

# THE RISE AND DECLINE OF CANNABIS PROHIBITION

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



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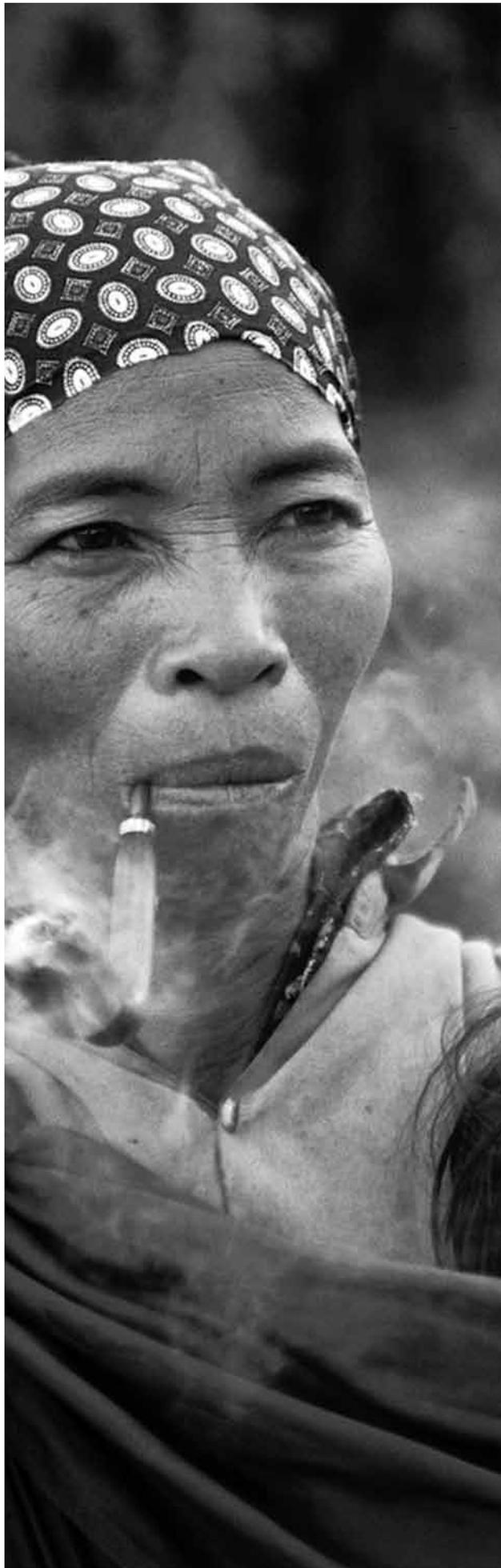
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A Co Ho woman smoking a pipe. Credit: Floris Leeuwenberg

## Introduction and summary

Cannabis has long been a substance drawing much attention within the international drug control regime, a system currently based upon the 1961 Single Convention on Narcotic Drugs. Today the regime landscape is changing. Faced with particular challenges and democratic decisions, a number of jurisdictions are moving beyond merely tolerant approaches to the possession of cannabis for personal use to legally regulating markets for the drug. In November 2012 voters within the U.S. states of Colorado and Washington passed ballot initiatives to tax and regulate cannabis cultivation, distribution and consumption for non-medical purposes. Just over a year later, Uruguay legislated state regulation of the entire chain of the domestic cannabis market for medical, industrial and recreational use. These policy shifts go well beyond the permitted prohibitive boundaries of the UN drug control conventions. They represent a break with an historical trajectory founded on dubious science and political imperatives. And they have thrown the global regime into a state of crisis, as this report will argue.

This publication is a joint effort of the Transnational Institute in Amsterdam and the Global Drug Policy Observatory at Swansea University. Research has been going on in various stages for about two years, and interim results were presented at the Seventh Annual Conference of the International Society for the Study of Drug Policy at the *Universidad de los Andes*, in Bogotá, in May 2013 and further discussed in an expert seminar on cannabis regulation in October 2013 in Amsterdam. Many academics, government officials and experts from NGOs and international agencies have provided useful comments on earlier drafts, but needless to say the end result is the sole responsibility of the authors. This final report will be first presented at the 57<sup>th</sup> session of the UN Commission on Narcotic Drugs (CND) in Vienna, 13-21 March 2014.

### The history of cannabis control

The cannabis plant has been used for spiritual, medicinal and recreational purposes since early mankind. The first chapter of this report describes in great detail the early history of international control and how cannabis was included in the existing UN drug control system. Prior to the construction of a multilateral legal regime to control a range of psychoactive substances, cannabis was subject to a range of prohibition-based control measures within individual nation states. Early examples from the nineteenth century, within the Arab world, some Mediterranean states, Brazil and South Africa for instance, were often implemented as a means of social control of groups operating on the fringes of society.

Internationally, the drive to control psychoactive substances was initially concentrated on opium, in particular in

China, during the early years of the twentieth century. For cannabis, several countries had opted for more regulatory than prohibitive models of control, and evidence was already available early on to suggest that, while not harmless, cannabis was not as dangerous as sensationalist reports suggested. Despite a lack of agreement among delegates to the first international meetings on the need to add cannabis to the agenda, it was not long before cannabis was drawn into the multilateral framework. While many delegates lacked any knowledge of the substance and were consequently bewildered by inclusion of cannabis in the negotiations, the efforts of Italy, with support from the United States, ensured that concern about “Indian Hemp” was mentioned in an addendum to the 1912 International Opium Convention. Following World War I, efforts to further develop the international drug control system under the auspices of the League of Nations saw the drug become the subject of increased attention. This time it was the Egyptian delegation, with support from the United States again, employing hyperbole and hysteria rather than the available scientific evidence base to help ensure cannabis be recognised as addictive and dangerous as opium.

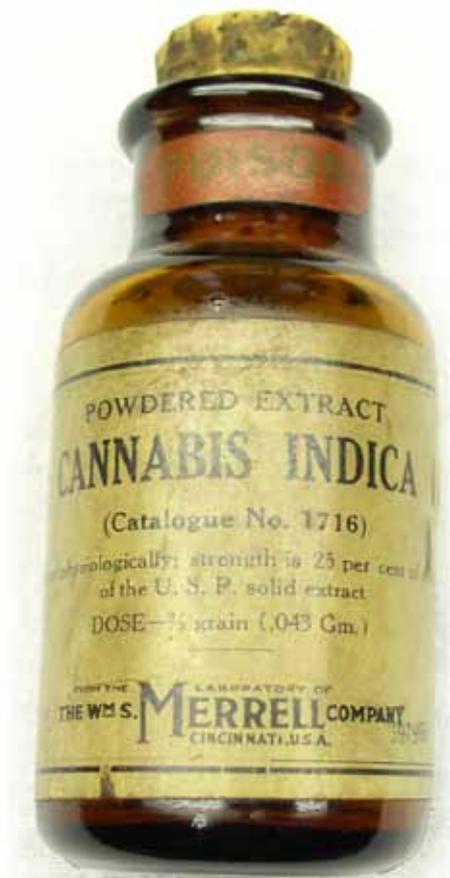
international anti-cannabis campaign. Efforts to tighten controls with the 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, however, largely failed. The U.S.’s ability to overcome opposition or apathy toward its staunch belief in outlawing the non-medical and non-scientific use of cannabis failed would increase a decade later in the post-war environment.

After 1945 Washington, D.C. exploited its newfound super-power status and dominance within the United Nations to push successfully for more stringent control of cannabis at the international level. Despite the evidence undermining U.S. messages concerning addiction, its role as a gateway drug and its links to criminality, the trend to prohibit the recreational use of cannabis became integral in developing a new “Single” convention that would replace the existing drug control treaties, cobbled together piecemeal since 1912. Beginning in 1948, the process was to entail three drafts and considerable debate about the place of cannabis within the unifying instrument. Vigorous U.S. endeavour, including the use of unreliable scientific data and considerable influence over the recently established WHO, did much to ensure that cannabis was condemned within the 1961 Single Convention as a drug with particularly dangerous properties. Cannabis never passed the test of a scientific review by WHO experts against the criteria required for inclusion of any psychoactive substance in the UN schedules of controlled drugs.

With the passage of the Single Convention, cannabis became classified as one of the most dangerous psychoactive substances under international control considered to have hardly any therapeutic value. In spite of concerns regarding traditional uses in many Asian and African countries, the Convention’s final form reflected the dominance of Western states within the negotiation process. Abolition of the “use of cannabis, cannabis resin, extracts and tinctures of cannabis for non-medical purposes” was required “as soon as possible but in any case within twenty-five years”. The only deviation from the zero-tolerance ethos of the treaty was the omission of leaves and seeds from the Convention’s definition of cannabis, which allowed the traditional and religious uses of *bhang* to continue in India.

A decade after the Single Convention, and displaying growing confusion concerning scheduling criteria within the still developing treaty system, the international community chose to include the main active principle of cannabis, *delta-9-THC* or dronabinol, within the 1971 Convention on Psychotropic Substances; a treaty that aimed to bring under international control psychoactive substances that had not been included within the 1961 Single Convention, many of them produced by the pharmaceutical industry. The UN drug control treaty system subsequently expanded further with the 1988 Convention against Illicit Traffic, introducing a number of stricter provisions establishing cultivation, trade and possession as a criminal offence.

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And so cannabis came under international control in the 1925 Geneva Convention, and gradually signatory states started to pass more prohibition-orientated legislation domestically. Driven by growing concerns around the use of cannabis within its own borders, particularly among certain ethnic groups, during the 1930s, the United States moved from playing a supporting role to spearheading an

Ironically, these efforts at the UN aiming to reduce and ultimately eliminate cannabis “abuse” coincided with its growing popularity and increasingly widespread use; a trend that was closely associated with emerging counter-cultural movements within many Western countries, including the U.S., during the 1960s. The response of many governments was to instigate commissions to explore ways to deal with the phenomenon at a national level. Most of the resultant proposals to adopt tolerant approaches to cannabis use were rejected. Within the U.S., the hostile response of the government led a number of states to utilize the opportunities afforded by the federal system to embrace forms of decriminalization of the possession of cannabis for personal use.

**Soft defections and INCB responses**

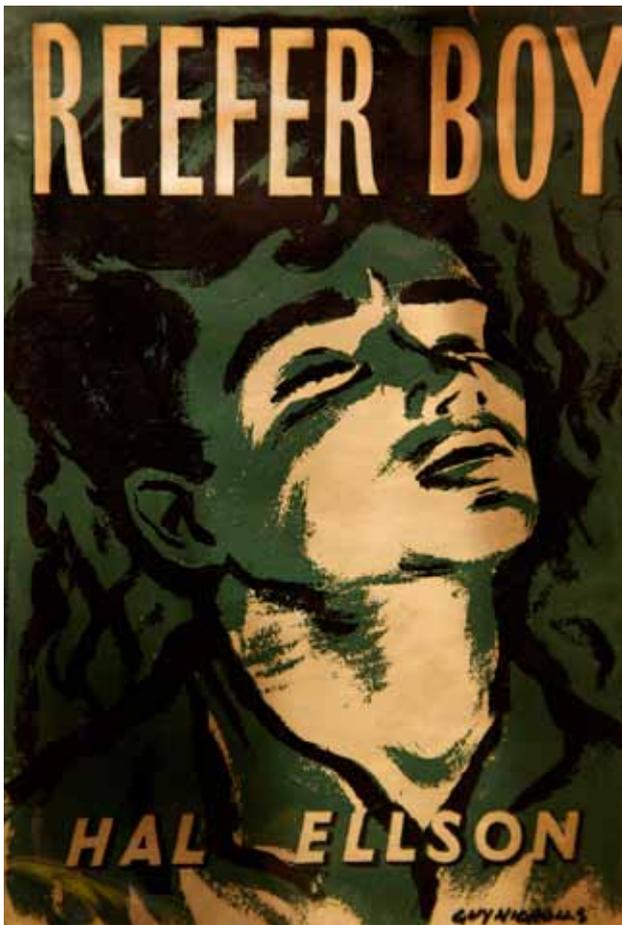
The Netherlands was an isolated example of national politicians taking on board commission advice. However, while early discussions within The Hague displayed a desire to remove the use of cannabis from the domain of criminal justice altogether, there was also an appreciation of the limitations imposed by the treaty framework. Indeed, then as now, while parties to the UN drug control conventions can exploit the considerable inbuilt flexibility to engage with decriminalisation of possession for personal use, including collective cultivation as now is happening in Spain, they cannot go much further without overstepping the treaty system’s legal boundaries. As such, the current policies within the Netherlands and some U.S. states can be seen as a legacy of cannabis policy choices made during what might be regarded as a first wave of ‘soft defection’ from the prohibitive ethos of the Single Convention forty years ago. More recently a second wave of policies that soften prohibition for recreational cannabis

use while respecting the confines of the international treaty framework can be identified around the globe. A “quiet revolution” of decriminalization has occurred in several Latin America and European countries as well as various Australian states and territories. Increasingly widespread engagement with medical marijuana schemes within U.S. states may also be regarded as a third wave.

This soft defection has not gone unnoticed or unchallenged at the UN, however. Since at least the early 2000s, heated discussions within the UN’s central drug policy making body, the CND, and the oppositional position of the International Narcotics Control Board (INCB or Board), which describes itself as the “independent and quasi judicial monitoring body for the implementation” of the UN conventions, revealed cannabis as a key and growing point of tension within the international regime. This dynamic has made a mockery of the much heralded “Vienna consensus” on drug control. Indeed, while the fractures within the consensus around cannabis have been growing over recent years, policy shifts towards legally regulated markets within Colorado and Washington and, at the national level, Uruguay have resulted in treaty breach and created a policy environment in which serious discussion about revising the regime, or nation states’ relationship to it, can no longer be ignored.

As argued in the second chapter of this report, the treaty body that should be assisting member states with this complex process has adopted a singularly unhelpful and obstructionist position on the issue. The INCB has acted as a inflexible defender of the status quo rather than a centre of technical expertise assisting with the careful management of regime change and the development of a more flexible legal structure able to accommodate a range





of approaches to cannabis. The Board, and particularly its current president, Raymond Yans, has shown itself incapable of helping reconcile the different views countries on the best way to deal with cannabis markets. The Board's view is correct that the operation of regulated markets within their territories puts the U.S. and Uruguay at odds with the Single Convention. However, the forthright nature of condemnation is characteristic of a relatively recent shift in its behaviour.

Indeed, between the early 1980s and the United Nations General Assembly Special Session (UNGASS) on drugs in 1998, the Board's stance on cannabis noticeably hardened. It moved away from factual descriptions of different policy approaches (for example noting that the Dutch coffeeshop system, which is legally justified via the "expediency principle", was within the parameters of the treaties) to progressively more vigorous attacks on calls for drug "legalization". Only by the mid-1990s the INCB adopted its current hostility towards Dutch coffeeshops, and was pushing for a tightening up of the UN system, including the incorporation of the plant's leaves in the definition of cannabis. Within the context of ongoing soft defection around cannabis possession and use in various parts of the world, such a defensive position continued during the UNGASS decade (1998-2008). The Board showed its hostility by increasingly harsh statements and "naming and shaming" more tolerant countries in its Annual Reports as well as concomitantly trying to establish an anti-cannabis agenda within the CND. This was perhaps understandable,

the treaty body being pushed into a defensive position and determined to defend the extant form of the regime in the lead-up to the 2009 High Level Segment of the CND to review the targets set in 1998. Among them was the ambitious aim of "eliminating or reducing significantly" the illicit cultivation of cannabis worldwide by the year 2008.

After 2009, claiming that tolerant approaches as well as medical marijuana schemes were sending the "wrong signals" about the harmfulness of the drug, the INCB attempted to stem the reformist tide especially in light of increasing support for policy approaches that went beyond the flexibility of the treaty framework. As we now know, the INCB's attempts to frame the emergence of regulated cannabis markets as a threat to the "noble objectives of the entire drug control system" had little if any influence upon events with the U.S. and Uruguay. Moreover, recent comments from the Board's president regarding Montevideo's "pirate attitude" to the conventions do little to hide the fact that the regime is facing the greatest challenge in its history, certainly since it has operated under the auspices of the UN.

### Scope and limits of treaty flexibility

The existing flexibility or room for manoeuvre in the treaty regime has allowed a variety of cannabis policy practices and reforms to deviate from a repressive zero-tolerance drug law enforcement approach, the legality of which is reviewed in detail in the third chapter. Non-enforcement of drug laws in the case of cannabis, rooted in social acceptance or long history of traditional use, is the reality in quite a few countries. Even though the 1961 Convention obliged traditional, including religious, use of cannabis to be phased out within 25 years (with the exception of *bhang* as mentioned above), the widespread persistence of religious uses in Hindu, Sufi and Rastafarian ceremonies and traditions led to lenient law enforcement practices in a number of Indian states, Pakistan, the Middle East, Northern Africa and Jamaica.

Depending whether the legal system allows for discretionary powers, in several countries more formalised schemes of non-enforcement have been established by providing guidelines for the police, the prosecution and/or the judiciary. In other countries cannabis consumption and possession for personal use are de jure no longer a criminal offence. Many varieties of such decriminalization schemes exist, in terms of distinguishing possession or cultivation for personal use from the intent to trade; and whether or not to apply administrative sanctions. Since the treaty requirements do not differentiate between possession and cultivation for personal use, first in Spain and more recently in some other countries, "cannabis social clubs" have started to engage in collective cultivation for personal use.

The inclusion of cannabis and its compounds in the strictest schedules of the conventions was a rejection of its usefulness for therapeutic purposes and an effort to limit its use exclusively to research purposes, for which only very small amounts would be required. Today, however, many countries have rejected this position as scientifically untenable and have established legal regimes recognising the medicinal properties of cannabis.

All these policy practices were interpreted by the implementing countries as respecting the confines of treaty latitude. Most have a solid legal basis, others employ a certain legal creativity, not always acknowledged by the INCB. And sometimes schemes perfectly justifiable in principle have been applied with a “pragmatic” dose of hypocrisy. The strictures of the conventions and the near impossibility to amend them have impelled some countries to stretching their inbuilt flexibility and escape clauses to questionable limits. Examples are the legal contradictions around the backdoor of the Dutch coffeeshops; the expansion of medical marijuana schemes in some U.S. states into recreational use; and the establishment of large-scale commercial cannabis social clubs in Spain. Indeed, while a fundamental change in cannabis policy is increasingly viewed as a legitimate option to consider in various parts of the world, the reputational (and possibly economic) costs of treaty breach are likely to deter most states from moving beyond some form of soft defection.

### **Options and obstacles for treaty reform**

The political reality of regulated cannabis markets in Uruguay, Washington and Colorado operating at odds with the conventions makes it unavoidable to discuss options for treaty reform or approaches that countries may adopt to adjust their relationship with the regime. As explained in detail in the final chapter in this report, there are no easy options; they all entail procedural complications and political obstacles. Possible routes to move beyond the existing framework and create more flexibility at the national level include: the rescheduling of cannabis by means of a WHO review; treaty amendments; modifications inter se by a group of like-minded countries; and the individual denunciation of the Single Convention followed by re-accession and a reservation, as recently accomplished by Bolivia in relation to the coca leaf.

The chosen path for reform would be dependent upon a careful calculation around the nexus of procedure, politics and geopolitics. The current system favours the status quo with efforts to substantially alter its current form easily blocked by states opposing change. That group remains sizeable and powerful, even in light of the U.S. federal government’s awkward position after the Colorado and Washington referenda. A coordinated initiative by a group of like-minded countries agreeing to assess possible routes and deciding on a road map seems the most likely scenario

for change and the possibility for states to develop legally regulated markets for cannabis while remaining within the confines of international law. Such an approach might even lead to the ambitious plan to design a new “single” convention. Such an option would address far more than the cannabis issue and could help reconcile various inconsistencies within the current regime such as those related to scheduling. It could improve UN system-wide coherence relative to other UN treaty obligations, including human rights and the rights of indigenous peoples. A new convention could borrow from other UN treaties and institute much-needed inbuilt review and monitoring mechanisms. Cannabis might be removed from the drug control apparatus altogether and placed within an instrument modelled on the WHO Tobacco Convention. Another option would be to encourage the UN General Assembly to use its authority to adopt treaty amendments, all the more interesting in light of the upcoming UNGASS on drugs in 2016.

Although the path ahead remains unclear, one thing is certain. The discussion of these and other options are no longer mere reformist fantasies. The cracks in the Vienna consensus have expanded to the point of treaty breach. And tensions are growing exponentially, with criticism of the existing framework no longer confined to hushed conversations on the fringes of the CND. Indeed, in 2013 a strong call for more flexibility came from the Organization of American States. For the first time a multilateral organisation engaged seriously in discussion about cannabis regulation and, more broadly, the search for policy alternatives to the “war on drugs”.

There are certainly many good reasons to question the treaty-imposed prohibition model for cannabis control. Not only is the original inclusion of cannabis within the current framework the result of questionable procedures and dubious evidence, but our understanding of both the drug itself and the dynamics of the illicit markets has increased enormously. Indeed, evidence shows how the implementation of the prohibitive model has failed demonstratively to have had any significant and sustained impact upon reducing the extent of the market. Rather it has imposed heavy burdens upon criminal justice systems; produced profoundly negative social and public health impacts; and created criminal markets supporting organised crime, violence and corruption. Having long accommodated various forms of soft defection from its prohibitive ethos, the regime has reached a watershed moment. In the face of efforts to implement cannabis policies that better suit the needs of individual nations and populations, the question facing the international community is no longer whether there is a need to reassess and modernize the UN drug control system, but rather when and how.

# WHY IS URUGUAY REGULATING NOT CRIMINALISING CANNABIS?



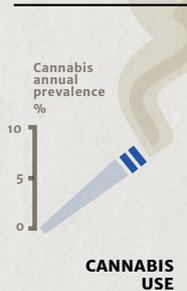
## UNDERMINE THE ILLEGAL MARKET

URUGUAY'S POLICY OF ALLOWING PERSONAL CONSUMPTION BUT PROHIBITING TRADE AND PRODUCTION PUSHED DRUGS ECONOMY INTO CRIMINAL HANDS

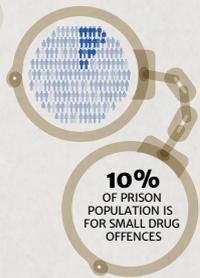
CRIMINAL INVOLVEMENT IN PRODUCTION INCREASED LIKELIHOOD OF CANNABIS USERS ALSO COMING INTO CONTACT WITH HARD DRUGS SUCH AS COCAINE PASTE (PACO)



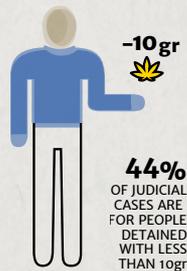
## FAILURE OF WAR ON DRUGS



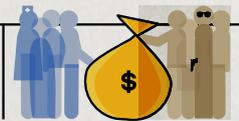
### FILLING PRISONS



### TARGETING USERS NOT JUST TRAFFICKERS



## INVEST MONEY IN HEALTH, EDUCATION, TREATMENT AND PREVENTION



NATIONAL DRUG COUNCIL BELIEVES:

**\$30-40million dollars** can be diverted from criminal networks

“The traditional approach hasn't worked. Someone has to be the first [to try this]”



# HOW WILL URUGUAY'S REGULATION OF CANNABIS WORK?

## REGULATIONS

NO SALE TO MINORS  
**-18**

PENALTIES FOR DRIVING UNDER INFLUENCE

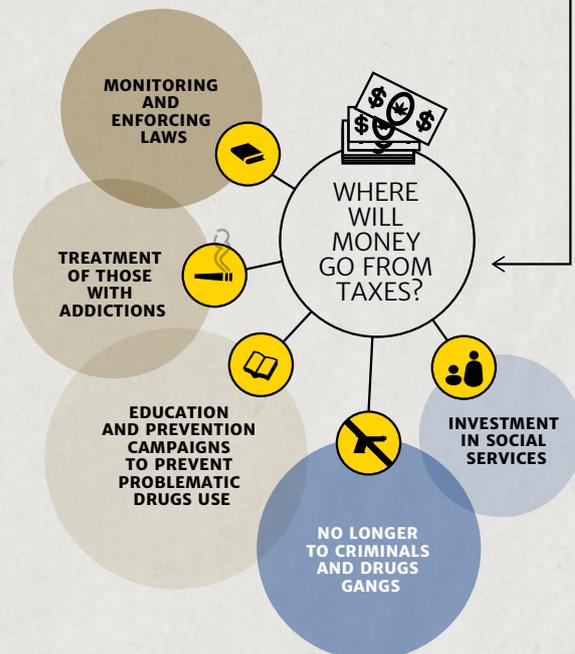
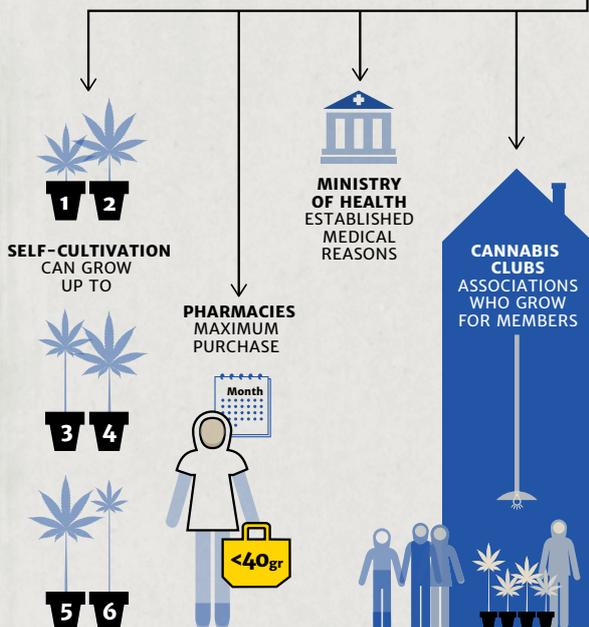


NO ADVERTISING

NO CONSUMPTION IN PUBLIC PLACES

INSTITUTE FOR REGULATION AND CONTROL OF CANNABIS (IRCCA) TO REGULATE PLANTING, PRODUCTION, PROCESSING, DISTRIBUTION, SALES AND MONITORING

## WHERE TO BUY?



## The history of cannabis in the international drug control system

Cannabis is the most widely illicitly used substance worldwide and is produced in virtually every country on the planet. The 2013 World Drug Report estimated that it is used by 180.6 million people around the world or 3.9 per cent of the global population aged 15 to 64.<sup>1</sup> Compared to other controlled psychoactive substances, its potential harm, physiological or behavioural, is considered less severe and cannabis is better integrated into mainstream culture. The cannabis plant has been used for religious, medicinal, industrial and recreational purposes since early mankind.<sup>2</sup> Hemp fibre was used to produce paper, rope and sailcloth, enabling European powers to build their colonial empires, where they subsequently discovered that the plant was also widely used for its psychoactive and medicinal properties.<sup>3</sup>

In 1961, the Single Convention on Narcotic Drugs, the bedrock of the United Nations drug control system, limited “the production, manufacture, export, import, distribution of, trade in, use and possession” of cannabis “exclusively to medical and scientific purposes”.<sup>4</sup> During the negotiations on the Convention there was even a failed attempt to make cannabis the only fully prohibited substance on the premise that “the medical use of cannabis was practically obsolete and that such use was no longer justified”.<sup>5</sup> Instead, it was included under the strictest controls in the Convention. Cannabis is listed twice: in Schedule I, as a substance the properties of which give rise to dependence and which presents a serious risk of abuse; and in Schedule IV, among the most dangerous substances, including heroin, by virtue of the associated risks of abuse, its particularly harmful characteristics and its extremely limited medical or therapeutic value.

This chapter discusses the early history of cannabis control; traces the history of how cannabis ended up in the 1961 Convention; the subsequent deviations and waves of defections from the international control regime; as well as the international skirmishing about what some countries regarded as “lenient policies”.

### The early history of cannabis control

Cannabis control developed in the late 19th and early 20th centuries through varied national and international drug control initiatives often related to opium, and a growing supervision of pharmaceutical products.<sup>6</sup> Just as with opium poppy and coca bush the control debate preceded the United Nations and even its predecessor the League of Nations. A report by the 2002 Senate Special Committee on Illegal Drugs in Canada about the emergence of the international drug control regime summarized the situation:



(UNOG Library, League of Nations Archives)

The international regime for the control of psychoactive substances, beyond any moral or even racist roots it may initially have had, is first and foremost a system that reflects the geopolitics of North-South relations in the 20<sup>th</sup> century. Indeed, the strictest controls were placed on organic substances – the coca bush, the poppy and the cannabis plant – which are often part of the ancestral traditions of the countries where these plants originate, whereas the North's cultural products, tobacco and alcohol, were ignored and the synthetic substances produced by the North's pharmaceutical industry were subject to regulation rather than prohibition.<sup>7</sup>

Early control measures were often implemented as means of social control of groups operating on the fringes of society. Some authorities in the Arab world, for instance, regarded hashish use to be a loathsome habit, associated with the Sufis, an economically and socially disadvantaged sector of Muslim society. Following Napoleon's invasion of Egypt in 1798, the Emperor prohibited his soldiers to smoke or drink the extracts of the plant in 1800 out of fear that cannabis would provoke a loss of fighting spirit. A three-month prison term was imposed, implementing perhaps the first "penal law" on cannabis.<sup>8</sup>

In Egypt and a few other Mediterranean countries such as Turkey and Greece, cannabis prevalence was high and attracted strong legal responses. Hashish was banned in Egypt through a series of decrees. The cultivation, use, and importation of cannabis were first forbidden in Egypt in 1868, when the sultan of Turkey still ruled over Egypt. Nevertheless, a tax on cannabis imports was imposed in 1874, despite its possession having been made illegal. In 1877, the sultan ordered a nationwide campaign to confiscate and destroy cannabis, followed by another law making cultivation and importation illegal in 1879. In 1884, cultivation of cannabis became a criminal offence. However, customs officers were allowed to sell the hashish abroad, instead of destroying the confiscated amounts, to pay informers and customs officers responsible for the seizures.<sup>9</sup>

These early attempts to outlaw cannabis, reissued in 1891 and 1894, had very little effect on the widespread recreational and medicinal use among Egypt's urban and rural poor, the *fellahin*.<sup>10</sup> Hashish was cheap and easily grown or smuggled in from Greece or elsewhere. Exemptions for non-Egyptians and enforcement issues made the laws largely ineffectual.<sup>11</sup> Cultivation, importation, and use of cannabis was banned in Greece in 1890. Hashish was considered an "imminent threat to society," particularly among the urban poor and rebellious youth known as *manges* who gathered in the *tekedes*, cafes frequented by hashish smokers in the harbour area of Piraeus and the centre of Athens. Nonetheless, hashish continued to be widely used, and Greece remained a significant exporter of hashish to Turkey and Egypt well into the 1920s.<sup>12</sup>

### **The Indian Hemp Drugs Commission Report (1894) key recommendations<sup>13</sup>**

1. Total prohibition of the cultivation of the hemp plant for narcotics, and of the manufacture, sale, or use of the drugs derived from it, is neither necessary nor expedient in consideration of their ascertained effects, of the prevalence of the habit of using them, of the social and religious feeling on the subject, and of the possibility of its driving the consumers to have recourse to other stimulants or narcotics which may be more deleterious (Chapter XIV, paragraphs 553 to 585).

2. The policy advocated is one of control and restriction, aimed at suppressing the excessive use and restraining the moderate use within due limits (Chapter XIV, paragraph 586).

3. The means to be adopted for the attainment of these objects are:

- adequate taxation, which can be best effected by the combination of a direct duty with the auction of the privilege of vend (Chapter XIV, paragraph 587).
- prohibiting cultivation, except under license, and centralizing cultivation (Chapter XVI, paragraphs 636 and 677).
- limiting the number of shops for the retail sale of hemp drugs (Chapter XVI, paragraph 637).
- limiting the extent of legal possession (Chapter XVI, paragraphs 689 and 690). The limit of legal possession of *ganja* or *charas* or any preparation or mixture thereof would be 5 *tola* (about 60 grams), *bhanga* or any mixture thereof of one quarter of a *ser* (a quarter of a litre).

South Africa was another of the first states to control cannabis. An 1870 law, tightened in 1887, prohibited use and possession by Indian immigrants, principally due to the perception that white rule was threatened by the consumption of *dagga*, as it was known.<sup>14</sup> Nevertheless, cannabis was used for pleasure and medicinal and religious purposes without widely by rural Africans and did not constitute a problem.<sup>15</sup> Pressure to prohibit cannabis was growing elsewhere in the 1880s, as temperance movements expanded their mandate from alcohol to other psychoactive substances and against intoxication in general.<sup>16</sup> But it was not inevitable that such concerns would lead to a ban on cannabis.

The pragmatic recommendations of one of the first and to this day one of the most exhaustive studies about the effects of cannabis, *The Indian Hemp Drugs Commission Report* in 1894, pointed in another direction. The Commission convened not as the result of any major concerns in India itself, but because of a question that was raised in the British House of Commons by temperance crusaders. They were concerned about the effects of the production and consumption of hemp and claimed that the "lunatic asylums

## Cannabis prohibition in Brazil

Cannabis was first prohibited in Brazil in 1830 when the Rio de Janeiro municipal council issued a directive that forbade the sale or use of *pito de pango* (cannabis, commonly smoked in a kind of water pipe) as well as its presence on any public premises. Any person who sold *pango* was liable to a fine of 20 *milreis* (about \$40 at the 1830 exchange rate),<sup>17</sup> and any slave or other person who used *pango* could be sentenced to a maximum of three days in prison.<sup>18</sup> Other municipal councils followed with similar directives: Caxias in 1846, São Luís in 1866, Santos in 1870, and Campinas in 1876, although it is unclear whether these laws were actually enforced.<sup>19</sup> An 1886 directive in São Luís, capital of the northern state of Maranhão, prohibited the sale, public exhibition and smoking of cannabis. Slaves violating the law were to be punished with four days in jail.<sup>20</sup>

The cannabis plant was not indigenous to Brazil and, although how it arrived there is uncertain, it almost certainly came along with black slaves from Africa (for its recreational, religious and medicinal purposes) in the sixteenth century when they were brought over to work on the sugarcane plantations in the northeast. Myth has it that cannabis seeds were brought over concealed in cloth dolls tied to the ragged clothing worn by the slaves. A further indication that cannabis was introduced from Africa is that it was known as *fumo de Angola* (Angolan smoke) or *diamba*, *liamba*, *riamba* and *maconha*, all derived from Ambundo, Quimbundo and other languages in present-day Angola and Congo.<sup>21</sup>

The introduction of cannabis in Brazil was one more step in its diffusion over the globe. Cannabis, in fact, was not indigenous to Africa either, but had most likely been brought there by Arab traders from India. Arriving on the east coast at trade hubs such as Zanzibar and the Island of Mozambique, it moved up the Zambezi river basin and down the Congo River to the west coast of southern Africa, from where it travelled to Brazil.<sup>22</sup> In Angola the Portuguese colonial rulers introduced one of the first prohibitions of cannabis; its use by slaves was ‘considered a crime’ the explorer David Livingstone observed in 1857, noting that ‘this pernicious weed is extensively used in all the tribes of the interior’ (which would roughly cover today’s Zambia).<sup>23</sup> Another explorer noted that although the Portuguese prohibited slaves from using it, *diamba* was sold widely at the market in Luanda (Angola) and was grown round village huts nearly everywhere in the country.<sup>24</sup> The lives of some tribes in the Congo centered on cannabis, which was cultivated, smoked regularly in a *riamba* (a huge calabash more than a yard in diameter) and venerated.<sup>25</sup>

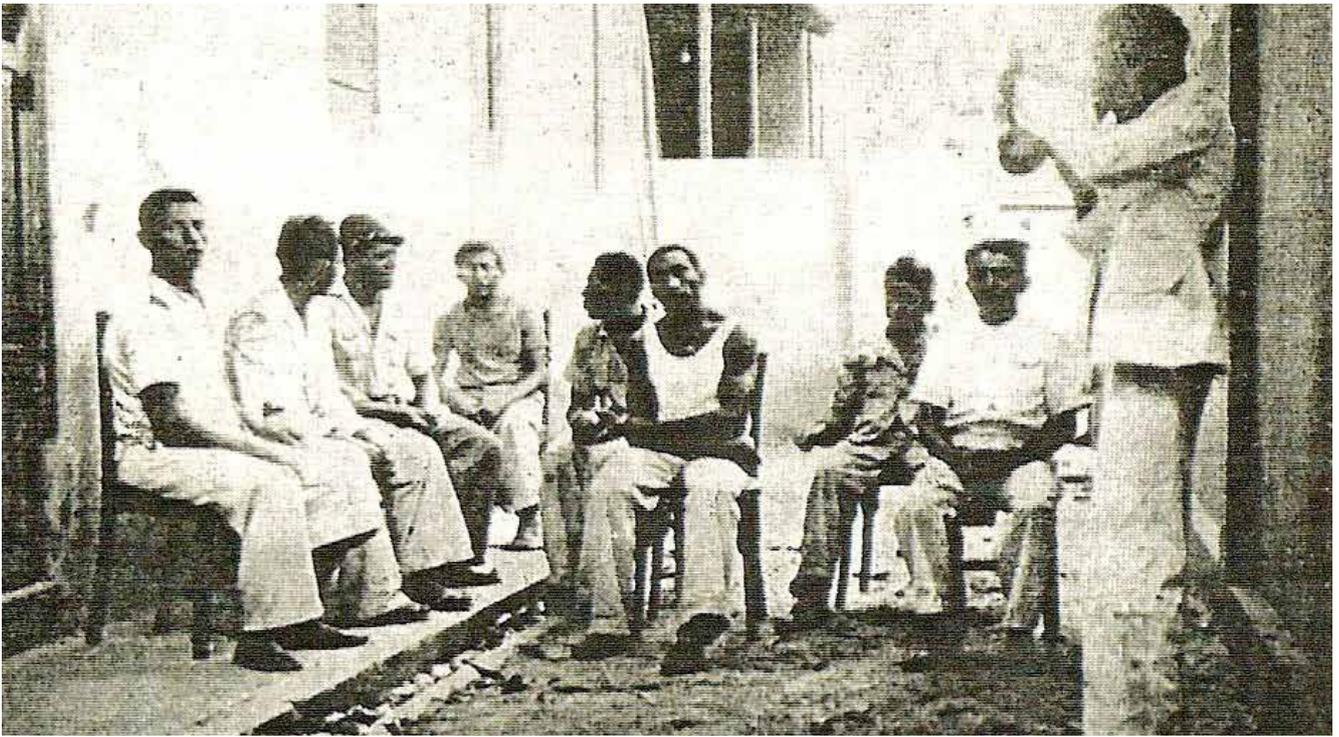
During the sugarcane boom in colonial Brazil’s Northeast,

quite commonly the slave owner enjoyed his tobacco cigar while allowing his slaves to grow and use cannabis.<sup>26</sup> The substance was in wide use in *quilombos*, runaway slave communities, early in the colonial period, as well as among fishermen, longshoremen and labourers later on. Its consumption eventually spread to the indigenous population. Cannabis use was also a form of socialisation in semi-ritualized smoking circles that gathered at the day’s end, known as *assembléias*, as well as occasionally in some African religious practices such as *umbanda* and *candomblé*.<sup>27</sup> Cannabis use, identified with Afro-Brazilian culture and folk medicine, was frowned upon by the white elite. Participants at the first Afro-Brazilian congress in Recife in 1934, attended by Gilberto Freyre,<sup>28</sup> identified cannabis as part of an Afro-Brazilian cultural tradition. Freyre saw the plant as a form of African cultural resistance in the Northeast.

However, it was not this emerging school of Afro-Brazilianist thought – which would eventually rehabilitate black heritage and culture in Brazil – that dominated the scientific and official discourse. An influential group of Brazilian doctors claiming to be concerned with the well being of the “Brazilian race” considered cannabis use to be a vice. Prominent among them was Rodrigues Dória, a psychiatrist and professor of Public Medicine at the Faculty of Law in Bahia, president of the Society of Legal Medicine and former governor of the state of Sergipe. He set the tone in a paper prepared for the Second Pan-American Scientific Congress in Washington, D.C., in December 1915, describing “the pernicious and degenerative vice” of cannabis smoking as a kind of “revenge of the defeated”, what he identified as the revenge of the “savage” blacks against “civilized” whites who had enslaved them.<sup>29</sup>

That first Brazilian analysis of cannabis stood as the reference for almost all subsequent studies on the subject for decades. This school of thought considered cannabis the “opium of the poor”, as it was allegedly used mainly among the lower classes, former slaves, criminals and the marginal fringe in society. This perspective dominated the cannabis discourse in Brazil until the 1960s, despite the fact that its agents had little direct knowledge of the subject. Comparing its effects to those produced by opium, cannabis was considered highly addictive and the cause of serious harm both to the physical and the mental health of its users, and blamed for multiple problems such as idiocy, violence, unbridled sensuality, madness and racial degeneration. Cannabis users were perceived of as being both deviant and sick, and in 1932 the plant was finally classified as a narcotic, the sale and use of which were definitively banned in 1938.<sup>30</sup>

An *Assembléia*, a quite common social gathering in the Northeast of Brazil until the 1940s in which *diamba* (cannabis) was consumed.



of India are filled with ganja smokers.”<sup>31</sup> Unfortunately, the seven-volume report’s wealth of information was largely ignored in the debates on cannabis control that were to unfold in the international arena under the auspices of the League of Nations and the United Nations in the 1920s, 1930s and the 1950s.

Its absence from international discussions is pertinent today since almost nothing of significance in the conclusions of this landmark report on the cannabis problem in India has been proven wrong in over a century since its publication. The Commission looked into earlier considerations in India to prohibit cannabis in 1798, 1872 and 1892, concluding that those proposals had always been rejected on the grounds that the plant grew wild almost everywhere and attempts to stop the common habit in various forms could provoke the local population and drive them into using more harmful intoxicants. The report concluded: “In respect to the alleged mental effects of the drugs, the Commission have come to the conclusion that the moderate use of hemp drugs produces no injurious effects on the mind. [...] As a rule these drugs do not tend to crime and violence.” The report also noted “that moderate use of these drugs is the rule, and that the excessive use is comparatively exceptional. The moderate use produces practically no ill effects.”<sup>32</sup>

Had the wisdom of the Indian Hemp Commission’s recommendations prevailed, we might now have a system not dissimilar to the new legislation on cannabis regulation adopted recently in Uruguay or the regulation models in Colorado and Washington being implemented after the successful ballot initiatives to tax and regulate cannabis in both states. Unfortunately, the international community chose to take another course of action and decided to ban

cannabis in the 1961 United Nations Single Convention on Narcotic Drugs. As the name suggests, the Single Convention is a consolidation of a series of multilateral drug control treaties negotiated between 1912 and 1953. In the following sections a short historical overview discusses what led to this decision.

### Initial attempts at international control

Internationally the drive to control psychoactive substances was initially concentrated on opium, in particular in China, where Western missionaries were appalled by the widespread and, in their eyes, destructive use of opium. Other substances would soon be included. One of the classic historic accounts of international drug control, *The Gentlemen’s Club* from 1975, includes the chapter “Cannabis: International Diffusion of a National Policy”.<sup>33</sup> As the title indicates, national control measures and prohibitions were subsequently internationalised, leading in turn to national bans in other countries. Before cannabis became subject of the international drive to control psychoactive substances, two very distinct models were already competing in the few countries that imposed controls: a prohibition model, which was largely ineffective; and a more sophisticated model of regulation, largely unknown and barely implemented. The large majority of countries did not have any controls at all.

The path towards prohibition was not always straightforward, and even when a ban was introduced, it was not always effectively enforced. In Egypt, for instance, by 1892 the cannabis ban was already being reconsidered. Caillard Pasha, Egypt’s British general director of customs, noted that Egypt’s prohibition had generated trafficking

### Morocco: regulation, prohibition or turning a blind eye

Cannabis has been used in Morocco for centuries. Traditionally, chopped cannabis herb mixed with chopped tobacco, a mixture known as *kif*, is smoked in a pipe with a small clay or copper bowl called a *sebsi*. Cannabis was also used in sweets (*majoon*) and tea, while limited medicinal and religious uses have also been reported.<sup>34</sup> Local administrations collected taxes on the sale of tobacco and *kif*, which were transferred to the sultan.<sup>35</sup> At the end of the nineteenth century, 90 per cent of France's need for pharmaceutical cannabis was imported from Morocco. With the arrival of European colonial powers at the end of the nineteenth century, a control regime developed that would over time vary between regulation, prohibition and, ultimately, turning a blind eye to cultivation in the isolated Rif mountains of northern Morocco.

Around 1890, Sultan Muly Hassan confirmed an authorized to cultivate cannabis in five *douars* (villages) the Berber tribal areas of Ketama, Beni Seddat and Beni Khaled in the Rif, while restricting its trade elsewhere.<sup>36</sup> This area is still the heartland of cannabis cultivation today, despite the prohibition of its cultivation in 1956 when the country became independent. Well-kept cannabis fields are everywhere on terraced slopes, even along the side of the main roads. Local villagers claim they are allowed to grow cannabis due to a *dahir* (decree) issued in 1935 by the authorities of the Spanish protectorate of northern Morocco (1912-56), based on a previous one dating from 1917.<sup>37</sup>

According to the 1917 decree, the *kif* had to be sold to the *Régie marocaine des kifs et tabac*, a multinational company based in Tangier, largely controlled by French capital, which acquired the monopoly to trade cannabis and tobacco in Morocco at the 1906 Algeciras Conference convoked to determine the status of the country. In 1912, the country was divided into two zones, one under French administration, the other under Spanish rule in the north, the latter comprising the cannabis cultivation zone in the Rif area. The aim of the *dahirs* regulating the cultivation, transport, sale and consumption of *kif* was to protect the interests of the monopoly against clandestine producers and sellers.<sup>38</sup> Farmers depended on the *Régie* for permission to grow and were obliged to hand in their harvest at factories in Tangiers and Casablanca where it was processed for commercial sale in tobacco shops.<sup>39</sup>

Use was largely unproblematic. Many smoked a few pipes in the evening while sipping coffee or a cup of tea. "The number of these 'careful' smokers is fairly high in the towns among the artisans and small shopkeepers", a UN study in 1951 reported.<sup>40</sup> In Tunisia, during the French protectorate that lasted until 1956, a similar system of "controlled toleration" existed, restricting contraband and maintaining consumption within moderate limits. The sale of chopped cannabis ready for smoking (*takrouri*) was organised by a

state monopoly like the sale of tobacco. The *Direction des monopoles* issued cultivation permits, fixed the area of authorized plantations every year, and bought the complete crop of whole plants from the producers. The Tunis Tobacco Factory prepared *takrouri* and distributed it in packets of five grams, which were sold in all the tobacco shops of the Tunis Regency.<sup>41</sup>

However, the status of cannabis was not undisputed in the Rif. During the short-lived Republic of the Rif (1923-26), established by Mohammed ben Abdelkrim who had unified the Berber tribes against Spanish occupation, the cultivation and consumption of *kif* was prohibited. Abdelkrim considered cannabis contrary (*haram*) to Islam. How effective the ban was is unclear, but in any event when Abdelkrim was defeated the Spanish and French occupational authorities allowed cultivation again. In the French-controlled area "a zone of toleration to the north of Fez" close to the Rif was established, "in order to allow adaptation to the new economic order of tribes" and contain cannabis smuggling from the Spanish zone.<sup>42</sup>

France, due to its perceived obligations under the 1925 Convention, issued a decree in 1932 prohibiting the cultivation of cannabis in its zone except for cultivation undertaken for the *Régie* around Kenitra (Gharb) and Marrakech (Haouz).<sup>43</sup> Although Spain adhered to the convention in 1928, licensed cultivation continued in the Spanish zone, which became the main source for licensed *kif* in the French zone as well. Apparently the regulation of 1917 was widely circumvented and the *kif* grown in the Spanish zone largely escaped the *Régie's* regulation.<sup>44</sup> Consequently in 1935 a decree in the Spanish zone restricted the cultivation area to the original villages in the area of Ketama, Beni Seddat and Beni Khaled. However, subsequent decrees did not specifically mention any area.

Only in 1954 did the French protectorate prohibit all cultivation. In the Spanish part, a *dahir* in 1954 still authorized the cultivation, production and distribution under licence of the monopoly, but with a significant possession threshold of 5 kilograms. Amounts surpassing that limit would incur administrative sanctions. Cultivation was allowed in unnamed municipalities with the authorization of local authorities and the monopoly.<sup>45</sup> In 1956, when Morocco gained independence and adhered to the existing drug control conventions, cannabis prohibition was extended to the former French and Spanish zones.<sup>46</sup> However, King Mohammed V decided to condone cannabis cultivation in the five historical *douars* after quelling an insurrection in the Rif, due to among other things the ban on cultivation.<sup>47</sup> At the time, the number of occasional or regular smokers has been estimated at nearly one million,<sup>48</sup> or about 8 per cent of the population.

The control regime under which cannabis cultivators in the Rif area have operated has varied from official authorization to informal toleration by the subsequent powers gov-

erning the area. Nevertheless, cultivation of the plant has flourished for over a century despite eradication campaigns and alternative development projects for crop substitution since the 1970s. The market has changed from domestic consumption to international export while the product has changed from *kif* to hashish, with the arrival of the sieving production method from Lebanon around the end of the 1970s. New strains were also introduced, first from Lebanon, followed increasingly in recent years by hybrids from commercial grow houses with much larger yields and potency, so much so, that the original Moroccan varieties are rapidly disappearing.<sup>49</sup>

Cultivation rapidly increased in the 1980s, due to the growing demand from Europe, probably peaking around 2003 when a crop monitoring survey by the UNODC and

networks supplying the country with all the hashish the clandestine market demanded, as well as illicit smoking dens, smuggling and corruption. He advocated that the Egyptian government should duplicate control and restriction policies put in place in India to contain excessive use and allow for moderate consumption, and pointed out that licences and taxation in India were providing revenue, while consumption had diminished.<sup>53</sup>

As with opium, it was clear that prohibition at the national level was unworkable without control of international trade. Subsequently, cannabis was included in the preparations for the International Opium Conference in 1911 in The Hague. The conference, building upon the outcomes of the 1909 Shanghai Commission, would lead to the 1912 International Opium Convention. As negotiations proceeded, substances other than opium and opiates came within the Conference's remit. The Italian delegation, worried by hashish smuggling in its North African colonies (present-day Libya, taken from Turkey during a war in 1911), raised the issue of international cannabis control.<sup>54</sup>

Many delegates were bewildered by the introduction of cannabis into the discussions. Pharmaceutical cannabis products were widespread in the early 20th century and the participants had no substantive knowledge, due to lack of statistics on international trade or even a clear scientific definition of the substance. Nor did delegates have any instructions from their governments on how to deal with the issue. The Dutch chairman, Jacob Theodor Cremer, suggested that countries deal with cannabis internally and that the subject might not even be part of the international drug control problem.<sup>55</sup> The United States alone supported Italy, whose delegation had already left after the first day of the Conference. The United States was only able to obtain a resolution in the addendum to the Convention:<sup>56</sup>

The Conference considers it desirable to study the question of Indian hemp from the statistical and scientific point of view, with the object of regulat-

ing its abuses, should the necessity thereof be felt, by international legislation or by an international agreement.<sup>57</sup>

the Moroccan government revealed that 134,000 hectares were under cultivation and the country was considered to be the largest hashish producer in the world. A subsequent survey in 2005 showed a significant decrease to 72,500 hectares and in 2011 cultivation was estimated to be 47,500 hectares.<sup>50</sup> The Moroccan government increased eradication significantly after 2003, using slash-and-burn campaigns and spraying of herbicides.<sup>51</sup> However, according to recent research, the actual production of hashish (as opposed to the area cultivated) might not be diminishing due to the introduction of higher-yield strains. Since 2013, the Moroccan parliament has been considering regulating cannabis for industrial and medicinal uses, in an effort to normalize the situation,<sup>52</sup> which might shift the pendulum on the status of cannabis toward regulation again.

Present at the Conference was Hamilton Wright, a State Department official who not only coordinated the international aspects of U.S. drug control policy, and was also responsible for drafting domestic drug legislation. In 1910 he had tried to include cannabis in a bill, arguing that if one "dangerous" drug would be effectively prohibited, habitual users would switch to another substance. Anticipating a shift away from opiates and cocaine, cannabis should be prohibited, Wright reasoned. And hence as many psychoactive substances as possible should be banned. He believed in "a hydraulic model of drug appetites,"<sup>58</sup> a kind of reverse gateway theory, which would become popular in later years. His bill (a precursor of the Harrison Narcotics Tax Act of 1914 to control opiates and cocaine) was defeated, principally due to opposition from the pharmaceutical industry, and cannabis would not be federally prohibited until 1937.

The 1912 Hague Convention called upon signatories to license manufacturers, regulate distribution and halt exports to those jurisdictions that prohibited its import. The main concern at the time was that the unregulated free trade in opium, heroin, morphine and cocaine would lead to an increase in domestic drug use. Hence basic controls on international trade had to be introduced. As most states were reluctant to penalise non-medical use of those psychoactive substances, the treaty predominantly addressed supply-oriented regulation of the licit trade and the availability for medical purposes.<sup>59</sup>

Nevertheless, the discussion on cannabis at the conference had early repercussions. The colonial government of Jamaica added cannabis in their legislation when they ratified the 1912 Hague Convention in 1913, and outlawed it a decade later. Cannabis had been introduced on the island by Indian contract labourers who arrived after the abolition of slavery in 1838.<sup>60</sup> British Guyana and Trinidad

Cannabis drying in the sun (Morocco, July 2009), Photo: Pien Metaal



also passed legislation that prohibited the cultivation of cannabis and regulated its sale and possession. Cannabis was sold under licence to Indian plantation workers until 1928.<sup>61</sup>

### Cannabis under the League of Nations

The supply-side approach was continued under the new multilateral structure developed in the wake of the First World War. Having assumed responsibility for the issue, including supervision of the 1912 Hague Convention, the League of Nations, through the Advisory Committee on Traffic in Opium and Other Dangerous Drugs, continued to strengthen transnational aspects of the emergent international drug control system and to institute controls over a wider range of drugs. The main concern was still opium, morphine and cocaine, but a letter from South Africa to the Committee in November 1923 put cannabis back on the agenda.

The South Africans, who had proclaimed a nationwide ban on the cultivation, sale, possession and use of cannabis in June 1922, wrote that from their perspective “the most important of all the habit-forming drugs” was cannabis, which was not included on the Convention’s list.<sup>62</sup> The Advisory Committee asked governments for information on the production, use and trade in the drug in a circular letter in November 1924. That same month, a Second Opium Conference that would significantly alter the legal status of cannabis was convened.

The Conference gathered in Geneva to discuss measures to be taken to implement the 1912 Opium Convention and set maximum limits on the production of opium,

morphine and cocaine and restrict the production of raw opium and coca leaf exported for medicinal and scientific purposes. However, on the second day of the meeting, Mohamed El Guindy, the delegate from Egypt, now nominally independent from Great Britain, proposed the inclusion of cannabis in the deliberations and moved to bring it under the scope of the Convention. He asserted that hashish was “at least as harmful as opium, if not more so.”<sup>63</sup> Support came from Turkey, Greece, South Africa and Brazil, countries that had experience with or banned cannabis already, although with only limited or virtually no success. Despite the British delegation’s argument that cannabis was not on the official agenda, El Guindy insisted and submitted an official proposal.

In his speech presenting the proposal, he painted a horrific picture of the effects of hashish. Although he conceded that taken “occasionally and in small doses, hashish perhaps does not offer much danger,” he stressed that once a person “acquires the habit and becomes addicted to the drug [...] it is very difficult to escape.” He claimed that a person “under the influence of hashish presents symptoms very similar to those of hysteria”; that the individual’s “intellectual faculties gradually weaken and the whole organism decays”; and that “the proportion of cases of insanity caused by the use of hashish varies from 30 to 60 per cent of the total number of cases occurring in Egypt.” Cannabis not only led to insanity, according to El Guindy, but was a gateway to other drugs, and vice versa. If it was not included on the list with opium and cocaine, he predicted, cannabis would replace them and “become a terrible menace to the whole world.”<sup>64</sup>

Most countries represented at the Conference had little to no experience with cannabis and were inclined to rely

upon those that did, notably Egypt, Turkey and Greece. The Egyptian ban on cannabis had affected the entire eastern Mediterranean and beyond. Greece, Cyprus, Turkey, Sudan, Syria, Lebanon and Palestine were requested to assist Egypt's law enforcement authorities by restricting cultivation and trade. El Guindy's proposal was certainly motivated by failed efforts to stem smuggling from those countries into Egypt.<sup>65</sup>

Despite the lack of evidence in his emotional speech supporting his claims about the effects of hashish, delegates were unprepared to contradict them. The assertion that 30 to 60 per cent of insanity was caused by hashish was, to be generous, an exaggeration. The 1920-21 annual report of the Abbasiya Asylum in Cairo, the larger of Egypt's two mental hospitals, recorded 715 admissions, of which only 19 (2.7 per cent) were attributed to hashish, considerably less than the 48 attributed to alcohol. Moreover, even the modest number of cases attributed to cannabis were "not, strictly speaking, causes, but conditions associated with the mental disease."<sup>66</sup>

El Guindy's excessive claims caused a moral panic among the delegates, the majority ill-informed, who applauded his intervention, despite some admitting that their knowledge on the issue was quite limited. The reaction was not unanimous, however. Delegates from India, the United Kingdom and France expressed sympathy for the Egyptian delegate's position, but argued that, as his government had

failed to give prior notice to the secretariat, the Conference was not competent to apply the provisions of the 1912 Hague Convention to hashish. The issue was referred to a subcommittee for further study, in which El Guindy introduced the proviso:

The use of Indian hemp and the preparations derived therefrom may only be authorised for medical and scientific purposes. The raw resin (charas), however, which is extracted from the female tops of the *cannabis sativa*, together with the various preparations (hashish chira, esrar, diamba, etc.) of which it forms the basis, not being at present utilised for medical purposes and only being susceptible of utilisation for harmful purpose, in the same manner as other narcotics, may not be produced, sold, traded in, etc., under any circumstances whatsoever.<sup>67</sup>

The subcommittee reported in favour of the complete prohibition of cannabis. Only three of the sixteen nations represented on the committee (the United Kingdom, India and the Netherlands) opposed the drastic step.<sup>68</sup> Curiously, neither the Indian and British delegates mentioned the 1895 Indian Hemp Drugs Commission's report, which offered a much more nuanced assessment of the benefits, risks and harms of cannabis.

The British and Indian delegates attached reservations to Guindy's controversial paragraph. Beyond restriction of

Second Opium Conference, Geneva, 1924-25 (UNOG Library, League of Nations Archives)



Advisory Committee on Traffic in Opium, 1938  
(UNOG Library, League of Nations Archives)



international trade, it interfered in domestic policy and legislation – at that time deemed a step too far. The U.S. had wanted to introduce similar provisions for opium, but was blocked by other delegations, precipitating the Americans’ angry departure from the Conference. Hence the recommendations were diluted significantly by the drafting committee for the new Convention, despite, what the subcommittee chairman qualified as the “somewhat uncompromising insistence” of El Guindy, a reprimand uncommon in the diplomatic world. Consequently cannabis was included in the International Opium Convention of 1925, under a limited regime of international control: prohibition of cannabis exportation to countries where it was illegal and the requirement of an import certificate for countries that allowed its use.<sup>69</sup>

Without due consideration of relevant evidence to support the necessity for control and at the request of Egypt alone, the Conference decided formally that ‘Indian hemp’ was as addictive and as dangerous as opium and should be treated accordingly, and cannabis was placed under legal international control in the 1925 Geneva Convention.<sup>70</sup> The Convention only dealt with the transnational dimension of the cannabis trade. The new control regime did not prohibit the production of or domestic trade in cannabis; it did not impose measures to reduce domestic consumption; nor ask governments to provide cannabis production estimates to the Permanent Central Opium Board (PCOB), established by the treaty to monitor and supervise the licit international trade, which at the time was the main source of supply for illicit markets.<sup>71</sup>

Following the approval of the 1925 International Opium Convention, European countries gradually outlawed cannabis possession and often its use as well (for example, the United Kingdom’s Dangerous Drugs Act, 1928; a revised Dutch Opium Law,<sup>72</sup> 1928; Germany’s second Opium Law, 1929).<sup>73</sup> These laws exceeded the obligations in the Convention, despite the absence of problems related to cannabis use in those countries. Bans issued on a national level on a substance demonized on the basis of questionable evidence set into motion stricter controls internationally. Soon after Egypt had forced cannabis control onto the international agenda, more powerful countries would become entangled in the process of increasing criminalisation and seeking tighter international prohibitive measures. The British drugs law, for instance, would serve as model for legislation in the British West Indies.<sup>74</sup>

At the League of Nations the issue didn’t attract significant interest after the 1925 Geneva Convention was adopted. In the 1930s, however, the Advisory Committee began to pay increasing attention to cannabis, under pressure from Egypt, but especially from the U.S. and Canada. At the Committee’s 19th session in 1934, a report was tabled that estimated there were no less than 200 million cannabis users worldwide, although it was unclear how that figure was arrived at. The Egyptian delegation demanded “the worldwide outlawing of the cannabis indica plant”, but other delegations were unimpressed by the poorly substantiated statements.<sup>75</sup> Consequently, the issue was referred to a subcommittee.

Criticism of the prohibitive trend appeared occasionally. A 1926 *New York Times* article questioned El Guindy's allegations against cannabis. The article quoted the 1894 Indian Hemp Drugs Commission report, contending that neither insanity nor criminality was related to cannabis, "but when excesses were noted they were usually connected with other vices, such as alcohol and opium. Not a single medical witness could clearly prove that the habit gave rise to mental aberration."<sup>76</sup> The article referred to research among U.S. military personnel in the Panama Canal Zone with 17 volunteers smoking marijuana under medical supervision. The investigating committee reported that the "influence of the drug when used for smoking is uncertain and appears to have been greatly exaggerated" and concluded "there is no medical evidence that it causes insanity," and that "there is no evidence that the marijuana grown locally is a habit-forming drug [...] or that it has any appreciable deleterious effects on the individuals using it." The committee recommended that "no steps be taken by the authorities of the Canal Zone to prevent the sale or use of marijuana, and that no special legislation [...] was needed."<sup>77</sup>

### Enter the United States

At the time of the 1925 Opium Convention the United States was ineffectually implementing a prohibition regime for alcohol (1920-1933). A moral panic fed by sensationalist newspaper reports about violence supposedly incited by marijuana use among Mexicans immigrant labourers was building. As a result, requests were made to include marijuana in the Harrison Act. The Federal Bureau of Narcotics (FBN), established in 1930 and headed by Commissioner of Narcotics Harry J. Anslinger until 1962, at first minimized the problem, arguing that cannabis control should be handled by individual states rather than the federal government. He considered heroin a much more dangerous substance and was cautious about committing the FBN to the control of a substance that grew freely across many, particularly southern, U.S. states. However, pressure to do something mounted: from local police forces in affected states, then from governors, and from the governors to the Secretary of the Treasury, Anslinger's boss.<sup>78</sup>

Passing federal legislation in the United States is a complicated affair, due to constitutional restraints allowing states substantial control in their domestic affairs. The Bureau's attempts to design a federal law were initially based on the treaty-making powers of the federal government as the authority that could introduce an anti-marijuana statute.<sup>79</sup> That might explain the increased activity of the U.S. at the Advisory Committee. Anslinger's predecessors had used those same tactics in 1912 and 1925 "to enforce domestic legislation in time to underline the seriousness of U.S. intentions at international meetings and thereby increase their capacity to influence international decisions;

at the same time, they used international obligations as an argument for domestic legislation."<sup>80</sup>

Although not a member of the League of Nations, the United States maintained extra-official presence as an observer in the deliberations and voiced its dissatisfaction with the lenient approach of the European colonial powers who had significant financial interests in the production of opium and coca and the manufacturing of their derivatives, morphine, heroin and cocaine. One of the reasons the U.S. had withdrawn from the 1924-1925 Geneva Conference was the producing countries' refusal to commit to specific measures restricting production of raw opium and coca leaves to medical and scientific needs. Washington saw this as a major gap in the international system of control. Limitation of the available supplies could not be achieved without control at the source: restricting the cultivation of the plants.<sup>81</sup>

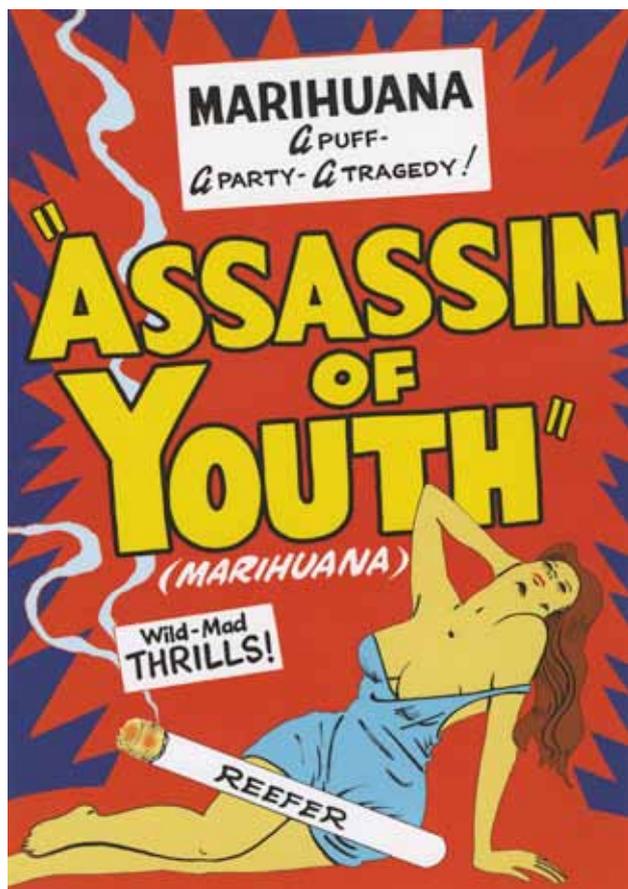
The U.S. tried to introduce stricter measures, including for cannabis, at the Conference for the Suppression of the Illicit Traffic in Dangerous Drugs in Geneva in 1936. The Conference was convened to address the increasing problem of illicit drug trafficking, an unintended consequence of the increased effectiveness of the control regime imposed on licit international drug markets. The U.S. proposal for the draft convention included compulsory severe penalties on anyone promoting or engaging in cultivation, production, manufacture, or distribution for non-medical and non-scientific purposes. Other delegations rejected that path and, reminiscent of the 1925 Geneva Conference, the U.S. delegation walked out of the meeting, dissatisfied with limited application of the convention. The U.S. strategy was to influence its domestic policy, establishing a constitutional basis, via treaty, for federal regulation of the cultivation and production of opium and cannabis,<sup>82</sup> and according to the historian William B. McAllister "perhaps individual use as well".<sup>83</sup> However, the delegation considered the 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs to be "a retrograde step."<sup>84</sup>

Shortly after his return to Washington, Anslinger and the Treasury Department went ahead with preparations for the passage of a federal bill to control cannabis, replete with what was effectively a scare campaign on Capitol Hill and in the media. Following a by now well-practiced approach, in April 1937, for example, he assured a House of Representatives committee that under the influence of marijuana "some people will fly into a delirious rage and may commit violent crimes." In a response to a follow-up question, he said that the drug was "dangerous to the mind and body and particularly dangerous to the criminal type, because it releases all of the inhibitions."<sup>85</sup> Anslinger's also testified:

Most marijuana smokers are Negroes, Hispanics, jazz musicians, and entertainers. Their satanic music is

driven by marijuana, and marijuana smoking by white women makes them want to seek sexual relations with Negroes, entertainers, and others. It is a drug that causes insanity, criminality, and death – the most violence-causing drug in the history of mankind.<sup>86</sup>

Such views were widely reproduced in radio appearances, public forums, magazine articles and in the film *Reefer Madness*. Accompanying the racist and xenophobic undertone, the demonization bordered on the ridiculous. At one point Anslinger even claimed that marijuana had a strangely exhilarating effect upon the musical sensibilities, noting that cannabis had long been used as a component of “singing seed” for canary birds.<sup>87</sup>



Collection Hash Marihuana & Hemp Museum Amsterdam/Barcelona

Such was the atmosphere in August 1937 when the federal government approved the Marijuana Tax Act, effectively banning cannabis in the country. The law imposed an occupational tax upon importers, sellers, dealers and anyone handling the drug. The provisions of the Act were not designed to raise revenue, or even regulate the use of marijuana. The purpose was to provide the legal mechanisms to enforce the prohibition of all use of marijuana.<sup>88</sup> This was the case even though debate for the passage of the bill in the House of Representatives lasted only half an hour and contained no medical or scientific data. Reflecting the laxity and indifference of discussion, Texas Congressman Sam Rayburn responded to a question about the bill's provisions: “It is something to do with something that is called marijuana. I believe it is a narcotic of some kind.”<sup>89</sup> Before the introduction of the law only

four states had enacted prohibitions against non-medical usage of marijuana, California (1915), Texas (1919), Louisiana (1924), and New York (1927), but in 1937, 46 of the nation's then 48 states had banned the substance.

The U.S. subsequently reinforced its drive to strengthen international control and lead the international anti-cannabis movement. It presented extensive documentation to a subcommittee of the League of Nation's Advisory Committee, claiming a link between crime, dementia and cannabis, whilst promoting the gateway theory that cannabis use leads to heroin addiction. Anslinger declared in 1938 before the Advisory Committee: “[...] the drug [marihuana] maintains its ancient, worldwide tradition of murder, assault, rape, physical and mental deterioration. The office's archives prove that its use is associated with dementia and crime. Thus, from the point of view of policing, it is a more dangerous drug than heroin or cocaine.”<sup>90</sup>

In contrast, one of the most important documents finally produced by the sub-committee insists that there is no link between violence and cannabis in Africa. The subcommittee's work, completed in December 1939, demonstrated sensitivity to cultural differences in cannabis use – even though the Indian situation and the lessons from the Hemp Commission were once again ignored – and an appreciation of the difficulties to be expected in efforts to control the substance. The subcommittee concluded that more studies were necessary on the precise content of cannabis, on the causes of addiction and its connection with dementia and crime, and on the growing phenomenon of substitution of cannabis with heroin that was occurring in North Africa, Egypt and Turkey. In an earlier report an increase in heroin use in Tunisia was attributed to cannabis control, and it raised the concern that “[...] at present, total suppression (at least in countries where cannabis use is a very ancient custom) would result in an increase in addiction to manufactured drugs, which are far more dangerous [...]”<sup>91</sup>

The work of the League of Nations ended with the outbreak of the Second World War. After 1945, with the full weight of the U.S. brought into play, the parameters for international cannabis control changed significantly. Meanwhile, attracting little if any attention, other control models also persisted. In India, Tunisia and French Morocco, for example, systems of controlled sales had been adopted.<sup>92</sup>

### Towards the 1961 Single Convention

With the creation of the United Nations, the Commission on Narcotic Drugs (CND) replaced the Advisory Committee of the League of Nations. During its first meeting in 1946 future discrepancies in the cannabis debate were already beginning to show. At that meeting, medical opinions from the U.S. and Mexico were referred to that refuted any significant health-related harms from

## Cannabis and insanity

A recurrent issue in the debate on whether or not to prohibit cannabis is the supposed link between cannabis and insanity, or as the debate evolved, cannabis and psychosis/schizophrenia. Since the 1840s cannabis has been accused of triggering insanity and hailed as a cure for it. With the benefit of hindsight and incalculable scientific research, the verdict is that “[c]annabis is associated with psychosis (a symptom) and schizophrenia (an illness where this symptom is persistent) in complex, contradictory and mysterious ways”.<sup>93</sup>

One of the key psychoactive components of cannabis, tetrahydrocannabinol (THC), might sometimes induce psychosis-like effects, such as anxiety and paranoid delusions, but transient paranoia is not schizophrenia. Persistent cannabis use (or that of any kind of psychoactive substance) may precipitate psychosis in individuals with genetically predisposing factors, and complicate and worsen symptoms in a person with schizophrenia, but there is no evidence it can cause psychosis.<sup>94</sup> On the other hand, another key component in cannabis, cannabidiol (CBD), has powerful antipsychotic and anti-anxiety properties, so effective that “CBD may be a future therapeutic option in psychosis, in general and in schizophrenia, in particular”.<sup>95</sup> This might explain why people with schizophrenia or predisposed to psychotic symptoms report relief after using cannabis.

Although the number of users increased and average strength of cannabis has raised significantly, the numbers of people being diagnosed with schizophrenia has remained stable over time.<sup>96</sup> That is not to say that cannabis is completely harmless, but that the harms are often exaggerated and other environmental factors, such as alcohol for instance, are frequently overlooked. A systematic review of epidemiological data on cannabis dependence (1990-2008) indicates:

the modest increase in risk and the low prevalence of schizophrenia mean that regular cannabis use accounts for only a very small proportion of the disability associated with schizophrenia. From a population health perspective, this raises doubt about the likely impact of preventing cannabis use on the incidence or prevalence of schizophrenia [...].<sup>97</sup>

The object here is not to review all the often conflicting evidence on the relation between cannabis and psychosis, but to how one argument, that cannabis causes insanity, prevailed. And this position prevailed despite the lack of evidence to substantiate the claim overriding significant doubts about the relationship that existed from the beginning of the debate. One of the earliest inquiries, by the colonial government of India in 1872, did indeed conclude that habitual ganja use tended to produce insanity, but a careful examination of the evidence presented in the

reports underlying that conclusion, shows that the alleged relationship lacked “solid or sound foundations” and its accuracy was often disputed by medical officers.<sup>98</sup> However, “bad information, administrative expedience and colonial misunderstandings of a complex society” turned into statistics and the statistics provided the “evidence” that cannabis led to mental illness.<sup>99</sup>

The *Indian Hemp Drugs Commission* in 1894 was also instigated by claims that the lunatic asylums of India were filled with ganja smokers. After extensive research into the nature of asylum statistics the majority of the Commission members agreed “that the effect of hemp drugs in this respect ha[d] hitherto been greatly exaggerated”.<sup>100</sup> Most medical doctors involved in the study were convinced that cannabis use did not cause insanity, but rather stimulated a mental illness that “was already lurking in the mind of the individual” and that alcohol played at least an equal if not a more important role.<sup>101</sup> That conclusion seems to summarize current opinions about the relationship between cannabis and psychosis.

As mentioned in this chapter, the dramatic announcements on the mental health implications of cannabis use by the Egyptian delegate Mohammed El Guindy at the Geneva conference had a significant impact on the deliberations to include cannabis in the 1925 Convention. El Guindy produced statistics supporting his claims that 30 to 60 per cent cases of insanity were caused by hashish. In a subsequent *Memorandum with reference to hashish as it concerns Egypt*, submitted by the Egyptian delegation to support El Guindy, the figure was even more alarming, claiming that “about 70 percent of insane people in lunatic asylums in Egypt are hashish eaters or smokers”.<sup>102</sup> El Guindy’s figures were probably based on the observations of John Warnock, the head of the Egyptian Lunacy Department from 1895 to 1923, published in an article in the *Journal of Mental Science* in 1924.<sup>103</sup>

However, as historian James Mills showed, Warnock made broad generalizations about cannabis and its users despite that those he saw were only the small proportion of them in hospitals. Whether this was an accurate picture of cannabis use in Egypt did not seem a relevant question to him. Other Egyptian statistics showed a very different picture.<sup>104</sup> This tendency among some doctors to extrapolate their experiences in mental health departments to society at large was common in many studies in many countries and resulted in ignoring the fact that the vast majority of cannabis users did so without any problem. Studies often generalised cases of a few single individuals with personality disorders to make broad claims about the overall harmful effects of cannabis.<sup>105</sup>

Not all directors of mental health hospitals reached the same conclusions. The Mexican psychiatrist Leopoldo Salazar Viniegra, for instance, who had earned a reputation as a result of his work with addicts in the national mental

health hospital, refuted the existence of a marijuana psychosis. In an article in 1938, entitled *El mito de la marihuana* (The Myth of Marijuana), he argued that that assumption in public and scientific opinion was based in myth. The link of the substance with insanity, violence and crime, which had dominated the public discourse in Mexico since the 1850s, was the result of sensational media reports and, in later years, U.S. drug enforcement authorities.<sup>106</sup> According to Salazar, at least in Mexico, alcohol played a much more important role in the onset of psychosis and social problems.

Shortly after he was appointed as head of Mexico's Federal Narcotics Service, he told U.S. officials that the only way to stem the flow of illicit drugs was through government-controlled distribution. Due to Mexico's 1920 cannabis prohibition, 80 per cent of the drug law violators were cannabis users. He argued that Mexico should repeal cannabis prohibition to undercut illicit trafficking (the suppression of which he considered impossible in Mexico due to widespread corruption) and focus on the much more serious problems of alcohol and opiates. In 1939, he initiated a programme of clinics dispensing a month's supply of opiates to addicts through a state monopoly.<sup>107</sup> Salazar argued that the traditional perceptions of addicts and addiction had to be revised, including "the concept of the addict as a blameworthy, antisocial individual".<sup>108</sup>

In doing so, Salazar not only made an enemy out of the powerful U.S. Commissioner of Narcotics Anslinger, who had used the alleged relation to push through the prohibitive Marijuana Tax Act, but also went against the opinions of the established medical opinion in Mexico. As a delegate to the Advisory Committee of the League of Nations and participating in its meeting in Geneva in May 1939, he saw that the intolerance of and demands for prohibiting cannabis had increased exponentially under the leadership of the American delegates and their allies.<sup>109</sup> He infuriated Anslinger with his proposal to treat addicts in and out of prison with a morphine step-down project.<sup>110</sup> Back home, in an article in the *Gaceta Medica de México*, he challenged the validity of the data relating hashish to schizophrenia in a report from Turkey submitted to the Committee.<sup>111</sup>

Salazar considered the then existing international drug control conventions "as practically without effect".<sup>112</sup> His opinions opposed Washington's punitive supply-side

cannabis use and its minimal influence on criminal behaviour. The Mexican representative claimed that too many restrictions on cannabis could lead to it being substituted by alcohol, which would have worse consequences. The Indian delegate declared that Indian people used *ganja* and *bhang* in moderation.<sup>118</sup>

The U.S. representative, Commissioner Anslinger, insisted on proving the connection between cannabis use and

approach on drug control and he stepped on too many toes both nationally and internationally. The U.S. consul general in Mexico suggested that ridicule would be the best way to stop the "dangerous theories" of Salazar.<sup>113</sup> After a concerted campaign in which U.S. and Mexican officials set out to destroy him personally, the Mexican press depicted him as a madman and "propagandist for marijuana".<sup>114</sup> Due to the intense diplomatic and public pressures, he was forced to resign as head of the Federal Narcotics Service and was replaced by someone more complaisant in the eyes of the U.S. State Department and the FBN.<sup>115</sup>

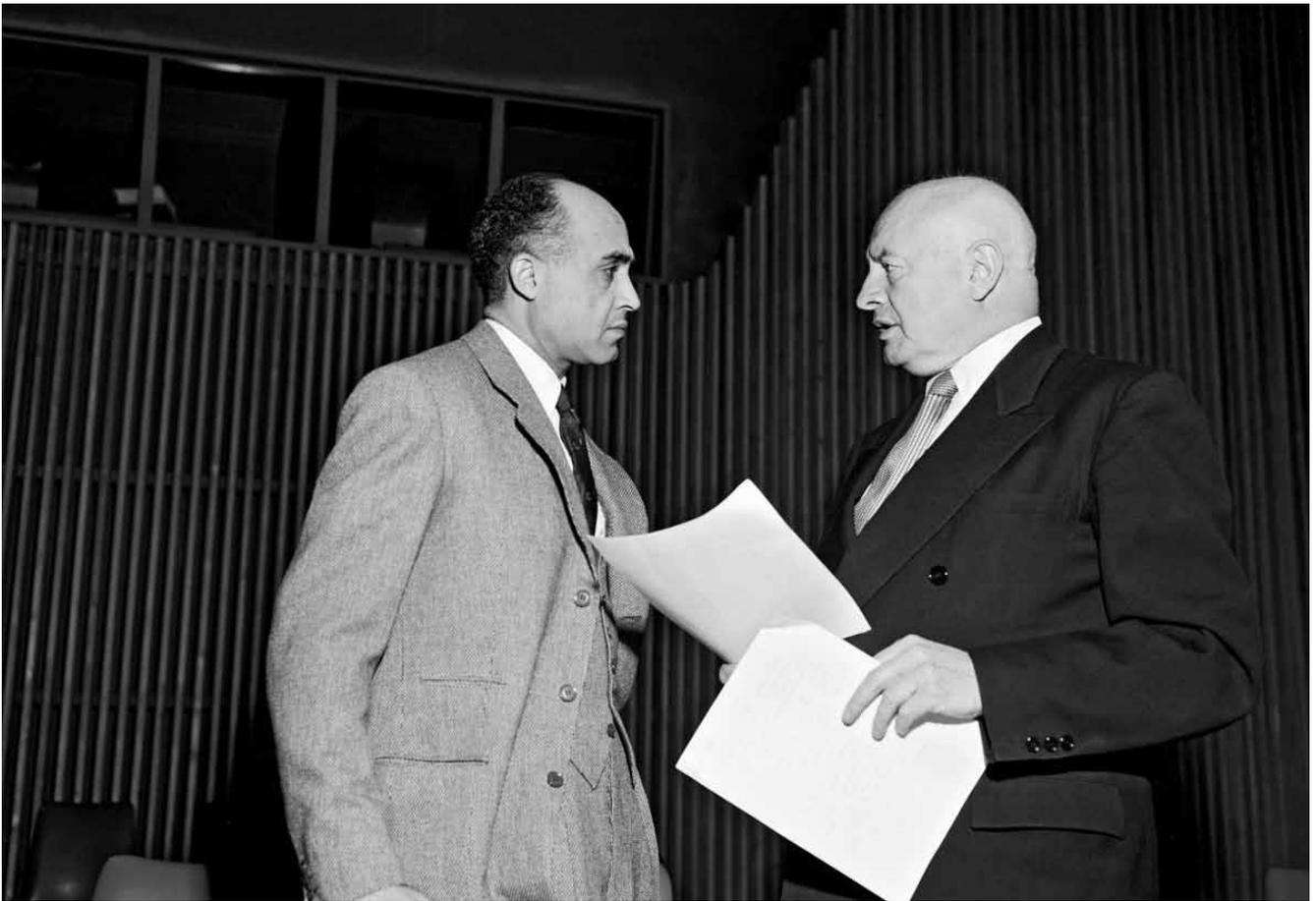
Not surprisingly, Salazar's work was dismissed by Pablo Osvaldo Wolff in his booklet *Marihuana in Latin America*. As discussed later in this chapter, Wolff, who claimed that cannabis did cause psychosis, was much more astute in assuring his opinions were dominant across the relevant UN institutions. Nevertheless, after the 1961 Single Convention was adopted, the UN Bulletin on Narcotics published a review in 1963 that shed substantial doubt on the relationship and, if there was one, about its prevalence. In the review, the Canadian psychiatrist H.B.M. Murphy concluded: "It is exceedingly difficult to distinguish a psychosis due to cannabis from other acute or chronic psychoses, and several suggest that cannabis is the relatively unimportant precipitating agent only." He elucidated that "it probably produces a specific psychosis, but this must be quite rare, since the prevalence of psychosis in cannabis users is only doubtfully higher than the prevalence in general populations".<sup>116</sup>

The debate continues and opinions on how and why cannabis use is related to psychosis and schizophrenia still spark debate among medical observers today. A 2010 editorial in the *International Drug Policy Journal* called for a more rational approach, decrying that "overemphasis on this question by policymakers has distracted from more pressing issues" and concluded that they

should give greater voice to the risks and harms associated with particular cannabis policies and to the evaluation of alternative regulatory frameworks. Given the decades of research and experience with cannabis prohibition, it seems reasonable to reorient the cannabis policy debate based on known policy-attributable harms rather than to continue to speculate on questions of causality that will not be definitively answered any time soon.<sup>117</sup>

crime, and launched an attack against a report issued in 1944 by New York's mayor, Fiorello La Guardia, the goal of which was to provide a thorough, impartial and scientific analysis of marijuana smoking among the city's Latin and black population.<sup>119</sup> Based on five years of interdisciplinary research, the study refuted the scare stories the FBN was circulating in the press and other media and claims by officials about the dangers of cannabis. Among its conclusions was that the "practice of smoking

US Narcotics Commissioner Harry J. Anslinger meets delegate Saleh A. Mahmoud from Egypt at the 1952 CND in New York (Photo: UN Photo/MB)



marijuana does not lead to addiction in the medical sense of the word” and that the drug was “not the determining factor in the commission of major crimes.” Moreover, “the publicity concerning the catastrophic effects of marijuana is unfounded [...] There [is] no direct relationship between the commission of crimes of violence and marihuana [... M] arihuana itself has no specific stimulant effect in regard to sexual desires” and that “use of marihuana does not lead to morphine or cocaine or heroin addiction.” In light of such findings, it called for an intelligent approach to the drug.<sup>120</sup>

In the absence of an international normative consensus about drug use and the willing capacity to coerce nations to adhere to stringent control policies the League of Nations had been unable to secure the global prohibition of certain drugs for non-medical purposes. The voluntary nature of adherence to the conventions ensured that the pre-UN framework had a more regulatory character, concerned predominantly with “restrictive commodity agreements”.<sup>121</sup> This was about to change. After the Second World War the United States was the dominant world power and could “persuade” other states to adopt stricter policies.<sup>122</sup> This power shift led to dismissing impartial evidence on the benefits, risk and harms of cannabis and its potential medical usefulness, and eased the way for providing biased evidence supporting the U.S. decision to prohibit the substance. For example, a CND secretariat paper continuing the work of the subcommittee from the 1930s omitted all references to the La Guardia report because the U.S. did not submit it.

In 1948 the recently formed UN Economic and Social Council (ECOSOC) approved a U.S.-drafted and CND-sponsored resolution requesting the UN’s Secretary General to draft a new convention replacing all the existing treaties from the 1912 Hague Convention onwards. Owing much to Anslinger’s endeavours, work on a kind of “single” or “unified” treaty began. It would have three core objectives: limiting production of raw materials; codifying existing conventions into one; and simplifying the existing drug control apparatus. Between 1950 and 1958, the nascent document went through three drafts.<sup>123</sup>

A first draft of the future single convention was presented in February 1950 by the CND Secretariat. The proposals for cannabis were drastic. The draft text incorporated two alternative approaches, both holding that recreational cannabis use needed to be rigorously discouraged. The first alternative worked on the conjecture that cannabis had no legitimate medical use that could not be met by other “less dangerous substances”. With the exception of small amounts for scientific purposes, the production of cannabis would be prohibited completely.<sup>124</sup>

The second option recognized that cannabis did have legitimate medical purposes. It should be produced and traded exclusively by a state monopoly only for medical and scientific ends. To ensure that no cannabis leaked into “illicit traffic” a range of measures, such as state-run cultivation and the uprooting of wild plants, was proposed. In countries with significant traditional recreational use, “a

reservation” could allow production on the strict condition that the reservation would “cease to be effective unless renewed by annual notification [...] accompanied by a description of the progress in the preceding year towards the abolition of such non-medical use and by explanation of the continued reasons for the temporary retention of such use.”<sup>125</sup>

No agreement was reached and decisive action was stalled. More information was needed as “a rigid limitation of the use of drugs under control to exclusively medical and scientific needs does not sufficiently take into consideration long established customs and traditions which persist in particular in territories of the Middle and Far East and which is impossible to abolish by a simple decree of prohibition.”<sup>126</sup> The draft boldly claimed that all non-medical consumption of cannabis was harmful and recommended that countries in which traditional recreational use was common should be obliged to ban such practices, denying that social use of cannabis in many southern countries was commonly accepted by many as a phenomenon comparable to the social use of alcohol in the U.S. and Europe.<sup>127</sup> Years later, Hans Halbach, head of the WHO Section on Addiction Producing Drugs from 1954 to 1970, pointed out the cultural bias: “If in those days the opium-producing countries had been as concerned about alcohol as Western countries were concerned about opium, we might have had an international convention on alcohol.”<sup>128</sup>

By deferring cannabis for further study the issue risked ending up in the same indecisive state as in the pre-war period under the auspices of the League of Nations, when it was studied year in year out, without a noticeable

impact on the decision-making process. Much valuable information was gathered, but its often contradictory nature did not help to reach a suitable policy conclusion. The dominant position of the U.S. and the emergence in the post-war years of what historian McAllister has called an “inner circle” of drug control advocates at the UN who were determined to set a “radical” agenda were central to breaking the impasse.<sup>129</sup>

One of the crucial issues was whether cannabis had any justifiable medical use. The body mandated to determine medicinal utility was the WHO Expert Committee on Drugs Liable to Produce Addiction. In 1952 the Committee declared “cannabis preparations are practically obsolete. So far as [we] can see, there is no justification for the medical use of cannabis preparations.”<sup>130</sup> That verdict was not substantiated by any evidence and was clearly influenced by ideological positions of certain individuals holding powerful positions. The secretary of the Expert Committee was Pablo Osvaldo Wolff, the head of the Addiction Producing Drugs Section of the WHO (1949-1954). Wolff, described as an American protégé, was part of that “inner circle” of control advocates and was made the WHO’s resident cannabis expert due to vigorous U.S. sponsorship.<sup>131</sup>

Anslinger wrote the preface to the 1949 English edition of Wolff’s booklet *Marijuana in Latin America: The Threat It Constitutes*, as a polemic against the La Guardia report that argued, in contrast to Anslinger and Wolff’s opinion, that the use of marijuana did not lead to mental and moral degeneration. Wolff’s work supported the pre-war claims and arguments of the U.S. government, such as the estimate that there were 200 million cannabis addicts in

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



## Schedules under the UN drug control conventions

### 1961 Single Convention on Narcotic Drugs

SCHEDULE I	SCHEDULE II	SCHEDULE III
Substances that are highly addictive and liable to abuse, and precursors readily convertible into drugs similarly addictive and liable to abuse (e.g. <i>cannabis, opium, heroin, methadone, cocaine, coca leaf, oxycodone</i> )	Substances that are less addictive and liable to abuse than those in Schedule I (e.g. <i>codeine, dextropropoxyphene</i> )	Preparations containing low amounts of narcotic drugs, are unlikely to be abused and exempted from most of the control measures placed upon the drugs they contain (e.g. <2.5% <i>codeine</i> , <0.1% <i>cocaine</i> )
↓		
SCHEDULE IV		
Certain drugs also listed in Schedule I with "particularly dangerous properties" and little or no therapeutic value (e.g. <i>cannabis, heroin</i> )		

### 1971 Convention on Psychotropic Substances

SCHEDULE I	SCHEDULE II	SCHEDULE III	SCHEDULE IV
Drugs presenting a high risk of abuse, posing a particularly serious threat to public health with little or no therapeutic value (e.g. <i>LSD, MDMA, cathinone</i> )	Drugs presenting a risk of abuse, posing a serious threat to public health, which are of low or moderate therapeutic value (e.g. <i>dronabinol, amphetamines</i> )	Drugs presenting a risk of abuse, posing a serious threat to public health, which are of moderate or high therapeutic value (e.g. <i>barbiturates, buprenorphine</i> )	Drugs presenting a risk of abuse, posing a minor threat to public health, with a high therapeutic value (e.g. <i>tranquillizers, including diazepam</i> )

### 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

TABLE I	TABLE II
Precursors of psychotropic substances, such as ephedrine, piperonal, safrole, phenylacetic acid, lysergic acid; and a few key reagents such as acetic anhydride used in the conversion of morphine into heroin and potassium permanganate used in the extraction of cocaine	A wide range of reagents and solvents that can be used in the illicit production of narcotic drugs and psychotropic substances, but also have widespread licit industrial uses, including acetone, ethyl ether, toluene and sulphuric acid



the world.<sup>132</sup> The booklet has been qualified as “primarily a diatribe against marihuana [...] practically devoid of hard data”<sup>133</sup> that provided little to no scientific evidence regarding the alleged association between cannabis and crime.

Rather than a credible study, it is a pamphlet admonishing cannabis’ menacing effect. “With every reason, marihuana [...] has been closely associated since the most remote time with insanity, with crime, with violence, and with brutality,” Wolff concludes. The bombastic language discredits any scientific reliability and impartiality. For example, cannabis: “changes thousands of persons into nothing more than human scum,” and “this vice... should be suppressed at any cost.” Cannabis is labelled as a “weed of the brutal crime and of the burning hell,” an “exterminating demon which is now attacking our country.” Users are referred to as addicts whose “motive belongs to a strain which is pure viciousness.”<sup>134</sup>

Wolff also distorted available evidence by cherry-picking from reports to support his position, claiming for instance, “an American commission which studied marijuana addiction in the Panama garrisons found among the addicts individuals who were under charges of violence

and insubordination.” That commission was the Panama Canal Zone one mentioned above, which had reached the diametrically opposite conclusion based on evidence that acts of violence and insubordination had little to no relation to cannabis, but were, in fact, caused by alcohol.<sup>135</sup> Wolff’s claim that there was “no medical indication whatsoever that will justify its use in the present day”<sup>136</sup> was taken onboard by the WHO expert committee about cannabis in 1952, of which he was the secretary.

The deliberations from 1950 to 1955 would determine the status of cannabis in the 1961 UN Single Convention on Narcotic Drugs.<sup>137</sup> And Wolff practically unilaterally determined the WHO position during these crucial years. At the 1953 CND meeting a study programme was approved to evaluate existing control regimes in cooperation with the Food and Agriculture Organization (FAO) and the WHO. The importance of the WHO undertaking a study on the physical and mental effects was stressed. When the CND met in 1955 the delegates were presented a report, *The Physical and Mental Effects of Cannabis*, written by Wolff.<sup>138</sup> Little more than an update of his earlier booklet, and no less biased, it concludes that “cannabis constitutes a dangerous drug from every point of view, whether physical,

mental, social or criminological,” and “not only is marihuana smoking per se a danger but that its use eventually leads the smoker to turn to intravenous heroin injections.”<sup>139</sup>

The report is relentless in its drive to reach that conclusion. Wolff has little indulgence for those “inclined to minimize the importance of smoking marihuana.”<sup>140</sup> The literature cited is highly selective and the work of the League’s Subcommittee in the 1930s barely acknowledged. There are also serious doubts about the official status of the document: it did not represent the WHO’s institutional point of view and was not endorsed by the relevant expert committee nor mentioned in its reports. Wolff’s successor, the aforementioned Hans Halbach, referred to the report “as a working paper for the WHO Secretariat [...] made available for distribution by the WHO Secretariat.”<sup>141</sup> However, at the CND meeting, many delegates perceived the document as representing the WHO position.

### Cannabis condemned: the 1961 Single Convention

The CND reached the verdict that cannabis had no medicinal value at its 1955 meeting on the basis of the minimal and biased documentation presented.<sup>142</sup> Proof that cannabis had a medicinal use in traditional Indian medicine, for example, did not stymie the prohibition impetus. India’s objections had little effect against the powerful anti-cannabis bloc.<sup>143</sup> As a result, the third draft of the Single Convention of 1958 included a special section under the heading “prohibition of cannabis”. But opposition prevented its adoption at the Plenipotentiary Conference that negotiated the draft version in New York from 24 January to 25 March 1961. In attendance were representatives of 73 states and a range of international organisations.

India objected because it opposed banning the widespread traditional use of *bhāng* made from cannabis leaves with a low psychoactive content, described by the Indian delegate as a “mildly intoxicating drink” that was “far less harmful than alcohol.”<sup>144</sup> Pakistan argued against prohibition, as did Burma, leading to an interesting interlude in which the supply of cannabis for elephants used in the timber industry was discussed. Other states supported continued use of cannabis in some pharmaceutical preparations as well as in indigenous medicine, professing that future research might well reveal further medicinal benefits. Deviating from the zero-tolerance bias so prevalent at the Conference, leaves and seeds were explicitly omitted from the definition of cannabis, which now only referred to the “flowering or fruiting tops of the cannabis plant.”<sup>145</sup> As such, the traditional use of *bhāng* in India could continue.

Questions about “indigenous medicine”, “quasi-medical uses”, “traditional uses” and precise definitions of the plants or derived substances that should be placed under

control remained unresolved. Several delegations argued that using the phrasing “medical, scientific and other legitimate purposes” could provide a solution for allowing certain traditional uses such as the Indian *bhāng* brew and “indigenous medicinal” applications. Deemed confusing and deviating from the fundamental principle of limitation to medical and scientific purposes only, the insertion “other legitimate purposes” was rejected. The exceptions for industrial purposes of cannabis (fibre and seed) were cited in separate articles.

Widely socially accepted uses of cannabis in many Asian and African countries, were thus condemned to be abolished, a culturally biased approach that was also extended to coca leaf chewing. Article 49 required the abolition of the non-medical and non-scientific use of cannabis, cannabis resin, extracts and tinctures of cannabis as soon as possible, with a maximum delay of 25 years. The required number of 40 ratifications of the treaty to enter into force was reached in December 1964, hence the 25-year phase-out scheme for cannabis ended in 1989.<sup>146</sup>

Along with heroin and a few other selected drugs cannabis was included in Schedule I (containing those substances considered most addictive and most harmful) and in the strictest Schedule IV (containing those substances to be the most dangerous and regarded as exceptionally addictive and producing severe ill effects) of the Single Convention. Thus, it became classified among the most dangerous psychoactive substances under international control with extremely limited therapeutic value. Cannabis, cannabis resin and extracts and tincture of cannabis are therefore subject to all control measures foreseen by the Convention.<sup>147</sup> With regard to Schedule IV, article 2, 5 (b) of the Convention stipulates that any signatory “shall, if in its opinion the prevailing conditions in its country render it the most appropriate means of protecting the public health and welfare, prohibit the production, manufacture, export and import of, trade in, possession or use of any such drug except for amounts which may be necessary for medical and scientific research only.” Due to its inclusion in Schedule IV, the Convention hereby suggests that parties should consider prohibiting cannabis for medical purposes and only allow limited quantities for medical research.<sup>148</sup>

The key provision of the Convention is found under General Obligations in Article 4: “The parties shall take such legislative and administrative measures [...] to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs”.

### THC and the 1971 “Psychotropics” Convention

The psychoactive compounds of cannabis were identified after the 1961 Convention was concluded. In 1963, Raphael Mechoulam and his research partners at the

### **WHO & the scheduling of dronabinol / THC: the unfinished saga<sup>150</sup>**

- 1971** Dronabinol included in Schedule I of the 1971 Convention
- 1987** U.S. government requests UN Secretary General to transfer it from Schedule I to II
- 1989** WHO 26<sup>th</sup> Expert Committee recommends transferring dronabinol to Schedule II
- 1990** CND rejects in March the recommendation, fearing increase of abuse
- 1990** WHO 27<sup>th</sup> Expert Committee again recommends in September de-scheduling to Schedule II, adding evidence of therapeutic usefulness and low risk of abuse
- 1991** CND adopts recommendation and dronabinol is transferred to Schedule II
- 2002** WHO 33<sup>rd</sup> Expert Committee meeting undertakes new critical review and recommends transfer to most lenient Schedule IV, requiring hardly any control measures
- 2003** WHO recommendation is deliberately kept away from the CND through political interference in the procedure by UNODC under US pressure
- 2006** WHO 34<sup>th</sup> Expert Committee meeting “updates” its previous review and now recommends transfer to Schedule III
- 2007** CND decides not to vote on the new recommendation, instead requesting WHO to update the review when additional information becomes available
- 2012** Lack of funding obstructs its functioning and only after six years the 35<sup>th</sup> WHO Expert Committee meets and decides there is not sufficient new evidence to merit another review
- 2013** WHO communicates to the CND that in absence of relevant new evidence its recommendation to transfer dronabinol to Schedule III still stands
- 2013** CND keeps it off the agenda and no vote takes place; minority discontent leads to the decision to put the issue of CND handling of WHO recommendations on the 2014 agenda

Hebrew University of Jerusalem revealed the structure of cannabidiol (CBD). By the following year they had isolated delta-9-tetrahydrocannabinol (THC), established its structure and synthesized it.<sup>149</sup>

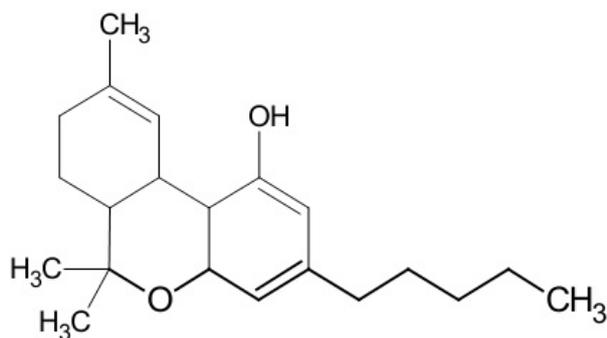
As mentioned above, cannabis, or more precisely its “flowering and fruiting tops” and its resin, were included

in Schedules I and IV of the 1961 Single Convention. The active alkaloids of other plant materials controlled under the 1961 Convention, like cocaine that can be extracted from the coca leaf or morphine from opium poppy, were included in the Schedules of the same convention. In the case of cannabis, however, the basic rationale of the Single Convention was abandoned with the decision instead to control its main active ingredient, THC, under the 1971 Convention on Psychotropic Substances. Dronabinol, a pharmaceutical formulation of THC, was included in the most stringent Schedule I when the 1971 Convention was adopted, corresponding in severity of control measures with Schedule IV of the 1961 Convention. As explained in INCB training materials, the use of those substances “must be prohibited except for scientific and very limited medical purposes.”<sup>151</sup>

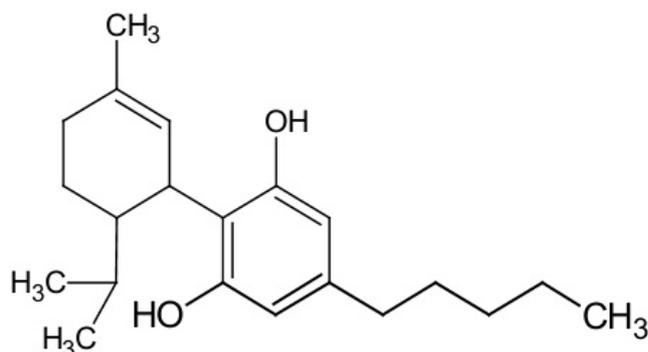
In 1969 the WHO Expert Committee announced it “strongly reaffirms the opinions expressed in previous reports that cannabis is a drug of dependence, producing public health and social problems, and that its control must be continued” and that “medical need for cannabis as such no longer exists.”<sup>152</sup> The WHO Expert Committee and the INCB still had few differences of opinion at the time. After discussing a draft of what would eventually become the 1971 Convention on Psychotropic Substances, the WHO Expert Committee in 1970 suggested a division of five categories and recommended the inclusion of tetrahydrocannabinols in the strictest category of “drugs recommended for control because of their liability to abuse constitutes an especially serious risk to public health and because they have very limited, if any, therapeutic usefulness.”<sup>153</sup>

The pharmaceutical industry, meanwhile, had become interested in the medicinal potential of cannabinoids, and preferred they be dealt with under a new treaty rather than added to the 1961 Convention, to keep exploration and commercial development separated from the politically charged controls the Single Convention had placed on cannabis itself. During the 1971 conference, disputes regarding the separation of control measures for cannabis from those for its active principles, erupted several times. One of the difficulties was how to define and control the production or manufacture of “psychotropic” substances. As the official records of the Conference note, “The Technical Committee had discussed the problem in connexion with the tetrahydrocannabinols, derived from the cannabis plant. If “production” meant planting, cultivation and harvesting, then cannabis would have to be treated as a psychotropic substance.”<sup>154</sup>

It was finally decided, in the words of the Indian delegate, that “all references to production should be dropped” because otherwise the fact that “tetrahydrocannabinols had been included in Schedule I” and since “cannabis was the plant from which those substances were derived”, it “would mean that cannabis would fall within the scope” of the treaty as well.<sup>155</sup> The 1971 conference thus adopted



Tetrahydrocannabinol (THC)



Cannabidiol (CBD)

a control logic completely different from the rationale behind the 1961 Convention. The issue of cultivation, production and required precursors, whether plants or other substances, for psychotropic substances was deliberately kept out of the treaty.<sup>156</sup>

Including THC in Schedule I allowed its use in medical research, but posed obstacles for the development and marketing of pharmaceutical preparations for medical uses. Successful lobbying of the pharmaceutical industry, based on a slowly increasing body of evidence regarding medicinal efficacy of cannabis and its cannabinoids, led to a 1982 U.S. government request to transfer dronabinol from Schedule I to II. Several years later the WHO Expert Committee conducted a critical review resulting in a positive recommendation. The CND adoption in 1991 of the WHO recommendation to deschedule dronabinol and all its stereoisomers to the less stringent Schedule II of the 1971 Convention was the first step in the still ongoing process of formal acknowledgement at UN level of the medical usefulness of the main active compound of cannabis.<sup>157</sup> (See Box: WHO & the scheduling of dronabinol / THC: the unfinished saga)

### First wave of soft defection

The 1961 Single Convention was not even in print before the debate about the status of cannabis restarted. At the CND session immediately following the 1961 conference, comments from professionals in the Dutch press that cannabis addiction was no worse than alcoholism triggered a debate. Views not entirely consistent with the international control policy only just embodied in the Single Convention were being voiced. The majority opinion in the CND argued that the international community had agreed that cannabis use was a form of drug addiction and emphasized that any publicity to the contrary was misleading and dangerous.<sup>158</sup> Over the years, this would become the stock response whenever anyone dared to voice dissent. Known today as the “Vienna consensus” (since the UN drug control machinery moved from Geneva to Vienna in 1980) that so-called consensus is hailed by its promoters as the

bedrock of the UN drug control system. Those favouring reform see it as a barrier to modifying the status quo of an increasingly inadequate regime no longer fit for purpose.

Due to its growing popularity and increasingly widespread use, particularly its close association with the emerging counter-cultural movements, cannabis became the focus of drug enforcement activities in many western countries in the 1960s. Meanwhile, western cannabis pilgrims were heading off for the countries in which cannabis consumption remained a traditional custom. The shift in drug use patterns within these western nations coincided with the coming into force of the Single Convention and the birth of the new era in international drug control, ironically, including increased controls on the drugs under the UN operated regime. Arrests for drug offences reached unprecedented levels, driven largely by the growth in cannabis offences, including those for simple possession. In the U.S., for example, offences relating to the drug rose by 94.3 per cent between 1966 and 1967, the year the Convention was ratified in Washington, with even small amounts of cannabis potentially resulting in custodial sentences of up to ten years.<sup>159</sup>

Although this was an extreme, large numbers of predominantly young people were receiving criminal convictions, fines and, in some cases, prison sentences in a range of western countries. The handling of cannabis users within a variety of national legal systems consequently triggered significant domestic debate. Extensive public inquiries or commissions were established to examine drug use and recommended changes in the law on cannabis, in a number of nations, principally the U.K. (Report by the Advisory Committee on Drugs Dependence, the so-called Wootton Report, 1969), the Netherlands (The Baan Commission, 1970 and Hulsman Commission, 1971), the U.S. (The Shafer Commission Report, *Marihuana: A Signal of Misunderstanding*, National Commission on Marihuana and Drug Abuse 1972), Canada (The Commission of Inquiry into the Nonmedical Use of Drugs, commonly referred to as the Le Dain Commission, 1973) and Australia (Senate Social Committee on Social Welfare, 1977).



As with earlier inquiries, including the Indian Hemp Commission of 1894, the Panama Zone Report in 1925 and the 1944 La Guardia Report, all the exercises came to broadly the same conclusions. Cannabis was not a harmless psychoactive substance, yet compared with other drugs the dangers were being exaggerated. Further, as commentators have pointed out, there was general agreement that “the effects of the criminalization of cannabis were potentially excessive and the measures even counterproductive.” Consequently, “lawmakers should drastically reduce or eliminate criminal penalties for personal use.”<sup>160</sup> As was largely the case at the national level, the reports had little noticeable effect on the attitude of the international drug control community, though their spirit may have influenced to some extent the 1972 Protocol Amending the Single Convention on Narcotic Drugs. A minor reorientation of the regime toward greater provision for treatment and social reintegration was proposed, as was the option of alternatives to penal sanctions for trade and possession offences when committed by drug users.<sup>161</sup> The prohibitive ethos and supply-side focus of the drug control regime, however, remained untouched.

Such stasis on the international stage did not prevent a number of waves of “soft defection” from the conventions’ dominant zero-tolerance approach. Despite, and often due to, the U.S. federal government’s continued opposition to any alteration of the law, a number of U.S. states relaxed their policies regarding possession and decriminalized or depenalized personal use in the 1970s. Thus, while Washington was successfully imposing its prohibitionist policy on the rest of the world, the federal government had major difficulties in maintaining its policy domestically.<sup>162</sup>

That dichotomy began when the Nixon administration introduced the Controlled Substances Act in 1970 and initiated the “war on drugs”. The law placed cannabis in the same schedule as heroin (Schedule I drugs regarded as possessing a high potential for abuse with no medicinal value) and prohibited the recreational use of the drug nationwide. At the same time Nixon also appointed the Shafer Commission to study cannabis use in the country. The results were not to the President’s liking, the Commission favouring an end to cannabis prohibition and the adoption of other approaches, including a social-control policy seeking to discourage marijuana use. In his presentation to Congress in 1972, the Commission’s chairman recommended the decriminalization of small amounts of amounts, saying, “criminal law is too harsh a tool to apply to personal possession even in the effort to discourage use.”<sup>163</sup>

Nixon dismissed the Commission’s findings. Nevertheless, the report had a considerable impact on the diverging trends on cannabis in the U.S. In 1973 Oregon became the first state to decriminalize cannabis. Possession of one ounce (28.35 grams) or less became punishable only by a \$500 to \$1,000 fine. California followed in 1975, making possession under one ounce for non-medical use punishable by a \$100 fine. The Alaska Supreme Court ruled in 1975 that possession of amounts up to one ounce for personal use were legal in one’s own house under the state constitution and its privacy protections. Other states followed with varying policies, including measures such as fines, drug education, treatment instead of incarceration or assigning the lowest priority to various cannabis offences for law enforcement.<sup>164</sup>

Outside the U.S., in an isolated example of national politicians taking on board commission advice, Dutch authorities acted on many recommendations made by the Baan and Hulsman Commissions and began re-evaluating how to deal with cannabis use, a process that was to lead to the coffeshop system. The Dutch government at the time was even prepared to legalize cannabis, according to a government memorandum in January 1974:

The use of cannabis products and the possession of them for personal use should be removed as soon as possible from the domain of criminal justice. However, this cannot be realized as yet, as it would bring us into conflict with our treaty obligations. The Government shall explore in international consultations whether it is feasible that agreements as the Single Convention be amended in a way that nations will be free to institute, at their discretion, a separate regime for cannabis products.<sup>165</sup>

Fully aware that an amendment of the Single Convention was impossible when on the other side of the Atlantic a war on drugs had been declared, the Dutch government did not insist. Nevertheless, a breakthrough in the United States, not unlike what would eventually be achieved in Colorado, Washington and Uruguay, did seem possible only a few years later. In August 1979, President Jimmy Carter, in a message to Congress, took up the recommendations of the Shafer report that had been dismissed by his predecessor Nixon:

Penalties against possession of a drug should not be more damaging to an individual than the use of the drug itself; and where they are, they should be changed. Nowhere is this more clear than in the laws against possession of marijuana in private for personal use. We can, and should, continue to discourage the use of marijuana, but this can be done without defining the smoker as a criminal. States which have already removed criminal penalties for marijuana use, like Oregon and California, have not noted any significant increase in marijuana smoking. The National Commission on Marijuana and Drug Abuse concluded five years ago that marijuana use should be decriminalized, and I believe it is time to implement those basic recommendations.<sup>166</sup>

Carter supported legislation amending federal law to eliminate all federal criminal penalties for the possession of up to one ounce of marijuana, leaving the states to remain free to adopt whatever laws they wished concerning cannabis use. Stressing that decriminalization was not legalization (in that the federal penalty for possession would be reduced and a person would receive a fine rather than a criminal penalty), the proposed policy shift nevertheless signified a substantial change.

However, amidst growing public opposition lessening the punitive response to cannabis use,<sup>167</sup> hope of reform ended

with Carter's defeat in the 1981 presidential election and the concomitant conservative backlash across many areas of public policy. President Ronald Reagan re-initiated Nixon's war on drugs and introduced new more punitive prohibitive legislation. Moreover, Reagan not only introduced stricter laws in the U.S., but embarked on a mission at the international level to accomplish what U.S. delegates had not been able to achieve in the 1930s and Anslinger had failed to accomplish satisfactorily with the 1961 Convention and its 1972 Amending Protocol: prevent the growth of an increasingly lucrative criminal market and the massive expansion of illegal drug trafficking networks supplying it.

Consequently, just as in the 1930s and the development of the 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, an additional convention was deemed necessary to counter drug trafficking and pursue the earnings from drug trafficking in an effort to remove both the incentive (profit) and the means (operating capital). The result was yet another international control mechanism and the beginnings of an anti-money-laundering regime to identify, trace, freeze, seize and forfeit drug-crime proceeds.<sup>168</sup> The 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances significantly reinforced the obligation of countries to apply criminal sanctions to combat all the aspects of illicit production, possession and trafficking of drugs.

### Successive waves of soft defections

Current policies in both the Netherlands and in some U.S. states can be seen as the legacy of policy choices made during a first wave of cannabis liberalization four decades ago. More recently, a second wave of policies softening the prohibition of recreational cannabis use can be identified around the globe: what has been called a "quiet revolution" of decriminalization in several Latin American and European countries and within Australian states and territories.<sup>169</sup>

These waves of soft defection mainly consist of softening or abolishing penal provisions for personal use, possession for personal use, and in some instances the cultivation of a limited amount of plants for personal use. The medical-marijuana movement in the U.S. might be seen as a third wave of soft defection although concomitant with the second one. In 1996, voters in California passed Proposition 215, the Compassionate Use Act, exempting medical use of cannabis from criminal penalties. This does not legalize cannabis, but changes how patients and their primary caregivers are treated by the court system. California's law allows for individuals to possess, cultivate and transport cannabis as long as it is used for medical purposes with a doctor's written "recommendation", as opposed to a prescription.<sup>170</sup>

Since 1996 other states have followed the Californian example to varying degrees. Currently there are 21 with medical marijuana laws and 14 that have decriminalized cannabis one way or another. Medical-marijuana dispensaries and cannabis buyers' clubs have emerged to provide cannabis to those with legitimate medical need. A grey market has developed through trial and error in which cannabis is now available as a medical treatment in several U.S. states to almost anyone who tells a willing physician that discomfort would be lessened if he or she smoked.<sup>171</sup> Despite substantial differences across counties and cities, the "Californian model" has grown into something close to de facto legalization for recreational use.

The intransigence of the federal government regarding states' medical-marijuana arrangements, in particular the move towards de facto regulation of cultivation for recreational use in some states, has made cannabis policy a battleground for activists, law enforcement, voters, local, state and federal legislators and, in the final instance, the courts. The regulation of medical-marijuana cultivation could be considered a precursor to the legal regulation of the recreational cannabis market, not unlike alcohol-regulation models. The successful ballot initiatives in Washington and Colorado in November 2012 are the most recent stage in this process, and are expected to be the start of yet another wave that now moves from soft to hard defection, leading to treaty breaches.

At the UN level the increased soft defection regarding cannabis in some western countries led to a reaction at the 2002 session of the CND. The attempt was based on the 2001 annual report of the INCB, which contained strong language about the leniency trend. On the first day of the session the president of the INCB, Hamid Ghodse, stated: "In the light of the changes that are occurring in relation to cannabis control in some countries, it would seem to be an appropriate time for the Commission to consider this issue in some detail to ensure the consistent application of the provisions of the 1961 Convention across the globe." The hard liners in international drug control took up this invitation and expressed their grave concern. Morocco, for instance, pointed at the emerging contradiction between the trend towards decriminalization of cannabis use and a continuing pressure on "southern" countries to eradicate cannabis with repressive means.<sup>172</sup>

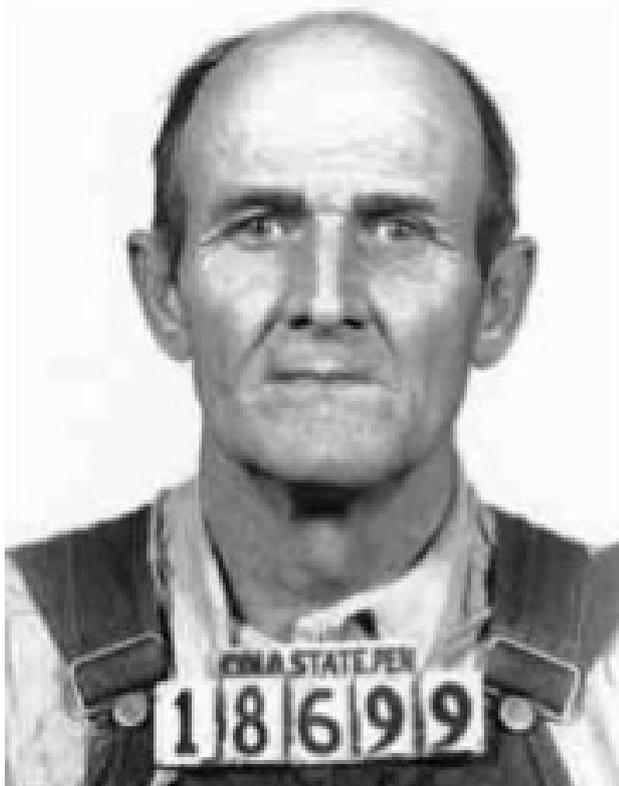
Although Morocco, a major supplier of hashish for the European market, certainly had a point, one cannot ignore that in many so-called southern producer countries, often with a long tradition of cannabis use, law-enforcement services habitually turn a blind eye to domestic cannabis use as well. In the end, the selective focus towards cannabis use in developing countries and a variety of decriminalization policies in western countries are quite similar. One could, therefore, point to the hypocrisy on both sides of the debate and the lack of realization that there is in fact more common ground than is apparent in arguing for a regime change, in particular where cannabis is concerned.

The skirmishing about "lenient policies" continued at the CND in 2003, remaining unresolved. One of the outcomes of the debate was a request to the United Nations Office on Drugs and Crime (UNODC) to prepare a global market survey on cannabis,<sup>173</sup> which resulted in a special chapter in the 2006 World Drug Report, entitled "Cannabis: Why we should care". In the report the UNODC recognized that "much of the early material on cannabis is now considered inaccurate, and that a series of studies in a range of countries have exonerated cannabis of many of the charges levelled against it."<sup>174</sup> It goes on to note that "[M]edical use of the active ingredients, if not the plant itself, is championed by respected professionals." That in itself is surely a valid reason to remove cannabis from Schedule IV, now that the UNODC also acknowledges that the scientific basis for putting cannabis on the list of the 1961 Single Convention at the same level as heroin has been incorrect.

Nevertheless, the report is inconsistent due its effort to balance or counter scientific research with the political correctness of the global drug prohibition regime. In its preface, written by the then UNODC Executive Director Antonio Maria Costa, the unsubstantiated allegations about cannabis re-emerged. Costa claimed that the unlimited supply and demand of cannabis were "devastating" and that the world was experiencing a "cannabis pandemic." According to Costa, "the characteristics of cannabis are no



A hemp drug shop in the Khandesh region in India, displaying bhang, ganja, and majum. From the Indian Hemp Drugs Commission Report (1894). (Courtesy: National Library of Scotland)



**First conviction for marijuana in the U.S.**

Samuel R. Caldwell was the first person convicted of selling cannabis under the Marijuana Tax Act of 1937, after drug-enforcement agents busted him with 3 pounds of cannabis in his apartment in Denver, Colorado. He was sentenced to four years of hard labour, in addition to a \$1,000 fine. Federal Bureau of Narcotics chief Harry Anslinger came to Denver to watch the trial. Caldwell was incarcerated in 1937, at age 58, and released in 1940 at age 60. Caldwell died one year after his release. Seventy-six years later, Colorado was the first state to allow a regulated cannabis market.

(Source: *Marijuana in Colorado has a long history and an uncertain future*, The Denver Post, December 31, 2013)

longer that different from those of other plant-based drugs such as cocaine and heroin.” In so doing the executive director echoed the unsubstantiated claims of Anslinger and Wolff from more than fifty years earlier. Central to these claims were the emergence of high potency cannabis on the market and the failure to control supply at global level.

Costa’s strong language was at odds with the more cautious section about cannabis in the World Drug Report, however. To be sure, the claim of a devastating cannabis pandemic is not anywhere substantiated. Further, the report suffers from an attempt to bridge the gap between the exaggerated claims within Costa’s preface and the more cautious content of the main text itself. Although it contains much valuable information, in trying to span the two the report tends to stress the negative and discard the positive. It basically ignores the increased medical use of cannabis. In discussing potential health and addiction problems the UNODC admits that much of the scientific data is still inconclusive, but the report tends to highlight research that indicates problems, while research that contradicts these conclusions is disregarded.<sup>175</sup> The report does, nonetheless, demonstrate that supply reduction is impossible given the potential to grow the plant anywhere and that all past attempts to control availability have failed.

In its final conclusion, however, the report raises the key issue concerning cannabis today, as evidenced by the pioneering reform initiatives in Uruguay, and Washington and Colorado:

The world has failed to come to terms with cannabis as a drug. In some countries, cannabis use and trafficking are taken very seriously, while in others, they are virtually ignored. This incongruity undermines the credibility of the international system, and the time for resolving global ambivalence on the issue is long overdue. Either the gap between the letter and spirit of the Single Convention, so manifest with cannabis, needs to be bridged, or parties to the Convention need to discuss redefining the status of cannabis.<sup>176</sup>

Now, nearly eight years after the writing of those words, and given the fact that some jurisdictions are allowing a regulated market for recreational use, the debate about a different status of cannabis in the international drug control regime seems to be more necessary than ever.

## The INCB and cannabis: from description to condemnation

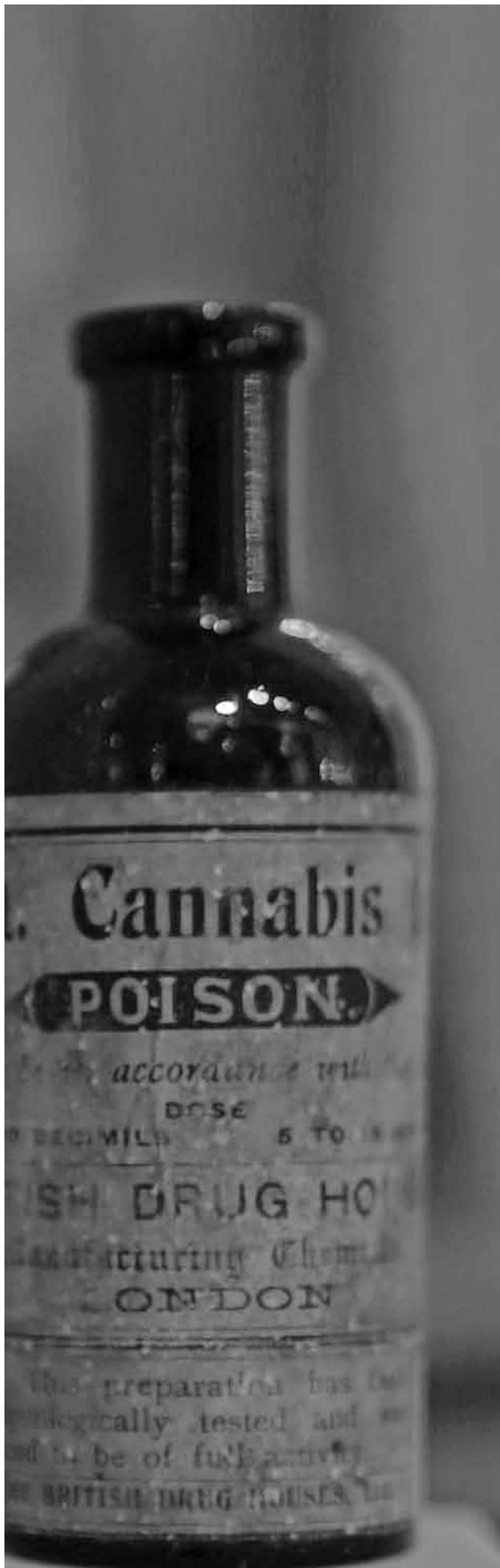
“Monitoring and supporting Governments’ compliance with the international drug control treaties” the International Narcotics Control Board (INCB or Board) describes itself as “the independent and quasi-judicial body for the implementation of the United Nations drug control conventions”.<sup>1</sup> As with other issues deemed within its purview, the Board’s view of the way different parties to the conventions choose to address cannabis use, or in the Board’s terminology, “abuse”, within their borders has fluctuated over time. Its position has, in general, hardened regarding policies deviating from strict prohibition of the non-medical and non-scientific use of the substance, a not surprising response bearing in mind increasing engagement with or consideration of more tolerant approaches by member states. This trend runs through its annual reports, periodic statements and other interventions in the policy debate, sometimes arguably beyond its mandate.

As will be described in this chapter, in recent decades three periods can be identified in relation to the way in which the Board’s views and performance on cannabis have developed. Since 1980 there was a gradual toughening of stance from an initially descriptive attitude towards a greater concern for and condemnation of countries over their tolerant cannabis policies. During the decade following the UN General Assembly Special Session (UNGASS) on drugs in 1998, this approach continued with the increase of less-punitive cannabis policies receiving extraordinary prominence within the INCB annual reports; a process that combined with the Board’s attempts to put the issue on the international agenda. Most recently, since 2009, it has played a very vocal, at times aggressive and ultimately unsuccessful role trying to counter policy shifts towards legal regulation.

### The hardening of the INCB position: 1980-1998

In the early 1980s, comment within the annual reports was generally descriptive. While noting with concern the scale of the cannabis market and the growing and “widespread assumption” or “erroneous belief” that the drug was “harmless”, there was no condemnation of specific national policies. The Board urged the importance of research; the dissemination of findings across “the public at large”;<sup>2</sup> and in keeping with its close engagement with the prohibition-oriented dominant narrative during this period, commended authorities who had given “further proof of their commitment to ‘wage war on drugs’”, including in relation to cannabis seizures.<sup>3</sup>

By 1983, the INCB began to highlight concern over “disquieting signs that in the face of the magnitude of the [drug] problem determination may be giving way to



Collection Hash Marihuana & Hemp Museum Amsterdam/Barcelona

permissiveness”. The Board notes that “Circles in certain countries apparently assume that to permit unrestricted use of some drug, regarded by them as less harmful, would permit better control of other drugs which they deem more perilous to health. To adopt such an approach would be retrogressive.” Within this context, and referring to its report for 1979, it “reaffirms that each Government is free to decide in light of the particular conditions existing in its country on the most appropriate measures for preventing the non-medical consumption of cannabis.” Nevertheless, it was quick to remind states that they “must also take into account the international implications which could result from its decisions” and that recreational use “is illegal under the 1961 Convention.”<sup>4</sup>

One might note that, despite significant shifts away from a prohibition-oriented approach to cannabis use within some states, the Board does not directly criticise any specific national policy, including that of the Dutch.



Rather, in 1983 the Board states that it has been “following with interest developments in the Netherlands” and after dialogue with the government “agrees that legislation is in conformity with the Single Convention.”<sup>5</sup> A similarly non-confrontational and descriptive position is taken in 1989.<sup>6</sup> Two years later the Board also notes in a very matter of

### Mandate and functions of the INCB

The International Narcotics Control Board (INCB) is the independent and quasi-judicial monitoring body for the implementation of the United Nations international drug control conventions. It was established in 1968 in accordance with the Single Convention on Narcotic Drugs, 1961. It had predecessors under the former drug control treaties as far back as the time of the League of Nations.

Broadly speaking, INCB deals with the following:

- As regards the licit manufacture of, trade in and use of drugs, INCB endeavours, in cooperation with Governments, to ensure that adequate supplies of drugs are available for medical and scientific uses and that the diversion of drugs from licit sources to illicit channels does not occur. INCB also monitors Governments’ control over chemicals used in the illicit manufacture of drugs and assists them in preventing the diversion of those chemicals into the illicit traffic.
- As regards the illicit manufacture of, trafficking in and use of drugs, INCB identifies weaknesses in national and international control systems and contributes to correcting such situations. INCB is also responsible for assessing chemicals used in the illicit manufacture of drugs, in order to determine whether they should be placed under international control.

In the discharge of its responsibilities, INCB:

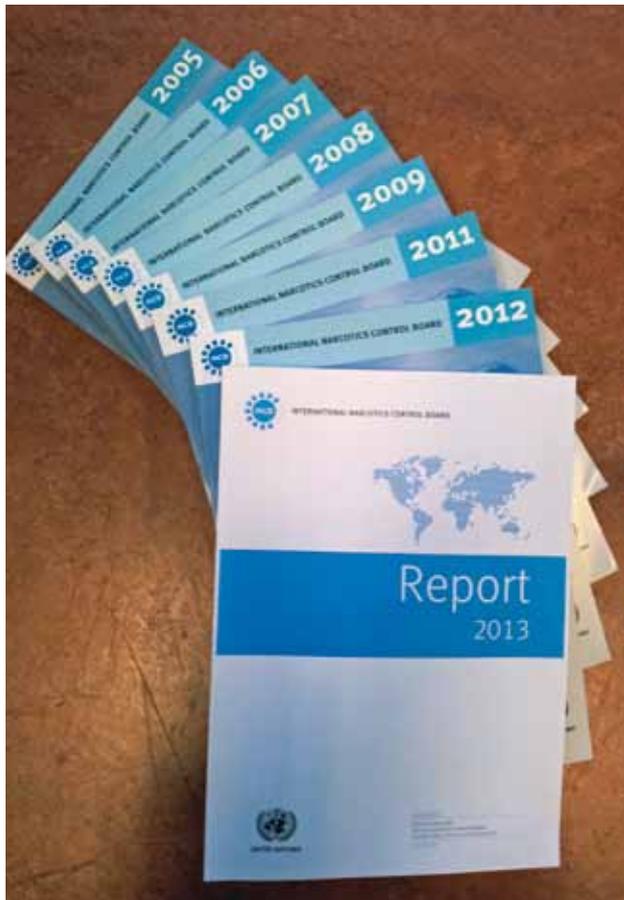
- Administers a system of estimates for narcotic drugs and a voluntary assessment system for psychotropic substances and monitors licit activities involving drugs through a statistical returns system, with a view to assisting Governments in achieving, inter alia, a balance between supply and demand.

- Monitors and promotes measures taken by Governments to prevent the diversion of substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances and assesses such substances to determine whether there is a need for changes in the scope of control of Tables I and II of the 1988 Convention.
- Analyses information provided by Governments, United Nations bodies, specialized agencies or other competent international organizations, with a view to ensuring that the provisions of the international drug control treaties are adequately carried out by Governments, and recommends remedial measures.
- Maintains a permanent dialogue with Governments to assist them in complying with their obligations under the international drug control treaties and, to that end, recommends, where appropriate, technical or financial assistance to be provided.

INCB is called upon to ask for explanations in the event of apparent violations of the treaties, to propose appropriate remedial measures to Governments that are not fully applying the provisions of the treaties or are encountering difficulties in applying them and, where necessary, to assist Governments in overcoming such difficulties. If, however, INCB notes that the measures necessary to remedy a serious situation have not been taken, it may call the matter to the attention of the parties concerned, the Commission on Narcotic Drugs and the Economic and Social Council. As a last resort, the treaties empower INCB to recommend to parties that they stop importing drugs from a defaulting country, exporting drugs to it or both. In all cases, INCB acts in close cooperation with Governments.

(source: [incb.org](http://incb.org))

fact manner, “The authorities of the Netherlands continue to apply the guidelines which were adopted in 1976 for the detection and prosecution of offences under the country’s Opium Act and take a relatively tolerant attitude towards small-scale dealing of cannabis conducted in cafes, while at the same time restricting trafficking in other drugs as much as possible. This policy is designed to reduce the involvement of young people with criminal elements. Abuse of cannabis is reported to have been stable since the beginning of the 1970’s.”<sup>7</sup>



During the mid-to-late 1980s, comment on the drug was restricted to general criticism of “permissiveness” among national authorities, their toleration of the use of “so-called ‘soft’ drugs” and how, in the view of the Board, this risked acceptance of drugs use more generally.<sup>8</sup> Any interest in cannabis policy within the annual reports during this period appears to have been superseded by increasing concern for synthetic “designer drugs”, drugs and organised crime, and the link between injecting drug use and AIDS. During the late 1980s and early 1990s, however, the Board’s response to cannabis becomes part of a more general and progressively more vigorous attack on calls for drug “legalization” within various nation states. Within this context, its position on the Netherlands and other “industrialized” countries taking a tolerant approach to cannabis use begins to change.

For example, in the *Annual Report for 1992*, amidst much analysis of what at this time it defines as “well-intended” discussions around legalization and its growing concern

over more potent strains of cannabis,<sup>9</sup> the Board explicitly contrasts the experiences of different nations with different relationships to the drug. Acknowledging the primacy of “the constitutional principles and basic legal concepts” of parties’ “legal systems”,<sup>10</sup> but also stressing the limits of latitude within the treaty structures, the Board notes that it “would like to draw the attention of industrialized countries to the fact that in 1961 they initiated the introduction of the international drug control of cannabis at a period when serious cannabis abuse problems did not exist in their countries.” Foreshadowing a ‘North versus South’ narrative that was to gain considerable traction a decade later and implicitly claiming the successful implementation of article 49 of the Single Convention,<sup>11</sup> the Board goes on to point out, “Countries in which cannabis consumption was traditional implemented the provisions of the 1961 Convention.” The report continues, “If cannabis were to be legalized, the responsibility of industrialized countries would be enormous: they would be obliged to justify, at the same time, their 1961 decision to prohibit cannabis and their new decision to add cannabis to other legal substances like alcohol and tobacco.”<sup>12</sup>

Within this discursive framework, the Netherlands becomes the focus of increasing criticism, perhaps a trend mirroring the increasing commercialization of the coffeshop system. However, not until 1994 and the Board’s devotion of space within the report to “Evaluation of the effectiveness of the international drug control treaties” do we see the now familiar highly critical tone. The transformation of what in the previous year been “lively debate”<sup>13</sup> into condemnation might well be explained by the increasing presentation within the policy reform debate of the Netherlands’ approach as an example of a successful alternative to the prohibition of non-medical and non-scientific cannabis use. In the face of this, the Board argues that it is “questionable whether the theory of the separation of markets has ever demonstrated its practicability.” Moreover, and without supporting evidence, it continues to state, “Places where cannabis distribution is tolerated have attracted traffickers of other drugs and abusers, as well as potential abusers; thus, all types of drugs seem to be readily available at such places.”<sup>14</sup>

Such a hardening of stance can also be seen in the Supplement to the Annual Report for 1994. Here the INCB emphasizes, “In the years following the adoption of the 1961 Convention, cannabis abuse also developed in countries where traditional forms of cannabis use (ceremonial, religious, medical or social) never existed, such as countries in western Europe.” “The 1961 Convention” it contends, “does not provide adequate control measures for those situations, as such situations were not foreseen at the time of its adoption.” The Board also argues that the availability of stronger varieties of cannabis compounds “the already growing problem of non-traditional abuse”.<sup>15</sup> Indeed, moving away from a focus on solely “non-traditional” use and examining what it regards to be

increasing THC content of different varieties of cannabis, the Board “recommends that consideration should be given to strengthening the provisions of the 1961 Convention regarding the control of cannabis” by, among other things, “extending the control to cannabis leaf”. One should note, as was explained in the first chapter, that the cannabis leaf was not included within the Schedules of the Convention, but by 1994 this omission is regarded as incongruous since leaves were now seen as often containing more “THC than cannabis resin”. As such, the Board continues “it might be necessary to consider a revision of the classification of the cannabis plant and cannabis products in the 1961 Convention, ensuring that there is a correlation with the potency of the plants and the products.”<sup>16</sup>

In addition to recommending a strengthened control regime, by the mid-1990s the Board was also responding to any perceived weakening of the system in resolute and defensive terms. For example, in its report for 1996 it commended authorities in the U.S. for their “firm stand” against referenda in November that year concerning the use of cannabis for “alleged medical purposes”, democratic processes that the Board deemed to be “indirect but evident attempts to legalize cannabis”. We see the Board’s language taking on a hostile tone with references to “well-financed, non-profit foundations sponsor institutions that are developing strategies for the legalization of drugs [sic].”<sup>17</sup>

The same year, in reference to plans in Germany to distribute cannabis through pharmacies, the report is overtly critical of the Netherlands and any claims that the “experience of the coffeeshop policy there has been ‘positive.’” The state-

ment that the toleration of coffeeshops “does not conform to the provisions of the 1961 Convention” reinforces this position. Lacking any awareness of irony, in the same paragraph it notes that the Dutch level of cannabis use is not significantly higher than in other European countries and much lower than in North America.<sup>18</sup> This is redolent of the President of the Board’s public statements that year. When responding to a Dutch television interviewer’s statement that cannabis policies within the country were “working”, Dr Oskar Schroeder replied, “I’m not really interested if it’s working or not working. What I’m interested in is what you are doing within the lines of the international treaty. That’s what we have to check. We’re not really interested if it works or not.”<sup>19</sup>

In one of the first thematic chapters of the Board’s Annual Reports, “Preventing drug abuse in an environment of illicit drug promotion”, the report for 1997 is critical of attitudes towards cannabis across a wide range of areas, including tolerant law enforcement practices. And this was the context in which the Board described the selling of cannabis in coffeeshops as “an activity that might be described as indirect incitement.”<sup>20</sup> (See the section on coffeeshops in the next chapter) Moving beyond those sections of society seen as responsible for promoting illicit drug use, the following year’s publication presented cannabis as a key challenge for the future of the drug control system as a whole. A position no doubt influenced by the proximity of the publication’s release to the UNGASS. Under the heading the ‘Cannabis Problem’, the report for 1998 again highlights the success of outlawing and for the most part eliminating the “traditional use and abuse



of cannabis”. Echoing its position from four years earlier, the Board stresses, however, “In countries where cannabis abuse has spread only in recent decades, there is a need for the 1961 Convention to be implemented more thoroughly, in particular through more effective prevention campaigns drawing attention to the dangers of cannabis abuse, thereby correcting the false image that such abuse has gained among a large segment of the youth population.”<sup>21</sup> In this respect it calls for more research on the drug (including potential therapeutic properties and medicinal use),<sup>22</sup> but also warns, “Political initiatives and public votes can be easily misused by groups promoting the legalization of all use of cannabis.”<sup>23</sup>

other increasingly tolerant approaches within a growing number of countries. The following year, the report highlights the growing tension between such practices and strict adherence to the treaties. Moreover, as part of an unusually lengthy 22-paragraph section devoted to the ‘Control of cannabis’ the Board notes the existence of “some shifting towards a more liberal cannabis policy in several developed countries,” singling out Spain, Italy, Luxemburg and Portugal.

In these countries, the Board notes, “possession of cannabis for personal consumption is not considered a criminal offence, and acts preparatory to personal consumption,

INCB President Raymond Yans during the interview in which he accused Uruguay of having a “pirate attitude” regarding the conventions.



### The INCB’s views during the ‘UNGASS Decade’: 1998-2008

As the international community entered what has been referred to as the UNGASS decade, 1998-2008,<sup>24</sup> the Board’s position on cannabis continued to harden. Indeed, having noted in the report for 1999 in hostile, yet general, terms the notion that cannabis was regarded in some states as a ‘soft’ drug and that this was sending the wrong message about its safe use,<sup>25</sup> the Board began to use the annual report to condemn specific states beyond its usual focus the Netherlands. For example, having expressly noted with concern “grey areas of business” in Switzerland and the “social acceptance” of drugs, particularly cannabis, in Australia in the report for 2000,<sup>26</sup> the Board begins responding more generally to decriminalization and

such as acquisition, transportation and possession of cannabis are not penalized. Only administrative sanctions apply to those acts.”<sup>27</sup> In a common refrain it reproaches the Netherlands for its coffeeshops, but now it also criticises legislation under consideration in Switzerland, Belgium and the United Kingdom. The Board notes that if the proposed Swiss policy were to be approved it would “amount to an unprecedented move towards legalization of the consumption, manufacture, possession, purchase and sale of cannabis for non-medical purposes” and “would not be in conformity with international drug control treaties, in particular the 1961 Convention”<sup>28</sup> Similar concerns are expressed in its report for 2002, along with recognition of ongoing discussions on “liberalizing or legalizing” cannabis in several states in the United States. On this point, the INCB expresses its appreciation that the

U.S. Federal government “continues to ensure that national laws in line with the international drug control treaties are enforced in all states.”<sup>29</sup>

While, due to the different nature of what was taking place in the two countries, the U.K. largely avoided the admonishment directed towards the Swiss within the annual report itself,<sup>30</sup> it did not remain out of the line of fire. In 2003, the Board’s President, Philip Emafo, was highly critical of what by this time had become the British government’s decision to re-classify cannabis from a Class B to a Class C drug. Possession of the drug would remain illegal but, unless there were aggravating factors, it was not automatically an arrestable offence. In a letter to its Secretary Herbert Schaepe, the British Under Secretary of State for Anti-Drugs Co-ordination and Organized Crime, Bob Ainsworth, noted that the Board had used alarmist language, omitted any reference to scientific evidence on which the decision to reclassify was based and presented the decision in a misleading way to the media.<sup>31</sup> During questioning on the issue by a House of Commons Select Committee, Ainsworth commented that the Home Office was

astonished at what was said in that regard. I do not know what legal basis there was for the comments that were made or what research was put into the announcement that was made... I do not know what legal advice they have taken with regard to our changes of classification on cannabis... I think UN bodies ought to base their pronouncements on evidence, fact and legal basis, and not on reaction and knee-jerk comment. It certainly seemed to me that that was exactly what they were doing. If they have some evidence that anything we have done is in any way in contravention of international Conventions, they had better let us know. I do not believe they have, and I do not believe there is any justification for the comments that they made.<sup>32</sup>

This increasingly aggressive approach to defending its narrow interpretation of the treaties also manifested itself in the Board moving to set the political agenda and developing organizing narratives for discussion of the drug during the yearly CND sessions.<sup>33</sup> This was evident in March 2002 when at the CND regular session the INCB President Hamid Ghodse expanded upon the critique within the Board’s 2001 report against the European practice of “leniency” towards cannabis use and possession. Ghodse called upon “all Governments and relevant international bodies to examine the issue of cannabis control within the framework of the 1961 Convention”. He continued:

I would like to take this opportunity to remind parties to the Convention of their obligation to notify the Secretary-General, if they have information which, in their opinion, may require an amendment to any of the schedules of the Convention... For example, if there is clear evidence that a substance should no longer be

under international control or should be in a different schedule, this evidence should be made public and disseminated to all parties. In the light of the changes that are occurring in relation to cannabis control in some countries, it would seem to be an appropriate time for the Commission to consider this issue in some detail to ensure the consistent application of the provisions of the 1961 Convention across the globe.<sup>34</sup>

Ghodse’s remarks are correct in that, then as now, it was CND’s role to consider the issue. Nonetheless, his comments were carefully constructed to induce prohibition-oriented states to halt and ultimately roll back the tolerant policies operating or being discussed by some parties to the conventions. Indeed, as discussed elsewhere,<sup>35</sup> the Board had some success in indicting European liberalization as a relinquishment of responsibility for cannabis consumption in the face of concerted efforts to eliminate the cultivation of cannabis by the “traditional” producer states. This “diligent producer versus the lenient consumer state” narrative did much to instigate the introduction of a resolution at the 2002 CND aiming to limit policy manoeuvre within the treaties. While ultimately unsuccessful, several delegates to the Commission attributed the impetus for the resolution to the INCB.<sup>36</sup>

Another increasingly prominent narrative closely accompanied the emergence of the Board’s binary discourse regarding diligent African-Arab producer states versus lenient western, particularly European, consumer states: cannabis as the weak point within the treaty-based control

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framework. In conjunction with attention to the producer-consumer dichotomy, the Board particularly emphasised this concept in its Annual Report for 2001: “When the international drug control treaties were adopted, the international community emphasized the principle of universality, *since a breach in the international consensus by one State would endanger the implementation of the treaties by other States* [italics added].”<sup>37</sup> Framing deviation from a prohibition-oriented approach to cannabis use in such terms, the report continued, “Some Governments have justified changes of policy by stating that the consumption of cannabis is not more dangerous to health than the consumption of alcohol or tobacco and carries a lower risk than the consumption of other drugs such as heroin, cocaine or amphetamines.” It then reminded presumably those same governments of the “mechanisms and procedures” with which parties “if they have such evidence, may propose changes to the conventions” and invited “all Governments and relevant international bodies, in particular the Commission on Narcotic Drugs and WHO, to take note of and discuss the new cannabis policies in a number of countries and to agree ways to address that development within the framework of international law.”<sup>38</sup>

As to be expected, this theme was also prominent within the President’s statement at the opening of the 2002 CND.<sup>39</sup> As with the comments above, both the report and Hamid Ghodse’s accompanying comments were accurate in their suggestions that member states should move to examine the scheduling of cannabis within the conventions. It was evident, nonetheless, that while paying lip service to protocol, procedures and a mandate to highlight tensions within the international system, the Board was far from enthusiastic to discuss formal changes to the parameters of regime that could allow more flexibility for its members, even if that was to be the choice of states within the Commission. Indeed, only a few paragraphs after discussing the mechanisms for rescheduling contained within Article 3 of the Single Convention, the report for 2001 exposes the Board’s position, and in so doing its proclivity for overstepping its mandate. It stated that, “Adding another drug to the same category as alcohol and tobacco would be a historical mistake...”<sup>40</sup>

Until 2009, the reports continue to view the cannabis issue --albeit less explicitly--from this perspective. In so doing they contain many familiar themes, although with the UNGASS fast approaching, some are given increasing prominence as the years go by. With the advance of the calendar the Board increasingly devotes more attention to the issue of the medical use of cannabis. Rather than merely describe the adoption of the policy within various countries, the Board again exceeds its authority by expressing concern over the scientific basis of the practice.<sup>41</sup> As discussed elsewhere, it is not the INCB’s role to make judgments in these terms.<sup>42</sup> On this issue, the INCB appears especially anxious regarding events in the United States and uses the publication to support the federal government’s position

against the policy decisions of individual U.S. states. This is the case in the report for 2008. Concerned that an increase in medical marijuana schemes in general, and California’s in particular, would lead to an increase in “abuse” the Board “calls upon the authorities in the United States to continue its efforts to stop that practice.”<sup>43</sup> Recognition of tensions between Washington, D.C. and the states here echoes concern shown in the report for 2003 about debates within some parts of the U.S. regarding decriminalization and legalization. As was the case throughout the UNGASS decade, the Board openly expresses its support for the federal government’s opposition to any discussion of a shift away from punitive prohibition.<sup>44</sup>

Not surprisingly, the coffeeshop system in the Netherlands remained a point of interest and criticism within a number of reports between 1998 and 2009. That said, from 2004 onwards, the Board adopted an alternative, if somewhat disingenuous approach, to the perennial topic. Indeed, picking up on some adjustments to the way Dutch authorities allowed the coffeeshops to operate, in 2004 the Board presented the refinements in approach very much as the beginnings of a policy reversal. In so doing, it welcomed the initiative and commented that it was “an important step in the right direction – towards full compliance with the international drug control conventions concerning cannabis.”<sup>45</sup> A similar line was also taken in the report for 2008.<sup>46</sup>

The framing of what were in reality little more than policy refinements in terms of a Damascene conversion and disavowal of the coffeeshop system can in many ways be seen as the deliberate construction of a narrative designed to counter growing engagement with alternative policy approaches in other parts of the world. Indeed, on a number of occasions the Board expressed its concern that the implementation (or even consideration) of reduced penalties for the personal possession and use of cannabis in a number of diverse countries, including Canada and Jamaica, was creating a perception that the drug was harmless.<sup>47</sup> Conversely, the INCB has always been quick to commend any government deciding not to engage with policies that shift away from its preferred reading of the conventions, as was the case with Switzerland in February 2006.<sup>48</sup>

Within the context of what was then a steady trickle of states away from the punitive approach towards the non-scientific and non-medical use of cannabis and engagement with some form of decriminalization, the INCB president, Hamid Ghodse, used the foreword to the report for 2008 to raise the Board’s concerns. This was particularly poignant in that this was the final report leading up to the High Level Segment of the CND to review progress towards the targets set by the 1998 UNGASS and as such could influence the Vienna debates in March 2009. In his opening remarks, Ghodse writes “The international community may wish to review the issue of cannabis.” This was the case, he



continued, because despite becoming more potent, being associated with increasing numbers of accident-room admissions, and being a gateway to other drugs (statements made without any corroborating evidence) “the use of cannabis is often trivialized and, in some countries, controls over the cultivation, possession and use of cannabis are less strict than for other drugs.”<sup>49</sup> Having set the tone beyond the usual critical comment, non-punitive cannabis policies receives extraordinary prominence within the main body of the report. Bringing together many of the concerns that had been expressed over previous years, the report notes “The Board believes that cannabis represents a challenge on several counts.” Specifically that:

- The tolerance of “recreational” use of cannabis in many countries is at odds with the position of cannabis in Schedules I and IV of the 1961 Convention;
- The relationship between the cannabis policies implemented in different countries and impact of those policies on patterns of illicit use is unclear;
- Public perceptions of the alleged “medical” uses of cannabis and its “recreational” use are overlapping and confusing;
- Developing countries that struggle to eliminate illicit cannabis cultivation are discouraged by the tolerant policies

of their wealthier neighbouring countries and, perhaps as a consequence, receive little alternative development assistance.<sup>50</sup>

With this in mind, and highlighting the seriousness afforded the issue by the Board, one of the report’s concluding recommendations focuses on cannabis. Reiterating its concerns about some sections of society considering it a harmless, “soft drug”, and the decriminalization trends in many countries, the report states: “The Board again wishes to draw the attention of Governments to the fact that cannabis is a narcotic drug included in Schedules I and IV of the 1961 Convention and that drugs in Schedule IV are those particularly liable to abuse. The Board calls on all Governments to develop and make available programmes for the prevention of cannabis abuse and for educating the general public about the dangers of such abuse.”<sup>51</sup>

#### Attempting to counter the reformist tide: 2009-2013

At the High Level Segment of the 2009 CND, member states demonstrated their continuing support for the drug control treaties and signed a Political Declaration reaffirming that “the ultimate goal of both demand and supply strategies is to minimize and eventually eliminate the availability and use of illicit drugs and psychoactive substances.”<sup>52</sup>

Nonetheless, since then, and often revealing a growing gap between statements and positions in Vienna and individual states' policy preferences, the INCB has faced a rising tide of cannabis policy reforms. Some of these, as we now know, were to go further than merely exploiting the flexibility within the UN drug control framework; an exercise that in itself had been increasingly vexing the INCB. Within this context, the Board's Annual Reports between 2009 and 2012 contained many familiar themes. They also, however, introduced and accentuated others, including the sale of cannabis seeds via the internet,<sup>53</sup> in response to the emerging and increasingly significant challenges to the fundamental tenets of the international structures for controlling cannabis "abuse".

Among the familiar topics of concern during this period was what the Board referred to as "medical" cannabis schemes.<sup>54</sup> This was particularly so with regard to those operating within U.S. states. In the report for 2009, for example, the Board noted with concern, but no evidence, that the schemes were leading to an increase in the size of the illicit market for non-medical use and were "sending the wrong message" to other countries.<sup>55</sup> Three years later, emphasizing California's admittedly lax approach to defining what constituted medical use, the Board's remarks were a refrain of points made in earlier reports,<sup>56</sup> depicting the schemes as a "major challenge to compliance by the Government of the United States with the international drug control treaties."<sup>57</sup>

Within this context, the decriminalization of cannabis for recreational use also continued to receive substantial attention. The Board's position on this topic did change somewhat, however. Added to warnings about sending the "wrong signal" or the "wrong message to the general public", the report for 2009 attacks policy shifts, or even discussion thereof, in a number of countries,<sup>58</sup> particularly within U.S. states. As so often before, the precise mechanisms behind the process of sending signals and giving messages remain unexplored and problematic.<sup>59</sup> Nonetheless, the Board once again chose to highlight these issues, maintaining its hostile stance to what were the legitimate and legally sound policy choices of sovereign states, once again raising concern about its tendency to exceed its mandate.<sup>60</sup> Yet, the following year, although still critical of Dutch coffeeshops and expressing ongoing concern for medical marijuana schemes within U.S. states,<sup>61</sup> the Board lessened its overt opposition to decriminalization trends.<sup>62</sup> Moreover, it even tacitly acknowledged the legitimacy of such a legal approach. As the IDPC notes in its response to the Board's Annual Report for 2010: "Arguably the INCB has little choice in the matter. With a steady stream of nation states considering or engaging with some form of decriminalization...the Board's adoption of any other position would have made it look even more out of step with the realities of current policy trends."<sup>63</sup> It might even be argued that at this point, to borrow President Obama's phrase, the INCB had "bigger fish to fry". While appreciably softening its stance on decriminalization,



Smoking a dagga pipe the traditional way in South Africa. A bong made from a ruminant's horn.  
Credit: Floris Leeuwenberg



it remained unyielding on significant and increasingly likely moves to legalize cannabis for recreational use. In this vein, it welcomed the U.S. government's opposition to Proposition 19 in California.<sup>64</sup> In so doing, however, the Board certainly overestimated the influence of the UN conventions on California voters. In response to the rejection of Proposition 19, the *Annual Report for 2010* claims that the "result represents a recognition of the danger of cannabis abuse and an affirmation of the international drug control conventions [emphasis added]".<sup>65</sup>

The Board's concern regarding the application of the drug control treaties within the territory of parties to the conventions was an issue that, predominantly in response to cannabis-related policy developments within the U.S., grew in prominence from 2009. It receives substantial attention in the *Annual Report for 2009*<sup>66</sup> and two years later is the focus of a special topics section, "Application of the international drug control treaties in countries with federal structures". With the U.S. clearly in mind, the Board stresses: "The international drug control treaties must be implemented by States parties, including States with federal structures, regardless of their internal legislation, on their entire territory [emphasis added]."<sup>67</sup> Highlighting several operational disconnects, including once again the North-South dichotomy, within the international system, the *Annual Report for 2011* also points out that "changes in policy and legislation are taking place predominantly in developed countries". It continues, "The growing gap between declared government policy at the international level and incomplete implementation at the national level remains a matter of concern. It is disturbing that,

while many developing countries have been devoting their limited resources to eradicating cannabis plants and fighting trafficking in cannabis, certain developed countries, have at the same time, decided to tolerate the cultivation of, trade in and use of cannabis for purposes other than those provided for by the international drug control treaties."<sup>68</sup>

As we now know, such reasoning did little to stem the reformist tide. And at the time of the drafting of the Report for 2012 (published in March 2013), events in Uruguay and the U.S. states of Washington and Colorado were the most serious challenges ever faced by the drug control system. As such, within a broader framework of "shared responsibility", Raymond Yans used his Foreword to stress, "Any such [cannabis legalization] initiatives, if implemented, would violate the international drug control conventions and could undermine the noble objectives of the entire drug control system, which are to ensure the availability of drugs for medical and scientific purposes while preventing their abuse." Building upon this position, the notion of treaty breach (if not stated explicitly) and the need for "universal implementation" of the conventions appear at various points in the report, including in the special topics section ("global drug policy debate") for Uruguay and as a specific recommendation concerning Washington and Colorado.<sup>69</sup> To be fair, as we have demonstrated in the main body of this report the Board is correct in viewing the policy reforms in Colorado, Washington and Uruguay (at the time not yet voted in its senate), in contravention of the 1961 Single Convention as amended by the 1972 Protocol.<sup>70</sup> What should be considered, however, is how the Board, particularly its president, has reacted.

At one point in relation to Uruguay, the Board stresses that "Non-compliance by any party with the provisions of the international drug control treaties could have far reaching negative consequences for the functioning of the entire drug control system."<sup>71</sup> Yet, as IDPC has observed, "debates about what would be the best way for the global community to approach the issue of drug use are, quite simply, beyond the competence of the Board, and belong elsewhere in the UN system: at the General Assembly, the Economic and Social Council (ECOSOC), the CND."<sup>72</sup> Moreover, it is far from helpful that Raymond Yans recently accused Uruguay of, among other things, having a "pirate attitude" regarding the conventions.<sup>73</sup>

We find ourselves in an unfortunate state of affairs. As the UN framework for the control of cannabis begins to fail in the face of democratically selected policy choices made within sovereign states, the international community needs more than ever expert technical advice on how to carefully manage change and develop a more flexible legal structure able to accommodate a range of approaches to dealing with what has long been a widely available and used substance. A simplistic, "treaties say no" approach is no longer tenable.



## Cannabis reforms: the scope and limits of treaty latitude

Within its prohibitive parameters, parties to the UN drug control conventions are afforded a certain degree of latitude in the formulation of national policies.<sup>1</sup> Like most multilateral instruments, the 1961, 1971 and 1988 conventions are the products of political compromise and are consequently “saturated with textual ambiguity”;<sup>2</sup> making their interpretation more art than science. Detailed guidance for interpretation is provided for each treaty in an official Commentary. Proceedings of the conferences in which the conventions were negotiated, provide further information about the intentions of the drafters and the arguments used in debates to reach the compromises or, quite often the voting, on the final wording.

The interpretive practice of the parties is another important source of determining the margins of interpretation of ambiguous terms. Flexible interpretations of certain treaty provisions by parties uncontested over time become part of the accepted scope of interpretation. Resolutions or political declarations adopted by the CND, ECOSOC or the General Assembly can also play a significant role in this regard. Finally, in its capacity to monitor treaty compliance, the INCB also provides guidance to countries on the implementation and interpretation of the 1961 and 1971 conventions.<sup>3</sup> The Board often maintains a very narrow interpretation of the treaty and usually lags behind in the development and acceptance of certain legal interpretations by the parties, but is not mandated to settle the dispute when differences arise.<sup>4</sup>

All those sources combined provide clear indications for what constitutes an interpretation “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” as the Vienna Convention on the Law of Treaties requires.<sup>5</sup> The resultant interpretations have provided the existing flexibility or room for manoeuvre<sup>6</sup> that has led to a variety of cannabis policy practices and reforms deviating from a repressive zero-tolerance drug-law-enforcement approach.

**Turning a blind eye.** Non-enforcement of drug laws in the case of cannabis is the informal reality in quite a few countries, rooted in a social acceptance or long history of traditional use. For example, Morocco, India, Cambodia, Pakistan, or even Egypt (which played a prominent role in negotiating cannabis into the international drug control treaty system) have very strict anti-drug laws applicable to cannabis, but all display a tolerance that rarely leads to arrest and prison sentences for minor cannabis offences. In some of these countries disguised cannabis dispensaries are even informally allowed to operate.<sup>7</sup> In part such cultural legacies operate on the basis of a well-established and accepted system of small bribes to law-enforcement

officers, comparable to an informal fine system replacing the severe penal sanctions required by the drug laws, seen as unenforceable.

***Expediency principle and discretionary powers.*** Depending on the legal system and political power of a nation, in several countries more formalised schemes of non-enforcement have been established by written rules or guidelines for the police, the prosecution and/or the judiciary. This results in de facto decriminalization of use and possession, or in the case of the Netherlands even in allowing the sale of small quantities of cannabis in coffeeshops. Such acts remain criminal offences according to the law, but its enforcement is given the lowest priority.

***Decriminalization.*** In several other countries cannabis consumption and possession for personal use (sometimes including cultivation for personal use) are de jure no longer a criminal offence. Many varieties of such decriminalization schemes exist, in terms of distinguishing possession or cultivation for personal use from the intent to trade; and whether or not to apply administrative sanctions.

***Collective cultivation for personal use.*** The treaty requirements do not differentiate between possession and cultivation for personal use. In Spain, a jurisdiction with established decriminalization practices and a relevant record of jurisprudence on the matter, legal interpretation gradually became more flexible, allowing for the collective exercise of cultivation for personal use in the form of “cannabis social clubs”.

***Scheduling as a less harmful drug.*** Several countries have scheduled cannabis in a category for less harmful substances, or have prosecutorial guidelines or jurisprudence leading to lower sanctions for cannabis offences than for more harmful substances. This defies the UN scheduling system that classifies cannabis along with heroin and a few other substances (not including cocaine) as the most harmful ones with practically no medicinal uses. The conventions do however allow for certain national deviations as long as they comply with the minimum requirements for control applicable to the UN Schedule in which the substance is included.

***Medical use.*** Including cannabis in Schedule IV of the 1961 Convention and of THC in Schedule I of the 1971 Convention was in effect a rejection of its usefulness for therapeutic purposes and an effort to limit its use exclusively to medical research, for which only very small amounts would be required. Today, many countries have rejected this position as scientifically untenable and have established legal regimes recognising the medicinal properties of cannabis and its compounds. The WHO already recommended moving THC to a lower control schedule under the 1971 Convention, and the Expert Committee will soon also reconsider the current classification of cannabis under the 1961 Convention. Meanwhile, in

practice, some jurisdictions have given medical schemes more legal discretion regarding recreational use, by permitting relatively easy access to cannabis for a wide range of physical and psychological complaints.

***Religious use.*** The 1961 Convention recognised no legitimate religious use of psychoactive plants like coca and cannabis, the traditions hence condemned as criminal behaviour had to be phased out within 25 years. However, the widespread persistence of religious uses of cannabis in Hindu, Sufi and Rastafari ceremonies and traditions led to lenient law-enforcement practices in a number of Indian states, Pakistan, the Middle East, Northern Africa and Jamaica. The 1971 Convention, in contrast, showed more consideration for ceremonial uses, leaving psychedelic plants (mainly cacti and mushrooms) outside the 1971 control regime, scheduling only their isolated alkaloids. Consequently, compared to cannabis, there is significantly more leniency in international law with regard to religious use of peyote or ayahuasca.

***Industrial uses of hemp.*** Article 28 of the 1961 Convention specifies that the treaty does “not apply to the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes”. Varieties of the cannabis plant with relatively low psychoactive cannabinoid content, usually referred to as “hemp” instead of “cannabis”, have been widely used for its fibre to make paper, denim or sails. The legitimate hemp industry has suffered hugely from the controls imposed on cannabis, but is experiencing a comeback. The treaty explicitly left the use of cannabis for such purposes open, but posed



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operational problems for law enforcement as both types of the plant have the same appearance and a grey market for low-THC-content hemp for recreational purposes does exist in some countries.

**Cannabis leaves.** As mentioned above, the compromise reached during the negotiations over the 1961 Single Convention to limit the definition of cannabis to only its flowering tops and resin, leaves space for low-THC-content recreational uses of its leaves. This legal loophole allows for the existence of a “bhang” market in some Indian states.

All these practices or uses of cannabis are, or at least intended to stay, within the confines of the treaty latitude. Most have a solid legal basis, others employ a certain interpretive creativity not always acknowledged legally justifiable by the INCB. And sometimes schemes perfectly justifiable in principle have been applied to practices difficult to defend without a dose of hypocrisy. The strictures of the conventions and the near impossibility to amend them have led to stretching to questionable limits their flexibility and the validity of their in-built escape clauses. Examples are the legal contradictions around the backdoor of the Dutch coffeeshops; the expansion of medical marijuana schemes in some U.S. states into recreational use; the establishment of large-scale commercial cannabis social clubs in Spain; or the creation of special “churches” with cannabis ceremonies, taking advantage of religious freedom legislation.

Below we review in some detail the legality and variety of the already existing deviations from strict prohibition in cannabis policies and practices. We also examine the recently emerging initiatives to introduce a fully legally regulated cannabis market under governmental control in two U.S. states and in Uruguay. Breaking out of the treaty confines obviously creates other types of legal tensions that must be carefully considered and a number of options for resolving such breaches are discussed in the next chapter.

### **Decriminalization of possession for personal use**

“Use” of drugs was consciously omitted from the articles that list the drug-related acts for which penal measures are required. There is no doubt, therefore, that the UN conventions do not oblige any penalty (criminal or administrative) to be imposed for consumption per se. The Commentary to the 1988 Convention in relation to its article 3 is quite clear on the issue: “It will be noted that, as with the 1961 and 1971 Conventions, paragraph 2 does not require drug consumption as such to be established as a punishable offence.”<sup>8</sup>

The conventions are more restrictive with regard to possession, purchase or cultivation for personal consumption. Article 33 of the 1961 Single Convention states

parties shall “not permit the possession of drugs except under legal authority” (and then only for medical and scientific purposes) and article 36, paragraph 1, obliges parties to make possession a punishable offence. Crucially, regarding the obligation to criminalize possession, a distinction is made between possession for personal use and that for trafficking. According to Boister, the thrust of the Convention’s penal provisions is the prohibition of illicit drug trafficking, allowing little interpretative doubt that parties are obliged to criminalize possession in that context. But it “does not appear that article 36(1), obliges parties to criminalize possession of drugs for personal use.”<sup>9</sup> The Convention’s focus on the suppression of trafficking can be seen as an affirmation that countries are not obliged in terms of article 36 to criminalize simple possession under the 1961 Convention. This view is also bolstered by the drafting history of article 36, in fact, originally entitled “Measures against illicit traffickers”.<sup>10</sup> Based closely upon the earlier instrument, the subject is treated similarly in the 1971 Convention.

Circumstances became more complex with the introduction of the 1988 Convention. Article 3 repeats in slightly broader language the provisions of article 36 of the Single Convention and article 22 of the 1971 Convention. Paragraph 2 of article 3 adds:

Subject to its constitutional principles and the basic concepts of its legal system, each party shall adopt such measures as may be seen necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

Even though the language is more restrictive and might be regarded as reducing the flexibility of the earlier treaties, a persuasive legal case can be made that article 3, paragraph 2 still leaves significant scope for deviation from the punitive approach. “Subject to its constitutional principles and basic concepts of its legal system”, represents a clear “escape clause”. It implies that “any latitude existing under this Convention does not result exclusively from the Convention but also from the constitutional and other legal principles of each country”. Therefore, “Parties would not violate the Convention if their domestic courts held criminalization of personal use to be unconstitutional”,<sup>11</sup> and consequently are not obliged to establish possession for personal use to be a criminal offence. A strong case can also be made that a party need not make cultivation for personal use a criminal offense either.<sup>12</sup> Further, the article allows for alternatives to conviction or punishment for offences related to personal use and other offences “of a minor nature”, albeit restricting and strongly discouraging national discretionary powers related to illicit trafficking offences of a more serious nature.<sup>13</sup>

As a result, a country might rule that, in line with its own national circumstances, it is not within the interest of society to prosecute for possession or cultivation for personal use; that the right to privacy overrules state intervention regarding what people consume or possess in their private homes; or that self-destructive behaviour, be it consumption of potentially harmful substances or other behaviour including suicide, shall not be subject to punishment. These justifications have been argued and accepted respectively in the Netherlands, Alaska and Germany with regard to possession of cannabis for personal use. More recently, in Argentina the Supreme Court ruled that the section of the 1989 drug law criminalizing drug possession was unconstitutional.<sup>14</sup> The existence of an escape clause of this nature, based on constitutional principles as well as basic concepts of national legal systems, is relatively rare in international law.<sup>15</sup> It has been utilized by a range of authorities to create more policy flexibility while remaining within the confines of the treaty framework.<sup>16</sup> Thus, despite widespread acceptance of the 1988 Convention, significant room for manoeuvre in relation to cannabis decriminalization has been retained since its enactment in 1990.

At the subnational level, dating from the 1970s a significant number of states within the U.S. have decriminalized the possession of cannabis for personal use.<sup>17</sup> In Australia, a similar process has taken place in Victoria, New South Wales, Queensland and Tasmania.<sup>18</sup> Other states and territories in Australia have decriminalized cannabis possession by applying non-criminal punishments, with threshold quantities differing according to jurisdiction.<sup>19</sup>

Enormous differences continue to exist across Europe. Spain, for example, does not consider possession of drugs for personal use a punishable offence, criminal or administrative. However, the absence of a clear legal distinction and smoking in public remaining banned, can in practice still create difficulties for people who use drugs.

In the Netherlands or Germany, possession for personal use remains *de jure* a criminal offence, but *de facto* guidelines are established for police, prosecutors and the courts to avoid punishment, including fines or other administrative sanctions, if the amount is insignificant or for personal consumption. In yet other states like the Czech Republic, possession of cannabis for personal use is no longer a criminal offence, but those caught with small amounts can be deferred to treatment services if required, or administrative sanctions may be applied.<sup>20</sup>

Probably the best-known example of the latter category is Portugal, which decriminalized drug use, acquisition and possession for personal consumption of all drugs in 2001, for quantities not exceeding what an average user would consume in ten days. Portuguese officials were careful to ensure that the new policy remained within the “mainstream of international drug policy” and that decriminalization was consistent with the relevant provisions of the 1988 Convention. It was the Portuguese view that replacing criminalization with administrative regulations maintained the international obligation to prohibit those activities and behaviours.<sup>21</sup> Drug use, acquisition and possession for personal consumption are no longer considered a crime, although administrative

Bhang shop in Jaisalmer, Rajasthan, India.





Bisnoi men smoking a pipe. Credit: Floris Leeuwenberg

sanctions can still be applied by special bodies created within the Health Ministry. These Commissions for Drug Addiction Dissuasion provide information, discourage people from using drugs and refer users to the most suitable options, including, if required, treatment. Although initially hostile, in 2005 the INCB accepted that the Portuguese policy was legitimate inasmuch as drug possession was still prohibited, even if sanctions were administrative rather than penal, acknowledging that “the practice of exempting small quantities of drugs from criminal prosecution is consistent with the international drug control treaties”.<sup>22</sup> Decriminalization constituted only one element of a major policy change including a strong public health orientation in Portugal, which included comprehensive responses in the fields of prevention, treatment, harm reduction and social reintegration, all contributing to a general positive trend regarding all available indicators.<sup>23</sup>

“Despite the different legal approaches towards cannabis,” within Europe, the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) concludes after a review of EU cannabis policies:

A common trend can be seen across the Member States in the development of alternative measures to criminal prosecution for cases of use and possession of small quantities of cannabis for personal use without aggravating circumstances. Fines, cautions, probation, exemption from punishment and counselling are favoured by most European justice systems. It is of interest to note that cannabis in particular is frequently distinguished from other substances and given special treatment in these cases, either in the law, by prosecutorial directive, or by the judiciary.<sup>24</sup>

In response to policy developments in the Americas, in 2010 the INCB strongly criticized the governments of Argentina, Brazil, Mexico and certain U.S. states for “the growing movement to decriminalize the possession of controlled drugs [which has to be] resolutely countered”.<sup>25</sup> But a year later, the INCB report no longer attacked the increasing decriminalization of possession for personal use, perhaps another tacit indication, like its 2005 position regarding Portugal, that the Board had finally given up its legally untenable opposition. The general treaty obligation to “limit exclusively to medical and scientific purposes” the use and possession of drugs still stands, but there is no binding legal obligation for nations to prohibit possession or cultivation of cannabis for personal consumption under their domestic criminal laws if it contradicts a basic principle of national law.

To what extent the general obligation requires specific provisions under *administrative* law to “not permit” such acts, remains open to interpretation. The 1961 Commentary seems quite clear, in reference to articles 4 and 33, declaring that parties “must prevent the possession of drugs for other than medical and scientific purposes by

all the administrative measures which they are bound to adopt under the terms of the Single Convention, whatever may be their view on their obligation to resort to penal sanctions or on the kind of punishment which they should impose” and that “the obligation of Parties not to permit the possession of drugs except under legal authority requires them to confiscate drugs if found in unauthorized possession, even if held solely for personal consumption”.<sup>26</sup> Over time state practices seem to have expanded the scope for interpretation beyond what was intended at the time the treaty and its Commentary were drafted.

The state of Alaska is an interesting case in this regard. In 1975 an Alaskan Supreme Court ruling (*Ravin v State*) barred the state from criminalizing possession and use of cannabis within an individual’s home in line with its constitution’s privacy provisions. The “State Supreme Court decided that the relative insignificance of cannabis consumption as a health problem in Alaskan society meant that there was no reason to intrude on the citizen’s right to privacy by prohibiting possession of cannabis by an adult for personal consumption at home”.<sup>27</sup> A 1990 voter initiative recriminalized simple possession, but an Alaskan Court of Appeals decision in 2003 (*Noy v State*) challenged the constitutionality of this vote and ruled: “Alaska citizens have the right to possess less than four ounces [one ounce is 28.35 grams] of marijuana in their home for personal use.”<sup>28</sup>

While there remains confusion around the application of the law by police authorities, the state consequently permits possession of cannabis for personal use without any criminal or civil penalty. Alaska represents an example (as do Uruguay and Spain) where possession of limited amounts of cannabis for personal use is not a punishable offence at all, criminal or administrative. There is, however, a conflict between Alaskan state and U.S. federal law. Although possession of less than four ounces of cannabis within an adult’s home is essentially “legal” under state law, it is not under federal law. Similar legal disputes have been fought over medical marijuana laws in some states and over the regulation initiatives recently passed in Washington State and Colorado.

### Cannabis Social Clubs

The same latitude that the treaty regime allows for possession for personal use applies to cultivation, as the conventions do not distinguish between “possession” and “cultivation” for personal use. Similar difficulties as with possession arise in national jurisdictions regarding the legal distinction between cultivation for personal use and cultivation with intent to supply. The decision as to whether to apply quantitative thresholds, to require other proof to establish the intent to traffic, or to leave the distinction to a judge, is left by the conventions entirely in the hands of national authorities. As a consequence, legal reforms

that have included decriminalization or exemption from prosecution for cultivation of cannabis for personal use are allowed under the same conditions that apply to possession for personal use.

In Spain this latitude has led to the development of “cannabis social clubs” cultivating cannabis for personal use on a collective basis.<sup>29</sup> This cooperative model is legally based on the decriminalization of cultivation for personal use and was started in the 1990s by grassroots initiatives in Spain, taking advantage of a grey zone in the national law and court jurisprudence. Spanish law does not penalize consumption and in 1974 the Supreme Court ruled that drug consumption and possession for consumption are not criminal offences, although administrative sanctions do exist for smoking in public places.

The movement began in Barcelona in 1993 when the *Asociación Ramón Santos de Estudios Sobre el Cannabis* (ARSEC) decided to challenge the juridical position regarding cultivation. ARSEC asked the public prosecutor if it would be considered a crime to grow cannabis for a group of adult users. The reply that, in principle, this was not criminal behaviour, resulted in a cultivation experiment involving about a hundred people and attracted media attention. The crop was confiscated, but a lower court acquitted those involved. Subsequently the case was taken to the Supreme Court, which ruled cannabis cultivation as dangerous per se and therefore punishable. In the following years other associations appeared, notably in

the Basque Country. In 1997, the Kalamudia association established the region’s first collective cannabis plantation, but subsequently failed in its efforts to achieve regulation in the Basque regional parliament. Subsequent initiatives, consequent seizures and court cases led to revisions of the Supreme Court ruling in 2001 and 2003, establishing that possession of cannabis, including large quantities, is not a crime if there is no clear intention of trafficking. The first club was legally constituted in 2001, followed by hundreds all over Spain, in particular in the Basque Country and Catalonia.

The Supreme Court decisions have served as a basis for various judicial rulings ratifying the legality of cultivation of cannabis clubs. The proviso is that there is non-profit distribution exclusively within a closed group of adult members registered with the club having a right to their share of the harvest according to their personal needs.<sup>30</sup> However, the interpretation of these judicial rulings remains ambiguous. The police still frequently raid the plantations of cannabis associations and prosecutors keep bringing cases to court, despite several court rulings allowing the model and ordering the police to return the seized cannabis and plants.<sup>31</sup>

A major goal of the Spanish clubs is to achieve political and legal recognition by the authorities. The associations are legally constituted, openly declaring their objectives and purposes, and paying taxes. They call for greater clarity in the law to permit individual and collec-



tive cultivation for medicinal purposes and personal recreational consumption. At present, the Basque Country and Catalan regional parliaments are debating a form of legal regulation within the confines of the national law and the rejection of the current club model by the national prosecution office.<sup>32</sup>

More recently a more commercial type of club has appeared, especially in Barcelona,<sup>33</sup> essentially functioning like a Dutch coffeeshop, but with a membership-only policy. These clubs are rapidly increasing due to the opportunities cannabis entrepreneurs see in a future regulated industry. They are investing in clubs now, anticipating regulation, already securing a position on the market as well as hoping to leave the current juridical quagmire in which there still is a thin line between licit and illicit cultivation. Membership sometimes runs into several thousand per club (including foreigners). To meet demand, these clubs are regularly forced to buy from what is still the illicit market. One of the larger clubs in Barcelona proposed procuring their members' supply from large-scale plantations in the Catalan municipality Rasquera.<sup>34</sup> An agreement with the local administration was signed, but was blocked by the prosecution office. Nevertheless, other municipalities in Catalonia have expressed interest in similar cultivation agreements with clubs in Barcelona.

This Spanish model is being copied by activists in other European countries, in particular in Belgium, the United Kingdom,<sup>35</sup> and even in France, the country with some of the most draconian drug laws in Europe.<sup>36</sup> In Latin America informal clubs have appeared in Argentina, Colombia and Chile, in each case adapting to local laws, de facto decriminalization conditions and court rulings or the blind eye of the authorities. In Uruguay clubs of 15 to 45 members are allowed under the new cannabis regulation law approved in December 2013. Persuaded that the model is in conformity with the UN drug control conventions, it has gained popularity among lawmakers in Mexico and several European countries, such as Portugal<sup>37</sup> and Germany.<sup>38</sup> Having gained legitimacy in several countries, the model is now a frequent subject in the international debate about drug policy reform.

A next step in this approach could be to extend the model to include growers in developing countries supplying the clubs with non-domestically grown cannabis. Outsourcing one's personal supply to growers across borders would require "import for personal use" to be allowed. While this would require international agreements allowing import and export and would likely be fiercely opposed by drug control authorities, the proposition has a certain logic. One of the main arguments for the clubs is that they cut out the black market. The same would be true for foreign-grown hashish that is already available in several clubs but lacks the legal justification based on collective cultivation for personal use of the club members. European growers have had little success producing hash with the quality and taste

similar to that from traditional sources like Morocco or Afghanistan. Many European consumers still have a preference for hashish over home-grown marijuana, resulting in a persisting illegal supply to the social clubs in Spain, the coffeeshops in the Netherlands and the illicit markets in other European countries in general. Such a situation will continue as long as the design of legal regulation models for the cannabis market are based on domestic growing, without taking into consideration the reality that a part of the market is supplied from abroad and is not so easily replaced by import substitution.

In Morocco a debate on regulating cannabis cultivation for sale to the government for medicinal and industrial purposes has been initiated in parliament.<sup>39</sup> If accepted, that sale might be extended to supplying legally constituted and regulated markets outside the country, also for recreational use. There is also a developmental argument in support of such an option. Hashish production is an important part of the local economy in the Moroccan Rif mountains; continuing the efforts to undermine those farmers' livelihoods would lead to considerable impoverishment and consequently increased migration toward Europe. Moreover, the traditionally produced hashish contains less THC and a significantly higher percentage of CBD, making it less noxious than the European product.<sup>40</sup>

## Medical Marijuana

There is no question that the UN conventions in principle allow for the medical use of controlled substances, including cannabis, and are meant to guarantee sufficient availability of controlled drugs for licit purposes. The inclusion, however, of cannabis and its active compounds in the strictest schedules of the 1961 and 1971 treaties, reserved for substances with "particularly dangerous properties" that are "not offset by substantial therapeutic advantages" has created obstacles for legal provisions for the medicinal use of cannabis. The INCB has frequently expressed its opposition to medical marijuana schemes such as those operating at the state level in the U.S. One of its two arguments can be easily contested; the other, however, appears to have considerable legal legitimacy.

First, the Board questions the medical usefulness of marijuana. Its 2003 report notes that the conventions leave the interpretation of "medical and scientific purposes" up to the parties,<sup>41</sup> a crucial point, allowing for latitude within the conventions. Yet, concomitantly the INCB places the onus on governments "not to allow its medical use unless conclusive results of research are available indicating its medical usefulness".<sup>42</sup> It is not the Board's mandate to decide whether scientific results are conclusive or not, nor whether cannabis has medical usefulness. Countries can decide that themselves, and a unique mandate has been given to the WHO regarding advice on proper scheduling under the 1961 and 1971 Conventions. Nonetheless there

are quite a few examples of the INCB casting judgment.<sup>43</sup> The Board's opposition on grounds of medical usefulness is unfounded for two reasons: the lack of any universally accepted position on the issue; and it is not within the INCB's remit or competence. Furthermore, the WHO, as mentioned above, has taken a contradictory position in its recommendations regarding dronabinol or THC under the 1971 Convention.

The INCB's second point of contention is, however, more valid. As noted in its 2008 report, the Board also regards certain medical marijuana schemes to be in violation of article 28 of the Single Convention, stipulating "specific requirements that a Government must fulfil if it is to allow the cultivation of cannabis, including the establishment of a national cannabis agency to which all cannabis growers must deliver their total crops".<sup>44</sup> The cultivation and distribution of cannabis for medicinal purposes is only permitted under strict state control and requires a government agency with the "exclusive right of importing, exporting, wholesale trading and maintaining stocks [...] Only cultivators licensed by the Agency shall be authorized to engage in such cultivation." The Convention continues that, where medical marijuana schemes are in operation, a government agency must award all licenses and take "physical possession" of all crops.<sup>45</sup> Most countries allowing medical cannabis have introduced and abide by the required structures and procedures.<sup>46</sup> However, this is clearly not the case within commercial schemes operating in U.S. states like California and the INCB's

arguments regarding the legality of those practices under the Conventions are legitimate.

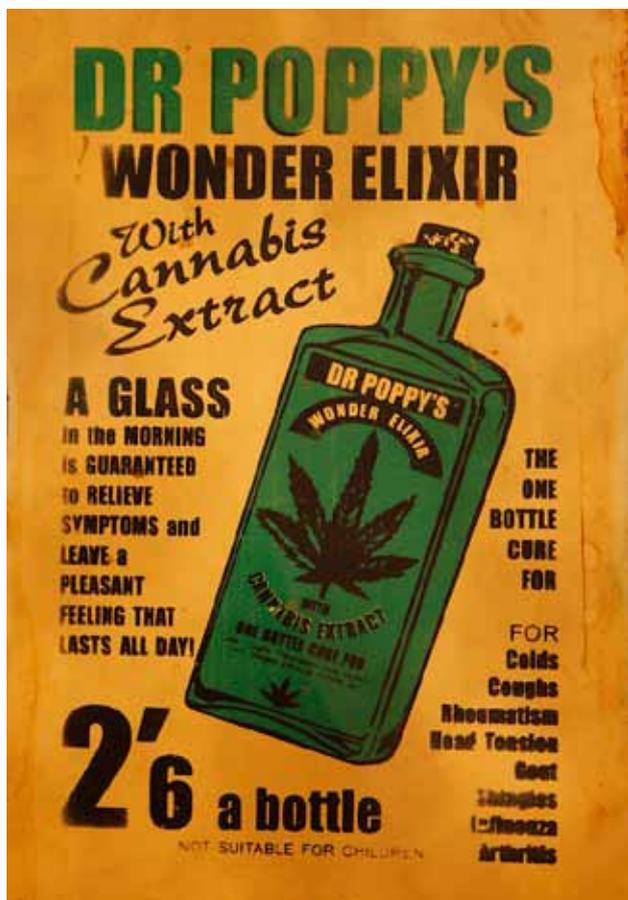
### Dutch coffeeshops

The INCB has also long claimed that the Dutch coffeeshop system operates in contravention to the drug control treaties.<sup>47</sup> In its 1997 Annual Report, for instance, the Board went so far as to claim that the coffeeshop system constituted "an activity that might be described as indirect incitement",<sup>48</sup> implying that Dutch authorities were complicit in the crime of promoting illicit drug use.<sup>49</sup> Though no longer at the forefront of cannabis tolerance after the developments in Spain, the U.S. states and Uruguay, the Netherlands in the 1970s was the first, and for a considerable time the only country to allow the limited retail sale of cannabis for recreational use through the coffeeshops. Under the present arrangement the possession of cannabis remains a statutory offence, but the government employs an expediency principle, and has issued guidelines on the use of discretionary powers, assigning the lowest judicial priority to the investigation and prosecution of cannabis for personal use. The guidelines further specify the terms and conditions for the sale of cannabis in authorized coffeeshops, whereby the sale of up to 5 grams of cannabis per transaction is tolerated and the coffeeshop is permitted to hold up to 500 grams of the drug.<sup>50</sup>

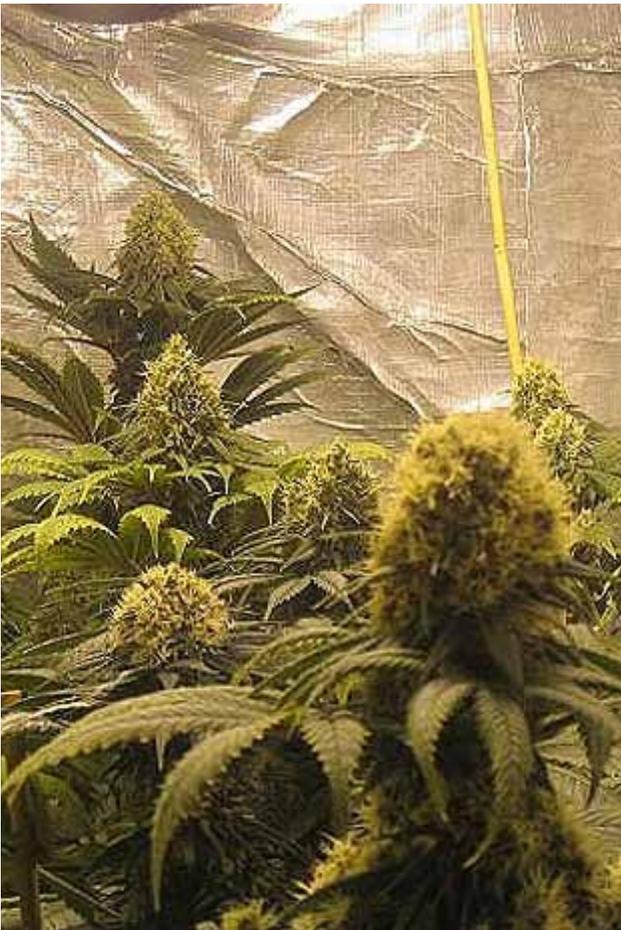
Dutch authorities and lawyers maintain that their law and implementation strategy are permitted under the treaties. The provisions in the Single and the 1988 Conventions requiring criminalization of cannabis cultivation, possession and trade for non-medical purposes are satisfied in Dutch legislation in the Opium Act. The 1988 escape clause to apply constitutional principles and basic concepts of their legal systems in the case of possession, purchase and cultivation for personal consumption was also emphasized in a reservation made by the Netherlands at the time of signing.

In jurisdictions such as the Netherlands that follow the expediency principle (a discretionary option that allows authorities to refrain from prosecution if seen in the public interest to do so), it is possible to meet the letter of the international conventions by de jure establishing cultivation, possession and trade of cannabis (even for personal use) as criminal offences while allowing de facto legal access to cannabis for non-medical purposes by declining to prosecute such illegal acts under specified circumstances. As argued above, there is little doubt that this conforms with the acknowledged treaty latitude concerning cultivation, purchase and possession for personal use (under article 3, para. 2).

Whether it can be extended to sale and possession of quantities for commercial trading purposes, as is permitted de facto in the coffeeshop system, is arguable and a matter



Collection Hash Marihuana & Hemp Museum Amsterdam/Barcelona



of contention. This is the case since it is a treaty obligation to make such offences, “liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation” (article 3, para. 4-a). The 1988 Convention limits the applicability of discretionary powers under domestic law for illicit drug trafficking offences.<sup>51</sup> The Netherlands, upon acceptance of the treaty in 1993, therefore made an explicit reservation in order to fully preserve its discretionary powers and to ensure that implementing the 1988 Convention would not affect its legal justification for the coffeeshops.<sup>52</sup>

While this argumentation can be defended based on the letter of the treaties combined with the reservation the Netherlands made under the 1988 Convention, it does stretch the art of interpretation to its limits. The question can be raised whether or not the coffeeshop system can be regarded as a legitimate and faithful implementation of the prohibitive spirit of the treaties, given the general obligation under the Single Convention that “parties shall take such legislative and administrative measures as may be necessary [...] to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.”<sup>53</sup>

That said, if the coffeeshops are viewed as operating within the, albeit stretched, parameters of the extant treaty framework, one might apply the same argumentation to allow supplies to the coffeeshops; a route that would resolve

the “back door” problem that has confounded the model from its inception. The Dutch government rejects any experiments with legally controlled cultivation, claiming that it is not permissible under the UN Conventions. However, given the fact that the legal justification for the coffeeshop model as it exists today is not only based on the flexibility the treaties allow for consumption-related offences, but applies the expediency principle to distribution and trade, it is difficult to justify that the same discretionary power could not be applied to the cultivation of cannabis to supply the coffeeshops under certain conditions. Interpretation would be stretched that much further, but most probably within the same limits.

Some Dutch jurists go even further, arguing that, since it is not defined within the conventions, the treaty concept of “medical purpose” could be interpreted broadly enough to include any policy measures, including a legal regulation of the cannabis market, justifiable on the basis of its positive contribution to public health, as that is the primary aim of the 1961 Convention.<sup>54</sup> While such a position could be argued on the basis that the conventions leave discretion to individual countries as to what constitutes medical use, the Commentary does not seem to support such a broad interpretation.<sup>55</sup> The trend in cannabis policy developments may well lead to more acceptance of such a broad interpretation in the future, but at present its legal basis is problematic.

### A regulated cannabis market

As we have seen, decriminalization, including schemes in which possession, purchase and cultivation for personal use are no longer punishable offences, is now functioning comfortably within the confines of the UN drug control conventions. Parties are also allowed to provide social support rather than punishment for those caught up in minor drug offences due to socio-economic necessity and the lack of alternative livelihood options. Indeed, the 1988 Convention introduced the provision to allow health or social services “as alternatives to conviction or punishment” for offences of a minor nature, not only in cases in which the offender is dependent on drugs, but for anyone involved in minor drug offences. This compensates for the stricter provisions in the treaty calling for harsher penalties for more serious offences. It introduces proportionality principles in sentencing for low-level drug offences such as small-scale cultivation, street dealing or courier smuggling. Here lies a potential legal basis for development-based policy approaches regarding subsistence farmers of cannabis (and of coca or opium poppy): non-enforcement of legal eradication requirements in the absence of alternative-livelihoods options, in order to create an enabling legal environment for sustainable development assistance. It could also be applied to micro-traders, a group for which this policy option is rarely considered. Although the conventions leave considerable room for

manoeuvre and permit softening of criminal sanction requirements, the limits of latitude are also clearly established and finite. Authorities cannot create a legally regulated market including the cultivation, supply, production, manufacture or sale of controlled drugs for non-medical and non-scientific use, which is to say, recreational purposes. Proscriptions laid out in the conventions clearly prevent authorities from creating a legally regulated market for cannabis beyond the realm of medical and scientific purposes.

Although the explicit reference to the complete “prohibition of cannabis” in the original draft version was deleted, the Single Convention did broaden the scope of the regime to include the cultivation of plants. Article 22 of the Single Convention specified the “special provision applicable to cultivation” using a similar phrasing as used for Schedule IV substances:

“Whenever the prevailing conditions in the country or a territory of a Party render the prohibition of the cultivation of the opium poppy, the coca bush or the cannabis plant the most suitable measure, in its opinion, for protecting the public health and welfare and preventing the diversion of drugs into the illicit traffic, the Party concerned shall prohibit cultivation.”<sup>56</sup>

This refers to prohibiting cultivation for medical and scientific purposes, because the requirement to prohibit cultivation for other purposes is the basic premise of the treaty. The only exception is that it does “not apply to the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes” (article 28, para. 2).

For parties deciding not to prohibit cannabis cultivation, article 28 establishes clear conditions under which licit

production for medical or scientific purposes would be permitted.<sup>57</sup> As touched on above in the discussion of the INCB’s stance on medical marijuana, these requirements, identical to those in article 23 for the control of the opium poppy, include the obligation to create national agencies with a monopoly to license and control distribution. Such agencies designate the areas in which the cultivation can take place, allow only licensed cultivators to engage in such cultivation, and ensure that the total crop be delivered to the agency. The agency maintains exclusive rights regarding importing, exporting, wholesale trading and maintaining stocks.

These treaty articles about the optional character of prohibition, leaving open options for licit cannabis cultivation, are often misinterpreted by cannabis-reform advocates, arguing that they also allow for licit cultivation for non-medical purposes if the strict requirements for governmental control are met. They argue that if a party does not “render the prohibition of the cultivation [...] the most suitable measure [...] for protecting the public health and welfare,” that party is not required to prohibit it and thus can allow cannabis cultivation under state control. However, the object and purpose of the conventions limits the non-prohibition option exclusively to medical and scientific purposes. And in the case of cannabis, as per its inclusion in Schedule IV, the Single Convention clearly recommends that it should be limited to small amounts for research only. Legal regulation of the cannabis market for recreational purposes, therefore, cannot be justified within the existing limits of latitude of the UN drug control treaty regime. It is within this context that we must view recent policy shifts in two U.S. states and in Uruguay.

### The Colorado and Washington initiatives

In November 2012, voters in the states of Washington and Colorado approved ballot initiatives establishing legally taxed and regulated markets for the production, sale and use of cannabis. Washington’s Initiative 502 (I-502) passed with a 55.7 to 44.3 per cent majority and in Colorado, Amendment 64 (A-64) passed by 55.3 to 46.7 per cent.<sup>58</sup> With Uruguay, these represent the first initiatives to legally regulate the cannabis market, going beyond the coffeshop system in the Netherlands and the cannabis clubs in Spain, which are merely tolerated through judicial guidelines and court rulings rather than enshrined in law.

In Washington and Colorado voter approval depended on a number of key motivations for the creation of a regulated cannabis industry: eliminating arrests; undercutting black markets and reducing violence; assuring product quality; increasing choices for those seeking intoxication; and limiting access by young people. Expectation that the initiatives would generate much needed income in tax revenue and save the states money on law enforcement was a significant factor as well.<sup>59</sup> Both states already had



November 2012 ballot initiatives <sup>60</sup>		
	Colorado A-64	Washington I-502
<b>Taxes applicable</b>	Excise tax at 15% plus 15% sales tax on top of normal state and local taxes	Excise taxes at 25% at production, processing and retail levels. Plus general state and local sales taxes
<b>Proposed cultivation laws</b>	Personal cultivation of up to 6 plants allowed. Commercial cultivation allowed with licence only.	Commercial cultivation allowed with licence only.
<b>Proposed commercial zoning</b>	N/A	Not within a 1000 feet of a school, playground, recreation centre or facility, child care centre, public park, public transit centre, library or any game arcade, admission to which is not restricted to persons aged twenty-one years or older
<b>Advertising/Signage restrictions</b>	Restrictions on advertising and display of products.	State Liquor Control Board to develop restrictions on advertising including minimising the exposure to under-21s, no advertising near schools, public buildings and public transport.

a regulated medical marijuana industry and voters were accustomed to forms of legal marijuana.

The successful referenda could be seen as the beginning of a new wave of defection from the UN conventions, this time moving from soft to hard defection. In 2013, eleven U.S. states proposed legislative bills (as opposed to ballot initiatives) to regulate and tax marijuana.<sup>61</sup> Many of these have been temporarily stalled, but cannabis legalisation is now firmly on the policy agenda. New referenda are expected in California and Oregon to coincide with either the 2014 congressional or 2016 presidential election. The final decision is very much a strategic consideration since, among other things, the demographics of voter turnout varies. Reform initiatives in the U.S. have taken the form of direct democracy through ballot initiatives and bills within state legislatures. A bill originates and is voted in the legislature, whereas an initiative is a law or constitutional amendment voted by the electorate, it having been added to the ballot through a petition process.<sup>62</sup>

It was not the first time reform activists in the U.S. used ballot initiatives to change the status of cannabis, but until November 2012 they had been unsuccessful. As early as 1972 California held a ballot initiative on legalisation (Proposition 215), but it failed 66 to 33 per cent. In 1986, at the peak of the President Reagan's "war on drugs", Oregon held a ballot initiative to legalize cannabis, which also failed, this time 74 to 26 per cent. In 2004 Alaska voted on regulating recreational use, it losing 56 to 44 per cent. Nevada voted on a similar policy in 2006, which was rejected 56 to 44 per cent. Colorado also held a vote on cannabis in 2006, aiming to make possession of up to one ounce legal, without addressing production and supply issues, which failed 58 to 41 per cent.<sup>63</sup>

In November 2010 in California, Proposition 19, known as the Regulate, Control and Tax Cannabis Act, proposed allowing anyone over 21 to possess up to one ounce of marijuana; cultivate limited amounts within a private space; and designate city or county authorities in charge of regulating and taxing the commercial market. The Proposition failed to pass by 53.5 to 46.5 per cent. Interestingly, a post-election poll revealed that 50 per cent of the voters believed cannabis should be legal, but voted against the proposition due to issues with the details of the regulations. According to a recent poll in California a solid majority of 65 per cent now supports legalizing, regulating and taxing adult recreational marijuana.<sup>64</sup> Oregon held a ballot initiative in November 2012 to institute a legally regulated marijuana market for recreational use, but that failed by 54 to 46 per cent due to the poor design of the proposal.<sup>65</sup>

The outcomes of the ballot initiatives and their subsequent regulation models announced in October 2013, are in clear contravention of federal law; specifically the 1970 Controlled Substances Act establishing federal prohibition, and Washington D.C.'s commitments under international law. However, the clear majorities in the referenda and the shift in opinion polls are an important signal for politicians in the U.S. that cracking down on cannabis will no longer be popular. A poll in October 2013 showed that for the first time a clear majority of 58 per cent of Americans nationwide were in favour of legalising and regulating cannabis, up from 12 per cent in 1969.<sup>66</sup>

The reform initiatives reflect a shift in public attitude towards recreational cannabis use. In a sense, they can be seen as a shift back to President Carter's proposal at the end of the 1970s that the states remain free to adopt whatever

laws they wished concerning cannabis users; and related support for legislation amending federal law to eliminate all federal criminal penalties for the possession of up to one ounce of cannabis. Today's initiatives, of course, go beyond decriminalization, and on to regulate and tax production and distribution.

Fully aware of the major shifts in public opinion, the Obama administration was slow in its response, but on 29 August 2013, the Department of Justice issued a memorandum to federal prosecutors. It announced that it would not seek to challenge or otherwise undercut voter initiatives passed in Washington and Colorado, while reiterating the commitment to maintaining federal laws prohibiting cannabis.<sup>67</sup> The memorandum set out eight enforcement priorities. Those priorities were to prevent:

- the distribution of marijuana to minors;
- revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels.
- the diversion of marijuana from states where it is legal under state law in some form to other states.
- state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity.
- violence and the use of firearms in the cultivation and distribution of marijuana.
- drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use.
- the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands.
- marijuana possession or use on federal property.<sup>68</sup>

Since the federal government relies on state and local law-enforcement agencies for enforcement, the memorandum stated that, because enactment of these laws affects the “traditional joint federal-state approach” to enforcement, the guidance rested on its expectation that those states enacting laws authorising marijuana-related conduct would “implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests”, while stressing that the guidance did not “alter in any way the Department’s authority to enforce federal law, including federal laws relating to marijuana, regardless of state law”.<sup>69</sup>

Deputy Attorney General James Cole testified before the Senate Judiciary Committee that federal prosecutors and



## A NEW APPROACH TO MARIJUANA

agents were prepared to focus aggressive efforts on interstate and national enforcement of marijuana trafficking laws: “We are not giving immunity. We are not giving a free pass. We are not abdicating our responsibility.”<sup>70</sup>

The initiatives increased the pressure on the federal government to find a solution to the state-federal conflict brought about by the implementation of legally regulated cannabis markets. The issue remains far from being resolved. Due to the complicated legal interaction between federal and states’ rights, the main issue is whether federal law “pre-empts” state laws, rendering them null and void. The principle of pre-emption is rooted in the Supremacy Clause of the U.S. Constitution, which dictates that federal law and treaties generally override conflicting state law on the same subject matter. The concept of supremacy is, however, limited by the Tenth Amendment to the Constitution, which reserves to the states powers not granted to the federal government under the Constitution. To complicate matters even more, pre-emption power is also limited by the “anti-commandeering” principle, providing that the federal government may not “commandeer” the state legislative process by forcing states to enact legislation or enforce federal legislation.<sup>71</sup>

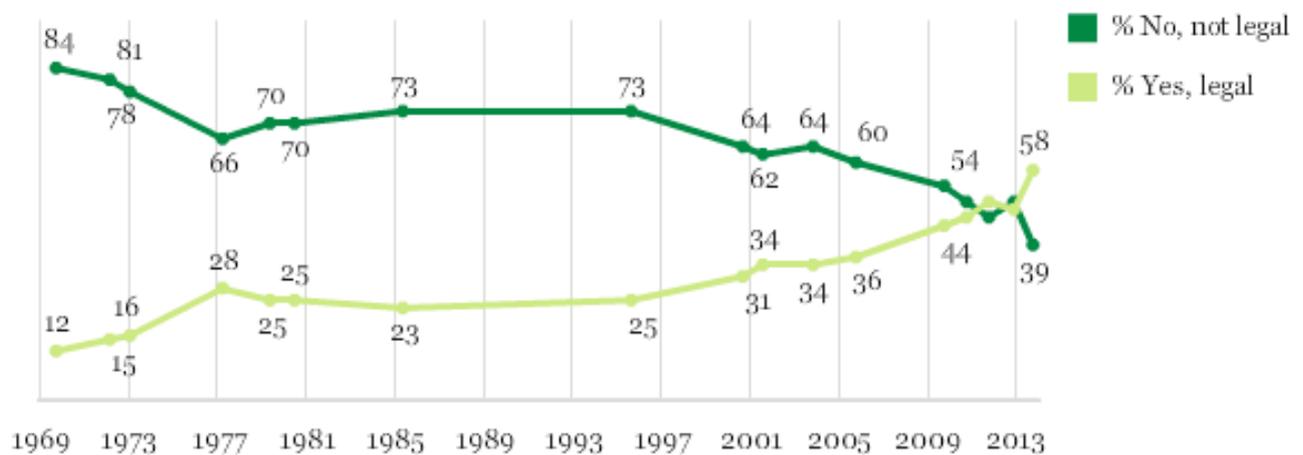
Although currently eclipsed by divisions over legally regulated cannabis markets, the divergence of views on cannabis between the states and the federal government had already been a point of conflict with the 21 states permitting medical marijuana use since 1996. Both Presidents George W. Bush and Barack Obama promised not to interfere in

states' medical marijuana policies during their presidential campaigns, but both failed to keep that promise. Federal agencies have raided medical marijuana facilities regularly under both administrations. Having already signalled its displeasure regarding medical marijuana schemes within the U.S., the INCB quickly voiced grave concern about the outcome of the ballot initiatives in the U.S., claiming "these developments are in violation of the international drug control treaties";<sup>72</sup> while emphasizing that the U.S. has an obligation to ensure full compliance over its entire territory. In its 2012 annual report, the Board urged the federal government "to take the necessary measures to ensure full compliance with the international drug control treaties on its entire territory".<sup>73</sup>

Regarding the issue of taxation, Washington has imposed a heavy 25 per cent tax on each of the three steps of production: producer to processor, processor to retailer and retailer to customer. Passed in November 2013, Colorado's taxation is less onerous and in the form of a 15 per cent excise tax and a 10 per cent sales tax. Finding the "sweet spot" for taxation is key in order to secure a robust self-funding regulation, without increasing the price of legal marijuana to a level making the black market attractive. Unlike Colorado, Washington has imposed a cap on the total amount of marijuana that can be produced per year in the state. The chief rationale behind limiting annual production is to avoid diversion of surplus legal cannabis that can be illegally smuggled to other states. Diversion is

### Americans' Views on Legalizing Marijuana

Do you think the use of marijuana should be made legal, or not?



### GALLUP

Colorado's and Washington's laws are based on a similar model, allowing a three-tiered system of production, processing and retail by licensed individuals or organisations.<sup>74</sup> They both tax and tightly regulate legal marijuana markets; require rigid security and third-party laboratory testing; limit sale to individuals over 21 and the amount one can carry; prohibit out-of-state investment; and track marijuana closely from "seed-to-sale".<sup>75</sup> Nevertheless, there are important differences between the two approaches. In Colorado, the ballot initiative was a constitutional amendment, hence its full title, Amendment-64. As such, no future state government can overturn the policy without further amending the state constitution. This is in contrast to Washington, where I-504's status as a law makes it easier to change or repeal.<sup>76</sup> Furthermore, since the Tenth Amendment to the U.S. Constitution asserts that the federal government's powers are limited by the states and that it is "the people" who are sovereign, A-64 arguably has greater potential to restrict the capacity of federal government to intervene in Colorado than it can in Washington.<sup>77</sup>

understandably a major concern of federal authorities, and while Colorado has not imposed a cap, it may do so in the future if deemed necessary.<sup>78</sup>

Colorado and Washington also license the businesses differently. Colorado initially requires "vertical integration", meaning that every business must be involved in all stages of the enterprise (growing, processing, and selling) to get a license; the rationale being that initially limiting the number of businesses makes it easier to control the new market. In the summer of 2014, Colorado will open the market to those interested in specific sections of the industry. Washington, conversely, prohibits "vertical integration", permitting businesses a license in only one stage, to prevent monopolists from setting artificially high prices.

While Colorado has a stringent two-year-minimum-residency requirement for any owner or investor, Washington has only a three-month requirement. These rules essentially prohibit out-of-state investment in the marijuana industry to reassure the federal government that

illegal drug money from across the country and around the world is not entering the legal market. The rules and regulations are still hotly debated and may change over time as both states learn from experience.

### Uruguay: “Someone has to be first...”

On 20 December 2013, after the bill had passed both chambers of the Uruguayan Parliament, President José Mujica enacted Law 19.172, making Uruguay the first country in the world to legally regulate the cannabis market from seed to sale. The consumption and possession for personal use of cannabis, in fact of no psychoactive drug, has ever been criminalised in Uruguay, but now the state will take control over the import, export, cultivation, production and distribution of cannabis through the newly established Institute for Regulation and Control of Cannabis (*Instituto de Regulación y Control de Cannabis, IRCCA*). In a presentation to the INCB, Vice-Minister of Foreign Affairs Luis Porto, explained that this “initiative to responsibly regulate the cannabis market” forms part of the national *Strategy for Life and Coexistence* aiming to “guarantee the right to public safety”.<sup>79</sup>

Through regulation Uruguay intends to reduce the potential risks and harmful effects of smoking marijuana for recreational purposes; take the cannabis market out of

the hands of criminal organisations; and separate the licit cannabis market from the illicit market of more harmful substances, especially the one that causes the most concern, *pasta base*, a crude form of cocaine base smoked throughout the region. Uruguay has a long history of the state regulating the alcohol market, and cannabis will be strictly controlled, following that model. The *Administración Nacional de Combustibles, Alcoholes y Portland (ANCAP)* was established as a state company in 1931, both to operate Uruguay’s oil refinery, and run a state alcohol monopoly to eliminate illegal production of very toxic hard liquors. The state lost its monopoly on distilled spirits in 1996 but continued to control the alcohol market, seen as a positive example in support of cannabis regulation.

“The state needs to regulate this market, like it did before with alcohol,” Senator Lucia Topolansky, and wife of the president, said. Uruguay’s national drug coordinator, Julio Calzada, despite worrying about increasing problems related to excessive alcohol use, said the state liquor factory deserved credit for eliminating dangerous brews. “Today we have to take action with marijuana because those who buy it don’t know what they’re buying, just the same as what happened with people buying alcohol in 1930.”<sup>80</sup> After citing the work of his predecessors in controlling alcohol in 1931, Senator Roberto Conde introduced the new law in the senate: “In our country the consumption of cannabis is a licit activity, however its access is not, thus

Public debate in Montevideo with Martin Jelsma (TNI) and Julio Calzada (Junta Nacional de Drogas), October 2012. Photo: JND

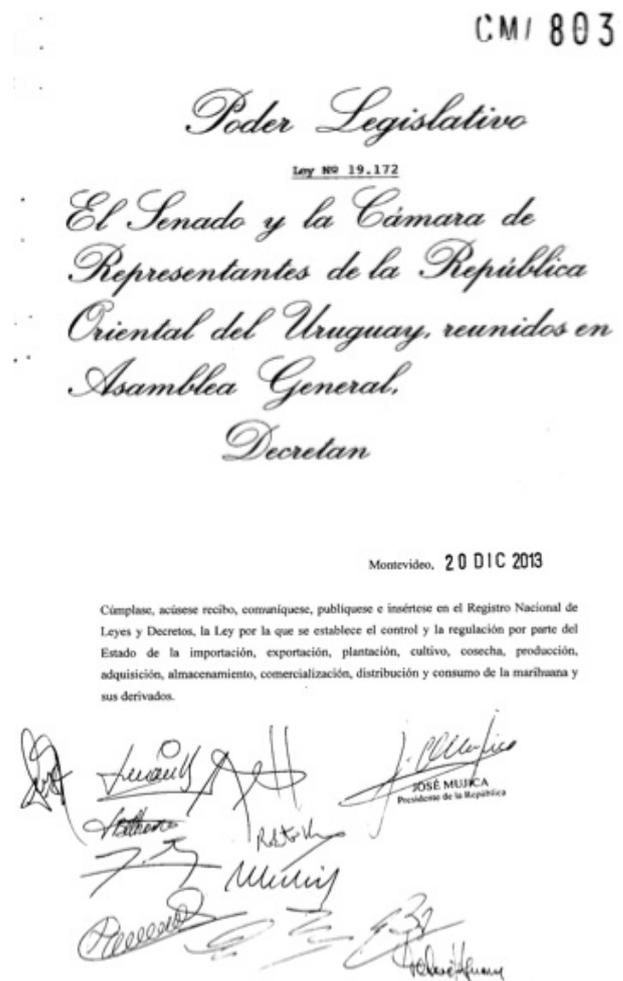


users must resort to the black market with all the risks that implies.” Among other objectives, he continued, the state intervention seeks to “reduce the resources of organized crime and to establish safe channels for users”.<sup>81</sup>

The elaboration within the ruling *Frente Amplio* party of legislative proposals on cannabis started a few years ago, initially focused on *autocultivo* (cultivation for personal use) and cannabis clubs based on the Spanish model. In May 2011 a legislative proposal was submitted to congress decriminalizing possession up to 25 grams of cannabis and the cultivation and harvesting of a maximum of eight cannabis plants for personal use, which could also be carried out collectively by associations of users. Amidst ongoing parliamentary discussion, in June 2012 the government announced it would present its own legislative proposal to legally regulate the whole chain of production, distribution and sale of marijuana. The announcement was made within the context of measures aimed to address public insecurity related to *pasta base*, blamed for the majority of drug-related crimes and violence. But the most noteworthy proposal was regulation of the cannabis market under state monopoly control.

According to Congressman Sebastián Sabini, one of the drafters of the *autocultivo* bill, President Mujica’s proposal changed the terms of the debate: “Our proposal is aimed at reducing judicial interventions against growers and establishing some principles for community regulation, such as the case of the cultivation clubs. Now, the state would have a monopoly on production, distribution and sales.”<sup>82</sup> Many who had been working on the other proposal were concerned that the executive’s alternative plan would not allow cultivation for personal use (individually or collectively), while ending criminal prosecution of people growing cannabis plants for their own use had been the primary motive behind the parliamentary initiative.

The government package, moreover, contained other controversial elements, such as an increase of minimum sentences for small trafficking offences from one to three years and the possible enforced treatment of “addicted persons”. These proposals were made in the context of distinguishing more clearly policy responses to the two different markets, *pasta base* and cannabis, and making the very sensitive proposal to regulate cannabis more politically acceptable by cracking down harder on *pasta base*. Difficult negotiations on all points led to a number of compromises. The increase in minimum penalties was scaled down to 20 months, very significant in that offenders sentenced less than 24 months are eligible for probation, alternative sentences or conditional release. The compulsory treatment provision was also substantially changed, limiting the option to “problem drug users in crisis situations who pose a risk to themselves or to others”, representing in fact an improvement compared to the relevant provisions still in force under the existing drug law (article 40 of the 1974 Law 14.294).



In December 2012 a new version of the cannabis regulation bill was presented, allowing *autocultivo* up to six plants and including the option of social clubs (initially only 15 members but in the final approved version changed to 15 to 45 members). The parliament vote, however, was postponed due to residual opposition within the *Frente Amplio* and polls indicating insufficient public support for cannabis legalisation. The government and civil society groups engaged in intensive campaigns to explain the regulation and increase support. Meanwhile, internal negotiations within the ruling party coalition were engaged to bring the dissenters on board and ensure a majority vote. The House of Representatives approved the bill in a 50-46 vote 31 July 2013, and on 10 December the Senate approved it as well. The law would likely have failed without the strong conviction of the president, his principal advisor Diego Cánepa, and the commitment of a group of dedicated parliamentarians and activists.

The comprehensive Law 19.172 establishes the following rules for cannabis regulation:

- Cultivation of hemp for industrial purposes (containing less than 1 per cent THC) falls under the responsibility of the Ministry of Livestock, Agriculture and Fisheries.

- Cultivation of psychoactive cannabis (containing more than 1 per cent THC) for medical purposes, scientific research or “for other purposes” requires prior authorisation from the IRCCA.
- Cultivation of cannabis for personal consumption or shared use at home is permitted up to six plants with a maximum harvest of 480 grams per year.
- Membership clubs with a minimum of 15 and a maximum of 45 members, operating under control of the IRCCA, are allowed to cultivate up to 99 cannabis plants with an annual harvest proportional to the number of members and conforming to the established quantity for non-medical use.
- IRCCA licenses pharmacies to sell psychoactive cannabis for therapeutic purposes on the basis of medical prescription, and for non-medical use up to a maximum of 40 grams per registered adult per month.
- Any plantation operating without prior authorisation shall be destroyed upon the order of a judge.

The possession of drugs for personal use was never a criminal offence in Uruguay, but no quantitative thresholds indicating a reasonable amount for personal use had ever been established, leaving absolute discretion of the judge. Under the new law persons carrying with them up to 40 grams are not liable for prosecution; and, as mentioned above, at home people can have six plants or a harvested

amount of maximum 480 grams. Greater quantities must be authorized by IRCCA, as in the case of a social club, licensed producer or pharmacy retailer. Several more technical rules, for example establishing acceptable quality standards and thresholds for THC and CBD content, are still being elaborated, a task expected to be completed by April 2014 after which implementation can begin.

When Uruguay announced its intention, on 20 June 2012, INCB President Raymond Yans immediately denounced the regulation plan. At the UN General Assembly session in New York six days later, he took the opportunity of the International Day against Drug Abuse and Illicit Trafficking, to proclaim: “A chain is no stronger than its weakest link. If the chain of drug control is broken in one country or region — and I am thinking now of certain projects in Uruguay — the entire international drug control system may be undermined.”<sup>83</sup> “Dialogue” with the INCB has since been troubled, and Uruguayan officials have struggled to find the right legal justification for their model of cannabis regulation under the UN treaty regime, or to provide proper argumentation justifying the need to breach it.

In December 2013 Yans accused Uruguay of negligence with regard to public health concerns, deliberately blocking dialogue attempts and having a “pirate attitude” towards the UN conventions. President Mujica reacted angrily, declaring that someone should “tell that guy to stop lying”, while Milton Romani, Uruguay’s ambassador to the Organisation of American States said that Yans



Moroccan Marihuana Smoker  
 Credit: Collection Hash Marihuana & Hemp Museum Amsterdam/Barcelona



“should consider resigning because this is not how you treat sovereign states”.<sup>84</sup> In the context of this abysmal rapport, Vice-Minister Luis Porto went to Vienna in February 2014 to present to the INCB Uruguay’s new legislation and explain the arguments behind it.

Porto’s key points were: The object and purpose of the drug control conventions is the protection of health and countering the harmful effects of illicit drug trafficking. All measures taken in that context must neither contradict Uruguay’s constitution nor leave any fundamental rights unprotected. The obligations assumed under other conventions, must be taken into account as well, in particular those relating to the protection of human rights. And “given two possible interpretations of the provisions of the Convention, the choice should be for the one that best protects the human right in question, as stated in Article 29 of the American Convention on Human Rights”. For those reasons, Uruguay believes “that production and sale in the manner prescribed in the new law may be the best way, on the one hand, to combat drug trafficking, and on the other, to defend the constitutionally protected right to freedom of our fellow citizens”.<sup>85</sup> He also reminded the Board that Uruguay actively promoted better integration of human rights instruments with drug control policy at the CND.<sup>86</sup>

Porto stressed that cannabis consumption was not criminalized in Uruguay, that the existence of the cannabis market was not created by the new law, which, in fact, is a very restrictive model of regulation that in no way promotes

the use of cannabis. He drew attention to several elements of the new law coinciding with treaty provisions, such as the establishment of a state control agency; the prohibition of advertising; the attention given to educational efforts and awareness campaigns regarding the risks, effects and potential harms of drug use; and the emphasis on the prevention of the problematic use of cannabis. He concluded: “the spirit, as well as the regulations of Law No. 19.172, follow the philosophy of the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol and incorporate the bases established by it”.

The Uruguayan government does not deny that the cannabis regulation now being implemented triggers legal tensions with the treaties, and in this regard has called for an open and honest debate about the UN drug control system. Diego Cánepa, for example, told the CND in March 2013: “Today more than ever we need the leadership and courage to enable us to discuss in the international community if a revision and modernization is required of the international instruments we have adopted in the last 50 years.”<sup>87</sup> At the same time, as is the case for the U.S. government, it is politically and diplomatically not easy for Uruguay to declare publicly they are in direct violation of an international treaty they have signed. On their own it will not be easy to legally resolve the breach of certain treaty provisions, so the disaccord and tension will likely continue until more countries are willing to join them in a future treaty reform effort. The options and difficulties associated with embarking on that challenge are discussed within the following chapter.

## Treaty reform options

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

### WHO review – modification of cannabis scheduling

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

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



seriously undermines and delegitimizes their international control.”<sup>3</sup> The experts go on to recommend improvements to WHO’s substance-evaluation process through the reassessment of all scheduled substances at least every twenty years; a process they argue should start with cannabis and a few other most relevant and least recently researched substances. In fact, such a review has already been announced regarding cannabis. In response to a 2009 resolution on cannabis seeds, in which the CND “look[ed] forward to an updated report on cannabis by the Expert Committee”;<sup>4</sup> the ECDD decided at its meeting in Tunisia in 2012 to include cannabis on the agenda of its next meeting, taking place in June 2014.<sup>5</sup>

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

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

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

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

### Denunciation and reaccession with a new reservation

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



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

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

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

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

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

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

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

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



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

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

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

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

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

### Amending the treaties

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



the human rights regime, was blocked. Then, as mentioned above, a small but powerful minority of 18 countries objected. The principal argument was most clearly spelled out in the Swedish objection, that “the Bolivian proposal pose[d] the risk of creating a political precedent and might directly infringe on the international framework for the fight against drugs which would send a negative signal”.<sup>24</sup>

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

Curiously enough, only ten years after the Single Convention was adopted, the U.S. was proposing numerous amendments, convinced that it was “time for the international community to build on the foundation of the Single Convention, since a decade has given a better perspective of its strengths and weaknesses”. The U.K. and Sweden were the first to support that call to modernize the Convention and to convene a conference of the parties to negotiate the amendment proposals that eventually led to the 1972 Protocol amending the 1961 Convention.

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

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

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

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

### Modifications inter se

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

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

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

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

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

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

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

### Denunciation

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

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

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

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

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



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



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

### From cracks to breaches and beyond

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

other difficulties encountered with the implementation of the current treaty system, revisiting the logic behind it and its inherent inconsistencies. Another important criterion for a new treaty is UN system-wide coherence and full compatibility with other UN treaty obligations in the area of human rights, including economic, social and cultural rights, the right to health, and rights of indigenous peoples. Overlap between the 1988 Trafficking Convention and the two related UN conventions adopted thereafter addressing organised crime and corruption issues<sup>41</sup> would also need to be considered.

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

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

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

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

Until recently, even discussing treaty reform was a political

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

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

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

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

## Untidy legal justifications

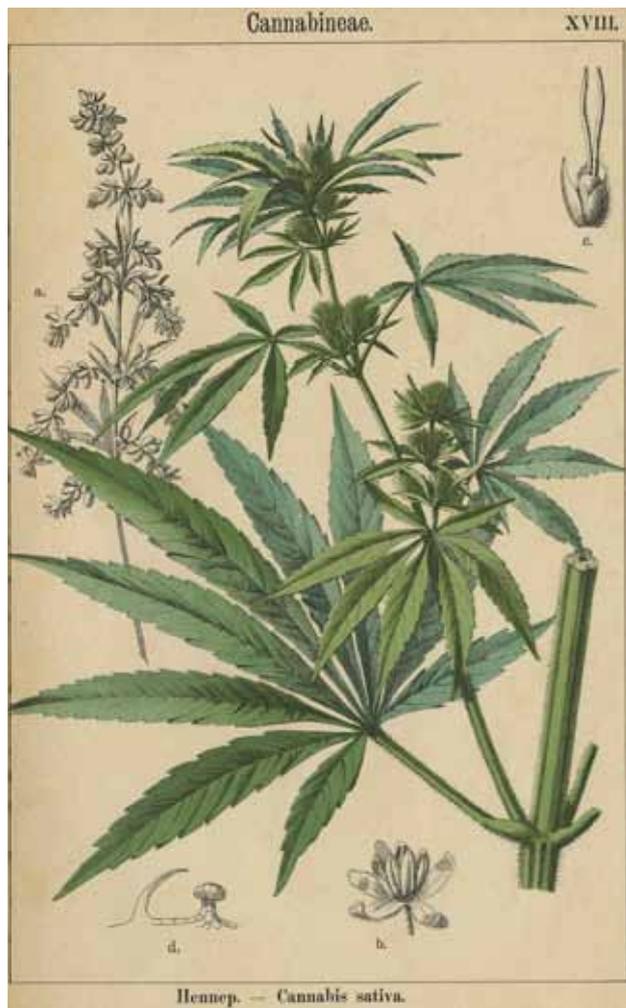
Understandably, the U.S. and Uruguay are both hesitant to explicitly acknowledge that recent policy changes represent clear breaches of international law. Uruguay, as described in the previous chapter, acknowledges that there are legal contentions and that the treaty system may require a revision and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

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

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

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





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

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

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

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

### Conclusions

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

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

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

## WHO and the scheduling of dronabinol / THC

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

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

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

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

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

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

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

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

## Endnotes

**The history of cannabis in the international drug control system**

- 1 WDR (2013), p. xi
- 2 Abel (1980)
- 3 Cannabis was first described in a medical context by the Chinese emperor Shen-Nung in 2700 BC to treat “beri-beri, constipation, female weakness, gout, malaria, rheumatism and absentmindedness”. See: Geller (2007)
- 4 United Nations (1961), Article 4, General Obligations
- 5 Bewley-Taylor and Jelsma (2012a), quoting: E/CONF.34/24 (1964)
- 6 Ballotta, Bergeron and Hughes (2009)
- 7 Senate Special Committee on Illegal Drugs (2002)
- 8 Ballotta, Bergeron & Hughes (2009)
- 9 Kozma (2011)
- 10 Mills (2003), pp. 177-180; Smoking hashish is still popular in Egypt and the harsh laws, including capital punishment, are rarely enforced. See: Cunningham and Habib (2013).
- 11 Kendell (2003)
- 12 Stefanis, Ballas and Madianou (1975)
- 13 The chapters and paragraphs indicated are those used in the Report of the Indian Hemp Drugs Commission (1895). See also: Mills (2003), p. 130. *Ganja* is a term of Sanskrit origin for cannabis, *charas* is a type of hashish and *bhanga* is a preparation from the leaves and flowers (buds) of the female cannabis plant with a low THC content, smoked or consumed as a beverage.
- 14 Ballotta, Bergeron and Hughes (2009); Du Toit (1977)
- 15 Ames (1958)
- 16 Geller (2007)
- 17 The price for a slave in 1830 was 250 milreis and the annual wage of a skilled urban tradesman about 175 milreis. See Frank (2004). The money the fine levied could buy 250 pounds of bread.
- 18 Freyre (1932/2002), pp. 446-47; Cordeiro de Farias (1955); Hutchinson (1975); Henman (1980).
- 19 Vidal (2008); Paulraj (2013).
- 20 Röhrig Assunção (1995), p. 159
- 21 Henman (1980); Paulraj (2013).
- 22 Ames (1958); Du Toit (1975)
- 23 Livingstone (1857), p. 540; Du Toit (1975)
- 24 Monteiro (1875), p. 26 and pp. 256-58
- 25 Ames (1958)
- 26 Hutchinson (1975).
- 27 Henman (1980); Paulraj (2013).
- 28 Gilberto Freyre, one of Brazil’s foremost sociologists and cultural anthropologists openly admitted to have smoked cannabis, which he had learned from sailors from Alagoas “without the danger of slipping in amok,” indicating responsible use of the substance (Freyre, 1975).
- 29 Dória (1915)
- 30 MacRae and Assis Simões (2005)
- 31 Kendell (2003); Mills (2003), pp. 93-99
- 32 Report of the Indian Hemp Drugs Commission (1895). See also: Mills (2003), pp. 118-121. The seven volumes comprise 3,281 pages.
- 33 Ketill, Pan and Rexed (1975), pp. 181-203
- 34 Benabud (1957); Carpentier, Laniel and Griffiths (2012)
- 35 Ounnir (2006). See also: *Boletín de la Sociedad Geográfica de Madrid*, Tomo XVI, Año IX, Número 1, January 1884, pp. 35 and 42; available at <http://prensahistorica.mcu.es/es/consulta/registro.cmd?id=11000051886>.
- 36 Labrousse and Romero (2001); Chouvy, (2008); Afsahi (2011).
- 37 Personal observation by the author in the village of Azila near Ketama during a research mission in July 2009. The farmers showed us a copy the 1934 *dahir*. The 1917 decree (*Reglamento para la repesión del contrabando de tabaco y kif en la zona de influencia de España en Marruecos*) was published in the *Boletín Oficial de la Zona de Influencia española en Marruecos*, nr. 5, March 10, 1917, available at <http://hemerotecadigital.bne.es/issue.vm?id=0003838902>. The 1935 decree (*Dahir dictando medidas provisionales para prohibir el cultivo de tabaco y kif en las cabilas de nuestro Zona de Protectorado*) was published in the *Boletín Oficial de la Zona de Protectorado Español en Marruecos*, nr. 24, August 31, 1935, pp. 1071-73, available at <http://prensahistorica.mcu.es/es/consulta/registro.cmd?id=11000159175>
- 38 Benabud (1957), Chouvy (2005)
- 39 The mixture consisted of two-thirds of cannabis and one-third of tobacco. See: El Atouabi (2009).
- 40 Bouquet (1951).
- 41 Bouquet (1951).
- 42 Benabud (1957), Chouvy (2005), El Atouabi (2009).
- 43 Labrousse and Romero (2001); Chouvy (2005).
- 44 El Atouabi (2009).
- 45 *Dahir aprobando el Reglamento para la repesión del contrabando de tabaco y kif en la Zona de Protectorado*, Boletín oficial de la zona de Protectorado español en Marruecos, nr. 53, December 31, 1954, available at <http://prensahistorica.mcu.es/es/consulta/registro.cmd?id=11000159036>
- 46 Morocco adhered to the 1961 Single Convention in 1966 and followed France in its drug legislation. The 1974 drug law penalised import, production, manufacture, transport, export and possession of substances or plants classified as narcotics (article 2), as well as its use (article 8). *Dahir portant loi n°1-73-282 du 28 rebia II 1394 (21 mai 1974) relatif à la répression de la toxicomanie et la prévention des toxicomanes*, Bulletin Officiel nr 3214, June 5, 1974; available at <http://adala.justice.gov.ma/production/html/Fr/liens/..%5C71772.htm>
- 47 Chouvy (2005)
- 48 Benabud (1957)
- 49 Chouvy and Afsahi (2014)
- 50 Chouvy and Afsahi (2014)
- 51 Le Braz (2010)

- 52 Karam (2013)
- 53 Kozma (2011)
- 54 Bruun, Pan & Rexed (1975), pp. 181-82; Mills (2003), pp. 154-56. Italy only consented to the conference after its request was accepted that the trade in Indian hemp and hashish be considered. See: Taylor (1969).
- 55 Mills (2003), pp. 154-56
- 56 Musto (1999), p. 51
- 57 Bruun Pan and Rexed (1975), p. 182
- 58 Musto (1972)
- 59 Bewley-Taylor & Jelsma (2011)
- 60 Chevannes (2001)
- 61 Fraser (1974)
- 62 Mills (2003), p. 160
- 63 Mills (2003), p. 167
- 64 Kendell (2003); Mills (2003), pp. 169-71
- 65 Kozma (2011)
- 66 Kendell (2003)
- 67 Mills (2003), p. 173
- 68 Bewley-Taylor (2002b), p. 32
- 69 The 1925 Convention included the following provisions in a separate chapter on Indian Hemp (Chapter IV). Article 11 §1 stated: "In addition to the provisions of Chapter V [Control of International Trade] which shall apply to Indian hemp and the resin prepared from it, the Contracting Parties undertake: (a) To prohibit the export of the resin obtained from Indian hemp and the ordinary preparations of which the resin forms the base... to countries which have prohibited their use, and in cases where export is permitted, to require the production of a special import certificate issued by the Government of the importing country stating that the importation is approved for the purposes specified in the certificate and that the resin or preparations will not be re-exported". Article 11 §2 established the general rule: "The Contracting Parties shall exercise an effective control of such a nature as to prevent the illicit international traffic in Indian hemp and especially in the resin". See: UNODC (2009).
- 70 Kendell (2003)
- 71 UNODC (2009); Bewley Taylor and Jelsma (2012a)
- 72 The Netherlands was one of the first countries in which cannabis became the object of statutory regulation. The import and export of cannabis was introduced into the Opium Act in 1928. Possession, manufacture, and sale became criminal offences in 1953. Statutory decriminalization of cannabis took place in 1976. De facto decriminalization, however, set in somewhat earlier. See: Korf (2002)
- 73 Ballotta, Bergeron & Hughes (2009)
- 74 Fraser (1974)
- 75 Bruun, Pan & Rexed (1975), p. 185-87; Mills (2013), p. 44
- 76 NYT (1926). The issue received more attention as the previous year a group "said to be Mexicans" had been growing marijuana in public parks in New York City, causing quite an uproar, followed by features in Sunday tabloids about the "fearful consequences of using this allegedly habit-forming and dreadful weed".
- 77 The research continued off and on well into the 1930s, due to soldiers' ongoing habit of marijuana smoking, but did not significantly alter the conclusions. Commanders unduly emphasized the effects of marijuana and delinquency, "disregarding the fact that a large proportion of the delinquents are morons or psychopaths, which conditions of themselves would serve to account for delinquency". Marijuana use among soldiers was prohibited. See: Siler et al. (1933). This study built upon the Panama Canal Zone Military Investigations (1916-1929) comprising a succession of military boards and commissions on marijuana smoking by U.S. military personnel stationed in the Zone.
- 78 Musto (1999), pp. 221-23. However, other studies indicate that prior to the efforts of the FBN to publicize the evils of marijuana in the mid-1930s the drug was virtually ignored on the national level. See: Himmelstein (1983).
- 79 McWilliams (1990), pp. 66-7
- 80 Bruun, Pan and Rexed (1975) p. 139; Bewley-Taylor (2002), p. 158
- 81 Taylor (1969); Bewley-Taylor & Jelsma (2011a)
- 82 Taylor (1969), p. 297; Bruun, Pan & Rexed (1975), p. 138
- 83 McAllister (2000), p. 123
- 84 NYT (1936); Bewley-Taylor (2001), p. 41
- 85 McWilliams (1990), p. 70
- 86 Gerber (2004), p. 9
- 87 Anslinger and Cooper (1937)
- 88 McWilliams (1990), pp. 67-80. The act only required purchase of a one-dollar tax stamp by all who possessed, traded, or prescribed cannabis. "But the devil was in its associated 60 pages of regulations, which detailed the application and maintenance process for obtaining the stamp. Doctors who wished to prescribe it had to give the FBN extensive information, including the names and addresses of patients, circumstances surrounding the prescriptions, and so on. Frequent reports and Treasury Department inspections were required, and errors were punishable by a fine of \$2,000 (about \$25,000 in today's dollars), a five-year imprisonment, or both." See: Geller (2007).
- 89 McWilliams (1990), p. 75; see also: Musto (1999), pp. 228-229
- 90 Anslinger (1938)
- 91 Bruun, Pan and Rexed (1975), p. 193
- 92 Bouquet (1951)
- 93 See for a good and recent overview: Measham, Nutt and Hulbert (2013).
- 94 Zuardi, et al. (2012); Measham, Nutt and Hulbert (2013).
- 95 Zuardi, et al. (2012)
- 96 Measham, Nutt and Hulbert (2013); Frisher et al. (2009).
- 97 Degenhardt, Ferrari, Calabria, Hall, Norman et al. (2013).
- 98 Mills (2003), pp. 82-92.
- 99 Mills (2003), pp. 91-92
- 100 Mills (2003), p. 119
- 101 Mills (2003), p. 211
- 102 Mills (2003), pp. 183-87

- 103 Mills (2003) mentioning: John Warnock, 'Twenty-Eight Years' Lunacy Experience in Egypt (1895-1923)', *Journal of Mental Science*, 70 (1924): 233-61
- 104 The 1920-21 annual report of the Abbasiya Asylum in Cairo, the larger of Egypt's two mental hospitals only attributed 2.7 per cent of its admissions to cannabis and even that modest number represented "not, strictly speaking, causes, but conditions associated with the mental disease." See Kendell (2003).
- 105 See for instance Murphy (1963)
- 106 Salazar Viniegra (1938), Campos (2012), pp. 225-26. According to Salazar "the suggestive load and the ideas which surround marihuana are formidable and have accumulated during the course of time. Marihuana addicts, journalists and even doctors have been the ones charged with transmitting the legend from generation to generation." See: Bonnie and Whitebread (1974), pp.193-94.
- 107 Walker (1996), pp. 67-71; Bonnie and Whitebread (1974), pp.193-94; Astorga (2003), p. 219, De Mauleón (2010).
- 108 Walker (1996), pp. 67-71
- 109 Pérez Montfort (1995)
- 110 Carey (2009)
- 111 Salazar Viniegra (1939)
- 112 Walker (1996), pp. 67-71
- 113 Astorga (2003), p. 209; Walker (1996), pp. 67-71
- 114 Carey (2009)
- 115 Leopoldo Salazar Viniegra "had the audacity to point out certain facts that are now virtual givens in the literature on drug policy—that prohibition merely spawned a black market whose results were much worse than drug use itself and that, in particular, marijuana prohibition led to the harassment and imprisonment of thousands of users who posed very little threat to society [...] Though historians have correctly viewed Salazar as a victim of an increasingly imperialist U.S. drug policy, it has not been sufficiently emphasized that he was also a victim of Mexico's home-grown anti-drug ideology that still dominates public opinion today." See: Campos (2012).
- 116 Murphy (1963)
- 117 IJDP (2010), pp. 261–264
- 118 Bruun, Pan and Rexed (1975), p. 195
- 119 McWilliams (1990), pp. 102-103
- 120 New York Academy of Medicine (1944); Woodiwiss (1988), pp. 58-59
- 121 May (1948), p. 350
- 122 Bewley-Taylor (2002b), p. 47
- 123 Bewley-Taylor and Jelsma (2011a)
- 124 Mills (2013), pp. 97-98
- 125 Mills (2013), pp. 97-98
- 126 Mills (2013), p. 98, quoting E/CN.7/216, Report of the Commission on Narcotic Drugs (Fifth Session)
- 127 Bewley-Taylor and Jelsma (2011a)
- 128 BJA (1992)
- 129 McAllister (2000), pp. 156-57; see also Bruun, Pan and Rexed (1975), p. 124-25
- 130 WHO (1952)
- 131 King (1974)
- 132 Bruun, Pan & Rexed (1975), p. 124 and pp. 196-97. The booklet was originally published as an article in Spanish as 'La marihuana en la America Latina; la amenaza que constituye', *Revista de la Asociacion Medica Argentina*, Buenos Aires, 1948.
- 133 Kalant (1968), p. 25
- 134 Goode (1970), pp. 231-32
- 135 Kaplan (1975), pp. 101-02
- 136 Bruun, Pan and Rexed (1975), pp.196-197
- 137 Bruun, Pan and Rexed (1975), p. 197
- 138 E/CN.7/L.916 (1955)
- 139 E/CN.7/L.916 (1955), Bruun, Pan and Rexed (1975) pp. 198-99
- 140 E/CN.7/L.916 (1955), Mills (2013) pp. 102-03
- 141 Bruun, Pan and Rexed (1975) pp. 198-99, quoting a letter from Halbach to Bureau of Narcotics of 27 October 1965.
- 142 As Mills discusses, while evidence concerning "routine users of cannabis engaged in harmless activities" were available during discussions of the drug in 1957, the Commission did not refer to them. Moreover, in presenting its summary of where the Commission had reached on cannabis "as it entered the final phase of redrafting the Single Convention" it quoted Wolff's conclusion that "cannabis drugs were dangerous from 'every point of view'". Mills (2013), p. 107
- 143 Bewley-Taylor and Jelsma (2011)
- 144 Bewley-Taylor and Jelsma (2011) quoting E/CONF.34/24 (1964), pp. 58–62; Mills (2013), p.112
- 145 Bewley-Taylor and Jelsma (2011)
- 146 Bewley-Taylor and Jelsma (2011)
- 147 Bewley-Taylor (2012) p.154
- 148 Bewley-Taylor & Jelsma (2011); Bewley-Taylor (2012) pp. 154-156
- 149 Leichman, Abigail (2012). The work in Israel initiated research into medical use of cannabis, resulting in a thriving medical cannabis industry that now covers some 10,000 patients. However, the first true cannabinoids were isolated and described by the Scottish biochemist Alexander R. Todd in 1939 and the American Roger Adams. The latter's extensive 1940 series in the *Journal of the American Chemical Society* served as the primary basis of cannabinoid knowledge for decades. Commissioned by the FBN in the late 1930s, Adams produced moderately pure cannabidiol and cannabinol from wild hemp. See: Geller (2007).
- 150 WHO Expert Committee reports, available at :  
CND reports available at: <http://www.unodc.org/unodc/en/commissions/CND/session/cnd-documents-index.html>
- 151 Secretariat of the International Narcotics Control Board, Psychotropics Control Section, Vienna 2012.
- 152 WHO (1969) Geneva, pp. 19-20
- 153 WHO (1970) Geneva, p. 13
- 154 E/CONF.58/7/Add.1 (1973), p. 38
- 155 Ibid., p. 78

- 156 In recent years, CND resolutions refer to “illicit cultivation of crops used for the production of narcotic drugs and psychotropic substances”, an improvement over the imprecise “illicit crops” or “illicit cultivation of narcotic drugs”. But the addition of “psychotropic substances” to that improved wording is a terminological error as cultivation and plants were explicitly left out of the 1971 Convention. Hence there is no such thing as “illicit cultivation of crops used for the production of psychotropic substances”.
- 157 WHO (2006), pp. 2-3
- 158 Bruun, Pan and Rexed (1975), p. 201
- 159 Bewley-Taylor (2012), p. 158
- 160 Room et al. (2008) p. 96; Ballotta, Bergeron & Hughes (2009) pp. 106-09
- 161 “Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers of drugs shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration.” Article 38 of the Single Convention as amended by the 1972 Protocol follows very closely article 20 of the 1971 Convention. See: E/CN.7/588 (1976), p. 330.
- 162 Blickman & Jelsma (2009)
- 163 National Commission on Marihuana (1972).
- 164 Blickman & Jelsma (2009)
- 165 De Kort (1994), pp. 417-427, quoting a Memorandum [Nota] of 4 January 1974 in the *Nederlandse Staatscourant* (Netherlands State Gazette), No. 5, 8 January 1974.
- 166 Carter (1977)
- 167 Musto and Korsmeyer (2002), pp. 185-241.
- 168 See for instance: Blickman (2009)
- 169 Bewley-Taylor (2012), pp. 157-190; Rosmarin and Eastwood (2012)
- 170 Blickman & Jelsma (2009)
- 171 An owner of a dispensary estimated that 40 percent of clients suffer from serious illnesses such as cancer, AIDS, glaucoma, epilepsy and multiple sclerosis. The rest claim to have less clearly defined ailments like anxiety, sleeplessness, attention deficit disorder, and assorted pains. See: Samuels (2008)
- 172 Some observers pointed a finger at the United States as instigating the attack, see Bewley-Taylor (2012), pp. 202-05. See also: Blickman (2002).
- 173 UN General Assembly resolution 59/160 (2004)
- 174 WDR (2006) p.156
- 175 See, for example: Woodridge, E, Barton, S, Samuel, J, Osorio, J, Dougherty, A, & Holdcroft A, (2005) ‘Cannabis Use in HIV for Pain and Other medical Symptoms’, *Journal of Pain and Symptom Management*, Vol. 29, Issue 4, pp. 358-357
- 176 WDR (2006) p. 186
- INCB (1981), *Report for 1981*, paras. 10, 150, 152, 153, 155, 164, 165.
- 3 INCB (1982), *Report for 1982*, para. 130.
- 4 INCB (1983), *Report for 1983*, paras. 8, 10, 130.
- 5 INCB (1983), *Report for 1983*, para. 118
- 6 See for example INCB (1989), *Report for 1989*, para 109: “The drug policy of the Netherlands emphasizes the prevention of abuse and the rehabilitation of drug addicts [...] For the country as a whole, overall the abuse of cannabis’ has ‘remained stable.”
- 7 INCB (1991), *Report for 1991*, para. 171
- 8 INCB (1984), *Report for 1984*, paras. 10 & 11
- 9 INCB (1992), *Report for 1992*, paras. 12-23
- 10 In a reference to article 3 of the treaty, paragraph 15 (b) notes that “Unless to do so would be contrary to the constitutional principles and basic concepts of their legal systems, only the 1988 Convention clearly requires parties to establish as criminal offences under the law the possession, purchase or cultivation of controlled drugs for the purpose of non-medical consumption”. See: INCB (1992), *Report for 1992*.
- 11 As discussed in the main text of this publication, under the terms of article 49 the expiration of transitional reservations, including those regarding the suppression of non-medical use of cannabis, was 12 December 1989. Consequently in the Annual Report for 1989, the Board notes that in relation to suppressing the officially sanctioned non-medical use of cannabis ‘The objective of the Convention has been achieved... with the possible exception of Bangladesh.’ See: INCB (1989), *Report for 1989*, para. 48
- 12 INCB (1992), *Report for 1992*, para. 22
- 13 Indeed, in 1993 the Board referred to cannabis policy in the Netherlands in the following terms: ‘The dialogue between the Government of the Netherlands and the Board has led to lively discussion among the general public and at the governmental level in that country. The Board is confident that the Government of the Netherlands will take the necessary measures to limit the cultivation of cannabis and the expansion of so-called coffee-shops.’ See: INCB (1993), *Report for 1993*, para. 285
- 14 INCB (1994), *Report for 1994*, para. 213
- 15 INCB (1994), *Report for 1994*, Supplement, paras. 39 & 40
- 16 INCB (1994), *Report for 1994*, Supplement, para. 41
- 17 INCB (1997), *Report for 1996*, para. 209
- 18 INCB (1997), *Report for 1996*, paras. 321 & 359
- 19 ADLRF (1996), cited in Bewley-Taylor (2012b), pp. 237-8.
- 20 INCB (1997), *Report for 1996*, paras. 321 & 359. Under the subheading “Changing the environment that promotes drug taking” the Board was critical of the portrayal of cannabis in the media, the positive promotion of hemp products, political campaigns based on legalization or the medical use of cannabis in U.S. and tolerant law enforcement practices.
- 21 INCB (1999), *Report for 1998*, para. 35
- 22 INCB (1999), *Report for 1998*, para. 105
- 23 INCB (1999), *Report for 1998*, para. 107
- 24 It seems that the term ‘UNGASS decade’ was first officially

### The INCB and cannabis: from description to condemnation

- 1 See the INCB website: <http://incb.org/incb/en/about/mandate-functions.html>
- 2 See for example, INCB (1980), *Report for 1980*, para. 8; and

used in E/CN.7/2008/CRP.17 (2008). Since then it has also been used to refer more generally to the period 1998-2009 because the review of the 1998 UNGASS targets did not take place until 2009. See Bewley-Taylor, (2012b), p. 2.

25 INCB (2000), *Report for 1999*. The Board also expressed concern for the availability for cannabis seeds, hemp shops and the internet, see: paras. 424, 455, 456, 474

26 INCB (2001), *Report for 2000*, paras 503 & 524

27 INCB (2002a), *Report for 2001*, para. 214.

28 INCB (2002a), *Report for 2001*, para. 225

29 INCB (2003), *Report for 2002*, paras 185 & 302

30 See INCB (2003), *Report for 2002*, para. 499. Here the board notes that the reclassification announcement could cause “confusion and widespread misunderstanding”.

31 Travis (2003) and Ainsworth (2003)

32 For the full account of the Select Committee discussion, see: HASC (2003).

33 Blickman (2002)

34 INCB (2002b)

35 Bewley-Taylor (2012b), pp. 200-206

36 Bewley-Taylor (2012b), pp. 200-206

37 INCB (2002a), *Report for 2001*, p. 36

38 *Ibid.*

39 INCB (2002b)

40 INCB (2002a), *Report for 2001*, p. 37; for further discussion, see: Bewley-Taylor (2012b), pp. 206-211.

41 See for example, INCB (2004), *Report for 2003*, para. 141; INCB (2005), *Report for 2004*, para. 166; and INCB (2006), *Report for 2005*, para 80.

42 See Bewley-Taylor (2012), p. 248

43 INCB (2009), *Report for*, para. 432.

44 INCB (2004), *Report for 2003*, para. 329

45 INCB (2005), *Report for 2004*, paras. 216-220

46 INCB (2009), *Report for 2008*, para. 182. Also see: IDPC (2009), pp. 7-8.

47 For Canada, see for example, INCB (2005), *Report for 2004*, para. 301, and INCB (2006), *Report for 2005*, para. 377; and for Jamaica see INCB (2005), *Report for 2004*, para. 277

48 INCB (2007), *Report for 2006*, para. 584

49 INCB (2009), *Report for 2008*, Foreword. For further discussion, see: IDPC (2009), pp. 7-8.

50 INCB (2009), *Report for 2008*, para 34

51 INCB (2009), *Report for 2008*, Recommendation 21

52 E/2009/28 (2009)

53 See INCB (2010), *Report for 2009*, para. 74 and Recommendation 29; and INCB (2011), *Report for 2011*, Special topics, ‘Use of cannabis seeds for illicit purposes’ (paras. 249-258) and Recommendation 27

54 See for example INCB (2012a), *Report for 2011*, para. 93

55 INCB (2010), *Report for 2009*, para. 400

56 See for example: INCB (2012a), *Report for 2011*, para. 429.

57 INCB (2013), *Report for 2012*, para. 221.

58 Mexico, Argentina, Brazil and Colombia

59 IDPC (2010), pp. 7-8.

60 For a full discussion see IDPC (2010), pp. 7-10.

61 INCB (2011), *Report for 2010*, paras. 709 & 395

62 IDPC (2011), p. 9.

63 IDPC (2011), p. 9.

64 INCB (2011), *Report for 2010*, para. 394.

65 Indeed, “The notion that many voters within the Golden State had any idea of the existence of the UN drug control conventions seems farfetched.” See: IDPC (2011), p. 9.

66 INCB (2011), *Report for 2009*, paras. 277-285 & 400

67 INCB (2012a), *Report for 2011*, para 281. Also see IDPC (2012), pp. 7-8.

68 INCB (2012a), *Report for 2012*, para. 288

69 INCB (2013), *Report 2012*, paras. 81, 451, Recommendation 5

70 As IDPC has noted, the Board is on shakier ground where it attempts to link increase in daily cannabis “abuse” with “decreases in the perceptions of risks associated with the use of cannabis” within the “context of campaigns promoting legalization for medical purposes, as well as decriminalization of cannabis for non-medical purposes” (para. 507). See: IDPC (2013), p. 9. There are also curious incongruities in the Board’s language discussing policy shifts in Uruguay. In paragraph 258, the *Report for 2012* states that, if implemented, the cannabis law “would be contrary to the provisions of the conventions. Later, however, the report notes that, if adopted, “the law *could* be in contravention’ of the conventions” [emphasis added] (para 513). This may be nothing more than an editorial oversight, but it might also suggest a difference in point of view among the drafters of the report.

71 INCB (2013), *Report for 2012*, para. 258

72 IDPC (2013), p. 15

73 Jelsma (2013)

### Cannabis reforms: the scope and limits of treaty latitude

- 1 Bewley-Taylor and Jelsma (2012)
- 2 Boister (2001), p. 22
- 3 The INCB’s monitoring mandate under the 1988 Convention is very restricted, largely limited to its precursor control regime.
- 4 United Nations (1961), article 48 on Disputes:
  1. *If there should arise between two or more Parties a dispute relating to the interpretation or application of this Convention, the said Parties shall consult together with a view to the settlement of the dispute by negotiation, investigation, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their own choice.*
  2. *Any such dispute which cannot be settled in the manner prescribed shall be referred to the International Court of Justice for decision.*
- 5 United Nations (1969), article 31 (1)

- 6 Dorn and Jameson (2000)
- 7 For examples from Cambodia, Pakistan and Egypt see: *World Wide Weed*, a Global Post in-depth series, 27 February 2013. <http://www.globalpost.com/series/world-wide-weed-marijuana-legalization-global>
- 8 E/CN.7/590 (1998) p. 82
- 9 Boister (2001), p. 81
- 10 United Nations (1973), p. 112.
- 11 Boister (2001), p. 125
- 12 Domestic legal interpretations do not always take into account this flexibility regarding cultivation. See for example, the 2005 US Supreme Court case, *Gonzales v. Raich*. Although complicated by the fact that this is related to cultivation of marijuana for personal *medical* use, the Supreme Court ruled that the Drug Enforcement Administration was acting lawfully in seizing and destroying six plants. See: Thoumi (forthcoming).
- 13 E/CN.7/590 (1998), pp. 85-95
- 14 See: 'Overview of drug laws and legislative trends in Argentina', TNI Drug Law Reform in Latin America (webpage), <http://www.druglawreform.info/en/country-information/argentina>
- 15 While many treaties are subject to member states' constitutional principles, the basic rules of international law provide that a state party "may not invoke the provision of its internal law as a justification for its failure to perform a treaty". See: United Nations (1969), article 27.
- 16 Boister (2001), p. 125, footnote 228
- 17 Oregon, California, Colorado, Ohio, Maine, Minnesota, Mississippi, New York, Nebraska, Connecticut, Louisiana, Massachusetts, New Jersey, Nevada, Vermont, Wisconsin, West Virginia. See: Room et al. (2008), pp. 85-86
- 18 Pacula, Chiqui, and King (2004)
- 19 South Australia, the Australian Capital Territory, the Northern Territory and Western Australia.
- 20 Only very few European countries (Sweden, Latvia and Cyprus) exercise the option to impose prison sentences for possession of small amounts. For an overview of policies see: Blickman and Jelsma (2009); Room et al.(2008); and Rosmarin and Eastwood (2012)
- 21 Van het Loo, Van Beusekom and Kahan (2002); Domoslawski (2011)
- 22 INCB (2005), *Report for 2004*
- 23 Domoslawski (2011)
- 24 EMCDDA (no date), *Legal Topic Overviews*
- 25 INCB (2010), *Report for 2009*
- 26 United Nations (1973), p. 113, and p. 402.
- 27 Boister (2010), p.125
- 28 *Noy v State* (2003)
- 29 Barriuso (2011)
- 30 For a more detailed history of the legal context of the cannabis clubs, see Barriuso (2011).
- 31 Barriuso (2011)
- 32 Barriuso (2012a). The procedure was interrupted by regional elections but resumed in September 2012. For Catalonia, see: Subirana (2013) and Sustainable Drug Policies Commission (2013).
- 33 Sustainable Drug Policies Commission (2013)
- 34 Barriuso (2012b)
- 35 CLEAR (2013). See for a list of Cannabis Social Clubs already established, awaiting legislative change that would allow them to become operative: <http://ukcsc.co.uk/official-club-list/>
- 36 See for instance: Le Devin (2013) and AFP (2013)
- 37 Barriuso (2012c)
- 38 DPA (2012)
- 39 Karam (2013)
- 40 Niesink & Rigter (2013)
- 41 INCB (2004), *Report for 2003*, p. 37. Furthermore, while some clauses within article 2, paragraph 5, of the Single Convention might be read as limiting the use of medical marijuana to research purposes only, inclusion of the phrase "in its opinion" on two occasions confirms that parties are within their rights to permit the use of marijuana for medical purposes.
- 42 INCB (2003), *Report for 2002*, p. 67
- 43 Bewley-Taylor (2010), p. 5
- 44 INCB (2009), *Report for 2008*, p. 66
- 45 United Nations (1961). paragraph 3 of article 23, which focuses on National Opium Agencies and to which Article 28 on the Control of Cannabis refers, notes: "The governmental functions... shall be discharged by a single government agency if the constitution of the Party concerned permits it."
- 46 Ballotta, Bergeron and Hughes (2009), p. 112. Apart from more than twenty U.S. states, regulations for medicinal use of cannabis are in place in the Netherlands, Canada, Spain, Germany, Austria, Israel, Finland, Italy and the Czech Republic.
- 47 IDPC (2008), p. 11
- 48 INCB (1998), *Report for 1997*
- 49 Blickman (2002); Bewley-Taylor (2012b), pp. 200-206.
- 50 Grund and Breeksema (2013)
- 51 United Nations (1988). Article 3, para. 6 states that parties "shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement measures in respect of those offences, and with due regard to the need to deter the commission of such offences."
- 52 "The Government of the Kingdom of the Netherlands accepts the provisions of article 3, paragraphs 6, 7, and 8, only in so far as the obligations under these provisions are in accordance with Dutch criminal legislation and Dutch policy on criminal matters." The Dutch reservation can be found at: United Nations Treaty Collection, Chapter VI: Narcotic Drugs And Psychotropic Substances, (19) United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-19&chapter=6&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en)
- 53 United Nations (1961), article 4 on General Obligations
- 54 Y. Buruma, professor of criminal law and criminology,

- recently appointed to the Dutch Supreme Court, elaborated this interpretation as a member of a drug-policy commission for the Dutch social democratic party, the PvdA. Such a broad interpretation appealing to the general purpose of the treaty, in his opinion, is not uncommon in international law, citing an example from the European Human Rights Court. For an unofficial English translation, see: <http://www.drugtext.org/Law-and-treaties/european-integration-and-harmonization.html>
- 55 See for example: United Nations (1973), p. 111.
- 56 United Nations (1973), pp. 275–276. The Commentary explains that a government “might come to the conclusion that it cannot possibly suppress a significant diversion into the illegal traffic without prohibiting the cultivation of the plant” and that the “decision whether the conditions of article 22 for prohibition exist is left to the judgement, but not entirely to the discretion of the Party concerned.” It goes on to note: “A Government which for many years, despite its efforts, has been unable to prevent large-scale diversion of drugs from cultivation can hardly be of the opinion that prohibition of such cultivation would not be ‘the most suitable measure ... for protecting public health and welfare and preventing the diversion of drugs into the illicit traffic.’”
- 57 UNODC (2009), p. 61
- 58 For results and content of the ballot initiatives, see Ballotpedia at <http://ballotpedia.org>
- 59 Crick, Haase and Bewley-Taylor (2013)
- 60 Crick, Haase and Bewley-Taylor (2013)
- 61 Crick, Haase and Bewley-Taylor (2013)
- 62 Crick, Haase and Bewley-Taylor (2013)
- 63 Crick, Haase and Bewley-Taylor (2013)
- 64 Miles (2013); Tulchin and O’Neil (2013)
- 65 For a good overview on the reasons why ballot initiatives passed or failed, see: Crick, Haase and Bewley-Taylor (2013).
- 66 Swift (2013)
- 67 Richey (2013)
- 68 Cole (2013)
- 69 Crick, Haase and Bewley-Taylor (2013)
- 70 Richey (2013)
- 71 Crick, Haase and Bewley-Taylor (2013)
- 72 UNIS/NAR/1153 (2012)
- 73 INCB (2013), *Report for 2012*, Recommendation 5, p. 116
- 74 Crick, Haase and Bewley-Taylor (2013)
- 75 Gray (2013)
- 76 Crick, Haase and Bewley-Taylor (2013)
- 77 Crick, Haase and Bewley-Taylor (2013)
- 78 Gray (2013)
- 79 MRE (2014)
- 80 Haberkorn (2013)
- 81 Conde (2013)
- 82 Ruchansky (2012)
- 83 INCB (2012b)
- 84 Jelsma (2013)
- 85 MRE (2014)
- 86 E/CN.7/2008/L.16 (2008)
- 87 Intervención del Jefe de Delegación de Uruguay (2013)
- ### Treaty reform options
- 1 WHO (1952), p. 11
- 2 WHO (1965), p. 11
- 3 Danenberg et al. (2013)
- 4 Commission on Narcotic Drugs, *Exploration of all aspects related to the use of cannabis seeds for illicit purposes*, CND Resolution 52/5, March 2009
- 5 WHO (2012), p. 16
- 6 Danenberg et al. (2013)
- 7 E/CN.7/2014/10 (2014), p. 18.
- 8 United Nations (1973), p.90. The Commentary also emphasized: “In no case can the Commission decide to extent control to a substance if the World Health Organization has not recommended to do it.” And: “It is suggested that the Commission should in principle accept the pharmacological and chemical [i.e. as regards “convertibility”] findings of the World Health Organization. When it does not accept the recommendation of the World Health Organization, it should be guided by other considerations such as those of an administrative or social nature.”
- 9 See for more details E/CN.7/2014/10 (2014), Annex I, Procedure to change the scope of control of substances under the 1961 Convention and the 1971 Convention.
- 10 Danenberg et al. (2013).
- 11 According to the 2009 Constitution: “The State shall protect native and ancestral coca as cultural patrimony, a renewable natural resource of Bolivia’s biodiversity, and as a factor of social cohesion; in its natural state it is not a narcotic. It’s revaluing, production, commercialization and industrialization shall be regulated by law”. Constitution of the Plurinational State of Bolivia, article 384. The Constitution came into effect on February 7, 2009, after more than 61 per cent of voters approved its text in a referendum on January 25, 2009. See: <http://pdba.georgetown.edu/Constitutions/Bolivia/bolivia09.html>
- 12 Jelsma, M. (2011)
- 13 IDPC (2011)
- 14 Helfer (2006), p. 379
- 15 Disproportionately harsh judgements and punishments were justified in the 1578 Inquisition handbook with the argument that “punishment does not take place primarily and per se for the correction and good of the person punished, but for the public good in order that others may become terrified and weaned away from the evils they would commit”. See: Jelsma (2011).
- 16 Blickman (2013)
- 17 TNI/WOLA (2013)
- 18 This is argued for example in Room (2012b).
- 19 Errors in the English translation of the Bolivian reservation have caused confusion and while some have since been rectified, a few remaining but crucial punctuation

- differences with the Spanish original persist. A correct English version would read: “The Plurinational State of Bolivia reserves the right to allow in its territory: traditional coca leaf chewing; the consumption and use of the coca leaf in its natural state; for cultural and medicinal purpose; such as its use in infusions; and also the cultivation, trade and possession of the coca leaf to the extent necessary for these licit purposes. At the same time, the Plurinational State of Bolivia will continue to take all necessary measures to control the cultivation of coca in order to prevent its abuse and the illicit production of the narcotic drugs which may be extracted from the leaf.”
- 20 United Nations (1973), p. 476.
- 21 United Nations (1969), article 19.
- 22 For a general discussion of treaty interpretation see ASIL and IJA (2006)
- 23 C.N.194.2009.TREATIES-2 (2009).
- 24 All G8 countries, the United States, United Kingdom, France, Italy, Germany, the Russian Federation, Japan and Canada, plus Sweden, Denmark, Singapore, Slovakia, Estonia, Bulgaria, Latvia, Malaysia, Mexico and Ukraine. See: Jelsma (2011).
- 25 E/2011/58 (2011).
- 26 Ibid.
- 27 United Nations (1961), article 48, para. 2.
- 28 The Beckley Foundation published in 2012 a report, edited by Robin Room, detailing the amendments required in order to enable the option of legally regulated markets for all drugs. See: Room (2012a).
- 29 United Nations (1969), article 41.
- 30 Abduca and Metaal (2013)
- 31 Aust (2007), p. 274
- 32 Klabbers (2006), p. 1086
- 33 Klabbers (2006), p. 1088
- 34 *Vienna Convention on the Law of Treaties 1969*, (Done at Vienna on 23 May 1969. Entered into force on 27 January 1980), United Nations, *Treaty Series*, vol. 1155, p. 331. Article 48 says that a “State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty”. Article 62 provides that a “fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of the treaty, and which was not foreseen by the parties” can be invoked as grounds for withdrawing from a treaty if “the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and the effect of the change is radically to transform the extent of obligations still to be performed under the treaty”.
- 35 Leinwand, M. (1971), pp. 413-441
- 36 Room, R., et al. (2008)
- 37 Bewley-Taylor, D. (2002)
- 38 1969 Single Convention on Narcotic Drugs, op.cit., Article 14.
- 39 Helfer, L. R., (2005), p. 1588
- 40 Bewley-Taylor, D., (2012)
- 41 United Nations Convention against Transnational Organized crime (2000) and the United Nations Convention against Corruption (2003). See <http://www.unodc.org/unodc/en/treaties/index.html>
- 42 See Bewley-Taylor, D, *International Drug Control: Consensus Fractured*, (Cambridge University press, 2012) pp. 283-290.
- 43 *Commentary 1961 Single Convention*, op.cit., pp. 462-463
- 44 *Commentary 1961 Single Convention*, op.cit., pp. 462,
- 45 For example, *Cannabis Policy: Moving Beyond Stalemate*, op.cit.
- 46 Nine countries are implementing a national alcohol prohibition policy (Afghanistan, Bangladesh, Brunei, Iran, Kuwait, Libya, Saudi Arabia, Sudan and Yemen) and there are many different regulatory models co-existing in the world today, ranging from very restrictive state controls to almost unrestricted free markets. See: [http://en.wikipedia.org/wiki/List\\_of\\_countries\\_with\\_alcohol\\_prohibition](http://en.wikipedia.org/wiki/List_of_countries_with_alcohol_prohibition)
- 47 Alcohol prohibition did not immediately end when the 21st Amendment was ratified in December 1933. The Amendment left the decision to the states and it was not until 1966 that Mississippi became the last state to repeal prohibition. Even after that many restrictions remained in place at state or county level. Kansas for example did not allow sale of liquor “by the drink” (on premises) until 1987. Quite a few U.S. counties are still “dry” today in the sense that the sale of alcohol is prohibited. See for example: [http://en.wikipedia.org/wiki/Prohibition\\_in\\_the\\_United\\_States#Post-repeal](http://en.wikipedia.org/wiki/Prohibition_in_the_United_States#Post-repeal)
- 48 See for a summary, background and analysis of the two OAS reports: Youngers (2013).
- 49 OAS (2013a), p. 104.
- 50 OAS (2013a), p. 104.
- 51 *Scenarios for the Drug Problem in the Americas, 2013-2025*, by the Scenario Team appointed by the Organization of American States under the mandate given to the OAS by the Heads of Government of Member States meeting at the 2012 Summit of the Americas in Cartagena de Indias, OAS official records series.
- 52 WHO (2003), p.11
- 53 WHO (2006), pp. 2-3
- 54 A/RES/S-20/2, Political Declaration, General Assembly Special Session on the World Drug Problem, 10 June 1998.
- 55 *WHO Recommendations to the Commission on Narcotic Drugs*, WHO statement at the CND, delivered by W. Scholten, Vienna, March 2007.
- 56 Bewley-Taylor (2012b), pp. 211-213
- 57 E/CN.7/2013/1 (2013), p.6.

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

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

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

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

## **Transnational Institute**

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

## **Global Drug Policy Observatory**

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