

THE RISE AND DECLINE OF CANNABIS PROHIBITION

THE HISTORY OF CANNABIS IN THE UN DRUG
CONTROL SYSTEM AND OPTIONS FOR REFORM

Treaty reform options



Treaty reform options

There are various ways to change the conventions, or a country's obligations under a treaty after having become a party to it, to make legal regulation of cannabis legitimate under international law. Implementing any of these options would entail procedural complications and political obstacles. None of them provide an easy opt-out from the current treaty requirements proscribing the shift to legal regulation. Consequently, as well as examining a number of possible routes for creating more policy space at the national level, in this chapter we also discuss the consequences of proceeding with cannabis regulation prior to legally resolving infringement of the treaty regime. That is to say, a party's or parties' willingness to contravene the conventions for a certain period of time. As more countries join the chorus for regulation, at some point the obstacle of the treaty obligations will have to be addressed and formal adaptations in the treaty regime itself or the relationship with it will need to be adopted.

WHO review – modification of cannabis scheduling

As described above, cannabis entered the international drug control system under the League of Nations on dubious grounds. Subsequently, under the United Nations, the decision to place cannabis in Schedules I and IV of the 1961 Single Convention was heavily influenced by a memo expressing the very biased personal opinion of the WHO official Pablo Osvaldo Wolff, and not based on a position taken by the WHO Expert Committee on Drug Dependence (ECDD). Although many delegates misread his paper as the WHO position, in fact the Expert Committee never presented a formal recommendation to the CND about the scheduling of cannabis; not prior to the Single Convention or, indeed, ever. Twice in its reports the Expert Committee referred to a discussion on cannabis, but no formal review was undertaken. In 1952 this was reflected in one paragraph, with the remark: "So far as [the committee] can see, there is no justification for the medical use of cannabis preparations."¹ The 1965 report was more elusive about the subject, stating that "medical needs for cannabis as such no longer exists" although THC "whether naturally or synthetically produced, may eventually be shown to have medical applications"² In neither report were any references, evidence or explanation supplied.

In itself, the absence of a WHO recommendation is sufficient reason to question the legitimacy of the current classification of cannabis on procedural grounds. A group of academic experts, including WHO researchers, recently concluded as much in *Drug and Alcohol Dependence*: "The present situation in which several important substances (e.g., cannabis, cannabis resin, heroin and cocaine) were never evaluated or were evaluated up to eight decades ago



seriously undermines and delegitimizes their international control.”³ The experts go on to recommend improvements to WHO’s substance-evaluation process through the reassessment of all scheduled substances at least every twenty years; a process they argue should start with cannabis and a few other most relevant and least recently researched substances. In fact, such a review has already been announced regarding cannabis. In response to a 2009 resolution on cannabis seeds, in which the CND “look[ed] forward to an updated report on cannabis by the Expert Committee”;⁴ the ECDD decided at its meeting in Tunisia in 2012 to include cannabis on the agenda of its next meeting, taking place in June 2014.⁵

In the journal article, the authors predict that a review would at least recommend removing cannabis from Schedule IV, which is reserved for substances that have “particularly dangerous properties and lack therapeutic value” and a classification that they deemed not to be “true anymore in the 21st century”. Referring to the difficulties regarding THC/dronabinol rescheduling under the 1971 Convention, they acknowledge that it is not certain such a WHO recommendation would be adopted, but noted that assuming “the CND let the scientific approach prevail over political considerations, such an update to modern knowledge will accommodate for the moment those countries that are uncomfortable with the current international drug control arrangements, although it will not address the more structural criticism related to the prohibition principle.”⁶

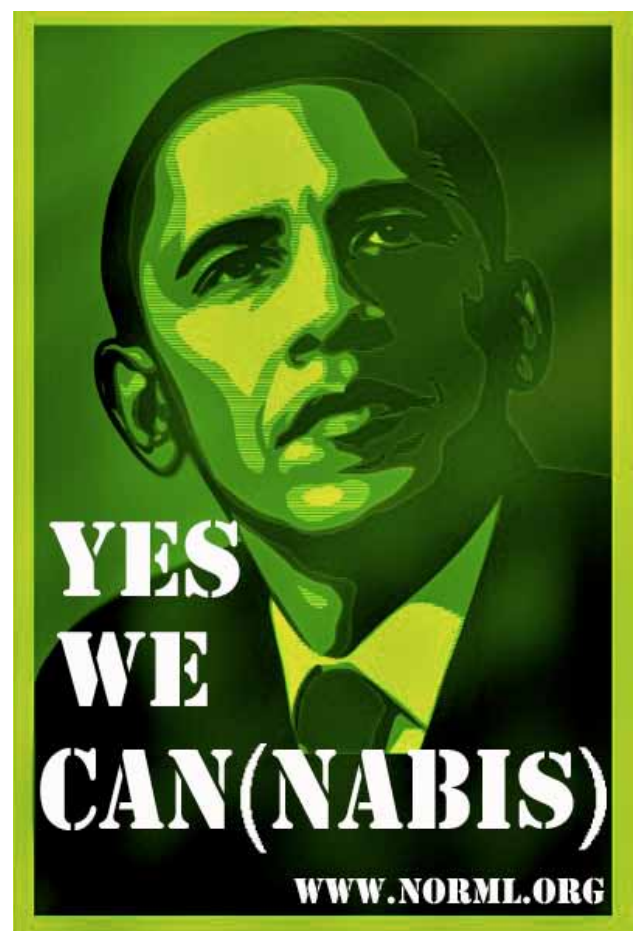
A WHO recommendation to remove cannabis not only from Schedule IV but also from Schedule I could be scientifically justified, but would be politically controversial. Given the current balance of power, such a recommendation would unlikely receive the required majority vote of the 53 CND member states. Modifying schedules does not require consensus; these are the only decisions the CND takes by vote. In the case of cannabis, scheduled under the Single Convention, the decision would be taken by a simple majority of its “members present and voting”.⁷ Also, it is important to note that the CND, with respect to the 1961 Convention, can only approve or reject a WHO recommendation; it cannot decide to place a substance in a schedule of the Single Convention that has not been recommended.⁸ The experience with dronabinol has demonstrated, however, that taking this path is not an easy option, even though the criteria for a decision under the 1971 Convention are stricter than those laid out in the 1961 Convention. Instead of a simple majority, the 1971 Convention requires a two-thirds majority vote of the CND’s total membership, e.g. a minimum of 36 votes is required to adopt a WHO recommendation under the 1971 Convention.⁹

Apparently anticipating a possible political stalemate in the case of a recommendation to remove cannabis from Schedule I, the article concludes, “a process of turning away

from international drug policies by individual countries has started already. The clearest example is Bolivia by having a reservation now for the control of coca leaf.”¹⁰ One last complication is that cannabis is also mentioned by name in specific articles of the Single Convention (as are coca bush and opium poppy), so a deletion from its schedules does not immediately resolve all the issues. Amendments or a reservation may be necessary.

Denunciation and reaccession with a new reservation

Bolivia represents the unique example of a country successfully repudiating certain 1961 treaty obligations after having accepted them unreservedly by accession in 1976. The Single Convention obliged countries to ban the tradition of coca leaf chewing (by December 1989) as well as coca tea drinking or any other form of non-medical consumption of coca in its natural state (containing the cocaine alkaloid). The new constitution, approved by popular referendum after Evo Morales’ election protects coca as part of the country’s cultural heritage. Consequently, abiding by those rules expressed in the Single Convention became untenable.¹¹ An initial attempt to amend article 49 by deleting the obligation to abolish coca leaf chewing failed when 18 countries objected after the U.S. convened a group of “friends of the convention” specifically to rally against what they perceived to be an undermining of the “integrity” of the treaty and its guiding principles.¹²



Then, on 29 June 2011, Bolivia notified the UN Secretary-General that it had decided to exit the Single Convention, taking effect from 1 January 2012. Following denunciation, Bolivia re-acceded, reserving the right to allow in its territory traditional coca leaf chewing, the use of the coca leaf in its natural state, and the cultivation, trade and possession of the coca leaf to the extent necessary for these licit purposes.¹³

The procedure of treaty denunciation followed by reaccession with reservation is sometimes contested, primarily out of concern that accepting this mechanism too easily could set precedents that might lead to an undermining of other treaty frameworks, principally the human rights treaty regime. Although substantiated caution has justly limited its practice in international law, in exceptional cases it is arguably a legitimate procedure. In an authoritative analysis of the denunciation/reaccession procedure, Laurence Helfer, Director of the International Legal Studies Program at Vanderbilt University Law School, defended it as a valuable mechanism that contributes to the effective functioning of the international treaty system rather than undermining it. Helfer concluded that,

a categorical ban on denunciation and reaccession with reservations would be unwise. Such a ban would [...] force states with strongly held objections to specific treaty rules to quit a treaty even when all states (and perhaps non-state actors as well) would be better off had the withdrawing state remained as a party. It would also remove a mechanism for reserving states to convey valuable and credible information to other parties regarding the nature and intensity of their objections to changed treaty commitments or changes in the state of the world that have rendered existing treaty rules problematic or inapposite.¹⁴

The Bolivian coca case relied on an abundance of arguments to justify beyond doubt the legitimacy of applying the mechanism in this exceptional case. These included demonstrating that the outdated arguments used at the time of the 1961 ban are looked upon now as culturally insensitive if not racist; the untenable conflict between the Bolivian Constitution and other international law obligations in the area of indigenous and cultural rights; the failed attempt to resolve the conflict through other means provided for in the treaty (that is, through amendment); the legality of the procedure according to the rules laid down in the treaty provisions themselves; and the reality that the obligation to abolish coca chewing had never been applied in practice. In short, the procedure dealt with an historical error that needed to be corrected. What has been called the “inquisitorial nature” of the INCB response¹⁵ and the 15 objections submitted by – again – all the G8 members and a few other countries all echoed the political fears surrounding any attempt to challenge and modernize the foundations of the UN drug control system.¹⁶ In contrast to the previous

amendment procedure that could be blocked by a small number of objections, this time the number of objections fell far short of the 62 (one-third of all state parties to the Convention) required to block Bolivian action.¹⁷ The procedure thus successfully resolved the legal tensions for Bolivia, a victory celebrated massively in the country as the long-awaited end to the UN condemnation of its indigenous coca culture so many people had fought for several decades.

With cannabis reforms now entering the realm of legal regulation and treaty breaches, the question arises whether the same procedure could successfully and legitimately be applied in the case of cannabis as well.¹⁸ Much of the public attention around the Bolivia case focussed on traditional use and the fact that the original amendment proposal only addressed the specific treaty ban on coca chewing as laid down in article 49. That same article includes an identical ban and phase-out obligation for the widespread traditional use of cannabis. This allows for a transitional reservation under the condition that the “use of cannabis for other than medical and scientific purposes must be discontinued as soon as possible but in any case within twenty-five years”. Upon signature or accession, India, Nepal, Pakistan and later Bangladesh, applied for that transitional exemption, thereby allowing the “use of cannabis, cannabis resin, extracts and tinctures of cannabis for non-medical purposes” as well as the production and trade for that purpose until December 1989, 25 years after the Single Convention came into force.

Those countries, and several others in Northern Africa and the Middle East, could as rightfully appeal to millennium-old traditions and nowadays recognized indigenous and cultural rights to preserve them, as Bolivia has done regarding the case of coca in the Andean region. For Uruguay, the U.S. or European countries, using the argument of defending the continuation of ancient traditional or cultural uses of cannabis is less obvious. That said, the Bolivian reservation goes beyond simply protecting the indigenous practice of coca chewing. It more broadly reserves the right to “the use of the coca leaf in its natural state” and its cultivation and trade for that purpose.¹⁹

In fact, making a reservation exempting a particular substance from the treaty’s general obligation to limit drugs exclusively to medical and scientific purposes, is explicitly mentioned in the Commentary on the Single Convention as an option that would be procedurally allowed, for coca leaf as well as for cannabis. While article 49 on “transitional reservations” restricts that possibility to a limited period of 25 years, by applying article 50 on “other reservations”, according to the Commentary, “a Party may reserve the right to permit the non-medical uses as provided in article 49, paragraph 1, of the drugs mentioned therein, but also non-medical uses of other drugs, without being subject to the time limits and restrictions provided for in article

Cannabis in the Rif mountains (July 2009). Photo: Pien Metaal



49”.²⁰ The difference would be that while reservations made under article 49 are automatically accepted, other parties can raise objections to reservations made under the conditions of article 50. If one-third or more of the parties object, the reservation would not be permitted.

A reservation similar to the Bolivian one on coca leaf, by which a state would exempt itself from implementing the Convention’s obligations for cannabis, could thus be attempted following the same treaty procedure. The Vienna Convention on the Law of Treaties requires that a reservation stand the test of not being “incompatible with the object and purpose of the treaty”.²¹ Those overall aims of the Single Convention are expressed in the preamble’s opening paragraph regarding concern about “the health and welfare of mankind” and the treaty’s general obligation to limit controlled drugs “exclusively to medical and scientific purposes”. The absence in the Commentary of any accompanying cautionary text, however, when referring to this as a legitimate option seems to imply that exemption by means of a reservation of a specific substance from the general obligations would not in itself constitute a conflict with the object and purpose of the treaty as a whole.

Arguing that exempting certain substances from that obligation could in fact even be beneficial for “the health and welfare of mankind” may strengthen the chance of passing the compatibility test with regard to the object and purpose of the treaty. Different schools of thought exist regarding these requirements. Some remain close to the letter of the Single Convention itself, others interpret its

object and purpose in view of relevant rules of international law more broadly and in a way that takes into account the fundamental reason or problem it was supposed to address.²²

A downside to this approach, besides the already mentioned risk of creating precedents for weakening other UN treaty regimes, is that it applies only to the reserving nation and that unilateral escape mechanisms could reduce pressure on the treaty system to undergo a multilateral and more fundamental process of reform and modernization. It is in effect a one-off fix for an individual state and could not be applied regularly. Nonetheless, the procedure is worthy of consideration under specific circumstances, especially after other avenues for creating more flexibility on a particular topic have been explored and failed.

Amending the treaties

The mechanisms available to modernize the UN drug control treaty regime via amendment procedures or renegotiations among its parties have high built-in thresholds; invoking those mechanisms easily runs into procedural and political obstacles. The only recent example of an attempt to use them has been Bolivia’s amendment proposal in 2009 to delete the obligation of the 1961 Convention to abolish coca leaf chewing.²³ But even such a minor amendment to correct an outdated requirement clearly in conflict with indigenous and cultural rights, recognized since the writing of the Convention as part of



the human rights regime, was blocked. Then, as mentioned above, a small but powerful minority of 18 countries objected. 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”.²⁴

In their objections most countries mentioned their full respect for indigenous rights, but as Italy contended, “promoting respect for indigenous traditions should be fully coherent with and preserve the integrity of the Single Convention”.²⁵ The Single Convention’s requirement for the prohibition of some of those traditions exposes the blatant contradiction underlying such a statement. Behind it lies the fear that accepting the validity of Bolivia’s amendment might open a Pandora’s box. For those who regard the Single Convention as sacrosanct, allowing any changes would jeopardize the integrity of the entire drug-control system. Mexico’s objection clearly echoed that point of view, saying that it “deems it inadvisable to initiate a process to amend the Single Convention of 1961”.²⁶

Curiously enough, only ten years after the Single Convention was adopted, the U.S. was proposing numerous amendments, convinced 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”. The U.K. and Sweden were the first to support that call to modernize the Convention and to convene a conference of the parties to negotiate the amendment proposals that eventually led to the 1972 Protocol amending the 1961 Convention.

Surely, another four decades have provided an even “better perspective regarding its strengths and weaknesses” and shown that a recalibration is now urgently required to bring the treaty in line with developments in international law.

In terms of procedure, if such a proposed amendment has not been rejected by any party within 18 months, it automatically enters into force. If objections are submitted, ECOSOC must decide if a conference of the parties need be convened to negotiate the amendment. Other options are less clear, but if only a few or minor objections are raised, the Council can decide to accept the amendment in the understanding it will not apply to those who explicitly rejected it. If a significant number of substantial objections are tabled, the Council can reject the proposed amendment. In the latter case, if the proposing party is not willing to accept the decision, it can either denounce the treaty or a dispute may arise which could ultimately “be referred to the International Court of Justice for decision”.²⁷ Beyond shifting discussion of drug policy beyond the confines of a relatively obscure part of the UN system, involvement of the International Court of Justice would introduce another set of possible scenarios. While these are manifold and the outcome dependent upon the degree of conservatism displayed by the Court on the issue, it is certain that proceedings in The Hague would be lengthy.

When the influential G8 group of nations rallied against its proposed amendment, Bolivia circumvented such procedural complexities by not waiting for a formal ECOSOC decision. Rather, Bolivian officials initiated the alternative procedure of denunciation and readherence with reservation. The type of amendments necessary to

enable legal regulation of the cannabis market are, however, significantly more substantial and therefore almost certain to encounter too many objections for automatic approval, as was eventually the case for Bolivia and coca.²⁸

Modifications inter se

The 1969 Vienna Convention on the Law of Treaties also allows for the option to modify treaties between certain parties only, offering in this context an intriguing and thus far under-explored legal option somewhere between selective denunciation and a collective reservation. According to article 41, “Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone”, as long as it “does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations” and it is not “incompatible with the effective execution of the object and purpose of the treaty as a whole.”²⁹

This could be an interesting option to explore in order to provide a legal basis justifying international trade between national jurisdictions that allow or tolerate the existence of a licit market of a substance under domestic legal provisions, but for which international trade is not permitted under the current UN treaty obligations. It could apply, for example, to the import of hashish to supply cannabis clubs in Spain or Dutch coffeeshops. Both are arguably operating within the legal parameters of their national jurisdictions, but international treaties prohibit the import of hashish. Similarly, the proposed new legislation in Morocco would allow cannabis cultivation and trade for medical and industrial purposes, but UN treaty restrictions would still prohibit export for other purposes even if those would be considered “licit uses” under domestic law in Spain or The Netherlands. Moreover, treaty provisions currently prohibit the export of coca leaf from Bolivia, where cultivation and trade of coca leaf for its use in natural form is now fully legal, to Argentina, where its consumption is also legal under domestic law.³⁰ An agreement among these, or other, sets of countries to modify the treaty, and thus permit trade between them, would seem to be a satisfactory arrangement difficult to challenge on the basis that it would affect the rights of other parties.

In theory, modification inter se could also be used by a group of like-minded countries that wish to resolve the legal treaty breach resulting from a national decision to legally regulate the cannabis market, as Uruguay has done already. They could sign an agreement with effect only among themselves, modifying or annulling the cannabis control provisions of the UN conventions. As such, in the relationship and collaboration between a state party to the modification and states that are not, all the treaty provisions would remain in force and unaltered. Modification inter se is normally permissible in situations in which parties are seeking to enforce higher standards than those in the treaty,

for example in environmental or human rights treaties.³¹ On the other hand, a modification with regard to cannabis that relaxes the obligations in the original agreement might be more difficult to justify; although one might argue such a route would strengthen obligations relating to other UN treaties, human rights for instance.

Aust and Klabbers, two authorities on treaty law, both agree that the option of modification inter se is available in principle unless expressly prohibited by a treaty, and as long as it satisfies the two key conditions mentioned above. First, that it does not affect the enjoyment by the other parties of their rights under the treaty or add to their burdens, and second that it must not relate to a provision, derogation from which would be incompatible with the effective execution of the object and purpose of the treaty as a whole. With this in mind, some of the parties to the conventions who are not part of the modification inter se agreement would probably claim breach of treaty by the modifying parties. However, the procedure in itself (unlike the procedure of withdrawal and re-accession with a new reservation) is not subject to parties’ objections so, beyond efforts to exert reputational costs, their only legal recourse would probably be to take the dispute to the International Court of Justice.

Any argument that the procedure would be invalid because the 1961 Single Convention predates the 1969 Vienna Convention (that only entered into force in 1980), would be easily countered since there is general agreement that the Vienna rules on treaties apply to previous conventions unless those specify other rules.

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Moreover, the procedure was already available in the late nineteenth century in international law, so the concept and practice of modification *inter se* was not introduced, but merely specified by the Vienna Convention.³² Its rare application is not an argument against at least exploring its possible merits toward achieving more flexibility within the international drug control treaty regime. As Klabbers writes, “treaty revision is a curiously under-analysed phenomenon in international law” and is “often deemed to be a matter for politics and diplomacy” as much as it is governed by legal rules.³³

Denunciation

The Vienna Convention on the Law of Treaties provides that historical “error” and “fundamental change of circumstances” (*rebus sic stantibus*, literally “things thus standing”) can be grounds for invalidating a state’s consent to a treaty.³⁴ According to Leinwand, “[I]f the fundamental situation underlying treaty provisions becomes so changed that continued performance of the treaty will not fulfil the objective that was originally intended, the performance of those obligations may be excused.” In an early attempt to legally accommodate cannabis reforms beyond the treaty latitude, he argued in 1971 for the applicability of those clauses to justify “selective denunciation” from the cannabis provisions under the 1961 Single Convention. The inclusion of cannabis, he wrote, “was a mistake, based on the erroneous scientific and medical information generally available to the delegates when the treaty was

drafted.”³⁵ The highly politicized and scientifically dubious history of how cannabis ended up in the 1961 treaty would definitely support Leinwand’s conclusion. The use of the *rebus sic stantibus* doctrine and the option of “selective denunciation”, however, are rarities in international law. The Beckley Foundation’s Global Cannabis Commission report, therefore, concluded in 2008 that “taking this path might be less legally defensible than denunciation and reaccession with reservations”, which would have the same end result.³⁶

Withdrawing from the UN drug control conventions completely is likely to trigger even stronger condemnations than seen in the case of Bolivia, and may have serious political, economic and reputational repercussions.³⁷ For countries receiving development aid or benefitting from preferential trade agreements, sanctions from the U.S. and the European Union would probably be unavoidable. Adherence to all three drug control conventions has been made an explicit condition in several other agreements, not only in the sphere of trade and development but it is also a *sine qua non* for accession to the European Union, for example. Very few countries would be able to confront such pressures alone. Also, most countries now struggling to abide by all its strictures and considering options for change want to keep significant parts of the international drug-control regime intact, not least its control system for production, trade and availability of drugs for medicinal purposes.

Denunciation would not automatically exclude access to controlled drugs for licit purposes, since (as an exception in international law) the drug control conventions impose obligations even on non-parties to adhere to the system of estimated requirements and monitoring rules for international trade of controlled drugs for medical and scientific purposes. Many countries, however, are already suffering inadequate availability of essential medicines, and exiting the treaty system administering their production and trade would only complicate those problems. Moreover, the 1961 and 1971 Conventions provide the INCB the possibility to impose “remedial measures” in terms of restricting or banning trade in medicines controlled under those treaties to countries if “the Board has objective reasons to believe that the aims of this Convention are being seriously endangered by reason of the failure of any Party, country or territory to carry out the provisions of this Convention.”³⁸ While the procedure under that treaty article has only been activated by the INCB a few times, and is operative now in the case of Afghanistan, actual sanctions have never been applied. It would be extremely controversial as such measures would have immediate and severe humanitarian consequences and violate the human right to health, for which the Board would not want to be responsible.

All that said, the instrument of denunciation, or perhaps the threat of using it, could serve as a trigger for treaty revision. By merely initiating an exit from the confines



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Preparing for sieving cannabis to manufacture hashish (Morocco, July 2009); Photo: Pien Metaal



of the regime, a like-minded group of countries might be able to generate a critical mass sufficient to compel states favouring the status quo to engage with the process. States and parts of the UN apparatus resistant to change might be more open to treaty modification or amendment if it was felt that such a concession would prevent the collapse of the control system. Helfer's analysis is: "[W]ithdrawing from an agreement (or threatening to withdraw) can give a denouncing state additional voice [...] by increasing its leverage to reshape the treaty [...] or by establishing a rival legal norm or institution together with other like-minded states."³⁹ Under such circumstances, subsequent changes may be an acceptable cost to nations favouring the basic architecture of the existing regime, but not willing to risk that its immutability could lead to its demise when countries would actually start to withdraw.⁴⁰

From cracks to breaches and beyond

A coordinated initiative for treaty reform by a group of like-minded countries to enable legal regulation of the cannabis market, would need to assess the feasibility of the different legal routes available and agree on a road map and timetable for implementation of the best possible scenario. That could lead to an ambitious plan to design a new Single Convention that would eventually replace the existing three drug control treaties. This would be a goal far surpassing the issue of cannabis regulation, aiming to address

other difficulties encountered with the implementation of the current treaty system, revisiting the logic behind it and its inherent inconsistencies. Another important criterion for a new treaty is UN system-wide coherence and full compatibility with other UN treaty obligations in the area of human rights, including economic, social and cultural rights, the right to health, and rights of indigenous peoples. Overlap between the 1988 Trafficking Convention and the two related UN conventions adopted thereafter addressing organised crime and corruption issues⁴¹ would also need to be considered.

An advantage of this approach is that it could simultaneously deal with issues (including creating legal flexibility for countries to regulate domestic cannabis markets) in relation to the three drug control conventions. It could re-establish consistency and clarity similar to what the Single Convention was meant to do with regard to all the pre-UN treaties. Adding two separate treaties, that is to say the 1971 and 1988 Conventions, with somewhat different rationales and an incomprehensible scheduling logic, has again resulted in confusion.⁴² Clearly, this initiative requires careful preparation among its proposers and careful political manoeuvring to find the right alliances and sufficient support to ensure positive outcomes on a number of crucial issues. It would require convening a plenipotentiary conference like the one that resulted in the 1972 protocol amending the Single Convention. More recent multilateral treaties have inbuilt review and

monitoring mechanisms. Related UN treaties such as the 2000 Convention against Transnational Organized Crime, the 2003 Convention against Corruption and the 2003 WHO Framework Convention on Tobacco Control are all required to periodically convene Conferences of the Parties (COPs) mandated to take decisions promoting effective implementation and to adopt protocols, annexes and amendments to the conventions. No such mechanism exists for any existing drug control treaty and this in itself is another reason for bringing the drug control treaty system more into line with established UN norms and practices.

Substantially modifying the scheduling of cannabis (and coca leaf) via a WHO review might be a feasible scenario. Regarding amendments, an alternative option explained in the Commentary on the Single Convention is particularly interesting in light of the upcoming UNGASS in 2016: “[T]he General Assembly may itself take the initiative in amending the Convention, either by itself adopting the revisions, or by calling a Plenipotentiary Conference for this purpose.”⁴³ The General Assembly could thus adopt treaty amendments by simple majority vote, “always provided that no amendment, however adopted, would be binding upon a Party not accepting it.”⁴⁴ The Secretary-General or the General Assembly could first appoint an expert group or high-level panel to advise on various options for treaty reform, including the more ambitious idea for a new Single Convention. Cannabis, most likely, would no longer be part of the control system under such a new Single Convention. Another international control model for cannabis could perhaps be designed, as several have suggested, modelled on the WHO Tobacco Convention.⁴⁵

Alternatively, it could be left entirely to national (or in some cases perhaps regional) policy making, in which case several countries will surely choose to maintain a domestic prohibition policy for cannabis. The fear that any changes in the current international control system would affect its “integrity” and inevitably bring it down like a house of cards, needs to be overcome. In this context, it should be recalled that in absence of any international controls, several countries strictly maintain a ban on alcohol domestically.⁴⁶ Those countries banning alcohol would probably not be the same ones that would choose to continue banning cannabis. In fact, in many Muslim and Hindu cultures, religious and social attitudes against alcohol have historically been rigid while more relaxed toward cannabis; a drug often regarded as an acceptable alternative to alcohol. This helps explain the existence of informal tolerance towards cannabis in some parts of the world. Any dismantling of the current UN treaty-imposed global cannabis prohibition regime is likely to be a gradual process not dissimilar from the dismantling of alcohol prohibition within the U.S.⁴⁷

Until recently, even discussing treaty reform was a political

taboo informally accepted as necessary to uphold the delicate Vienna drug control consensus. Cracks in the consensus have become more frequent this last decade, however, and have now, in the case of coca and cannabis, reached the point of treaty breaches. Furthermore, critiques of the existing international control framework are no longer confined to hushed conversations on the fringes of the CND. In March 2013, for the first time in the history of the Commission, four countries, Argentina, Uruguay, Guatemala and the Czech Republic, spoke out in favour of an open debate about evaluating and adapting the conventions.

A strong call for more flexibility also came last year from two reports on *The Drug Problem in the Americas* by the Organization of American States (OAS), resulting from the mandate given to it at the Cartagena Summit of the Americas in April 2012 to analyse the results of hemispheric drug policies and to explore new approaches.⁴⁸ OAS Secretary General Insulza concludes in the analytical report that the problem requires “a flexible approach, with countries adopting tailored approaches that reflect individual concerns”. Dealing with the problem “calls for a multifaceted approach, great flexibility, a sound grasp of often different circumstances, and, above all, the conviction that, in order to be successful, we need to maintain unity in the midst of diversity” he said.⁴⁹ “With respect to United Nations conventions,” Insulza continues, “changes could result from the possibility that the current system for controlling narcotics and psychotropic substances may become more flexible, thereby allowing parties to explore drug policy options that take into consideration their own specific practices and traditions.”⁵⁰

With regard to cannabis, Insulza’s report concludes: “[I]t would be worthwhile to assess existing signals and trends that lean toward the decriminalization or legalization of the production, sale, and use of marijuana. Sooner or later decisions in this area will need to be taken.” The second report, *Scenarios for the Drug Problem in the Americas*, describes four possible scenarios on how drug-related problems and drug-policy responses in the Americas might develop between now and 2025. Within this the “Pathways” scenario describes a ground-breaking domino effect that the legal regulation of cannabis in the U.S. and Uruguay may have in the hemisphere and its impact on global debates in the years to come.⁵¹

Negotiating agreement among the parties to change the UN drug control treaty system in such a way that it would legally accommodate national flexibility on cannabis regulation, as history demonstrates, will surely be complicated. The viability of the available treaty reform options, as described, should be assessed in greater detail. And pragmatic options for countries wishing to move forward with cannabis regulation now, prior to a globally negotiated arrangement, need to be spelled out more clearly.

Untidy legal justifications

Understandably, the U.S. and Uruguay are both hesitant to explicitly acknowledge that recent policy changes represent clear breaches of international law. Uruguay, as described in the previous chapter, acknowledges that there are legal contentions and that the treaty system may require a revision and modernization. At the same time, the government defends its position by referring to other legal obligations that need to be respected, including human rights principles, which take precedence in case of any doubt. Moreover, the government claims its policy decision is fully in line with the original objectives the drug control treaties aimed at, and have subsequently failed to achieve: the protection of the health and welfare of humankind.

The United States has invested probably more effort than any other nation over the past century to influence the design of the global control regime and enforce its almost universal adherence. If the U.S. now proclaims it can no longer live by the regime's rules, it risks undermining the legal instrument it has used so often in the past to coerce other countries to operate in accordance with U.S. drug control policies and principles. Officials in Washington have been trying to develop a legal argument, based on the August 2013 memorandum from the Justice Department regarding enforcement priorities, claiming that the U.S. is not violating the treaties because cultivation, trade and possession of cannabis are still criminal offences under federal drug law; and because the treaty provisions allow for considerable flexibility regarding law enforcement

practices, especially when there are conflicts with a party's constitution and domestic legal system. Using the expediency principle, the argument continues, federal law enforcement intervention in state-level cannabis regulation is simply not high priority; but by allowing states de facto to regulate the cannabis market, the federal government would not be violating its international treaty obligations because the approaches pursued in Washington and Colorado are still prohibited under federal law.

In legal terms, such a line of argumentation is easily contestable. The INCB has pointed out in recent annual reports in reference to cannabis developments at state level in the U.S., a party is obliged "to ensure the full implementation of the international drug control treaties on its entire territory". Hence law enforcement priority isn't a valid consideration; rather the law needs to be in conformity with the treaties at all levels of jurisdiction. Any reference regarding treaty flexibility based on the premise that the manner in which a party implements the provisions is "subject to its constitutional principles and the basic concepts of its legal system" is also very problematic. While that principle applied to the 1961 Convention as a whole, the escape clause was deliberately deleted from the 1988 Convention with regard to the obligation to establish cultivation, trade and possession as a criminal offence, except in relation to personal consumption mainly due to U.S. pressure during the negotiations. Washington's rationale was that it wanted to limit the flexibility the preceding conventions had left to nation states. And finally (as mentioned in the section on Dutch coffeeshops in the previous chapter),





the 1988 Convention restricted the use of discretionary legal powers regarding cultivation and trafficking offences (article 3, paragraph 6).

All that notwithstanding, if, the U.S. interpretation attracted a certain level of political acceptance and became part of an extended practice of flexible treaty interpretation, significantly more room for manoeuvre would open up. Other countries would be able to apply similar arguments, not only to legally justify cannabis regulation, but for other currently contested policies as well, such as drug consumption rooms or legally regulated markets for coca leaf. Accepting such an argumentation would come close to a de facto amendment by means of broad interpretation that would restore the escape clause for the entire 1988 Convention (including for article 3, paragraph 1 (a) and (b) offences), and simultaneously annul the restrictions placed on the exercise of discretionary powers under domestic law.

The Netherlands, for example, made a special reservation upon ratification of the 1988 Convention, exempting the country from the limitations on prosecutorial discretion the treaty intended to impose. Even with such a reservation in hand, however, the Dutch government has maintained thus far that the expediency principle under which the coffeeshops are operating, could not be used to justify

non-enforcement guidelines with regard to cannabis cultivation. That position has often been challenged in the domestic policy debate as an excessively restrictive legal interpretation of existing treaty flexibility. If the U.S. now asserts that the treaties are sufficiently flexible to allow state control and taxed regulation of cultivation and trade for non-medical purposes on its territory, accordingly the Netherlands could comfortably extend the expediency principle to include the cultivation of cannabis destined to supply the coffeeshops by issuing additional non-prosecution guidelines.

Conclusions

There are good reasons to question the treaty-imposed prohibition model for cannabis control. The original inclusion of cannabis within the current international framework is the result of questionable procedures and dubious evidence. Furthermore, no review that meets currently accepted standards and scientific knowledge has ever taken place. Added to this, implementing the prohibitive model has not proven to have had any effect on reducing the extent of the market. Rather it has imposed heavy burdens on criminal justice systems, produced profoundly negative social and public health impacts, and created criminal markets supporting organized crime, violence and corruption. For all these reasons, multiple forms of soft defection, non-compliance, decriminalization and de facto regulation have persisted in countries where traditional use is widespread, and have since blossomed around the world to almost every nation or territory where cannabis has become popular in the past half century.

Decades of doubts, soft defections, legal hypocrisy and policy experimentation have now reached the point where de jure legal regulation of the whole cannabis market is gaining political acceptability, even if it violates certain outdated elements of the UN conventions. Tensions between countries seeking more flexibility and the UN drug control system and its specialized agencies, as well as with countries strongly in favour of defending the status quo, are likely to further increase. This seems inevitable because the trend towards cannabis regulation appears irreversible and is rapidly gaining more support across the Americas, as well as among many local authorities in Europe that have to face the difficulties and consequences of implementing current control mechanisms.

In the untidy conflict of procedural and political constraints on treaty reforms versus the movement towards a modernized more flexible global drug control regime, the system will likely go through a period of legally dubious interpretations and questionable if not at times hypocritical justifications for national reforms. And the situation is unlikely to change until a tipping point is reached and a group of like-minded countries is ready to engage in the challenge to reconcile the multiple and increasing legal inconsistencies and disputes.

WHO and the scheduling of dronabinol / THC

After the CND adoption in 1991 of the WHO recommendation to deschedule dronabinol from Schedule I to the less stringent Schedule II of the 1971 Convention, scientific research continued and in 2002, the WHO Expert Committee undertook another critical review, eventually concluding that: “The abuse liability of dronabinol is expected to remain very low so long as cannabis continues to be readily available. The Committee considered that the abuse liability of dronabinol does not constitute a substantial risk to public health and society. In accordance with the established scheduling criteria, the Committee considered that dronabinol should be rescheduled to Schedule IV of the 1971 Convention on Psychotropic Substances.”⁵²

But in its subsequent report the Committee reported “no further procedural steps were taken”, explaining that “the procedure was not finished and the Committee’s advice was not sent to the CND at that time”.⁵³ Preparations for a special 2003 CND session had started to raise some political tension related to the midterm review of the targets set at the 1998 UN General Assembly Special Session (UNGASS) on drugs towards “eliminating or significantly reducing the illicit cultivation of the coca bush, the cannabis plant and the opium poppy by the year 2008”.⁵⁴ Halfway through the decade, it was clear that the international community was not on track to achieve these lofty goals. The proposal to move dronabinol to the lightest existing control scheme under the UN conventions, added tensions to an already difficult political environment. Some states, notably the U.S., feared that tabling a WHO proposal saying that the main active ingredient of cannabis has valuable medical properties and consequently does not need to be strictly controlled might send “a wrong signal” at a moment when the effectiveness of the UN drug control strategy in general was being reviewed, and even challenged by others. If the WHO believed the main psychoactive ingredient of cannabis did not require strict UN control, why should cannabis or its resin require such control? What is more, if the treaty system was challenged in relation to the inclusion of cannabis, the substance representing the bulk of the illicit drugs market, would that not undermine the credibility of the UN drug control system as a whole?

Political pressure thus kept the issue off the CND agenda in 2003, but it reappeared a few years later when the WHO

presented to the CND an “updated” recommendation to transfer it to Schedule III. The WHO stated: “Dronabinol has a low abuse risk because there is no cheap synthesis or isolation possible, so the substance is not an easy object for large profits in the world of illicit trade. It is mainly available in oily capsules, which make them less attractive for drug abusers. And we should also not forget that there is an alternative that is abundantly available almost everywhere and that is called cannabis.” Having reviewed all relevant information provided, the WHO concluded that it did not make sense to postpone the decision or to undertake yet another assessment, stressing its “recommendations are based on the principle that there should be evidence for scheduling”.⁵⁵

However, relaxing treaty controls on the main active compound of cannabis was still too politically controversial. As such, the WHO recommendation was not put to a vote, as procedurally required. Instead the CND decided to do precisely what the WHO had said would not make sense: to postpone a decision and ask for yet another assessment. The CND’s inability to deal with evidence-based recommendations conflicting with the drug control ideology of some of its dominant member states was again evident. These political tensions impeded the WHO’s access to necessary financial resources to exercise its treaty mandate, and the Expert Committee was unable to meet for six years following the 2006 meeting; another example of the WHO being sidelined within the internal UN debates.⁵⁶

When in 2012, the Expert Committee managed to organise its next meeting, it discussed whether it should revisit its recommendation on dronabinol. As the Committee was unaware of any new evidence likely to alter the scheduling recommendation made at its previous meeting, it affirmed “the decision to move dronabinol and its stereoisomers from Schedule II to Schedule III of the 1971 Convention should stand”.⁵⁷ At the following CND session in March 2013, however, procedural arguments were used to avoid any discussion of the issue. Calling for yet another assessment would have made a mockery of the whole scheduling procedure as well as demonstrating once again the incapacity of the CND to deal with the underlying conflict between ideology and evidence. Discontent among some countries about this stalemate resulted in the decision to make the issue of scheduling procedures a special agenda item for the CND session in 2014.

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

UN standards of today. If not, a critical mass of dissenters will soon feel forced to opt out of the current system’s strictures, and, using any of the available reservation, modification or denunciation options, use or create a legal mechanism or interpretation to pursue the drug policy reforms they are convinced will most protect the health and safety of their people.

Endnotes

Treaty reform options

- 1 WHO (1952), p. 11
- 2 WHO (1965), p. 11
- 3 Danenberg et al. (2013)
- 4 Commission on Narcotic Drugs, *Exploration of all aspects related to the use of cannabis seeds for illicit purposes*, CND Resolution 52/5, March 2009
- 5 WHO (2012), p. 16
- 6 Danenberg et al. (2013)
- 7 E/CN.7/2014/10 (2014), p. 18.
- 8 United Nations (1973), p.90. The Commentary also emphasized: “In no case can the Commission decide to extent control to a substance if the World Health Organization has not recommended to do it.” And: “It is suggested that the Commission should in principle accept the pharmacological and chemical [i.e. as regards “convertibility”] findings of the World Health Organization. When it does not accept the recommendation of the World Health Organization, it should be guided by other considerations such as those of an administrative or social nature.”
- 9 See for more details E/CN.7/2014/10 (2014), Annex I, Procedure to change the scope of control of substances under the 1961 Convention and the 1971 Convention.
- 10 Danenberg et al. (2013).
- 11 According to the 2009 Constitution: “The State shall protect native and ancestral coca as cultural patrimony, a renewable natural resource of Bolivia’s biodiversity, and as a factor of social cohesion; in its natural state it is not a narcotic. It’s revaluing, production, commercialization and industrialization shall be regulated by law”. Constitution of the Plurinational State of Bolivia, article 384. The Constitution came into effect on February 7, 2009, after more than 61 per cent of voters approved its text in a referendum on January 25, 2009. See: <http://pdba.georgetown.edu/Constitutions/Bolivia/bolivia09.html>
- 12 Jelsma, M. (2011)
- 13 IDPC (2011)
- 14 Helfer (2006), p. 379
- 15 Disproportionately harsh judgements and punishments were justified in the 1578 Inquisition handbook with the argument that “punishment does not take place primarily and per se for the correction and good of the person punished, but for the public good in order that others may become terrified and weaned away from the evils they would commit”. See: Jelsma (2011).
- 16 Blickman (2013)
- 17 TNI/WOLA (2013)
- 18 This is argued for example in Room (2012b).
- 19 Errors in the English translation of the Bolivian reservation have caused confusion and while some have since been rectified, a few remaining but crucial punctuation differences with the Spanish original persist. A correct English version would read: “The Plurinational State of Bolivia reserves the right to allow in its territory: traditional coca leaf chewing; the consumption and use of the coca leaf in its natural state; for cultural and medicinal purpose; such as its use in infusions; and also the cultivation, trade and possession of the coca leaf to the extent necessary for these licit purposes. At the same time, the Plurinational State of Bolivia will continue to take all necessary measures to control the cultivation of coca in order to prevent its abuse and the illicit production of the narcotic drugs which may be extracted from the leaf.”
- 20 United Nations (1973), p. 476.
- 21 United Nations (1969), article 19.
- 22 For a general discussion of treaty interpretation see ASIL and IJA (2006)
- 23 C.N.194.2009.TREATIES-2 (2009).
- 24 All G8 countries, the United States, United Kingdom, France, Italy, Germany, the Russian Federation, Japan and Canada, plus Sweden, Denmark, Singapore, Slovakia, Estonia, Bulgaria, Latvia, Malaysia, Mexico and Ukraine. See: Jelsma (2011).
- 25 E/2011/58 (2011).
- 26 Ibid.
- 27 United Nations (1961), article 48, para. 2.
- 28 The Beckley Foundation published in 2012 a report, edited by Robin Room, detailing the amendments required in order to enable the option of legally regulated markets for all drugs. See: Room (2012a).
- 29 United Nations (1969), article 41.
- 30 Abduca and Metaal (2013)
- 31 Aust (2007), p. 274
- 32 Klabbers (2006), p. 1086
- 33 Klabbers (2006), p. 1088
- 34 *Vienna Convention on the Law of Treaties 1969*, (Done at Vienna on 23 May 1969. Entered into force on 27 January 1980), United Nations, *Treaty Series*, vol. 1155, p. 331. Article 48 says that a “State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty”. Article 62 provides that a “fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of the treaty, and which was not foreseen by the parties” can be invoked as grounds for withdrawing from a treaty if “the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and the effect of the change is radically to transform the extent of obligations still to be performed under the treaty”.
- 35 Leinwand, M. (1971), pp. 413-441
- 36 Room, R., et al. (2008)
- 37 Bewley-Taylor, D. (2002)
- 38 1969 Single Convention on Narcotic Drugs, op.cit., Article 14.
- 39 Helfer, L. R., (2005), p. 1588
- 40 Bewley-Taylor, D., (2012)
- 41 United nations Convention against Transnational Organized crime (2000) and the United Nations Convention against Corruption (2003). See <http://www.unodc.org/unodc/en/treaties/index.html>

- 42 See Bewley-Taylor, D, *International Drug Control: Consensus Fractured*, (Cambridge University press, 2012) pp. 283-290.
- 43 *Commentary 1961 Single Convention*, op.cit., pp. 462-463
- 44 *Commentary 1961 Single Convention*, op.cit., pp. 462,
- 45 For example, *Cannabis Policy: Moving Beyond Stalemate*, op.cit.
- 46 Nine countries are implementing a national alcohol prohibition policy (Afghanistan, Bangladesh, Brunei, Iran, Kuwait, Libya, Saudi Arabia, Sudan and Yemen) and there are many different regulatory models co-existing in the world today, ranging from very restrictive state controls to almost unrestricted free markets. See: http://en.wikipedia.org/wiki/List_of_countries_with_alcohol_prohibition
- 47 Alcohol prohibition did not immediately end when the 21st Amendment was ratified in December 1933. The Amendment left the decision to the states and it was not until 1966 that Mississippi became the last state to repeal prohibition. Even after that many restrictions remained in place at state or county level. Kansas for example did not allow sale of liquor “by the drink” (on premises) until 1987. Quite a few U.S. counties are still “dry” today in the sense that the sale of alcohol is prohibited. See for example: http://en.wikipedia.org/wiki/Prohibition_in_the_United_States#Post-repeal
- 48 See for a summary, background and analysis of the two OAS reports: Youngers (2013).
- 49 OAS (2013a), p. 104.
- 50 OAS (2013a), p. 104.
- 51 *Scenarios for the Drug Problem in the Americas, 2013-2025*, by the Scenario Team appointed by the Organization of American States under the mandate given to the OAS by the Heads of Government of Member States meeting at the 2012 Summit of the Americas in Cartagena de Indias, OAS official records series.
- 52 WHO (2003), p.11
- 53 WHO (2006), pp. 2-3
- 54 A/RES/S-20/2, Political Declaration, General Assembly Special Session on the World Drug Problem, 10 June 1998.
- 55 *WHO Recommendations to the Commission on Narcotic Drugs*, WHO statement at the CND, delivered by W. Scholten, Vienna, March 2007.
- 56 Bewley-Taylor (2012b), pp. 211-213
- 57 E/CN.7/2013/1 (2013), p.6.

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**Drug Prevention and
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**OPEN SOCIETY
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The cannabis plant has been used for spiritual, medicinal and recreational purposes since the early days of civilization. In this report the Transnational Institute and the Global Drug Policy Observatory describe in detail the history of international control and how cannabis was included in the current UN drug control system. Cannabis was condemned by the 1961 Single Convention on Narcotic Drugs as a psychoactive drug with “particularly dangerous properties” and hardly any therapeutic value. Ever since, an increasing number of countries have shown discomfort with the treaty regime’s strictures through soft defections, stretching its legal flexibility to sometimes questionable limits.

Today’s political reality of regulated cannabis markets in Uruguay, Washington and Colorado operating at odds with the UN conventions puts the discussion about options for reform of the global drug control regime on the table. Now that the cracks in the Vienna consensus have reached the point of treaty breach, this discussion is no longer a reformist fantasy. Easy options, however, do not exist; they all entail procedural complications and political obstacles. A coordinated initiative by a group of like-minded countries agreeing to assess possible routes and deciding on a road map for the future seems the most likely scenario for moving forward.

There are good reasons to question the treaty-imposed prohibition model for cannabis control. Not only is the original inclusion of cannabis within the current framework the result of dubious procedures, but the understanding of the drug itself, the dynamics of illicit markets, and the unintended consequences of repressive drug control strategies has increased enormously. The prohibitive model has failed to have any sustained impact in reducing the market, while imposing heavy burdens upon criminal justice systems; producing profoundly negative social and public health impacts; and creating criminal markets supporting organised crime, violence and corruption.

After long accommodating various forms of deviance from its prohibitive ethos, like turning a blind eye to illicit cannabis markets, decriminalisation of possession for personal use, coffeeshops, cannabis social clubs and generous medical marijuana schemes, the regime has now reached a moment of truth. The current policy trend towards legal regulation of the cannabis market as a more promising model for protecting people’s health and safety has changed the drug policy landscape and the terms of the debate. The question facing the international community today is no longer whether or not there is a need to reassess and modernize the UN drug control system, but rather when and how to do it.

Transnational Institute

Since 1996, the TNI Drugs & Democracy programme has been analysing the trends in the illegal drugs market and in drug policies globally. The programme has gained a reputation worldwide as one of the leading international drug policy research institutes and a serious critical watchdog of UN drug control institutions. TNI promotes evidence-based policies guided by the principles of harm reduction and human rights for users and producers, and seeks the reform of the current out-dated UN conventions on drugs, which were inconsistent from the start and have been overtaken by new scientific insights and pragmatic policies that have proven to be more successful. For the past 18 years, the programme has maintained its focus on developments in drug policy and their implications for countries in the South. The strategic objective is to contribute to a more integrated and coherent policy – also at the UN level – where drugs are regarded as a cross-cutting issue within the broader development goals of poverty reduction, public health promotion, human rights protection, peace building and good governance.

Global Drug Policy Observatory

National and international drug policies and programmes that privilege harsh law enforcement and punishment in an effort to eliminate the cultivation, production, trade and use of controlled substances – what has become known as the ‘war on drugs’ – are coming under increased scrutiny. The Global Drug Policy Observatory aims to promote evidence and human rights based drug policy through the comprehensive and rigorous reporting, monitoring and analysis of policy developments at national and international levels. Acting as a platform from which to reach out to and engage with broad and diverse audiences, the initiative aims to help improve the sophistication and horizons of the current policy debate among the media and elite opinion formers as well as within law enforcement and policy making communities. The Observatory engages in a range of research activities that explore not only the dynamics and implications of existing and emerging policy issues, but also the processes behind policy shifts at various levels of governance.