

John Collins

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Rethinking ‘Flexibilities’ in the International Drug Control System – Potential, Precedents and Models for Reforms:

John Collins¹

Abstract

Background:

Much international drug policy debate centres on, what policies are permissible under the international drug treaties, whether member states are openly ‘breaching’ these treaties by changing national regulatory frameworks and shifting priorities away from a ‘war on drugs’ approach, and what ‘flexibility’ exists for policy reform and experimentation at national and local levels. Orthodox interpretations hold that the current system is a US-led ‘prohibition regime’ that was constructed in an extremely repressive and restrictive manner with almost no flexibility for significant national deviations. This paper challenges these orthodox interpretive frameworks and suggests no absolute and clear dichotomy between strict adherence and ‘breaches’ of the international treaties.

Methods

This paper uses historical analysis to highlight the flaws in orthodox policy analyses, which assume a uniform interpretation, implementation and set of policy trajectories towards a ‘prohibition regime’ in the 20th century. It challenges some existing legal interpretations of the treaties through recourse to historical precedents of flexible interpretation and policy prioritisation. It then examines the legal justifications currently being formulated by member states to explain a shift towards policies which, until recently, have been viewed as outside the permissible scope of the conventions. It then examines a functionalist framework for understanding the likely contours of drug diplomacy in the post-UN General Assembly Special Session (UNGASS) 2016 era.

Results:

The paper highlights that, contrary to current policy discourses, the international control system has always been implemented in a ‘flexible’ manner. It demonstrates that drug control goals were repeatedly subsumed to security, development, political stability and population welfare imperatives, or what we might now refer to under the umbrella of ‘development issues.’ The paper further demonstrates that policy prioritisation, inherent treaty ambiguities and complexities as well as the recognition of broader issues of security and development were just some of the ways in which member states have flexibly implemented the treaties over the last century. This has frequently occurred in spite of apparent contradictions between

¹ John Collins earned his PhD from the Department of International History at the London School of Economics and Political Science (LSE). He is Executive Director of the LSE IDEAS International Drug Policy Project.

national policies and reigning interpretations of international drug control obligations.

Conclusion:

UNGASS 2016 inaugurated a new era based on an evolving understanding of the UN drug control system. In this 'post-'war on drugs' era', national and local policy choices will increasingly hold greater relevance than international ones. Further, based on numerous historical precedents, international legal interpretations will likely continue to evolve and serve a reactive functional role in providing the formal scope to justify national and local deviations from past global norms. These shifting interpretations are, and will continue to be, reflected in an interim reliance on treaty 'flexibilities' to explain sustained international cooperation, even as that cooperation shifts to an entirely new implementation framework.

Introduction:

The failures of the 'war on drugs' have been well documented elsewhere (The Global Commission on Drug Policy, 2014). Former and sitting presidents throughout Latin America to the past President of the United States, his former Attorney General, and now the Prime Minister of Canada all openly reject the 'war on drugs' in favour of new approaches grounded in public health and policy alternatives including legal regulation of cannabis. Director of the US Office of National Drug Control Policy (ONDCP), Michael Botticelli, recently described the war on drugs as 'all wrong' (Pelley, 2015).

The UN General Assembly Special Session on Drugs (UNGASS) convened in New York City in April 2016 to consider all aspects of the international drug control strategy. This paper will argue that the meeting inaugurated the end point of the global 'war on drugs' era, an and that dates from the declaration of the 'war on drugs' in 1971, to the UNGASS in 2016. The key questions remain, how to reform national and international approaches to drugs, where to direct scarce resources, how to translate evidence into policy, and what policies to replace the 'war on drugs' strategy with. While a wholesale change in national regulatory structures, let alone international ones, seems far off, incremental shifts have begun and look likely to pick up steam. In this new era, the 'post-war on drugs era' national and local spheres increasingly hold greater relevance than international ones in determining policy choices and outcomes.

At the international level this is reflected in greater reliance on treaty 'flexibilities' to sustain international cooperation, even if that cooperation occurs on an entirely new implementation framework. The term 'flexibility' appeared in the official UNGASS 'outcome document.' Some commentators interpret 'treaty flexibilities' as public health oriented approaches grudgingly permitted within the treaties but against

their prohibitionist intent (Martin Jelsma & David Bewley-Taylor, 2016). This paper rejects this reading and construes flexibilities as implementations which were previously viewed as outside mainstream interpretations of the treaties during the 'war on drugs' era but are now increasingly accepted, for example the U.S. State Department's rationale for selective federal enforcement of cannabis prohibitions: see (William R. Brownfield, 2014).

Meanwhile, Some reject flexibilities as a 'cop out' to avoid rewriting the treaties, or claim flexibilities on drug treaties represent a threat to international law (Reinl, 2016). This paper rejects both of these arguments, highlighting that the history of UN drug control is poorly understood, the certainty and clarity of domestic obligations of the treaties overstated, and the obligation to pursue policies which we equate with the 'war on drugs' largely non-existent. This paper argues that selective enforcement, policy prioritisation, wide national regulatory variations, and purposefully undefined criteria for 'medical and scientific' use (Thoumi, 2016) all represent ingrained interpretive room within the conventions, magnified by an absence of any tangible treaty enforcement mechanisms.

This paper begins by highlighting that the treaties themselves do not constitute a 'prohibition regime' mandating a 'war on drugs.' It examines the latest historical research regarding the construction, 'purpose' and implementation of the conventions to highlight the inherent 'flexibilities' within them. It explains how that the treaties represent a relatively loose international trade regulatory framework and that, like all regulatory frameworks, they suggest permitted and non-permitted (or prohibited) practices. It argues that an extreme focus on tackling certain types of behaviours from the 1970s onwards produced the modern 'war on drugs' – but it is far from a direct by-product of the UN drug conventions (Collins, 2015).

It then proceeds to offer concrete historical examples from the twentieth century highlighting that drug control goals were repeatedly subsumed to security, development, political stability and population welfare imperatives, or what we might now refer to under the umbrella of 'development issues.' Finally, this paper examines new interpretive frameworks that emerged during the UNGASS debates to enable the transition to a 'post-war on drugs era' which build on convention 'flexibilities' to enable policy experimentation. It suggests that multilateralism will adapt to provide a functional cooperative framework to help member states (the executors of the treaties) to manage this issue, mitigate cross-border spill-overs, forward evidence-based drug policies, and openly challenge practices unjustified by evidence and banned by existing human rights law.

Adding Historical Texture to Interpretive Orthodoxy: Understanding the 'Purpose' and Implementation of the Conventions:

In contemporary policy discourse the conventions are frequently described in terms of absolute mandates towards prohibition. Further, they are almost universally viewed as a US policy export. It is, as is often repeated, a 'prohibition regime' advocating a clear set of prohibitionist principles originated and driven by US

zealotry (Jelsma & Bewley-Taylor, 2012). The treaties are, as some have put it: ‘fundamentally about prohibition’ and the US acted as their enforcer.² The treaties, it is inferred, mandate unconstrained and symmetrical enforcement around preventing the non-medical and non-scientific use of certain substances.

This interpretation usually begins with the current policy framework as the logical outcome of the treaties and thereby reads the history backwards from the current approach. The treaties preceded the war on drugs and therefore must have mandated it. Further, in the absence of legal clarity within the documents their ‘prohibitionist’ intent is often used to infer an obligation to repressive policies in legal analyses.³

One could think of an analogy around prohibitions around intellectual property laws. International regulations (and prohibitions) on intellectual property theft would never be read as carte blanche for extreme policing and human rights degrading responses to those involved. Similar comparisons could be made for piracy, whereby a policy decision to enact an aggressive and grossly disproportionate military response in all cases is somehow construed as a requirement of international law. Such a logical fallacy is readily apparent in this case, but seems lost in drug policy discussions.

A clear example is visible in legal analyses of the system of ‘Scheduling’, an international regulatory mechanism which seeks to outline national controls for drugs based on their apparent harms. In the case of Schedule IV, seemingly the most stringent schedule of control, a recent overview of Cannabis controls by Bewley-Taylor, Jelsma and Kramer point to ‘[International Narcotics Control Board (INCB)] training materials’, suggesting the use of those substances “must be prohibited except for scientific and very limited medical purposes.” (Bewley-Taylor, Jelsma, & Blickman, 2014, p. 25). However, the historical reality is far less absolute. As Historian William McAllister writes,

‘the entire system is built around the concept of supply control, not, it should be emphasised, the oftused ‘prohibition’. No drugs are absolutely proscribed by the international treaties (although Schedule IV of the Single Convention enumerates a short list of substances that governments have the option to ban).

In other words, selective historicising and interpretation of the ‘intent’ of the treaties results in meaning and obligations being imposed onto documents that were in fact written to be highly flexible. For example, as the Commentary on the Single Convention of 1961, the legal bedrock of the modern control system, explicitly highlights, a core definition within the drug control lexicon ‘the term ‘medical purposes’ does not necessarily have exactly the same meaning at all times and under all circumstances’ and is therefore open to national interpretation (United Nations, 1973).

² Expressed by a number of policy actors in public and private discussions.

³ Private discussions.

Meanwhile a shift in recent historiography highlights that the US's role in the system's genesis is vastly overstated, particularly with regard to the Single Convention of 1961. It is a truism of contemporary drug policy discourse that the 'prohibitionist' US imposed the UN treaties. However, the historiography is absolutely clear that the US rejected the framework outlined in the Single Convention as too weak and a threat to global health and welfare. Most importantly, the Single Convention allowed for the regulation of international supplies of pain medicines, but provided no mechanism for shrinking them, other than mild dissuasion – for example, self-reporting exports to the INCB. The U.S. instead pushed for the stalled and widely unpopular 1953 Opium Protocol which would have limited the production and export of opiates to a global oligopoly of countries.

The U.S. delegation pointed out that the Single Convention was based on 'an entirely different concept' of production limitation than the 1953 Protocol. The Single Convention, they wrote, contained: 'a compromise provision resulting from the insistence of the Soviet Bloc, countries in the British Commonwealth, and some African countries that the new countries be permitted to produce and export opium if they so desire' (Collins, 2015, p. 250). As a result, one major U.S. press source described the Single Convention as a 'Soviet plot' to flood the world with opium (Collins, 2015, p. 254).

The Single Convention came into force in 1964. However, it was not until 1967 that the State Department shifted policy and drove its ratification through the Senate. As McAllister highlights, it is hard to understate lead US drug diplomat Harry Anslinger's 'antipathy to the Single Convention, nor to what extremes he would go to defeat it' (McAllister, 2000, p. 215). The fact that the treaty survived Anslinger's onslaught merely highlights the broad international buy-in to the global regulatory system outlined in the Single Convention, included by key states such as the UK (Collins, 2015).

Other recent historical works should galvanise the move beyond the 'US-led, prohibition regime' narrative and new analyses of global drug regulatory efforts as a complex system with many determinants. For example, Jim Mills recently challenged the genesis narrative around the Hague Convention of 1912 by highlighting Britain as a regulatory activist state, particularly regarding cocaine, and not merely a reluctant passive actor as previous analyses had suggested. He argues that there is an '[i]mportance of returning to the details of British participation in the emergence of the international drugs regulatory system...to get a clearer and more nuanced picture of what they sought to achieve and why' (Mills, 2014, p. 16). Meanwhile, James Windle has correctly highlighted that the 'concept of prohibition being a distinctly American construct is...flawed' and points to the genesis of the idea is Asia in the eighteenth and nineteenth centuries (Windle, 2013, p. 1). Isaac Campos makes a similar case about Mexico arguing that 'the problem is that historians simply have not looked deeply at the origins of drug prohibition in Latin America' (Campos, 2012, p. 4).

Similarly, the work of Collins argues that the entire regulatory structure of the system is misunderstood by the fixation on prohibitions. He argues that the system is not a 'prohibition regime', but a system of international commodity regulation with (like all regulatory systems) prohibitionist aspects. By policy analyses focusing on the prohibitionist aspects the entire functional regulatory 'core' of the conventions is missed along with a genuine understanding of national interests in sustaining the system, even if in an evolved, more 'flexible', form (Collins, 2015).

One conclusion from these analyses is that the 'limits of latitude' are not in any way clearly examined and may, as recent analysis by Francisco Thoumi has shown, be impossible to define given logical inconsistencies within the Conventions (see below). Current understandings of the legal limits of the conventions are explicitly based on historical analyses now recognised as weak, questionable or inaccurate. The current policy orthodoxy of 'limits' takes the current interpretive framework at face value and extrapolates a clear division between policies which are allowed and those which 'breach' the 'prohibitionist' goals of the treaties (For an example of the "limits" orthodoxy see: Jelsma & Bewley-Taylor, 2012).

Under this orthodoxy, states which deviate from this 'prohibitionist' approach, the Swiss, the Dutch, Uruguay, now the US, Bolivia and others which avoid the flashlight of international attention⁴ are regarded as aberrations or 'defections' from the clear intent of the conventions. A refined form of this analysis has sought to categorise how public health approaches represent a form of 'soft defection' from the 'regime', while overt breaks with the 'consensus' represent 'hard defections': (Bewley-Taylor, 2012). This establishes a clear dichotomy, between strict treaty adherents and those defecting from, or 'breaching,' the treaties. This dichotomy is then used to argue for the necessity of treaty rewriting since the irrational and illegitimate, US-imposed 'prohibitionist' system is bound to unravel towards a new and evolved system once its hegemon loses control.

The following examples, far from exhaustive, intend to highlight that instead of a clear dichotomy between adherence and 'breach,' implementation has always ranged on a broad spectrum. This implementation was determined by resource constraints, local economic development, security policies, political stability and geopolitics. As one UK diplomatic brief in 1951 highlighted, parts of the drug conventions had frequently 'been more honoured in the breach than in the observance.'⁵

Nevertheless, as a more functionalist-oriented interpretative framework would suggest, the conventions have traditionally been viewed as a useful coalescing mechanism for international cooperation and therefore deserving public declamations of respect and adherence. Legal accommodations (what we today

⁴ For example, the recognition that some Latin American governments had simply never criminalised drug use appeared almost to come as a surprise to some of those debating whether decriminalisation was possible under the conventions.

⁵ Draft Brief for UK Rep, 'ECOSOC XII', 6th February 1951, BNA, IOC (51)14, CAB 134/410.

might call 'flexibilities') have been a common part of the international discourse, and generally accepted provided they sustained a sense of coherent international management of the issue. Discussions of 'quasi-medical' opium use, contingency of suppression on action in surrounding territories, the need for development-first approaches in vulnerable regions and shifts in types of ambulatory 'maintenance' permitted represent some of the clearest examples of these evolving interpretive and implementation frameworks throughout the last century (See: Collins, 2015, pp. 38–100). It is towards these examples we now turn.

Regulations over Prohibitions:

Far from a system focused on 'prohibition,' prior to the 'war on drugs' era, prohibitions represented one (relatively minor) aspect of a broader international regulatory and trading arrangement. The vast majority of diplomatic fuel from 1924-1971, when the modern treaty system evolved, was burned on developing international trade regulations, particularly around the contentious issue of production controls. The U.S. favoured a strict oligopoly of producers based on quotas, while other powerful drug manufacturing states preferred a relatively free market to keep opium prices low (McAllister, 2000).

Prohibitionist aspects of international treaties, for example against state sanctioned opium smoking or problematic cultivation, were of secondary interest to most states. Many, the UK for example, thought the latter unsolvable and held much 'sympathy for the raw [opium] producing countries' (Collins, 2015, p. 183). They merely sought to enshrine market protections for their pharmaceutical firms and their healthcare sector in treaty law. Further, when the conventions were formulated, European countries had extremely low levels of domestic consumption. They viewed a well-regulated international trade as the best mechanism to keep consumption low and undermine the illicit market. Under this trajectory of supply management, international provisions around managing consumption were generally sidestepped or kept as relatively unobtrusive as possible (McAllister, 2012). Again, as one UK diplomat wrote, British public opinion, 'little excited by a drugs menace, would not favour extravagant local penalties to meet a world problem' (Collins, 2015, p. 200).

Prioritising Policies: Development, Security and Welfare First:

When international obligations pushed against preferred regulatory policies, the latter were generally continued regardless of the treaties by referring to mitigating factors. The 1912 and 1925 conventions suggested prohibitions on opium smoking and accompanying production in Asia. However, the imperial powers in pre- and post-World War II Asia largely refused to implement them because state structures were too weak to do so, medical systems - let alone treatment services - were non-existent, and because it would simply fuel an already large regional illicit market (Collins, 2015, pp. 38–100).

Instead, the focus of colonial governments was to regulate existing consumption via monopolies and maintenance. They could then aim towards a time when prohibitions would be feasible and not produce more harm than good (Collins, 2015,

p. 51). For example, many of the monopolies enacted registration and rationing systems and in many areas the core focus of opium policy was merely to make government opium more competitive than illicit opium. The goal was, first and foremost, do no policy harm and second to lessen the harms of the regional illicit markets. Blind adherence to international policy agendas forwarded by, what one British medical official called 'statistics-bound opiophobes' and 'anti-opium propagandists,' 'would be foolish as well as wrong' if it didn't take account of local realities (Collins, 2015, p. 84).

The Dutch and British, in particular, focused their diplomatic efforts on creating a fully regulated global licit market (see below) to undermine the illicit one. If this could be shown to demonstrably suppress the illicit market and make prohibitions more realistic in the longer run the latter would then be countenanced. Even then, however, they insisted on 'a reasonable transitional period' to shift away from certain types of consumption regardless of the terms set by the international drug treaties (Collins, 2015, p. 51). Prohibitions on certain types of use could be viewed as end goals but only if a whole array of development and governance outcomes were secured first (Collins, 2015, p. 87).

Quiet bilateral pressure from the U.S. eventually pushed the UK to officially end government supplies of smoking opium to registered users in most colonies at the end of World War II (Collins, Forthcoming). However, in many cases, local policies remained unchanged or the form of government 'maintenance' changed. For example, the Colonial Office merely switched to providing a pill of opium form as this was seen as more in line with conceptions of 'medical and scientific' use of the day (Collins, 2015, p. 148). Yet, as political unrest continued in Malaya through the late-1940s, they consciously avoided enforcing pointless prohibitions on smoking opium and deflected attention by once again highlighting illicit trafficking in the region as a mitigating factor (Collins, 2015, p. 196). The UK also steadfastly refused to implement immediate prohibitions in Burma after World War II, despite intense U.S. pressure (Collins, 2015, p. 98). Similarly, in 1945 the French government announced a policy of prohibition in their colonies (McAllister, 2000, p. 152). However, fears of social unrest and inability to implement prohibitions meant that highland groups were exempted and an unofficial opium monopoly continued (Windle, 2012, p. 427).

The U.S. itself was extremely selective on enforcement. It was happy to pressure states to implement prohibition, but would ignore them the moment broader geopolitical interests intervened. For example, although the US was ostensibly pushing Iran to limit opium production after World War II, embassy officials in Tehran, bucking against congressional pressure, cited 'patent instability' and refused to lobby for measures against opium production until stability returned (Collins, 2015, p. 154). In the 1940s and 1950s the US ignored high levels of opium smuggling from Kuomintang insurgents in Burma (McCoy, 2003). Further, the State Department ensured the UN Commission on Narcotic Drugs overlooked continued opium smoking in French Indochina pointing out that 'the political situation in that part of the world and in France' prevented it and suggested 'non-public corrective action' (Collins, 2015, p. 181). Similarly, in 1948 the State Department vetoed any criticism

of perceived Mexican inaction of opium growing citing 'other negotiations...in several matters of considerable importance, one of which is of great importance to us from the viewpoint of hemisphere defence', (Collins, 2015, p. 171).

What these and numerous other examples show is that drug issues were almost never read in isolation of broader health, welfare, development and security targets, and rarely as absolute obligations to institute un-sequenced and self-defeating policies.

A Clearer Understanding of the UN as a Normative Actor:

The UN is frequently referred to as the 'policemen' of global prohibition, a characterisation that obscures a more complex and less monolithic reality. The UN Commission on Narcotic Drugs is effectively a democratic forum populated by member states. The International Narcotics Control Board (INCB) is not a UN body - it has a role in assisting member states in treaty implementation and highlighting concerns to CND, but little room for autonomous enforcement. The drug secretariat (currently UNODC) exists to facilitate CND and member state policies. The Secretariat has played a role in advocating repressive policies and setting national policy trajectories towards the 'war on drugs.' However, this arose through agenda setting, policy dissemination and nudging towards repressive policies by suggesting they were based in best-practice evidence.

For example, the UN drug secretariat was instrumental in shaping the international narrative around managing consumption. This normative framework was established by a questionnaire circulated to member states in March 1947. Independent of any treaty obligations, questions were designed to suggest repressive and strict measures as the natural response, such as asking whether provision had been made to isolate drug 'addicts' from the rest of the population (Collins, 2015, p. 172). States began vying to outdo each other at CND in highlighting the severity of control and punishment. Soon the arrest of 'addicts,' overprescribing doctors, illicit traffickers and other narcotics laws violators were viewed as metrics of success in international control (Collins, 2015, p. 172).

The implication is that these were policy trajectories and choices, to which treaty debates have little key relevance. Member states can, just as they rolled towards these policies, roll back from them. UNODC, just as its predecessors painted repression as the policy du-jour, can now highlight more effective policies in its place. Meanwhile, as already discussed, the obligations, architecture and authorship of the 1961 Single Convention on Narcotic Drugs are widely misunderstood. It was a consolidation of existing treaties with some minor advances, such as defining the parameters of supply regulation and suggesting further prohibitions on types of non-medical and non-scientific use (while leaving these terms undefined (Thoumi, 2016)).

Later conventions like the 1971 and the 1988 were additions to the regulatory framework but provided little that was radically new. The 1971 Convention was an even looser regulatory framework than the Single Convention and was written with

the drug industry, while the 1988 Convention was written in terms of the 1961 Convention's regulatory framework (Collins, 2012). These conventions and relevant international bodies provided a useful enabling mechanism to coalesce member states around, while growing drug consumption in traditionally recalcitrant regions like Europe helped ensure the proliferation of repressive prohibitionist national models (McAllister, 2000). A global regulatory framework matured alongside and was co-opted by the 'war on drugs,' but it was not a determining factor.

Understanding the Licit Global Market:

From 1909-1967 a global regulatory system was created at the international level to manage the flows of 'dangerous drugs.' It was a system of trade regulation – not a system of global prohibition. Like all regulatory systems it created a distinction between 'licit' activities and 'illicit' activities. The former centred on undefined 'medical and scientific' use of 'scheduled' substances, while the latter centred on undefined forms of non-medical and non-scientific use and diversion. The overall goal was to create a 'planned' international market (Renborg, 1964) with demand being predicted by industry and governments and supply being determined by a central bureaucratic group of number crunchers – what became INCB – while transactions would be left to the market.

The assumption of the system's architects was that a functioning regulatory system would absorb most licit production, shrink the illicit market and thereby help lessen non-medical and non-scientific consumption. What would remain would be a minimal role for enforcement activities (Meyer & Parssinen, 2002). These assumptions proved misplaced as drug consumption grew rapidly in the 1960s onwards and with it the global illicit market. Further, the adoption of a westernised conception of 'medical and scientific' consumption consigned large swathes of traditional medical use to the illicit market and with it the regions where it was present. Simultaneously, those advocating a police oriented and repressive and militarised approach gained prominence and eventually instigated the 'war on drugs' of the 1970s – 2000s. However, by 2008 it was clear that this approach was not working and member states began to openly question the consensus. It is towards this period we now turn.

Lessons from The Recent History of UNGASS, 2008-2016 – the Emergence of 'flexibilities':

In 2008, amidst carnage in Mexico and a recognition of the mass incarceration crisis in the US, a shift in global drug policies became apparent. For the first time in decades, new approaches outside the 'war on drugs' strategy were countenanced. Tentative discussions gave way to open debate. By October 2012 President Juan Manuel Santos of Colombia called for a systematic rethink of global drug policies arguing that:

'The time has come to think outside the box. Our invitation is to dutifully study new formulas and approaches screened through an academic, scientific and non-politicised lens, because this war has proven to be extremely challenging and oftentimes, highly frustrating.' (Santos, 2012)

By June 2013, a coherent reform bloc had emerged in the Americas under the leadership of Mexico, Colombia and Guatemala. At the height of global reform rhetoric, even the UN Secretary General called for ‘a wide-ranging and open debate that considers all options’ (Ban Ki-moon, 2013).

Reform-minded civil society was encouraged and hoped for a full ranging debate which would break open the holy grain of global drug policy: rewriting the UN Drug Conventions (Martin Jelsma & David Bewley-Taylor, 2016). Some member states appeared willing to push a hard-line reform agenda and the idea of written treaty reforms was quietly countenanced. However, member states soon faced a choice: shift policies by (1) circumventing the conventions or (2) engaging in a monumental diplomatic process that risked rupturing the global control system and other issues, linked via byzantine international institutional structures and politics.

The tendency towards option (1) was only reinforced when one or more of the following factors seemed present:

1. If the system could be reformed by de facto rather than de jure means;
2. If the system could serve as a mechanism to readjust regional institutional alignments for a variety of issues by exploiting drugs as a geopolitical wedge issue;
3. If wavering adherence to the control system could add new pressure for additional resources from interested states such as the US to tackle issues seen as important to producer and transit countries.

Meanwhile, governmental views on drug treaty issue were summed up by one senior Latin American political leader in 2014: ‘we examined the treaties closely and concluded there is nothing in them which requires a ‘war on drugs’.’⁶ While many observers continued to argue normative, legal and moral imperatives for treaty rewriting, pragmatism seemed increasingly absent. Latin American governments, while leading the debate, appear to have done so for a variety of reasons including: geopolitics, national self-interest, diplomatic manoeuvring, pragmatism, a desire to pursue effective and evidence-based policies and other idiosyncrasies. When some of these factors began to shift or results were unclear, their willingness to bear the resource and time burdens of endless diplomatic processes waned.

The U.S., on the other hand simply shifted their interpretation of the international treaties after several states moved towards cannabis legalisation. Further, in moments of bluntness, State Department officials have openly asserted national sovereignty tempered by a need to defuse international criticisms (Centre for International and Strategic Studies, 2015). Conservative actors within the control system, most notably the diplomatically inept President of INCB (a treaty body with a poor human rights record (Csete, 2012)), Raymond Yans, sparked ire by publicly

⁶ Private discussions at LSE.

castigating Uruguay for legalising cannabis while seeming to avoid direct confrontation with the U.S. (Buenos Aires Herald.Com, 2013).

Simultaneously, a number of other 'flexibility frameworks' emerged to deflate the conventions as an obstacle to reform. Europe, while expressing discomfort with overtly highlighting international legal instruments as 'flexible,' preferred to speak of interpretive 'scope,' downplay the debate and keep it off their already packed policy agenda. Asia, meanwhile, sought a path of 'steady as she goes' on the 'war on drugs,' with ASEAN nations continuing the 'drug free world' pursuit (ASEAN, 2012). Russia, pursuing the maxim of 'offence is the best defence,' grappled with building repressive coalitions around anti-public health policies – for example an anti-methadone coalition (Helena Forrester, 2015) – and pushing a hard-line on opium production in Afghanistan. The obstacles to creating a new 'consensus' across these diverse blocs on this divisive issue unsurprisingly proved insurmountable.

The UN stepped in to take clearer control of the negotiating reins. Soon the UNGASS process became bogged down in consensus building and the reform impetus stalled. By mid-late 2015 expectations for the UNGASS meeting reached rock bottom. Some looked to 2019 as the 'next big step' where true UN reforms could be enacted. Others looked outside the system. As one senior Latin American official stated in a private roundtable: 'the current system does not work for us and we cannot wait for it to change.'⁷

The US solidified a national discourse around treatment and 'recovery' and focused on transmitting that narrative to the international level. Marijuana legalisation had become a sovereign issue and generally remained far from official UN discourses. A new consensus around public health, access to medicines and the need for human rights pervaded diplomatic language, but it was clear the international system had moved as far as was likely in a relatively short period. Some stasis was certain to follow UNGASS.

As the 'outcome document' materialised and the likely contours of UNGASS became impossibly clear, some civil society sought to unilaterally veto the process (Jelsma, 2016), but the dye was cast. Member states had burned significant diplomatic resources. Those at the vanguard initially sought to distance themselves from the outcome, but soon began to highlight the document as a major step forward, enabling an expansion of national experimentation through new treaty flexibilities. Others soon began to highlight it as a human rights win (Lines & Barrett, 2016).

In the years 2008-16 the UN served as a useful forum for driving a change in the normative underpinnings of global drug policies. By exposing the contradictions between the UN's approach to drug policy and broader approaches to human rights, development and public health (most notably in the field of HIV), significant rhetorical and policy shifts occurred. These changes have been internalised by CND, UNODC and its corresponding bodies (United Nations General Assembly, 2016). This

⁷ Private roundtable discussions at Wilton Park, November 2015.

percolated down to member states, many of whom more openly laud human rights and public health policies. However, while governments have absorbed the language of reform, they have generally avoided major shifts in budgets and policies. To tackle this latter issue now requires a shift beyond international forums and a greater focus on changing national and regional funding and policy goals.

Policy Experimentation in a Changed International Environment:

As US Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs, Ambassador William Brownfield stated: ‘Things have changed since 1961. We must have enough flexibility to allow us to incorporate those changes into our policies ... to tolerate different national drug policies, to accept the fact that some countries will have very strict drug approaches; other countries will legalise entire categories of drugs’ (William R. Brownfield, 2014).

There is no single mechanism to define the boundaries of the treaties. Member states must instead decide whether the national regulatory systems they enact remain ‘in good faith in accordance with the ordinary meaning’ of the treaties, as mandated by the Vienna Convention on the Law of Treaties (Art. 31, *Vienna Convention on the Law of Treaties*, 1969).

Meanwhile, as Mark Kleiman and Jeremy Ziskind note: ‘The places that legalise cannabis first will provide – at some risk to their own populations – an external benefit to the rest of the world in the form of knowledge, however the experiments turn out...[t]he guardians of the international treaty regimes would be well advised to keep their hands off as long as the pioneering jurisdictions take adequate measures to prevent ‘exports’’ (Mark A.R. Kleiman & Jeremy A. Ziskind, 2014).

Frameworks for Flexibilities:

1) Resource/Capacity Limitations: Selective Enforcement Model:

This framework derives from legal complications around enforcing the treaties in a federal political system. The U.S. remains the test case. The federal government is the signatory to the UN drug control treaties and is their executor. Individual U.S. states are not. The federal government has no constitutional authority to force states to implement the treaties. The federal government only has the authority to directly enforce the treaties in states via federal resources.

The U.S. State Department has argued this would place an excessive burden on federal resources and is therefore not consonant with a realistic interpretation of the drug control treaties. Further, the drug control treaties make repeated and specific mention of ‘constitutional limitations’ as a mitigating factor around implementing a number of their clauses. For example, Article 35 of the 1961 Single Convention includes the preface: ‘Having due regard to their constitutional, legal and administrative systems the Parties shall...’(Art. 35, *Single Convention on Narcotic Drugs*, 1961)

The US State Department has gone further and suggested a four-point framework for continuing international cooperation on drug policy, whilst allowing increasing variation in national policies (William R. Brownfield, 2014):

- 1) Defend the integrity of the core⁸ of the conventions.
- 2) Allow flexible interpretation of treaties.
- 3) Allow different national/regional strategies.
- 4) Tackle organised crime.

Other federalist jurisdictions have faced similar issues. In the case of Spain, a 2013 report by RAND highlights that:

‘Following several Supreme Court rulings, the possession and consumption of cannabis is no longer considered a criminal offence, and the jurisprudence in the field has tended to interpret the existing legislation in a way that permits ‘shared consumption’ and cultivation for personal use when grown in a private place. While there is no additional legislation or regulation defining the scale or particulars under which cultivation could be permitted, the Cannabis Social Club (CSC) movement has sought to explore this legal space, reasoning that if one is allowed to cultivate cannabis for personal use and if ‘shared consumption’ is allowed, then one should also be able to do this in a collective manner. In this context, hundreds of CSCs have been established over the past 15 years, but legal uncertainty around the issue of production continues.’ (Kilmer, Kruithof, Pardal, Caulkins, & Rubin, 2013)

2) Supremacy of Human Rights Treaties over Drug Control Treaties:

Human rights obligations are a part of the UN Charter. Obligations derived from the drug control treaties are subordinate to human rights obligations. As the UN Charter explicitly states, ‘in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’(Ch. XVI, Art 103, *United Nations Charter*, 1945)

Uruguay has provided a systematic elaboration of this argument. The Uruguayan Ministry of Foreign Affairs wrote to the International Narcotics Control Board (INCB) in February 2014:

‘The Uruguayan State is an absolute defender of international law. In that sense, it has a comprehensive view of the law and obligations assumed by the country not only in the sphere of the Drug Conventions of 1961, 1971 and 1988, but also in the field of the protection of human rights...

It is important for Uruguay to remark the following:

⁸ What this paper highlights as the international trade regulatory framework.

- (i) *The object and purpose of the Convention on Narcotic Drugs, especially the 1988 Convention, should be combating illicit trafficking and, in particular, combating the harmful effects of drug trafficking...*
- (ii) *All the measures adopted to put this combat into practice must neither contradict the Uruguayan Constitution nor ignore or leave fundamental rights unprotected.*
- (iii) *The obligations that our State, as well as other State parties, have assumed under other Conventions, must be taken into account, in particular those related to the protection of human rights, since they constitute jus cogens [“compelling law”] and cannot be ignored.*
- (iv) *...given two possible interpretations of the provisions of the Convention, the choice should be for the one that best protects the human right in question, as stated in Article 29 of the American Convention on Human Rights...In this context and on the basis of the above interpretation, we believe that production and sale in the manner prescribed in the new law may be the best way, on the one hand, to combat drug trafficking, and on the other, to defend the constitutionally protected right to freedom of our fellow citizens.’ (Ministerio de Relaciones Exteriores de Uruguay, 2014)*

3) Expanded Definition of ‘Medical and Scientific’ via Social Scientific Policy Experimentation:

As the commentary on the 1961 Single Convention states, ‘The object of the international narcotics system is to limit exclusively to medical and scientific purposes the trade in and use of controlled drugs.’(United Nations, 1973)

The Commentary on the Single Convention states that ‘the term ‘medical purposes’ does not necessarily have exactly the same meaning at all times and under all circumstances’ (United Nations, 1973). Prior to 1961, an array of states counted state regulated opium eating and smoking as ‘quasi-medical’ use (Collins, 2015, p. 15). Although this has ceased, it highlights the continued evolutionary process of convention interpretation. By redefining national understandings of ‘medical and scientific’ with greater regard to national needs, indigenous rights and human rights, states can expand the scope of licit consumption practices under the conventions. This provides significant and innate flexibility of interpretation around implementation of the conventions (Thoumi, 2016).

Conclusion:

The history of the international system highlights some key insights for reform debates:

1. The term 'medical and scientific' use was the treaty delineator between licit and illicit practices. However, it was a consistently shifting parameter determined by reigning cultural norms. The international control system of was a reflection of these norms, not a determinant. In the Single Convention the definition of 'medical and scientific' use was consciously left to member states (United Nations, 1973) to decide alongside broad scopes to implement national regulations.
2. Bilateral political pressure was often the key driver of shifts towards prohibitive models of regulation, not any overweening fidelity to a prohibitionist reading of the drug conventions. Recourse to bilateral pressure was, in-turn, generally determined by, and subservient to, broader geopolitical interests.
3. The conventions, from the very beginning, were read and implemented with close regard to local socioeconomic and political realities. This has since been extended to include UN human rights regimes which mitigate against repressive policies.

During the 'war on drugs' era, 1971-2016, drug policies became increasingly untethered from other policy realities. Many international forums, once bastions of the prohibitionist mentality of market eradication and zero tolerance to drug use, now openly discuss compassion and public health approaches. The interventions (if not the language) of 'harm reduction' are increasingly recognised for their efficacy. The clear failures of 'demand reduction' and 'supply reduction' policies militate against cheerleading for a continuation of a police-led and militarised strategy (Felbab-Brown, 2014). Few still seriously speak of a 'drug free world.' Meanwhile, emerging regulatory experimentation with recreational drug markets is widely viewed as either inevitable (Caulkins, 2016) or a positive empirical social scientific experiment (Mark A.R. Kleiman & Jeremy A. Ziskind, 2014).

Meanwhile, myriad political, diplomatic, economic, realpolitik, irrational, moral and legion other forces have brought international drug policy to the point it is today. An inflection point occurred over the last decade, which drove global drug policies more quickly towards a new normative international framework. The complex political and economic forces which buttress the system have begun to shift. However, UNGASS demonstrates that change will be evolutionary, not transformative; ad hoc, messy and legally ambiguous, not clear, coherent and legalistic. This is as one would expect with any issue within the realm of international relations. The 'war on drugs' has always been about interpretation, implementation and resource allocation. The escape from the 'war on drugs' will similarly rest on interpretation (flexibilities), implementation (evidence or ideology) and resource allocation (public health and human security over incarceration and policing). This paper has highlighted precedents, possibilities and models for multilateralism to adapt to changing global realities.

Bibliography:

ASEAN. (2012, April 3). ASEAN Leaders' Declaration on Drug-Free ASEAN 2015.

Retrieved from

http://www.asean.org/archive/documents/Declaratin%20on%20Drug%20Free%20ASEAN_Endorsed%20by%20Summit_FINAL.pdf

Ban Ki-moon. (2013, June). *Secretary-General's remarks at special event on the International Day against Drug Abuse and illicit Trafficking*. New York.

Retrieved from <http://www.un.org/sg/statements/index.asp?nid=6935>

Bewley-Taylor, D. R. (2012). *International Drug Control: Consensus Fractured*.

Cambridge University Press.

Bewley-Taylor, D. R., Jelsma, M., & Blickman, T. (2014). *The Rise and Decline of Cannabis Prohibition*. Transnational Institute. Retrieved from

<https://www.tni.org/en/publication/the-rise-and-decline-of-cannabis-prohibition>

- Buenos Aires Herald.Com. (2013, December 15). Mujica blasts UN Official Raymond Yans over marijuana law. Retrieved from <http://www.buenosairesherald.com/article/147539/mujica-blasts-un-official-raymond-yans-over-marijuana-law>
- Campos, I. (2012). *Home Grown: Marijuana and the Origins of Mexico's War on Drugs*. University of North Carolina Press.
- Caulkins, J. P. (2016). Legalising Drugs Prudently: The Importance of Incentives and Values. In J. Collins & A. Soderholm (Eds.), *After the Drug Wars: Report of the LSE Expert Group on the Economics of Drug Policy*. London: LSE IDEAS. Retrieved from <http://www.lse.ac.uk/IDEAS/publications/reports/pdf/LSE-IDEAS-After-the-Drug-Wars.pdf>
- Centre for International and Strategic Studies. (2015, February 6). What's Happening in U.S. Drug Policy at Home and Abroad? Retrieved from <http://csis.org/event/whats-happening-us-drug-policy-home-and-abroad>
- Collins, J. (Forthcoming). Breaking the Monopoly System: American influence on the British decision to prohibit opium smoking and end its Asian monopolies, 1939-1943.
- Collins, J. (2012). The International Drug Control System. *Governing the Global Drug Wars*. Retrieved from <http://www.lse.ac.uk/IDEAS/publications/reports/SR014.aspx>
- Collins, J. (2015). *Regulations and prohibitions: Anglo-American relations and international drug control, 1939-1964*. London School of Economics and

- Political Science (LSE), London. Retrieved from
<http://etheses.lse.ac.uk/3107/>
- Csete, J. (2012). Overhauling Oversight: Human Rights at the INCB. *Governing the Global Drug Wars*. Retrieved from
<http://www.lse.ac.uk/IDEAS/publications/reports/SR014.aspx>
- Felbab-Brown, V. (2014). Improving Supply-Side Policies: Smarter Eradication. Interdiction and Alternative Livelihoods - and the Possibility of Licensing. In J. Collins (Ed.), *Ending the Drug Wars: Report of the LSE Expert Group on the Economics of Drug Policy*. LSE. Retrieved from
<http://www.lse.ac.uk/IDEAS/publications/reports/pdf/LSE-IDEAS-DRUGS-REPORT-FINAL-WEB01.pdf>
- Helena Forrester. (2015, August 20). Russia Seeks International Anti-Methadone Coalition Ahead of UNGASS. Retrieved from
<http://www.talkingdrugs.org/russia-seeks-international-anti-methadone-coalition-ahead-of-ungass-0>
- Jelsma, M. (2016, April 12). UNGASS 2016: Watershed event or wasted opportunity? Retrieved from <https://www.tni.org/en/article/ungass-2016-watershed-event-or-wasted-opportunity>
- Jelsma, M., & Bewley-Taylor, D. R. (2012). *The UN Drug Control Conventions: The Limits of Latitude* (Series on Legislative Reform of Drug Policies No. 18). Transnational Institute and International Drug Policy Consortium. Retrieved from
<http://www.tni.org/sites/www.tni.org/files/download/dlr18.pdf>
- Kilmer, B., Kruithof, K., Pardal, M., Caulkins, J. P., & Rubin, J. (2013). *Multinational Overview of Cannabis Production Regimes*. RAND Europe.

Lines, R., & Barrett, D. (2016, September 5). The Human Rights Win at UNGASS on Drugs That no one is Talking About and How We Can Use it. Retrieved from <https://hrcessex.wordpress.com/2016/05/09/the-human-rights-win-at-the-ungass-on-drugs-that-no-one-is-talking-about-and-how-we-can-use-it/>

Mark A.R. Kleiman, & Jeremy A. Ziskind. (2014). Lawful Access to Cannabis: Gains, Losses and Design Criteria. In John Collins (Ed.), *Ending the Drug Wars: Report of the LSE Expert Group on the Economics of Drug Policy*. The London School of Economics and Political Science. Retrieved from <http://www.lse.ac.uk/IDEAS/publications/reports/pdf/LSE-IDEAS-DRUGS-REPORT-FINAL-WEB01.pdf>

Martin Jelsma, & David Bewley-Taylor. (2016, May 7). UNGASS 2016: A Broken or B-r-o-a-d Consensus? Retrieved from <https://www.tni.org/en/publication/ungass-2016-a-broken-or-b-r-o-a-d-consensus>

McAllister, W. B. (2000). *Drug Diplomacy in the Twentieth Century: an International History*. Routledge.

McAllister, W. B. (2012). Reflections on a Century of International Drug Control. *Governing the Global Drug Wars*.

McCoy, A. W. (2003). *The Politics of Heroin: CIA Complicity in the Global Drug Trade, Afghanistan, Southeast Asia, Central America, Colombia* (3rd ed.). Lawrence Hill Books.

Meyer, K., & Parssinen, T. M. (2002). *Webs of Smoke: Smugglers, Warlords, Spies, and the History of the International Drug Trade*. Rowman & Littlefield.

Mills, J. H. (2014). Cocaine and the British Empire: The Drug and the Diplomats at the Hague Opium Conference, 1911–12. *The Journal of Imperial and Commonwealth History*, 42(3), 400–419.

Ministerio de Relaciones Exteriores de Uruguay. (2014, February 4). Señor Subsecretario del Ministerio de Relaciones Exteriores ante JIFE. Retrieved from <http://www.bvcedro.org.pe/bitstream/123456789/543/9/4377-DR-CD.pdf>

Pelley, S. (2015, December 13). A New Direction on Drugs. Retrieved from <http://www.cbsnews.com/news/60-minutes-a-new-direction-on-drugs/>

Reinl, J. (2016, January 10). The Paradox of War on Drugs and Marijuana Legalisation. Retrieved from <http://www.aljazeera.com/indepth/features/2016/01/paradox-war-drugs-marijuana-legalisation-160109182606156.html>

Renborg, B. A. (1964). The Grand Old Men of the League of Nations: What They Achieved. Who They Were. *UN Bulletin on Narcotics*. Retrieved from http://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin_1964-01-01_4_page002.html

Santos, J. M. (2012). Re-examining the Drug Problem Through a Fresh Lens. *Governing the Global Drug Wars*. Retrieved from <http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SR014/SR-014-FULL-Lo-Res.pdf>

Single Convention on Narcotic Drugs (1961).

The Global Commission on Drug Policy. (2014). *Taking Control: Pathways to Drug Policies That Work*. New York City.

Thoumi, F. E. (2016). Re-examining the “Medical and Scientific” Basis for Interpreting the Drug Treaties: Does the “Regime” Have Any Clothes? In J. Collins (Ed.), *After the Drug Wars: Report of the LSE Expert Group on the Economics of Drug Policy*. London: LSE IDEAS. Retrieved from <http://www.lse.ac.uk/IDEAS/publications/reports/pdf/LSE-IDEAS-After-the-Drug-Wars.pdf>

United Nations. (1973). *Commentary on the Single Convention on Narcotic Drugs, 1961*. New York. Retrieved from https://www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the_single_convention_1961.pdf

United Nations Charter. (1945). Retrieved from <http://www.un.org/en/sections/un-charter/un-charter-full-text/index.html>

United Nations General Assembly. Our joint commitment to effectively addressing and countering the world drug problem, A/RES/S-30/1 (2016).

Vienna Convention on the Law of Treaties (1969).

William R. Brownfield. (2014, October). *Trends in Global Drug Policy*. New York City. Retrieved from <http://fpc.state.gov/232813.htm>

Windle, J. (2012). The suppression of illicit opium production in Viet Nam: an introductory narrative. *An Interdisciplinary Journal*, 57(4), 425–439. <https://doi.org/10.1007/s10611-012-9364-3>

Windle, J. (2013). How the East Influenced Drug Prohibition. *The International History Review*.