly qualified with phrases like "in full conformity with the UN drug control conventions" because no party can legitimately object to something it voluntarily signed on to in the past and to which it is still legally bound today. Except for the small minority of daring dissenters mentioned, avoiding any debate on the conventions is politically convenient for most countries. The G-8 (or today the G-7) has clearly made a pact that the "integrity" of the drug control treaty system be defended. Crossing

⁷⁹ 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, no. 11 (Amsterdam: TNI, 2011), <http://www.tni.org/files/download/dlr11.pdf>; and IDPC, *Bolivia's Legal Reconciliation with the UN Single Convention on Narcotic Drugs*, IDPC Advocacy Note (London: IDPC, 2011), <http://www.druglawreform.info/images/stories/documents/IDPC-advocacy-bolivia-july2011.pdf>.

⁸⁰ INCB, *Report of the International Narcotics Control Board for 2011*, E/INCB/2011/1 (Vienna: UN, 2012), v, http://www.unodc.org/documents/southasia/reports/2011_INCB_ANNUAL_REPORT_english_PDF.pdf.

⁸¹ See TNI and Washington Office on Latin America (WOLA), "Bolivia Wins a Rightful Victory on the Coca Leaf: Creates a Positive Example for Modernizing the UN Drug Conventions," press release, January 11, 2013, <http://www.undrugcontrol.info/en/newsroom/press-releases/item/4267-bolivia-wins-a-rightful-victory-on-the-coca-leaf>. The G-8 countries plus Sweden, the Netherlands, Portugal, Finland, Israel, Ireland, and Mexico objected to Bolivia's proposal.

⁸² Martin Jelsma, "Treaty Guardians in Distress: The Inquisitorial Nature of the INCB Response to Bolivia," *TNI Weblog* (blog), July 11, 2011, <http://www.druglawreform.info/en/weblog/item/2626-treaty-guardians-in-distress>.

⁸³ "Important Intervention of the Argentine Health Minister at the UN-CND: Statement by the Argentine Minister of Health Dr. Juan Mansur at the 55th Session of the UN Commission on Narcotic Drugs, Vienna, March 16, 2012," news release, Intercambios, March 16, 2012, <http://www.intercambios.org.ar/en/15-ideas-en/news/important-intervention-of-the-argentine-health-minister-at-the-un-cnd/>.

⁸⁴ *Intervención del Jefe de Delegación de Uruguay, 56º Período de Sesiones de la Comisión de Estupefacientes, Prosecretario de la Presidencia del Uruguay*, March 11, 2013.

⁸⁵ This section draws on personal observations of the author, who has participated as an observer in CND sessions since 1996 on the basis of TNI's ECOSOC consultative status.

a red line established by that powerful alliance immediately engenders political risks—such as losing a seat in the Security Council or the G-20, or diplomatic tensions with the most powerful countries in the world—that most countries prefer to avoid. Such a level of *realpolitik* explains, for example, why the Netherlands and Germany submitted formal objections against Bolivia over the coca issue, despite the fact that both countries have traditionally defended both pragmatic drug policies and indigenous rights. Similarly, the EU seems to have swallowed whole the obvious contradiction of defending an “open debate” and an “evidence-based” drug policy, while simultaneously agreeing to delineate certain no-go areas for the UNGASS, effectively imposing censorship and political limits on the direction of the discussion.

But the political realities that have limited the space for debate and drug policy reforms are shifting, and thereby opening opportunity for change. The various cannabis legalization initiatives at the state level⁸⁶ have made it complicated for the United States to remain the chief enforcer of the global drug control regime, of which it was the chief architect. After years of criticizing others for breaking ranks and strong-arming them to comply with a strict interpretation of the treaties, the United States finds itself in a delicate position in light of noncompliance within its own borders.⁸⁷ As a result, the U.S. Department of State is changing its narrative around the UN drug control system and its obligations in advance of UNGASS 2016. The new discourse, developed and actively promoted by Ambassador William Brownfield, Assistant Secretary of State for International Narcotics and Law Enforcement, emphasizes defending “the integrity of the three conventions” as before,

but it now proposes more flexible treaty interpretation and tolerance of different national policies.⁸⁸ The main objective is to prevent the clear treaty breaches of state-level cannabis legalization initiatives from triggering an open international debate on treaty reform. As the 2014 Presidential Determination spelled out, the U.S. government still firmly believes that the “frameworks established by the U.N. conventions are as applicable to the contemporary world as when they were negotiated and signed by the vast majority of U.N. member states.”⁸⁹ After a century of supporting the prohibitionist drug control system it helped establish, the last thing the U.S. wants is to see the system be questioned in an international forum. Presenting the illusion that the ongoing domestic cannabis policy changes are within acceptable limits of the UN drug control conventions is therefore essential.

In exchange for international political acceptance of its legally untenable position that cannabis legalization at the state level in the United States does not represent a breach of the UN conventions, Washington appears willing to allow Uruguay and others to regulate cannabis unhindered as well. This is potentially attractive to quite a few countries as it expands political space for countries in the Americas introducing (or considering to introduce) cannabis policy reforms, such as Uruguay, Jamaica, Belize, Mexico, Colombia, and Ecuador, to proceed without the diplomatic tensions with Washington such changes would have provoked just a few years ago. For the EU, the advantage of Brownfield’s proposal is primarily its diffusion of the growing tensions between cannabis regulation and treaty compliance, and its keeping the lid on politically inconvenient discussions about treaty reform. Legally speaking,

⁸⁶ For details, see Mark A.R. Kleiman, *Legal Commercial Cannabis Sales in Colorado and Washington: What Can We Learn?* (Washington, DC: Brookings Institution, 2015).

⁸⁷ Wells Bennett and John Walsh, *Marijuana Legalization is an Opportunity to Modernize International Drug Treaties* (Washington, DC: Brookings Institution, 2014), <http://www.brookings.edu/~media/research/files/reports/2014/10/15-marijuana-legalization-modernize-drug-treaties-bennett-walsh/cepmmjlegalizationv4.pdf>.

⁸⁸ Damon Barrett, Martin Jelsma, and David Bewley-Taylor, “Fatal Attraction: Brownfield’s Flexibility Doctrine and Global Drug Policy Reform,” *Huffington Post*, November 18, 2014, http://www.huffingtonpost.co.uk/damon-barett/drug-policy-reform_b_6158144.html.

⁸⁹ Presidential Determination no. 2014-15 of September 15, 2014, “Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2015,” 79 Fed. Reg. 56625 (September 22, 2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-09-22/pdf/2014-22675.pdf>.

Brownfield's proposal does not create more space for policy reform, as neither the INCB nor any credible authority or academic expert in international law has thus far supported the confusing legal foundations underlying his political discourse on treaty integrity and flexibility. But in strictly political terms, it completely changes the landscape for cannabis policy reform opportunities around the globe.

The nascent U.S. discourse raises a number of serious questions and doubts. Who gets to decide which flexible interpretation is acceptable under a more lenient regime and which one is not? Is the United States willing, for example, to apply the same principle to Bolivia's coca policy or to drug consumption rooms, or will it continue to condemn such practices?

An argument for flexibility in treaty interpretation is hardly new. For decades, drug policy reforms in decriminalization and harm reduction have explored that room for maneuver. Protracted political and legal battles have been fought about the legality of those reforms under the treaty regime, and some still continue, such as those regarding drug consumption rooms, pill testing, heroin prescription, or indigenous and spiritual uses.

That the U.S., having always rejected such flexible interpretations, now seems to be shifting its position is in principle a most welcome development. But the United States has not clarified what the defense of a more flexible treaty interpretation means in terms of its position regarding the aforementioned long-standing controversies in which it has played a prominently obstructive role. Out of political necessity, the U.S. now leaps to defend the legalization of a cannabis market for recreational use—at the very core of what the conventions were designed to prevent—as permissible under treaty flexibility, yet without providing any sound legal justification. Perhaps

more importantly, by stretching the treaty flexibility approach beyond the legally defensible, the United States is reverting to the dubious tradition of selective adherence to international law based on political expedience. Such an à la carte approach to international law undermines its most fundamental principle: *pacta sunt servanda* (agreements must be kept).⁹⁰

Options for Systemic Reforms

Some critics argue that starting a discussion on the revision of the conventions will either lead to an even worse treaty or to the collapse of the already fragile international consensus on drug control. However, such analysis forgets that shortly after adopting the 1961 Single Convention, the United States itself proposed numerous amendments, leading to a Conference of the Parties (COP) at which the 1972 Protocol was adopted, amending the 1961 Convention. The United States argued then that it was “time for the international community to build on the foundation of the Single Convention, since a decade has given a better perspective of its strengths and weaknesses.”⁹¹

Today, opponents to treaty revision discussion maintain that the only way to protect the “integrity of the treaty system” is to deny that there are any problems with the international legal framework for drug control. In their view, merely admitting and discussing its flaws and inconsistencies would fatally undermine the regime. This fear might spring from recognition that the outdated provisions of the UN drug control conventions, the incoherence between the three, and the tensions between them and other UN treaties all indicate that the drug control treaties could not withstand robust scrutiny undamaged. But could treaty reform debate at UNGASS 2016 realistically initiate modernization and improvement of the global drug control system, and breathe new life into a moribund and increasingly challenged framework? Negotiating

⁹⁰ Rick Lines and Damon Barrett, “Has the US Just Called for Unilateral Interpretation of Multilateral Obligations?” *Opinio Juris* (blog), December 18, 2014, <http://opiniojuris.org/2014/12/18/guest-post-us-just-called-unilateral-interpretation-multilateral-obligations/>.

⁹¹ UN, “Memorandum of the United States of America Respecting its Proposed Amendments to the Single Convention on Narcotic Drugs, 1961,” E/CONF.63/10, in *United Nations Conference to Consider Amendments to the Single Convention on Narcotic Drugs, 1961 (Geneva, 6-24 March 1972): Official Records*, vol. 1 (New York: UN, 1974), 3-4.

a completely new Single Convention to replace the three existing ones, or even an amendment protocol like that of 1972 to correct the most problematic provisions, is not a very attractive prospect at this point in time, given present diverging opinions and the broken global drug policy consensus.

Other international treaty regimes often have built-in monitoring and evaluation mechanisms, for example regular COPs to review implementation problems encountered by the parties. But the three drug control conventions lack such mechanisms to enable evolution of the system over time. The INCB is mandated to monitor compliance of the 1961 and 1971 conventions, but has often played an unhelpful role. Apart from the 1972 conference mentioned above, no COP has ever been convened. The 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances is an exceptional case of a UN treaty that does not have any monitoring or review mechanism⁹² because the INCB mandate was limited to the precursor control regime established under article 12.⁹³ In contrast to its broader mandate under the 1961 and 1971 conventions, the INCB was not charged to perform any monitoring duties regarding the rest of the 1988 Convention. Explaining the more restricted mandate, the commentary refers to the discretion required already from the INCB under the 1961 and 1971 conventions: “It is clear such discretion will certainly be called for under the 1988 Convention, where certain articles deal with matters that can be of a highly political character.”⁹⁴ The differences in INCB’s role over time arose “no doubt because of the very different character of the latter Convention, dealing as it does with matters of criminal law

and its enforcement that go beyond the scope of the earlier conventions into areas touching more closely on the sovereignty and jurisdiction of States.”⁹⁵

Easy options for treaty reforms requiring consensus do not exist, but ways to get around consensus merit examination. According to a commentary on the 1969 Vienna Convention on the Law of Treaties:

Due to the conflicting interests prevailing at an international level, amendments of multilateral treaties, especially amendments of treaties with a large number of parties, prove to be an extremely difficult and cumbersome process; sometimes, an amendment seems even impossible. It may thus happen that some of the States Parties wish to modify the treaty as between themselves alone.⁹⁶

Such an *inter se* agreement is permissible if it “(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.”⁹⁷

In the case of a modification *inter se* for the purpose of legitimizing under international law legal regulation of the recreational cannabis market as well as international trade among a group of like-minded countries for that purpose, both conditions could be met. It would require that the agreement include a clear commitment to the original treaty obligations vis-à-vis countries not party to the *inter se* modifica-

⁹² Two subsequent conventions also within the remit of UNODC’s functions as an implementing agency, the 2000 “Palermo” Convention Against Transnational Organized Crime and the 2003 Convention Against Corruption, have regular COPs to discuss implementation, interpretation, and, if necessary, amendments.

⁹³ UN, *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 1988, Vienna, December 20, 1988, *United Nations Treaty Series* 1582, no. 27627 (2001), <https://treaties.un.org/doc/Publication/UNTS/Volume%201582/v1582.pdf>.

⁹⁴ UN, *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: Done at Vienna on 20 December 1988*, E/CN.7/590 (New York: United Nations, 1998), 378, section 22.11, www.undocs.org/E/CN.7/590.

⁹⁵ *Ibid.*, 374, section 22.2.

⁹⁶ Oliver Dörr and Kirsten Schmalenbach, eds., *Vienna Convention on the Law of Treaties: A Commentary* (London and New York: Springer Heidelberg Dordrecht, 2012), 719.

⁹⁷ UN, *Vienna Convention on the Law of Treaties*, Vienna, May 23, 1969, *United Nations Treaty Series* 1155, no. 18232 (1980), article 41, paragraph 1 (b), <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

tion agreement, especially concerning prevention of trade or leakage from regulated to prohibited jurisdictions. The different options for treaty modification for individual or groups of countries, such as late reservations, denunciation and re-adherence, and *inter se* agreements are controversial because a generalized application of such procedures would erode the stability of international treaty regimes. Modification *inter se* should not be seen as a silver bullet or long-term solution and any recourse to it will be contested, as was the case in reaction to Bolivia's coca procedure. But applied with caution and reason under exceptional circumstances it can provide useful interim arrangements that should stand up to legal arguments and procedurally will not be easily blocked.

The drafters of the 1969 Vienna Convention considered the option of *inter se* modifications as a core principle for international law and the issue was discussed at length at the International Law Commission in 1964: "The importance of the subject needed no emphasis; it involved reconciling the need to safeguard the stability of treaties with the requirements of peaceful change."⁹⁸ Quoted during the discussion were the words of U.S. Secretary of State Edward R. Stettinius Jr., head of the U.S. delegation to the 1945 San Francisco Conference at which the founding United Nations Charter was adopted: "Those who seek to develop procedures for the peaceful settlement of international disputes, always confront the hard task of striking a balance between the necessity of assuring stability and security on the one hand and of providing room for growth and adaptation on the other."⁹⁹ From the very beginning, its evolutionary nature was seen as fundamental to the United Nations system, a system in which all member states "under-

take to respect agreements and treaties to which they have become contracting parties without prejudice to the right of revision," according to the Egyptian delegate.¹⁰⁰ It was therefore "equally important to ensure that arbitrary obstacles were not allowed to impede the process of change. There had been many instances in the past of States, by their stubborn refusal to consider modifying a treaty, forcing others to denounce it."¹⁰¹

That is precisely what happened to Bolivia after the adoption in 2009 of a new Bolivian constitution that required the state to protect the coca leaf as part of its cultural patrimony.¹⁰² Acknowledging that state regulation of the domestic coca market for non-medical purposes was contrary to the provisions of a treaty that Bolivia had signed, Evo Morales' government attempted to reconcile its national and international legal obligations.¹⁰³ The United States and the INCB condemned Bolivia for undermining the international drug control regime and lobbied to get the G-8, several other European countries, and Mexico behind them. Bolivia had, in fact, respected international law, taking its treaty obligations seriously while enumerating the problems it had with certain provisions, and invested quite a lot of political capital and diplomatic effort to resolve the legal conflicts in a responsible way. Bolivia was fully supported in its approach by the UN Permanent Forum on Indigenous Issues.¹⁰⁴

In light of legal regulation of the cannabis market for non-medical use in a number of U.S. states, equally qualifying as treaty breaches, the United States has been quite different and arguably much less respectful of international law than Bolivia's efforts. Sensibly,

⁹⁸ International Law Commission (ILC), "Summary Record of the 745th Meeting: 15 June 1964," A/CN.4/SR.745, in *Yearbook of the International Law Commission: 1964*, vol. 1 (New York: UN, 1965), 144, paragraph 49, http://legal.un.org/ilc/documentation/english/a_cn4_sr745.pdf.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, paragraph 53.

¹⁰¹ *Ibid.*

¹⁰² See the Constitution of the Plurinational State of Bolivia, article 384, https://www.constituteproject.org/constitution/Bolivia_2009.pdf. The constitution came into effect on February 7, 2009, after more than 60 percent of voters approved its text in a referendum on January 25, 2009.

¹⁰³ IDPC, *Bolivia's Legal Reconciliation with the UN Single Convention on Narcotic Drugs*.

¹⁰⁴ ECOSOC, *Permanent Forum on Indigenous Issues: Report on the 9th Session (19-30 April 2010)*, E/2010/43-E/C.19/2010/15 (New York: UN, 2010), http://www.un.org/esa/socdev/unpfi/documents/E_2010_43_EN.pdf.

U.S. federal authorities decided that the existence of antiquated UN treaty provisions was no longer sufficient reason to crack down on democratically undertaken drug policy changes that had no apparent negative impact on public health or security, or upon neighboring jurisdictions. The U.S. response regarding its international treaty obligations, however, was quite different: denial of any legal conflict; a legally indefensible political discourse on treaty flexibility according to which U.S. states were allowed to do precisely what the treaties had been designed to prevent; and, turning hypocrisy into an art form, intensification of diplomatic efforts to defend the “integrity of the conventions” and to ensure that treaty revision be kept out of the UNGASS debate.

Policy Recommendations for UNGASS 2016

A genuinely open and inclusive debate is the only promising way forward. Denying the reality that the drug policy landscape has changed and that systemic breaches have occurred is no longer a feasible option. Just one year away from UNGASS 2016, the chance that controversial issues like cannabis regulation and treaty reform will appear prominently on the agenda are slim at best. Most likely there will be unsatisfactory watered-down language vaguely reflecting a change of course in drug policy: more focus on health and development, less criminalization, more respect for human rights and proportionality in sentencing, better access to essential medicines, and so on. But such high-level political gatherings have the potential to ratify more progressive language on each of these key issues, thereby showing that things are changing and moving in the right direction.

Legally untidy justifications arguing that there are no tensions between ongoing drug policy reforms and the strictures of the UN conventions are counterproductive. An honest discussion about the inconsistencies and the Jurassic nature of the treaty regime cannot be avoided much longer.¹⁰⁵ The pressure from local and national policy changes will continue to

build, and the UN regime will soon have to show a capacity for evolution to accommodate these developments. Otherwise the treaty system risks becoming irrelevant as more countries resort to dubious unilateral reinterpretations, leading to an à la carte approach of cherry-picking politically convenient treaty provisions and simply ignoring the rest, and in so doing weaken respect for the basic principles of international law.

At present, the broken Vienna consensus and politicized divides in global drug policy cripple any possibility of reaching significant UN-level progress in a political declaration or in treaty reforms through consensus-driven negotiations, as the 2014 Joint Ministerial Statement clearly manifested. Hence, it is perfectly understandable that a majority of countries resists putting treaty reform formally on the policy agenda at this point in time. A more promising approach would be to explore, at least for the interim, systemic reform options that do not necessarily require consent of all treaty parties.

The possibility of an *inter se* agreement, specifically designed for these kinds of circumstances, could offer an attractive option for a group of like-minded countries interested in beginning a discussion on how to make the international drug control framework “fit for purpose” again. Over time, such an *inter se* agreement might evolve into an alternative treaty framework to which more and more countries could adhere. In principle, several other routes could also allow more maneuvering within the treaty regime while avoiding the cumbersome process of unanimous approval. A decision to remove a specific substance, the coca leaf or cannabis for example, from the schedules listing the drugs controlled under the 1961 Convention, or to move it to a lighter-controlled schedule, is taken by a simple majority vote in the CND on the basis of a WHO recommendation, and so does not require consensus. Similarly, re-scheduling decisions of substances controlled under the 1971 Convention require a two-thirds majority

¹⁰⁵ Heather Haase (rapporteur), *Report of the International Law and Drug Policy Reform Expert Seminar* (Washington, DC: TNI / Swansea University Global Drug Policy Observatory / International Centre on Human Rights and Drug Policy / WOLA, forthcoming).

vote. The General Assembly is mandated to adopt amendments by majority vote for most UN treaties, including amendments of the drug control conventions. Additionally, individual countries or groups of like-minded countries can exempt themselves from certain treaty provisions using the Bolivian route of withdrawal from a treaty followed by re-accession with a reservation, when the validity of certain provisions are questioned on the basis of a legal conflict with other obligations.

At this early preparatory stage, one cannot predict whether UNGASS 2016 will be a watershed moment in drug policy history or one more anticlimax, as in 1998. But drawing lessons from the history of the UN drug policy debate and previous special sessions can facilitate a meaningful process and outcome for UNGASS 2016.

Special advisory groups played a useful role in both UNGASS 1990 and 1998, in spite of the political restrictions imposed upon their mandates and composition. The secretary-general and the president of the General Assembly should use this mechanism again for UNGASS 2016, especially given the array of tensions, cracks, and breaches described above. The group's terms of reference should cover all key issues emerging in UNGASS preparations, including the UN institutional drug control architecture; UN system-wide coherence on drug policy; harmonization of drug control with human rights and development principles; inconsistencies of the treaty regime regarding scheduling criteria and procedures; securing the availability of controlled drugs for medical purposes; and the increasing legal tensions with evolving policy practices, especially with regard to cannabis regulation. The group's main task would be to recommend ways to better deal with these contentious and difficult issues following UNGASS 2016, in preparation for the next UN high-level review in 2019. The composition of such an advisory expert group no doubt will be subject again to political negotiations, but evolved UN standards for such initiatives

are likely to enable participation from different UN agencies, civil society, academic experts, and affected populations such as drug users and farmers.

While recognizing the special role and expertise of the Vienna-based agencies, another lesson learned from previous special sessions is the importance of active involvement by all relevant UN agencies. The near monopoly Vienna acquired over the drugs issue within the UN system after UNGASS 1998 has proven to be an obstacle to a more system-wide coherent approach. The marginalized position of the WHO, despite its comparable mandate to the INCB under the drug control conventions, is a case in point and requires urgent attention. Actively soliciting and mandating the participation of UN agencies working in the fields of health, social and economic development, human rights, and peacekeeping would surely contribute to a more holistic and balanced approach at UNGASS 2016. The UN System Task Force on Drug Trafficking and Organized Crime, jointly coordinated by UNODC and the Department of Political Affairs, could play an important role in that process given its special mandate to facilitate contributions of all relevant UN departments in the UNGASS process.

Since the previous two UNGASSs, global civil society, affected populations, and the academic community have become more active and better organized on drug policy issues. Mechanisms for their meaningful participation in UN-level drug policy making processes have improved but still do not live up to the established practices of most other branches in the UN family. A Civil Society Task Force has recently been jointly created by the Vienna and New York NGO Committees on Narcotic Drugs to strengthen civil society participation in the UNGASS process; it should receive full support in its efforts to ensure optimal use of the accumulated nongovernmental expertise and experience to shape the UNGASS process and its outcomes.

Secretary-General Ban Ki-moon urged member states to use UNGASS 2016 "to conduct a wide-rang-

¹⁰⁶ Statement, Ban Ki-moon, "Statement: Secretary-General's Remarks at Special Event on the International Day Against Drug Abuse and Illicit Trafficking," New York, 26 June 26, 2013. <http://www.un.org/sg/statements/index.asp?nid=6935>.

ing and open debate that considers all options.”¹⁰⁶ UN special sessions are precious—and costly—political opportunities for the international community to discuss key global challenges and to agree on more effective policy responses to protect the welfare of humankind. Such an opportunity must not go to waste.

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