ISSN 2054-2046

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Balancing Treaty Stability and Change:

Inter se modification of the UN drug control conventions to facilitate cannabis regulation

Martin Jelsma, Neil Boister, David Bewley-Taylor, Malgosia Fitzmaurice and John Walsh

Policy Report 7 | March 2018

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Martin Jelsma,[p] Neil Boister,[¨] David Bewley-Taylor,[a] Malgosia Fitzmaurice,[Ω] and John Walsh[*]

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Key Points

- Legal tensions are growing within the international drug control regime as increasing numbers of member states or jurisdictions therein move towards or seriously consider legal regulation of the cannabis market for non-medical purposes, a policy choice not permitted under the existing UN legal framework.
- Reaching a new global consensus to revise or amend the UN drug control conventions to accommodate cannabis regulation, or that of other psychoactive plants and substances currently scheduled in these treaties, does not appear to be a viable political option in the foreseeable future.
- The application of dubious or 'untidy' legal arguments to accommodate regulated cannabis markets does little for the integrity of the regime, undermines respect for international law more broadly and is not sustainable.
- Appealing to human rights obligations can provide powerful arguments to question full compliance with certain drug control treaty provisions, but does not in itself resolve the arguable conflict between different treaty obligations.
- States may wish to adopt a stance of respectful temporary non-compliance as they pursue legally valid and appropriate options for the re-alignment of international obligations with domestic policy.
- The nature of the international drug control regime's internal mechanisms does much to limit avenues for modernisation and forces states to consider extraordinary measures, such as the rightful choice made by Bolivia in relation to coca to withdraw and re-adhere with a new reservation.
- Amongst reform options not requiring consensus, *inter se* modification appears to be the most 'elegant' approach and one that provides a useful safety valve for collective action to adjust a treaty regime arguably frozen in time.
- *Inter se* modification would require the like-minded agreement to include a clear commitment to the original treaty aim to promote the health and welfare of humankind and to the original treaty obligations vis-à-vis countries not party to the agreement.
- A legally-grounded and coordinated collective response has many clear benefits compared to a chaotic scenario of a growing number of different unilateral reservations and questionable re-interpretations.
- Among other things, *inter se* modification would provide opportunities to experiment and learn from different models of regulation as well as open the possibility of international trade enabling small cannabis farmers in traditional Southern producing countries to supply the emerging regulated licit spaces in the global market.
- *Inter se* modification would facilitate the development of what, within an international policy environment characterized by faux consensus, is increasingly necessary: a 'multi-speed drug control system' operating within the boundaries of international law, rather than one that strains against them.

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INTRODUCTION

The drug policy landscape is in a process of profound change, most notably with more and more countries moving towards a legal regulation of the cannabis market. This reality is increasing legal tensions within the international drug control regime, an almost universally accepted treaty-based system currently built on a suite of three UN treaties agreed in 1961[1], 1971[2] and 1988[3]. These are little known examples of so-called 'suppression conventions' that underpin a range of prohibition regimes in international law.[4] Dating back to the first decades of the twentieth century, the bedrock of the regime in its current form is the 1961 Single Convention on Narcotic Drugs (as amended by the 1972 Protocol[5]). As in other issue areas, these pieces of hard law are accompanied by periodic soft law instruments (Political Declarations and variations thereof) and supported by several treaty bodies and agencies to create what is intended to be an internally coherent and mutually reinforcing legal framework.

The regime's overarching goal as expressed in the preamble of the Single Convention is to safeguard the 'health and welfare' of humankind. In so doing it applies a dual imperative: to ensure an adequate supply of controlled drugs for the licit market—including World Health Organization (WHO) listed essential medicines—and at the same time to prevent the non-scientific and non-medical production, supply, and use of narcotic and psychotropic substances. Within this context, the system has been developed on two interconnected tenets. First, a deeply held belief that the best way to protect health and reduce what has become known simply and somewhat vaguely as the 'world drug problem' and the harms associated with it is to minimize the scale of—and ultimately eliminate—the illicit market. And second, that this objective can be achieved through reliance on prohibition-oriented and supply-side dominated measures.[6] In this way, and while permitting some deviation from its authoritative norm, the regime has succeeded in generating a powerful prohibitionist expectancy with respect to how its members approach the non-medical and non-scientific use of substances scheduled in the UN drug control conventions.[7]

Cannabis use is expressly limited to medical and scientific purposes by the regime with Article 4 of the Single Convention obliging all parties to that treaty 'to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs' listed in its schedules.[8] Cannabis, moreover, has been placed under the strictest of the drug conventions' control schedules.[9] Yet the substance is, and has long been, by far the world's most widely used illicit drug.[10] Moreover, in recent years, constituencies in a growing number of countries have been questioning the wisdom of adhering to a strategy of prohibiting non-medical cannabis use, as the drug conventions insist.

Rather than persist with decades-long efforts at banning cannabis markets, citizens and governments of an increasing number of sub-national and national jurisdictions are deciding to instead provide for legal, regulated access to cannabis for medical use as well as for adults for non-medical purposes. The International Narcotics Control Board (INCB or Board)—according to its own literature, the 'independent and quasi-judicial expert body' for 'monitoring and supporting Governments' compliance with the international drug control treaties'[11]—has condemned these steps as contrary to states' international obligations under the drug treaties. In its Annual Report for 2016, the INCB commented on Canada's intention to move to a regulated market for cannabis:

> *Canada is party to all three international drug control treaties. The Government has initiated a process that has as its goal the legalization and regulation of access to cannabis for non-medical use. The Board notes that the legalization of the use of cannabis for non-medical purposes is inconsistent with the provisions of the 1961 and 1988 Conventions because the Conventions oblige States parties to limit the use of narcotic drugs exclusively to medical and scientific purposes. That limitation, expressed in article 4, paragraph (c), of the 1961 Convention, is binding on all parties; regulating the use of drugs outside medical and scientific purposes is not allowed under the Convention. The limitation of the use of drugs to medical and scientific purposes is a fundamental principle that lies at the heart of the international drug control framework, to which no exception is possible and which gives no room for flexibility. The Board urges the Government to pursue its stated objectives—namely the promotion of health, the protection of young people and the decriminalization of minor, non-violent offences—within the existing drug control system of the Conventions.*[12]

The Board has commented similarly on cannabis policy developments in other States Parties to the UN drug treaties—notably the United States of America, Uruguay, Jamaica and the Netherlands—making its position crystal clear: the existing drug treaties provide zero 'wiggle room' for regulating cannabis for non-medical purposes. Moreover, the INCB has taken pains to underscore that the 'strict prohibition of non-medical use set out in the 1961 Convention' applies fully to states with federal structures of government. In other words, if 'sub-national Governments have taken measures towards legalizing and regulating the non-medical use of cannabis, despite federal law to the contrary' (as is quite evidently the situation today in the United States of America) then such developments are 'in violation of the international drug control legal framework.'[13]

To be sure, the drug treaties do afford certain latitude for countries, providing considerable room for manoeuvre for national and local policy makers on a range of crucial issues, including the decriminalization of the possession of drugs for personal use and implementation of an array of harm reduction services. The INCB, for its part, has often promoted overly restrictive interpretations of what the treaties do and do not permit, thereby creating unwarranted impediments to policies that are widely recognized as fitting comfortably within the confines of the treaties.[14] But there are in fact limits to the policies permissible under the treaties, and one of the clearest such limits is that legally regulated access to non-medical cannabis (or non-medical use of any of the other over 100 substances within the treaties' purview, for that matter[15]) is out of bounds. Notwithstanding the clear and oft-repeated stance of the INCB, however, reforms to legalize and regulate cannabis are moving forward. Laws are being enacted, regulatory systems are being implemented, and regulated markets are taking shape: all posing considerable challenges to the international legal framework for drug control in its current form.

Movement toward legal regulation of non-medical cannabis is most obvious in the Americas, namely in the United States of America, Uruguay, and Canada. Beginning with the states of Colorado and Washington in 2012, eight U.S. states and District of Columbia have now approved ballot initiatives to legalize cannabis for non-medical uses, despite the fact that cannabis remains illegal under U.S. federal law. In January 2018, Vermont became the first U.S. state to legalize adult-use cannabis through the legislature (rather than via ballot initiative). The ten jurisdictions where adult-use cannabis is now legal under state law—including California, the nation's most populous state—are home to more than

one in five Americans. The generally positive experiences of the early adopters, such as Colorado, are being observed closely, and the number of states opting for regulation instead of prohibition appears poised to grow in the years to come.[16]

In January 2018, President Donald Trump's Attorney General, Jeff Sessions, rescinded Obama-era Justice Department guidelines (the August 2013 'Cole memo')[17] that had provided qualified federal accommodation for state-legal cannabis, so long as the states had robust regulatory systems in place and were meeting specified federal enforcement priorities. Sessions' decision to rescind the Cole memo has amplified the uncertainties about the enforcement risks faced by participants in the state-legal cannabis markets. But the Attorney General's move has also prompted state officials and growing cadres in the U.S. Congress to intensify efforts for bipartisan legislation to protect state-level cannabis reforms against federal intervention, and ultimately to modify federal law to accommodate state-legal regulation of non-medical cannabis.

Notwithstanding Sessions' intentions, the momentum remains clearly on the side of legal regulation in the United States, with most Americans[18]—and especially younger voters—in favour of legal cannabis, and large bipartisan majorities opposed to federal intervention against states that do choose to legalize.[19] Tellingly, the approval of Vermont's new law to provide legal access to cannabis came just days after Sessions rescinded the Cole memo. In a politically polarized country, legal cannabis stands out as one of the few policy areas with bipartisan appeal.[20] In short, the legal cannabis genie is out of the proverbial bottle—due to the decisions of the citizens and elected representatives of a growing number of U.S. states—and it is difficult to imagine that the U.S. federal government, regardless of who is in charge, will be able to put that genie back in the bottle. It even appears likely that Attorney General Sessions' effort to turn back the clock on cannabis reform will help achieve the opposite result, hastening the day when a bipartisan coalition in the Congress is able to revise U.S. federal law to explicitly allow the states to regulate cannabis.

Even before the November 2012 passage of the Colorado and Washington State ballot initiatives, President José 'Pepe' Mujica of Uruguay proposed in June 2012 that his country should regulate cannabis nationwide. Uruguay's parliament ultimately approved a law to do so in December 2013. Uruguay began sales of non-medical cannabis in July 2017 and already more than 21,500 Uruguayans are registered to make legal purchases of the cannabis grown by government-licensed producers. Meanwhile, more than 8,100 people are registered to cultivate cannabis for personal use, and nearly 80 civil associations have obtained a license to grow collectively for their members.[21] Uruguayan authorities estimate that some 20 percent of the country's cannabis users are now registered to legally access cannabis across these distinct regulated sources.[22] In contrast to the situation in the United States, where citizens have led reform efforts and elected officials have begun to follow, Uruguay's reform was spearheaded by elected officials, despite tepid support for the effort among the general Uruguayan public. Nevertheless, as implementation of the 2013 law has unfolded, public acceptance in Uruguay has gradually increased, and the law itself now appears settled in place, without great risk of reversal by future governments, even though modifications will doubtless be required as the law's implementation proceeds.

In Canada, Prime Minster Justin Trudeau's government introduced legislation in April 2017 to regulate cannabis for non-medical uses. Building on the report of a federally appointed task force,[23] debate is taking place in the Canadian parliament, with ultimate approval of

laws to regulate cannabis likely in the course of 2018. Canada is thus poised to become the first G7 country to legalize and regulate adult-use cannabis. As in the United States, public opinion in Canada is decidedly in favour of legal regulation,[24] and it is difficult to imagine the scenario in which Canada's government would opt to return to a prohibitionist-oriented approach to cannabis that has become so widely discredited in the country.

Meanwhile, a diverse group of Latin American and Caribbean countries—including Argentina, Chile, Colombia, Jamaica, Mexico and Peru—are enacting and implementing a range of medical cannabis systems. Such systems are, if implemented in line with certain provisions, permitted within the treaty framework. But the fact that a variety of states are now taking up medical cannabis in some form is further evidence of a change in outlook within the region. The shifts on cannabis policy underway in the Americas are also contributing to renewed debate and proposals for cannabis regulation at local and national levels in Europe and Oceania. For example, the new Dutch government has announced that it will be permitting local experiments in regulated cannabis production to supply the country's cannabis 'coffeeshops,' where purchase and use is tolerated. In New Zealand, the new governing coalition has committed to holding a nationwide ballot initiative on whether to legalize cannabis, before elections in 2020.

Against this backdrop of already-enacted reforms and new proposals for legally regulating cannabis, the WHO's Expert Committee on Drug Dependence (ECDD) has initiated a pre-review process for cannabis and has announced that it will convene a special meeting in June 2018 to discuss the classification of cannabis under the drug conventions. It is important to appreciate that the original inclusion of cannabis within the current international framework is the result of questionable procedures and dubious evidence. With the last review conducted in 1935, no formal evaluation that meets currently accepted standards of scientific knowledge has ever taken place.[25]

As incipient as legal regulation of non-medical cannabis may be—with formal regulatory systems only emerging in the last few years—regulation appears unlikely to be merely a fleeting whim or a passing fad. It would be more prudent to expect that the shift toward regulation consolidates and expands, at least among democracies. As the INCB points out in its latest Annual Report, '[l]egislation and policy pertaining to cannabis continue to shift throughout North America. Changes to national and local laws are expected to continue throughout 2017 and into 2018'.[26] The existing instances of legal regulation, in the U.S. and in Uruguay, are already clearly out of compliance with the provisions of the UN drug treaties. As more nations contemplate and take the step of legally regulating cannabis—as Canada is poised to do in 2018—these treaty tensions will continue to mount. In anticipation of such a scenario, in which a growing number of jurisdictions opt for cannabis regulation, despite the obvious breach of the drug treaties that such a reform entails, governments and the UN system should give serious consideration to options for managing these policy shifts in ways that can help to reinforce the UN pillars of peace and security, human rights, development, and the rule of law, and in ways that can help to modernize the drug treaty regime itself.

The treaty tensions surrounding the move in some countries toward legal regulation have become the 'elephant in the room' in key high-level drug policy forums, including the April 2016 UN General Assembly Special Session (UNGASS) on drugs—obviously present, but studiously ignored. Different countries and international agencies have different reasons for seeking to avoid directly engaging the question of what exactly to do about these tensions. But the kinds of treaty breaches that

may have seemed merely hypothetical only a few years ago are already a reality today and will not simply fade away. Ignoring the elephant in the room—to extend the metaphor—will not make it vanish; the more likely scenario is that more elephants will be showing up. The urgency to develop well-grounded legal options relating to cannabis regulation and the future evolution of the UN drug control framework is thus increasing. The time is right for the discussion of concrete proposals for moving forward on the path of legal regulation with due respect for international law—a crucial consideration for not only the international drug control regime itself but also the wider international legal system of which it is a part.

This policy report aims to offer exactly such proposals for consideration and debate, convinced that grappling openly now with the complex legal and political questions involved is better than denying or deflecting the challenge. Building on the ideas and discussions generated across two expert seminars organized in 2014 and 2017, and that involved international lawyers and experts from beyond the realm of drug policy,[27] this report considers some of the legal avenues available to governments seeking to align their new domestic cannabis regulatory laws with their international obligations. It assesses the feasibility and desirability of a number of different legal options with several key contexts in mind: the comparatively rigid structure and inertial functioning of the international drug control regime itself; the foreseeable procedural and political obstacles that different alignment strategies may face, given the state of the global debate on cannabis; and the wider menu of options that international law offers so as to find the balance between ensuring treaty regime stability and allowing for changes in light of new circumstances and new understandings.

The report begins with a brief review of the different positions adopted by the U.S. federal government and by Uruguay regarding treaty tensions around cannabis regulation. We then offer a sketch of how governments that opt to regulate cannabis could acknowledge, with due respect for international law, that their reform will inevitably entail a temporary and transitional period of non-compliance with some provisions of the drug treaties, and that they will undertake the steps that will be required to align their new cannabis laws with their international legal obligations. Having explored aspects of the contemporary policy landscape, the report moves on to describe the inter-locking impediments to regime evolution that characterize the UN drug control treaty system and its decision-making machinery and processes. This analysis of the regime's comparative stasis, what has been described as a 'Jurassic system' and one that almost seems 'frozen in time',[28] helps to understand why, in an effort to align cannabis regulation with states' international legal obligations, recourse to relatively extraordinary *legal* strategies may be not only defensible, but even desirable.

With this context in mind, we then explore in detail the rationale, potential legitimacy, and feasibility of the *inter se* option for treaty modification, whereby a group of two or more like-minded states could conclude agreements among themselves that permit the production, trade, and consumption of cannabis for non-medical and non-scientific purposes, while minimizing the impact on other states and on the goals of the drug conventions. The report concludes that the option of *inter se* modification holds enormous promise and merits careful consideration for application by like-minded states, not only as an immediate and legitimate safety valve for the rising treaty tensions around cannabis regulation, but as the basis for like-minded countries to promote and deepen the discussion on how—in the words of UNODC's Executive Director from ten years ago—"to make the [drug] conventions fit for purpose and adapt them to a reality on the ground that is considerably different from the time they were drafted."[29]

Efforts to deny or side-step questions of compliance

The two States Parties to the UN drug conventions that have thus far proceeded with implementation of formal non-medical cannabis markets are the United States and Uruguay. Their situations are very different, and they have provided contrasting commentaries on the implications of their moves.

U.S. officials, for their part, have argued that since the cultivation, trade, and possession of cannabis taking place in multiple U.S. states remain criminal offenses under U.S. federal law, the federal government as State Party to the conventions is not in breach. U.S. officials have maintained, moreover, that the existing treaty framework possesses sufficient flexibility to allow for regulated cannabis markets.[30] These arguments are strained by any reasonable understanding of the treaties and their overtly prohibitionist aims, including with regard to cannabis.[31] The main objective of the U.S. 'flexibility' argument, which was fashioned in the lead up to the 2016 UNGASS, was likely to 'prevent clear treaty breaches of state-level cannabis legalization initiatives from triggering an open international debate on treaty reform.'[32] Indeed, as a political stance, the U.S. position undoubtedly succeeded in shaping the UNGASS debate. Governments deliberately avoided discussing the issue and concluded the high-level meeting with an outcome document declaring that new challenges 'should be addressed in conformity with the three international drug control conventions, which allow for *sufficient flexibility* for States parties to design and implement national drug policies according to their priorities and needs…' (Emphasis added).[33]

The U.S. arguments with respect to treaty compliance on cannabis regulation arise from the conundrum that state-level legalization creates for the federal level of U.S. government. The United States was, despite complex bureaucratic infighting within Washington, the chief architect of the 1961 Single Convention, including placing cannabis under the strictest control measures. Moreover, the U.S. government has long been considered the most ardent champion of the drug treaties, and the foremost proponent of the treaties' full and vigorous implementation.[34] While certainly the result of multinational endeavour, the creation and enforcement of the global cannabis prohibition regime has, in short, been a significant U.S. domestic and foreign policy priority across decades.[35] Under the U.S. federal system, however, the various states do enjoy appreciable leeway to shape their policies in ways that can diverge from federal laws and preferences. As citizens in some states have begun to replace cannabis prohibition with laws to regulate cannabis, the U.S. federal government has found itself with limited options to push back. The Obama administration's August 2013 decision (spelled out in the Justice Department's Cole memo) to provide the states with a policy of qualified accommodation expressed the recognition that—for a variety of legal, political, and practical reasons—the federal government would find it very difficult to impede the states from moving ahead with cannabis regulation.

Under the Trump administration, Attorney General Sessions has made clear his animus toward legal cannabis, and by doing away with the Obama-era guidance, Sessions has certainly heightened concerns over how federal enforcement powers will be wielded. But the states should not be expected to reverse course, even if the Trump administration expends significant political capital in an effort to compel them. This leaves the U.S. federal government in the same awkward situation that began in November 2012 when the voters of Colorado and Washington State approved their ballot initiatives: unable to undo the states' reforms, and therefore out of compliance with the drug treaties. This is so despite the United States' long history of wielding its power and influence on behalf of those very treaties—including via the 'certification' and 'presidential determination' processes[36]—and in particular on behalf of maintaining cannabis prohibition.

Especially with the 2016 UNGASS looming, U.S. officials were not about to acknowledge difficulties in complying with the treaties on cannabis, and thus fashioned a two-pronged argument—federalism and flexibility—to deny that U.S. treaty compliance was in any doubt. As noted above, both of these arguments have been clearly, repeatedly, and categorically rejected by the INCB. As proper *legal* arguments, the U.S. assertions do not withstand scrutiny.[37] At the same time, as a *political* response to the awkward reality that faces the U.S. federal government—states are proceeding ahead with regulation and the federal government can do little to stop them—the U.S. posture of citing federalism and asserting treaty flexibility to deny non-compliance succeeded in keeping the cannabis treaty tensions off-stage at the UNGASS.

Success in the short-term, however, does not necessarily mean that the U.S. stance will have staying power, especially because the underlying legal basis for the political posture is so flimsy. In the scenario that the U.S. Congress eventually revises federal law to formally accommodate regulated cannabis, the federalism explanation will certainly no longer be possible (to be clear, it is not a legitimate argument from the treaty compliance standpoint today). And unwarranted assertions of treaty flexibility, though politically useful thus far for the United States vis-à-vis cannabis regulation and the drug treaties, will likely wear thin over time even for—or especially for—the United States itself, as other states may assert the existence of treaty 'flexibilities' for their own political purposes across different treaty regimes, and in ways that the U.S. and other governments may find to be problematic.

At the same time, the proclaimed 'flexibility' that might seem initially alluring for a number of other states may look less appealing if it proves to not be so universally available after all. In a unilateral 'a la carte' approach to multilateral treaty obligations, where would the judgement on the use of flexibility reside? What if the U.S. government (or other relatively powerful countries) considers itself the implicit arbiter of flexibility, deciding which countries can really avail themselves of the latitude that supposedly exists? Having asserted flexibility as a way to manage its own political dilemma around cannabis and the treaties, the United States may, for example, wish to use its power to block other states from availing themselves of similar flexibilities.[38] As Lines, Barrett and Gallahue presciently argued in 2014, 'the flexibility that the U.S. seeks for itself may not extend to others at all'.[39] In 2015, amid early and generalised discussions concerning the creation of legal cannabis markets in Jamaica, Washington strongly opposed any move on the grounds that Jamaica was a transit country. Further, as discussed below, it is important to recall how the U.S. vehemently objected to the moves undertaken by Bolivia to defend domestic uses of the coca leaf and rallied international opposition against them.

Thus, a selective approach to treaty compliance, though it has proven politically tenable for the United States so far regarding cannabis regulation, is unlikely to age well or advantage other states. Indeed, the United States, like other countries where cannabis regulation is taking place, would be well advised to explore legally valid options to align its new cannabis realities with its international obligations.

For its part, Uruguay has argued that its policy is fully in line with the original objectives that the drug control treaties emphasized but have subsequently failed to achieve: namely, the protection of the health and welfare of humankind. While there can be little doubt that Uruguay is indeed also contravening its obligation under the Single Convention to limit cannabis exclusively to medical and scientific purposes, Uruguay has sought to place the drug treaties in the context of the country's adherence to its more foundational obligations under international law. Uruguayan authorities have specifically argued that the creation of a regulated market for adult use of cannabis

is driven by health and security imperatives and is therefore an issue of human rights. As such, officials point to wider UN human rights obligations that need to be respected, specifically appealing to the precedence of human rights principles over drug control obligations within the UN system as a whole. In the event of a conflict between human rights obligations and drug control requirements, they argue, Uruguay is bound to give priority to its human rights obligations.[40]

The argument for the priority of human rights obligations in matters of drug control is not a new one for Uruguay. In 2008, Uruguay sponsored a resolution at the Commission on Narcotic Drugs (CND), the UN's central policy making body on the issue, to ensure the promotion of human rights in the implementation of the international drug control treaties.[41] In 2015, Uruguay co-sponsored the UN Human Rights Council resolution that called upon the UN High Commissioner for Human Rights (OHCHR) to prepare a report 'on the impact of the world drug problem on the enjoyment of human rights.'[42] In its contribution to OHCHR's preparations, Uruguay laid out its stance regarding the primacy of human rights:

> *We reaffirm the importance of ensuring the human rights system, underscoring that human rights are universal, intrinsic, interdependent and inalienable, and that is the obligation of States to guarantee their priority over other international agreements, emphasizing the international drug control conventions.*[43]

Nor is Uruguay alone in asserting the centrality of human rights principles in matters of drug policy. Indeed, the UN General Assembly's 2014 resolution on international drug control cooperation noted explicitly that drug control efforts.

> *…must be carried out in full conformity with the purposes and principles of the Charter of the United Nations and other provisions of international law, the Universal Declaration of Human Rights and the Vienna Declaration and Programme of Action on human rights and, in particular, with full respect for the sovereignty and territorial integrity of States, for the principle of non-intervention in the internal affairs of States and for all human rights and fundamental freedoms, and on the basis of the principles of equal rights and mutual respect.*[44]

Moreover, Uruguay's argument that human rights protections take precedence over drug control requirements also finds explicit support in the 2010 report to the UN General Assembly by the UN Special Rapporteur on the Right to Health, which signalled that 'When the goals and approaches of the international drug control regime and international human rights regime conflict, it is clear that human rights obligations should prevail.'[45]

Uruguay's emphasis on human rights obligations in defending its law to regulate cannabis for non-medical and non-scientific purposes—notwithstanding drug treaty provisions that expressly forbid such an approach—is thus consistent with Uruguay's own general trajectory in support of international law and has a clear basis within the UN system. By contrast to the U.S. posture of denying non-compliance and asserting treaty flexibility, Uruguay's human rights-based argument is coherent with the country's rationale for revising its cannabis law in the first place and has prompted further research that lends support to Uruguay's approach.[46]

Moreover, while reluctant to acknowledge its cannabis regulation model represents non-compliance with the drug treaties, Uruguay has noted that it creates legal tensions within the treaty system that may require revision and modernization to accommodate it. At the 2013 CND session in Vienna, for example, Diego Cánepa, head of the Uruguayan delegation, declared: 'Today more than ever we need the leadership and courage to discuss if a

revision and modernization is required of the international instruments adopted over the last fifty years.'[47]

As the first country willing to take the step of regulating cannabis for non-medical uses, it is significant that Uruguay has justified its reform with reference to its overarching human rights obligations under international law. The human rights rationale for adopting a regulatory approach provides a powerful case for moving ahead, even though regulation will inevitably entail breaching certain drug treaty obligations. But the human rights arguments for regulation, however valid, do not automatically resolve the legal conflict; drug treaty obligations are still being breached by the country that opts to regulate non-medical cannabis. Although the human rights arguments do not erase the issue of non-compliance, they do provide a strong justification for a country to enter into a temporary period of non-compliance with the goal of formally altering its relationship to the obligations that it can no longer meet. As discussed below, such a period of transitionary 'respectful non-compliance' could set the stage for two or more States to avail themselves of the *inter se* option for treaty modification, concluding agreements among themselves that permit the production, trade, and consumption of cannabis for non-medical and non-scientific purposes.

As things stand, the current use of 'untidy legal justifications'[48] to deny or to side step compliance questions have certainly permitted both the United States and Uruguay to deflect much criticism concerning what are obvious treaty breaches. That said, despite—in terms of international law—justifiable censure from the INCB and some member states, the more widespread calculated political denial that currently pervades the conference rooms of Vienna,[49] the part of the UN where most multinational discussion on drug policy takes place, is certainly not tenable in the long term.

Respectful non-compliance and the pursuit of legally valid options for re-alignment with international obligations

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

Under such conditions, it is not difficult to understand why many countries would prefer to avoid or delay confronting the treaty questions raised by cannabis regulation. Indeed, such concerns go far in explaining the attraction of the legally fallacious—but politically potent—stance that the drug treaties as they stand are flexible enough to accommodate the regulation of adult use cannabis. But the costs of adhering to such a legal fiction are likely to grow over time, at the expense of the reputations of the states that cling to it, and to the detriment of compliance with the drug control treaties themselves as well as international law more broadly.

Within this context, another option—in this case a transitionary one—is worth considering: the respectful acknowledgment of a state of temporary non-compliance. This would open the door for the careful consideration of the procedures that would allow cannabis regulation to move forward in accord with, rather than outside, international law. The appeal of such an approach is enhanced

when one considers the fluid state of the international drug policy landscape. Such fluidity includes not only the changing position on the legal status of cannabis of a growing number of member states, nations that might be willing to be part of a like-minded group, but also the ongoing ECDD review of the place of cannabis within the treaty schedules.

Under such circumstances, states that wish to proceed with legal regulation could candidly acknowledge that doing so would result in non-compliance. However, this would not involve the pursuit of non-compliance as a legally disruptive end in itself, or along the lines as what has been referred to as 'operational noncompliance'.[50] Rather, the State could present the reasons for its national policy reform, how its reforms will affect compliance, and—crucially—make clear its commitment to achieving realignment through valid procedures as soon as possible. As Posner and Sykes point out in their discussion of what they call 'efficient breach', sometimes 'a situation arises' when 'temporary deviation' is the best option.[51] In this context, the recognition of the fact that a State can no longer fully comply with the conventions' obligations regarding cannabis need not be seen as disrespect for international law. To the contrary, acknowledging non-compliance and committing to resolve the situation underscores that treaty commitments matter. Waving away worries about non-compliance by resorting to dubious legal justifications is much more an expression of disrespect for international law.[52] Moreover, such a 'holding' position of respectful, temporary non-compliance would allow for the implementation of domestic policy shifts without the immediate need for re-alignment of national legislation with international law. Although it can be argued that a neat sequential adjustment of multilateral commitments and subsequent alterations in national law would be the optimal legal approach, the inherent rigidity of the UN drug control framework makes this prospect unrealistic. This is especially so within timetables that are domestically acceptable and in circumstances where a state is seeking to minimize negative consequences for both itself, including those relating to reputation, and the regime.[53]

To be sure, the argument that states wishing to implement regulated cannabis markets in compliance with international law should take their time to carefully consider all options and follow correct protocol is strengthened in light of the drug control regime's systemic resistance to substantive change and the complications that this entails. And it is to some of the structural sources of this inertia that we now turn our attention.

THE INTERNATIONAL DRUG CONTROL REGIME'S (LIMITED) CAPACITY FOR CHANGE

As suggested in the preceding discussion, the regime does have some capacity for change and evolution. A useful taxonomy to help understand the mechanisms and process behind such transformation can be derived from the ideas of Diehl and Ku regarding two distinct but inter-related aspects of international law: *operating systems* and *normative systems*.[54]

The regime's operating system

Viewing treaties as core to any regime's operating system and 'an important repository of modes or techniques for change'[55] several processes can be identified to show how the international drug control regime has changed over time. To be sure, while the course of multilateral drug control is sometimes portrayed as 'a smooth continuum connecting events in the first decade of the twentieth century to the present day; an arc of unbroken progress incorporating both soft and hard law instruments alike', a strong case can be made that the Single Convention itself was more than

just a consolidating treaty.[56] Rather, although largely successful in achieving this goal, its passage should be regarded as a significant 'watershed' event when the 'multilateral framework shifted away from regulation and introduced a more prohibitive ethos to the issue of drug control'.[57]

Moreover, in codifying into a single instrument most of the pre-1961 'foundational treaties,' including those under the League of Nations, the Convention was originally intended to be the 'book of books' and the last word in international drug control.[58] Nonetheless, in response to changes in the nature of the illicit drug market in the following years, member states—notable amongst them the United States—felt it necessary to strengthen and expand the UN control framework at various points. Consequently, as well as itself being amended in 1972, the Single Convention was supplemented by the 1971 Convention on Psychotropic Substances and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This was an expansion and evolution of the regime paradoxically necessitated by the ineffectiveness of the Single Convention itself.

From an operating system perspective, it is also important to appreciate not only the capacity of the regime to expand its purview through the development of new instruments but also the availability of structural mechanisms for change within the conventions themselves. Key among these is treaty modification, a process that allows for constant adjustment in the scope of the regime via the scheduling procedure. As noted elsewhere, while 'often viewed as an obscure issue' scheduling 'lies at the core of the functioning of the international drug control system.'[59] Based on recommendations from the WHO (or more precisely, as noted above, the ECDD) the Vienna-based 53-member CND makes decisions on adding, removing, or transferring between schedules or conventions narcotic drugs and psychotropic substances under international control as laid out in the Single Convention and the 1971 Convention. Provisions concerning changes in the 'scope of control' are contained within articles 3 and 2 of those conventions respectively. Additionally, in line with Article 12 of the 1988 Convention, the Commission decides on the inclusion in, deletion from, or transfer between its 'tables' 'Substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances,' more commonly referred to as pre-cursors. This decision is made upon recommendations from the INCB. Created under the Single Convention and established in 1968, the INCB is the product of a merging of two much older bodies: The Permanent Central Opium Board, created by the 1925 International Opium Convention and the Drug Supervisory Body, created by the 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotics Drugs.

At a more substantive level, the drug control treaties also allow for revision through amendment: the formal alteration of a convention article or articles. This option is provided for in Article 47 of the Single Convention, Article 30 of the 1971 Convention and Article 31 of the 1988 Convention. Procedures for amending both the 1961 and 1971 Conventions are almost identical. Parties can at any time notify the UN Secretary-General (UNSG) of a proposal for an amendment, including the reasoning behind the move. The UNSG then communicates the proposed amendment and reasons for it to the parties and the CND's parent body, the Economic and Social Council (ECOSOC or Council), which, depending upon their responses, decides on how to proceed. The amendment procedure of the 1988 Convention differs subtly from its antecedents. In the first instance, the Council is bypassed and the UNSG proceeds on their own authority to circulate the proposed amendment and the reasoning behind it to the parties to the Convention and to inquire whether they accept it.[60]

It was the use of Article 47 of the Single Convention that began the process leading to the Amending Protocol in 1972. Then, owing much to the energetic endeavours of Washington, ECOSOC passed a resolution calling for a plenipotentiary conference to amend the Convention[61] with U.S. diplomats arguing 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 on its strengths and weaknesses.'[62] Held in Geneva, the resulting conference was sponsored by 31 nations, attended by representatives from 97 states and considered an extensive set of amendments. The product of the meeting, the Protocol Amending the Single Convention on Narcotic Drugs, was signed on 25 March 1972 and came into force in August 1975.[63] Rather than making dramatic changes to the Single Convention, the Amending Protocol fine-tuned existing provisions relating to the drug estimates system, data collection and output, while also strengthening law enforcement measures and extradition and the functioning of the Board.[64] Importantly, following provisions within the 1971 Convention, it drew attention to the need to provide treatment and alternatives to penal sanctions for drug users.

All that said, while Article 47 facilitated appreciable treaty revision in the early 1970s and substances are scheduled and rescheduled on a regular basis, both amendment and modification of all three conventions are highly susceptible to blocking action of states wishing, for whatever reason, to preserve the existing shape of the regime. In terms of alteration of schedules, and with its origins dating back to the 1931 Convention,[65] the Single Convention requires a simple majority of CND member states. For the 1971 Convention, a decision of two-thirds is required. Both treaties also include a facility whereby the request of one Party can trigger the appeal of a scheduling decision to the Council, whose majority-based verdict is final.[66] Although the Board rather than WHO takes the lead in the modification process, similar issues pertain regarding the 1988 Convention. Like the 1971 Convention, the Commission's decision must be carried with a two-thirds majority and again any Party can initiate a review of the CND's decision by the Council. As with the earlier Conventions, ECOSOC may confirm, alter, or reverse the decision of the Commission.

Similarly, procedures within all three treaties allow even limited opposition to a proposed amendment to thwart the initiative. For both the 1961 and 1971 Conventions, if no Party rejects the amendment within 18 months after circulation 'it shall thereupon enter into force.' (Article 47 (2) and Article 30 (2) respectively). However, if a proposed amendment is rejected by one or more parties, the Council may follow suit in 'response to objections and the substantial arguments provided'[67] or decide whether a conference should be called to consider the amendment. As well as operating on a more generous timetable, provisions within the 1988 Convention differ somewhat in other respects. According to Article 31 (1), if a proposed and circulated amendment has not been rejected by any party within 24 months, 'it shall be deemed to have been accepted and shall enter into force in respect of a Party…' However, moving away from 'tacit approval' within the earlier treaties,[68] this comes into effect ninety days after 'that party has deposited with the Secretary General an instrument expressing its consent to be bound by that amendment.' In this case, if the proposed amendment is rejected by any party, the UNSG must consult with the parties and 'if a majority so requests, bring the matter to the Council which may decide to call a conference.' (Article 31 (2)).

The origins of the provisions for amendment within the current UN conventions appear to stem from articles concerning 'revisions' in the 1931 Convention and the 1936 Convention for the Suppression of the illicit Traffic in Dangerous Drugs, the only foundational treaties to contain such mechanisms.[69] The

approach may also have been influenced by Article 22 of the 1953 Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International Whole Trade in and Use of Opium.[70] This was a treaty that came into force in 1962 only to be superseded by the 1961 instrument in 1964.[71] Although the thresholds and bodies involved in the pre-UN treaties differ to those within the existing regime, the option of convening all the parties to discuss proposed amendments is complicated relative to more recent instruments in other issue areas.[72] This is the case in spite of efforts at the 1961 plenipotentiary conference to reduce the complexity of the process contained in early drafts of the Single Convention. As a reading of the *travaux* reveals, discussions around the amendment procedures focused on keeping the process of whether to convene a conference to consider amendments as simple as possible with the outcome leaving much discretion with ECOSOC.[73]

As such, despite some differences in approach for both modification and amendment, the result is the same. Although formal mechanisms for revision exist within all the treaty texts and consequently generate the impression of dynamism, the reality is stasis on anything other than non-controversial issues. On this point, it is worth recalling a message within the first edition of the *World Drug Report* in 1997. Then the United Nations International Drug Control Programme, forerunner of the current UN agency responsible for coordinating international drug control activities, the United Nations Office on Drugs (UNODC), noted that 'Laws—even the international Conventions—are not written in stone; they can be changed when the democratic will of nations so wishes it.'[74] With regard to amendment in particular, while remarkably progressive for a UN document, sentiment within the publication belies the daunting political and procedural obstacles confronting any member state or states wishing to initiate a formal change of the current regime. This is particularly so during the current era when, unlike the early 1970s, there is significant divergence in the way regime members are choosing to deal with substances deemed illicit for anything other than medical and scientific purposes. Further complicating the situation is the often-contradictory approach to protecting regime integrity deployed by parties who are themselves deviating in one way or another from the regime's authoritative norm; the U.S. position on cannabis being a case in point.

The regime's normative system

Indeed, while, as in other issue area regimes, norms are important in the overall functioning of the regime, they are particularly relevant to the last aspect of its operating system to be discussed here, the generation of resolutions and decisions by bodies such as the CND, ECOSOC, and the UN General Assembly. An important component of treaty evolution, arguably it is here where amalgamation of the regime's operating and normative systems is most obvious. This is the case since, working within the over-arching principles of the regime framework, resolutions and decisions do much to reaffirm or adjust the regime's normative tone and character. Although non-binding, resolutions in particular are considered to have some moral weight. This is particularly so regarding the products of the CND's 'Committee of the Whole' (CoW), the technical committee where resolutions are negotiated and agreed upon before being submitted to the CND Plenary, and then ECOSOC, for the formality of adoption.[75] It is consequently in the CoW that on some occasions parties engage in laboured and even heated debates and negotiations on specific issues and how they relate to interpretative practice around both the letter and the spirit of the treaties. Considerable diplomatic capital may be invested in this process because interpretations that remain uncontested by other parties within the Commission can over time become part of acceptable scope for interpretation and shift the regime's normative

focus.[76] It is plausible to suggest that the intensity of negotiations around not only some CND Resolutions but also more prominent soft law instruments such as Political Declarations is in some ways a result of the lack of realistic structural modalities for formal revision of the regime. Indeed, while it is not the focus of this analysis, both the 'Jurassic' nature of the regime and the existence of a legal limbo within which both the U.S. and Uruguay live in relation to regulated cannabis markets, may in part derive from the drug control treaty's decision-making mechanisms and, relative to other issue area regimes, primitive non-compliance structures (See Box).

On this point, the international control framework is certainly not free from the maxim that treaty interpretation is an art and not a science. As touched upon above, utilization of the extant flexibility and ambiguity within the texts has over the years permitted a significant number of states increasingly dissatisfied with the punitive approach privileged by the conventions to engage in a process of what can be called 'soft defection'. Rather than quitting the regime, utilizing the inherent plasticity within the treaties these states have chosen to deviate from its prohibitive norm. Such an approach creates policy space at the national level while allowing the parties to technically remain within the legal boundaries of the Conventions. Since norms are crucial to the essential character of any regime, such a process of what should be considered normative attrition represents a form of regime transformation.

Crucially, however, in this case the transformation involves regime weakening and changes *within* rather than a more substantive change *of* the regime. This would require a significant alteration in normative focus via formal treaty revision or other processes. Although regime transformation through soft defection can be identified from the early years of the contemporary UN regime, it has been especially prominent since the late 1990s. The last twenty years or so have seen a growing number of parties engage with not only the public health-oriented harm reduction approach, but also implement the depenalization or decriminalization of the possession of drugs for personal use, particularly in relation to cannabis, as well as medical marijuana schemes.[77] Such a shift has had much to do with an improving evidence base concerning the effectiveness of market interventions, particularly in relation to health oriented versus law enforcement dominated approaches. This has also been accompanied by an increasing realization of the tension that often exists between drug policy and human rights norms and obligations; a tension that is exacerbated by the drug control regime. As Barrett and Nowak highlighted in 2009, 'Unlike human rights law, which focuses to a large extent on the protection of the most vulnerable, the drug conventions criminalise specifically vulnerable groups. They criminalise people who use drugs, known to be vulnerable to HIV, homelessness, discrimination, violence and premature death…'[78] Paradoxically, while legitimizing space for policy plurality at the domestic level, through working within its overarching architecture the process of soft defection actually helps to sustain the existing operating structures. Moreover, as the Board's changing interpretative stance on several policy choices demonstrates, at a system level the regime has an impressive noteworthy ability to absorb normative shifts.

Conferences of the Parties: Facilitating change?

Unlike many of those in other issue areas, it can be argued that the international drug control regime operates through somewhat dated structures; structures that do much to limit its dynamism and responses to changes in circumstances. In this regard it is instructive to compare the regime with others, including that addressing environmental regulation and the Multilateral Environmental Agreements (MEAs) upon which it is based. In terms of MEAs it is interesting to note the different governance structures. Indeed, rather than a functional commission of ECOSOC—that is to say the CND—or officially the Council itself, as is the case with the international drug control regime, the highest decision-making body of MEAs is the Conference of the Parties (COPs), in some instances called the Meeting of the Parties (MOPs). Although there remains some debate surrounding the precise power of COPs within this field, there is general agreement that the organs are 'responsible for the dynamic evolution of MEAs, providing permanent fora for their further development and revision'.[79] Following the steps set out in the MEA and the rules of procedure, a COP adopts legally binding or non-binding decisions containing further commitments of parties. 'This function', it has been noted, 'establishes a more effective alternative to ad hoc diplomatic conferences negotiating specific issues'. It is also important to note that COPs are cheaper in terms of cost.[80] The use of COPs as a mechanism for regular treaty review also operates, in terms of issue area and geography, closer to home. Both the 2000 UN Convention against Transnational Organised Crime (UNTOC) and the 2003 UN Convention against Corruption contain inbuilt provisions for a 'Conference of the Parties to the Convention'; Articles 32 and 62 respectively. Moreover, the former includes provision for the addition of new instruments to create 'a system that can easily be supplemented by additional protocols in the future which may then focus on other specific, maybe new, upcoming areas of transnational organised crime'.[81] The UNTOC, which like all the drug treaties not only falls under the remit of the UNODC but also is linked conceptually to the drug control treaties—and built upon the 1988 Convention specifically[82]—was seen to break new ground in this regard. Writing in 2004, Clark noted 'Article 32 of the Transnational Crime Convention is innovative procedurally in the international criminal law area'.[83] COPs, as experience in international crime control and elsewhere including MEAs reveals, should not be considered a silver bullet. Nonetheless, they appear to be a viable structure to assist in the effective operation, and crucially, evolution of multilateral regimes.[84]

The process of soft defection and absorption can only go so far, however. While containing considerable flexibility, the plasticity of the treaty system is not infinite.[85] Recent years have witnessed the policy choices of several parties, or territories therein, that reveal not only the regime's shortcomings in dealing with advances in scientific knowledge and international human rights law, but also its stubborn resistance to substantive change. The result has been the need to resort to extraordinary legal procedures. This has been the situation with both the well-documented case of Bolivia vis-à-vis the coca leaf and recourse to the very distinct arguments being put forward by the United States and Uruguay regarding cannabis, as discussed above. In terms of the former, denunciation with re-accession and a reservation was a legitimate although rarely used and controversial practice deployed in the 'absence of alternative paths to resolve legal conflicts.'[86] The latter has created the current state of legal limbo that does little for the credibility or integrity of the regime and has the potential to generate problems for international law well beyond the

realms of transnational drug policy. And, keen to move outside of the Vienna silo, it is to other international legal domains that we should look to enhance our understanding of regime evolution and change.

In the foreword to its annual report for 2016, the INCB President stated that while '…some actors will continue to talk about the need to "modernize" the treaties and their provisions; INCB is of the view that the international drug control system continues to provide a modern and flexible structure that can meet the world's drug control needs for today and tomorrow.'[87] In so doing, despite growing challenges to such a perspective,[88] the Board dismisses the concept of regime evolution and modernization and the fact that substantive change does take place in other issue areas. Examples can be found in a range of other contemporary transnational issues of concern. This includes the environmental regime and the Multilateral Environmental Agreements upon which is built, as well as others more directly related to international drug control. Here, for instance, the histories of the global anti-money laundering regime based around the UN Convention against Transnational Organised Crime (UNTOC or Palermo Convention) and the UN Convention against Corruption (UNCAC), both of which build upon provisions within the 1988 Convention,[89] are instructive. Another example can be found within the realm of international trade policy. As the transition from the regime based around the General Agreement on Tariffs and Trade (GATT)—a system emerging from the same post-war environment as the global drug policy regime—to the World Trade Organisation demonstrates, evolution is not always smooth.[90] This was the case even amidst a widespread realization among parties that the GATT was 'no longer as relevant to the realities of world trade as it had been in the 1940s.'[91] Yet, clearly change can and does occur. The increasingly pressing challenge, therefore, is how to manage rather than ignore the process of change taking place within the realm of international drug policy.

THE *INTER SE* MODIFICATION OPTION

One possible option for effecting compatibility of the reform of domestic cannabis laws with the reforming state party's commitments under the UN drug control conventions is the conclusion of *inter se* agreements among like-minded parties permitting its production, trade and consumption for non-medical and non-scientific purposes. *Inter se* modification would serve to legitimise the actions of states prepared to align their domestic practice under international law in a way that could not be achieved if they were acting alone, so long as it minimises impact on other parties and on the goals of the conventions.

Article 41 of the 1969 Vienna Convention on the Law of Treaties[92] (VCLT) provides for specific options for such agreements between two or more parties in order to modify a multilateral treaty like a drug convention. According to one of the VCLT commentaries:

> *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.*[93]

Such an *inter se* modification agreement is permissible if (a) 'the possibility of such a modification is provided for by the treaty' or (b) when 'the modification is question is not prohibited by the treaty and (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; or (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.'[94]

Before exploring these conditions for the operation of article 41, it should be noted that in terms of the rubric to article 41 such *inter se* agreements 'modify the treaty between themselves alone', i.e., they create a special regime but only for their parties. They do not alter the general regime, to which the parties to the *inter se* agreement remain bound and which they must respect 'in their relations with the other parties as if the *inter se* agreement did not exist.'[95] This rubric respects the *pacta tertiis nec nocent nec prosunt* rule of international law consolidated in article 34 of the VCLT that such agreements cannot create rights or impose obligations on other non-parties to the *inter se* agreement which are party to the drug conventions. Article 41 is designed to ensure that such agreements do not provide a back-door to amendment of the treaty as a whole in violation of this rule.

Most such modifications cause little difficulty because they are designed to 'implement, update and strengthen the treaty in the relations between the parties to the modifying treaty',[96] i.e., to add to the rule, not to relax the rule. In deliberations on the draft version of article 41 the International Law Commission (ILC)[97] clarified that 'a modification was not always necessarily the reversal of a rule in the amended instrument (amendment *contra legem)*; the effect of the modification might be to add something that was consistent with that instrument (amendment *secundum legem)* or to remove doubts which had arisen (amendment *praeter legem).'[98] *Inter se* agreements of the second kind (*secundum* or *intra legem*) are usually unproblematic. The Nuclear Non-Proliferation Treaty,[99] for example, deliberately promotes the *inter se* mechanism to agree on stricter provisions among groups of countries, for example the creation of nuclear-free zones, than could be reached in the negotiations between all the parties. Modifications of this kind must meet the implicit double imperative of guaranteeing stability of general relations among the parties while enabling movement in special relations of certain parties.[100]

An *inter se* agreement on cannabis regulation would however clearly fall in the category of a *contra legem* modification. The preparatory work of the VCLT and subsequent discussions at the ILC leave no doubt that the *inter se* mechanism can also be used *contra legem,* to derogate from certain treaty provisions, something that might be seen as a 'collective reservation' by two or more of the parties, otherwise there would have been no need to specify the conditions regarding the rights of other parties and the object and purpose of a treaty.[101]

If like-minded states parties have changed their domestic legal regulation of cannabis, basically by 'de-scheduling' the substance, they may face a claim by other non-parties to the *inter se* agreement that are parties to the drug conventions that they have tried to modify their relationship with all parties. Evidence of 'the spill-over effect that legalization may have in neighbouring jurisdictions where the use of cannabis for non-medical purposes remains illegal'[102] might lend substance to this claim. But simple modification of the rule itself may already entitle such a response because it may affect, for example, reporting duties to the INCB. The Board administers a system of estimates for narcotic drugs, including cannabis, and monitors licit activities through a statistical returns system 'to ensure that adequate supplies of drugs are available for medical and scientific uses and that the diversion of drugs from licit sources to illicit channels does not occur.'[103] It is unclear whether the INCB and the regulating states parties would be willing to consider expanding the administrative system to include estimates and requirements of cannabis for other purposes that would become licit under an *inter se* agreement, but remain illicit under the UN convention.

In the case of Bolivia's reservation on coca leaf, in fact the INCB in its latest Annual Report does invite the country 'to furnish to it separate estimates and statistical reports in respect

of the reserved activities, in addition to the estimates and statistics mandatory under article 19, article 20 and article 27, paragraph 2, of the 1961 Convention as amended. These estimates and statistical reports should specify the quantities of coca leaf that are estimated to be used and actually used in the country for the reserved purposes.'[104] Similar separate estimates and statistics could be provided on non-medical and non-scientific purposes of cannabis allowed under an *inter se* agreement. With regard to cultivation for medical and scientific purposes, the Single Convention only requires furnishing estimates and statistics on opium poppy, not on coca bush or cannabis, so the separate data on other purposes under a reservation or *inter se* agreement also would not need to include information on areas of cultivation.

A special system of non-prohibition of cannabis among some parties at a domestic level formalised in an *inter se* agreement appears at first sight to be impossible if those same states have promised a large number of other parties that they will maintain a general system of prohibition of cannabis for non-medical and non-scientific purposes, and the special system may necessitate changes to the general system. Analysis of the two additional conditions in article 41 shows how they are designed to constrain the actions of parties to reduce the risk of 'true incompatibility' between the general obligations—the drug conventions—and the special obligations—the *inter se* agreement—thus avoiding bringing into play article 30 of the VCLT's rules about incompatible successive treaty obligations.[105] In other words, adherence to the conditions in article 41 avoids a situation of normative conflict where parties to an *inter se* agreement modify not only their relations among themselves but generally. This provokes the key question the rest of this report explores: can domestic cannabis reform which is harmonised among like-minded states by an *inter se* agreement and which may even permit international trade in cannabis among these parties, avoid unacceptable interference with the rights of non-parties to the inter-se agreement and avoid true incompatibility with the drug conventions?

Balancing Stability and Change

Article 41 has a Janus-faced quality in that it looks backward to maintaining stability of the treaty and forward to its modification for some parties so long as they do not disturb that stability. During the ILC deliberations on the VCLT, it was observed that with the adoption of a special article on *inter se* modification, the Commission 'had reached an ingenious compromise between the need to recognize the rights of the parties to a treaty in its initial form and the need to permit the modification of the treaty in order to take account of certain international requirements. But care should be taken to maintain flexibility so as to meet the requirements of the international community.'[106] 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 ILC 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.'[107] 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, were repeated during the discussion in this regard in the ILC: '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.'[108]

Merkouris and Fitzmaurice (2015) record that it was not disputed in the ILC that *inter se* agreements are 'an essential technique, and a necessary safety valve, for the adjustment of

treaties to the dynamic needs of international society. If such a technique had not existed, there would have been stagnation in many treaty relations… The *inter se* procedure had been the means resorted to for that necessary evolution.'[109] The VCLT therefore needed to 'make provision for the *inter se* procedure so as to avoid the stagnation that would result from the *liberum veto* of a single party'.[110] From the very beginning, its evolutionary nature was seen as fundamental to the United Nations system, a system in which according to the Egyptian delegate all member states 'undertake to respect agreements and treaties to which they have become contracting parties without prejudice to the right of revision'.[111] 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.'[112]

That is precisely what happened after Bolivia adopted a new constitution in 2009 which required the state to protect the coca leaf as part of its cultural patrimony.[113] Acknowledging that state regulation of the domestic coca market for non-medical purposes was contrary to its obligations under the drug control conventions, Bolivia had to face many obstacles and limited options to reconcile its national and international legal obligations, including a failed—though formally still pending—attempt to amend the Single Convention.[114] In the end, as noted above, Bolivia chose to denounce the Single Convention only to re-accede a year later with a reservation regarding the coca leaf. As will be argued below, this could be seen as a precedent for the key question addressed in this report. However, while the procedure resolved the legal conflict surrounding its domestic coca market, as the INCB underscored, the reservation 'is explicitly limited to activities within its territory, thus not conferring and/or broadening any rights to engage in international trade of any kind'.[115]

To legitimise international trade, an *inter se* agreement between Bolivia and those countries interested to import the now licitly produced Bolivian coca leaf could offer a solution.

The permissibility of *inter se* modification

Specific treaty provisions

Article 41(a) of the VCLT provides for *inter se* modification among like-minded parties if 'the possibility of such a modification is provided for by the treaty'. An express provision of this kind illustrates general consent among the parties to further modification among parties. An early example of such a special agreement, article 19 of the 1883 Paris Convention on the Protection of Industrial Property[116] clarifies that parties reserve the right to make them 'in so far as these agreements do not contravene the provisions of this Convention.' A more recent example, article 311(3) of the 1982 UN Convention on the Law of the Sea (UNCLOS),[117] provides expressly for *inter se* agreements modifying or suspending the provisions of the UNCLOS. It states:

> *Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied therein, and that the provisions of such agreements do not affect the enjoyment by other States parties of their rights or the performance of their obligation under the Convention.*

Reinforcing the point made earlier about the limited material scope of these *inter se* agreements, article 311(3) clarifies that such agreements are permitted to modify or suspend the operations of the Convention solely among themselves, without affecting the rights of others. This suggests that derogating

modification is limited to provisions of the convention that can be isolated bilaterally without affecting the rights of others. This is reinforced by the repetition in the rest of article 311(3) of the formula in article 41 prohibiting limitation or suspension of a provision the derogation of which is incompatible with the effective execution of the object and purpose of the convention. It suggests that whether such derogating modification is permitted depends on the nature of the provision that is being derogated from by the *inter se* agreement. To reinforce this point, it can be noted that *inter se* modifications to the Treaty for the European Union envisaging cooperation in the area of justice were restricted to those that did not undermine the internal market or restrict trade.[118] The drug conventions do make express provision for modification *inter se* of certain kinds of provisions but these provisions are limited to modifications complementing and enhancing the effectiveness of law enforcement measures in the drug conventions such as article 6(11) of the 1988 Trafficking Convention, which provides that the 'Parties shall seek to conclude bilateral and multilateral agreements to carry out or enhance the effectiveness of extradition.'

Where the treaty is silent on this question, VCLT article 41(b) permits modification not expressly provided for by the treaty if 'the modification in question is not prohibited by the treaty', subject to two additional conditions. It would only be permissible under these two conditions if it does not affect the rights of other parties under the treaty and it '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'. There are no specific provisions in the drug conventions prohibiting *inter se* modification, although the question remains whether the drug conventions are to be construed as impliedly prohibiting an *inter se* modification involving the establishment of a non-medical market for the production and consumption of cannabis. It appears clear from the deliberations in the ILC, however, that it considered that only when a modification failed one or both of the two additional conditions could it be considered impliedly prohibited by the convention in question.[119] It follows that the permissibility of modification is a question of whether an *inter se* agreement between like-minded states parties with regard to cannabis (or coca) regulation can meet either of the two additional conditions, as both must be met.[120]

Affecting the Rights of Other Parties

Article 41(b) (i) provides that the *inter se* agreement to modify a treaty is permissible if it 'does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations'. The condition is a reflection of the principle *res inter alios acta*, which runs through article 41 as a whole, based on the fact that the other parties have not consented to the transformation of their rights or obligations.[121] In essence, this condition is designed to ensure that an *inter se* agreement to which they are not party does not burden them in any way.

The drug conventions set out a complex and extensive range of obligations on states parties. A reservation or *inter se* agreement among a limited number of parties that would increase the burden on states that were not party to the *inter se* agreement but which were party to the drug conventions would clearly not be permissible. The question of relevance to this report is whether such a burden on other states would be imposed if one or more parties decide not to prohibit but regulate the sale and supply of cannabis.

Compatibility with the Object and Purpose

Article 41(b) (ii) provides that the *inter se* agreement is permissible if it '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.' The ILC has devoted a lot of attention to defining the concept of the object and purpose of treaties in the context of its in-depth consideration of treaty reservations, and the 'concerns expressed in those debates are not essentially different from concerns that seem relevant also for deciding the permissibility of *inter se* agreements under article 41'.[122] The ILC's 10th report on reservations refers to the opinion of the International Court of Justice that the object and purpose of a treaty can be deduced: 1) from its title; 2) from its preamble; 3) from an article placed at the beginning of the treaty that 'must be regarded as fixing an objective, in the light of which the other treaty provisions are to be interpreted and applied'; 4) from an article of the treaty that demonstrates 'the major concern of each contracting party' when it concluded the treaty; 5) from the preparatory work on the treaty; and 6) from its overall framework. Still, on that basis 'the Court forms a "general impression", in which intuition and subjectivity inevitably play a large part.'[123] The ILC underscores the difficulties involved in defining the object and purpose of a treaty and concludes: 'At most, one can infer that a fairly general approach is required: it is not a question of "dissecting" the treaty in minute detail and examining its provisions one by one, but of extracting the "essence", the overall "mission" of the treaty.'[124] This condition is thus not concerned with minor modifications, but with modifications that impact on the *raison d'être* of the conventions,[125] on the system as a whole.[126]

The object and purpose of the drug control treaties is primarily laid down firstly in the preamble of the Single Convention which spells out that it is '*Concerned* with the health and welfare of mankind', and secondly through the 'general obligation' in article 4 to 'limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs'.[127] A reservation or *inter se* agreement that would depart from those basic principles for all the substances controlled under these treaties would clearly not be permissible. The question is, however, whether the effective execution of the object and purpose of the treaty as a whole would be immediately compromised if one or more parties decide not to prohibit but regulate the sale and supply of cannabis for other purposes.

The Uncertain Status of Cannabis in the 1961 Convention

The questions (i) of the rights and obligations of other parties in regard to cannabis and (ii) the object and purpose of the drug conventions in regard to cannabis cannot be adequately dealt with without some sense of the status of the substance within the system. Cannabis was brought under international control by the 1925 Geneva International Opium Convention and on that basis automatically entered the post-WWII drafting process for the UN Single Convention. Interestingly, with respect to cannabis, the limitation to medical and scientific purposes during this early period only applied to 'Galenical preparations (extract and tincture) of Indian hemp'; and with regard to other purposes, the contracting parties were only required to 'prohibit the export of the resin obtained from Indian hemp and the ordinary preparations of which the resin forms the base (such as hashish, esrar, chiras, djamba) to countries which have prohibited their use' (article 11-a). The system of export authorisation and import certification established under article 12 of the 1925 Convention and administered by the Permanent Central Board (PCB), a precursor body of today's INCB, thus originally included cannabis for non-medical and non-scientific purposes. That also applied to the statistics states parties had to submit annually to the PCB: 'estimates of the quantities of each of the substances covered by the Convention to be imported into their territory for internal consumption during the following year for medical, scientific *and other purposes*' (article 21, emphasis added).

Although the WHO Expert Committee stated in 1959 that it 'believed that the composition of the schedules should be most carefully reviewed before they become an established part of the new Convention', this never happened in the case of cannabis and several other substances that were copy-pasted into the Single Convention's draft schedule from the previous treaties.[128] The scientific basis and even the procedural legality of the inclusion of cannabis in schedules I and IV (reserved for drugs that are 'highly addictive and liable to abuse and rarely used in medical practice'[129]) is therefore questionable. Recognising that 'cannabis has never been subject to a formal pre-review or critical review', the WHO Expert Committee recommended at its November 2016 meeting to conduct pre-reviews for cannabis and its component substances.[130]

At the time of negotiating the Single Convention, especially in Asia, Africa and the Middle East, cannabis was widely used and socially accepted for cultural, ceremonial and traditional medicinal purposes. The proposal to broaden the phrasing of the treaty's general obligation 'to limit exclusively to medical and scientific purposes' by adding 'and other legitimate purposes' (wording that was used in the 1912 and 1925 treaties), which could have allowed the continuation of some of those centuries-old practices, was rejected.[131] As a compromise, India managed to protect its *bhang* culture by excluding the leaves of the cannabis plant from the treaty's definition of 'cannabis', and countries with widespread traditional cannabis uses were granted a special 'transitional reservation' option under article 49 to abolish those practices gradually over 25 years. For other reservations, article 50 specified certain restrictions including the procedure that if more than one-third of the parties object it would not be allowed.

Of relevance to the key issue in this report is the fact that the official Commentary on the Single Convention raises the question whether the reservation procedure established under article 50 could in principle be used by parties to reserve the right to allow non-medical uses of cannabis beyond the 25-year limit, and concludes that '[b]y operation of article 50, paragraph 3, a Party may reserve the right to permit the non-medical uses as provided in article 49, paragraph 1, of the drugs mentioned therein, … without being subject to the time limits and restrictions provided for in article 49'.[132] Thus, according to the Commentary, unless more than one-third of the treaty parties would object, it could be legitimate for a country to reserve the right to allow non-medical uses of cannabis. It is arguable that, in absence of specific rules about it in the treaty, in principle the same permissibility would apply to an *inter se* modification agreement. Objecting Parties might try to argue that the same threshold of objections should apply to *inter se* modification as well, treating it basically as a 'collective reservation'. However, the threshold for accepting reservations varies across treaties, and the 1988 Trafficking Convention, for example, to which an *inter se* agreement on cannabis may also need to refer, does not include a procedure for objecting to reservations at all. The VCLT does not specify an objection procedure or threshold for acceptance for *inter se* modification agreements. The fact that the ILC has argued, as referred to above, that the basic criteria for permissibility of reservations are not 'essentially different' from those of *inter se* modification, does not imply that treaty-specific objection procedures regarding reservations should be applied in the same way to *inter se* agreements as well (see the section on Notification and Objections below).

Divergence of control principles under the 1971 Convention

An additional argument to support the view that the 'integrity' of the UN drug control treaty system would not be immediately compromised if countries make exemptions for cannabis, can be derived from the way in which the 1971 Convention on Psychotropic Substances

diverged from the 1961 Convention in regard to certain basic principles of its scheduling system. Inconsistently, while 'cannabis' is scheduled as a 'narcotic drug' under the Single Convention, one of its psychoactive compounds (*delta*-9-tetrahydrocannabinol, THC/'dronabinol') was included as a 'psychotropic substance' under the 1971 Convention.[133] Diverging from the zero-tolerant principle behind the Single Convention, the 1971 Convention allowed parties to make reservations for plants 'which are traditionally used by certain small, clearly determined groups in magical or religious rites, … except for the provisions relating to international trade'.[134] Moreover, it included a 'principle of non-acceptance' with regard to all scheduling decisions. A party may submit a notification explaining why, 'in view of exceptional circumstances, it is not in a position to give effect with respect to that substance to all of the provisions of the Convention'.[135]

During the 1971 Conference, several developing countries objected to granting parties more 'loop-holes' for psychotropic substances 'produced by the industrialized countries' than had been allowed under the 'transitional reservations' for traditional plant-based narcotic drugs of the Single Convention.[136] India argued that, given the fact that the draft text already made a 'provision for review by the Economic and Social Council of decisions taken by the Commission on WHO recommendations, the right of non-acceptance would imply that an individual country could consider itself wiser than those three bodies, which spoke for the international community as a whole', and suggested therefore to introduce a time limit on the right of non-acceptance.[137] Several Northern countries argued, however, that '[i]nsuperable difficulties could arise' to obtain parliamentary acceptance of the treaty 'unless provision were made in it for a degree of non-compliance with decisions by WHO and the Commission' and that it would be unrealistic to impose 'an arbitrary time limit for a situation of partial compliance'.[138]

The 1971 Conference in the end adopted the right to partial non-compliance for specific substances without time restrictions. The compromise solution envisaged that the non-acceptance of scheduling decisions was circumscribed 'by control measures—graduated according to the various schedules—both national and international, which the non-accepting party should, in any case, apply to a given substance'.[139] Those measures include the requirement of national licenses for manufacture, trade and distribution, and the provisions relating to international trade specified in articles 12 and 13. Regarding the latter, the non-accepting State should still '[c]omply with the obligations relating to export and import … except in respect to another Party having given such notice for the substance in question'.[140]

The uncertain status of cannabis in the general scheme of the conventions and in particular the failure to assess whether it has analogous qualities to other controlled drugs by the WHO expert committee means that there is a *prima facie* case that an *inter se* agreement formalising a shift to an alternative from of regulation for the substance would neither burden the other parties to the drug conventions nor run counter to the object and purpose of the drug conventions. These questions, however, can only be conclusively answered by reference to the nature of the drug conventions.

Reciprocal versus absolute treaties

Whether a *contra legem inter se* modification affects the rights of other parties, depends in the first place on the basic nature of the treaty, whether it has primarily what Fitzmaurice called 'reciprocal', 'interdependent' or 'integral' characteristics,[141] or what the ILC study group on the 'Fragmentation of International Law' terms as the 'distinction between treaties containing (merely) reciprocal obligations and treaties whose obligations were non-reciprocal—that is to

say, of a 'more absolute type'[142] For example, the VCLT provides a special rule under article 60 on invoking breach where 'the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every other party in respect to the further performance of its obligations under the treaty'. According to Sadat-Akhavi:

> *A treaty is 'interdependent' when the obligation of each party is dependent on the corresponding performance by all the other parties, so that a fundamental breach by one party prejudices the treaty regime applicable between all parties. For instance, treaties on disarmament and treaties prohibiting the use of particular weapons are 'interdependent' treaties. An* inter se *agreement modifying the provisions of an 'interdependent' treaty should be unlawful since it necessarily affects the rights of third States under that treaty.*[143]

There is more flexibility with regard to treaties 'which are of the reciprocating type, providing for a mutual interchange of benefits between the parties, with rights and obligations for each involving specific treatment at the hands of and towards each of the others individually.'[144] Reciprocal treaties are those in which rights and obligations are granted to other parties to the multilateral convention in a 'quasi-bilateral fashion' and *inter se* agreements are permissible because the subject matter of those rights—for example, diplomatic relations in the 1961 Vienna Convention on Diplomatic Relations[79]—means that the impact of a specific change between two parties *inter se* can be confined to those parties, and has no effect on the rights of others or on the object and purpose of the treaty as a whole.[145] They are unlike absolute treaties, which as Rigaux and Simon put it, 'cannot be reduced to … bilateral relations, that are malleable *à la carte*.'[147]

The ILC's fragmentation study notes that absolute treaties are often used to unify rules of law in specific domains, to create an 'obligation of solidarity' among the parties, for which conformity with the object and purpose of the treaty serves as a legal test.[148] Seamless wholes, breach of one rule radically changes the legal position of all other parties.[149] Justice van Eysinga gave an example in his dissenting decision in the *Oscar Chin* Case, which involved a question of whether the 1919 Convention of Saint Germain-en-Laye, an *inter se* agreement, modified the older and much more broadly supported *1855 General Act of Berlin*, in regard to the management of the Congo Basin:

> *The General Act of Berlin does not create a number of contractual relations between a number of States, relations which may be replaced as regards some of these States by other contractual relations; it does not constitute* jus dipositivum*, but it provides the Congo Basin with a regime, a statute, a constitution. This regime which forms an indivisible whole may be modified, but for this the agreement of all the contracting Powers is required. An inextricable legal tangle would result if, for instance, it were held that the regime of neutralisation provided for in Article 11 of the General Act might be in force for some contracting Powers while it had ceased to operate for certain others.*[150]

For Justice van Eysinga, the provision in the Berlin Act for amendment by 'common accord' reinforced his view.[151] The effectiveness of absolute treaties depends on compliance with all of its provisions by all of its parties; if two or more parties derogate from one of its provisions they derogate from the treaty as a whole, effecting the legal positions of all of the parties and in consequence impacting on the object and purpose the treaty. Klabbers notes that plans within the EU, in the late 1990s, to de-activate the Refugee Convention[152] between Member States of the EU[153] ran into criticism that this would result in an impermissible modification between

some of the Refugee Convention's parties difficult to reconcile with article 41(1) (b) as it would affect the definition of refugee in article 1 of the Refugee Convention and was incompatible with the effective execution of the Convention's object and purpose.

So the question comes down squarely to this: are the drug conventions of a reciprocal type, permitting *inter se* variation because their provisions are in their nature 'quasi-bilateral', or are they more integrated or even absolute, where such variation is not permissible because to continue the culinary metaphor the menu is set and cannot be broken up *à la carte* by parties no longer wishing to eat all of the courses. At first glance the general character of the drug conventions suggests they form an integrated interdependent regime. They satisfy conditions for such absolute treaties identified by Harvard Research in 1935: they have been almost universally subscribed to by states, their provisions have a legislative character, and they have been implemented in a uniform fashion.[154] It is for that reason they have been identified as constituting a whole and archetypal 'global prohibition regime',[155] which suggests their rules are integrated and cannot be disassembled by reluctant parties who would defeat their purpose if they entered into an *inter se* agreement to de-schedule cannabis and permit its non-scientific or non-medical production, supply and use in contravention of article 4 of the 1961 Single Convention.

Digging a little deeper, however, it is arguable that a change in the system of control of cannabis away from strict prohibition would neither lead to a radical change in the position of all of the other parties nor conflict with an entirely unassailable foundational purpose of the drug conventions. The drug conventions do not have the same level of functional obligation as, for example, the International Space Station Intergovernmental Agreement,[156] where the fifteen states parties involved agreed to 'establish a long-term international cooperative framework'[157] for the design, development and operation of an 'integrated International Space Station'[158] to which each participating state agreed to contribute certain 'elements'.[159] An *inter se* agreement would not be permissible to vary the obligations in the Space Station treaty because it would mean the station would not function. Treaty regimes controlling commodities like the drug conventions are functionally integrated in different degrees in regard to different substances. As described above, both the 1961 Single Convention and the 1971 Convention included provisions allowing parties to exempt themselves—by means of a (transitional) reservation or a notification of non-acceptance—from the control regime for a specific substance under certain circumstances and conditions. On that basis, it could be argued that an *inter se* agreement among a group of countries which seeks a collective exemption from the cannabis-specific provisions of the drug control treaty regime would not be *prima facie* 'incompatible with the effective execution of the object and purpose of the treaty as a whole' or necessarily affect the rights of other parties.

At a more specific level, if a particular State that is party to an *inter se* agreement permits a cannabis market for non-medical or scientific purposes it will have an impact of a functional kind—the particular function being domestic suppression of cannabis so as to ensure cannabis does not flow across borders into those that are not party to the *inter se* agreement states—when cannabis actually begins to be trafficked across borders. At that point, the latter states will rightly be able to complain that the former state is in breach of its drug convention obligations because its conduct (in the form of an omission to control the transboundary traffic) will place a burden on the latter states. As Room et al. (2008) cautioned in the report of the Global Cannabis Commission:

> *there will be vociferous opposition from a number of quarters' to any moves to reform and therefore 'it would be wise for a state or states which are moving outside the present conventions to give reassurances that they will continue a commitment to some aspects of the current regime—in particular to controls on international trade which maintain comity, the principle that other states' domestic arrangements, for instance of cannabis prohibition, will be honoured.*[160]

To avoid an argument about functional integration being disrupted, the *inter se* agreement would have to be based on domestic markets that are isolated from non-parties to the *inter se* agreement. An assumption that a shift to a regulated market among certain states parties would increase the transnational flow of cannabis into states parties not party to the *inter se* agreement is, however, questionable. The international drug control system is currently ineffective in preventing the international illegal traffic of cannabis in spite of the illegality of this traffic in all states parties. A strictly controlled legal regulated market is likely to prove more effective in preventing the illicit export of cannabis from regulated jurisdictions in comparison to the current situation because state controls over the substance are likely to be tighter and more widely respected than is currently the case. Thus, counter intuitively, a legally regulated market in parties to the *inter se* agreement may well benefit non-parties to the agreement instead of harming them.

The 'Absolute' Nature of Prohibition

The drug conventions do require a certain degree of normative integration in order to achieve their overall functional purposes. This is revealed through internal elements of the treaty such as statements about the need for 'universal action' in paragraph three of the preamble to the Single Convention, and through external state practice such as the reiteration in GA Resolutions that there is a duty to implement 'as a matter of priority, all the provisions' of the drug control conventions,[80] and a 'collective responsibility to uphold the principles of human dignity, equality and equity at the global level'.[162] It is much more difficult to sustain the notion that this level of normative integration implies that the drug conventions have established a system where states have rights in regard to the conduct of other states in regard to specific drugs within their own domain, even if it does not have a direct cross-border effect. Prior to 1961 the drug control system was interpreted in such a way as to respect differences between the laws of the state parties. The system functioned to prevent the uncontrolled export of certain substances to states that have prohibited those substances.[163] This tolerance of difference was fundamental to the origins of the international control system prior to 1946, until a transformation of the system was undertaken in the post-War period which culminated in the 1961 Convention. It involved the attempt to convert what had been essentially a 'reciprocal' system into a morally charged 'absolute' principle of prohibition.

This transformation never achieved that goal.[164] The drug conventions are integrated to a degree, but not so integrated that they consist of an absolute normative regime akin to, for example, that created in regard to prohibition of genocide by the Genocide Convention of 1949.[165] They have neither achieved *ius cogens* status nor are they part of customary international law.[166] Moreover, it is not plausible to argue that they are *erga omnes* obligations, which the international community as a whole are required to protect, as is the case with human rights conventions.[167] With regard to *erga omnes* obligations, non-injured States may be entitled to invoke a breach, according to the ILC, because the "collective interest of treaty parties has been violated".[168] The drug conventions, however, do not meet the *erga omnes* criteria; failure to adhere to

their obligations does not necessarily have consequences for all other parties, it will depend on the circumstances. Interestingly, there is also no specific procedure in the conventions for the making of complaints by states that are not directly affected.[169]

Nor do the drug conventions create international crimes in the same sense of the Genocide Convention, where the individual is liable under international law directly. They create an indirect system of control mediated by the state. Indeed, any comparison to human rights conventions is inappropriate because state practice does not support the interpretation that the drug conventions are of the same absolute nature as human rights conventions. In *Pushpanathan v Canada,*[170] for example, the Canadian Supreme Court held there was no indication that drug trafficking on any scale was contrary to the purposes of the UN or that its prohibition protected core human rights. It is untenable to argue that a government regulated market in cannabis comes close to violate an *erga omnes* or a *ius cogens* norm and is therefore *ipso facto* in violation of the rights of the other parties, unlike *inter se* modification of a human rights convention which would result in a violation of an absolute regime. The true degree of integration may be contested by states that object to such an *inter se* agreement, but the onus would be on them to show that the system was integrated in an absolute manner in regard to the particular substance in question.

Looking more closely at the nature of the obligations in the regime in regard to particular substances, the UN drug control regime applies to a specific set of substances listed on the treaty schedules, which are subject to exemptions, varying levels of control, review procedures and regular changes. Early scheduling decisions, especially on cannabis, coca and opium, have often been criticised for being influenced by colonial heritage, cultural and racial prejudices, and ideology more than scientific evidence.[171] Many other psychoactive substances, including harmful ones like alcohol and tobacco, have never been placed under international control at all, or—in the case of tobacco—under a fundamentally different control regime of a more regulatory than prohibitive nature.[172] It is therefore difficult to argue that the UN drug control treaty regime somehow embodies an 'absolute' prohibition principle to limit all psychoactive drugs exclusively to medical and scientific purposes, comparable to, for example, the absolute nature of the prohibition of torture under international law from which derogation by means of reservation or *inter se* modification obviously would not be permissible.

Precedents and Practices

The 1925 and 1931 'closed agreements'

Examples of *inter se* agreements that have raised issues about compatibility with previous drug control treaties are rare. One potential example involves the continued reliance during the League era of states that produced opium on regulated markets when other states wished to proceed to total prohibition for non-medical purposes. Article 2 of the 1925 Geneva International Opium Convention[173] obliged parties to undertake to enact law for the effective control of the production of opium. In spite of this promise made to other states parties to the 1925 Convention, opium producer states opted to rely on government monopolies to control production, and this approach was formalised in two 'closed agreements', the 1925 Agreement Concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium,[174] and the 1931 Agreement Concerning the Suppression of Opium Smoking[175] which were limited to the opium producer states 'which still recognise the use of prepared opium', at the time largely under colonial rule.[176]

Whether the special agreements were a true *inter se* modification is difficult to say. The 1925 Special Agreement preceded the 1925 Geneva Convention, but the U.S. and some

others regarded it as an agreement contrary to the overall purpose of the 1912 The Hague Opium Convention. It led to the U.S. and China walking out of the negotiations of the 1925 Geneva Convention, arguing that '[t]here is no likelihood under present conditions that the production of raw opium and coca leaves will be restricted to the medicinal and scientific needs of the world'.[177] In the 1931 Agreement, Britain, France, India, Japan, the Netherlands, Portugal and Siam (now Thailand) 'decided to review the position in regard to the application in their Far-Eastern possessions and territories' of the earlier instruments and agreed to 'supplement' them with a number of measures between themselves alone. The starting point for the 1931 Conference were the recommendations of the Commission of Enquiry into the Control of Opium Smoking in the Far East, which included suggestions for a revision of some of the provisions of the 1912 Opium Convention and the 1925 Geneva Opium Agreement:

> *The Commission had never imagined that the stipulations of either international or municipal law held good for ever. They were quite aware that many of their recommendations necessitated changes in international conventions or agreements and in the national systems of law; but they had not hesitated on that account to put them forward, for they were convinced that certain changes were necessary if progress was to be made.*[178]

The 1925 Geneva Convention represented a political compromise in the sense that its article 5 obligation to 'enact effective laws or regulations to limit exclusively to medical and scientific purposes the manufacture, import, sale, distribution, export and use' of 'manufactured drugs' had been limited in the case of opium to 'medicinal opium' only, defined in article I to mean 'raw opium which has undergone the processes necessary to adapt it for medicinal use in accordance with the requirements of the national pharmacopoeia'. With regard to other opium products, the contracting parties of the 1931 Agreement agreed that 'retail sale and distribution of opium shall take place only from Government shops … or from shops managed, under Government supervision'; a provision which 'need not be applied if a system of licensing and rationing of smokers is in force, which affords equivalent or more effective guarantees' (article I) and that '[p]ersons under twenty-one years of age shall be prohibited from smoking opium and from entering any smoking-establishment' (article II). The parties furthermore derogated from certain earlier restrictions on international trade by agreeing that 'it shall be permissible for a Government Monopoly to be supplied with prepared opium from the factory of a Government Monopoly in another territory of the same Power' (article IV). There is thus an argument that the 1931 Agreement clashed with a number of provisions of the 1925 Geneva Convention, and could be seen as an early example of an *inter se* modification agreement to loosen certain drug control treaty obligations for a group of states parties.

The Bolivian reservation on coca leaf

Bolivia's successful attempt to derogate from its drug control treaty obligations regarding the coca leaf serves if not as a strict precedent of an *inter se* agreement then at least as an analogous challenge to the drug conventions in regard to the level of control over a specific substance. After a failed attempt to amend the Single Convention's Article 49, which obliges parties to abolish coca leaf chewing within 25 years, in June 2011 Bolivia became the first country to denounce the treaty, re-acceding early 2013 with the following reservation:

> *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 purposes; for 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.[179]

Despite a call from the INCB arguing that Bolivia's move 'would undermine the integrity of the global drug control system',[180] the number of objections fell far short of the one-third of treaty parties (62) required to block it. The objections to Bolivia's reservation came primarily from G8 and EU countries.[181] According to Arp (2014), objection only from a selective group may suggest that a denunciation and re-accession with a reservation cannot be seen as contrary to internationally accepted norms of customary law: 'For most other states, such a practice seems to be an acceptable procedure to formulate a late reservation to a treaty. At least these states' silence when faced with such a situation—as notably in the Bolivian example—implies their acquiescence.'[182] 'The corpus of international treaty law adopted after World War II is aging, and seldom do those treaties provide for flexible procedures to adapt to new circumstances,' Arp continues.[183] After analysing five recent cases involving different unrelated treaty regimes, he goes on to argues that in some circumstances the acceptability of the controversial procedure increases in times of normative change:

The European states seem not to oppose the denunciation and re-accession with a reservation when this forms part of a broader process of the reform and change of international law. The Swedish example shows that no state objects to the denunciation and re-accession with a reservation if the interested states were already critical about the existing treaty rules that were affected by the reservation.[184]

The Bolivian derogation from certain treaty obligations regarding the coca leaf does not appear to have affected the rights of other parties in any serious way. Other examples like *khat, kratom* and *ephedra,* psychoactive plants with stimulant properties comparable to coca, which are not controlled under the international drugs conventions but are subjected to widely varying degrees of national controls and prohibitions, provide further evidence for the possibility of co-existence in practice of fundamentally different control regimes for the same substance. In the case of cannabis, the early stages of 'soft defection' did lead to diplomatic tensions, for example between the Netherlands and neighbouring countries, but the rapidly expanding divergence in cannabis policies at national and sub-national levels, including the fully legally regulated markets in U.S. states and Uruguay, have thus far not caused major problems with neighbouring jurisdictions that maintain a prohibitionist approach.

The fact that in the Bolivian case none of the objecting states considered the reservation to be an obstacle for the re-entry into force of the Convention between them and Bolivia[185] could be interpreted as a tacit agreement that treaty provisions regarding specific substances are in principle 'separable from the remainder of the treaty with regard to their application'.[186] And, as noted above, the rules applicable to reservations are in principle the same as those for a collective derogation from certain treaty obligations by means of an *inter se* modification agreement.

UN Convention on the Law of the Sea

Analogous instruments to *inter se* agreements that appear to conflict with the terms of the original convention can be found in other areas of law. Perhaps the most famous is the 1994 Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea (the 'Deep Sea Bed Agreement', UNCLOS),[187] used to coax Western states into supporting the UNCLOS which was not yet in force even

though the Agreement appeared to contradict the provisions of the UNCLOS in regard to the mining of the deep sea bed, which in effect the Agreement amended.[188] Participants in the informal consultations, however, rejected the idea of a protocol of amendment, preferring the label of an 'implementation agreement'. According to Harrison (2007), '[w]hilst many of the basic principles underlying the deep seabed mining regime remain the same, the detailed provisions are the subject of far-reaching reform. The language of the Agreement is straightforward and uncompromising. Several provisions of the Convention are simply "disapplied".'[189] States not yet party to UNCLOS had to become party to the Agreement and the main treaty which it contradicted, while states already party to UNCLOS have been taken to have acquiesced in this 'imaginative' route towards maintaining universal participation in the law of the sea. Formally, however, the Agreement is only binding on those states which became party to the Convention prior to the adoption of the Agreement that have accepted it, and there are a number of UNCLOS parties—some 35—for which the 1994 Agreement is not yet law.[190] In similar fashion an *inter se* agreement on cannabis regulation which deviates from strict prohibition can be rationalised on the basis of maintaining universal subscription to the principal elements of the international drug control system, while allowing parties to 'disapply' the implementation of certain provisions.

Notification and Objections

'It is generally assumed,' according to the ILC, 'that participation in a multilateral treaty creates a community of interests and a solidarity implying an entitlement for the parties to express their views on the compatibility of special arrangements concluded between some of them with the overall regime of the treaty.'[191] Article 41(2) of the VCLT provides therefore for a duty on those parties intending to enter such an *inter se* agreement to notify the other parties to the drug conventions and of the particular modification for which the *inter se* agreement provides. It makes it clear that compliance with article 41 must be ensured before such a treaty is entered into as the simple act of notification in time of their precise intentions (which should be worked out by that point) serves as a warning and conveys the content of the proposed changes allowing due diligence in this regard by the other parties who may if they feel it necessary voice their objections.[192] However, it is not necessary to do so at an early stage:

> *The Commission considered that it is unnecessary and even inadvisable to require notice to be given while a proposal is merely germinating and still at an exploratory stage. It therefore expressed the requirement in terms of notifying their "intention to conclude the agreement and . . . the modifications to the treaty for which it provides" in order to indicate that it is only when a negotiation of an* inter se *agreement has reached a mature stage that notification need be given to the other parties.*[193]

The ILC study group on the 'Fragmentation of International Law' dealt in considerable detail with the *inter se* issue, and confirmed that 'notification must be given at a relatively advanced stage in the negotiation of the *inter se* agreement but nevertheless sufficiently prior to its conclusion so as to enable a meaningful reaction'.[194] It is for each other party to make up their mind whether the *inter se* agreement breaches the general agreement.[195] However, the legal effect of an objection made after notification is uncertain; 'it seems clear that the *inter se* agreement concluded in deviation from the original agreement is not thereby invalidated', it depends on an interpretation of the original treaty as to what consequences should follow.[196]

Inter se modification is not akin to amendment of the general body of the treaty 'as between all parties', governed by article 40 of the VCLT,

precisely because not all the parties participate. It permits modification among a restricted group of parties so long as the rights and obligations of the whole group under the treaty are respected. If its terms are not observed, conclusion of an *inter se* agreement may lead to accusations of breach of the drug conventions triggering state responsibility, but that is not the main concern here. Firstly because, as the Bolivian example has shown, even if some other parties agree a material breach has occurred and the integrity of the treaty is compromised, a response of termination of the treaty by those states that consider their rights affected is highly unlikely because that would only further erode the effective implementation of the treaty they intend to protect, so would not be in their interest. And secondly because the reality is that the rapidly changing drug policy landscape has already led to treaty breaches and those are only likely to increase; the *inter se* modification would not be the cause of the breach, but rather an attempt to reconcile under international law breaches that are already happening in practice.

CONCLUDING REFLECTIONS

Reaching a new global consensus to revise or amend the UN drug control conventions in order to accommodate legally regulated markets for cannabis, coca or other psychoactive plants and substances controlled under these treaties, does not appear to be a viable political scenario for the short-term foreseeable future. The inability to reach global consensus is not limited to drug control; it is a dilemma that links drug control with other global issues.[197] Meanwhile, the limits of flexible treaty interpretations have been reached and overstretching them any further with legally dubious arguments would result in undermining basic principles of international law.[198] States that intend to move towards legal regulation, or that have already done so, are therefore obliged to explore other options to reconcile such policy changes with their obligations under international law. Only a few options are available that do not require the consent of all the treaty parties.[199]

The WHO can recommend after a critical review by its Expert Committee on Drug Dependence to 'un-schedule' a controlled substance (remove it from the treaty schedules), and the Commission on Narcotic Drugs can adopt the recommendation by a simple or two-thirds majority vote (for the 1961 and 1971 conventions respectively). As noted above, the WHO Expert Committee is in fact undertaking a pre-review process for cannabis and has announced a special meeting to discuss the classification of cannabis for June 2018.[200] The outcome of the subsequent critical review could come to the CND agenda earliest by March 2019 and will probably result in its deletion from Schedule 4, and possibly to a de-scheduling from Schedule 1 to 2. The chance that a WHO recommendation to fully un-schedule cannabis from the treaties altogether would get the required CND majority, however, also looks under current political circumstances to be unlikely.

The only other available options that do not require consensus are either unilaterally by late reservations or denunciation and re-accession with new reservations, or collectively by *inter se* modification agreements among like-minded countries. All of these options are controversial because a generalized application of such procedures would erode the stability of international treaty regimes. Recourse to these options for the purpose of legitimising cannabis regulation will be contested, as was the case with Bolivia's procedure which—in the end successfully—legitimised the legal regulation of its domestic coca market.

Nevertheless, applied with caution and reason under exceptional circumstances, *inter se* treaty modification appears to provide a useful safety valve for collective action to adjust a

treaty regime frozen in time such as the UN drug control conventions.[201] It would require that the like-minded agreement includes a clear commitment to the original treaty aim to promote the health and welfare of humankind and to the original treaty obligations vis-à-vis countries not party to the *inter se* agreement. Few other routes are available that could allow more manoeuvring within the treaty regime while avoiding the cumbersome process of unanimous approval; under such circumstances, as Klabbers (2006) notes, the *inter se* option is 'perhaps the most elegant way out'.[202] The specific advantages of adopting *an inter se* agreement in regard to cannabis are:

- It could provide a model that respects international law while moving beyond dubious flexibility arguments that have negative implications for the integrity of international law beyond drug control.
- It could provide a basis for an alternative group response to the current control model, serving as a focus point for states parties to the drug control regime that are struggling to apply the current prohibitive model and seeking a more promising alternative.
- It would signal the intention of the parties to the *inter se* agreement to permanently change their system of regulation of cannabis and their relationship with the UN drug control regime.
- It would recognise that cannabis policy trends have moved beyond the realms of treaty flexibility and that today's political realities and limitations of the UN drug policy making mechanisms present obstacles for treaty amendments or other scenarios for a consensus-driven evolution of the UN drug control treaty regime.
- It would provide a framework for a more principled compliance with the underlying goal and purpose of the conventions, prioritising respect for human rights, health care and crime prevention.
- It would provide opportunities to experiment and learn from different models of regulation.
- It would open the possibility of international trade, enabling small cannabis farmers in traditional Southern producing countries to start producing for the regulated licit markets. Closed national systems are unlikely to fully replace existing illicit markets that are partly dependent on international trade to accommodate product variety and quality, cultural diversity and consumer preferences. Alternative development schemes aiming to shift cannabis farmers to other products have failed; the only viable option is to involve them in the opening licit cannabis markets for medicinal and other uses.

The possibility of *inter se* modification was specifically designed to find a balance between the stability of treaty regimes and the necessity of change in absence of consensus in order to respond to the social conditions in certain like-minded states. The circumstances in which the UN drug control treaty regime finds itself today—systemic challenges and inconsistencies, increasing tensions with State practices, huge political and procedural obstacles to amendments, and unilateral escape attempts—merit a careful consideration of the legitimacy of its application. A coordinated collective response has clear benefits compared to a chaotic scenario of a growing number of different unilateral reservations and questionable re-interpretations. Indeed, *inter se* modification would facilitate the development of what, within an international policy environment characterized by faux consensus, is increasingly necessary: a 'multi-speed drug control system'[203] operating within the boundaries of international law, rather than one that strains against them. It could also include a mechanism such as a Conference of the *inter se* Parties (COISP) to regularly review the agreements and enable further evolution

based on lessons learned, and in particular to prevent violation of the rights of the other parties in the principal conventions.

Acknowledgments

This policy report benefitted greatly from the detailed feedback of participants at 'Cannabis Regulation and the UN Drug Control Treaties', Expert Seminar, organized by Transnational Institute (TNI), the Global Drug Policy Observatory (GDPO) and the Washington Office on Latin America (WOLA), Amsterdam, 26-28 October 2017. As is the norm, any errors of fact or interpretation remain with the authors. Thanks also go to Tom Blickman (TNI) and Martin Horton-Eddison (GDPO) for their assistance in various ways with the report's production.

ENDNOTES

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