

Charting a Wiser Course

Human Rights & the World Drug Problem



A Report of the
Special Committee on
Drugs and the Law of the
New York City Bar Association



**CHARTING A WISER COURSE:
HUMAN RIGHTS AND THE WORLD DRUG PROBLEM**

**A REPORT OF THE SPECIAL COMMITTEE ON
DRUGS AND THE LAW
OF
THE NEW YORK CITY
BAR ASSOCIATION**

April 19, 2016

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Foreword - The Wiser Course

By The Honorable Robert W. Sweet

The Report is a careful authoritative assessment of the structure of drug control worldwide, its development and complications. Among the difficult and complicated issues noted is the interrelationship between drug control and other international obligations and norms, particularly human rights. The Report establishes the failure of the current regimen, most particularly the use of criminal prohibition to deal with what is in my view primarily a human right to self-determination, which when abused becomes a health problem. The facts surrounding this issue are set forth with clarity and authority.

“*Charting a Wiser Course*” is the culmination of thirty years of commitment by the Committee on Drugs and the Law of the New York Bar Association. Since 1986, the members of the Committee have served the Bar and society by studying and reporting on society’s treatment of drugs and mind altering substances, a treatment marked by fear, ignorance and unreality.¹ As an early participant in the controversies surrounding drug control, I am grateful to the Committee for bringing this report to my attention and for the Committee’s research and groundbreaking contributions.

The current report comes at a moment of accelerating change, scrutiny and concern. The report can well be considered as a foundation document for reform of the international structure of drug control at the upcoming United Nations General Assembly Special Session on the World Drug Problem (UNGASS 2016). It also is a clear call for long overdue review of United States policy.

The winds of change, new alternatives, national and state initiatives, conceptual revisions are set forth. “*Charting a Wiser Course*” depicts a moment in time when reevaluation and change, difficult and complicated, may be possible. From the perspective of a judge confronted by the effects of the current drug laws, their failure is manifest. A multi-billion dollar industry is criminally prohibited in the main, untaxed, outside the law and regulated only by street violence. The enforcement is discriminatory and ineffective. “*Charting a Wiser Course*” carefully sets forth the history, relevant facts and current attitudes surrounding this complicated and frequently misunderstood problem of human conduct.

The Committee has remained consistent over time and has developed an overarching perspective. Every policy maker and concerned citizen should receive and study this authoritative report.

¹ The directly relevant lessons of Prohibition of alcohol, and the effects of its criminal sanctions, its repeal, and the present regulatory regimen have largely been ignored by policy makers to date.

Introduction

In 1986, the New York City Bar Association (“City Bar” or the “Association”) formed the Special Committee on Drugs and the Law (“the Committee”). The Committee was formed to research and analyze why the criminalization of drug use, manufacture, and distribution had neither solved nor ameliorated the problems associated with the manufacture, distribution, possession and use of drugs. The Association tasked the Committee with studying existing drug laws and reporting its findings and recommendations with respect to the practicality and efficacy of those laws.²

In 1994, eight years after its formation, the Committee released its landmark report, “A Wiser Course: Ending Drug Prohibition” (“A Wiser Course”).³ The report detailed the impact of what has come to be known as the War on Drugs,⁴ including the failures of the system to effectively combat the use, abuse, and distribution of controlled substances.⁵ The Committee found that, despite the billions of dollars spent over the years fighting the drug war, “the United States has made little or no progress toward reducing drug use or solving its ‘drug problem.’”⁶ “A Wiser Course” critically evaluated and examined the consequences of existing drug laws.⁷ The report analyzed the impact of existing drug paradigms on civil liberties and focused on the public’s perception of the War on Drugs.⁸ Further, it asserted that existing drug laws negatively impacted public health⁹ and oppressed minority communities through selective prosecution of drug laws.¹⁰

² SPECIAL COMMITTEE ON DRUGS AND THE LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, A WISER COURSE: ENDING DRUG PROHIBITION, 1-2, n. 2 (1994), <http://www.nycbar.org/pdf/report/94087WiserCourse.pdf> [hereinafter A WISER COURSE].

³ See *id.*

⁴ In June 1971, President Richard Nixon declared a “war on drugs.” Following this declaration, President Nixon dramatically increased the size and clout of federal drug control agencies. He also sought the introduction of mandatory minimum sentences for drug offenses and “no-knock” warrants. In the 1980s and 1990s, rates of incarceration in the United States increased dramatically, due in large part to efforts to expand law enforcement’s response to drug use and distribution. Our “zero-tolerance” drug policy and the draconian drug laws that developed as a result of President Nixon’s initial declaration are now known, collectively, as the War on Drugs. See *A Brief History of the Drug War*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/new-solutions-drug-policy/brief-history-drug-war> (last visited Apr. 18, 2016).

⁵ See A WISER COURSE, *supra* note 2, at 1-2.

⁶ See *id.*

⁷ See A WISER COURSE, *supra* note 2, at 5-18.

⁸ See A WISER COURSE, *supra* note 2, at 19-33.

⁹ See A WISER COURSE, *supra* note 2, at 46-59.

¹⁰ See A WISER COURSE, *supra* note 2, at 22-23.

The report denounced the nation's policy of drug prohibition, which had failed to eradicate the scourges of drug use, addiction and distribution, and called for "the opening of a public dialog regarding new approaches to drug policy, including legalization and regulation."¹¹

In 2009, the Committee issued a follow-up report entitled, "A Wiser Course: Ending Drug Prohibition, Fifteen Years Later" ("A Wiser Course: Fifteen Years Later").¹² In that report, the Committee renewed its call for a serious dialogue on United States' drug policy and a systematic re-evaluation of the assumptions underlying the existing national legal paradigm. The Committee's 2009 report noted that the United States' continued focus on prohibition had failed to solve the problems of substance abuse, addiction, and the illegal drug trade, and urged lawmakers to re-focus drug policy using a medical paradigm to evaluate the schedules for controlled substances under the Controlled Substances Act. "A Wiser Course: Fifteen Years Later" also recommended that Congress consider transferring aspects of drug regulation from the Justice Department to the Department of Health and Human Services.¹³

In the two decades since the Committee first addressed these issues in "A Wiser Course," governments, non-governmental organizations and researchers have conducted numerous studies to illuminate why the laws underlying the current punitive system have been unsuccessful in reducing the societal harms associated with substance use and distribution.¹⁴ Indeed, the public dialogue that the Committee called for in "A Wiser Course"—a call for which, at the time, lawmakers and the public were, perhaps, not quite ready—has, in the ensuing years, become much more mainstream.¹⁵

¹¹ See A WISER COURSE, *supra* note 2, at 83.

¹² See SPECIAL COMMITTEE ON DRUGS AND THE LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, A WISER COURSE: ENDING DRUG PROHIBITION, FIFTEEN YEARS LATER (2009), <http://www.nycbar.org/pdf/report/Wiser%20Course%20Statement.pdf>.

¹³ See *id.*, at 2-5.

¹⁴ Valle Avilés Pinedo, *Guatemala President Discusses International Drug Trade*, COLUMBIA UNIVERSITY SCHOOL OF INTERNATIONAL AND PUBLIC AFFAIRS (Sept. 30, 2013), https://new.sipa.columbia.edu/na_molina_093013 (noting remarks by President Otto Perez Molina that the prohibition model has "clearly failed" and calling for a comprehensive new approach to drug policy); GLOBAL COMMISSION ON DRUG POLICY, ON DRUGS: REPORT OF THE GLOBAL COMMISSION ON DRUG POLICY (2011), <http://www.globalcommissionondrugs.org/reports/war-on-drugs/> (last visited April 18, 2016); UNITED KINGDOM DRUG POLICY COMMISSION, A FRESH APPROACH TO DRUGS (2013), <http://www.ukdpc.org.uk/wp-content/uploads/a-fresh-approach-to-drugs-the-final-report-of-the-uk-drug-policy-commission.pdf>.

¹⁵ Matt Sledge, *Is The War On Drugs Nearing An End?*, THE HUFFINGTON POST (Apr. 8, 2013), http://www.huffingtonpost.com/2013/04/08/drug-war_n_3030040.html; Martha Mendoza, *U.S. Drug War Has Met None of Its Goals*, NBCNEWS.COM (May 13, 2010), <http://www.nbcnews.com/id/37134751/#.UpPhcPZ3thE>; Rafael Lemaitre, *Alternatives to the "War on Drugs:" Obama Drug Policy and Reforming the Criminal Justice System*, THE WHITE HOUSE BLOG (Nov. 21, 2011, 4:49 PM), <https://www.whitehouse.gov/blog/2011/11/21/alternatives-war-drugs-obama-drug-policy-and-reforming-criminal-justice-system>; Rafael Lemaitre, *Obama Drug Policy: Reforming the Criminal Justice System*, THE WHITE HOUSE BLOG (Dec. 5, 2011, 11:03 AM), <https://www.whitehouse.gov/blog/2011/12/05/obama-drug-policy-reforming-criminal-justice-system>.

As momentum builds to rethink drug policy at all levels, we believe the public dialogue must expand to address the global reach of the drug trade and the international implications of drug control. Drug policy is an inherently international construct due to the cross-jurisdictional issues involved. And, in fact, our local and regional drug control efforts derive, at bottom, from international law: state and local drug laws and policies are rooted in federal law which, in turn, is largely based on—and is, in fact, the implementing legislation for—the International Drug Control Conventions.¹⁶

In this latest report, “Charting a Wiser Course: Human Rights and the World Drug Problem,” the Committee steps beyond the borders of New York and, indeed, beyond the boundaries of the United States, in conducting its analysis of modern drug control. The modern system of drug control originated as an international undertaking, requiring universal commitment to the objectives of a punishment-based drug control system.¹⁷ Accordingly, this report seeks to investigate the changing landscape of international drug policy and recommend policy changes that will contribute to charting a wiser course.

Part I of this report reviews existing drug laws, nationally and internationally; Part II examines the implications of the global drug war and investigates legal models that several countries have implemented as alternatives to previous drug paradigms; Part III analyzes the effects of policy experimentation on international law; Part IV explores the human rights implications of existing and emerging drug laws and policies; Part V provides the Committee’s recommendations regarding drug control in the evolving international context; and Part VI offers the Committee’s conclusion that the global reach of the drug trade and the wide-ranging effects of substance abuse and addiction require an equally wide-ranging, multilateral and public health-oriented response across the international community and around the world.

¹⁶ 21 U.S.C. § 801(a)(2) (2014) (the Controlled Substances Act, as relating to Congressional findings and declarations: psychotropic substances, states “[t]he United States has joined with other countries in executing an international treaty, entitled the Convention on Psychotropic Substances and signed at Vienna, Austria, on February 21, 1971, which is designed to establish suitable controls over the manufacture, distribution, transfer, and use of certain psychotropic substances[...].”).

¹⁷ *A New Prescription*, THE ECONOMIST (Aug. 8, 2013), <http://www.economist.com/news/leaders/21583270-new-zealands-plan-regulate-designer-drugs-better-trying-ban-them-and-failing-new>; *see also*, Ed Krayewski, *New Zealand Looks to Legalizing, Regulating Synthetic Drugs*, REASON MAGAZINE (Aug. 8, 2013), <http://reason.com/blog/2013/08/08/new-zealand-looks-to-legalizing-regulati>.

I. The Current Paradigm

Criminal punishment for drug use, possession, manufacture and distribution has been the global legal norm for over five decades. There is increasing evidence, however, that punishment-based efforts to control the global illegal drug market have been largely unsuccessful.¹⁸ The following section provides a brief overview of the current legal system governing drug control, including (a) existing international drug laws, and (b) current drug laws in the United States.

A. International Drug Law: A Brief Overview

The modern international drug control paradigm originated with the 1912 Hague International Opium Convention (the “Hague Convention”), which aimed to suppress the trade of opium.¹⁹ The Hague Convention was followed by a series of international drug treaties, regulating first the supply of opium and then branching out to cannabis and cocaine.²⁰ In 1961, seeking to combine these treaties into a comprehensive legal instrument, the international community adopted the 1961 Single Convention on Narcotic Drugs (the “1961 Convention” or “Single Convention”).²¹ The 1961 Convention (as amended by the 1972 Protocol²²), along with the 1971 Convention on Psychotropic Substances²³ and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the “1988 Convention”),²⁴ provide the framework underlying national, regional, and local drug laws as implemented by countries around the globe. The Single Convention enjoys nearly universal adherence, with 185 signatory countries.²⁵

¹⁸ DAN WERB ET AL., THE TEMPORAL RELATIONSHIP BETWEEN DRUG SUPPLY INDICATORS: AN AUDIT OF INTERNATIONAL GOVERNMENT SURVEILLANCE SYSTEMS (2013), <http://bmjopen.bmj.com/content/3/9/e003077.full.pdf+html>; Richard Branson, *War on drugs a trillion-dollar failure*, CNN.COM (Dec. 7, 2012), <http://www.cnn.com/2012/12/06/opinion/branson-end-war-on-drugs/>.

¹⁹ Julia Ellsworth Ford, *The Coming International Opium Conference*, RYE CHRONICLE PRESS (1924), <http://digitalrepository.trincoll.edu/cgi/viewcontent.cgi?article=1025&context=moore>. The Hague Convention is widely believed to have inspired national drug control legislation, such as the 1913 Harrison Act in the United States, the foundation of U.S. drug law in the 20th century, see *The 1912 Hague International Opium Convention*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <https://www.unodc.org/unodc/en/frontpage/the-1912-hague-international-opium-convention.html> (last visited Mar. 31, 2016).

²⁰ See DAVID R. BEWLEY-TAYLOR, THE UNITED STATES AND INTERNATIONAL DRUG CONTROL, 1909-1997 (2002).

²¹ 1961 Single Convention on Narcotic Drugs, March 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 151 (hereinafter *1961 Convention*) (although adopted in 1961, the Single Convention was not ratified and entered into force until 1964).

²² Protocol amending the 1961 Single Convention on Narcotic Drugs, Mar. 25, 1972, 18 U.S.T. 1407, 520 U.N.T.S.

²³ 1971 Convention on Psychotropic Substances, Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175.

²⁴ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 28 I.L.M. 493.

²⁵ United Nations Treaty Collection, *STATUS*, UNITED NATIONS TREATY COLLECTION (Apr. 13, 2016, 5:02 PM), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-18&chapter=6&lang=en#1.

At the heart of the 1961 Convention is a policy of what many refer to as “prohibition”²⁶ – requiring member states to enact legislation “to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession” of certain drugs (cannabis, opiates, and cocaine).²⁷ Under the scheduling system found in the 1961 Convention, some substances, such as marijuana, are almost completely prohibited,²⁸ while others, such as cocaine, are restricted to medical or scientific uses, with systems in place to monitor supply to each country.²⁹ The purpose of this framework is to establish a universal approach to drug control, while addressing the dual objectives of having access to substances for medicinal and scientific use while decreasing the availability of such substances for illicit (i.e., any other) use.³⁰

The first sentence of the Preamble to the Single Convention states that the signatories are “concerned with the health and welfare of mankind.”³¹ This opening indicates that the system is primarily concerned with public health within the context of drug use and distribution. However, the Preamble goes on to provide that “addiction to narcotic drugs constitutes a *serious evil* for the individual and is fraught with social and economic danger to mankind” and that the signatories are “[c]onscious of their duty to prevent and *combat this evil*” (emphasis added).³² Thus, although ostensibly intended to create a system premised on public health, the Single Convention instead established what became the framework for the War on Drugs by calling for signatory nations to “combat” the “evil” of addiction as opposed to addressing drug dependence as a serious public health concern.

²⁶ *Prohibition*, MERRIAM-WEBSTER.COM, <http://www.merriamwebster.com/dictionary/prohibition> (last visited Mar. 31, 2016) (Prohibition is defined as “the act of not allowing something to be used or done” or “a law or order that stops something from being used or done.”). Drug prohibition has become known by scholars in fields relevant to drug controls and policy as a colloquialism used to encompass the totality of laws and policies underling the legal mandates against drug use, manufacture and distribution other than for medical or scientific purposes.

²⁷ *1961 Convention*,

note 21, Art. 4.

²⁸ Under the *1961 Convention*'s scheduling system, cannabis and cannabis resin are listed as Schedule I and IV. *See 1961 Convention*, *supra* note 21, Art. 2, Schedules.

²⁹ *See 1961 Convention*, *supra* note 21, Art. 23.

³⁰ *See 1961 Convention*, *supra* note 21.

³¹ *See 1961 Convention*, *supra* note 21, Preamble.

³² *Id.* This language is seen by some as being unusually moralistic for an international treaty. *See* GLOBAL DRUG POLICY OBSERVATORY ET AL., REPORT OF THE INTERNATIONAL LAW AND DRUG POLICY REFORM EXPERT SEMINAR 6 (2014) [hereinafter Expert Seminar Report], https://www.tni.org/files/publication-downloads/expert_seminar_report_-_international_law_drug_policy_reform.pdf.

Notably, the 1961 Convention did not require member countries to impose criminal sanctions for mere possession of drugs for personal consumption.³³ However, the 1988 Convention required that, “subject to its constitutional principles and the basic concepts of its legal system,” signatory countries must adopt measures to “establish as a criminal offense” possession of drugs for personal consumption. Because the convention does not specify the form of punishment that must be imposed, and because the provision is specifically limited by each party’s respective legal system, countries have a certain amount of latitude as to what sentences, if any, they impose for possession of drugs for personal use.³⁴ Indeed, some scholars have interpreted this clause as not requiring prosecution of possession for personal use as a criminal offense.³⁵ In practice, this ambiguity has led to a broad spectrum of interpretations: in some cases, these treaty obligations have been broadly interpreted to allow for decriminalization or non-enforcement, while in others they have been interpreted to require, or at least to justify, the imposition of penalties even for mere possession for personal consumption, including incarceration, severe physical punishment, and even the death penalty.³⁶

B. United States Drug Laws: Past and Present

The Controlled Substances Act³⁷ (CSA) is the implementing legislation for the Single Convention and is the controlling federal drug law in the United States. It regulates the manufacture, importation, possession, use and distribution of most psychoactive substances, except for three legal substances: caffeine, tobacco, and alcohol.³⁸ The CSA includes five schedules which are similar, but not identical, to those in the Single Convention.³⁹ These schedules

³³ While Article 33 states that parties shall not “permit the possession of drugs except under legal authority” and Article 36 “obliges parties to make possession a punishable offense,” these provisions have been interpreted to apply to possession for the purposes of trafficking in narcotics, not for personal consumption. DAVE BEWLEY-TAYLOR ET AL., TRANSNATIONAL INSTITUTE, *THE RISE AND DECLINE OF CANNABIS PROHIBITION* 44-45 (2014), http://www.tni.org/files/download/rise_and_decline_ch4.pdf.

³⁴ All of the drug control treaties are self-executing, meaning each country must enact implementing legislation. See *UN Drug Conventions Reform: TNI Briefing for the 2003 UNGASS mid-term review*, TRANSNATIONAL INSTITUTE (March 2003), <http://www.undrugcontrol.info/en/un-drug-control/conventions/item/2185-un-drug-conventions-reform>.

³⁵ *Supra* note 33, at 44-45.

³⁶ See STEPHEN ROLLES, *AFTER THE WAR ON DRUGS: BLUEPRINT FOR REGULATION* 17, TRANSFORM DRUG POLICY FOUNDATION (2009); see also *infra* note 206 and accompanying text.

³⁷ 21 U.S.C. §§ 801-904 (2012).

³⁸ *Id.*

³⁹ Compare *Id.* at § 812(a); with *1961 Single Convention*, *supra* note 21, Art. 2; and INTERNATIONAL NARCOTICS CONTROL BOARD, *LIST OF NARCOTIC DRUGS UNDER INTERNATIONAL CONTROL* (53rd ed. 2014), https://www.incb.org/documents/Narcotic-Drugs/Yellow_List/53rd_Edition/YL-53rd_edition_EN.pdf (the “Yellow List”).

classify drugs based upon three factors: (a) potential for abuse; (b) currently accepted medical use in the United States; and (c) accepted safety for use under medical supervision.⁴⁰

The listing of a drug in Schedule I means that the drug has been determined to have a high potential for abuse, has no currently accepted medical use in the United States, and is incapable of being used safely even under medical supervision; accordingly, physicians are prohibited from prescribing any drug included in Schedule I.⁴¹ Marijuana, for example, is listed as a Schedule I drug,⁴² as are heroin⁴³ and lysergic acid diethylamide (LSD).⁴⁴ Cocaine, however, is listed in Schedule II,⁴⁵ which means that the drug “has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions” and that abuse of the drug “may lead to severe psychological or physical dependence.”⁴⁶ In addition to federal law, each state has its own drug laws; and thirty states and the District of Columbia have adopted the Revised Uniform Controlled Substances Act, which was drafted in 1990 and amended in 1994.⁴⁷ State drug laws generally mirror the CSA’s scheduling with some variation, especially with respect to marijuana, and state laws vary dramatically in the penalties they prescribe for sale and possession of various substances.⁴⁸

In recent years, the CSA’s scheduling regime has been called into question by state action, causing tension between state and federal laws.⁴⁹ Twenty-three states and the District of Columbia

⁴⁰ 21 U.S.C. § 812(b) (2012).

⁴¹ 21 U.S.C. § 812(b)(1) (2012).

⁴² 21 U.S.C. § 812(c), Schedule I(c)(10); 21 C.F.R. § 1308.11(d)(23) (2015).

⁴³ 21 U.S.C. § 812(c), Schedule I(b)(10); 21 C.F.R. § 1308.11(c)(11) (2015).

⁴⁴ 21 U.S.C. § 812(c), Schedule I(c)(9); 21 C.F.R. § 1308.11(d)(22) (2015).

⁴⁵ 21 U.S.C. § 812(c), Schedule II(a)(4); 21 C.F.R. § 1308.12(b)(4) (2015).

⁴⁶ 21 U.S.C. § 812(b)(2) (2012).

⁴⁷ See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM CONTROLLED SUBSTANCES ACT 1994 (1995), http://www.uniformlaws.org/shared/docs/controlled%20substances/UCSA_final%20_94%20with%2095amends.pdf.

⁴⁸ See THE NATIONAL CRIMINAL JUSTICE ASSOCIATION, A GUIDE TO STATE CONTROLLED SUBSTANCES ACTS (1999), <https://www.ncjrs.gov/pdffiles1/Digitization/184295NCJRS.pdf>; see also THE IMPACT TEEN ILLICIT DRUG TEAM, ILLICIT DRUG POLICIES: SELECTED LAWS FROM THE 50 STATES (2002), <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=17318>.

⁴⁹ See TODD GARVEY, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS (2012).

have passed medical marijuana laws.⁵⁰ The legal use of marijuana as prescription medicine is supported by many credible medical organizations.⁵¹ Additionally, in 2012, Colorado and Washington made history by becoming the first states to tax and regulate (or “legalize”) marijuana for non-medical adult use.⁵² In 2014, Alaska and Oregon passed initiatives to tax and regulate marijuana,⁵³ and the District of Columbia passed an initiative to legalize the possession and cultivation of small amounts of marijuana.⁵⁴ In 2016, Nevada will vote on a statutory initiative to tax and regulate marijuana⁵⁵ and other states will consider similar initiatives.⁵⁶

As laws that permit medical marijuana and non-medical adult use in the United States gain traction, such developments demonstrate an obvious paradigm shift away from the past four decades of strict drug criminalization. By legalizing marijuana for medical and adult recreational use, state governments are enacting laws that permit conduct that is prohibited under federal law pursuant to the CSA. In this way, state action is beginning to challenge the legitimacy of our federal drug laws, a trend that, in turn, challenges the premises of the international treaties on which those federal laws are based.

⁵⁰ See AMERICANS FOR SAFE ACCESS FOUNDATION, MEDICAL MARIJUANA ACCESS IN THE UNITED STATES: A PATIENT-FOCUSED ANALYSIS OF THE PATCHWORK OF STATE LAWS (2016), <http://american-safe-access.s3.amazonaws.com/documents/Talana/State%20of%20the%20States%20Report%202016.pdf>.

⁵¹ For a list of health organizations that support legal access to medical marijuana see *Quick Reference*, NORML, http://norml.org/component/zoo/item/quick-reference?category_id=734 (last visited Mar. 31, 2016).

⁵² On January 1, 2014, Colorado became the first jurisdiction in the world where marijuana was legally sold to adults for non-medical use, see John Ingold, *World's First Legal Recreational Marijuana Sales Begin in Colorado*, THE DENVER POST (Jan. 01, 2014), http://www.denverpost.com/news/ci_24828236/worlds-first-legal-recreational-marijuana-sales-begin-colorado.

⁵³ See *Initiative Petition List*, STATE OF ALASKA DIVISION OF ELECTIONS, http://www.elections.alaska.gov/pbi_ini_status_list.php#13psum (last visited Mar. 31, 2016); and OREGON SECRETARY OF STATE, NOVEMBER 4, 2014, GENERAL ELECTION, OFFICIAL ABSTRACT OF VOTE (2014), <http://sos.oregon.gov/elections/Documents/results/results-2014-general-election.pdf> (Measure 91) (last visited Mar. 31, 2016).

⁵⁴ See *November 4, 2014 Certified Election Results*, DISTRICT OF COLUMBIA BOARD OF ELECTIONS, https://www.dcboee.org/election_info/election_results/2014/November-4-General-Election (Initiative #71) (last visited Mar. 31, 2016). Since District of Columbia law prohibits initiatives from addressing budgetary issues, the District of Columbia City Council would have to pass a bill to tax and regulate marijuana, but has been barred from considering taxation and regulation of marijuana by Congress. See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division E (Financial Services and General Government Appropriations Act, 2016), Title VIII (General Provisions-District of Columbia), § 809(b).

⁵⁵ INITIATIVE TO REGULATE AND TAX MARIJUANA (Apr. 23, 2014), <http://nvsos.gov/Modules/ShowDocument.aspx?documentid=3294>.

⁵⁶ P. Smith, *Eight States That May Legalize Marijuana Next Year*, STOPTHEDRUGWAR.ORG (Nov. 19, 2015), http://stopthedrugwar.org/chronicle/2015/nov/19/eight_states_may_legalize_mariju.

II. The Effects of the Global War on Drugs and Emerging Trends in Drug Control

After over half a century of international drug criminalization, the wisdom of drug policies focused almost exclusively on prohibition is being called into question. The growing realization that the current international policy has not achieved its ends is changing the legal landscape of drug control. The world's nations are beginning to experiment with new ways to approach drug policy due to data that illustrates the ineffectiveness of existing policies as well as additional harms associated with criminalizing drug use.⁵⁷

The following section reviews the harms associated with punitive drug laws and focuses on countries experimenting with alternatives to punishment. These alternatives include treatment as an alternative to incarceration, harm reduction, medicalization, depenalization and decriminalization, and taxation and regulation.

A. Prohibition and Punishment: Ineffective Tools in Combating the Harms Associated with Drug Use

Drug prohibition has been unsuccessful in achieving its goal of curtailing drug use.⁵⁸ The available statistics from the global drug war vividly illustrate the shortcomings of the punishment-based system. In 1999, nearly four decades since the advent of the modern drug control system, the UN reported in *Global Illicit Drug Trends 1999* that “[f]or many years trend analyses of the global supply of illicit drugs have presented a continuously rising picture, particularly for heroin and cocaine.”⁵⁹ The report further noted that “the abuse of various drug types, most of which were once limited to certain regions, has become prevalent worldwide.”⁶⁰ The 1999 data illustrated an overall *increase* in drug consumption and distribution⁶¹ that was contrary to the goals of the 1961 Convention and subsequent legal measures taken to curtail drug manufacture, distribution, and use. Furthermore, “it is estimated that 246 million people, or 1 out of 20 people between the ages of 15 and 64,” consumed an illicit substance in 2013.⁶²

⁵⁷ Samuel Oakford, *More U.N. States Quietly Say No to Drug War*, INTER PRESS SERVICE NEWS AGENCY (Dec. 7, 2013), <http://www.ipsnews.net/2013/12/more-un-states-quietly-say-no-to-drug-war/>.

⁵⁸ UNITED NATIONS OFFICE ON DRUGS AND CRIME, 2013 WORLD DRUG REPORT 57 (2013) (“the prevalence of people with drug dependence and drug use disorders has generally remained stable”).

⁵⁹ ODCCP, STUDIES ON DRUGS AND CRIME: GLOBAL ILLICIT DRUG TRENDS 1 (1999), http://www.unodc.org/pdf/report_1999-06-01_1.pdf.

⁶⁰ *Id.*

⁶¹ *Id.* at 1-2.

⁶² About 230 million people, or 5 per cent of the world's adult population, are estimated to have used an illicit drug at least once in 2010. Problem drug users number about 27 million, which is 0.6 per cent of the world adult population. UNITED NATIONS OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT (2015), https://www.unodc.org/documents/wdr2015/World_Drug_Report_2015.pdf; Katie Moss, *200 Million People Use Illicit Drugs, Study Finds*, ABC NEWS (Jan. 6, 2012), <http://abcnews.go.com/blogs/health/2012/01/06/200-million-people-use-illicit-drugs-study-finds/> (“Drug use is often hidden, particularly when people fear the consequences of

In order to deter drug use through punitive measures, roughly a thousand people around the world are executed by their governments every year.⁶³ This figure does not begin to cover the extra-judicial killings that are brought about as a direct result of punitive drug laws,⁶⁴ nor does that figure include the many innocent people who have lost their lives as a result of enforcement efforts.⁶⁵ It is estimated that the equivalent of 100 billion U.S. dollars are spent every year on drug law enforcement alone, and much more has been lost fighting the War on Drugs.⁶⁶ With these results, it is unsurprising that international drug control is being reexamined with a lens towards more humane and cost effective legal structures. Due to the failings of existing drug controls, many governments are beginning to push the boundaries of the governing treaties by exploring alternative models.

B. Countries Experimenting with Alternative Drug Laws and Policies

Over the last several years, countries around the world have been challenging the international drug control system with increasing regularity and purpose. Not only have many enacted harm reduction, medicalization and decriminalization measures, but several are also working to set up regulated markets.⁶⁷ Other countries have challenged the premises of international drug control treaties on human rights grounds. For example, Bolivia became the first country to withdraw from—and then re-accede to—the 1961 Single Convention on Narcotic Drugs in order to protect indigenous cultural and religious rights.⁶⁸ Even the United States, the originator and longtime champion of punitive drug control, is testing the limits of the international model:

being discovered for using drugs, such as being imprisoned.”); UNITED NATIONS OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT (2012), https://www.unodc.org/documents/data-and-analysis/WDR2012/WDR_2012_web_small.pdf; UNODC, A CENTURY OF INTERNATIONAL DRUG CONTROL 3 (2008).

⁶³ *On World Day against Death Penalty, UN says practice deters neither drug crimes nor abuse*, UN NEWS CENTRE (Oct. 10, 2015), <http://www.un.org/apps/news/story.asp?NewsID=52219#.VtcH4PkrJhE>.

⁶⁴ Hundreds of drug offenders are executed annually and the number likely tops 1,000 if figures from countries that do not disclose their death penalty data are included, *see* COUNT THE COSTS, THE WAR ON DRUGS: CREATING CRIME, ENRICHING CRIMINALS (2010), <http://www.countthecosts.org/sites/default/files/Crime-briefing.pdf>.

⁶⁵ COUNT THE COSTS, THE WAR ON DRUGS: CREATING CRIME, ENRICHING CRIMINALS (2010), <http://www.countthecosts.org/sites/default/files/Crime-briefing.pdf>.

⁶⁶ DRUG POLICY ALLIANCE, THE FEDERAL DRUG CONTROL BUDGET (2015), http://www.drugpolicy.org/sites/default/files/DPA_Fact_sheet_Drug_War_Budget_Feb2015.pdf.

⁶⁷ *See, e.g., New Zealand Looks to Legalizing, Regulating Synthetic Drugs*, REASON MAGAZINE (Aug. 8, 2013), <http://reason.com/blog/2013/08/08/new-zealand-looks-to-legalizing-regulati>; *see also infra* Section II.B.5., at 33-38.

⁶⁸ Coletta Youngers, *Bolivia Officially Returns as a Party to the 1961 Single Convention on Narcotic Drugs*, WASHINGTON OFFICE ON LATIN AMERICA (Feb. 12, 2013), http://www.wola.org/commentary/bolivia_officially_returns_as_a_party_to_the_1961_single_convention_on_narcotic_drugs; *see also* UNDOC, *Bolivia to re-accede to UN drug convention, while making exception on coca leaf chewing*, <https://www.unodc.org/unodc/en/frontpage/2013/January/bolivia-to-re-accede-to-un-drug-convention-while-making-exception-on-coca-leaf-chewing.html>.

marijuana has become legalized or decriminalized for both adult personal use and medical use in numerous jurisdictions throughout the United States. Uruguay has also enacted legislation creating a regulated market for cannabis, while New Zealand continues to experiment with a regulated market for new psychotropic substances.⁶⁹

The policy changes instituted by these countries illustrate a paradigm shift that is occurring in international drug control. The following discussion includes examples of some of the alternative drug policies with which countries have been experimenting and an evaluation of the strengths and weaknesses of these programs.

1. *Treatment as an Alternative to Incarceration*

One attempt to circumvent the harsh penal measures for drug use has been to offer treatment as an alternative to incarceration through what are commonly described as “drug courts.” Drug court programs operate on the premise that people who commit crimes as a result of drug addiction need drug treatment, not incarceration; and that effective court-supervised drug rehabilitation will do more to prevent recidivism and promote public health than putting users of prohibited substances behind bars. Drug courts allow users of prohibited drugs to avoid incarceration by agreeing to complete an effective drug treatment program that gives the individual an opportunity to overcome his or her drug addiction.⁷⁰ Such programs have enabled people suffering from addiction to avoid the harsh sanction and stigma of prison while also providing a solid, court-supervised support mechanism and aid in reintegration.⁷¹ The success of drug courts in reducing prison populations, providing much-needed medical and social interventions and reducing recidivism has led to the proliferation of drug court programs across the country and abroad.

Notably, however, as the model of drug courts is adopted in jurisdictions across the country and exported around the world, some drug treatment programs fall short of effective

⁶⁹ The number of laws either proposed or already enacted in the United States demonstrate the trend away from international and federal control and towards autonomy in the states, *see, e.g., Initiative Petition List*, STATE OF ALASKA DIVISION OF ELECTIONS, http://www.elections.alaska.gov/pbi_ini_status_list.php#13psum (last visited Mar. 31, 2016); and OREGON SECRETARY OF STATE, NOVEMBER 4, 2014, GENERAL ELECTION, OFFICIAL ABSTRACT OF VOTE (2014), <http://sos.oregon.gov/elections/Documents/results/results-2014-general-election.pdf> (Measure 91) (last visited Mar. 31, 2016); *On Drugs: Report of the Global Commission on Drug Policy*, GLOBAL COMMISSION ON DRUG POLICY (Jun., 2011), <http://www.globalcommissionondrugs.org/reports/war-on-drugs/>; UNITED KINGDOM DRUG POLICY COMMISSION, A FRESH APPROACH TO DRUGS (2013), <http://www.ukdpc.org.uk/wp-content/uploads/a-fresh-approach-to-drugs-the-final-report-of-the-uk-drug-policy-commission.pdf>. International governments have reacted similarly to the states of the United States, and are more often leading the way, *see, e.g., New Zealand Looks to Legalizing, Regulating Synthetic Drugs*, *supra* note 67.

⁷⁰ Joanne Csete & Denise Tomasini-Joshi, *Drug Courts: Equivocal Evidence on a Popular Intervention*, OPEN SOCIETY FOUNDATIONS (Feb. 2015), <https://www.opensocietyfoundations.org/reports/drug-courts-equivocal-evidence-popular-intervention>.

⁷¹ *See Drug Courts Work*, NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, <http://www.nadcp.org/learn/facts-and-figures> (last visited Apr. 18, 2016).

implementation, from a health standpoint.⁷² In some instances, enforced treatment becomes an alternative, but not necessarily gentler, form of incarceration.⁷³ Where drug treatment programs are not based on medical treatment and social intervention but, rather, become substitute forms of punishment, human rights violations may occur—even when treatment is ostensibly the focus of the model. In such circumstances, the “treatment” can be tantamount to incarceration, punishment or—in some cases—torture.

Such failures may arise where those enforcing the laws do not have the training or educational background to fully grasp the health implications of drug dependence and may see an enrollee’s inability to abstain from using drugs as a deliberate and antisocial affront to the system.⁷⁴ In a 2013 report that examined drug treatment centers in a number of countries, including China, Cambodia, and Vietnam, Juan Mendez, the UN Special Rapporteur on Torture, stated that

[c]ompulsory detention for drug users is common in so-called rehabilitation centers.... Sometimes referred to as drug treatment centers or 'reeducation through labor' centers or camps, these are institutions commonly run by military or paramilitary, police or security forces, or private companies. Persons who use, or are suspected of using, drugs and who do not voluntarily opt for drug treatment and rehabilitation are confined in such centers and compelled to undergo diverse interventions.⁷⁵

The victims of such interventions may face not only drug withdrawal without medical assistance, but also “state-sanctioned beatings, caning or whipping, forced labor, sexual abuse, and intentional humiliation,” as well as “flogging therapy,” “bread and water therapy,” and forced electroshock treatments, all in the name of rehabilitation.⁷⁶ Drug users are “a highly stigmatized

⁷² See Holly Catania & Joanne Csete, *Drug Courts and Drug Treatment: Dismissing Science and Patients’ Rights*, OPEN SOCIETY FOUNDATIONS (Jan. 10, 2014), <https://www.opensocietyfoundations.org/voices/drug-courts-and-drug-treatment-dismissing-science-and-patients-rights> (“The results were varied, and showed that many courts do not respect medical consensus on scientifically sound treatment standards. Some courts included OST [opioid substitution therapy] as part of court-mandated treatment options, while others allowed OST for a court-defined period of time as a bridge to abstinence. Still others showed intolerance and even disdain for anything having to do with methadone and buprenorphine, or—as with the drug court in Albany County—refused outright to admit people on methadone or buprenorphine treatment. Ordering people who are dependent on opioids to get off their prescribed methadone or buprenorphine medicines can force patients to seek out and become dependent on other opioids like prescription analgesics. Addiction to prescription opioids has been recognized as a priority problem by U.S. policy-makers, but drug courts may be exacerbating it.”) (last visited Feb. 24, 2016).

⁷³ See Donna Leinwand, *Drug Convictions Costing Students Their Financial Aid*, USA TODAY (Apr. 17, 2006), http://usatoday30.usatoday.com/news/nation/2006-04-16-drugs-students_x.htm.

⁷⁴ JUAN E. MENDEZ, SPECIAL RAPPOREUR ON TORTURE, HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL RAPPOREUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT ¶ 40 (2013), U.N. Doc. A/HRC/22/53.

⁷⁵ *Id.*

⁷⁶ *Id.* at ¶ 41.

and criminalized population” who suffer numerous abuses, including denial of treatment for HIV, deprivation of child custody, and inclusion in drug registries where their civil rights are curtailed.⁷⁷

One form of ill-treatment and “possibly torture of drug users” is the denial of opiate substitute therapy, “including as a way of eliciting criminal confessions through inducing painful withdrawal symptoms.”⁷⁸ The denial of such treatments in jails and prisons is “a violation of the right to be free from torture and ill-treatment,” Mendez noted, and should be considered a violation in non-custodial settings as well.⁷⁹

By denying effective drug treatment, state drug policies intentionally subject a large group of people to severe physical pain, suffering and humiliation, effectively punishing them for using drugs and trying to coerce them into abstinence, in complete disregard of the chronic nature of dependency and of the scientific evidence pointing to the ineffectiveness of punitive measures.⁸⁰

Of course, in many jurisdictions, drug treatment programs are effective and humanely implemented; and, due to the significantly lower cost of drug treatment compared to prison, sentencing arrestees to treatment has become increasingly popular.⁸¹ In New York State, for example, since largely repealing the draconian Rockefeller drug laws in 2009, the state has seen a dramatic rise in the number of felony drug offenders mandated to treatment instead of prison.⁸² In the first year after New York adopted judicial diversion provisions, which provide judges with discretion to refer offenders to treatment instead of mandating prison sentences, nearly 1,400 more drug-addicted offenders engaged in mandated treatment.⁸³ This represents an increase of 77 percent from the year before.⁸⁴

⁷⁷ *Id.* at ¶ 72.

⁷⁸ *Id.* at ¶ 73.

⁷⁹ *Id.*

⁸⁰ *Id.* at ¶ 74.

⁸¹ GOVERNMENT ACCOUNTABILITY OFFICE, DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, RESULTS (1997), <http://www.gao.gov/assets/160/155969.pdf>; GOVERNMENT ACCOUNTABILITY OFFICE, ADULT DRUG COURTS: STUDIES SHOW COURTS REDUCE RECIDIVISM, BUT DOJ COULD ENHANCE FUTURE PERFORMANCE MEASURE REVISION EFFORTS (2011), <http://www.gao.gov/assets/590/586793.pdf>.

⁸² JIM PARSONS, A NATURAL EXPERIMENT IN REFORM: ANALYZING DRUG POLICY CHANGE IN NEW YORK CITY (2015) (A technical report on the pre and post Rockefeller New York drug laws funded by the U.S. Dept. of Justice), http://www.vera.org/sites/default/files/resources/downloads/drug-law-reform-new-york-city-technical-report_03.pdf.

⁸³ *Id.*

⁸⁴ *Id.*

Mandated treatment shows significant reductions in drug use upon completion.⁸⁵ Thus, drug courts serve a valuable social function by redirecting drug users toward better long-term health outcomes and away from the cycle of crime and incarceration that traps many who suffer from substance abuse and addiction. However, public opinion on the benefits of drug court programs is not without detractors: critics have questioned the sanguine statistics associated with drug courts, arguing that the courts refer to these drug treatment programs the candidates who are the most likely to succeed.⁸⁶ Furthermore, referral to drug treatment does not negate the lasting burdens of the criminal conviction itself, which can have life-long negative consequences for victims of drug addiction as they attempt to move on with their lives.⁸⁷

Moreover, whether or not the treatment offered is “humane,” critics point out the incongruence of calling the drug issue a “public health” problem, and addiction itself a “disease,” while imposing any kind of penalty at all, even if the penalty is court-supervised addiction treatment.⁸⁸ Indeed, the practice of punishing drug addicts with incarceration when they relapse from their court-mandated treatment—even though, by definition, individuals suffering from

⁸⁵ *Id.*

⁸⁶ Joanne Csete & Denise Tomasini-Joshi, *Drug Courts: Equivocal Evidence on a Popular Intervention*, OPEN SOCIETY FOUNDATIONS (Feb. 2015), <https://www.opensocietyfoundations.org/reports/drug-courts-equivocal-evidence-popular-intervention>.

⁸⁷ MICHELLE ALEXANDER, *THE NEW JIM CROW* 92 (2010) (“It is the badge of inferiority – the felony record – that relegates people for their entire lives, to second-class status. As described in chapter 4, for drug felons, there is little hope of escape. Barred from public housing by law, discriminated against by private landlords, ineligible for food stamps, forced to ‘check the box’ indicating a felony conviction on employment applications for nearly every job, and denied licenses for a wide range of professions, people whose only crime is drug addiction or possession of a small amount of drugs for recreational use find themselves locked out of the mainstream society and economy – permanently.”).

⁸⁸ *DrugFacts: Understanding Drug Abuse and Addiction*, NATIONAL INSTITUTE ON DRUG ABUSE (Nov. 2012), <https://www.drugabuse.gov/publications/drugfacts/understanding-drug-abuse-addiction> (“Many people do not understand why or how other people become addicted to drugs. It is often mistakenly assumed that drug abusers lack moral principles or willpower and that they could stop using drugs simply by choosing to change their behavior. In reality, drug addiction is a complex disease, and quitting takes more than good intentions or a strong will. In fact, because drugs change the brain in ways that foster compulsive drug abuse, quitting is difficult, even for those who are ready to do so.”).

addiction are prone to relapse⁸⁹—demonstrates an inherent conflict in trying to inject a public health solution into the existing punitive drug control model.⁹⁰

In addition, there is the issue of medical consent: some critics have noted that consent on the threat of incarceration is, by definition, not freely given.⁹¹ And another consideration is the fact that many people arrested for drug possession are not addicted at all, which makes court-ordered treatment unnecessary and potentially harmful to those who must undergo “treatment” as the only alternative to a prison sentence.

Perhaps recognizing the limitations of drug court systems, some jurisdictions are now turning to alternative policing policies. For example, in Seattle, Washington, under the Law Enforcement Assisted Diversion Program (LEAD), police have the option of diverting drug users, as well as low-level dealers, to evaluation by a case worker instead of arresting them at all. Once an individual is admitted to the program, the caseworker works with the individual to determine his or her needs on a holistic basis. These needs might include housing or employment assistance in addition to the possibility of treatment.⁹² Other jurisdictions have decriminalized possession completely, either making possession an administrative offense or not taking any action at all.⁹³ This option is discussed in more detail below.

⁸⁹ *DrugFacts: Understanding Drug Abuse and Addiction*, NATIONAL INSTITUTE ON DRUG ABUSE (Nov. 2012), <https://www.drugabuse.gov/publications/drugfacts/understanding-drug-abuse-addiction> (“Similar to other chronic, relapsing diseases, such as diabetes, asthma, or heart disease, drug addiction can be managed successfully. And as with other chronic diseases, it is not uncommon for a person to relapse and begin abusing drugs again. Relapse, however, does not signal treatment failure—rather, it indicates that treatment should be reinstated or adjusted or that an alternative treatment is needed to help the individual regain control and recover.”); RYAN S. KING AND JILL PASQUARELLA, *DRUG COURTS: A REVIEW OF THE EVIDENCE* 15 (2009), http://www.sentencingproject.org/doc/dp_drugcourts.pdf.

⁹⁰ Such punishment commonly occurs when treatment decisions are put into the hands of judges or prosecutors and not in the hands of treatment professionals. See RYAN S. KING AND JILL PASQUARELLA, *DRUG COURTS: A REVIEW OF THE EVIDENCE* 16 (2009), http://www.sentencingproject.org/doc/dp_drugcourts.pdf.

⁹¹ DRUG POLICY ALLIANCE, *DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE* 16 (2011), https://www.drugpolicy.org/docUploads/Drug_Courts_Are_Not_the_Answer_Final2.pdf (“Mixing Treatment and Punishment: A Faulty Approach.”); Joanne Csete & Denise Tomasini-Joshi, *A Well-Intentioned, Deeply Flawed Approach to Drug Treatment*, OPEN SOCIETY FOUNDATIONS (May 29, 2015), <https://www.opensocietyfoundations.org/voices/well-intentioned-deeply-flawed-approach-addiction-treatment>; Harold Pollack, Eric Sevigny and Peter Reuter, *How to make drug courts work*, THE WASHINGTON POST (Apr. 26, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/04/26/how-to-make-drug-courts-work/>.

⁹² KATHERINE BECKETT, *SEATTLE’S LAW ENFORCEMENT ASSISTED DIVERSION PROGRAM: LESSONS LEARNED FROM THE FIRST TWO YEARS* (2014), <http://static1.1.sqspcdn.com/static/f/1185392/24777541/1398287318543/2014-Lead-Process-Evaluation.pdf?token=0kq0cRZWmDqurQ%2FUUxk8xENR3OI%3D> (report commissioned by the Ford Foundation).

⁹³ See GLENN GREENWALD, CATO INSTITUTE, *DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES* (2009).

2. Harm Reduction

One way societies have sought to minimize the harms caused by drug use is by employing a set of measures collectively known as “harm reduction” policy. Harm reduction (also known as “harm minimization, “risk minimization” and “risk reduction”) is a public health approach defined variously as “a set of practical strategies and ideas aimed at reducing negative consequences associated with drug use,” or “policies, programs, and practices that aim primarily to reduce the adverse health, social and economic consequence of the use of legal and illegal psychoactive drugs without necessarily reducing drug consumption.”⁹⁴ Harm reduction policies prioritize public health over criminal prosecutorial measures and focus on the human rights of drug users.⁹⁵ Measures that fall under the harm reduction umbrella include opioid substitution therapy (OST), needle/syringe programs (NPS), overdose prevention, safe injection facilities (SIFs),⁹⁶ and pill testing.

The term “harm reduction” is an intensely politicized term which has a controversial history in the international community and particularly at the UN Commission on Narcotic Drugs (CND). The CND has consistently rejected the precise term “harm reduction” but accepts certain specific harm reduction measures: OST, NPS, and overdose prevention measures have all been recognized as legitimate public health measures by the CND as well as the International Narcotics Control Board (INCB). Others, such as SIFs (notwithstanding their increasing prevalence around the world) and pill testing facilities, have been denounced by INCB as violating the Single Convention.⁹⁷

Despite this controversy, harm reduction activists have made significant progress in the past decade in furthering harm reduction policies at annual sessions of the CND. Over the last several years, the CND has adopted numerous resolutions endorsing harm reduction measures like NPS and overdose prevention measures, including the use of naloxone, an opioid antagonist used to counter the effects of opioid overdose.⁹⁸

⁹⁴ See *What is Harm Reduction? A Position Statement from the International Harm Reduction Association*, HARM REDUCTION INTERNATIONAL, <http://www.ihra.net/what-is-harm-reduction> (last visited Mar. 31, 2016).

⁹⁵ DAVID R. BEWLEY-TAYLOR, INTERNATIONAL DRUG CONTROL: CONSENSUS FRACTURED 36 (2012).

⁹⁶ Safe injection facilities (otherwise known as “supervised injection rooms” or “drug consumption rooms”) are legally sanctioned facilities where people who use intravenous drugs can inject pre-obtained drugs under medical supervision.

⁹⁷ Comments by then-INCB President Hamid Ghodse at the 54th Session of the Commission on Narcotic Drugs, Vienna, Austria, March 2011.

⁹⁸ THE COMMISSION ON NARCOTIC DRUGS, RESOLUTION 55/7: PROMOTING MEASURES TO PREVENT DRUG OVERDOSE, IN PARTICULAR OPIOID OVERDOSE (2012), https://www.unodc.org/documents/commissions/CND/Drug_Resolutions/2010-2019/2012/CND_Res-55-7.pdf. For all Resolutions from the Commission on Narcotic Drugs, see *Drug-related Resolutions and Decisions*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, https://www.unodc.org/unodc/en/commissions/CND/Resolutions_Decisions/Resolutions-Decisions_2010-2019.html#2012 (last visited at Apr. 18, 2016).

In 2009, the CND conducted a high-level review of the world drug problem, which resulted in the adoption by consensus of the Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem (the “Political Declaration”).⁹⁹ During negotiations, the issue of whether to include harm reduction as a component of demand reduction was hotly debated up until the last moment of the proceedings. Ultimately, the term “harm reduction” was not included in the Political Declaration but, in a dramatic moment directly following the adoption of the document, Germany, on behalf of 26 countries stood and read an Interpretive Statement declaring that they would interpret “related support services” to include “measures which a number of states, international organizations and non-governmental organizations, call harm reduction measures.”¹⁰⁰ This unprecedented maneuver ensured that support for harm reduction would appear as part of the official record of the proceedings.¹⁰¹

In March 2014, at the high-level review held by the CND to review progress in implementing the Political Declaration, harm reduction again became a hot button issue. Ultimately the term “harm reduction” again did not appear in the final document adopted by the CND, but the document did refer to “measures aimed at minimizing the negative public health and social impacts of drug abuse that are outlined in the WHO, UNODC, UNAIDS Technical Guide for Countries to Set Targets for Universal Access to HIV Prevention, Treatment, and Care for Injecting Drug Users.”¹⁰² The WHO [World Health Organization] Technical Guide encourages the use of many harm reduction measures, in particular syringe exchange programs which are proven to prevent the spread of HIV/AIDS.¹⁰³

⁹⁹ U.N. OFFICE ON DRUGS AND CRIME, COMMISSION ON NARCOTIC DRUGS, POLITICAL DECLARATION AND PLAN OF ACTION ON INTERNATIONAL COOPERATION TOWARDS AN INTEGRATED AND BALANCED STRATEGY TO COUNTER THE WORLD DRUG PROBLEM (2009), <https://www.unodc.org/documents/ungass2016/V0984963-English.pdf>.

¹⁰⁰ Bewley-Taylor, *supra* note 33, at 308-9. The statement was made on behalf of Australia, Bolivia, Bulgaria, Croatia, Cyprus, Estonia, Finland, Georgia, Greece, Hungary, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Saint Lucia, Slovenia, Spain, Switzerland, and the UK, and drew “sustained applause” from sections of the conference hall.

¹⁰¹ *Id.*

¹⁰² U.N. OFFICE ON DRUGS AND CRIME, COMMISSION ON NARCOTIC DRUGS, JOINT MINISTERIAL STATEMENT OF THE 2014 HIGH-LEVEL REVIEW BY THE COMMISSION ON NARCOTIC DRUGS OF THE IMPLEMENTATION BY MEMBER STATES OF THE POLITICAL DECLARATION AND PLAN OF ACTION ON INTERNATIONAL COOPERATION TOWARDS AN INTEGRATED AND BALANCED STRATEGY TO COUNTER THE WORLD DRUG PROBLEM 9 (2014), <https://www.unodc.org/documents/ungass2016/V1403583-1-2.pdf>.

¹⁰³ WORLD HEALTH ORGANIZATION, TECHNICAL GUIDE FOR COUNTRIES TO SET TARGETS FOR UNIVERSAL ACCESS TO HIV PREVENTION, TREATMENT AND CARE FOR INJECTING DRUG USERS (2009), http://apps.who.int/iris/bitstream/10665/44068/1/9789241597760_eng.pdf, (revised in 2012).

While many harm reduction measures are now endorsed by the United Nations Office on Drugs and Crime (UNODC)¹⁰⁴ and practiced all over the world, such measures are not required under the drug control treaties, and their implementation is far from universal. The Russian Federation, for example, famously outlaws the use of OST, particularly methadone treatment, for the treatment of opiate addiction.¹⁰⁵ In addition, although it is estimated that approximately 89 SIFs exist around the world (not including the United States),¹⁰⁶ they are still considered by INCB to be in contravention of the international drug control treaties.¹⁰⁷ Thus, there is still much progress to be made before it can be said that harm reduction measures are an accepted component of demand reduction around the world.

3. Medicalization

Another way societies have worked around punitive drug laws is to enact certain measures that might be thought of as “medicalizing” drugs normally considered illicit. Two examples of this are “heroin assisted treatment” (HAT) and medical marijuana.

¹⁰⁴ See U.N. OFFICE ON DRUGS AND CRIME, STRATEGIES TO REDUCE HARM AND HIV INFECTION AMONG DRUG USING POPULATIONS (2009), https://www.unodc.org/ddt-training/treatment/VOLUME%20D/Topic%204/1.VolD_Topic4_Harm_Reduction.pdf; see also Gilberto Gerra, *Drug Demand reduction and harm reduction: Complimentary Approaches*, U.N. OFFICE ON DRUGS AND CRIME, GLOBAL CHALLENGES SECTION, https://www.unodc.org/documents/balticstates//EventsPresentations/Harm_Reduction_EU/G.Gerra_DrugDemandReductionHarmReduction.pdf.

¹⁰⁵ See Kathleen Kingsbury, *Methadone as a Human Right*, OPEN SOCIETY FOUNDATIONS (Feb. 9, 2011), <https://www.opensocietyfoundations.org/voices/methadone-human-right>.

¹⁰⁶ EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, DRUG CONSUMPTION ROOMS: AN OVERVIEW OF PROVISION AND EVIDENCE (2016), www.emcdda.europa.eu/attachements.cfm/att_239692_EN_Drug%20consumption%20rooms_POD2015.pdf (updated Apr. 4, 2015). In addition to the 86 SIFs mentioned in the EMCDDA report, there is one facility in Australia and two in Canada, see generally INTERNATIONAL NARCOTICS CONTROL BOARD, CONTRIBUTION OF THE INTERNATIONAL NARCOTICS CONTROL BOARD TO THE HIGH LEVEL REVIEW OF THE IMPLEMENTATION BY MEMBER STATES TO THE POLITICAL DECLARATION AND PLAN OF ACTION ON INTERNATIONAL COOPERATION TOWARDS AN INTEGRATED AND BALANCED STRATEGY TO COUNTER THE WORLD DRUG PROBLEM (2014), https://www.incb.org/documents/Publications/ePublication/E-Publication_E_FINAL.pdf (discussing “drug injection rooms” in New South Wales and Vancouver, Canada) [hereinafter INCB 2014 HIGH LEVEL REVIEW]; see also Andrea Woo, *Ottawa Approves Second Injection Site*, THE GLOBE AND MAIL (January 15, 2016), <http://www.theglobeandmail.com/news/british-columbia/vancouver-facility-becomes-canadas-second-approved-supervised-injection-site/article28216557/>.

¹⁰⁷ INCB 2014 HIGH LEVEL REVIEW, *supra* note 106, at 42.

a. Heroin-Assisted Treatment (HAT)

Opiate use is widespread. "The United Nations Office on Drugs and Crime (UNODC), estimates that there are presently between 15.5 and 21.1 million opiate users in the world, the majority of whom are heroin users."¹⁰⁸

Of the estimated million people receiving some sort of drug treatment in Europe, there are an estimated 700,000 problem opiate users who are receiving opiate substitution treatment, most of these in methadone maintenance treatments. "In Western and Central Europe, 16 per cent of first-time entrants were seeking treatment for opioid use, and overall treatment demand remains high, which reflects an ageing cohort of opioid users in treatment: of the estimated 1.5 million opioid users in Europe, 700,000 received opioid substitution therapy in 2012."¹⁰⁹ While recent decades have seen an increase in the willingness to address the treatment needs of this population, with Opiate Substitution Therapy (OST) prominent amongst the range of treatment options, methadone programs remain the most widely used.

Clinicians and researchers, however, have begun to rethink approaches to meeting the needs of those who have been unresponsive to prior treatments. A series of heroin assisted treatment (HAT) studies examined the potential therapeutic value, on both the individual and societal level, of introducing "medical heroin prescription[s] for high-risk heroin users for whom such benefits cannot be expected or achieved from existing treatment options."¹¹⁰ Findings from international trials now suggest that the supervised use of medicinal heroin can be an effective second-line treatment for the most at risk population of drug users, for whom methadone has proven ineffective.¹¹¹ Additionally, ibogaine, a psychedelic drug that has demonstrated some efficacy in treating substance use disorders (particularly opioid withdrawal), presents another alternative to traditional opioid dependence treatment interventions.¹¹² (Although ibogaine is not

¹⁰⁸ CHRISTOPHER HALLAM, INTERNATIONAL DRUG POLICY CONSORTIUM, BRIEFING PAPER- HEROIN ASSISTED TREATMENT: THE STATE OF PLAY (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1909944.

¹⁰⁹ UNITED NATIONS OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT 2015 (2015), https://www.unodc.org/documents/wdr2015/World_Drug_Report_2015.pdf.

¹¹⁰ Benedikt Fischer et al., *Heroin-Assisted Treatment (HAT) a Decade Later: A Brief Update on Science and Politics*, 84 J. URB. HEALTH 552, 553 (2007), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2219559/pdf/11524_2007_Article_9198.pdf.

¹¹¹ JOHN STRANG ET AL., EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION (EMCDDA), NEW HEROIN-ASSISTED TREATMENT: RECENT EVIDENCE AND CURRENT PRACTICES OF SUPERVISED INJECTABLE HEROIN TREATMENT IN EUROPE AND BEYOND 136-145 (2012), http://www.emcdda.europa.eu/system/files/publications/690/Heroin_Insight_335259.pdf.

¹¹² See Global Ibogaine Therapy Alliance, *Ibogaine-Assited Detox Efficacy*, IBOGAINEALLIANCE.ORG, <https://www.ibogainealliance.org/ibogaine/therapy/detox/efficacy/> (last visited April 3, 2016).

controlled under international treaties, it is prohibited in several jurisdictions,¹¹³ including the United States.¹¹⁴)

In response to the need for an alternative to treating opioid addiction in users who have been resistant to available therapeutic opioid maintenance interventions (e.g., oral methadone maintenance treatment [MMT] and oral buprenorphine maintenance treatment [BMT]), several countries (Denmark, Germany, the Netherlands, the UK, and Switzerland) have legalized long-term supervised injectable heroin (SIH) for refractory opioid users (in Spain and Canada such use is permitted in the context of research trials only).¹¹⁵

Heroin assisted treatment is delivered under direct medical supervision to ensure safety and to prevent the diversion of medical heroin to the illicit market. This treatment is provided in specialized clinics, which are open year-round.¹¹⁶ While the “positive effects of heroin-assisted treatment should be weighed against the higher rate of serious adverse events which appear to be associated with the route of administration of opioids,” the controlled clinical setting, which requires a 30 minute stay after intravenous injection, allows adverse events to be easily managed clinically, unlike when street heroin is injected in uncontrolled and unhygienic settings.¹¹⁷ Moreover, this treatment option “aims to reduce patients’ use of ‘street’ heroin and involvement in crime and improve their well-being and social integration.”¹¹⁸ The HAT studies concluded that the use of prescribed pharmaceutical heroin is effective in bringing into treatment an especially marginalized group, providing these individuals a positive healthcare relationship with physicians and improving their health status.¹¹⁹

¹¹³ See Global Ibogaine Therapy Alliance, *Ibogaine Legal Status*, IBOGAINEALLIANCE.ORG, <https://www.ibogainealliance.org/ibogaine/law/> (last visited April 3, 2016).

¹¹⁴ 21 U.S.C. § 812(c), Schedule I(c)(8); 21 C.F.R. § 1308.11(d)(21).

¹¹⁵ Fischer, *supra* note 110, at 553; see also DRUG POLICY ALLIANCE, HEROIN-ASSISTED TREATMENT (HAT) (2016), http://www.drugpolicy.org/sites/default/files/DPA%20Fact%20Sheet_Heroin-Assisted%20Treatment_%28Feb.%202016%29.pdf (last visited Apr. 3, 2016).

¹¹⁶ Press Release, EMCDDA, First State-of-the-art Overview on New Heroin-Assisted Treatment, (April 19, 2012), <http://www.emcdda.europa.eu/news/2012/1> [hereinafter *EMCDDA Press Release*].

¹¹⁷ Christian Haasen et al., *Heroin-assisted Treatment for Opioid Dependence: Randomised Controlled Trial*, 191 BRIT. J. PSYCHIATRY 55, 60 (2007).

¹¹⁸ EMCDDA Press Release, *supra* note 116.

¹¹⁹ Dan Small et al., *Policy Makers Ignoring Science and Scientists Ignoring Policy: The Medical Ethical Challenges of Heroin Treatment*, 3 HARM REDUCTION J. 16 (2006) (at Lessons Learned), <http://www.harmreductionjournal.com/content/3/1/16>.

b. Medical Marijuana

Medical marijuana has recently dominated the national discussion on prohibited substances that arguably provide therapeutic benefits. “The term medical marijuana is ambiguous in that it can refer to two of the three forms in which cannabinoids occur. These include (1) *endocannabinoids*, arachidonic acid derivatives such as anandamide produced in human tissue like any other endogenous neurotransmitters; (2) *phytocannabinoids*, the hundreds of compounds in the *C sativa* plant, including the 2 most medically relevant ones, *Tetrahydrocannabinol* (THC) and *cannabidiol* (CBD); and (3) synthetic *cannabinoids*, laboratory-produced congeners of THC and CBD that form the foundation of the pharmaceutical industry in cannabinoid-related products.”¹²⁰

At present, the cannabinoids that are of most interest therapeutically are THC and CBD.¹²¹ THC has been found to stimulate appetite as well as reduce nausea, and it may also “may also decrease pain, inflammation (swelling and redness), and muscle control problems.”¹²² CBD is a non-psychoactive cannabinoid that “may be useful in reducing pain and inflammation, controlling epileptic seizures, and possibly even treating mental illness and addictions.”¹²³ For many people suffering serious illnesses “medical marijuana is the only medicine that relieves their pain and suffering, or treats symptoms of their medical condition, without debilitating side effects.”¹²⁴

Marijuana can be administered through smoking, vaporizing, sublingual delivery, or it may be ingested in the form of baked goods or teas.¹²⁵ Smoking is the most common method of ingesting marijuana because it is the quickest and most efficient way to deliver cannabinoids.¹²⁶ “The patient is able to feel the effects almost immediately, and can stop as soon as the desired relief is achieved.”¹²⁷ However, smoking may cause an increased risk of bronchitis and other respiratory problems. The respiratory risks associated with smoking marijuana are eliminated

¹²⁰ J. Michael Bostwick, *Blurred Boundaries: The Therapeutics and Politics of Medical Marijuana*, 87 MAYO CLINIC PROC. 172, 174 (2012), [http://www.mayoclinicproceedings.org/article/S0025-6196\(11\)00021-8/fulltext](http://www.mayoclinicproceedings.org/article/S0025-6196(11)00021-8/fulltext).

¹²¹ National Institute on Drug Abuse, *DrugFacts: Is Marijuana Medicine?*, DRUGABUSE.GOV, <http://www.drugabuse.gov/publications/drugfacts/marijuana-medicine> (last visited April 3, 2016).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Medical Marijuana*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/medical-marijuana> (last visited April 3, 2016).

¹²⁵ *How Marijuana Is Consumed*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/facts/drug-facts/marijuana/how-marijuana-consumed> (last visited April 3, 2016).

¹²⁶ *Id.*

¹²⁷ *Methods of Ingestion*, MICHIGAN MEDICAL MARIJUANA ASSOCIATION, <http://michiganmedicalmarijuana.org/page/articles/health/ingestion-methods> (last visited April 3, 2016).

when the drug is administered via vaporization, which avoids the toxic byproducts of combustion, or when it is ingested by eating or drinking it.¹²⁸

Although the federal government formally opposes medical marijuana, the use of marijuana for medicinal purposes has been approved for specific circumstances since December 31, 2000.¹²⁹ As a result, in a growing number of states, medical marijuana occupies a dual legal status. While it may be permissible according to state laws, marijuana remains formally banned by the federal Controlled Substances Act (CSA), which classifies marijuana as a Schedule I drug: a drug that has both a high potential for abuse and no acceptable medical use.¹³⁰

Although 86% of Americans support allowing severely ill patients to use marijuana if these patients might benefit from its administration, the DEA has consistently discouraged physicians from discussing marijuana with patients.¹³¹ Supporters of marijuana reform maintain that the Schedule I classification must be reconsidered in light of research supporting its therapeutic value. The American Medical Association (AMA) has urged a review of marijuana as a Schedule I controlled substance, “noting it would support rescheduling if doing so would facilitate research and development of cannabinoid-based medicine.”¹³² The AMA has joined with groups such as the Institute of Medicine, the American College of Physicians, and patient advocate groups in calling for changes to federal drug enforcement policies in order to establish a more evidence-based practice.¹³³

4. *Depenalization/Decriminalization*

Another measure that has been gaining traction is **depenalization**. Although there is no universal definition of the term, depenalization generally refers to the “relaxation of the penal sanction provided for by law.”¹³⁴ A policy of depenalization might include reducing or even eliminating

¹²⁸ *Id.*

¹²⁹ Rosalie Liccardo Pacula et al., *State Medical Marijuana Laws: Understanding the Laws and their Limitations*, 23 J. PUB. HEALTH POL’Y 413 (2002).

¹³⁰ 21 U.S.C. §§ 812(b), 812(c)(c)(10).

¹³¹ George J. Annas, *Medical Marijuana, Physicians, and State Law*, 371 NEW ENG. J. MED. 983, 983 (2014), <http://www.nejm.org/doi/full/10.1056/NEJMp1408965>.

¹³² Diane E. Hoffmann & Ellen Weber, *Medical Marijuana and the Law*, 362 NEW ENG. J. MED. 1453, 1453 (2014), <http://www.nejm.org/doi/full/10.1056/NeJMp1000695>.

¹³³ *Id.* at 1453.

¹³⁴ Martin Jelsma, *The Development of International Drug Control: Lessons Learned and Strategic Challenges for the Future*, at 9, GLOBAL COMMISSION ON DRUG POLICIES, *Working Paper Prepared for the First Meeting of the Commission*, Geneva, 24-25 January 2011, http://www.globalcommissionondrugs.org/wp-content/themes/gcdp_v1/pdf/Global_Com_Martin_Jelsma.pdf.

penalties, while the conduct itself remains a criminal offense.¹³⁵ The advantage of this policy is that it overcomes some of the harmful effects of a system premised on punishment. The downside is that it does not directly challenge the policy of criminalization, thereby leaving the drug market largely unregulated. Since only low-level possession crimes typically fall within depenalization statutes, those who manufacture, smuggle, or sell a prohibited substance are still left within the purview of prison terms. This allows for the continued existence of flourishing black markets for prohibited substances, replete with the violence typically associated with such criminal organizations.¹³⁶

Under depenalization, the offenders may still face fines, community service, and the social stigma associated with a drug conviction.¹³⁷ Regardless of the specifics of the drug crime, and regardless of whether one is sent to prison, drug treatment, or any other program, the fact of conviction is in itself a substantial hardship. The effects of a criminal record remain with the drug user for life, often making it harder to find employment or secure credit.¹³⁸ In America, a single drug conviction can make it impossible for an individual to live in publicly-subsidized housing or get financial aid for education for significant periods of time.¹³⁹ While being sentenced to treatment is an improvement over incarceration, a criminal record can have lifelong consequences.¹⁴⁰ While depenalization mitigates some of the harms caused by incarcerating drug users, it does little or nothing to combat the significant societal harms generated by drug criminalization. Therefore, depenalization is not a complete solution.

Other governments have chosen to experiment with **decriminalization**.¹⁴¹ Under a policy of decriminalization, personal possession or use of small amounts of prohibited drugs is not deemed to be criminal conduct. Decriminalization offers drug users freedom from fear of arrest should they seek treatment for addiction or medical problems related to their drug use. This has proven to be a significant benefit to those who use drugs in excess or are addicted to intravenously-administered drugs because decriminalization allows access to treatment and clean needles, thus

¹³⁵ *Id.*

¹³⁶ See, e.g., Dan Werb et al., *Effect of drug law enforcement on drug market violence: A systematic review*, 22 INT'L J. DRUG POL'Y 87 (2011).

¹³⁷ JOHN J. DONOHUE III ET AL., RETHINKING AMERICA'S ILLEGAL DRUG POLICY 1 (2011), <http://www.nber.org/papers/w16776.pdf>; MICHELLE ALEXANDER, THE NEW JIM CROW 92 (2010).

¹³⁸ Matt Ferner, *Colorado's Marijuana Arrests Disproportionately Impact Latinos, Blacks: MARP Report*, HUFFPOST DENVER (Oct. 25, 2012), http://www.huffingtonpost.com/2012/10/25/colorados-marijuana-arres_n_2018694.html.

¹³⁹ *Id.*

¹⁴⁰ MICHELLE ALEXANDER, THE NEW JIM CROW 92 (2010).

¹⁴¹ See, e.g., GLENN GREENWALD, CATO INSTITUTE, DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES (2009).

reducing the spread of disease.¹⁴² In addition, police, prison systems, and courts are no longer overwhelmed with large numbers of minor drug offenders and can focus on more serious crime.¹⁴³ What is more, decriminalization obviates the harmful long-term consequences of arrest or conviction.

While decriminalizing personal possession of small amounts of prohibited drugs is a more liberal measure than medicalization and depenalization, decriminalization does not address laws against the smuggling, sale, and manufacture of prohibited substances. And such laws against the smuggling, sale, and manufacture of prohibited substances, while well-intentioned, support the existence and proliferation of black markets in illicit drugs.¹⁴⁴ Additionally, the existence of these black markets ensure that impure products reach drug users, thus leading to a plethora of harms associated with consuming untested toxins as well as overdosing on unregulated amounts.¹⁴⁵

In 2001, Portugal decriminalized all drugs.¹⁴⁶ Fifteen years after this unprecedented experiment, drug use has roughly remained the same and even declined in certain areas.¹⁴⁷ Moreover, sexually transmitted disease and deaths due to drug overdoses have dramatically decreased.¹⁴⁸ The experiment has been widely regarded as a success, though drug trafficking is still illegal there.¹⁴⁹

¹⁴² *Id.* at 15-17.

¹⁴³ See, e.g., GEORGE MURKIN, DRUG DECRIMINALIZATION IN PORTUGAL: SETTING THE RECORD STRAIGHT 2-3 (2014), http://www.tdpf.org.uk/sites/default/files/Portugal_0.pdf. Portugal boasts levels of drug use below the European average and has found that decriminalization has apparently had a positive effect on crime. “While opportunistic thefts and robberies had gone up when measured in 2004, it has been suggested that this may have been because police were able to use the time saved by no longer arresting drug users to tackle (and record) other low-level crimes.”

¹⁴⁴ DANNY KUSHLICK ET AL., THE WAR ON DRUGS: UNDERMINING PEACE AND SECURITY (2016), <http://www.countthecosts.org/sites/default/files/Security-briefing.pdf>.

¹⁴⁵ See, e.g., Katherine Q. Seelye, *Heroin Yields Ground to Fentanyl, Its more Potent Killer Cousin*, NEW YORK TIMES (Mar. 26, 2016), <http://www.nytimes.com/2016/03/26/us/heroin-fentanyl.html>.

¹⁴⁶ *Drug Decriminalization in Portugal: A Health-Centered Approach*, DRUG POLICY ALLIANCE, https://www.drugpolicy.org/sites/default/files/DPA_Fact_Sheet_Portugal_Decriminalization_Feb2015.pdf (last visited April 3, 2016).

¹⁴⁷ See GLENN GREENWALD, CATO INSTITUTE, DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES 11 (2009); see also ARTUR DOMOSLAWSKI, OPEN SOCIETY FOUNDATIONS, DRUG POLICY IN PORTUGAL: THE BENEFITS OF DECRIMINALIZING DRUG USE 50 (2011).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

5. Taxation and Regulation

On November 6, 2012, the people of the state of Colorado voted to amend their state constitution to legalize the cultivation and retail sale of cannabis and cannabis-infused products as a matter of state law.¹⁵⁰ That same year, voters in the state of Washington enacted a substantially similar law, although not having the force or effect of an amendment to their state's constitution.¹⁵¹ Both states set the stage to extend legal protection to individuals and companies engaged in such sales, conditioned on compliance with a rigorous regulatory structure, licensing scheme, and tax assignment, the details of which were to be promulgated by state authorities in the coming months.¹⁵² The removal of state-level criminal penalties for adult possession of personal amounts of cannabis took effect immediately.¹⁵³

Colorado authorities enacted rules and regulations over the course of the following year, and retail cannabis stores throughout the state opened their doors to adults aged 21 years and older on January 1, 2014.¹⁵⁴ The following year, the Colorado Department of Revenue announced 2014 tax revenues totaling nearly \$44M on \$313M of retail sales of cannabis outside of the state's medical cannabis system.¹⁵⁵ On July 8, 2014, Washington opened marijuana retail stores; and on April 24, 2015, the state consolidated its medical and recreational marijuana programs through Senate Bill 5052, which designated the newly-named Washington State Liquor and Cannabis Board to oversee regulation and licensing of all marijuana producers, stores, and sales.¹⁵⁶ Oregon voters approved Measure 91 on November 4, 2014, which legalized adult retail marijuana to be

¹⁵⁰ See Sadie Gurman, *Coloradans Say Yes to Recreational Use of Marijuana*, DENVER POST (Nov. 6, 2012), http://www.denverpost.com/ci_21941918/nation-watches-colorados-marijuana-legalization-vote; Colo. Const. art. XVIII, § 16, <https://www.colorado.gov/pacific/sites/default/files/Section%2016%20-%20%20Retail.pdf>.

¹⁵¹ STATE OF WASHINGTON LAW COMMITTEE, WASHINGTON INITIATIVE MEASURE NO. 502 (2011) (the initiative was filed on Jul. 8, 2011).

¹⁵² See *Marijuana Enforcement*, COLORADO DEPARTMENT OF REVENUE, <https://www.colorado.gov/pacific/enforcement/marijuanaenforcement>; *FAQs on I-502*, WASHINGTON STATE LIQUOR AND CANNABIS BOARD, http://www.liq.wa.gov/mj2015/faqs_i-502.

¹⁵³ Keith Coffman & Nicole Neroulis, *Colorado, Washington First Stats to Legalize Recreational Pot*, REUTERS (Nov. 7, 2012), <http://www.reuters.com/article/us-usa-marijuana-legalization-idUSBRE8A602D20121107>.

¹⁵⁴ John Ingold, *World's First Legal Recreational Marijuana Sales Begin in Colorado*, THE DENVER POST AND THE WEST (Jan. 01, 2014), http://www.denverpost.com/news/ci_24828236/worlds-first-legal-recreational-marijuana-sales-begin-colorado.

¹⁵⁵ *Colorado Marijuana Tax Data*, COLORADO DEPARTMENT OF REVENUE (Jan. 2015), <http://www.colorado.gov/pacific/revenue/colorado-marijuana-tax-data> (last visited Apr. 4, 2016).

¹⁵⁶ Lisa Rough, *Washington Governor Signs Senate Bill 5052 Into Law, Guts State Medical Marijuana Program*, LEAFLY (Apr. 24, 2015), <https://www.leafly.com/news/headlines/washington-governor-signs-senate-bill-5052-into-law>.

regulated by the Oregon Liquor Control Commission.¹⁵⁷ Measure 91 went into effect on July 1, 2015.¹⁵⁸

The world immediately took notice of these steps towards legalization. In June 2012, while the ballot initiatives were still pending in Colorado and Washington, Uruguayan President Jose Mujica announced his intention to create a state-operated cannabis cultivation and sales system for his country. After securing legislative approval, Mujica signed that system into law on December 23, 2013.¹⁵⁹ Private cultivation and growth clubs have since begun in Uruguay and, in 2015, licenses were granted to two companies to grow plants for commercial distribution in pharmacies by 2017.¹⁶⁰ And Guatemalan President Otto Perez Molina, addressing the United Nations General Assembly in September 2013, referred to the “visionary decision[s]” of the voters of Colorado and Washington while calling for a comprehensive overhaul of international drug control systems.¹⁶¹

In opposition, INCB President Raymond Yans denounced Colorado and Washington voters’ choices and offered his opinion that, “[T]hese developments are in violation of the international drug control treaties, and pose a great threat to public health and the well-being of society far beyond those states.”¹⁶² He went on to petition the federal government of the United States to take action where state governments declined to do so, and reiterated that demand in the INCB’s 2013 Annual Report.¹⁶³

On Uruguay, Yans offered his opinion that lawmakers and President Mujica “knowingly decided to break the universally agreed and internationally endorsed legal provisions” of the 1961 Single Convention on Narcotic Drugs which requires state parties to limit cannabis availability to

¹⁵⁷ CONTROL, REGULATION, AND TAXATION OF MARIJUANA AND INDUSTRIAL HEMP ACT (2014) (“Measure 91”), <http://www.oregon.gov/olcc/marijuana/Documents/Measure91.pdf>.

¹⁵⁸ *Recreational Marijuana Frequently Asked Questions*, OREGON LIQUOR CONTROL COMMISSION, https://www.oregon.gov/olcc/marijuana/Pages/Frequently-Asked-Questions.aspx#Licensing_-_Retail (last visited Apr. 13, 2016).

¹⁵⁹ *It’s Official: Uruguay’s President Signs Into Law New Legal Marijuana Marketplace*, FOX NEWS LATINO (Dec. 26, 2013), <http://latino.foxnews.com/latino/news/2013/12/26/it-official-uruguay-president-signs-into-law-new-legal-marijuana-marketplace/>.

¹⁶⁰ Malena Castaldi, *Marijuana Coming Next Year to Your Local Pharmacy in Uruguay*, LIFE (Oct. 1, 2015), <http://www.reuters.com/article/us-uruguay-marijuana-idUSKCN0RV5X220151002>.

¹⁶¹ Alfonso Serrano, *Guatemala president to UN: Reform global drug policy*, ALJAZEERA AMERICA (Sept. 26, 2013), <http://america.aljazeera.com/articles/2013/9/26/guatemalan-presidentcallsfordrugpolicyreformatungeneralassembly.html>

¹⁶² Press Release, United Nations Information Service, INCB President Voices Concern About the Outcome of Recent Referenda about Non-medical Use of Cannabis in the United States in a Number of States, UNIS/NAR/1153 (Nov. 15, 2012), https://www.incb.org/documents/Publications/PressRelease/PR2012/press_release_151112.pdf.

¹⁶³ INTERNATIONAL NARCOTICS CONTROL BOARD, REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD 2013 106 (2014), <http://www.incb.org/incb/en/publications/annual-reports/annual-report-2013.html>.

medical and scientific purposes.¹⁶⁴ Undeterred, on June 26, 2015, Uruguay's National Drug Board announced its plans to present a report to the UN High Commissioner for Human Rights to defend the country's legalization process and argued that "the criminalization of use and possession of drugs infringes upon the right to freedom and autonomy."¹⁶⁵

Also recently, on November 4, 2015, Mexico's Supreme Court considered a challenge to the country's medical marijuana laws and declared that—for the four specific plaintiffs at issue in the case—prohibiting the use and cultivation of medical marijuana was unconstitutional and a violation of human rights.¹⁶⁶ And Chile's President Michelle Bachelet signed an executive order in December 2015 removing marijuana from the country's list of hard drugs, classifying it with a similar status as alcohol, and authorizing its sale in pharmacies.¹⁶⁷ Although such use has been decriminalized for years, medical marijuana users in Chile often face legal challenges when attempting to procure and use the drug.¹⁶⁸

Some argue that there is no reason to limit full legalization to the production and sale of cannabis; such a policy potentially could be adopted for all psychoactive drugs, with regulatory structures governing production and sales established to reflect the severity of the drug-specific concerns. Canadian harm reduction theorist Mark Haden, a professor at the University of British Columbia's School of Public Health, has proposed "sliding scale" regulatory frameworks for LSD, MDMA ("Ecstasy"), heroin and opiates, various forms of cocaine, amphetamines ranging from dextroamphetamine (trade name "Adderall") to methamphetamine, and other drugs.¹⁶⁹ Proposed restrictions include a mix of currently accepted regulations (age, level of intoxication at the point of attempted purchase, volume rationing, zoning and land use restrictions on sales and use, concentration limits and labeling, centralized database tracking of narcotic drug transactions) and others not yet implemented (delayed order and delivery times, required training on potential hazards of drug use as a condition of eligibility to purchase, prohibition on branding and sponsorship, graduated licensing akin to modern drivers' licensing with limitations on products an

¹⁶⁴ Steven Nelson, *Uruguay Violating Treaties By Legalizing Marijuana, U.N. Agency Says*, U.S. NEWS AND WORLD REPORT (Dec. 11, 2013), <http://www.usnews.com/news/articles/2013/12/11/uruguay-violating-treaties-by-legalizing-marijuana-un-agency-says>.

¹⁶⁵ *Uruguay Stands Up to UN on Marijuana Legalization*, PANAM POST (Jun. 29, 2015), <http://panampost.com/panam-staff/2015/06/29/uruguay-stands-up-to-un-on-marijuana-legalization/>.

¹⁶⁶ Edward Delman, *Is Smoking Weed a Human Right?*, THE ATLANTIC (Nov. 9, 2015), <http://www.theatlantic.com/international/archive/2015/11/mexico-marijuana-legal-human-right/415017/>.

¹⁶⁷ Cedar Attanasio, *Chile Marijuana Legalization: Michelle Bachelet Removes Weed From 'Hard Drug' List, Approves Medical Pot*, LATIN TIMES (Dec. 7, 2015), <http://www.latintimes.com/chile-marijuana-legalization-michelle-bachelet-removes-weed-hard-drug-list-approves-357337>.

¹⁶⁸ *Id.*

¹⁶⁹ Mark Haden, *Regulation of illegal drugs: an exploration of public health tools*, 15 INT. J. DRUG POLICY 225-30 (2004); Mark Haden, *Controlling illegal stimulants: a regulated market model*, 5 HARM REDUCTION J. 1 (2008).

individual is eligible to purchase that are expanded with proof of experience and requisite counseling).¹⁷⁰

Regulation is a model that recognizes that drug use and its associated problems are endemic in many societies and that efforts to remove these ills by reliance on the force of criminal law alone have led to avoidable consequences that amplify and compound problems caused by drug use and abuse¹⁷¹ while doing virtually nothing to stop drug use among the most problematic users. Punitive models have proven ineffective as categorical bans do not deter those who suffer from drug use disorders.

While almost half of the states within the United States have some medical and/or retail marijuana laws pending or on the books, regulation and taxation have also gained considerable support at the federal level with several key pieces of legislation moving through the House and Senate. The groundbreaking CARERS Act (Compassionate Access, Research, Expansion, and Respect States Act), introduced with bipartisan support on March 10, 2015, and its companion bill in the House (H.R. 1538), would permit states to legalize the production and possession of medical marijuana without federal interference, expand research of medical marijuana, and allow interstate transportation of certain types of high CBD marijuana.¹⁷²

Critically, the CARERS Act and the bipartisan Marijuana Business Access to Banking Act introduced in July 2015 will allow banks to service state-legal marijuana businesses and avoid the current cash-only system.¹⁷³ The House also proposed two bills comprising the Regulate Marijuana Like Alcohol Act (H.R. 1013), which would end the federal ban on marijuana and create a licensing and oversight system allowing taxation at the federal level.¹⁷⁴ And, as a step towards recognizing states' authority to set their own marijuana laws, an amendment to a spending bill, passed in late 2015, prohibits the Department of Justice from using resources to impede States from implementing their own laws that authorize the use, distribution, possession, or cultivation

¹⁷⁰ Mark Haden, *The control and regulation of currently illegal drugs*, 2 INT. ENCYCLOPEDIA OF PUB. HEALTH 7-16 (2008).

¹⁷¹ For instance, punitive drug control models encourage the spread of HIV by imposing criminal penalties for possession of syringes, which drives users to minimize their criminal exposure by sharing syringes. Moreover, criminalizing drug use has led to the forced removal of many young black and Hispanic men from their communities in the United States, leading to destruction of valuable and health-protective social capital. See DRUCKER E., A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA (2011).

¹⁷² Evan Halper, *Marijuana legalization gets a boost on Capitol Hill*, L.A. TIMES (Mar. 10, 2015), <http://www.latimes.com/nation/politics/politicsnow/la-pn-marijuana-senate-20150310-story.html>.

¹⁷³ *Bipartisan Group of Senators Introduce Marijuana Banking Bill*, DRUG POLICY ALLIANCE (Jul. 9, 2015), <http://www.drugpolicy.org/news/2015/07/bipartisan-group-senators-introduce-marijuana-banking-bill>.

¹⁷⁴ Kathleen Caulderwood, *New Bills Would Regulate Marijuana Like Alcohol at Federal Level*, INT'L BUSINESS TIMES (Feb. 20, 2015), <http://www.ibtimes.com/new-bills-would-regulate-marijuana-alcohol-federal-level-1823404>.

of medical marijuana.¹⁷⁵ Regulation and limited taxation have the potential to be the most flexible tools in the public health toolkit, if and when they are allowed in law.

¹⁷⁵ H. Rept. 114 -39, Text of House Amendment to the Senate Amendment to H.R. 2029 (2016), <http://docs.house.gov/billssthisweek/20151214/CPRT-114-HPRT-RU00-SAHR2029-AMNT1final.pdf>.

III. The Effects of Policy Experimentation on International Law

This report has examined the many ways in which countries have tested the flexibility of the international drug control treaties. Some would argue that many—if not all—of these measures fit quite comfortably within the confines of the treaties, and therefore there is no reason to revise or update them at this point in time, a procedure that would undoubtedly be enormously arduous and complex. The United States, admittedly in a difficult position given its own domestic situation, has promoted the “Four Pillars Approach” which focuses on respecting the “integrity” of the drug conventions while accepting a “flexible interpretation” of the treaties.¹⁷⁶ Under this approach, the treaties can accommodate almost any challenge as long as the “spirit” of the 1961 Convention is upheld and, therefore, treaty revision at this juncture is simply not necessary. For those who believe that treaty revision is simply far too complex a task to undertake—perhaps an impossible task since consensus among member states might never be achieved—this so-called “Brownfield Doctrine”¹⁷⁷ offers a comfortable (if temporary) solution.

In reality, however, while many of the measures discussed above fall within the flexibility of the conventions, others, such as cannabis regulation—a trend that is moving forward in many parts of the world—clearly contravene the treaties.¹⁷⁸ Policy experts point out that simply ignoring this reality in the name of “flexibility” sets a bad and even dangerous precedent, and may serve instead to undermine the international legal system as a whole.¹⁷⁹ Finally, the 1969 Vienna Convention on the Law of Treaties requires all parties to interpret treaties in good faith, in light of

¹⁷⁶ The “4 pillars” approach provides that the international community should, 1) “respect the integrity of the existing UN Drug Control Conventions,” 2) accept “flexible interpretation” of the conventions, 3) “tolerate different national drug policies,” accepting the fact that “some countries will have very strict drug approaches; other countries will legalize entire categories of drugs,” and 4) agree to “combat and resist” criminal organizations. William R. Brownfield, *Trends in Global Drug Policy*, U.S. DEPT. OF STATE (Oct. 9, 2014), <http://fpc.state.gov/232813.htm>.

¹⁷⁷ The 4 pillars approach was quickly dubbed the “Brownfield Doctrine” in various news and social media outlets. See Damon Barrett, *Fatal Attraction: Brownfield’s Flexibility Doctrine and Global Drug Policy Reform*, HUFFINGTON POST (Nov. 18, 2014), http://www.huffingtonpost.co.uk/damon-barett/drug-policy-reform_b_6158144.html (last visited April 13, 2016); *Into the breach: Drugs, control, and violating bad laws in good ways*, UNIVERSITY OF ESSEX HUMAN RIGHTS CENTRE (Nov. 27, 2014), <http://blogs.essex.ac.uk/hrc/2014/11/27/into-the-breach-drugs-control-and-violating-bad-laws-in-good-ways/>; *Viewpoints – The Brownfield Doctrine*, NEW ZEALAND DRUG POLICY FOUNDATION (Feb. 2015), <https://www.drugfoundation.org.nz/matters-of-substance/february-2015/brownfield-doctrine>.

¹⁷⁸ Dave Bewley-Taylor & Martin Jelsma, *The Limits of Latitude: The UN Drug Control Conventions*, TRANSNATIONAL INSTITUTE (Mar. 2012), <http://www.undrugcontrol.info/en/publications/legislative-reform-series-/item/3252-the-limits-of-latitude> (series on Legislative Reform of Drug Policies Number 18); INCB 2014 HIGH LEVEL REVIEW, *supra* note 106, at 42.

¹⁷⁹ Bewley-Taylor, *supra* note 178, at 16-17; see also John Walsh & Wells Bennett, *Marijuana Legalization is an Opportunity to Modernize International Drug Law Treaties*, BROOKINGS (Oct. 15, 2014), <http://www.brookings.edu/research/reports/2014/10/15-marijuana-legalization-modernize-drug-treaties-bennett-walsh>.

their “object and purpose,” which limits parties’ abilities to unilaterally reinterpret the conventions.¹⁸⁰

A. To Revise or Not to Revise- Which is the Greater Threat to the International System?

Government leaders speak often at the United Nations about their respect for the international legal system and the importance of the rule of law. Some of the same member states (and INCB) have also defended the need to protect the “integrity” of the international drug conventions, as if updating them (or even subjecting them to a review) would pose a threat to the entire drug control system.¹⁸¹ On the other hand, however, keeping a treaty system—or any legal system—in place long after its signatories have failed to adhere to it may not actually be in the interest of protecting that system at all: it may in fact do more harm than good to the broader international legal structure.

International law functions because sovereign countries pledge themselves in support of the law.¹⁸² That system is undermined when countries remain ostensibly committed to international policies but informally abandon those policies in the face of domestic need or hardship. In such a situation, a country segregates its official policy from its actual practice—thereby creating discord within the international community—in order to bring its internal policies more in line with the needs of its citizens.¹⁸³ As more nations that outwardly profess to be committed to the letter of international law pursue policies that subvert the stated purpose of the drug treaties, the effect is that true cooperation among countries is lost and the international legal system loses credibility.

Finally, experts have pointed out the inherent danger in Brownfield’s “flexibility” approach.¹⁸⁴ If member states can ignore the actual written provisions of the drug control treaties in order to suit a particular country’s needs, can signatories also apply this approach to the human rights treaties? How about disarmament treaties? And which country decides the limits of this “flexibility”? In this light, the wisdom of going to any lengths to prevent review and revision of the drug control treaties – in the name of protecting their “integrity” – becomes much less apparent.

¹⁸⁰ UN, Vienna Convention on the Law of Treaties, Vienna, May 23, 1969, United Nations Treaty Series 1155, no. 18232 (1980), art.41, para. 1(b), <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

¹⁸¹ INTERNATIONAL NARCOTICS CONTROL BOARD, REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD 2012 2 (2013), <http://www.incb.org/incb/en/publications/annual-reports/annual-report-2013.html>.

¹⁸² See generally U.N. Charter art. 1.

¹⁸³ Such as, until recently, the case of the Bolivian coca leaf. See *supra* note 68 and *infra* notes 185-87 and accompanying text.

¹⁸⁴ MARTIN JELSMAN, BROOKINGS FOREIGN POLICY, UNGASS 2016: PROSPECTS FOR TREATY REFORM AND UN SYSTEM-WIDE COHERENCE ON DRUG POLICY 19 (2016), https://www.tni.org/files/download/treaty_reform_drug_policy_ungass2016.pdf.

B. Should Loyalty to the International Drug Control System Take Precedence Over Obligations of Signatory Countries to Their Domestic Needs and Policy?

INCB and governments often speak out in favor of protecting the “integrity” of the international drug control system, even when the end result is illogical. In 2011, Bolivia withdrew from the Single Conventions entirely, in order to reconcile provisions in its 2009 Constitution protecting the practice of coca leaf chewing as an indigenous right and as part of its cultural heritage.¹⁸⁵ Soon after, Bolivia re-acceded to the Single Conventions with a reservation allowing for the traditional uses of the coca leaf.¹⁸⁶ Bolivia’s legal maneuver in this regard was entirely within its rights as a sovereign signatory nation, and represented the first direct challenge to the requirements of the treaties.¹⁸⁷ Bolivia’s approach represented a legally honest and upfront attempt to reconcile the fundamental incompatibility of the rights of Bolivian citizens with their national obligations under the existing treaty framework. Bolivia operated within the letter of international law, with the purpose of protecting fundamental cultural rights enshrined in the Bolivian Constitution.

Yet, the INCB Secretariat opposed the move, issuing a press release which stated that Bolivia’s actions, though technically permitted by the Single Convention, were “contrary to its spirit.”¹⁸⁸ The INCB urged the international community not to accept denunciation of the treaty followed by re-accession with reservations as a way for nations to free themselves of their obligations under the treaties, and stated that Bolivia’s approach was a “threat to the international drug control system.”¹⁸⁹ (Notably, INCB failed to recognize the argument that the use of the coca leaf might be protected under other treaties protecting the rights of indigenous peoples.) In the end, however, the required one-third of the parties to the Single Convention failed to block the maneuver, and Bolivia’s re-accession was successful.¹⁹⁰

¹⁸⁵ Constitute [Constitution] 2009, Title II, Ch. VII, Sec. II (Bolivia), https://www.constituteproject.org/constitution/Bolivia_2009.pdf.

¹⁸⁶ *Bolivia Officially Returns as a Party to the 1961 Single Convention on Narcotic Drugs*, WASHINGTON OFFICE ON LATIN AMERICA (Feb. 12, 2013), http://www.wola.org/commentary/bolivia_officially_returns_as_a_party_to_the_1961_single_convention_on_narcotic_drugs.

¹⁸⁷ INTERNATIONAL DRUG POLICY CONSORTIUM, IDPC ADVOCACY NOTE, BOLIVIA’S LEGAL RECONCILIATION WITH THE UN SINGLE CONVENTION ON NARCOTIC DRUGS, (2011), <http://www.undrugcontrol.info/images/stories/documents/IDPC-advocacy-bolivia-july2011.pdf> (citing Helfer, L.R., *Not fully committed? Reservations, risk and treaty design*, 367 YALE J. OF INT’L L. 379 (2006), http://www.yale.edu/yjil/PDFs/vol_31/Helfer.pdf).

¹⁸⁸ Press Release, International Narcotics Control Board, International Narcotics Control Board Regrets Bolivia’s Denunciation of the Single Convention on Narcotic Drugs, UNIS/NAR/1114 (Jul. 5, 2011), https://www.incb.org/documents/Publications/PressRelease/PR2011/UNIS_Press_release_1114_050711.pdf.

¹⁸⁹ *Id.*

¹⁹⁰ Coletta Youngers, *Bolivia Officially Returns as a Party to the 1961 Single Convention on Narcotic Drugs*, WOLA (Feb. 12, 2013),

In the wake of INCB's hardened stance against the actions undertaken by the Bolivian government in 2011, other countries have since taken approaches that, in fact, place them in direct violation of the treaties without any attempt to reconcile their changing domestic policy with their obligations under the drug treaties. Not surprisingly, these countries have, likewise, been criticized by INCB and member states defending the status quo.¹⁹¹ In December 2013, Uruguay became the first country in the world to enact legislation that would create a regulated market for marijuana. The policy was implemented because the country believed regulating the cannabis market would promote public health by eliminating the need for people to support and deal with violent narco-criminal cartels.¹⁹² The INCB immediately denounced the efforts of Uruguay to create a legal market for the sale of cannabis.¹⁹³ After Uruguay's House of Representatives approved the landmark bill, the INCB issued a statement that such a measure would "be in complete contravention to the provisions of the international drug control treaties," as the law would allow for non-medical use of the plant.¹⁹⁴ After the measure passed, the INCB remarked that Uruguay's government was "ignoring the science" on marijuana and that it was "disregarding the public health of its citizens."¹⁹⁵ Then-INCB President Raymond Yans went so far as to refer to Uruguay's government as "pirates."¹⁹⁶

And in Argentina, the country's highest court declared, in its 2009 *Arriola* ruling,¹⁹⁷ that the laws punishing personal possession of drugs were unconstitutional and violated human rights.¹⁹⁸ Thereafter, the INCB raised concerns about the *Arriola* decision in its annual report,

http://www.wola.org/commentary/bolivia_officially_returns_as_a_party_to_the_1961_single_convention_on_narcotic_drugs.

¹⁹¹ The US, Sweden, Russia, China, and most middle eastern countries fall into this category.

¹⁹² Simon Romero, *Uruguay Acts to Legalize Marijuana*, NEW YORK TIMES (Dec. 10, 2013), <http://www.nytimes.com/2013/12/11/world/americas/uruguay-acts-to-legalize-marijuana.html>.

¹⁹³ See *UN Narcotics Body Warns Uruguay Over Marijuana Bill*, BBC NEWS (Aug. 1, 2013), <http://www.bbc.co.uk/news/world-latin-america-23535990>.

¹⁹⁴ Press Release, United Nations Information Service, INCB President Urges Uruguay To Remain Within The International Drug Control Treaties, Noting Draft Cannabis Legislation, UNIS/NAR/1176 (Aug. 1, 2013), <http://www.unis.unvienna.org/unis/en/pressrels/2013/unisnar1176.html>.

¹⁹⁵ Jelsma, M., *INCB vs. Uruguay: the art of diplomacy*, TRANSNATIONAL INSTITUTE (Dec. 17, 2013), <https://www.tni.org/en/article/incb-vs-uruguay-art-diplomacy>.

¹⁹⁶ *Id.* (citing *La legalización de la marihuana en Uruguay es una actitud de "piratas"*, INFORMACIÓN (Jun. 12, 2013), <http://www.elpais.com.uy/informacion/onu-califica-actitud-uruguaya-pirata.html>).

¹⁹⁷ Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice] 25/8/2009, "Fallo "Arriola" del la Corte Suprema de Justicia de la Nación - Recurso de Hecho, Arriola, Sebastián y otros s/ causa n° 9080," A. 891. XLIV. (2009) (Arg). Decided on Aug 25, 2009, the Arriola Decision stated that criminalization of personal possession was an unconstitutional invasion of personal liberty, but as a Civil Law country, has no binding effect on future Argentinian cases.

¹⁹⁸ Kristel Mucino, *UN's International Narcotics Control Board's Annual Report Oversteps Mandate in Criticizing Decriminalization: INCB Interferes with Countries' Sovereignty*, WASHINGTON OFFICE ON LATIN AMERICA (Feb. 24,

along with the INCB's concerns about decriminalization laws passed in Mexico in 2008, and partial decriminalization laws passed in Brazil in 2006. The Board stated that the efforts to decriminalize personal possession by Argentina, Mexico, Brazil and other nations posed a direct threat to the coherence and effectiveness of the international drug control system and sent the "wrong message" to the public.¹⁹⁹

In response, the Argentine delegation to the United Nation's Commission on Narcotic Drugs publicly expressed its "concern and aggravation" over INCB's disrespect for Argentina's sovereignty and constitutional order.²⁰⁰ Furthermore, Mexico expressed similar concerns and frustrations following the INCB's statements denouncing Mexico's attempts to solve its substantial domestic drug problems.²⁰¹

The INCB has also been critical of the recent legalization of cannabis in numerous American states. At the 56th Session of the Commission on Narcotic Drugs, Raymond Yans stated that allowing recreational use of cannabis "would be a violation of international law."²⁰² Mr. Yans specifically stated that the United States has an obligation to ensure compliance with international law within its territories, and expressed his hope that the issue would soon be "dealt with" by the federal government of the United States.²⁰³ This criticism continued at the 57th and 58th Sessions of the CND and in the INCB's most recent report.²⁰⁴

INCB's historical commitment to defending the drug conventions—in spite of strong countervailing evidence as to their effectiveness—is perplexing. Its chief concern over the years seems to have been to guard the existing international treaty framework, even at the expense of the needs of people who live in the nations that are governed by that framework. Indeed, INCB

2010),
http://www.wola.org/news/uns_international_narcotics_control_boards_annual_report_oversteps_mandate_in_criticism_decri. While *Stare Decisis* does not apply to this decision, there have been attempts in the Federal Congress to legally repeal the ban, and the decision is respected and generally followed by lower courts.

¹⁹⁹ INTERNATIONAL NARCOTICS CONTROL BOARD, REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2009 (2010),
http://www.unodc.org/documents/southeastasiaandpacific/2010/02/incb/INCB_Annual_Report_2009.pdf (E/INCB/2009/1).

²⁰⁰ *Argentina and Mexico clash with the INCB, Italy with Europe*, TRANSNATIONAL INSTITUTE (May 3, 2010),
<http://www.tni.org/article/argentina-and-mexico-clash-incb-italy-europe>.

²⁰¹ *Id.*

²⁰² *INCB President Calls On the United States Government To Address Initiatives Aimed At Permitting Recreational Drug Use*, UNITED NATIONS INFORMATION SERVICE (Mar. 14, 2013),
http://www.incub.org/documents/Publications/PressRelease/PR2013/press_release140313.pdf (UNIS/NAR/1164).

²⁰³ *Id.*

²⁰⁴ INTERNATIONAL NARCOTICS CONTROL BOARD, REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2015 (2016), https://www.incub.org/documents/Publications/AnnualReports/AR2015/English/AR_2015_E.pdf.

has been highly criticized in the past for denouncing purported infractions of the drug conventions while remaining silent on the many human rights abuses carried out in the name of their enforcement. For many years, INCB took the position that to speak out against human rights abuses fell outside of its “mandate” as guardian of the treaties.²⁰⁵ In an appearance by then-INCB President Hamid Ghodse at the 55th Session of the CND, when an activist pointedly asked, “Is there any atrocity great enough to cause INCB to step outside its mandate?” Mr. Ghodse responded simply, “No, there is not.”²⁰⁶

Fortunately, thanks in no small part to years of advocacy by human rights and other organizations, this attitude has started to change. The last two INCB presidents, Raymond Yans and Dr. Lochan Naidoo, openly denounced the imposition of the death penalty for drug-related offenses (although they continue to remain loyal to the Board’s staunch opposition to cannabis regulation). Most recently, newly-appointed President Werner Sipp, in addressing ECOSOC in July 2015, emphasized that the framework on drugs is based on “the safeguarding of the health and welfare of humankind,” and implored member states to consider the abolition of the death penalty for drug-related offenses “in recognition of the growing number of international legal and policy pronouncements to this effect.”²⁰⁷ He also emphasized the need to prioritize access to essential medicines for “the treatment and management of pain associated for instance with illness, injury, child birth, surgical interventions and palliative care,” and announced that the Board would publish a special report on the issue.²⁰⁸ While these developments represent a significant step in the right direction, there is much more progress to be made.

C. Interpreting the International Drug Control Treaties in the Context of Other International Treaty Bodies

Human rights organizations and policy experts observe that the drug conventions have been interpreted and implemented by governments and INCB “in isolation from broader international law, despite the clear intersections between many areas of drug control and concurrent legal obligations.”²⁰⁹ These critics point out that the principle of prohibiting non-medicinal or scientific

²⁰⁵ See *Mandate and Functions*, INTERNATIONAL NARCOTICS CONTROL BOARD, <http://www.incb.org/incb/en/about/mandate-functions.html> (last visited April 2016) (for the specifics of the INCB’s mandate and functions).

²⁰⁶ Comment by President Hamid Ghodse in response to a question posed by Allan Clear of Harm Reduction Coalition, at an “Informal Civil Society Meeting with INCB” at the 55th Session of the CND, Vienna, Austria, March 2012.

²⁰⁷ Statement by Mr. Werner Sipp, President of the International Narcotics Control Board (INCB), Economic and Social Council Coordination and Management Meetings 2015, July 22, 2015, New York, https://www.incb.org/documents/Speeches/Speeches2015/2015_07_22_Statement_INCB_President_ECOSOC_final.pdf.

²⁰⁸ *Id.*

²⁰⁹ See Expert Seminar Report, *supra* note 32, at 14.

use has taken priority over the rights of citizens under other treaties, most notably human rights treaties, but also others such as those protecting the rights of indigenous peoples.²¹⁰

In addition, some academics argue that the drug conventions may, by their own terms, violate human rights norms. Damon Barrett, an expert in the intersection between the drug treaties and obligations under human rights treaties, presents the issue as follows:

What states are required to do under the drug treaties is inherently questionable from a human rights perspective, considering that they include obligations, the achievement of which requires investigation, arrest, prosecution, imprisonment, restrictions on freedom of speech (incitement), confiscation of property, extradition, eradication of crops and other actions. Indicators of success from these activities in turn map onto indicators of human rights risk, or even abuse.²¹¹

Others focus on the many human rights abuses committed in the course of implementation of the treaties, and emphasize the punitive nature of the treaties. For example, countries are granted a broad right to adopt “more strict or severe measures” than required under the treaties themselves, which some say invites governments to go too far in their zeal to show their efforts at implementation. Human rights abuses carried out in the name of treaty enforcement include long-term drug detention centers, disproportionate sentencing, and even the death penalty for drug offenses.²¹²

In light of these problems with treaty implementation, the International Drug Policy Consortium (IDPC), Transnational Institute (TNI), and other advocacy organizations have, over the past decade, focused attention on arguments that the current treaty structure provides more flexibility than the INCB has been willing to recognize.²¹³ IDPC and TNI take the position that, while there are some limits, there is arguably room for movement away from those aspects of treaty interpretation that give rise to human rights abuses.²¹⁴ These arguments have taken hold over the past few years, as many member states are now taking the view that criminalization for

²¹⁰ *Id.* at 14.

²¹¹ *Id.* at 15. Barrett further points out the difference between “process indicators” – what states are doing – and “outcome indicators” – what states should be aiming to improve.

²¹² Indonesia famously executed nine people in connection with drug trafficking charges in 2015. *See* Claire Phipps, *Bali Nine: Indonesia executes eight prisoners but reprieves Mary Jane Veloso*, THE GUARDIAN (Apr. 28, 2015), <http://www.theguardian.com/world/live/2015/apr/28/bali-nine-andrew-chan-myuran-sukumaran-executed-indonesia-mercy>.

²¹³ *See* DAVE BEWLEY-TAYLOR, TRANSNATIONAL INSTITUTE, TOWARDS REVISION OF THE UN DRUG CONTROL CONVENTIONS: THE LOGIC AND DILEMMAS OF LIKE-MINDED GROUPS (2012), http://dl.dropboxusercontent.com/u/64663568/library/the-logic-and-dilemma-of-like-minded-groups-tni-idpc_0.pdf.

²¹⁴ DAVE BEWLEY-TAYLOR & MARTIN JELSMA, THE UN DRUG CONTROL CONVENTIONS: THE LIMITS OF LATITUDE, INTERNATIONAL DRUG POLICY CONSORTIUM SERIES ON LEGISLATIVE REFORM OF DRUG POLICIES NO.18 (2012), <http://ssrn.com/abstract=2184316> or <http://dx.doi.org/10.2139/ssrn.2184316>.

possession for personal use is not required under the treaties, and that the conventions by their terms do not require harsh penalties for drug offenses; nor do they preclude many harm reduction measures such as syringe exchange, OST, or overdose prevention measures. At the same time, these organizations recognize that while governments should explore the full scope of options under the treaties, where there are tensions in terms of treaty adherence, the conventions must be reviewed, and, ultimately, revised.²¹⁵

At any rate, the policy changes of the past few years illustrate the dramatic paradigm shift that is occurring in international drug control. What remains to be seen is whether or not the current treaty structure has enough flexibility to allow for changes sufficient to permit the modernization of drug control in respect of human rights, or whether the inherent limitations of the current framework preclude the survival of the conventions as they currently stand.

²¹⁵ MARTIN JELSMA, BROOKINGS FOREIGN POLICY, UNGASS 2016: PROSPECTS FOR TREATY REFORM AND UN SYSTEM-WIDE COHERENCE ON DRUG POLICY 19 (2016), https://www.tni.org/files/download/treaty_reform_drug_policy_ungass2016.pdf; THE ROAD TO UNGASS 2016: PROCESS AND POLICY ASKS FROM THE INTERNATIONAL DRUG POLICY CONSORTIUM (2015), https://www.unodc.org/documents/ungass2016/Contributions/Civil/IDPC/International_Drug_Policy_Consortium_UNGASS-asks_External_04-2015_ENGLISH.pdf [hereinafter IDPC Process and Policy Asks].

IV. International Drug Controls in the Context of Human Rights: Effects of a Punishment-Based Legal System and the Future of International Drug Control

The United Nations has helped establish a global consensus on human rights. The UN Charter requires that any and all treaties promulgated under its authority adhere to certain basic human rights, and that they “promot[e] and encourage[e] respect for human rights and for fundamental freedoms.”²¹⁶ The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (“ICCPR”), and International Covenant on Economic, Social and Cultural Rights (“ICESCR”) broadly define human rights as the universal recognition that all human beings **are entitled** to be treated with dignity, respect, and fairness.²¹⁷ By virtue of these agreements, all member nations are required to recognize human rights as a basic tenet of good governance, and to guarantee human rights in their countries. An effective drug policy for the future must ensure that drug control is reconciled with the obligations and purposes contained in the Charter of the United Nations and in the Universal Declaration of Human Rights.²¹⁸ Therefore, human rights principles are central to the discussion on drug control.

Existing drug laws have produced—even encouraged—extensive human rights violations. As noted in the Committee’s original report, “A Wiser Course,” the United States’ drug laws and their enforcement practices have led to disproportionate prosecution of minorities and low-income individuals. More than two decades after the publication of the Committee’s original report, the disparate impact of drug laws is still manifest within the United States.²¹⁹ Furthermore, human

²¹⁶ UN Charter, Ch.1, Art.1, n.3.

²¹⁷ See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf; International Covenant on Civil and Political Rights (Dec. 16, 1966), <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>.

²¹⁸ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

²¹⁹ The disparate racial impact of the United States’ War on Drugs continues to be undeniable. Approximately 14 million Caucasians report the use of illicit drugs whereas 2.6 million African Americans report the use of illicit drugs. However, despite the fact that five times as many Caucasians use drugs as compared to African Americans, African Americans are sent to prison for drug offenses at a rate ten times higher than that of Caucasian citizens. African Americans represent 12% of the total population of drug users but represent 38% of those arrested for drug offenses and 59% of those in state prison for drug offenses. Additionally, African Americans serve nearly the same amount of time for a drug offense on average (58.7 months) as Caucasians do for a violent offense (61.7 months). Furthermore, “[r]esearch shows that prosecutors are twice as likely to pursue a mandatory minimum sentence for black people as for white people charged with the same offense.” *The Drug War, Mass Incarceration, and Race Fact Sheet*, DRUG POLICY ALLIANCE (Feb. 2016), http://www.drugpolicy.org/sites/default/files/DPA%20Fact%20Sheet_Drug%20War%20Mass%20Incarceration%20and%20Race_%28Feb.%202016%29.pdf. These statistics irrefutably demonstrate that the War on Drugs has disproportionately targeted persons of color within the United States; see also EXECUTIVE COMMITTEE OF THE NEW YORK CITY BAR ASSOCIATION, *MASS INCARCERATION: SEIZING THE MOMENT FOR REFORM 1* (2015) (the Introduction states that “African-Americans and Latinos collectively account for 30% of our population, but they represent 60% of our current inmates. The raw numbers are striking: approximately one in every 35 African-American men, and one in 88 Latino men is presently serving time behind bars (in contrast to one in 214 white

rights violations have occurred globally under current drug control regimes around the world.²²⁰ After decades of these practices, the international community has begun to focus attention on the serious human rights implications of current control regimes.

This week, the United Nations will host the 2016 United Nations General Assembly Special Session on the World Drug Problem (“UNGASS 2016”). In connection with this important U.N. undertaking, existing international drug controls are being examined and called into question by countries around the globe. The emerging view is that punitive measures—which criminalize drug use, manufacture, and distribution²²¹—do not work. These punitive protocols have neither curtailed drug abuse nor prevented the illegal manufacture and distribution of narcotics.²²² In fact, many nations, particularly in Latin America, have seen an *increase* in violence due to black markets created by existing drug laws.²²³ Some Latin American nations are seeking flexibility in their obligations to adhere to specific drug controls, and hope to experiment with new approaches that they believe will lead to decreased violence and other harms associated with punitive drug controls.²²⁴ Others argue that the kinds of human rights violations caused by drug controls are at

men)), http://www2.nycbar.org/pdf/report/uploads/Mass_Incarceration_Seizing_the_Moment_for_Reform-20150928.pdf.

²²⁰ Amnesty International reports that the death penalty is available for drug related offenses in more than 30 countries around the world. These offenses “can include anything from trafficking heroin or being caught carrying a small amount of marijuana.” Notably, some countries include mandatory death sentences. *Is the Death Penalty the Answer to Drug Crime?*, AMNESTY INTERNATIONAL (Oct. 9, 2015), <https://www.amnesty.org/en/latest/campaigns/2015/10/is-the-death-penalty-the-answer-to-drug-crime/>. Arguably, the proportionality of the sentence to the crime, particularly in the cases of a small possession offense, is problematic. This issue becomes more apparent when the sentence of death for drug offense is read in conjunction with the Universal Declaration of Human Rights, stating that everyone has the right to life, liberty and security of the person and that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

²²¹ See *supra* Section II(a), at 13-14.

²²² The World Drug Report 2015 stated, “It is estimated that a total of 246 million people, or 1 out of 20 people between the ages of 15 and 64 years, used an illicit drug in 2013. That represents an increase of 3 million over the previous year but, because of the increase in the global population, illicit drug use has in fact remained stable. The magnitude of the world drug problem becomes more apparent when considering that more than 1 out of 10 drug users is a problem drug user, suffering from drug use disorders or drug dependence. In other words, some 27 million people, or almost the entire population of a country the size of Malaysia, are problem drug users.” UNITED NATIONS OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT 2015 11 (2015), https://www.unodc.org/documents/wdr2015/World_Drug_Report_2015.pdf.

²²³ United Nations Office on Drugs and Crime finding that “the presence of each additional cartel in a particular location results in a doubling of the homicide rate, which suggests that the main channel relating the drug trade to violence is competition between cartels over the control of territory...” UNITED NATIONS OFFICE ON DRUGS AND CRIME GLOBAL STUDY ON HOMICIDE 75 (2013), https://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf.

²²⁴ JAMES COCKAYNE & SUMMER WALKER, WHAT COMES AFTER THE WAR ON DRUGS – FLEXIBILITY, FRAGMENTATION OR PRINCIPLED PLURALISM? (2015),

odds with existing human rights treaty obligations. UNGASS 2016 is an opportunity to advance the dialogue on drug reform at the international level. Drug policy reformers hope that the conference will advance discussion and concerted action to prevent additional human rights violations going forward.

None of the three existing drug control Conventions²²⁵ expressly reference human rights.²²⁶ However, "...it is clear that states are obliged to read the Conventions in light of the Universal Declaration of Human Rights, and to implement their Convention obligations in ways that respect human rights."²²⁷ Notably, in May 2015, the U.N. Office of the High Commissioner for Human Rights reported:

When considering the world drug problem we have to acknowledge that the prohibition of drugs has placed the markets of this lucrative trade in the hands of criminal organizations, and creates enormous illegal funds which stimulate armed conflicts throughout the world. For years the U.N. apparatus paid little attention to the controversy created by the international drug control system: the negative consequences of the international attempt to control the use and production of substances are often more harmful than the drugs themselves.²²⁸

The Universal Declaration of Human Rights states that all human beings are born free and equal in dignity and rights, and mandates that all people act toward one another in a spirit of brotherhood.²²⁹ The Declaration includes "the right to life, liberty and security of person."²³⁰ The Declaration further states that all human beings are to be free from torture, inhuman or degrading treatment or punishment, and have the right to freedom of thought, conscience, and religion.²³¹ Arguably, punitive drug controls have led to violations of the right to life and liberty, as well as

http://i.unu.edu/media/unu.edu/news/72569/UNU_Drug_Policy_Online_Final.pdf [hereinafter What Comes After the War on Drugs].

²²⁵ See *supra* Section I(a), at 8-10.

²²⁶ What Comes After the War on Drugs, *supra* note 224, at iv, 27-28.

²²⁷ *Id.*

²²⁸ Erneistien Jensema, *Regarding: Submission of the Transnational Institute to the OHCHR regarding resolution*, TRANSNATIONAL INSTITUTE DRUGS AND DEMOCRACY PROGRAMME (May 15, 2015), <http://www.ohchr.org/Documents/HRBodies/HRCouncil/DrugProblem/TransnationalInstitute.pdf> (A/HRC/28/L.22).

²²⁹ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

²³⁰ *Id.*

²³¹ *Id.*

torture and inhumane punishment, and even the rights of freedom of conscience and freedom of religion. Ultimately, one of the goals for UNGASS 2016 should be to focus on the development of drug programs that emphasize protecting human rights.²³² Therefore, human rights violations that have occurred due to the drug control treaties will be a critical component of the 2016 UNGASS when the floor is opened to explore flexibility in punitive drug law practices.

²³² See What Comes After the War on Drugs, *supra* note 224, at iv, 27-28.

V. Recommendations

Twenty years ago, “A Wiser Course: Ending Drug Prohibition” called for a dialogue on new approaches to drug policy.²³³ This dialogue has since taken place around the world and has dramatically intensified in recent years. Specific recommendations have now emerged from a number of legal scholars, non-governmental organizations and experts on drug policy, harm reduction and addiction.²³⁴ After much review and consideration of these recommendations, as well as analysis of all of the factors set forth in this report, we present the following recommendations to the United Nations and the international community:

A. Explicitly Endorse Harm Reduction and Expand its Meaning Under International Law.

Currently, the international drug control treaties and underlying legal documents do not contain the term “harm reduction” even though the term is used in documents adopted by the General Assembly in other areas such as HIV/AIDS.²³⁵ To resolve this inconsistency and endorse harm reduction, the international drug control treaties and other documents should not only recognize “harm reduction,” they should explicitly and expansively define the term. This definition could be drawn from the Beyond 2008 Declaration adopted by consensus at a global civil society forum,²³⁶ and also specifically include the nine interventions recognized by WHO, UNODC, and UNAIDS,²³⁷ as well as overdose death prevention measures, testing for drug impurities, safe injection facilities, Good Samaritan laws, and other practices that reduce the harm of drugs and drug use to society and individuals.

²³³ A WISER COURSE, *supra* note 2, at 83.

²³⁴ ROBIN ROOM & SARAH MACKAY, BECKLEY FOUNDATION, ROADMAPS TO REFORMING THE UN DRUG CONVENTIONS (2012), http://www.beckleyfoundation.org/Roadmaps_to_Reform.pdf; HOW TO REGULATE CANNABIS: A PRACTICAL GUIDE, TRANSFORM (May 2014), <http://www.tdpf.org.uk/sites/default/files/How-to-Regulate-Cannabis-Guide.pdf>; DAVE BEWLEY-TAYLOR, TRANSNATIONAL INSTITUTE, TOWARDS REVISION OF THE UN DRUG CONTROL CONVENTIONS: THE LOGIC AND DILEMMA OF LIKE-MINDED GROUPS (2012), <https://www.tni.org/files/download/dlr19.pdf>.

²³⁵ *See supra* section II.B.2., at 24-27.

²³⁶ The Beyond 2008 Declaration defines “harm reduction” as “efforts primarily to address and prevent the adverse health and social consequences of illicit/harmful drug use, including reducing HIV and other blood borne infections.” BEYOND 2008, VIENNA NGO COMMITTEE ON NARCOTIC DRUGS (2008), https://www.unodc.org/documents/NGO/B2008_Declaration_and_Resolutions_English.pdf.

²³⁷ WORLD HEALTH ORGANIZATION ET AL., UNITED NATIONS OFFICE ON DRUGS AND CRIME & JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS (2012) (For countries to set targets for universal access to HIV prevention, treatment and care for injecting drug users), http://apps.who.int/iris/bitstream/10665/77969/1/9789241504379_eng.pdf.

B. Work to Make Quality, Evidence-Based Drug Treatment Available when Appropriate, and Continue to Improve and Promote “Best Practices” for Drug Treatment for the International Community.

Many drug users do not become addicted to drugs and do not need treatment;²³⁸ conversely, adequate drug treatment is often unavailable for those who truly need it.²³⁹ And when treatment is available, it is often based on a one-size-fits-all abstinence-only model, or rooted in religion or requiring religious practices. For this reason the Committee recommends that UNODC, WHO, other relevant UN agencies, and the international community work towards 1) fostering better availability of treatment across the world, and 2) continuing to improve and promote best practices for treatment in accordance with accepted standards of world health, based on an evidence-based, client-centered approach and taking into account a wide range of goals including abstinence, moderation and harm reduction.²⁴⁰

C. Ensure Universal Access to Essential Medicines.

Ensuring the adequate availability of controlled substances for medical and scientific purposes is a core obligation under the international drug control treaties.²⁴¹ However, there are grave problems with availability of drugs for these purposes in many countries, which causes pronounced and severe suffering to countless individuals.²⁴² Groups such as Human Rights Watch and the International Association for Hospice and Palliative Care have been working toward a solution to this problem and progress has been made. However, much more can be accomplished. To this end, the Committee recommends that Member States and the UN system, including the WHO and UNODC, develop an action plan that ensures access to controlled medicines, and that this goal become central to discussions on international drug policy going forward.

²³⁸ An analysis of data collected by the National Survey on Drug Use and Health (NSDUH) suggests that most first time users of most drugs were not using them a year later and that for nearly all illicit drugs, more than 90% of first-time users did not become dependent. *The NSDUH Report: Substance Use and Dependence Following Initiation of Alcohol or Illicit Drug Use*, NSDUH (Mar. 27, 2008), <http://www.oas.samhsa.gov/2k8/newUseDepend/newUseDepend.pdf>.

²³⁹ *Id.* According to the report, 23.5 million persons aged 12 or older needed treatment for an illicit drug or alcohol abuse problem in 2009 (9.3 percent of persons aged 12 or older). Of these, only 2.6 million—11.2 percent of those who needed treatment—received it at a specialty facility.

²⁴⁰ The Committee notes the issuance of the international guidance on treatment by UNODC and WHO, and without commenting specifically on the report, commends these efforts and encourages the UN and the international community to continue to improve international standards. *See* COMMISSION ON NARCOTIC DRUGS, INTERNATIONAL STANDARDS FOR THE TREATMENT OF DRUG USE DISORDERS (2016), https://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_59/ECN72016_CRP4_V1601463.pdf.

²⁴¹ 1961 Convention, Preamble; *see also* INTERNATIONAL NARCOTICS CONTROL BOARD, REPORT 2014 ¶ 11 (2015), http://www.unis.unvienna.org/unis/protected/2015/AR_2014_E.pdf.

²⁴² The INCB concluded in 2014 that 5.5 billion people live in countries with “low levels of, or non-existent access to,” controlled medicines and have “inadequate access to treatment for moderate to severe pain.” *Id.* at ¶ 12.

D. Remove International Restrictions on Cannabis to Allow for Enactment of a Range of Local Measures, Including Regulation.

Despite the fact that many people believe that the nonmedical use of cannabis should be permitted, the majority of low level drug offenses in the United States and around the world are related to cannabis.²⁴³ For years, countries have been slowly liberalizing their treatment of cannabis laws by decriminalization and *de facto* legalization, and now, in the case of the United States and Uruguay, laws providing for regulated cannabis markets. Although laws permitting non-medical use contravene the international treaties, this trend is likely to continue: at least twelve bills have been introduced at the state level in the US,²⁴⁴ and Canada, Mexico, and others may soon follow suit.²⁴⁵

The Committee recommends that, in the short term, Member States be tolerant of a certain amount of experimentation with cannabis laws at the local level, in recognition of the changing realities on the ground; however, they must acknowledge that these laws are in contravention of the Conventions and discuss this tension openly and honestly. Ultimately, steps should be taken to remove the restrictions in the Conventions to explicitly permit experimentation with respect to cannabis, including regulation.

E. Encourage the De-Escalation and/or Consider the Removal of Criminal Sanctions for Possession of Cocaine, Heroin, Opiates and Psychotropic Substances for Personal Use.

For the many reasons discussed in this report and in keeping with the growing body of scientific and epidemiological research demonstrating that drug use and addiction are, at bottom, physiological and medical concerns, the Committee believes drug use should be treated as a public health issue rather than a criminal one. Accordingly, we believe that provisions in the international treaties requiring that possession of scheduled drugs be punished as criminal offenses should be reconsidered, and potentially entirely removed. In making this recommendation, we caution against language specifying that exemption from criminal punishment be limited to possession of “small amounts,” or delineating specific small amounts that would qualify as possession for personal use, because such limitations sometimes lead to perverse results: individuals purchasing or possessing drugs for personal or social use nonetheless have been prosecuted as “traffickers” for possessing more than a “small” or designated amount.²⁴⁶

²⁴³ UNITED NATIONS OFFICE ON DRUGS AND CRIME, CANNABIS: A SHORT REVIEW (2012), https://www.unodc.org/documents/drug-prevention-and-treatment/cannabis_review.pdf.

²⁴⁴ EMILY CRICK, HEATHER J. HAASE & DAVE BEWLEY TAYLOR, GLOBAL DRUG POLICY OBSERVATORY, LEGALLY REGULATED CANNABIS MARKETS IN THE UNITED STATES: IMPLICATIONS AND POSSIBILITIES (2013), <https://www.swansea.ac.uk/media/Leg%20Reg%20Cannabis%20digital%20new-1.pdf>.

²⁴⁵ *Id.*

²⁴⁶ See, e.g., *New Study Reveals Alarming Pattern In Imprisonment for Drug Crimes in Latin American: The weight of the law falls on the most vulnerable individuals, overcrowding prisons, but allowing drug traffickers to flourish*,

F. Allow Regulation of New Psychoactive Substances (“NPS”).

The proliferation of new psychoactive substances (“NPS”), such as “bath salts” and synthetic cannabinoids, appearing on the illicit market each year has presented a unique challenge to the international community.²⁴⁷ While many countries have reacted to this new phenomenon by simply banning the new substances as they appear, it has become clear in recent years that this approach is ineffective given the limitless chemical combinations possible in the manufacture of new substances.²⁴⁸ Unfortunately, these substances are then left unregulated, posing an even greater health hazard to society.

New Zealand has attempted to address this issue by passing the Psychoactive Substances Act 2013,²⁴⁹ a new regulatory framework for the testing, manufacture, sale, and regulation of NPS with the onus on the manufacturer to show that a product is ‘low risk’ before it may be placed on the market.²⁵⁰ This is a promising program that represents a departure from the penal approach and is “pragmatic, evidence-based, and has the protection of health and harm reduction clearly highlighted as its main purposes.”²⁵¹ We recommend that other countries in the international community consider adopting similar legislation.

G. Stop Crop Eradication and Promote Economic Development.

Although coca and poppy crop eradication has been a widely accepted method of fighting the “war on drugs” for years, experience has shown that these methods are simply ineffective in

WASHINGTON OFFICE ON LATIN AMERICA (Dec. 8, 2010), http://www.wola.org/news/new_study_reveals_alarming_pattern_in_imprisonment_for_drug_crimes_in_latam_america (last visited April 18, 2016). The article looks at a comparative study that was conducted to analyze the impact of drug policies on the prison systems of eight Latin American countries. The study found that in most of the countries the severity of the penalties may be grossly disproportionate to the crimes committed.

²⁴⁷ The number of NPS reported by Member States to UNODC rose from 166 at the end of 2009 to 251 by mid-2012, an increase of more than 50 percent. For the first time, the number of NPS actually exceeded the total number of substances under international control (234). UNITED NATIONS OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT 2014 (2014), https://www.unodc.org/documents/wdr2014/World_Drug_Report_2014_web.pdf.

²⁴⁸ CATHERINE MCCULLOUGH, ET AL., INTERNATIONAL DRUG POLICY CONSORTIUM, NEW ZEALAND’S PSYCHOACTIVE SUBSTANCES LEGISLATION 1 (2013), http://www.grea.ch/sites/default/files/idpc-nzdf-briefing-paper_new-psychoactive-substances-in-new-zealand.pdf.

²⁴⁹ Psychoactive Substances Act 2013, Jul. 27, 2013 (N.Z.), <http://www.legislation.govt.nz/act/public/2013/0053/latest/DLM5042921.html?src=qs>.

²⁵⁰ McCullough, *supra* note 248, at 6.

²⁵¹ *Id.* at 7.

the long term.²⁵² Any short-term success is soon cancelled out as crops are quickly replanted in other areas or countries (a phenomenon known as the “balloon effect”).²⁵³ Not only is crop eradication ineffective, it also worsens poverty in already vulnerable regions and “generates violence, conflict and human rights violations.”²⁵⁴ As has been shown in Thailand and Bolivia, strategies to improve the overall quality of life of coca or poppy farmers through development policies aimed at ensuring alternative sources of income first, followed by reduction efforts that are both voluntary and gradual, have been much more effective.²⁵⁵ The Committee recommends that forced crop eradication, including aerial spraying, be stopped and approaches emphasizing sustainable development and the promotion of alternative livelihoods be employed to the greatest extent possible.

H. End the death penalty for drug-related offenses and ensure proportionality in sentencing for drug-related crimes.

A health and human rights-based system of drug policy requires that any punishment for drug offenses be proportionate to the crime committed. This means that proportionality in sentencing should be paramount, distinguishing, for example, between low, medium and high-level drug offenses, and taking into account the role of the accused offender in drug trafficking networks and whether the offense is violent or nonviolent.²⁵⁶ In addition, due process must be insured for drug offenses; specifically, no one should be detained in a drug treatment facility without the right to be heard.

Most importantly, according to the United Nations Special Rapporteurs on summary executions and on torture, executions for drug-related offenses are unlawful killings that “amount to a violation of international law.”²⁵⁷ More than 30 states permit the death penalty for drug-related offenses and in many countries these cases make up a large proportion of total executions.²⁵⁸ Many countries that retain the death penalty for drug-related offenses justify its use by citing its deterrent

²⁵² Coletta A. Youngers, *Promoting Human Rights-Based Drug Policies in Latin America*, WASHINGTON OFFICE ON LATIN AMERICA (Dec. 10, 2013), http://www.wola.org/commentary/promoting_human_rights_based_drug_policies_in_latina_america.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ See *IDPC Process and Policy Asks*, *supra* note 215, at 5.

²⁵⁷ Brenda Vukovic, *Using the death penalty to fight drug crimes violates international law, UN rights experts warn World Day Against the Death Penalty*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Oct. 10, 2015), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16581&LangID=E#stHash.sGVOOyqA.dpuf>.

²⁵⁸ *Id.*

value. However, according to the experts, regardless of the nature of the offense, “the scientific evidence for deterrence is unreliable, inconclusive and, in many instances, simply wrong.”²⁵⁹

In the case of drugs, “no empirical research supports the claim that the threat of execution, or even of a lengthy prison term, deters drug use or drug trafficking.”²⁶⁰ Given that the main reason cited for imposing the death penalty is completely unsupported, and the possibility for error is so high, the death penalty should never be imposed in connection with a nonviolent drug-related offense, no matter how serious the charge. The Committee recommends that member states show their commitment to human rights-based drug laws by formally agreeing to a moratorium on the death penalty for drug-related offenses.

I. Promote Alternative Policing Methods Around Drug Law Enforcement.

Law enforcement around drug offenses has traditionally focused on reducing the size of illicit drug markets through eradication of drug production, distribution and supply.²⁶¹ It has become clear, however, that these strategies have not been successful in significantly reducing the supply of illicit drugs in consumer drug markets.²⁶² There is a growing recognition among scholars and experts in the field that law enforcement efforts could be used to more productively shape these markets rather than attempting to eradicate them, with a focus on harm reduction, especially with respect to drug-related violence, and by shifting the focus away from harsh penal measures and more towards promoting public health and welfare.²⁶³ Alternative approaches, such as the “Law Enforcement Assisted Diversion Program” in Seattle,²⁶⁴ and other police strategies incorporating harm reduction measures,²⁶⁵ shift the focus of enforcement from harsh penal measures to promoting the health of the community. The Committee recommends that these methods be studied and that their implementation be supported by the UN and the international community.

²⁵⁹ Jeff Fagan, *Deterrence and the Death Penalty in International Perspective*, in UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, MOVING AWAY FROM THE DEATH PENALTY: ARGUMENTS, TRENDS, AND PERSPECTIVES 84 (2015), <http://www.ohchr.org/EN/newyork/Documents/Moving-Away-from-the-Death-Penalty-2015-web.pdf>.

²⁶⁰ *Id.* (citing David Skarbek, *Prisonomics: lessons from America's mass incarceration*, 34 ECONOMIC AFFAIRS 411 (2014)); John F. Pfaff, *The durability of prison populations*, 2010 UNIVERSITY OF CHICAGO LEGAL FORUM 73-116.

²⁶¹ INTERNATIONAL DRUG POLICY CONSORTIUM, MODERNIZING DRUG LAW ENFORCEMENT SERIES SUMMARY (2014), https://dl.dropboxusercontent.com/u/64663568/library/MDLE-summary_March-2014_ENGLISH.pdf.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Law Enforcement Assisted Diversion*, LEAD, <http://leadkingcounty.org/> (last visited Apr. 1, 2016).

²⁶⁵ See GEOFFREY MONAGHAN & DAVE BEWLEY-TAYLOR, MODERNIZING DRUG LAW ENFORCEMENT SERIES, REPORT 1: POLICE SUPPORT FOR HARM REDUCTION POLICIES AND PRACTICES TOWARDS PEOPLE WHO INJECT DRUGS (2013), <http://gdppc.idebate.org/sites/live/files/Police-support-for-harm-reduction.pdf>.

J. Change the metrics and indicators of success in international drug control policy to reflect goals centered around public health and human rights.

Since law enforcement around drug offenses has traditionally focused on reducing the size of illicit drug markets, enforcement strategies have typically been designed to maximize the destruction of crops and seizures of illicit drugs through eradication and arrests. Success is often measured by the number of arrests/seizures, square hectares of illicit crops eradicated, and drug-related indictments/convictions.²⁶⁶ These have been referred to as “process” indicators as the actions themselves are considered achievements. Thus, they can give a false impression of success while in reality have no effect on community health and wellbeing.²⁶⁷ Moreover, they also have been found not only to lead to police abuse and violations of human rights in Latin America and other regions,²⁶⁸ but also to exacerbate drug-related harms such as HIV/hepatitis C transmission, fatal overdose, and substance use disorder.²⁶⁹

Numerous organizations such as IDPC, TNI, and the Global Commission on Drug Policy thus called for a reorientation of measurements and indicators of success away from punitive, action-oriented factors and towards those based on public health and community wellness.²⁷⁰ In an Open Letter to UN leaders, including the Secretary General and the President of the General Assembly, the International Centre for Science in Drug Policy (ICS DP) has delineated four categories of potential drug policy indicators: Health, Peace & Security, Development, and Human Rights.²⁷¹ UN University also recently recommended that a formal work stream be initiated to develop metrics focusing on “the human development impact of drugs and drug control policies.”²⁷² The Committee supports these calls and also recommends that a process be put in

²⁶⁶ JUAN CARLOS GARZON VERGARA, TNI/IDPC, *FIXING A BROKEN SYSTEM: MODERNIZING DRUG LAW ENFORCEMENT IN LATIN AMERICA* 4 (2014), http://www.druglawreform.info/images/stories/DLR_29_eng_web.pdf (Series on Legislative Reform of Drug Policies No. 29) [hereinafter *Fixing a Broken System*].

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ DAN WERB, ET AL., *A CALL FOR A REPRIORITIZATION OF METRICS TO EVALUATE ILLICIT DRUG POLICY* 3 (2016), https://d3n8a8pro7vhmx.cloudfront.net/michaela/pages/61/attachments/original/1453256889/ICS DP_Open_Letter_EN_Web.pdf?1453256889 [hereinafter *Open Letter*].

²⁷⁰ *See* *Fixing a Broken System*, *supra* note 266 at 11; *see also* IDPC *Process and Policy Asks*, *supra* note 215; GLOBAL COMMISSION ON DRUG POLICY, *TAKING CONTROL: PATHWAYS TO DRUG POLICIES THAT WORK* (2014), http://static1.squarespace.com/static/53ecb452e4b02047c0779e59/t/540da6ebe4b068678cd46df9/1410180843424/global_commission_EN.pdf.

²⁷¹ *See* *Open Letter*, *supra* note 269, at 4-5.

²⁷² JAMES COCKAYNE & SUMMER WALKER, *WHAT COMES AFTER THE WAR ON DRUGS – FLEXIBILITY, FRAGMENTATION OR PRINCIPLED PLURALISM?* (2015), http://i.unu.edu/media/unu.edu/news/72569/UNU_Drug_Policy_Online_Final.pdf.

place to thoroughly evaluate current metrics and indicators and refocus them to better connect with the realities on the ground and the well-being of the community.

K. Convene an independent commission to study the impact and efficacy of the international drug control architecture and report back with specific recommendations for the UN and the international community.

Over the past year, calls for the convening of a group or process to review the international drug control architecture itself have grown louder and are coming from multiple directions. Transnational Institute, which has studied the area extensively, has called for an expert advisory group to “review the UN drug control architecture, system-wide coherence, treaty inconsistencies, and legal tensions regarding cannabis regulation.”²⁷³ IDPC has called for a similar group to review issues such as regulated cannabis markets, tensions with human rights obligations, indigenous rights, the traditional use of coca leaf chewing, and the need to improve access to controlled medicines.²⁷⁴ Jamaica, Uruguay, and Ecuador have publicly expressed their support for the concept at the General Assembly high level thematic debate on drugs held in New York in May 2015.²⁷⁵ Even UN agencies have joined the chorus: in its recent report, UN University called for an “Open Working Group” to be formed at the UN in New York, similar to that convened during the process that resulted in the Sustainable Development Goals.²⁷⁶

²⁷³ VANDA FELBAB-BROWN & HAROLD TRINKUNAS, BROOKINGS, UNGASS 2016 IN COMPARATIVE PERSPECTIVE: IMPROVING THE PROSPECTS FOR SUCCESS (2015), <http://www.brookings.edu/~media/Research/Files/Papers/2015/04/global-drug-policy/FelbabBrown-TrinkunasUNGASS-2016-final-2.pdf?la=en>; *see also* UNGASS 2016: *Background memo on the proposal to establish an expert advisory group*, TRANSNATIONAL INSTITUTE (Nov. 2015), https://www.tni.org/files/publicationdownloads/background_memo_november_ungass_2016_final.pdf.

²⁷⁴ *See* IDPC Process and Policy Asks, *supra* note 215; INTERNATIONAL DRUG POLICY CONSORTIUM, ADVOCACY NOTE 1, IDPC RECOMMENDATIONS FOR THE “ZERO DRAFT” OF THE UNGASS OUTCOME DOCUMENT 5 (2015), https://www.tni.org/files/publication-downloads/idpc-advocacy-note_recommendations-on-ungass-zero-draft_english.pdf.

²⁷⁵ High Level Thematic Debate in preparation for UNGASS on the World Drug Problem, *see* PERMANENT MISSION OF JAMAICA TO THE UNITED NATIONS, STATEMENT BY THE HONORABLE MARK J. GOLDING, MINISTER OF JUSTICE (2015), <http://statements.unmeetings.org/media2/4658471/jamaica.pdf>; HIGH LEVEL GENERAL ASSEMBLY THEMATIC DEBATE IN SUPPORT OF THE PROCESS TOWARDS 2016 UNGASS, STATEMENT BY MILTON ROMANI GERNER, SECRETARY GENERAL OF NATIONAL ASSEMBLY OF URUGUAY (2015), <http://statements.unmeetings.org/media2/4658472/uruguay.pdf>; PERMANENT MISSION OF ECUADOR TO THE UNITED NATIONS, CELAC INTERVENTION AT THE INTERACTIVE DISCUSSION AT THE HIGH LEVEL THEMATIC DEBATE IN SUPPORT OF THE PROCESS TOWARDS 2016 SPECIAL SESSION OF THE GENERAL ASSEMBLY ON THE WORLD DRUG PROBLEM (2015), <http://statements.unmeetings.org/media2/4658459/ecuador.pdf>.

²⁷⁶ What Comes After the War on Drugs, *supra* note 224, at v, 33.

An additional possibility that has not received much attention is the convening of an outside commission of experts to review the international drug control system, including not just the efficacy of the Conventions but the drug control system as a whole. The commission could be made up of politicians and civil servants as well as experts from civil society and academics from different regions around the world. It would be tasked with studying the international drug control system, including not just the Conventions but also the structure of the UN drug control system – the INCB, UNODC, and CND – over a finite period of time, and providing a report containing specific recommendations for the UN and the international community.

One important example of such a commission is the “Brundtland Commission,” which was created by then Secretary General Javier Pérez de Cuéllar to unite nations to pursue sustainability (and whose report coined the phrase “sustainability goals”).²⁷⁷ There are other examples of successful commissions—both initiated by the UN or independently²⁷⁸—but the Brundtland Commission is seen as the most successful in terms of forming international ties between governments and organizations, allowing important international problems to be viewed from a more holistic perspective.²⁷⁹

In our view, the technically and politically complex task of reviewing international drug control systems would be best undertaken by a UN-initiated but independent Commission tasked with studying the international treaties—including inconsistencies, structure, and areas of tension with modern realities—as well as establishing a system to oversee this UN-initiated but independent Commission. This commission would not have to take the place of an expert advisory group but could coordinate and complement its work, while providing needed independence from the UN system. Yet it would still be tasked by the UN with delivering specific recommendations to the international community over a specified time period, perhaps between now and when the ten-year review process under the 2009 Political Declaration expires in 2019.

²⁷⁷ WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT: OUR COMMON FUTURE (1987), <http://www.un-documents.net/our-common-future.pdf>.

²⁷⁸ Examples of commissions that were not initiated by the UN include the Global Ocean Commission, which was set up to “review the effectiveness of the existing legal framework for the high seas in meeting the unique challenges and threats of the 21st century,” the World Commission on Forests and Sustainable Development, and the Global Commission on Drug Policy, whose purpose is to “to bring to the international level an informed, science-based discussion about humane and effective ways to reduce the harm caused by drugs to people and societies.” *What We Do*, GLOBAL COMMISSION ON DRUG POLICY, <http://www.globalcommissionondrugs.org/what-we-do/> (last visited Apr. 1, 2016).

²⁷⁹ The 1992 and 2002 Earth Summits were the direct result of the Brundtland Commission. See UNITED NATIONS COMMISSION ON SUSTAINABLE DEVELOPMENT, FRAMING SUSTAINABLE DEVELOPMENT: THE BRUNDTLAND REPORT – 20 YEARS ON (2007), http://web.archive.org/web/20120417131934/http://www.un.org/esa/sustdev/csd/csd15/media/backgrounder_brundtland.pdf.

VI. Conclusion

The members of the Committee are aware that the recommendations provided in this report are ambitious, and we realize that implementing them will be no simple task. We recognize the complexity of change on an international scale and acknowledge that much technical work and tolerance for a certain amount of fallout from experimentation with new approaches will be necessary. However, we believe that reform is necessary, and it is best to approach these changes proactively and responsibly.

A number of prominent international organizations have analyzed in detail the processes by which significant changes to the international treaty system could occur.²⁸⁰ Among the avenues cited are amendment or modification of the current treaty system, denunciation of the entire treaty system or selective denunciation (including withdrawal with reservations to selective provisions, such as in the case of Bolivia).²⁸¹ These options are fraught with complexity given the legal requirements for each and the political makeup of the Commission on Narcotic Drugs.²⁸² TNI suggests another possibility, known as “modification inter se” in which two or more countries may agree to modify the treaty as between themselves alone, so long as the modification does not “affect the enjoyment of rights or performance of the obligations of other parties under the treaties and is not incompatible with the object and purpose of the treaty as a whole.”²⁸³ “Roadmaps” goes one step further, suggesting that an entirely new treaty system could be devised by a group of like-minded countries, perhaps using the WHO Framework Convention on Tobacco Control²⁸⁴ as an example,²⁸⁵ although such a process would undoubtedly be a vast undertaking with its own complications.

No matter how complex the road going forward may be, the international community must not be reluctant to move towards change. Though few member states are willing to unilaterally push for reform of the system, the past few years has seen a growing realization among members

²⁸⁰ ROBIN ROOM & SARAH MACKAY, BECKLEY FOUNDATION, ROADMAPS TO REFORMING THE UN DRUG CONVENTIONS (2012), http://www.beckleyfoundation.org/Roadmaps_to_Reform.pdf [hereinafter Roadmaps]; DAVE BEWLEY-TALORY, ET AL., THE RISE AND DECLINE OF CANNABIS PROHIBITION (2014), https://www.tni.org/files/download/rise_and_decline_ch4.pdf.

²⁸¹ Dave Bewley-Taylor, *Challenging the UN drug control conventions: problems and possibilities*, 14 INT’L J. OF DRUG POL’Y 171-79 (2003), http://www.unawestminster.org.uk/pdf/drugs/UNdrugsBewley_Taylor_IJDP14.pdf; see also *supra* notes 182-183 and accompanying text.

²⁸² *Id.* at 171-79.

²⁸³ MARTIN JELSMA, BROOKINGS FOREIGN POLICY, UNGASS 2016: PROSPECTS FOR TREATY REFORM AND UN SYSTEM-WIDE COHERENCE ON DRUG POLICY (2016), https://www.tni.org/files/download/treaty_reform_drug_policy_ungass2016.pdf [citing the 1969 Vienna Convention on the Law on Treaties].

²⁸⁴ WORLD HEALTH ORGANIZATION, WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL (2003), <http://apps.who.int/iris/bitstream/10665/42811/1/9241591013.pdf>.

²⁸⁵ Roadmaps, *supra* note 280, at 231 and 278.

of the international community that reform of the system is not only vital, but inevitable. In June 2013, the Organization of American States (OAS) published two reports, an “Analytical Report”²⁸⁶ and a “Scenarios Report,”²⁸⁷ delineating four different scenarios for drug reform and the possible consequences of each scenario.²⁸⁸ The OAS also issued a declaration that highlights that drug policies need to be implemented from a human rights and a gender perspective.²⁸⁹ And at the CND’s High Level Review in Vienna in March 2014, a statement was delivered on behalf of over fifteen countries denouncing the use of the death penalty for drug-related offenses.²⁹⁰ Still others called for reform of the global drug control system during the High Level Thematic Debate held in New York in May 2015.²⁹¹

UN agencies are actively leading the charge on global drug policy reform. In September 2015, the Human Rights Council held a panel discussion and passed a resolution on the impact of the world drug problem on the enjoyment of human rights,²⁹² The Joint United Nations Programme on HIV/AIDS (UNAIDS) and United Nations Development Programme (UNDP) have each issued thoroughly progressive reports on the impact of drugs on their mandates centered around public health, human rights, and development,²⁹³ and many other UN agencies have made their own

²⁸⁶ ORGANIZATION OF AMERICAN STATES, THE DRUG PROBLEM IN THE AMERICAS (2013), http://www.oas.org/documents/eng/press/Introduction_and_Analytical_Report.pdf.

²⁸⁷ ORGANIZATION OF AMERICAN STATES, SCENARIOS FOR THE DRUG PROBLEM IN THE AMERICAS 2013-2025 (2012), http://www.oas.org/documents/eng/press/Scenarios_Report.PDF.

²⁸⁸ *Id.* at 25-71.

²⁸⁹ *Declaration of Antigua Guatemala “For a Comprehensive Policy Against the World Drug Problem in the Americas,”* ORGANIZATION OF AMERICAN STATES (Jun. 7, 2013), http://www.oas.org/en/media_center/press_release.asp?sCodigo=S-010.

²⁹⁰ *High Level Segment – Adoption of the Joint Ministerial Statement*, CND BLOG (Mar. 14, 2014), <http://cndblog.org/2014/03/high-level-segment-adoption-of-the-joint-ministerial-statement/>.

²⁹¹ *High-level Thematic Debate in support of the process towards the 2016 Special Session of the General Assembly on the World Drug Problem*, UNITED NATIONS GENERAL ASSEMBLY (May 7, 2015), http://www.un.org/pga/070515_hltd-world-drug-problem/ (in support of the process towards the 2016 Special Session of the General Assembly on the World Drug Problem).

²⁹² *Human Rights Council holds panel discussion on the impact of the world drug problem on the enjoyment of human rights*, UNITED NATIONS HUMAN RIGHTS, OFFICE OF THE HIGH COMMISSIONER, HUMAN RIGHTS COUNCIL (Sept. 28, 2015), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16515&LangID=E>.

²⁹³ JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, A PUBLIC HEALTH AND RIGHTS APPROACH TO DRUGS (2015), http://www.unaids.org/sites/default/files/media_asset/JC2803_drugs_en.pdf; UNITED NATIONS DEVELOPMENT PROGRAMME, PERSPECTIVES ON THE DEVELOPMENT DIMENSIONS OF DRUG CONTROL POLICY (2015), https://www.unodc.org/documents/ungass2016/Contributions/UN/UNDP/UNDP_paper_for_CND_March_2015.pdf.

contributions.²⁹⁴ UN University's report made waves throughout the UN community for its progressive tone and unapologetic proposal for a thorough review of the UN system around drugs.²⁹⁵ Even UNODC issued, then withdrew, a briefing paper calling on member states to "consider the implementation of measures to promote the right to health and to reduce prison overcrowding, including by decriminalizing drug use and possession for personal consumption."²⁹⁶

And, as noted above, the UN will host a special session of the UN General Assembly (UNGASS 2016) to review the world drug problem in April 2016. UNGASS 2016 will be the first special session held by the General Assembly to consider the world drug problem since 1998. It promises to be an excellent and rare opportunity for the UN and the international community to conduct a thorough debate and examination of the international drug control system. The UNGASS intends to issue a "short, substantive, concise and action-oriented document comprising a set of operational recommendations...." This document, which already has been negotiated in Vienna and will be recommended for adoption at UNGASS, would, ideally, call for a shift in the global drug paradigm from a prohibition-based system to the public health and human rights based system supported by many. However, many believe the document may fall far short of this goal.²⁹⁷

Whether the long anticipated "wide-ranging debate" will actually take place at UNGASS 2016 is not yet known, but much debate already has taken place in the lead-up to it. Many forward-looking statements were made by member states during the High Level Thematic Debate on drugs held in New York in May 2015; and on February 10, 2016, where almost 300 stakeholders took part in a lively consultation held by the President of the General Assembly in which many members of civil society, academics and addiction professionals called for a shift towards public health and human rights based drug policies.²⁹⁸

Our hope is that the April 2016 meeting will not only set the tone for more honest discussions going forward, but will throw open the door to a thorough and unflinching review

²⁹⁴ *United Nations Entities*, UNGASS 2016: SPECIAL SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY ON THE WORLD DRUG PROBLEM, http://www.unodc.org/ungass2016/en/contribution_UN_Entities.html (last visited Apr. 18, 2016).

²⁹⁵ See *supra* note 294.

²⁹⁶ UNITED NATIONS OFFICE ON DRUGS AND CRIME, BRIEFING PAPER: DECRIMINALISATION OF DRUG USE AND POSSESSION FOR PERSONAL CONSUMPTION (2015), <http://www.undrugcontrol.info/images/stories/documents/unodc-brief-decrim.pdf>

²⁹⁷ *Negotiating the UNGASS outcome document: Challenges and the way forward*, INTERNATIONAL DRUG POLICY CONSORTIUM (Feb. 11, 2016), <http://idpc.net/publications/2016/02/negotiating-the-ungass-outcome-document-challenges-and-the-way-forward>.

²⁹⁸ MOGENS LYKKETOFT, SUMMARY OF THE PRESIDENT OF THE GENERAL ASSEMBLY ON THE INTERACTIVE STAKEHOLDER CONSULTATION IN SUPPORT OF THE PREPARATORY PROCESS FOR THE UNITED NATIONS GENERAL ASSEMBLY SPECIAL SESSION ON THE WORLD DRUG PROBLEM (2016), http://www.unodc.org/documents/ungass2016/Contributions/Civil/CSTF/9-Mar_UNGASS-Summary-of-Informal-Interactive-Stakeholder-consultations-9-March-2016.pdf.

process on the road to 2019 and beyond. But regardless of what transpires at UNGASS, the international community must prepare itself to reconsider the failed policies of the past and take concerted and proactive steps to develop a new system, whether through fundamental amendment of the treaties or the creation of an entirely new treaty structure. Only in this way can the international community let go of the damaging and ineffective policies of the past and move toward a system based on respect for the individual, the community of nations, and the world.