



## **INTERNATIONAL LAW AND DRUG POLICY REFORM**

### **Report of a GDPO/ICHRDP/TNI/WOLA Expert Seminar**

**Washington, D.C.**

**17–18 October 2014**

Drug policy reform is currently higher on the international agenda than it has been in recent memory. With a United Nations General Assembly Special Session (UNGASS) on drugs set for 19-21 April 2016, the prominence of this issue will further increase. Significant legal and policy reforms at the national level have taken place in recent years that pose considerable challenges to the international legal framework for drug control, and beg important questions regarding states' international legal obligations.

As these debates move forward and as such reforms expand, international drug control law, often regarded as distant and arcane, becomes a more immediate and tangible concern. Clear legal tensions and, in some cases, breaches, are evident. The responses to these challenges will have ramifications beyond national borders and into international relations, and beyond international drug control law and into the broader realm of public international law.

The Expert Seminar "International Law and Drug Policy Reform," organized by The Global Drug Policy Observatory (GDPO), International Centre on Human Rights and Drug Policy (ICHRDP), Transnational Institute (TNI) and the Washington Office on Latin America (WOLA), took place in Washington, D.C., on 17-18 October 2014. The meeting convened international legal scholars from academia, the United Nations, and governmental agencies to discuss and debate international legal challenges and dilemmas raised by ongoing drug policy developments. It marked the first phase of an ongoing collaboration between the host organizations intended to inform a fluid and fast-moving debate with robust international legal analysis. This report, representing the outcome of the seminar, is intended to help shape the research agenda around the implications of national drug policy reform for the UN drug control conventions and international law more broadly and orient the discussion for follow-up expert seminars and papers in 2015 and 2016. The aim of this process is to inform discussions and debate at the 2016 UNGASS and beyond and to provide nuanced and well-grounded legal argumentation relating to the future of the UN drug control framework.

After a brief overview of contemporary challenges in the context of international law and drug policy reform, the Expert Seminar was comprised of four structured sessions and a final open session. Each structured session began with introductory remarks from two to three seminar participants. In order to

create a confidential setting and to encourage candid discussion, the Expert Seminar was conducted under the Chatham House Rule,<sup>1</sup> under which participants may use the information received but may not reveal the identity nor the affiliation of the speaker or the participants at the meeting. Annexed to this report is a list of participants, excluding the names of those who, under Chatham House Rule, requested not to be listed. Also annexed is a collection of suggested readings provided to participants prior to the seminar.

The first session looked at the nature of state obligations under the UN drug conventions; the second discussed intersections with other treaty regimes; the third focused on the meaning and consequences of a treaty breach; the fourth explored reform options within the drug treaties; and the final session—intended to draw conclusions from the seminar relevant for the organizers to consider in planning follow-up activities in the broader context of UNGASS and beyond—drew a lively conversation about the “Jurassic” nature of the drug conventions relative to other international treaty regimes. The international drug control regime predates the establishment of the United Nations and developed during the League of Nations in the first half of the 20<sup>th</sup> century, which helps to explain its atavistic nature.

## **Introduction—International law and drug policy reform: An overview of contemporary challenges**

The session began with an overview of contemporary challenges in international law and drug policy reform.

The UNGASS is an important moment, coming at a time when the foundation of the system is being questioned and there are serious challenges to the treaty regime. Key questions arising from this situation are: How flexible are the treaties? What are the limits of flexibility? Are some states currently in breach? How is the system evolving? As such, it is time to advance this important debate by drawing on the expertise of treaty scholars to get some fresh ideas and understanding about how other regimes evolve.

To begin the discussion, it is necessary to look at the longer story of the evolution of the international drug control system going back over a century. Over the first half of this history, there were seven different instruments focusing on the control of international trade of substances with a regulatory regime to ensure availability of substances for medical and scientific purposes while preventing their abuse — notably, none of the substances were prohibited and the legislation regarding domestic drug use or cultivation was left to the discretion of nation states. After the Second World War, the United States emerged as a main political power, ushering in a more prohibitionist approach.

The result was the 1961 Single Convention on Narcotic Drugs (the “Single Convention”)<sup>2</sup> which sought to combine all of the previous drug treaties into one, and among other things, strictly limited the use and

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1. “When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.” Chatham House, The Royal Institute of International Affairs (1927). <http://www.chathamhouse.org/about/chatham-house-rule>.

2. The Single Convention on Narcotic Drugs (1961), available at [https://www.incb.org/documents/Narcotic-Drugs/1961-Convention/convention\\_1961\\_en.pdf](https://www.incb.org/documents/Narcotic-Drugs/1961-Convention/convention_1961_en.pdf).

trade in psychoactive drugs to medical and scientific purposes, and required that traditional uses of coca, opium and cannabis be abolished. In the ensuing 10 years and with the emergence of several new psychoactive substances, including psychedelics, the international community realized that this treaty was not sufficient. While there was temptation to add these new substances to the control schedules contained in the Single Convention, the parties instead deemed them outside of its scope, and negotiated a new list of substances to be scheduled in a new 1971 Convention on Psychotropic Substances.<sup>3</sup>

During the same time, the thinking about drug control had evolved somewhat, with the United States (U.S.) seeking to strengthen controls while others asking for more lenient provisions such as alternatives to punishment, i.e., allowing treatment for drug offenses instead of incarceration. The result of these negotiations was the 1972 Protocol Amending the Single Convention.<sup>4</sup>

The 1961 Single Convention (as amended by the 1972 Protocol) and the 1971 Convention were largely successful in their original goal of controlling the licit market and preventing the diversion of controlled substances for illicit purposes. The vast majority of psychoactive substances were produced licitly at that time by the pharmaceutical industry, and the treaties were primarily designed to, and largely effective in, controlling “leakage” outside the system. However, illicit demand for psychoactive drugs started to increase (especially in the West), resulting in the expansion of illicit production and trafficking. Especially in the cases of the traditional plant-based drugs — cannabis, cocaine, and heroin — the markets became almost entirely illicit; cultivation, processing, international trade and street sales all turned into illegal business.

To suppress this illicit trade, member states adopted the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances<sup>5</sup> which required parties to treat a wide range of drug offenses (including possession for personal consumption) as criminal offenses. At the same time, the exemption period for phasing out traditional uses of cannabis (1979), and opium and the coca leaf (1989), expired, and the Cold War was coming to an end.

Fifteen years later, prison populations in many countries had skyrocketed to two or three times what they had been prior to the enactment of the 1988 Convention, and the U.S. had given the military a “counternarcotics” mission, unleashing a real “War on Drugs.” The escalation of criminalization, mass incarceration, and military anti-drug operations also started to trigger doubts among a group of countries. This new sentiment led to initially primarily European countries enacting harm reduction and decriminalization measures, and cracks started forming in the so-called “Vienna Consensus.”<sup>6</sup> The global

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3. The 1971 Convention introduced the dubious category of “psychotropic” drugs, which included opioids such as buprenorphine and pentazocine, psychedelics such as LSD, psilocybine, mescaline and MDMA, but also the active ingredient THC of cannabis (scheduled in the 1961 Convention) and the active ingredient cathinone of the khat plant (which has never been scheduled). Convention on Psychotropic Substances (1971), available at [https://www.incb.org/documents/Psychotropics/conventions/convention\\_1971\\_en.pdf](https://www.incb.org/documents/Psychotropics/conventions/convention_1971_en.pdf).

4. Protocol Amending the Single Convention (1972).

5. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), available at [https://www.incb.org/documents/PRECURSORS/1988\\_CONVENTION/1988Convention\\_E.pdf](https://www.incb.org/documents/PRECURSORS/1988_CONVENTION/1988Convention_E.pdf).

6. The international drug control system is based on what TNI has labeled a fragile “Vienna consensus.” The core of the UN drug control system is comprised of the UN Commission on Narcotic Drugs (CND), the International Narcotics Control Board (INCB), and the UN Office on Drugs and Crime (UNODC), all headquartered in Vienna, Austria. The painstaking consensus-driven CND negotiations every year to keep up the appearance of unity have become the symbol of paralysis and frustration.

HIV epidemic reinforced political support for harm reduction, and in the 2000s the decriminalization trend took firm ground in Latin America as well. Meanwhile, globalization had gained pace, adding considerable challenges to the supply-side focus of the regime, and since 1961 the world's population had tripled and moved more and more towards urban centers, rendering any visions of societies free from drug use even farther away.

Now the earlier “cracks” have led to systemic breaches, in particular around the reclaimed legitimacy of traditional coca use in Bolivia and the legal regulation of cannabis in Uruguay and some U.S. states. As such, the 2016 UNGASS represents a new era in international drug control. Many questions are arising, and there may be room for “adjustments” to the system. The four session themes in the Expert Seminar reflect some of the big questions about how this important event could deal with the reality of the existence of systemic breaches and treaty violations.

## **Session 1—The nature of State obligations under the UN drug conventions**

The first session provided a baseline for the subsequent sessions by engaging participants in a discussion of the nature of the legal obligations undertaken by States parties to the UN drug conventions. During this session, participants looked at the obligations under the UN drug conventions — their object and purpose, general and specific obligations, their non-self-executing nature, states’ margin of discretion, the nature of the obligations owed to other States parties, and enforcement mechanisms, including the role and mandate of the International Narcotics Control Board (INCB) and complaints to the International Court of Justice (ICJ) or other forms of arbitration.

### ***Overview of the legal obligations undertaken by States parties***

The session began with an overview of the legal obligations undertaken by States parties, including an exploration of their margin for discretion around different activities, from possession for personal consumption to trafficking.

Under the Conventions, States parties must treat drug trafficking and related conduct as serious crimes, although treatment may be offered as an alternative in cases of a minor nature. Article 33 of the Single Convention states flatly that possession is not permitted “except under legal authority” — however, the Single Convention and the 1971 Convention do not obligate parties to criminalize possession for consumption (although they may if they choose).<sup>7</sup> The Single Convention (for Schedule I and IV) and the 1971 Convention (for Schedule I) prohibit most activities for non-medical and non-scientific purposes without specifying the means by which this should be accomplished.<sup>8</sup> The 1971 Convention, however, contrary to the 1961 Convention, did not extend controls to the cultivation of plants containing so-called “psychotropic” substances.<sup>9</sup>

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7. See Single Convention, Article 36(1)(a) and 1971 Convention, Article 22(1)(a).

8. Article 4 of the Single Convention limits the “production, manufacture, export, import, distribution of, trade in, use and possession of drugs” to medical and scientific purposes. Article 5 and 7 of the 1971 Convention prohibit all “use” of Schedule I drugs except for scientific and “very limited” medical purposes.

9. The cultivation of cacti, mushrooms or khat plants containing scheduled alkaloids, is therefore not prohibited under international law. See David Bewley-Taylor and Martin Jelsma, “Regime change: Re-visiting the 1961 Single Convention on Narcotic Drugs,” in: *International Journal of Drug Policy* 23 (2012) 72–81, doi:10.1016/j.drugpo.2011.08.003, p.79.

Notably, the Conventions do not require State parties to criminalize personal use and limit obligations to criminalize personal use-related offenses (any party may lawfully reduce punishment to minimum strictness). But there is much less leeway for conduct having to do with anything other than personal use, i.e., trafficking, distribution, or sales. Alternative measures may be used only with respect to minor offenses.

In general, so long as a country remains party to the Conventions, there is no scope to remove penal offenses entirely. Under the 1961 and 1971 Conventions, which do not apply to personal use, parties have very little scope to reduce penalties. Under the 1988 Convention, which includes possession for personal use as an offense but contains a carve-out for each country's domestic legal circumstances,<sup>10</sup> there is greater scope to reduce penalties.

Finally, it is significant that “medical and scientific” uses are not defined, although the phrase has a long history in the drug conventions dating back to its first use in Article 5 of the International Opium Convention signed in Geneva in 1925.<sup>11</sup> The phrase replaced the former term “medical and legitimate purposes” which appeared in the International Opium Convention signed at The Hague in 1912.<sup>12</sup>

Because the term is not formally defined, countries have more leeway to interpret scientific and medical use for themselves. Article 31 of the 1969 Vienna Convention on the Law of Treaties (VCLT)<sup>13</sup> requires parties to interpret conventions “in good faith” (and also notes that “subsequent practices” can be taken into consideration when interpreting a treaty).<sup>14</sup> Governments have not defined medical purposes in the same way: there are significant differences between Western countries that follow principles of modern medicine on the one hand and indigenous cultures on the other. For example, consumption of controlled substance under medical care by people who are dependent on drugs in order to enable them to lead normal lives and/or to reduce the pain of withdrawal is considered a medical purpose in some countries but not in others. However, the ambiguity surrounding medical/scientific use only allows more leeway with respect to these uses; clear non-scientific or non-medical use (i.e., recreational use) is not permitted.

### ***Reflections on the object and purpose of the UN drug conventions***

Until recently, those who have worked with the Conventions have largely ignored their broader purposes and concentrated on functional roles — limitation of the production of raw materials, limitation of manufacture, control of the international trade through estimates system, suppression of the illicit traffic concentrating on all the various technical measures thought necessary to achieve these goals. But the object and purpose of the Conventions are critical in interpreting the scope and nature of the obligations contained in these treaties.

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10. The requirement to treat possession for personal consumption as a criminal offense under the 1988 Convention is “subject to [each party’s] Constitutional principles and basic concepts of its legal system.” Article 3(2).

11. *League of Nations Treaty Series*, vol. 81, pp. 318-358.

12. *League of Nations Treaty Series*, vol. 8, pp. 188-239.

13. Vienna Convention on the Law on Treaties (1969), available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

14. *Id.*, Article 31(3)(b).

So what are the objects and purposes of the Conventions? To answer this question it is necessary to look to the Vienna Convention.

Article 26 of the Vienna Convention provides the general obligations *pacta sunt servanda*: Every treaty in force is binding upon the parties to it and must be performed in good faith. Article 31 (general rule of interpretation) provides that a treaty must be interpreted “in light of its object and purpose.” Article 32 (supplementary means of interpretation) specifies that “supplementary means of interpretation” including the preparatory work of the treaty and the means of its conclusion may be used when interpretation under the general rule would leave the meaning ambiguous or obscure, or would lead to a result which is “manifestly absurd or unreasonable.”

It follows that in the interpretation of any particular provision in the treaties the object and purpose sheds an important light on the ordinary meaning of the terms used.

What then, is the object and purpose of the Single Convention? A textual analysis suggests that the shared object (if not the purpose) is to limit various activities relating to scheduled drugs to “medical and scientific purposes.” One of the more controversial issues is to what extent this logic has been sustained through all of the provisions of the conventions and still dictates how they should be interpreted today. The Preamble of the 1961 Convention is instructive in this analysis. The phrase “concerned with the **health and welfare** of mankind” has, until recently, been overshadowed by the Preamble’s focus on the “**serious evil**” of drug addiction and the “**duty to prevent and combat this evil.**” The choice of such a strongly pejorative term, not normally used in international treaties, implies an overall moral obligation.

The General Obligation of Article 4(c) of the 1961 Convention is very blunt — all activities are “limited to medical and scientific purposes.” The phrase “medical and scientific purposes” is used at nine key points in the 1961 and 1971 Conventions to limit activity to those exclusive functions. The Preamble to the 1971 Convention is slightly softer, rephrasing “medical and scientific” with restricting “the use of such substances to legitimate purposes.” However, the original phrase is also used repeatedly throughout the 1971 Convention. (The 1988 Convention is more concerned with “illicit” versus “licit” activity and assumes that the scope of these activities has already been defined by the previous conventions.)

It is important to note that the object and purposes analysis must take into account the events of the time. Under the arrangements prior to the Second World War, governments largely controlled the flow of substances. After the war, an ascendant U.S. moved to put its prohibitive stamp on the global regime, which it had tried to do in vain before and during the League of Nations period. The U.S. government, or parts thereof, consequently ushered in a tightening up of the system, representing a major shift in the dynamics of international drug control. In 1961 the Single Convention was adopted with a number of purposes — key among them the elimination of non-medical and non-scientific drug use and associated market activities.

### ***Overview of legal tensions arising from national level reforms***

In his introductory remarks on legal tensions among member states around various reforms, one participant asked, “Why do bright, educated people with the same evidence arrive at such opposite conclusions?” According to the person posing the question, the issue of drugs matters dearly to people — we

develop intuitions based on our natural tendencies, which greatly colors our judgment. At the same time, we need outside events to validate our intuitions.

The Preamble of the Single Convention concerns itself with the “health and welfare of mankind” (the official French and Spanish translation — “physical and moral human health” — is even more moralistic). According to then-UN Secretary General Kofi Annan at the 1998 UNGASS on drugs, the goal of Article 4 is a “world without drugs” (except for ensuring access to essential medicines and limiting drugs to medical and scientific uses). Do we accept this? The presenter argued that this should be one policy option among many, not an obligation that keeps us in a straightjacket. The world has obviously changed since 1961. These days what is considered legitimate use could be outside medical and scientific purposes as understood at the time.

The problem, it was argued by this participant, is that countries say that they comply with the Conventions “as if,” realizing that they really can’t comply with the goal of limiting activities “exclusively to medical and scientific purposes” as per the general obligation of the Single Convention. The reasons are multiple and diverse: institutional (corruption and the lack of financial resources to enforce treaty obligations), cultural (traditional or religious uses) or socio-economic (“world-market prices for bananas have plummeted, we tacitly allow marijuana”) et cetera, which leads to authorities to effectively turn a blind eye to infractions.

What can be done? One possibility, it was suggested, would be to allow more political space for experimentation with innovative policies that cannot be legally justified under the current treaty regime, based on the argument that such experimentation could identify policies that may advance the original goals of the Conventions. It is a healthy principle to constantly critically evaluate policy coherence and impact, and to experiment in practice with possible alternative approaches, including those that challenge existing dogmas, laws and treaties. Regulation of drug markets, such as the recent examples in some U.S. states and Uruguay, are domestic per definition, and opening up the trade internationally would run into additional legal obstacles and result in more tensions with other treaty obligations. Also, financial transactions between different state and national jurisdictions can easily trigger legal conflicts with anti-money laundering legislation. Consequently, economies of scale cannot easily develop and traditional producers, such as Caribbean cannabis farmers, risk to be left out.

In Latin America, there are tensions and conflict, but no regional consensus about how to proceed. Uruguay, for example, argues that international legal human rights obligations should be paramount and that strict compliance with the 1961 Single Convention has a lower priority if there is a conflict between the two. Bolivia is in favor of limited coca production as a protected right of its indigenous peoples, but isn’t in favor of cocaine production or cannabis. In Mexico, the predominant issue is violence related to drug markets, while in Colombia the problem is complicated by the role of the drug trade in the long-running internal conflict. Consensus around international level policy reform in Latin America will be difficult because of disagreements about how to move forward.

It was argued by this participant that the solutions should look towards protection of human rights and protection of the environment. The illicit drug trade, moreover, is just one aspect of organized crime. Also deserving scrutiny are the practices of the pharmaceutical companies, which are like the mafia be-

cause they bribe doctors with vacations and conferences at exotic beach resorts. All of these problems in the system make drugs hard to control.

### **Discussion**

Comments of the participants in the discussion following the presentations ranged from analyses of object and purpose and general or specific obligations of international treaties, to options for governments at national levels, and the session ended with a brainstorming about solutions for the way forward.

### **Object and Purpose / Public Health and Human Rights**

Object and purpose is a very elusive concept. "A mystery wrapped in enigma." It is vague, but flexible. Consequently, the object and purpose of a treaty is generally difficult to determine. The analysis typically starts with the preamble but must take into account the terms of the treaty and the drafting history. Further, relying solely on analysis of object/purpose is considered a weak method of interpreting a treaty.

One participant suggested that the interpretation of object and purpose depends on what member states are doing and on customary law. If many states were to interpret the object and purpose in a certain way, options for policy reform and a more lenient legal interpretation of treaty obligations would have much more traction. In reply, however, it was noted that under Article 31 of the Vienna Convention, interpretation is not legally a question of practice.

It was also noted that, the International Criminal Court has ruled that it is impossible to change the object and purpose of a convention through practice of the parties or resolutions and amendments.<sup>15</sup> Parties may place an emphasis on a particular concept but cannot alter its object and purpose. The bottom line is that object and purpose cannot be altered, and as such one must be very careful with an evolutionary interpretation of this concept.

Other participants made further arguments and posed questions based on object and purpose analysis:

- Could we use the concept of medical purpose and that cannabis regulation is a public health issue? For example, that the coffeeshop system in the Netherlands is designed to improve public health, by separating the market of less hazardous (cannabis) and hazardous drugs (i.e. heroin). Heroin has been registered as a medicine in the Netherlands to allow for heroin assisted program.<sup>16</sup>

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15. Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening), Judgment, (March 31, 2014), p. 26, available at <http://www.icj-cij.org/docket/files/148/18136.pdf>.

16. There have been attempts to argue that the treaty concept of 'medical purpose' could be interpreted as broadly as to include any policy measures, including a legal regulation of the cannabis market, that can be justified on the basis of its positive contribution to public health, since that is the primary aim of the treaty. While such a position could be argued on the basis of the fact that the Conventions leave the decision about what constitutes 'medical use' to countries, the Commentary on the 1961 Single Convention does not seem to support such a broad interpretation (see for example Commentary on the Single Convention, p. 111). It is not unthinkable that state practices could expand the scope for interpretation in this direction in the future, but such space is clearly not yet established. See: Bewley-Taylor, D. & Jelsma, M. (2012). *The Limits of Latitude: The UN drug control conventions*, Series on Legislative Reform of Drug Policies, No. 18, March 2012, available at: <http://www.undrugcontrol.info/images/stories/documents/dlr18.pdf>.



- The 2014 Arms Trade Treaty is clearer in its preamble on object and purpose, separating these concepts. The object relates to the more specific aims of the treaty (Establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms; Prevent and eradicate the illicit trade in conventional arms and prevent their diversion) while the purpose is the broader *telos* (Contributing to international and regional peace, security and stability; Reducing human suffering; Promoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties). The same may go for the drug treaties, whereby the health and welfare of mankind may be seen as the purpose, with the specific provisions agreed to representing the object of the agreements themselves. The question is, what if we set a goal/purpose of health and welfare, but fail comprehensively to achieve that goal via the mechanisms adopted (object) and then continue to measure “success” with a process that leads to harm? In other words in this case the object and the purpose could be in competition.
- Article 1(3) of the UN Charter provides that its purpose is “human rights and fundamental freedom for all,” and the Conventions have to be read in context of this provision. Harm Reduction International has made this argument many times. But why is that at the national level, drug policy is always preferred over human rights?

One reaction from an international legal expert was that the argument that as long as we respect the object and purpose of a treaty, we can “do what we want” doesn’t stand up in the law. In order to accomplish certain goals, sometimes the terms of the treaties must be changed. One participant likened the situation to The World Health Organization Framework Convention on Tobacco Control, noting that the original object of health in each has become gotten lost.

It was noted that some experts on the drug control conventions have argued that the structure and content of Article 4 of the Single Convention points to a reading of it as a set of *Special Obligations* rather than *General Obligations*. However, participants found general consensus that Article 4 was, in fact, representative of obligations in other treaties and not overly “special” in character.

It was suggested that the discussion exclusively on object and purpose and the distinction between general and special obligations are ultimately not that helpful within debates around treaty interpretation. Rather, the situation would be better framed as a three-tiered system:

- First tier: the ultimate **goal** is health and welfare.
- Second tier: the **strategy** to achieve this is to ensure the availability of medicines and limit use of listed substances to medical and scientific purposes, and
- Third tier: the **instruments or means** to put this strategy into effect, which are currently predominantly penal sanctions.

Only in the third tier — instruments/means — is there any flexibility for national governments, with the object and purpose of “health and welfare” largely being forgotten. In the view of one participant the main issue is not the first two tiers (goal and strategy) because these cannot easily be changed. Rather, it was discussed, the third tier is most important — specifically, how much flexibility do we have in terms

of instruments? On this point it was noted that the INCB has made progress — it has made concessions in terms of flexibility, for example, around decriminalization in Portugal and harm reduction in the Czech Republic. Others noted that changes to the second tier was central to the problem — how the issue is framed and what success means — and that change was possible but only when treaty reform was on the table.

Finally it was noted that the challenges around drugs are wide and diverse, and a discussion of object and purpose is simply insufficient to address them.

### **Tensions over national level reforms**

The discussion turned to national level reforms that stretched the boundaries of the Conventions and to the tensions caused by these measures.

For example, in the Netherlands, where the policy is one of non-enforcement of the laws prohibiting the purchase of cannabis in coffeeshops, illicit production is still actively prosecuted.<sup>17</sup> However, according to one participant, the non-enforcement against coffeeshops created apathy of the policy towards producers and consequently, the Netherlands is now a much bigger producer country. According to German Narcotics Law 31(a), possession of small quantities of any drug (not limited to cannabis) for personal use is not required to be prosecuted.<sup>18</sup> In Italy, criminalization for personal consumption was also removed and at the time there was no international response.<sup>19</sup> Various other countries have forms of decriminalization. While article 3(2) of the 1988 treaty requires legal justification to move towards decriminalization none have experienced considerable international opprobrium either for their models or their justifications.

More recently, Bolivia opted to withdraw from the Single Convention with the intention of re-acceding with a reservation against the provision requiring it to abolish the use of the coca leaf in the Single Convention. Bolivia succeeded in re-acceding with a reservation despite the formal objections of 18 coun-

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17. Under the Dutch Opium Act the sale and possession of cannabis remains a statutory offense. However, the government employs the “expediency principle,” a discretionary option that allows the Public Prosecution to refrain from prosecution if it is in the public interest to do so. Investigation and prosecution has been assigned the “lowest judicial priority.” Based on that principle, coffeeshops are tolerated when they follow the guidelines – known as the AHOJG criteria – issued by the Ministry of Justice through the Public Prosecution Office: refraining from advertising (A), not selling hard drugs (H), not causing public disorder (O), no sales to minors (J), and sales limited to a small quantity per transaction (5 grams), as well as limits on inventory (500 grams) (G). In 2013 a resident-only criterion (I) was added to the AHOJG guideline but an opt-out was included which has meant that, in practice, the resident-only criterion is largely ignored by most municipalities with coffeeshops. With the ratification of the 1988 Convention, the Netherlands made a reservation to safeguard the expediency principle.

18. The public prosecutor may refrain from prosecution if the offense is a minor, if there is no public interest in a prosecution and if the offender procures or possesses narcotic drugs in small quantities exclusively for his personal use. Art. 31a (1), Narcotic Drugs Act, 31 July 1981. This discretionary principle is quite similar to the Dutch expediency principle and was added in the law because German law generally functions according to the legalistic principle that implies total enforcement of law violations (excluding misdemeanors).

19. In 2006, the threshold quantities for non-prosecution were significantly lowered to such a level that, in practice, the decriminalization was abolished. See: Zuffa, G. (2011), *How to determine personal use in drug legislation: The “threshold controversy” in the light of the Italian experience*, TNI Series on Legislative Reform of Drug Policies Nr. 15, available at <http://druglawreform.info/images/stories/documents/dlr15.pdf>. See also the *Third White Book on the 2006 Italian drug legislation and its consequences on the penal and prison systems*, available at <http://www.fuoriluogo.it/sito/home/archivio/biblioteca/dossier/3-libro-bianco-sulla-legge-fini-giovanardi/-third-white-book-on-the-2006-italian-drug-legislation-and-its-consequences-on-the-penal-and-prison-systems-#more>.

tries.<sup>20</sup> In 2012, two U.S. states (Colorado and Washington) had approved ballot initiatives creating regulated markets for recreational cannabis. In November 2014, those two states were joined by Alaska, Oregon, and the District of Columbia.<sup>21</sup> Furthermore, the federal government has taken steps to allow state-sanctioned cannabis businesses to utilize banking services under federal regulations, in response to the dangers legal businesses face having to keep too much cash on hand.

Tensions to consider are: 1) decriminalization 2) harm reduction, which grates against the zero-tolerance nature of the Conventions; 3) indigenous rights, culture, religious freedom — for example, the 1961 Convention requires the abolition of certain indigenous practices; 4) scheduling (e.g., ketamine)<sup>22</sup>; and 5) the lack of transparency in the working methods of the INCB.

### **Discretion of parties**

The group then discussed the amount of discretion parties have if their internal law conflicts with the treaties.

An international legal scholar explained the relationship of treaties and internal law: under the Vienna Convention and rulings of the International Court of Justice, internal law is of no relevance to the performance of its treaty obligations by a member state.<sup>23</sup> By ratifying or acceding to an international treaty a Party assumes the responsibility to ensure its application in its entire territory. On the other hand, the 1988 Convention specifically provides a carve-out for each state's constitutional provisions and the basic concepts of its legal system with regard to possession for personal consumption.<sup>24</sup> The point was made, however, that some U.S. states and Uruguay have gone far beyond allowing personal use and the 1988 Convention's constitutional escape clause does not apply to distribution.

There are other legal complications. Under German law for example, precedence of law is four-tiered: the highest is European Union (EU) law, second is the German Constitution, third is general principles and the fourth level is international law. In the U.S., the implementing legislation for the Single Convention is the federal Controlled Substances Act (CSA) of 1970. However, in reaction to the Colorado and Washington ballot initiatives, the U.S. Department of Justice has issued new guidance for federal prose-

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20. For an overview of the objections to Bolivia's re-accession, see the table in *Bolivia wins a rightful victory on the coca leaf*, available at <http://druglawreform.info/en/newsroom/press-releases/item/4267-bolivia-wins-a-rightful-victory-on-the-coca-leaf>.

21. At the time of the Expert Seminar, the states of Colorado and Washington had approved ballot initiatives to legalize and regulate recreational cannabis. In November 2014, after the Expert Seminar, Alaska and Oregon passed similar initiatives, and voters in the District of Columbia approved a measure that allowed for legal possession and home growing but stopped short of a regulatory and tax system, leaving that step to the D.C. Council. However, the U.S. Congress exercises ultimate authority over D.C. affairs, and Congress is currently blocking D.C. plans to create a regulatory structure.

22. Following on from moves in 2014, at the 2015 Commission on Narcotic Drugs in March the Chinese government initiated a move to put ketamine, an essential anesthetic in human and veterinary medicine, under international control. China originally proposed bringing ketamine under the 1971 Convention's most severe control regime of Schedule I, which would dramatically affect its availability for surgery in poor rural settings and emergency situations. However, due to a successful civil society campaign, the decision to reschedule was postponed.

23. "A party may not provoke the provisions of its internal law as justification for its failure to perform a treaty." Vienna Convention, Art. 27.

24. Single Convention, Art. 3(2).

cutors that amounts to a conditional accommodation of state laws allowing regulated cannabis markets, provided that the states do not violate a set of listed federal priorities.<sup>25</sup>

It was pointed out that there are constant tensions between international law and internal law. Overall, domestic and international courts have applied a pro-treaty interpretation. For instance, in 2004, the International Court of Justice issued an advisory opinion ruling that the construction of the wall built by Israel in occupied Palestinian Territory in accordance with its internal security laws was contrary to international humanitarian law and human rights law.<sup>26</sup> In *U.S. v. Palestine Liberation Organization*,<sup>27</sup> the U.S. District Court for the Southern District of New York ruled that when a treaty conflicts with a federal statute, the one that was executed last is the one that governs — but only where Congress has clearly evinced an intent to supersede the treaty. In *Germany v. U.S. vs. Germany* (the “LaGrand” case), the ICJ found that the rights contained in the Vienna Convention on Consular Relations of 24 April 1963 could not be denied by the application of domestic (i.e., state) legal procedures.<sup>28</sup>

A further point was made that the reason the LaGrand case is taught in U.S. law schools is to illustrate how little international law matters in U.S. courts. One participant opined that the U.S. Supreme Court’s attitude in that case towards international law was one of utter indifference.<sup>29</sup>

## Potential solutions

This lively discussion led to a brainstorming of ideas for potential solutions. It was suggested that the whole discussion needed to be placed in the broader perspective — a treaty represents a minimum consensus on international cooperation. From this perspective, there are a number of possibilities to solve or reduce the tensions between the treaties and national (and sub-national) regulated markets for the recreational use of cannabis:

- 1) **Reschedule cannabis.** Under the Single Convention, this would require a recommendation of the WHO Expert Committee and a majority vote of the 53 members of the CND to adopt it. According to some participants, this would be politically unlikely and would also be of limited utility regarding cultivation for regulated cannabis markets for non-medical and non-scientific purposes, due to the inclusion of cannabis within numerous articles of the Single Convention, beyond the schedule itself.
- 2) **Amend the Conventions.** Most participants considered this to be politically even more unlikely to be achieved because, only a very limited number of parties have expressed any interest to open that debate and it would require near consensus to approve significant amendments.

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25. U.S. Department of Justice, *Memorandum for all US Attorneys re: Guidance Regarding Marijuana Enforcement*, Cole, James M., 29 August 2013 (Cole Memorandum), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

26. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Criminal Court, The Hague, 9 July 2004, available at <http://www.icj-cij.org/docket/files/131/1677.pdf>.

27. 695 F. Supp. 1456 (S.D.N.Y. 1988), available at <http://www.uniset.ca/other/cs4/695FSupp1456.html>.

28. *LaGrand (Germany v. United States of America)*, Judgment, ICJ Reports 2001, p. 466, available at <http://www.icj-cij.org/docket/files/104/7736.pdf>.

29. In this case the U.S. Supreme Court gave no deference to an order of the ICJ directing the U.S. to halt the execution of a German national based on a violation of his rights under the Vienna Convention on Consular Relations. See: *The Federal Republic of Germany v. United States*, 526 U.S. 111 (1999), available at <http://www.law.cornell.edu/supct/pdf/127ORIGP.ZPC>.

3) **More flexible treaty interpretation.** Use the flexibility provided by article 3(2) of the 1988 Convention (Constitutional carve-out for personal use) and the fact that “medical and scientific purposes” is not defined within the Single Convention or its sister treaties to argue the legality of (experimentation with) cannabis regulation, denying the existence of treaty breaches and avoiding any debate about treaty reform. Politically perhaps more likely to attract support, according to most participants, but the option is legally questionable and unsustainable.

4) **Ignore the treaties.** Some participants argued that the best option might be to focus our attention on what happens *de facto* on the ground in jurisdictions that have legalized recreational cannabis, question the relevance of the UN drug control system and international law in general, wait and see how many others will follow in the coming years and how tensions with the treaty regime develop over time before deciding on any course of action..

5) **Denunciation.** Others participants argued that instead of keep trying to find consensus on the international level, countries should consider to withdraw from the UN drug control treaty regime, either individually or as a group of countries, and (perhaps) re-accede with reservations legally enabling them to implement the drug policy changes they consider to best serve the health and safety of their citizens.

These options were explored further in the next sessions. States remain party to the treaties for a number of reasons, one of which is that the drug treaties also regulate the global trade in drugs for licit medical purposes. Also, being party to all three of the drug control conventions is a condition in a number of preferential trade agreements. When Bolivia withdrew from the 1961 Convention, the European Commission (EC) started the procedure to withdraw Bolivia’s access to the Generalised Scheme of Preferences (GSP+).<sup>30</sup> But before the EC’s withdrawal procedure was completed, Bolivia’s re-accession with reservation had been accepted by the UN Secretary General, thereby sparing Bolivia from being removed from GSP+. Ratification and active implementation of each of the three drug control Conventions is also a *sine qua non* condition for accession to the European Union.

The point was made that, assuming a breach of the Conventions (specifically by the U.S. in relation to recreational cannabis) — and understanding that the legal possibilities are limited — reform movements should talk about political pressures instead. For example, how might the U.S. government be persuaded to see treaty reform as in U.S. interests?

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30. Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008. Article 9 says that a GSP beneficiary country may benefit from the tariff preferences provided under the special incentive arrangement for sustainable development and good governance if: “(b) it has ratified all the conventions listed in Annex VIII (the ‘relevant conventions’) and the most recent available conclusions of the monitoring bodies under those conventions (the ‘relevant monitoring bodies’) do not identify a serious failure to effectively implement any of those conventions; (c) in relation to any of the relevant conventions, it has not formulated a reservation which is prohibited by any of those conventions or which is for the purposes of this Article considered to be incompatible with the object and purpose of that convention. [...] (d) it gives a binding undertaking to maintain ratification of the relevant conventions and to ensure the effective implementation thereof”. Annex VIII of the Regulation includes the 1961, 1971 and 1988 Conventions. According to the info pack on *EU’s Generalised Scheme of Preferences* (October 2014), “The philosophy of the GSP+ is that of an incentive based mechanism. It fosters the achievement of its goals by offering the “carrot” of preferences, which it provides when the relevant conventions are ratified and effectively implemented.” The GSP+ currently covers 13 beneficiaries: Armenia, Bolivia, Cape Verde, Costa Rica, Ecuador, El Salvador, Georgia, Guatemala, Mongolia, Pakistan, Panama, Paraguay and Peru. Available at <http://trade.ec.europa.eu/doclib/html/152865.htm>.

Wrapping up the discussion, a participant advised that preparations for UNGASS should focus on identifying desired outcomes, not just looking for where there may be flexibility or wiggle room. The enormous breadth of drug problems will mean that different countries will have different priorities. For example, if the focus of attention is violence around supply and production, the challenge is very different from looking at the human rights of users. One perspective might be about relatively “small tweaks,” while another perspective leads to much bigger and different proposals. Member states each look at the problem from the perspective of their own situation — from West Africa to Honduras to Bolivia the issues are very different.

## **Session 2—Intersections with other treaty regimes**

The second session took a closer look at the intersections of the drug treaties with other treaty regimes.

It has often been said that governments and the INCB have tended to interpret and implement the UN drug conventions in isolation from broader international law, despite the clear intersections between many areas of drug control and concurrent legal obligations. Up until this point, the Seminar discussion had looked mostly at the drug Conventions: the Single Convention, as amended by the 1972 Protocol, the 1971 Convention and the 1988 Convention. It is useful — though only rarely done — to look at other treaty regimes for comparison and to provide insight into how the drug treaties intersect with legal instruments in other issue areas. Indeed, this was one of the key drivers for the organizers to bring together a group of international legal experts that included individuals with minimal drug policy background.

### ***Overview of the intersections between human rights and drug control: Complementarities, tensions, and conflicts***

The session began with an overview of the ways that obligations undertaken and rights granted under the drug treaties intersect with contemporary human rights norms, specifically the “complementarities, tensions, and conflicts” and the challenges they pose.

- **Complementarities** refer to those areas where requirements of the drug treaties and human rights law coincide in their goals. The challenge is to maximize such complementarities.
- **Tensions** on the other hand, are areas where implementation of the drug treaties carries significant potential for or risk of human rights violations. The challenge in such cases is to minimize or limit the risk.
- **Conflicts** stem from the international agreements themselves, not State actions. There are two types to consider: 1) *inherent norm conflict* whereby two norms are contradictory, and 2) *conflict of the applicable law*, whereby two norms that would otherwise not conflict cannot be applied to the same situation.<sup>31</sup>

The most obvious example of **complementarities** is the preambular commitment to the health and welfare of mankind in the drug treaties. Caution is required, however, as “the health and welfare of

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31. Pauwelyn, J. & Guzman, A. (2012), *International Trade Law*, Wolters Kluwer / Aspen Publishers, 2nd ed.

mankind” tends to be used to demonstrate consistency *without further analysis*, as if this pointing to this phrase is sufficient to show that there are no tensions or potential conflicts.

The most common intersections are **tensions**, for the basic reason that *what states are required to do under the drug treaties is inherently questionable from a human rights perspective*, considering that they include obligations, the achievement of which requires investigation, arrest, prosecution, imprisonment, restrictions on freedom of speech (incitement), confiscation of property, extradition, eradication of crops and other actions. Indicators of success from these activities in turn map onto indicators of human rights risk, or even abuse. The difference between these is that the indicators of success in drug control are *process indicators* — what states are doing. The indicators of human rights problems are *outcome indicators* — what states should be aiming to improve. Arguably, the outcomes outweigh the processes.

States are also granted a broad right to adopt “more strict or severe measures” than required under each treaty. So what boundaries does human rights law place on the discretion enjoyed by States? What does human rights law prevent states from doing in the name of implementing their drug treaty obligations? On the other hand, States are also granted more “positive” progressive rights: important caveats and safeguard clauses within the drug treaties. Human rights law helps expand the importance and strength of those avenues.

Finally, to consider **conflicts** one may look at the ban on traditional uses of coca under the 1961 Single Convention, specifically with regard to Article 49,<sup>32</sup> and Article 4.<sup>33</sup> It was emphasized that *there is no way to do what is required under Article 49 without conflicting with contemporary human rights norms*. Articles 4 and 49 are designed to *abolish* these practices forever without caveat or qualification. Article 3 of the 1988 Convention adds criminal penalties to cultivation without the safeguard clause applied to possession. Today, the idea of contracting an indigenous group out of its traditions, and without free prior and informed consent, would be impermissible. Article 49 must be read in the light of today’s standards, not the prevailing standards around indigenous cultures of the 1950s.

The first question is whether this amounts to an inherent norm conflict. If so, then one of them is illegal with regard to the other. Has Article 49 become illegal as it relates to indigenous peoples? Or, on the contrary, would allowing indigenous peoples free, prior and informed consent — and thereby frustrating Article 49 — be itself illegal? Even if it does not constitute an inherent norm conflict, a State with an indigenous population that uses such plants may still be faced with a conflict of the applicable law — it cannot in the circumstances comply with both norms. This seems to have been what Bolivia faced when it chose to withdraw from the Single Convention and re-accede with a reservation to Article 49.<sup>34</sup>

A proportionality assessment provides another route for avoiding a conflict with human rights law. A proportionality assessment is required to determine the legitimacy of the limitations on the rights in question (which are after all not absolute). Considerations include the “minimum impairment principle”

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32. Article 49 permitted parties to reserve the right to permit temporarily (among other things) the traditional chewing of the coca leaf, but the practice was required to be abolished within 25 years after the convention took effect, in 1964. Single Convention, Art. 49 (1)(c), 2(e).

33. Article 4 provides general obligations including the requirement to “limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.” Single Convention, Art. 4(c).

34. For more information see <http://www.tni.org/pressrelease/bolivia-wins-rightful-victory-coca-leaf>.

(were no less restrictive means ever considered to achieve the goals of the drug treaties?), the duration of the limitation (perpetual and not open for review), and of course evidence about the limitation's effectiveness towards the achieving its aims.

If this test is passed, and a rights limitation is deemed to be a proportionate limitation, there is no conflict. But if it does not pass, there is a conflict of the applicable law. To explain the seriousness of that, consider the general obligation of the Single Convention contained in Article 4, to limit uses of scheduled substances to medical and scientific purposes. This, independent of Article 49 (which makes it 100 percent clear what is intended) also engages indigenous peoples' rights in negating their traditional uses. It also engages, beyond these populations, the right to privacy, freedom of expression and cultural and religious freedoms of other groups.

And if a proportionality test fails with regard to, say, the right to privacy, and a State is faced with a consequent conflict of the applicable law — between, say, the International Convention on Civil and Political Rights (ICCPR) and the Single Convention — then that conflict affects pretty much every State party to the ICCPR, every State party to the European Convention in Human Rights (ECHR) and the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples' Rights. If a public health and human rights based approach is to be pursued — something that has become a mantra of sorts — then this proportionality test must be carried out in good faith.

### ***Drug control and the purposes and principles of the United Nations***

In providing an overview of the issue area, one participant explained that in discussing drug control “from a policy perspective one only gets ... the bird's eye view from the Deputy Secretary-General's office” which is the “broadest view” within the UN. He remarked that the impact of the drug issue is clear in three areas: human rights, peace and security, and human development. The challenges in this area are cross-cutting, and extremely difficult because of the tensions within the system, and because the system looks at unintended consequences in a fractured way. As an attempted corrective, the UN System Task Force on Transnational Organized Crime and Drug Trafficking was established to look internally at how the two frameworks (drugs and crime) should apply.

The Political Declaration<sup>35</sup> made at the 2009 Commission on Narcotic Drugs (CND) acknowledged that the system must respect **human rights** and fundamental freedoms. Moreover, the High Commissioner for Human Rights has come out vocally on many aspects of this, including the right to the highest standard of health and the abolition of the death penalty. Following the Seminar, a landmark resolution was adopted at the UN Human Rights Council, co-sponsored by approximately 50 states, and calling for a thematic panel on human rights and drug policy prior to the UNGASS with a report from the Office of the High Commissioner to guide the discussion.

Because of stigma and mandatory data collection, many people who use drugs are reluctant to take advantage of harm reduction education and interventions. Also, there is an arbitrary response and ten-

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35. Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem, High Level Segment, CND Vienna, March 2009, available at [http://www.unodc.org/documents/commissions/CND/CND\\_Sessions/CND\\_52/Political-Declaration2009\\_V0984963\\_E.pdf](http://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_52/Political-Declaration2009_V0984963_E.pdf).



sion within the criminal justice system — forced treatment, enforced labor, un-medicated withdrawal — all of which are human rights issues for member States implementing the drug control treaties, and are beginning to be addressed by the UN system.

The challenges in **peace and security** are less evident, or at least less well-addressed. The Security Council has taken up six debates in which the problem of the illegal drug trade was discussed, but the challenges are difficult to address, e.g., alternative livelihoods and economic development frameworks.

Finally, addressing the challenges in the **development** agenda is particularly difficult because there are fewer tools to address the issues within the drug control framework, which leads to a range of unintended consequences. The CND has requested that other agencies in the UN system clarify the impact of the drug Conventions on other areas (how the UN can effect capacity-building in affected States for example), and to provide the basis for a clearer empirical discussion. The challenge is that the only agency dealing directly with the drug issue is the UN Office on Drugs and Crime (UNODC), and other agencies have not yet provided a focused response. The participant concluded that there is a real hope that the UNGASS 2016 will galvanize these efforts, with the Deputy Secretary-General really trying to push the system to take a closer look at how the drug issue affects the entire UN system.

### **Discussion**

Responses from participants in the discussion addressed the concept of harmonization in international law, especially with respect to indigenous cultures and historical injustices, unintended consequences, and conflicting agendas/ideologies.

### **Harmonization**

First, one participant gave some background on the concept of “harmonization.” It is a well-known phenomenon in international law that treaties can conflict. The Vienna Convention only resolves conflicts within treaties with the same subject matter.<sup>36</sup> Article 31 of the Vienna Convention provides the rule of “systemic integration,” such that treaty interpretation shall include “any relevant rules of international law applicable in the relations between the parties.”<sup>37</sup> The rule on systemic integration has proven difficult to apply. It came to prominence in the Oil Platform case (Iran v. U.S.), but in that case its application was not entirely clear.<sup>38</sup> The rule was considered again in the “Biotech” case of U.S. v. Canada<sup>39</sup> but the World Trade Organization (WTO) would not apply it where all of the parties were not members to the WTO. The main point to consider from these cases, it was explained, is that caution must be exercised when bringing cases before courts and tribunals, as the rule on “systemic integration” is a good rule, but not all-encompassing or absolutely reliable.

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36. Vienna Convention, Art. 30.

37. Vienna Convention, Art. 31(3)(c).

38. Case Concerning Oil Platforms (Islamic Republic of Iran v. U.S., Judgment of 12 December 1996), available at <http://www.icj-cij.org/docket/files/90/7287.pdf>.

39. “European Communities Measure Affecting the Approval and Marketing of Biotech Products” (U.S. v. EC Biotech Products Case), World Trade Organization, September 2006, available at [https://www.wto.org/english/news\\_e/news06\\_e/291r\\_e.htm](https://www.wto.org/english/news_e/news06_e/291r_e.htm).

It was pointed out that it is important to not underestimate the significance of human rights treaties because historically it takes time for rights to be recognized. For example, women's rights were not considered human rights until recently. Consequently, it was argued by one participant that there is a need to start linking reform-oriented discussions to specific human rights. Once framed in that way, there's a basis to work from. For example, gender-based domestic violence was ignored for hundreds of years and is now at the forefront of attention.

### **Indigenous cultures and historical injustices**

With respect to indigenous cultures, it was stated that one must look not only to the C169 Indigenous and Tribal Peoples Convention (the International Labour Organisation, or "ILO" framework),<sup>40</sup> but also to Article 27 of the International Covenant on Civil and Political Rights<sup>41</sup> referring to minority rights, and the UN Declaration on the Rights of Indigenous Peoples.<sup>42</sup> Not all parties have ratified the ILO framework as not all countries have indigenous populations. Indeed, it is unclear how much of a part of customary law indigenous cultures are because of the lack of universal participation.

One participant raised the point that the three drug control conventions treat indigenous issues in an inconsistent matter. While the Single Convention explicitly required ending all traditional uses of coca, opium and cannabis, some parties to the 1971 Convention didn't want to enforce the abolition of religious practices using substances such as peyote and ayahuasca. The drafters didn't want to infringe on religious and indigenous rights, so only included active ingredients but left the plants out of the schedules and omitted cultivation entirely. The 1971 Convention therefore has remnants of legitimate purposes other than non-medical/scientific use. The 1988 Convention added further confusion on the issue of traditional use. In an attempt to obtain legal recognition for traditional uses of coca leaf similar to the ones granted to certain psychedelics under the 1971 Convention, Peru and Bolivia negotiated paragraph 2 of Article 14 into the 1988 Convention, saying that any measures adopted "shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use." However, the same article (paragraph 1) stresses that these measures shall not be less stringent than the provisions of the Single Convention, which, as mentioned above, requires parties to completely abolish all traditional uses. Is it possible to argue, therefore, that even within the Conventions, some other uses are allowed? The United Nations Permanent Forum on Indigenous Issues has already explored the issues, but what are the options to resolve this problem? Can the parties go to the International Court of Justice (ICJ)?

According to the international law experts at the seminar, we must look at the traditional lifestyle interpretation to answer this question. For example, how do other states interpret the lifestyle of indigenous countries, especially within the ILO framework? Traditional lifestyles are linked to nature and natural

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40. C169 Indigenous and Tribal Peoples Convention, 1989 (no. 169): Convention concerning Indigenous and Tribal Peoples in Independent Countries (Geneva, September 1991), available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169).

41. International Covenant on Civil and Political Rights (Geneva, March 1976), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

42. UN Declaration on the Rights of Indigenous Peoples (Resolution A/61/L.67 and Add.1, September 2007), available at [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

resources, although growing coca is not explicitly included within the framework of the ILO on natural resources.<sup>43</sup>

Moreover, citing the case *Prince v. South Africa*,<sup>44</sup> practical concerns were raised about the international judicial or quasi-judicial mechanisms regarding their basic understanding of the drug issue. In *Prince*, a South African law student was denied admission to practice law because, as an adherent to Rastafarianism, he used cannabis for religious purposes. The UN Human Rights Committee upheld the denial on the basis that the law was designed to protect public safety. In view of the Committee, “based on the harmful effects of cannabis” an exemption for religious purposes might cause diversion and “constitute a threat to the public at large.”<sup>45</sup> The faulty logic of the government was taken on face value. Therefore doubt was expressed about the prospect that taking a case to the ICJ or other mechanism would necessarily improve the situation, at least with respect to cannabis issues.

Another participant pointed out that coca was originally included in Schedule 1 of the Single Convention because at the time it was viewed as a symbol of exploitation. Landlords and mine owners paid portions of salaries with coca. It was viewed as part of a corrupt system, and some progressive forces were anti-coca. But the indigenous peoples themselves were never consulted about it.<sup>46</sup> With the indigenous revival, coca became a symbol of rebellion, and in the case of Bolivia the government itself has sought to ensure indigenous rights to traditional uses of coca. Some also see the issue of indigenous rights being used as a pretext to advance other agendas, for example, the efforts of the Morales government in Bolivia to promote the coca industry, including for non-traditional use and export. Arguably, the point was made, this is similar to the situation regarding cannabis in the United States, where medical marijuana is being used as a prelude to other agendas, namely legal recreational markets. There are many arguments in favor of human rights, but many possible conflicts — the issues, it was agreed, are not simple.

Another participant noted that the debates will not often be resolved by a focus on the text of the treaty provisions themselves, but inevitably become questions of politics and interests of sovereign states. When interpretation goes beyond the “nuts and bolts” of legal treaties, it becomes a matter of historical injustices, and selective emphasis to suit a particular need or agenda. International lawyers can “go on about treaties” but can’t get away from the system of sovereign states and the reality that there is no final authority. When a state defies international norms, what can be done? The only way ultimately to deal with a rogue state must be to find balance between legal dimensions and the extent you’re willing to use historical arguments to further them. How do you get several different regimes with diverging realities to talk to one another? In the experience of this participant, there have been many efforts to dialogue and to coordinate — there is lots of coordination but as yet little cohesion. The UN System Task Force, for example, while set up to coordinate, has been abysmal on cohesion. Peacekeeping missions have also been subject to political expediency.

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43. Indigenous and Tribal Peoples Convention, Art. 15, 1989 (No. 169), available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169).

44. *Prince v. South Africa*, Comm. 1474/2006, U.N. Doc. A/63/40, Vol. II, at 261 (HRC 2007).

45. *Id.* Par. 7.3.

46. See also Thoumi, Francisco E., *A Modest Proposal to Clarify the Status of Coca at the United Nations*, Bogotá: Centro Editorial Universidad del Rosario, 2005.

Another participant raised the false dichotomies involved with this very “Western” way of thinking — what’s a medicine versus a drug, indigenous versus modern, and so on. People in China and India, for example, see the relationship between food and medicine very differently — in their traditional, more holistic way of looking at human health they regard food as drugs with medicinal properties as well. These issues aren’t adequately addressed in the discussions.

One participant discussed the UN Conference on Environment and Development, or “Rio 1992” in which ‘developed’ and ‘developing’ states considered the question of historical injustices, and agreed that ‘developed’ states play a role in alleviating their consequences. The U.S. and other ‘developed’ countries claimed there must be a time limit on this however. It was noted that one must take into account cultural diversity. The example of the famous Japanese whaling case was mentioned in this regard.<sup>47</sup> Here, Japan wanted to preserve its historical cultural coastal whaling practice in the Antarctic Ocean, but was denied on the grounds that the practice violated the International Convention for the Regulation of Whaling.<sup>48</sup>

### **The need for empirical evidence**

Towards the end of the session, clarification was requested regarding the need for empirical evidence. It was pointed out that there’s plenty of empirical evidence that current drug policies cause unintended consequences, but that “unintended consequences” is a misnomer, since these consequences are now completely foreseeable and therefore no longer unintended. Under basic common law tort principles we might better see ongoing efforts without change as reckless or negligent.

A response to this point was that information has to be evidence-based or calibrated based on evidence, the point being that any pushback on the policy must be supported by data. Outside the UN Department for Economic and Social Affairs (DESA), UNODC and a few other select UN agencies, there is very little data collection and analysis and no forward scanning of the consequences of the drug laws themselves. Governments are left with regulation versus prohibition, and left without data to bring about change and motivate member states to intervene.

## **Session 3—The meaning and consequences of breach**

The next session concentrated on the meaning and consequences of breach of international treaties. Recent reforms allowing for legally regulated markets for cannabis have brought both Uruguay and the United States into what appear to be clear breaches of the Single Convention and 1988 Convention. The U.S. government and some civil society activists, however, claim that there is no breach, while Uruguay defends the necessity of a breach by pointing to the priority that must be accorded to human rights obligations and the protection of basic health and safety of its citizens. Others have variously suggested that the treaties should be ignored or are of the view that acknowledging a breach is politically harmful to reform objectives. Using Uruguay and the United States as case examples, this session focused on the legal situation. First, the legal reasoning of both Uruguay and the United States were discussed and de-

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47. Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening), Judgment (Mar. 31, 2014), available at <http://www.icj-cj.org/docket/files/148/18136.pdf>.

48. International Convention for the Regulation of Whaling, 1946, Schedule (July 2012) (entered into force Feb. 4, 2013).

bated. Second, the legal consequences of a breach with regard to bilateral and multilateral relations/legal obligations were considered.

### ***Overview of U.S. arguments regarding cannabis reforms and the 1961 Single Convention***

The session opened with an overview of the U.S. government's stance concerning its internal laws and policies on cannabis. Although there is no official description of the detailed legal arguments behind the U.S. position, the arguments can be extrapolated from recent public statements made by Ambassador William R. Brownfield (U.S. State Department, Bureau of International Narcotics and Law Enforcement Affairs).<sup>49</sup> Essentially, the U.S. asserts that its policy of qualified accommodation of state-level cannabis legalization<sup>50</sup> is in compliance with the treaties because they leave room for flexibility and prosecutorial discretion.

Brownfield indicated that the U.S. view is that there is flexibility built into the Conventions giving broad prosecutorial discretion to member states, which may decide how to enforce their drug laws as long as they agree with certain policy goals such as access to medicines and combating criminal networks, in line with the ultimate goal of "protecting the health and welfare of mankind." Brownfield has presented the argument for flexible interpretation as one part of the new U.S. international stance, the "Four Pillars" approach: 1) respect the integrity of the Conventions, 2) accept flexible interpretation of those conventions, 3) tolerate different national drug policies, accepting the fact that some countries will have very strict drug approaches (including capital punishment) while others will legalize entire categories of drugs, and 4) agree to combat and resist criminal organizations involved in the drug trade.<sup>51</sup> Along those lines, revision of the drug conventions is seen as unnecessary and is strongly opposed.

This position was deemed by most of the participants to be legally unpersuasive and problematic from the point of view of respect for international law, reciprocity, and adherence to treaties in other areas. While participants understood why the argument was politically attractive for U.S. domestic purposes and for other countries that would like to avoid any discussion of drug treaty reform, it was argued that the "Four Pillars" assertion of unilateral interpretation of international laws sets a risky precedent for treaty adherence in other areas, including arms control and human rights.

It was pointed out that marijuana remains illegal under the federal Controlled Substances Act ("CSA"), which explicitly prohibits the cultivation, distribution and possession of marijuana throughout the United States (and serves as the implementing legislation of the Single Convention and related treaties). The federal government cannot compel states to adopt laws that mimic federal drug laws. States, for their part, cannot annul federal laws, but they are not obliged to assist the federal government to enforce its own drug laws, and as a practical matter, there simply aren't enough federal resources to prosecute marijuana cases in states opting to legalize.<sup>52</sup> The Obama administration could conceivably have

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49. See *Trends in Global Policy*, Brownfield, William R., October 9, 2014, available at <http://fpc.state.gov/232813.htm>.

50. Since the Expert Seminar, Oregon, Alaska and the District of Columbia have all passed legislation legalizing marijuana for recreational use (although Congress has taken steps to block the legislation in DC).

51. See *Trends in Global Policy*, Brownfield, William R., October 9, 2014, available at <http://fpc.state.gov/232813.htm>.

52. See for example: Wells Bennett and John Walsh, *Marijuana Legalization is an Opportunity to Modernize International Drug Treaties*, Brookings Institution and WOLA, Washington, D.C., October 2014, available at

opted to use federal authority to block the states from moving ahead with their new regulatory schemes, but if such a move were to succeed, it would leave intact those aspects of the state laws that repealed prohibition and criminal sanctions, but would remove the systems meant to regulate the newly legal cannabis market.

### ***Overview of Uruguay's arguments regarding cannabis reforms and the 1961 Convention***

Having heard an overview of the situation within the U.S. and tensions with the drug control treaties and the possible consequences for international law more broadly, there followed an overview of Uruguay's reforms around cannabis and justification under the drug control treaties. It was explained how possession and consumption were never punishable offenses in Uruguay. So consumption was legal, but a person had to purchase from an illegal source, so in this way had to pursue an illegal activity in pursuit of a legal one. It's also true that while there were no deaths from marijuana uses, there have been many deaths related to the black market for marijuana. Therefore by regulating cannabis, the government argued that it was taking the business away from criminal gangs and thus protecting its citizens. The overreaching objective of the law was to protect public health and safety, thus defending the human rights of Uruguayan citizens; as the government has argued, human rights treaties take precedence over the drug control treaties in the case of conflict between the two.

### ***Overview and analysis of laws in the Netherlands***

Attention then shifted to the Netherlands and the relationship between the obligations of the Dutch government under the international drug conventions, the 'coffeeshops' and whether cultivation of cannabis to supply the coffeeshops would be allowed under the UN treaties.

The group was reminded that the UN Conventions entail a multi-layer system to prevent the misuse of drugs, most notably cannabis for recreational use. Criminal prosecution is required for almost all conduct involving drugs under explicit and implicit requirements. At the administrative level, there must be a total ban on possession of drugs except under license exclusively for medical and scientific purposes. Even if not criminalized, drugs must be seized. As a result of this system, it is impossible to regulate the cultivation of cannabis for recreational use, and even allowing the sale through coffeeshops is difficult to justify under the Conventions.

According to the views of one participant — a view that was shared by many in the room — from an internal perspective, the UN Conventions are obsolete since drug consumption is a given in all parts of the world. The international consensus, it was argued, is broken and eroded as countries face different problems such as prison overcrowding and, in the case of Uruguay for example, public health and safety problems. Many countries feel they must put too much effort in prosecuting even low-level drug offenses. In the Netherlands, the coffeeshops represent a system of *de facto* legalization, but they also present what's known as the "back door" problem; a situation that raises the question, who is engaged in the supply of cannabis for the coffeeshops? It was suggested by one participant that the current situa-

tion leads people who are not involved in crime to become engaged in criminal activity since they see tolerance for possession, begin to cultivate, and consequently end up in the criminal justice system.

Meanwhile, international law is broader than the drug conventions. Human rights law, for example, obligates states to view the system in conflict with human rights law and public health principles: this includes regulating purity with respect to contaminants, THC, and other substances. The object should, it was claimed by one participant, be to invoke the right to health and argue that the best way to satisfy that right is through regulation. In this way there is a conflict between human rights obligations and drug conventions, and basically two ways to solve it: 1) harmonize with the human rights perspective (although it is hard to reconcile object and purpose of each, given that the drug conventions are so rigid and tight), or 2) treat it as a conflict: between human rights law and drug law. In this case the question arises, which one prevails?

In this regard, the issue of how state responsibility fits in was also raised. If a country violates the drug conventions, is there any redress from another state? Is it a violation against all other parties? Are obligations *ergo omnes* such that every state is against the other (“owed by all”)? And may states make complaints against other states even if not a direct victim? Under Article 14 of the Single Convention the answer is probably not. There is only a requirement to share information on compliance with the INCB, there is no complaint procedure. Cases will only be taken to the International Court of Justice (ICJ) if two states are both of the view that the complaint should be adjudicated by ICJ (there is no compulsory jurisdiction of ICJ), although a single state may present the case to the ICJ and request an advisory opinion. Only states that can show actual harm can get redress. In any case, what would be the redress? Compensation? This would only be possible if a state were truly harmed. It was argued that in the case of regulation without effect on other states it would be hard to get compensation.

Finally, on this topic, it was emphasized that breaching the Conventions does not come without costs. According to one participant, the Netherlands coffeeshop system is in contravention of the treaties and is contrary to EU law, and this fact has been used against it in negotiations for other treaties — for example in negotiating the Amsterdam Treaty,<sup>53</sup> when France used the threat of “torpedoing” negotiations because of claimed violations on drugs. In this respect, it was argued, a country’s position is always weaker if it violates, or is widely considered to be violating, a treaty.

A concluding recommendation from one member of the group, with agreement from others, was to go beyond the flexibility of the drug control treaties in international law, by basing arguments on specific provisions of human rights law.

### ***Consequences of breach of international treaties***

The next part of the session discussed the consequences of breaches of international treaties in general (not specifically the drug treaties). Several articles in the 1969 Vienna Convention on the Law of Treaties (VCLT) provide grounds for termination of an international treaty: Article 60 (“Termination or suspension of the operation of a treaty as a consequence of its breach”), Article 62 (“Fundamental change of

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53. Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts (1997).

circumstances”) and Article 64 (“Emergence of a new peremptory norm of general international law or *jus cogens*”). These provisions have been strictly formulated by the International Law Commission and the International Court of Justice and have limited application, in line with the principles underlying the VCLT. They have their roots in the 1950 recommendations of Gerald Fitzmaurice, which set forth several important concepts around bilateral/contractual obligations, which were interdependent among states, and integral/absolute obligations.<sup>54</sup>

The International Law Commission drafted Article 60 in response to the reactions of states to breach. The provisions of Article 60 are complex. Section 1 is concerned with the material breach of a bilateral treaty — entitling the other party to terminate or suspend the treaty. Section 2 deals with the material breach of a multilateral treaty by one of the parties, which entitles the other parties to suspend the treaty in whole or in part by unanimous agreement, or to terminate it as between themselves and the defaulting party or as between all parties. In addition, a party specially affected by the breach may invoke it as a ground for suspending the operation of the treaty as between itself and the defaulting party, and finally, any party other than the defaulting party may invoke the breach as a ground for suspending the treaty with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty. A “material breach” exists where a repudiation of the treaty is not sanctioned by the VCLT or the violation is of a provision “essential to the accomplishment of the object or purpose of the treaty.”

The concept of State Responsibility was also discussed. This is a pillar of international law and a complex area, as illustrated in *Gabcikovo (Hungary v. Slovakia)*<sup>55</sup> and courts have struggled with its application.<sup>56</sup> In 2001 the International Law Commission issued a set of draft articles to codify the law on state responsibility with detailed commentary (the “Draft Articles on State Responsibility”).<sup>57</sup>

Additionally, the overview of treaty breach highlighted that while the result of a material breach is suspension or termination, in the case of a nonmaterial breach, the rules of countermeasures are invoked. In the case of a ‘countermeasure’ the treaty obligations are enforced by states resorting to other treaty obligations (which some say must be in the area of the treaty breach). However, imposition of countermeasures is very limited and restricted to certain conditions: the countermeasure may not be an existing obligation and it should be proportional and necessary to induce the wrongdoing state to change its actions.

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54. Report on the Law of Treaties by Mr. G.G. Fitzmaurice (Extract from the Yearbook of the OLC, 1956, vol 2), available at [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_101.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_101.pdf).

55. *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J.Reports 1997, available at <http://www.icj-cij.org/docket/files/92/7375.pdf>.

56. See generally *Rainbow Warrior (New Zealand v. France)*, France-New Zealand Arbitration Tribunal (30 April 1990), available at <http://www.iiij.org/courses/documents/rainbowwarrior.pdf>, and *Air Services Agreement Case (France v. US (1978))*, available at <http://iiij.org/courses/documents/AirServicesCase.pdf> (which arguably confused the law of treaties and state responsibility).

57. A/56/10 “Responsibility of States for Internationally Wrongful Acts”, available at [http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf).

Notably, these articles were endorsed by the UN General Assembly as draft articles, but were never formally adopted as Articles per se.



Finally, it was noted that Articles 42 and 48 of the Draft Articles on State Responsibility address the question of which states are entitled to invoke the responsibility of another state. Under classical international law, only a state that is directly injured by the breach is entitled to bring a claim, which is reflected in Article 42.<sup>58</sup> Article 48 allows a state that was not directly injured to invoke another state's responsibility in the case of *erga omnes* obligations, i.e., where the obligation is owed towards a group of states or even to the international community as a whole.<sup>59</sup>

Normally, it was explained, the ICJ would have found a case inadmissible where a claimant state was not directly injured. However, in the 2012 case *Belgium v. Senegal*,<sup>60</sup> the ICJ held that any of the 151 parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment may insist on performance of obligations under the convention even if the alleged torturer or victims have no connection with the applicant state. In 2001, in the aforementioned Japan whaling case, Japan did not contest admissibility where Australia and New Zealand were not directly injured.<sup>61</sup> This became part of international law.

### **Discussion**

A discussion followed on whether the U.S. and Uruguay are in breach of the Conventions, and if so, what recourse other countries might have and what the consequences might be to the breaching country.

Another member of the group acknowledged that the INCB can "call a country out" on noncompliance of the treaties but "is a dog that can't bite." Others pointed out that the U.S. and Uruguay have general reservations on the ICJ and therefore it may not have jurisdiction over a claim. However, it was noted, there are always consequences to treaty violations, whether direct or indirect. There are many more practical consequences than legal. Also, there are non-litigation remedies in addition to litigation remedies.

Uruguay's argument as to why it is not in violation of the treaties is that it is complying with its human rights obligations, which, it is claimed, trump its obligations under the drug treaties. This raised the question, is this position legally viable?

In response, the participants offered some thoughts and advice on practical application. One noted that Uruguay's defense uses human rights principles, but in order to be effective it must be specifically based on human rights law. Another opined that the argument that drug prohibition violated a human rights treaty was not a realistic approach. In terms of recourse of other countries against the U.S. and Uruguay,

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58. Article 42 provides that an injured state may invoke the responsibility of another state if the obligation breached is owed to that state individually or a group of states including that state or the "international community as a whole if the breach specially" affects the state, or is "of such character as radically to change the position of all the other states to which the obligation is owed with respect to the further performance of the obligation."

59. Article 48 provides that a non-injured state may invoke the responsibility of another state if the obligation breached is "owed to a group of States including that State, and is established for the protection of a collective interest of the group" or if the obligation breached is to the international community as a whole.

60. *Questions Concerning the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, available at <http://www.icj-cij.org/docket/files/144/17064.pdf>.

61. *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Judgment (Mar. 31, 2014), available at <http://www.icj-cij.org/docket/files/148/18136.pdf>.

it was thought that countermeasures, while not the most elegant, would probably be most effective. Even though the states might not be directly injured, they could theoretically make a claim for state responsibility under Article 48 of the 2011 ILC Report. One participant stated that they had never heard of a violation of a criminal law convention leading to state responsibility procedure so it was unlikely to expect that approach to work in the case of the drug treaties.

Much emphasis was placed on political, as opposed to strictly legal, consequences of a breach. The problem with the U.S. “four pillars” argument, it was claimed, is its defense of the treaties — clearly it is in breach but it is simultaneously upholding the ‘integrity’ of the Conventions. This is, one person believed, a “grenade that can blow up in your face.” Nevertheless, accepting for the sake of argument that there’s a breach, in weighing their responses, other countries have to balance the practical consequences, that is to say whether objecting is worth the effort and political capital and energy, or if it’s better to simply accept it. However, it was claimed, even if countries don’t object, that doesn’t mean that there won’t be consequences to the U.S. At some point, for example, the U.S. should expect its own “flexibility” argument to be used against it in another context, or that a country will use the breach as a negotiating tool in an area unrelated to drugs e.g., the U.S.’s claim that Russia is in violation of the 1987 Nuclear Forces Treaty. For this reason most of the participants concurred, there are good reasons why countries shouldn’t stretch treaties beyond acceptable bounds.

Many participants agreed that the consequences to the U.S. in particular are not insignificant — with one participant remarking that the consequences that the “most powerful defender [of the conventions] is unable to defend” them are “enormous.” Another called the consequences “unquantifiable” as the “greatest namer and shamer is now in shame.” It was also queried whether the U.S. could now argue that the Netherlands has been in breach of the Conventions for a long time, even though the Netherlands had already suffered political consequences from its stance on cannabis, especially around treaty negotiations in other areas.

One participant pointed out that while there are no direct consequences to the U.S. for its breach, there are sanction mechanisms in place. The U.S. is too much of a superpower to be threatened by sanctions, but the treaty procedure has been used against other countries as a disciplinary measure. For example, the INCB has activated the mechanism under Article 14 of the Single Convention against Afghanistan, which could theoretically lead to an embargo on buying or selling controlled drugs. It would, however, violate the right to health to impose a complete embargo on essential medicines against a country (as provided by the Single Convention),<sup>62</sup> so practically speaking that is not an option. The new U.S. call for “flexibility” of the Conventions does tend to reduce the disciplinary measures that the U.S. itself can attempt to impose on other nations, so in that sense it is a “game changer.” The questions now, it was argued, are 1) to what extent that applies to other provisions of the treaties, e.g., the coca leaf, and 2) is it technically wise to point out the breach? There has, it was noted, been some debate about this.

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62. Single Convention, Article 14, sec. 2.

It was highlighted that in their publication on the topic,<sup>63</sup> Wells Bennett and John Walsh argue that the U.S. will eventually have to stand up and admit that certain provisions of the treaties have become obsolete. The question is, how can the U.S. be persuaded to do this? In this sense, it's important to distinguish between legal arguments and tactics. Countries who argue against the U.S. position may be subjecting themselves to harm if they argue against the flexibility afforded to them under the U.S. "flexibility" argument, therefore no country is likely to call the U.S. out on its breach. A better tactic, it was suggested, is to deal with the issue by bringing the topic of reform to the table.

One participant expressed dismay that the discussion seemed to be heading toward the conclusion that the U.S. is so powerful that nothing could happen to it when it breaches a treaty. In this regard, the creation of the Aarhus Convention Compliance Committee — established to review arrangements for reviewing compliance with the environmental conventions — was noted. Although the INCB can report noncompliance to ECOSOC and to the General Assembly, there is very little the Board can actually do about a breach. A suggestion was made that it could be possible to bring the U.S. into compliance under political relations theory, whereupon it was strongly noted by some members of the group that the point was *not* to bring the U.S. in compliance, but rather to persuade it to take a more proactive stance on treaty reform. In other words, the problem is not the change underway in U.S. domestic policy, but rather the persistence of treaty obligations that are, at least for some countries, obsolete and unviable.

A final point was made that the current situation remains uncertain and that the U.S. still has considerable disciplinary power. Two examples on this point were given in relation to certain countries in Latin America. In the case of Guatemala, which is exploring the option of legalization of poppy cultivation for medical purposes, the U.S. (under Brownfield) has opposed any moves on the grounds that the country doesn't have the capacity to introduce such a policy. And Bolivia was recently sanctioned again by the U.S. because it "failed demonstrably" to meet its counterdrug obligations, on the basis of a Presidential Determination stressing that the "*frameworks established by the U.N. conventions are as applicable to the contemporary world as when they were negotiated and signed by the vast majority of U.N. member states*".<sup>64</sup> The determination expressed the U.S. concern that Bolivia tried "*to limit, redefine, and circumvent the scope and control*" for coca under the 1961 Convention,<sup>65</sup> basically what the U.S. states are doing in the case of cannabis. These were offered as examples to suggest that, in reality, Brownfield's flexibility doctrine does not apply equally to all countries. Moreover, both these cases — contrary to cannabis regulation — in fact could legitimately be defended under the conventions, because poppy

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63. Bennett, W. and Walsh, J., *Marijuana Legalization is an Opportunity to Modernize International Drug Treaties*, Brookings Institution and WOLA, Washington, D.C., October 2014, available at <http://www.brookings.edu/~media/research/files/reports/2014/10/15%20marijuana%20legalization%20modernize%20drug%20treaties%20bennett%20walsh/cepmjlegalizationv4.pdf>.

64. Barack Obama, *Presidential Determination—Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2015*, Memorandum for the Secretary of State, September 15, 2014, available at <https://www.whitehouse.gov/the-press-office/2014/09/15/presidential-determination-major-drug-transit-or-major-illicit-drug-prod>.

65. Memorandum of Justification for Major Illicit Drug transit or Illicit Drug Producing Countries for Fiscal Year 2015 – Bolivia, September 15, 2014, available at [http://www.whitehouse.gov/sites/default/files/docs/final\\_-\\_country\\_justifications\\_2015\\_majors\\_list1.pdf](http://www.whitehouse.gov/sites/default/files/docs/final_-_country_justifications_2015_majors_list1.pdf).

cultivation for medical purposes is allowed under certain conditions, and Bolivia managed to get a special reservation for coca leaf in its natural form.<sup>66</sup>

## **Session 4—Reform options within the drug treaties**

The final session of the dialogue focused on some options for treaty reform. There are various avenues for unilateral and multilateral reforms within the drug conventions and broader treaty law. Examples include denunciation, denunciation and re-accession with reservations, amendments, inter-se amendments and modifications, utilization of constitutional caveats within the penal provisions, and re-scheduling. Each of these raises specific legal and political considerations. During this session, participants discussed the available options open to reform-minded states, the limits of available options to reach agreement on the legal possibilities available to states absent reform to the extant treaties, and then looked to the processes of change within other treaty regimes to inform debate within international drug policy.

### ***Overview of reform options within the drug conventions***

During this overview the array of reform options and their viability were discussed. Regimes, it was explained, are not static — laws, even international conventions, can be changed. Indeed, it was noted that the 1997 World Drug Report acknowledges this fact.<sup>67</sup> Some possible options that have been explored are 1) modification or amendment, 2) denunciation, and more recently 3) modification *inter se*. The Conventions also allow for some deference to each country's constitutional principles and the basic concepts of their legal system, which has been used to enact reform in some instances. Also, the VCLT provides, under certain limited circumstances, that a treaty may be terminated or suspended upon a "fundamental change in circumstances,"<sup>68</sup> an interesting concept worth exploring.

One treaty modification for which clear rules are established is a change in the schedules found in the treaties, and is allowed under all three conventions, with a simple majority vote of the CND required for the 1961 Single Convention and a two-thirds majority vote required under the 1971 and 1988 Conventions. Because of these requirements and the current makeup of the CND, it is unlikely that a vote to change the scheduling of cannabis in Schedule I, for example, would be successful. Nevertheless, removing cannabis from Schedule IV (very limited medical use) might stand a better chance since a substantial number of countries allow medical use of cannabis and scientific evidence about useful medical properties of cannabis is increasing. In that light, initiating the rescheduling procedure for cannabis by requesting the WHO to undertake a critical review was considered by several participants to be a useful step to take. Given the absence of any scientific basis, it would be unlikely that the WHO Expert Committee would recommend maintaining the current inclusion of cannabis in Schedules I and IV so it would trigger at least an interesting debate.

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66. For more information see <http://www.tni.org/pressrelease/bolivia-wins-rightful-victory-coca-leaf>.

67. "Laws—and even the international Conventions—are not written in stone; they can be changed when the democratic will of nations so wishes it." United Nations International Drug Control Programme, *World Drug Report*, UNDCP/Oxford University Press, ISBN 0-19-829299-6, p. 199.

68. VCLT, Article 62.

Another problem, however, is that, as noted above, there are other provisions on cannabis in the text of the Conventions, and so amendment would most likely be necessary to impact cultivation issues. Amendment refers to a change in the text of one or more of the treaties, and would require either unanimity or the agreement by ECOSOC to review the issue through convening a Conference of the Parties (COP). ECOSOC can also decide to accept an amendment even if one or a few parties have objected, in the understanding that the amendment would not apply to those countries who opposed it, but that would be difficult to demonstrate in the drug arena. Because the block of countries currently in favor of the status quo is considerable, neither amendment nor modification appears feasible for the time being.<sup>69</sup> It was suggested that it would probably be more productive to focus on building coalitions of like-minded countries who might be better positioned to effect change in the future via other routes.

In this regard, Article 46 of the Single Convention allows for denunciation of the treaties. It was suggested that this option could be pursued with respect to selective provisions or to the treaty as a whole, possibly as a mechanism to trigger change. This is a legal option provided for in the treaties; however, in order for denunciation to result in termination of the treaty, the number of signatories remaining must be fewer than 40, which is highly unlikely given the current dynamics.

### ***Late reservations and inter-se amendments***

Following on from this discussion, an overview was provided of the mechanisms built into the treaties that are applicable to all parties, as well as “a la carte” options such as a modification *inter se*. These latter options, it was suggested, are generally more destabilizing, and are especially difficult for the U.S. to use because of reluctance for other countries to employ them in relation to other treaties, such as human rights treaties, security treaties, etc. If these measures are encouraged and permitted, the concern is that previous agreements may lose strength.

Reservations that are offered upon initial ratification of a treaty are generally more permissible than “late” reservations. Technically, late reservations are impermissible under the VCLT, but in practice they are usually allowed unless there is an objection. In the case of denunciation with re-accession (with recalibration of obligations), there is no specific prohibition but this practice is very controversial because states parties see this maneuver as disruptive. Bolivia, however, did succeed in re-acceding with a reservation. If the U.S. were to attempt such a step, it was argued by one participant, other states would understandably object as there is a questionable precedent set by residual reservations. It was also noted that it is unlikely that the U.S. could attempt this through unilateral presidential action.

According to the legal analysis of one participant, the likelihood of the success of modification *inter se* would depend on the objective of the Convention in question. Under the provisions of the VCLT, the modification may not affect the rights or obligations of other parties to the treaty, or be incompatible with its object and purpose.<sup>70</sup> *Inter se* modification, however, was characterized as a somewhat exotic

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69. Substantial amendments to the 1961 Convention were negotiated and approved with the 1972 Protocol amending the Single Convention on Narcotic Drugs. The only attempt since then, however, failed; Bolivia proposed an amendment to remove from the Single Convention the obligation to abolish coca chewing, but eighteen countries objected. See: Martin Jelsma, *Lifting the Ban on Coca Chewing: Bolivia's Proposal to Amend the 1961 Single Convention*, Series on Legislative Reform of Drug Policies 11, TNI 2012, available at <http://www.tni.org/sites/www.tni.org/files/download/dlr11.pdf>.

70. VCLT, Art. 41(1)(b).

practice, normally used by two countries to adopt additional restrictions, not to lessen restrictions, and would be very difficult with the drug Conventions because of their prohibitionist nature. While there is no procedure for objections, one participant argued that it would be difficult to imagine that the treaty administrator wouldn't be tempted to allow other parties to object. In other words, it was suggested, the notion of modification *inter se* should not be seen as a "quick fix" or magic bullet solution.

### ***An international relations perspective***

In order to provide a broader political context to the legalistic discussions, the seminar also included an international relations perspective. In speaking on this topic, one participant offered that it was unwise to spend too much time with the mechanics of the treaties and international law, but instead effort should be put into dealing with the geopolitical realities of the situation. It was suggested that we are currently in a unique position in that the superpower within the field of drug policy has now abdicated that position, and as such U.S. power to police the treaties is in question. However, it was argued, a bully doesn't change its stripes — the mantle of power and use of power may continue, but the base of power has become shaky. Under such circumstances, a lot of room has been created to go further; indeed, the room for reform options is unprecedented. This is, the group was reminded, the opposite of the climate during the international "moral arms race" that took place in the 1920s, during the temperance movement, when countries were all trying to outdo each other in pushing for strict controls on drugs.

In terms of processes of change, it was explained how the Netherlands started with defections from the regime and there have been more and more in recent years. Along with this optimistic scenario, however there are problems. First, there is a fear the drug conventions might fall into default and apathy, and become ineffective. The people currently making decisions on drug policy (in the CND) are diplomats, police, and ministers of justice. A tiny minority is from ministries of health but the majority adheres to the traditional supply-control regime. The UNODC is a small part of the UN General budget, with major donors such as Japan and Russia being clear proponents of the status quo and keen to maintain a system to protect their own interests. In this way, it was explained, the system is truly "donor driven." In order to change the system something very different needs to be attempted. Now, it was suggested, is the time, because the space for reform is bigger than it ever has been.

### ***Discussion***

The participants made a number of points regarding the different options under the treaties, which led to a constructive discussion on possible ways forward.

### ***Analysis of various options***

- *Fundamental Change in Circumstance.* A fundamental change of circumstances might justify terminating or modifying a treaty, but this is extremely restrictive and goes against treaty practice. The invocation of this rule has been successful only once, in the so-called "Rakia" case. Otherwise it is seen as principally undermining the 'sanctity of treaties'. Article 62 of the VCLT provides the only two justifications of the invocation of *rebus sic stantibus*: first, that the circumstances existing at the time of the conclusion of the treaty were indeed objectively essential to the obligations of treaty

and the instance wherein the change of circumstances has had a radical effect on the obligations of the treaty.<sup>71</sup>

- *Permanent Reservation.* A party may not make a new “transitional” reservation under Article 49<sup>72</sup> of the Single Convention to allow themselves another 15 or 25 years phase-out period for coca, opium and cannabis use because the provision started at the treaty enforcement start date (December 1964) and therefore the period for transitional reservations has passed in 1979 and 1989. However, the Commentary to the Single Convention does specifically mention the option for a party to make a permanent reservation under Article 50 to permit the non-medical use of the three substances mentioned in Article 49 and even certain other drugs.<sup>73</sup>
- *Denunciation and re-accession with reservation.*<sup>74</sup> If a number of states object to a reservation but there are not enough to meet the threshold to reject the reservation, the reservation will be accepted, “it being understood, however, that States which have objected to the reservation need not assume towards the reserving State any legal obligation under this Convention which is affected by the reservation.”<sup>75</sup>
- *Modification inter se.* Under Article 41 of the VCLT, any modification between two or more parties to a multilateral treaty must not “affect the enjoyment of the other parties of their rights under the treaty or the performance of their obligations.” In the case of disarmament treaties which are said to be “interdependent,” modification is arguably unlawful because it would necessarily affect the rights of third parties.<sup>76</sup> This is extremely restrictive and consequently these provisions are difficult to rely on. In the issue of international drug policy, the question was posed, are the implications for

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71. Fitzmaurice, M. & Elias, O. (2005), *Contemporary Issues in the Law of Treaties*, Eleven International Publishing, p. 174, available at [https://books.google.nl/books?id=rD\\_DDw2Rr\\_EC&pg=PA174](https://books.google.nl/books?id=rD_DDw2Rr_EC&pg=PA174).

72. Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol, Article 49, Transitional reservations: “1. A Party may at the time of signature, ratification or accession reserve the right to permit temporarily in any one of its territories: (a) The quasi-medical use of opium; (b) Opium smoking; (c) Coca leaf chewing; (d) The use of cannabis, cannabis resin, extracts and tinctures of cannabis for non-medical purposes; and (e) The production and manufacture of and trade in the drugs referred to under (a) to (d) for the purposes mentioned therein.” The restrictions and time limits are specified in paragraphs 2-5.

73. “By 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, but also non-medical uses of other drugs, without being subject to the time limits and restrictions provided for in article 49”; Commentary on the 1961 Single Convention on Narcotic Drugs, p. 476. See also: *Bolivia’s legal reconciliation with the UN Single Convention on Narcotic Drugs*, IDPC Advocacy Note, July 2011, available at <http://www.undrugcontrol.info/en/issues/unscheduling-the-coca-leaf/item/2628-bolivias-legal-reconciliation-with-the-un-single-convention-on-narcotic-drugs>.

74. See: Helfer, L.R., “Not fully committed? Reservations, risk and treaty design,” in: *Yale Journal of International Law*, 2006, Vol. 31, pp. 367-82, available at [http://www.yale.edu/yjil/PDFs/vol\\_31/Helfer.pdf](http://www.yale.edu/yjil/PDFs/vol_31/Helfer.pdf).

75. Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol, Article 50 paragraph 3; and Convention on Psychotropic Substances of 1971, Article 32, paragraph 3. The 1961 and the 1971 Conventions establish the same threshold: unless within 12 months one-third of the parties have objected to a reservation, it is deemed to be permitted. The 1988 Convention does not have any provision on reservations and therefore follows the general rules of the 1969 VCLT which does not establish a threshold; this means that a reservation under the 1988 Convention cannot be blocked by any number of objections.

76. See also Sadat Akhavi, Ali, *Methods of Resolving Conflicts Between Treaties*, Graduate Institute of International Studies Series, V. 3., Martinus Nijhoff 2003.

the other parties immediately apparent? It was noted that one possibility that is being reviewed is an import/export agreement for the licit trade in coca leaves between Bolivia — where, thanks to the new reservation, coca can now be produced legally — and Argentina, where possession and consumption is legal under domestic law but where it cannot grow. International trade in coca for non-medical purposes (and also not as a flavoring agent — an exception in the treaty for the Coca Cola company) is illegal under the conventions and must be established as a criminal offense; an *inter se* agreement modifying the 1961 and 1988 Conventions as between themselves alone, could enable licit trade from Bolivia to Argentina and put an end to the large-scale illegal cross-border smuggling. How would that “affect the enjoyment of the other parties of their rights under the treaty”? One participant noted that modifications *inter se* are not per se unlawful; rather use of the mechanism may face extreme hurdles. The General Agreement on Tariffs and Trade (GATT) is instructive here since all states have a stake in the outcome. The drug control regime is prohibitionist in its orientation, however, and as a result member states may feel more entitled to raise objections.

- *Rescheduling.* Under the 1971 Convention, if a new substance is added to a schedule, a party can make a reservation to its scheduling. So the idea for a country or a group of countries to “unschedule” by reservation or *inter se* agreement a specific substance — cannabis for example — from the treaties with effect only among themselves (while maintaining their treaty obligations regarding the substance vis-à-vis other parties) in principle is not such an extreme concept. In response to the query whether rescheduling cannabis would be considered a change in the treaty, one participant responded that this would not have a significant effect on the treaty articles in which cannabis is explicitly mentioned. Since only 53 states (members of the CND) vote on scheduling, the legal point of view was that changing the text would require something more. It was noted that the place of drugs within schedules can be changed every year, which would perhaps “freeze” the relevant textual provisions explicitly mentioning cannabis, but not withdraw them.

### **Practical considerations**

In addition to the legal aspects, political aspects were also considered, and seemed to one participant to be a lot more promising. It was pointed out that: 1) the INCB and the international community recognize harm reduction and there are mountains of evidence that these measures are effective, yet consumption rooms in Canada and several European countries are considered contrary to the Conventions; 2) we are still measuring success by process, not outcomes; 3) the role of the WHO is minimized in the treaty regime (why?); and 4) the U.S. is claiming flexibility of the treaties to allow legalization while displaying hypocrisy in not recognizing harm reduction principles.

One participant discussed the INCB position on harm reduction and safe injection sites in particular, saying that the international community as a whole does not necessarily support harm reduction — even in civil society there are organizations such as the World Federation Against Drugs that are very much against it. Further, discussion of harm reduction has been focused on the consumption side, with harm reduction in production/trafficking remaining a rather unpopular topic. It was also argued by one participant that some harm reduction practices can be argued to be in breach with the Conventions in



some ways, with safe injection sites being highly debated. It was noted that the INCB position is that a policy is illegal if a government uses its own resources to test drugs and provide needles, thereby making it co-responsible or even 'complicit' in illicit drug use. With regard to the Canadian courts having ruled that consumption rooms are constitutionally protected, one participant responded that the INCB is not bound by outside legal opinions.

It was acknowledged that "harmonization" of drug laws and human rights treaties is challenging, but important. In this regard it should be remembered that while no treaty is "superior" to another, human rights treaties have a special character and place within the UN system and figure prominently in the UN Charter.<sup>77</sup>

The question was asked whether human rights emphasis as an overarching priority would help with overcoming procedural gridlock. It was noted how the UNODC has espoused that the priority is health and human rights and acknowledged the importance of incorporating human rights norms, yet INCB's position has not been supported by international law more broadly.

Regarding the U.S. domestic position, one participant highlighted that in the U.S., most changes in international treaties require the approval of the U.S. Senate, which many have pointed out would be extremely difficult and probably impossible given its current makeup. Participants spent some time discussing whether it would be possible for the President to make a change internationally without going through the Senate, including whether Uruguay could start the process and the U.S. could go along with it without the Senate.

This line of reasoning raised the question, are there any procedures the Senate does not specially have to vote on? It was suggested that denunciation may be a possibility, but the Senate always asks the Executive Branch to inform it on resolutions, amendments to treaties, etc., and has a "weird hecklers veto."<sup>78</sup> Rescheduling would not require a Senate vote, but the U.S. would be pressed to lobby against the de-scheduling of cannabis (taking it out of the treaty schedules altogether). The Senate Foreign Relations Committee consents to treaties as presented, but any changes are considered to have to be reapproved. This was, it was noted, once an issue with regard to some annexes to the chemical weapons treaty. The Executive branch has not conceded that it has to go back to the Senate for every change, however. That said, re-accession with a reservation would be difficult because the Senate preserves its veto.

### **Possible ways forward**

Before moving into the final session, participants commented on a number of issues relating to possible ways forward.

#### *1) Reschedule Cannabis focusing on CBD/THC considerations*

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77. Charter of the United Nations, Articles 1 and 55 set out the purposes and principles of the UN. See M. Nowak (2007) "The three pillars of the United Nations: Security, Development and Human Rights," in M. E. Salomon, A. Tostensen, & W. Vandenhole (Eds.), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (2007), pp. 25-41.

78. A "heckler's veto" describes the ability – but not the right – of a person to be loud and obnoxious enough to drown out the free speech of others. A heckler is a person who harasses and tries to disconcert others with questions, challenges, or gibes.

It was noted how rescheduling was once attempted in relation to delta-9-THC or Dronabinol (strangely enough scheduled under the 1971 Convention). It would make a big difference if the U.S. wouldn't argue against it (although it was noted that consideration must be given to the text in the 1961 and 1988 Conventions). It was also pointed out that the process of re-visiting the issue could have the effect of getting the WHO more involved in the scheduling process as laid out in the Single Convention. One participant noted that the rescheduling issue is usually perceived as an issue of limiting, or setting a maximum of THC. Maybe a discussion on the minimum of CBD would be better, although more research is needed on this.

#### *2) Admit breach of the Conventions*

There was some agreement on the view that perhaps it would be best for the U.S. to acknowledge its breach of the Conventions by allowing the state laws regulating cannabis, but then do nothing immediate about it. Both the U.S. and Uruguay could best focus their efforts on explaining the reasons behind and the necessity of the decision they have taken, gradually building a case for future treaty reform.

#### *3) Actively nominate new INCB/WHO members*

There was also a discussion of the current makeup of the INCB (which is becoming more balanced and less ideological over time) and the WHO. The INCB is currently made up of doctors, law enforcement, public health professionals and diplomats, and most people who get onto the Board are committed to a particular agenda. The INCB, it was noted again, is historically prohibitionist, but that has been slowly changing. One participant argued that the international community needs to nominate members to the INCB or to the WHO that support more progressive policies.

#### *4) Expand soft law*

One of the key takeaway conclusions from this discussion for some of the group was the difficulty surrounding the legal options for moving forward with some sort of treaty reform. Therefore it was suggested that it might be more useful to continue to focus on influencing more informal "soft law" — resolutions, pronouncements, declarations — to extract legal exceptions to the treaties as they exist. Some starting places might be 1) to carve out exceptions based on human rights law, 2) establish distinctions between different forms of cannabis, 3) make concessions to diverse constitutional mechanisms and experiments/expand Constitutional carve outs.

### ***Final Session—How to unfreeze a Jurassic system?***

In the final session, participants drew conclusions from the seminar relevant for the organizers to consider in planning follow-up activities in the broader context of the UNGASS process and beyond.

Perhaps the most salient comment of the two-day seminar came from one participant who, after listening to all of the discussion and analysis around the drug control system, was left with the sense that the drug conventions were so stubbornly resistant to change compared to other treaty systems, that they almost seemed 'frozen in time.' All other treaty systems, it was stressed, even those that involved both the U.S. and Russia (two traditionally non-flexible countries), allow 'modernization to reflect realities of the times.' For this reason, the drug control treaties were dubbed the Jurassic Drug Control Con-

ventions, and the rest of the discussion centered around one important question: ***How do we “unfreeze” this Jurassic system?***

Participants offered final thoughts on this question as well as many practical suggestions for the way forward.

### **Treaty reform**

In addressing the question ‘How do we unfreeze a system that is so frozen in time,’ it was suggested that the Jurassic nature of the drug control system could be modernized by adopting the system of an inbuilt Conference of the Parties (COP) as is the case with related treaties such as the Transnational Organized Crime Convention (UNTOC) and the Convention against Corruption (UNCAC). Calling for a COP now would be seen as an attempt to reform, while an inbuilt COP system would reduce that fear. A COP would not immediately resolve the issue of overcoming the current political blockade towards reform by the majority of countries that want to preserve the status quo, but might be useful to try to incorporate language from existing human rights treaties, for example. It was noted that many regimes have an in-built COP mechanism and are able to modernize. It was also suggested that a human rights-compatible version of a drug control treaty should be written; a process that would isolate the existing drug control Conventions as a problem on several grounds — that they are bad law, highlighting the harmful provisions and wrongs. On this point, the view was put forward that the debates should be moved outside of the confines of the CND, perhaps to Geneva.

One participant argued that the problem is not the breach of the treaties by the U.S. or Uruguay, but rather the 1961 Single Convention itself. As such, there needs to be more discussion on options to address the problematic wording in these Jurassic conventions and exploration of options for *inter se* agreements between like-minded states.

Also, it was suggested, there needs to be more attention given to trends around other treaties — one new trend is to use bilateral agreements to strengthen the power of the treaty organ. An example given of this was in the “London Dumping Convention” (the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters) established to control pollution of the sea caused by dumping of hazardous wastes. To put pressure on Russia and the U.S., two countries entered into a bilateral convention to oblige states to introduce more restrictive measures. Perhaps a similar approach could be used in the “de-Jurassification” of the Conventions.

### **The INCB, WHO and other UN agencies**

Discussion on reform at the international level moved on to consider system bureaucracies and agencies. In this vein, one participant offered that the first step in thawing the system should be to “get the INCB to *stop* doing what it’s not supposed to do and to get it to do what it *is* supposed to do.” The Board’s composition also needs to be more tied to expertise we need instead of being the “mixed bag” it currently is, it was argued. Finally, two new WHO spots need to be filled and, with that in mind, it was emphasized that the WHO is completely marginalized at this point because the U.S. government feels that it has been “soft on drugs.” The WHO needs to be brought back to the forefront of the UN drug policy framework where it belongs.

Others agreed that the INCB is indeed “Jurassic” as well and also needs ‘de-freezing.’ Perhaps another step, it was suggested, would be to hold a meeting with similar bodies such as the Human Rights Committee and the Committee for the Rights of the Child, with the goal of forming a working group on drug issues from these committees. In reforming the INCB, existing human rights oversight bodies should be looked at. Transparency, it was argued, is key in human rights areas. The INCB needs to publicize its work and incorporate the same kind of transparency in its proceedings.

One participant remarked that the INCB itself is not the problem; rather it presents one of the best institutional models to permit change. As such, caution should be applied to efforts to replace it wholesale with something ‘better.’ Another participant agreed saying that it was less about reform of the INCB institutional architecture and more about its operating culture and its members.

Others agreed that a more system-wide approach should be encouraged including INCB, UNODC, WHO and other UN agencies. And it was noted that there is precedence for collaboration between UNODC and the Office of the High Commissioner for Human Rights for example. This should be built upon.

### **CND and UN Level Advocacy**

One participant pointed out that the group shouldn’t forget the snail’s pace process at the UN level — high-level negotiation is a laborious process with small windows of opportunity. CND advocacy is very important, but member states are only going to change if it’s in their national interest. The difficulty of reaching consensus was clearly demonstrated by the painstaking negotiations over the Joint Ministerial Statement that was finally adopted in March 2014. Furthermore, the CND and the Vienna-based UN bureaucracy behind it has muscled its way to leading the UNGASS preparatory process, with all ideas from other UN agencies being funneled through it. In relation to civil society engagement, the well-established Vienna NGO Committee is too dominated by drug-free organizations; while the New York NGO Committee has only recently been reinvigorated and is not yet fully engaged at the UN level. To have more of a role, civil society, it was suggested, needs to come together in a more meaningful way quickly, perhaps around the Third Committee proceedings. It would also be good to interact with the Human Rights Committee. The idea of the Civil Society Task Force may be promising. [Since the seminar took place, the CSTF was officially established and is now up and running.<sup>79</sup>]

Another member of the group stressed that there is a need to find a way to “break the inertia” at CND, perhaps by lobbying member states, especially the smaller countries. Many have instructions to stay with the status quo; many other countries are not represented in Vienna at all, so there is a need to get them more engaged with the issue. Typically in the past highlighting “unintended consequences” (a controversial phrase in the current discussion) has been the only way to make the discussion relevant; states have used the phrase as a euphemism to try to get certain issues addressed.

Others discussed the challenges of advocacy around the UN and the activities currently underway. It was argued that in New York member states are not as engaged in UNGASS as they could be. Some advocates have tried to support a group of like-minded countries to start to build consensus around some

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79. *Launch of the Civil Society Task Force*, IDPC Alert, December 2014, available at <http://idpc.net/alerts/2014/12/launch-of-the-civil-society-task-force>.

issues, but this has also been difficult. Since treaty reform, in terms of significant modification or amendment, isn't currently realistic, a promising option might be to push for an expert committee to be convened to review the issues around tensions between national policies and the legal obligations of the drug control conventions. Civil society continues to work to influence the "soft law" — resolutions and other documents — and has had some success with that.

Another participant noted that lobbying within the CND needs to involve national level advocacy, and that the Global South needs to be more vocal. 'The Global South is rising but there is no consensus' it was argued: Colombia, Mexico and Guatemala have played a crucial role calling for the UNGASS in 2016 but don't seem to come to a clear agreement about what to do with it; Ecuador and Uruguay do have clearer ideas about reform and are trying to join the coalition but don't have high hopes that much could result from the UN level at this point in time and rather invest their energy in regional dynamics in UNASUR and CELAC; Bolivia is not helpful and only focused on its coca issue; Peru and Panama are very conservative; Cuba and Venezuela are basically siding with Russia in a reaffirmation of a repressive prohibitionist doctrine; Brazil could potentially play an important role but drugs is not high on the political agenda at the moment and President Dilma Rousseff takes quite a conservative stance; and Argentina is focused on its own domestic political issues. So Latin America, where the drive and momentum for international drug policy reform is coming from, is currently quite divided. African and Caribbean countries are only recently entering the global drug policy stage and offer a promising but still weak new voice, while most Asian countries are still fully committed to defending the status quo in its most repressive form.

### **Political pressures and other approaches**

The importance of building up political pressure towards future treaty reform was again emphasized within the concluding discussion. One participant's suggestion was to encourage UN bodies to call on the U.S. and the Senate — perhaps even highlighting the breach — to take responsibility and get them to act.

Another member of the group advocated a three-step practical approach:

- 1) Allow the cannabis regulation practice to develop under the "flexible approach" to establish customary law over time;
- 2) Construct legal arguments as a defense (i.e., human rights defense regarding Uruguay's laws) rather than draw attention to the issue of treaty breach (while also not explicitly denying its existence);
- 3) Create more space to allow other states to come forward.

Finally, it was argued on this point, there should be concerted efforts to find other allies to push the U.S. forward in the meantime.

Another member of the group agreed that the Jurassic drug laws are the problem and the way to address it is to mobilize public opinion. In addition, it was argued that more attention needs to be given to what works and what doesn't work and to carefully document what happens in states that allow regulated cannabis markets. On this point, one participant suggested that the permission under the Conventions to use cannabis for medical and scientific purposes might be used to justify regulated cannabis

markets as 'social science experiments,' but the idea did not receive much support among the seminar participants.

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In closing and thanking the participants for attending and engaging in the discussions so wholeheartedly, the organizers announced that a follow-up seminar was being planned, likely in the Netherlands. In the preparations for a follow up meeting, the organizers would plan to invite members of the group to produce discussion papers on specific issues that had been raised and to build upon the momentum of this seminar. The event was concluded with the remark that, in terms of drug control treaty modernization, the UNGASS should be seen as part of a longer term "process rather than an event" and that the seminar had been a productive first step in creating a group of legal experts to help inform the ongoing and increasingly important debate for the UNGASS in 2016 as well as during the period between 2016 and the high-level review of the international drug control system in 2019.

## ANNEX I

### INTERNATIONAL LAW AND DRUG POLICY REFORM

*Expert seminar organized by*

*The Global Drug Policy Observatory, International Centre on Human Rights and Drug Policy,  
Transnational Institute and the Washington Office on Latin America*

**17-18 October 2014, Washington, D.C.**

#### PARTICIPANTS

Damon Barrett  
International Centre on  
Human Rights and Drug Policy  
[dbarrett@essex.ac.uk](mailto:dbarrett@essex.ac.uk)

Wells Bennett  
Brookings Institution  
[WBennett@brookings.edu](mailto:WBennett@brookings.edu)

Scott Bernstein  
Open Society Foundations  
[scott.bernstein@opensocietyfoundations.org](mailto:scott.bernstein@opensocietyfoundations.org)

Dave Bewley-Taylor  
Global Drug Policy Observatory  
[d.r.taylor@swansea.ac.uk](mailto:d.r.taylor@swansea.ac.uk)

Tom Blickman  
Transnational Institute  
[tblick@tni.org](mailto:tblick@tni.org)

Neil Boister  
University of Waikato  
[nboister@waikato.ac.nz](mailto:nboister@waikato.ac.nz)

Graham Boyd  
Drug Policy Consultant  
[grahamaboyd@gmail.com](mailto:grahamaboyd@gmail.com)

Sandeep Chawla  
UN Office on Drugs and Crime (retired)  
[chawla51@hotmail.com](mailto:chawla51@hotmail.com)

James Cockayne  
UN University  
[cockayne@unu.edu](mailto:cockayne@unu.edu)

Malgosia Fitzmaurice  
Queen Mary University of London  
[m.fitzmaurice@qmul.ac.uk](mailto:m.fitzmaurice@qmul.ac.uk)

Juan Carlos Garzon  
Woodrow Wilson Center  
[jcg78@georgetown.edu](mailto:jcg78@georgetown.edu)

Heather Haase  
New York City Bar Association  
[hhaase@msn.com](mailto:hhaase@msn.com)

Alison Holcomb  
ACLU-Washington State  
[holcomb@aclu-wa.org](mailto:holcomb@aclu-wa.org)

David Holiday  
Open Society Foundations  
[david.holiday@opensocietyfoundations.org](mailto:david.holiday@opensocietyfoundations.org)

Martin Jelsma  
Transnational Institute  
[mjelsma@tni.org](mailto:mjelsma@tni.org)

Daniela Nadj  
Queen Mary University of London  
[d.nadj@qmul.ac.uk](mailto:d.nadj@qmul.ac.uk)

Cleia Noia  
Social Science Research Council  
[noia@ssrc.org](mailto:noia@ssrc.org)

Joy Olson  
Washington Office on Latin America  
[jolson@wola.org](mailto:jolson@wola.org)

Jorge Parra  
DeJusticia  
[jparra@dejusticia.org](mailto:jparra@dejusticia.org)

Lisa Sánchez  
México Unido Contra la Delincuencia and  
Transform Drug Policy Foundation  
[lisa@mucd.org.mx](mailto:lisa@mucd.org.mx)

Adam Schaffer  
Washington Office on Latin America  
[aschaffer@wola.org](mailto:aschaffer@wola.org)

Rebecca Schleifer  
Yale Law School  
[Rebecca.A.Schleifer@gmail.com](mailto:Rebecca.A.Schleifer@gmail.com)

Edward Swaine  
George Washington University Law School  
[eswaine@law.gwu.edu](mailto:eswaine@law.gwu.edu)

Sanho Tree  
Institute for Policy Studies  
[stree@igc.org](mailto:stree@igc.org)

Steven van Hoogstraten  
Carnegie Stichting  
[hoogstraten@carnegie-stichting.nl](mailto:hoogstraten@carnegie-stichting.nl)

Piet Hein van Kempen  
Radboud University  
[p.h.vankempen@jur.ru.nl](mailto:p.h.vankempen@jur.ru.nl)

John Walsh  
Washington Office on Latin America  
[jwalsh@wola.org](mailto:jwalsh@wola.org)



## ANNEX II

### INTERNATIONAL LAW AND DRUG POLICY REFORM

#### RECOMMENDED READINGS

Barrett, Damon and Manfred Nowak, "The United Nations and Drug Policy: Towards a Human Rights-Based Approach," in Aristotle Constantinides and Nikos Zaikos, eds., *The Diversity of International Law: Essays in Honour of Professor Kalliopi K. Koufa* (Brill/Martinus Nijhoff Online 2010), 449, at

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