

Legalizing Cannabis Violates the UN Drug Control Treaties, But Progressive Countries like Canada Have Options

By: Roojin Habibi and Steven J. Hoffman

Abstract:

There is growing concern that the international drug control regime's outdated and restrictive drug control measures do not meet current human rights standards and public health needs. Provisions in three historically prohibitionist United Nations treaties – the 1961 Single Convention on Narcotic Drugs, the 1971 Convention on Psychotropic Substances, and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances – substantially limit Party latitude in legalizing and regulating schedule-listed substances, including cannabis. Against this backdrop, following through on a promise made during the 2015 national election, the Canadian government introduced Bill C-45 in April 2017 to legalize cannabis for non-medical uses by Summer 2018. This article analyzes and explains how legalizing cannabis violates the three United Nations drug control treaties. Anchored in the premise of respect for the rule of international law, the article identifies several ways forward for reconciling domestic cannabis legalization plans with international legal obligations under the United Nations drug control regime.

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I. Introduction

In 2016, on the occasion of the 30th Special Session of the United Nations General Assembly (UNGASS) on the World Drug Problem, the Executive Director of the United Nations (UN) Office on Drugs and Crime (UNODC), Yury Fedotov, wrote of a “decisive moment” in which Parties of the international drug control community reaffirmed their shared commitment to addressing persistent and evolving challenges under the existing international regime.¹ However, for a growing list of dissenting Parties, academics and civil society advocates, consensus in the drug control regime is a politically convenient façade² concealing a longstanding “rift between countries interested in drug policy reform and those with repressive drug regimes.”³

Narcotic drugs and psychotropic substances (collectively referred to as “illicit drugs”) are governed by three UN treaties constituting the international drug control regime: the 1961 *Single Convention on Narcotic Drugs* (as amended by the 1972 protocol) (“Single Convention”),⁴ the 1971 *Convention on Psychotropic Substances* (“Psychotropics Convention”),⁵ and the 1988 *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (“Trafficking Convention”).⁶ At their core, these treaties aim to curtail drug use by requiring Parties to criminalize the possession, cultivation, production, importation, sale and distribution of illicit drugs for non-medical and non-scientific purposes.⁷

¹ Yury Fedotov, “Preface” in *World Drug Report 2016* (New York: United Nations, 2016) at iii.

² Martin Jelsma, *UNGASS 2016: Prospects for Treaty Reform and UN System-Wide Coherence on Drug Policy*, (Washington: Brookings Institution, 2015) at 10.

³ Jessica Glenza, “UN backs prohibitionist drug policies despite call for a more ‘humane’ solution” *The Guardian* (20 April 2016) online: <www.guardian.co.uk>.

⁴ *Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol*, 25 March 1972, 976 UNTS 3, 11 ILM 804 (entered into force 8 August 1975) [Single Convention].

⁵ *Convention on Psychotropic Substances of 1971*, 21 February 1971, 1019 UNTS 175, 10 ILM 261 (entered into force 16 August 1976) [Psychotropics Convention].

⁶ *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988*, 20 December 1988, 1582 UNTS 95, 28 ILM 493 (entered into force 11 November 1990) [Trafficking Convention].

⁷ David Bewley-Taylor and Martin Jelsma, “The UN Drug Control Conventions: The Limits of Latitude” (2012) 1:18 TNI/IDPC Series on Legislative Reform of Drug Policies 1 at 4.

As of January 2018, there are 186 Parties to the Single Convention, 184 to the Psychotropics Convention, and 190 to the Trafficking Convention. Despite near-universal participation, the regime is often criticized as the product of a bygone era and out of step with contemporary norms and public health research.⁸ By explicitly allowing Parties to adopt strict or severe policies that go beyond codified provisions,⁹ such as the imposition of death penalty for drug-related offences, the treaties have also been accused of catalyzing or facilitating systematic abuses of universal and treaty-based human rights.¹⁰

In reaction to these shortcomings, an increasing number of Parties have pursued legal and policy avenues that circumvent restrictive treaty provisions. The case of cannabis possession for non-medical and non-scientific (e.g., recreational) use is a manifestation of this trend. Parties have deviated from criminalizing simple drug possession along a continuum from subtle defections, such as Portugal's diversion of offenders to non-criminal channels,¹¹ or the non-enforcement of laws criminalizing the possession of cannabis in The Netherlands,¹² to the *de jure* legalization of a regulated market for cannabis in several states within the United States (US),¹³ and nationally in Uruguay.¹⁴

Canada may soon be the newest addition to this continuum. In the country's 2015 national election, the Liberal Party of Canada ran and won on a campaign that included a pledge

⁸ Joanne Csete et al, "Public Health and International Drug Policy" (2016) 387 *The Lancet* 1427.

⁹ *Single Convention*, *supra* note 4 at s 39; *Psychotropics Convention*, *supra* note 5 at s 23; *Trafficking Convention*, *supra* note 6 at s 24.

¹⁰ Dainius Pūras and Julie Hannah, "Reasons for Drug Policy Reform: Prohibition Enables Systemic Human Rights Abuses and Undermines Public Health" (2017) 356 *Brit Med J* i6586.

¹¹ João Goulão, "A Public Health Approach as a Base for Drugs Policy: the Portuguese Case" (Presentation delivered at UNGASS 2016 on World Drug Problem Side Event, 20 April 2016) online: <www.unodc.org>.

¹² Justus Uitermark, "The Origins and Future of the Dutch Approach Towards Drugs" (2004) 34:3 *J Drug Issues* 511.

¹³ Wells C. Bennett & John Walsh, *Marijuana Legalization is an Opportunity to Modernize International Drug Treaties* (Washington: Brookings Institution, 2014).

¹⁴ John Walsh and Geoff Ramsey, *Uruguay's Drug Policy: Major Innovations, Major Challenges* (Washington: Brookings Institution, 2016).

to “legalize, regulate and restrict access” to cannabis.¹⁵ The new government’s plans were announced to the international community at UNGASS 2016, where Health Minister Jane Philpott stated that Canada would soon “introduce legislation...[to] keep marijuana out of the hands of children and profits out of the hands of criminals.”¹⁶ The proposed Bill C-45, entitled “An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts,” was introduced in the House of Commons on April 13, 2017.¹⁷ Among the stated objectives, the Bill seeks to:

“...protect the health of young persons by restricting their access to cannabis...protect young persons and others from inducements to use cannabis...provide for the licit production of cannabis to reduce illicit activities in relation to cannabis...deter illicit activities in relation to cannabis through appropriate sanctions...[and] reduce the burden on the criminal justice system in relation to cannabis.”¹⁸

Bill C-45 received final approval by the House of Commons on November 27, 2017, and has been referred to the Senate for its deliberation. As of January 2018, the Bill remains at Second Reading – but is expected to be approved very soon. The federal government has stated that it intends to legalize cannabis by July 2018.¹⁹

Although the legal status of cannabis has been debated on Parliament Hill for as long as international conventions have prohibited the substance,²⁰ the current momentum towards a legal

¹⁵ Honourable David Johnston, “Making real change happen” (Speech from the Throne to open the first session of the forty-second Parliament of Canada delivered at Ottawa, 4 December 2015), online: <speech.gc.ca>.

¹⁶ Health Canada, Plenary Statement for the Honourable Jane Philpott Minister of Health – UNGASS on the World Drug Problem (20 April 2016).

¹⁷ Bill C-45, *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts*, 1st Sess, 42nd Parl, 2017 (as passed by the House of Commons 27 November 2017).

¹⁸ *Ibid* at cl 7.

¹⁹ *House of Commons Debates*, 42nd Parl, 1st Sess, No 148 (30 May 2017) at 1245 (Hon Jody Wilson-Raybould)

²⁰ Elaine Hyshka, “The Sage Continues: Canadian Legislative Attempts to Reform Cannabis Law in the Twenty-First Century” (2009) 51:1 *Can J Criminology and Criminal Justice* 73.

and regulated cannabis market is unprecedented.²¹ There is, however, an elephant in the room. Canada's respect for international treaty law, as Party to all three UN drug control conventions, stands on shaky grounds. Recent debates on Parliament Hill have shed little light on how the government plans to reconcile international treaty obligations with the creation of a legal and regulated market for cannabis.²² The 2016 Task Force commissioned by government to advise on the regulation of cannabis was not mandated to provide guidance on this matter either.²³

Previous public inquiries have concluded that a regulated cannabis market without further diplomatic action would definitively contravene and exceed the latitude offered by the international drug control regime.²⁴ It would also undermine the international law of treaties, which depends on a good faith interpretation of treaty provisions by all Parties in light of the “object and purpose”²⁵ of the treaties, and the doctrine of *pacta sunt servanda* encapsulating the imperative to perform agreed-upon international obligations in good faith.²⁶

The 2016 UNGASS meeting revealed a fractured global consensus on drug prohibition. With Parties increasingly deviating from restrictive treaty provisions, and a review of the regime's Political Declaration and Plan of Action on the horizon in 2019,²⁷ the world is reaching a turning point in the development of international drug policy. As the first G7 country to table

²¹ Kent Roach et al, “A Partial Ceasefire? Reflections on the Impending Legalization of Marijuana” (2016) 63 CLQ 368.

²² *Debates of the Senate*, 42nd Parl, 1st Sess, No 150 (30 November 2017) at 1510 (Hon Tony Dean)

²³ Canada, Task Force on Cannabis Legalization and Regulation, *A Framework for the Legalization and Regulation of Cannabis in Canada: The Final Report of the Task Force on Cannabis Legalization and Regulation* (Ottawa: Health Canada, 2016) at 10.

²⁴ Le Dain G, *Commission of Inquiry into the Non-Medical Use of Drugs* (Ottawa: Government of Canada, 1972); Senate, Special Committee on Illegal Drugs, *Report of the Senate Special Committee on Illegal Drugs: Cannabis* (2002) at 467.

²⁵ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, 8 ILM 679, at s 31(1) (entered into force 27 January 1980) [*Vienna Convention*] at s 31(1).

²⁶ *Ibid* at s 26.

²⁷ United Nations Office on Drugs and Crime, *Political Declaration and Plan of Action on International Cooperation Towards an Integrated and Balanced Strategy to Counter the World Drug Problem* (New York: UN, 2009) at 14.

legislation proposing to legalize cannabis, Canada is at the forefront of this movement. In keeping with the Liberal government's focus on restoring Canada's constructive global leadership and the "deeply held Canadian desire to make a real and valuable contribution" to the world,²⁸ legislators could view this as an opportunity to adopt a pioneering role on the global stage.

In this article, we present and assess four general pathways that would allow the Canadian government to legalize cannabis while respecting international law: 1) treaty reform; 2) treaty reservation; 3) treaty withdrawal or denunciation, and 4) rescheduling the listing of cannabis within the treaties. To present the merits and pitfalls of each approach, we first outline the key features of the international drug control regime (Section II) and discuss the latitude for cannabis legalization under the treaties (Section III). Guided by the premise that all countries must respect the rule of international law and the Canadian government's commitment to multilateralism, we then turn our attention to the pathways for reconciling cannabis legalization with international legal obligations (Section IV). We ultimately conclude that Canada should withdraw from the three UN drug control treaties in the short-term so that its cannabis legalization effort does not turn international law into collateral damage, but that over the long-term, the country should leverage its global standing, G7 status, and growing global appetite for treaty reform to champion changes that would benefit all Parties to the treaties and those affected by drugs (Section V).

II. International Drug Control Regime: An Overview

i) The Treaties

Predating the League of Nations, efforts to counter drug use and trafficking trace back to

²⁸ Justin Trudeau, "Minister of Foreign Affairs Mandate Letter" online: <www.pm.gc.ca>.

the 1909 Shanghai Conference convened by European colonial powers to address opium use in China. The 1912 International Opium Convention, subsequent to the Shanghai Conference, became the launch pad for a series of subsequent agreements on drug control that formed the foundation of the contemporary international drug control regime. By the time the final draft of the Single Convention was agreed upon in 1961, it consolidated several decades of drug control agreements into a single set of rules administered by the UN.

The Single Convention requires Parties to implement baseline legislative and regulatory measures to prohibit the production, use and trade of narcotic drugs. In the Preamble, the treaty invokes a concern for the “health and welfare of mankind” and describes addiction as a “serious evil for the individual” that is “fraught with social and economic danger...”. Using vocabulary resembling a call to arms, the Preamble imposes a “duty to prevent and combat this evil.”²⁹

Although there is no explicit definition of the term “narcotic drug,” Article 1(j) of the treaty defines a “drug” as any natural or synthetic substance within Schedules I and II annexed to the Convention.³⁰ Schedules classify substances according to their perceived therapeutic value and potential for abuse. Substances in Schedule I are subjected to all the Convention’s restrictive provisions. Substances in Schedule II and III are exempt from an assortment of provisions, while the small number of substances in Schedule IV, in addition to being subjected to all provisions, are flagged for additional provisions within the treaty. Cannabis extracts, including cannabis, hashish and cannabis oil, are doubly listed within Schedules I and IV.

At the time of drafting, drugs forbidden by the Single Convention were mainly sourced through diversion from the legal market. In an effort to maintain control over the illicit drug market, the Convention contains provisions for a system of estimates and quotas required for

²⁹ *Single Convention*, *supra* note 4 at Preamble.

³⁰ *Ibid* at s 1(j).

narcotic drugs.³¹ Parties must furnish annual information regarding the quantity of drugs required for legal use to the International Narcotics Control Board (INCB), the regime's independent monitoring body. The total of these estimates is tallied against the total legal production of drugs. Yearly statistics on the production or manufacture of drugs, use of drugs for the manufacture of other drugs and specified substances, consumption and stock of drugs, must also be provided.³²

Owing to a US government-led initiative, the Single Convention was amended in 1972 by the *Protocol Amending the Single Convention on Narcotic Drugs, 1961*.³³ The main effect of changes was to enhance the INCB's mandate to prevent the illicit cultivation, production and manufacture of, and illicit trafficking in and use of drugs.³⁴ Provisions on the prevention of drug use were also amended to include "treatment, education, after-care, rehabilitation and social reintegration" as an alternative to or in lieu of conviction,³⁵ borrowing from a similar provision that appeared one year earlier in the Psychotropics Convention.³⁶

The Psychotropics Convention came as a reaction to the emergence of synthetic drugs such as amphetamines, barbiturates and benzodiazepines. Given that these substances were not previously scheduled in the Single Convention, several provisions were reiterated for psychotropic substances, including the listing of psychotropic substances in four schedules within the Convention. Tetrahydrocannabinol (THC), the main active ingredient in cannabis, is listed within Schedule II.

Beyond reiterating concern for the health and welfare of mankind, the Preamble to the Psychotropics Convention acknowledges the "public health and social problems resulting from

³¹ *Ibid* at s 19.

³² *Ibid* at s 20.

³³ *1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961*, 25 March 1972, 276 UNTS 14152 (entered into force 8 August 1975) [1972 Protocol].

³⁴ *Single Convention*, *supra* note 4 at s 2.

³⁵ *Ibid* at s 38.

³⁶ *Psychotropics Convention*, *supra* note 5 at s 20.

the abuse of certain psychotropic substances” while recognizing that their use could still be indispensable for “medical and scientific purposes.”³⁷ It also brings into focus the imperative to treat, educate and rehabilitate victims of drug use.³⁸

While the previous treaties emphasized control over the supply of illicit drugs, the Trafficking Convention directly addresses the illicit production, trafficking, and demand for drugs, which appeared in the 1970s and 1980s. The Convention seeks to eliminate the “root causes of the problem of abuse of narcotic drugs and psychotropic substances”³⁹ by providing for comprehensive measures, such as the confiscation of assets,⁴⁰ to combat drug trafficking, and mandating additional law enforcement mechanisms, such as extradition,⁴¹ which depend on international collaboration to achieve these objectives. The treaty also establishes a system of control over precursor chemicals used in the production and manufacture of narcotic drugs and psychotropic substances.⁴² These substances are listed in Table I and Table II of the treaty.

ii) The Institutions

The international drug control regime is administered jointly by the UN Economic and Social Council (ECOSOC), the Commission on Narcotic Drugs (CND) and the INCB. ECOSOC is a permanent organ of the UN General Assembly holding under its purview the CND and INCB.

The CND is the UN’s central drug policymaking body. Meeting annually, the CND adopts resolutions on drug policy and coordinates preparatory work for the UNGASS. Its treaty-mandated functions include amending the listing of substances within the Schedules and Tables

³⁷ *Ibid* at Preamble.

³⁸ *Ibid* at s 20(1).

³⁹ *Trafficking Convention*, *supra* note 6 at Preamble.

⁴⁰ *Ibid* at s 5.

⁴¹ *Ibid* at s 6.

⁴² *Ibid* at s 12.

of the treaties,⁴³ calling to the attention of the INCB any relevant matters,⁴⁴ and making recommendations for the implementation of the aims and provisions of the treaties.⁴⁵ The CND also oversees the strategic goals of the UN Drug Control Programme housed within the UN Office on Drug Control (UNODC). The UNODC is part of the UN Secretariat responsible for promoting international cooperation, building capacity, and providing legal and technical support to governments and agencies.

Headquartered in Vienna, the INCB is an independent and quasi-judicial monitoring body established by the Single Convention to oversee the implementation of the drug control treaties.⁴⁶ It is composed of thirteen expert members elected by ECOSOC, serving a term of five years each.⁴⁷ The body administers the system of estimates reported by Parties for their legal use of drugs,⁴⁸ as well as the system of statistical returns,⁴⁹ and issues an Annual Report detailing the estimates and statistical information received. It also reviews the status of global drug control efforts.⁵⁰

Beyond these technical duties, the INCB is also engaged in enforcing compliance with treaty obligations. Frequently, the body uses its Annual Report or press releases to comment on the non-compliance of a specific Party.⁵¹ When in doubt, it may dispatch missions to a specific Party and begin confidential consultations, request explanations and propose remedial measures

⁴³ *Single Convention*, *supra* note 4 at s 3; *Psychotropics Convention*, *supra* note 5 at s 2; *Trafficking Convention*, *supra* note 6 at s 12.

⁴⁴ *Single Convention*, *supra* note 4 at s 3; *Psychotropics Convention*, *supra* note 5 at s 2; *Trafficking Convention*, *supra* note 6 at s 21.

⁴⁵ *Psychotropics Convention*, *supra* note 5 at s 2, s 17.

⁴⁶ *Single Convention*, *supra* note 4 at s 5.

⁴⁷ *Ibid* at s 9.

⁴⁸ *Ibid* at s 12; *Psychotropics Convention*, *supra* note 5 at s 16.

⁴⁹ *Ibid* at s 13.

⁵⁰ *Ibid* at s 15.

⁵¹ Saul Takahashi, *Human Rights and Drug Control: False Dichotomy?* (Oxford: Bloomsbury, 2016) at 32.

to bring errant Parties within the boundaries of treaty provisions.⁵² If unsatisfied with these measures, it can bring the matter to the attention of the Parties, ECOSOC and the CND. Ultimately, the INCB may recommend to ECOSOC that Parties halt the import and export of drugs to or from the country concerned until it is satisfied that the situation has been rectified, though this recourse has not been activated to date.⁵³ Although the views of the INCB are not legally binding, they are considered authoritative and reflective of international consensus, and as such, should be given serious consideration by Parties.⁵⁴

III. Legalization of Cannabis Under International Law

i) Treaty Provisions Related to the Recreational Possession and Use of Cannabis

In Canada, international treaties are generally negotiated, ratified and signed by the executive branch of the Canadian government, as per British tradition. As a “dualist” country, international treaty obligations only integrate into Canada’s domestic legal system upon implementation of domestic legislation to this effect.⁵⁵ With respect to drug control, Canada incorporated provisions of the Single Convention in 1961 with the adoption of the *Narcotic Control Act*.⁵⁶ The statute has since been replaced by the *Controlled Drugs and Substances Act*, which regulates drugs listed within four schedules of the legislation, including cannabis and its derivatives.⁵⁷ Across all three drug control treaties, Canada has only made a reservation with respect to the use of peyote by “small, clearly determined groups” under the Psychotropics

⁵² *Single Convention*, *supra* note 4 at s 14(1)(a) & 14(1)(b); *Psychotropics Convention*, *supra* note 5 at s 19(1)(a), 19(1)(b) & 19(1)(c).

⁵³ *Single Convention*, *supra* note 4 at s 14(2); *Psychotropics Convention*, *supra* note 5 at s 19(2).

⁵⁴ *Takahashi*, *supra* note 51 at 17.

⁵⁵ Library of Parliament, “Canada’s Approach to the Treaty Making Process (Background Paper)”, by Laura Barnett, Publication No. 2008-45-E (Ottawa: Library of Parliament, 2008).

⁵⁶ *Narcotic Control Act*, RSC 1961, c N-1, as repealed by the *Controlled Drugs and Substances Act*, RSC 1996, c. 19

⁵⁷ *Controlled Drugs and Substances Act*, RSC 1996, c 19.

Convention.⁵⁸

The 1969 *Vienna Convention on the Law of Treaties* (Vienna Convention), to which Canada is party, guides states to interpret their treaty obligations in “good faith” according to the “ordinary meaning” given to terms in the treaty context, and in light of the “object and purpose” of the treaty.⁵⁹ While experts have described the provisions of the drug control treaties as being “saturated with textual ambiguity,”⁶⁰ the Vienna Convention directs Parties to several sources which may help in clarifying the “object and purpose” of the drug control regime. Beyond the text of the treaties themselves, including its preamble and annexes, Parties may look to the content of subsequent agreements,⁶¹ and any practice in the application of the treaty that establishes the agreement of the parties regarding its interpretation.⁶² Where ambiguities still exist, attention may also be given to the preparatory work of the treaty, the circumstances of its conclusion, customary international law and treaty commentary in order to fill any interpretive voids.⁶³ Below, we draw on each of these sources to outline the latitude afforded by international law to craft a national legal framework on cannabis.

The primary general obligation of the Single Convention is found in Article 4(c), which stipulates that Parties must “take such legislative and administrative measures as may be necessary... [s]ubject to the provisions of the [Single Convention], to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.”⁶⁴ Taken singularly, the provision does not require the

⁵⁸ Convention on Psychotropic Substances Concluded at Vienna on 21 February 1971: Accession by Canada, UN Doc C.N. 191. 1987. TREATIES-2 (Depositary Notification) (18 June 1987).

⁵⁹ *Vienna Convention*, *supra* note 25 at s 31(1).

⁶⁰ Neil Boister, *Penal Aspects of the UN Drug Control Conventions* (The Hague: Kluwer International, 2001) at 22.

⁶¹ *Vienna Convention*, *supra* note 25 at art 31.3(a)

⁶² *Ibid* at s 31(2).

⁶³ *Ibid* at s 32.

⁶⁴ *Single Convention*, *supra* note 4 at s 4(c).

criminalization of the listed activities. It also does not specify whether the limitation applies to the possession of drugs for non-medical or recreational use. While the term “medical and scientific purposes” is not defined anywhere in the treaties, it is reasonable to conclude that the recreational possession and consumption of cannabis as a mind-altering substance on social occasions or for personal leisure would not fall within purview of this caveat.

The requirement to impose sanctions comes into clearer focus with the penal provisions of each treaty on the topic of possession of illicit drugs. Article 33 of the Single Convention states that Parties must not “permit the possession of drugs except under legal authority.”⁶⁵ Article 36(1)(a) of the Single Convention requires the possession and production of narcotic drugs to be “punishable offences” subject to the constitutional limitations of the Party.⁶⁶ Within the Psychotropics Convention, Article 22(1)(a) requires Parties to treat as a punishable offence, again subject to the constitutional limitations of each Party, “any action contrary to a law or regulation adopted in pursuance of its obligation under [the Psychotropics Convention]” and ensure that serious offences “be liable to adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty.”⁶⁷ Unlike the Single Convention, Article 22 of the Psychotropics Convention does not list the specific conducts that are to be subjected to punishment, which has been interpreted as providing Parties greater flexibility to fashion the laws and regulations they deem adequate to fulfill their treaty obligations.⁶⁸ Importantly, the word ‘use’ is omitted from the penal provisions of both treaties, as is the requirement to administer *criminal* sanctions.

Article 3(2) of the Trafficking Convention also provides for similar penal provisions as

⁶⁵ *Ibid* at s 33.

⁶⁶ *Ibid* at s 36(1)(a).

⁶⁷ *Psychotropics Convention*, *supra* note 5 at s 22(1)(a).

⁶⁸ Le Dain, *supra* note 24.

Article 36 of the Single Convention and Article 22 of the Psychotropics Convention, but the language used is seemingly more punitive than its predecessors. The provision requires Parties to:

“...establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 [Psychotropics] Convention.”⁶⁹

Despite requiring the establishment of criminal offences, a distinction is made between serious offences listed in Article 3(1), such as drug trafficking,⁷⁰ and the possession, purchase or cultivation of illicit drugs for personal consumption listed in Article 3(2). In the latter case, the provision is subject to the “constitutional principles or basic concepts of [each Party’s] legal system.”⁷¹ In the 1988 Commentary on the Trafficking Convention, it was clarified that “as with the 1961 [Single] and 1971 [Psychotropics] Conventions, Paragraph 2 does not require drug consumption as such to be established as a punishable offence”⁷² and suggested that an offence deriving from personal consumption could be distinguished from more serious offences through “threshold requirements in terms, for example, of weight.”⁷³ UN treaty commentaries, while not the equivalent of the agreement itself, can be used as a guide in treaty interpretation, where the ordinary meaning of terms are unclear.

The legal obligations concerning cannabis are more complex owing to additional provisions that address the substance directly. In particular, Article 28(3) of the Single

⁶⁹ *Trafficking Convention*, *supra* note 6 at s 3(2).

⁷⁰ *Ibid* at s 3(1).

⁷¹ *Ibid* at s 3(2).

⁷² United Nations, *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*, UN Doc E/CN.7/590 (1988) at 82.

⁷³ *Ibid* at 83.

Convention requires parties to “adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant,”⁷⁴ and in the 1961 Commentary on the Single Convention it was reinforced that “production of cannabis and cannabis resin must not be undertaken for other than medical and scientific purposes.”⁷⁵ Article 5 of the Psychotropics Convention calls for Parties to “limit by such measures as it considers appropriate...the use and possession of, substances in Schedule II...to medical and scientific purposes” and goes on to state that “it is desirable that the Parties do not permit the possession of substances in Schedules II, III and IV except under legal authority.”⁷⁶

The prohibitionist approach to drug possession and consumption across the treaties is softened by certain caveats. First, all penal provisions pertinent to drug consumption are “[s]ubject to the constitutional of limitations of [each] Party”⁷⁷ and in the Trafficking Convention, “subject to basic concepts of [each Party’s] legal system.”⁷⁸ Parties are therefore afforded a degree of latitude in fashioning legal and policy responses to drug control adapted to their unique domestic context. This provision, often referred to as the ‘safeguard clause,’ was famously used by Bolivia (further discussed below) when it enshrined the chewing of coca leaf as a constitutionally-protected activity before re-acceding to the drug control treaties in 2013. While ultimately successful, Bolivia’s initiative to withdraw and re-accede to the treaties with reservations on constitutional grounds met with international criticism. Objecting Parties pointed out that the procedure was contrary to good faith in treaty relations⁷⁹ and against established

⁷⁴ *Single Convention*, *supra* note 4 at s 28(3).

⁷⁵ United Nations, *Commentary on the Single Convention on Narcotic Drugs, 1961*, UN Doc E.73.XI.I (1961) at 314.

⁷⁶ *Psychotropics Convention*, *supra* note 5 at s 5.

⁷⁷ *Single Convention*, *supra* note 4 at s 36.1(a); *Psychotropics Convention*, *supra* note 5 at s 22.1(a); *Trafficking Convention*, *supra* note 6 at s 3.2

⁷⁸ *Trafficking Convention*, *supra* note 6 at s 3.2.

⁷⁹ Objection by Italy to Bolivia’s reservation, UN Doc. C.N.750.2012.TREATIES-VI.18 (Depositary Notification) (28 December 2012).

customary law prohibiting late reservations.⁸⁰ The application of the safeguard clause is therefore not without its limits.

Whether the totality of treaty provisions on drug possession have the effect of prohibiting the possession of cannabis for *recreational* use is also a debated question. In an earlier draft of the Single Convention, Article 45, corresponding to the current Article 36(1), was part of a chapter addressing trafficking offences, leading some to argue that the provision was intended for this limited scope.⁸¹ The UN Secretariat provided credence to this view, commenting that although the Draft's division into chapters was not adopted into the Single Convention, "Article 36 is still in that part of the Single Convention which deals with illicit traffic."⁸² Nevertheless, the UN Secretariat went on to conclude that "the possession of drugs for other than medical and scientific purposes" should be prevented "by all the administrative measures which [Parties] are bound to adopt under the terms of the Single Convention, whatever may be their view on their obligation to resort to penal sanctions or on the kind of punishment which they should impose."⁸³

Taken together, the general obligation and penal provisions across the three treaties, the treaty regime's deference to national constitutional and basic legal principles, as well as the accompanying treaty Commentaries, offer Parties a degree of latitude in formulating drug law and policy on cannabis possession and use. Parties have especially departed from conventionally restrictive interpretations of treaty provisions concerning cannabis over the past ten years.⁸⁴

⁸⁰ Objection by Finland to Bolivia's reservation, UN Doc. C.N.95.2013.TREATIES-VI.18 (Depositary Notification) (8 January 2013); Objection by the Netherlands to Bolivia's reservation, UN Doc. C.N.102.2013.TREATIES-VI.18 (Depositary Notification) (8 January 2013); and Objection by Ireland to Bolivia's reservation, UN Doc. C.N.101.2013.TREATIES-VI.18 (Depositary Notification) (9 January 2013).

⁸¹ Daniel Dupras, *Canada's International Obligations Under the Leading International Conventions on the Control of Narcotic Drugs* (Library of Parliament, Ottawa: 1998).

⁸² United Nations, *supra* note 75 at 112.

⁸³ *Ibid* at 113.

⁸⁴ Robin Room et al, *The Beckley Foundation's Global Cannabis Commission Report: Cannabis Policy: Moving Beyond Stalemate* (Oxford: Beckley Foundation & Oxford University Press, 2009) at 11.

These policy derivatives have mainly involved either ‘depenalization,’ or the reduction in the severity of criminal or civil penalties imposed on the offender, or ‘decriminalization,’ where the status of an offence is changed from a criminal to a non-criminal or civil activity while maintaining a normative stance against the prohibited activity.⁸⁵

While such deviations have not always been met with the approval of the INCB, the organization has also demonstrated willingness to shift views. For instance, in 2001, Portugal adopted a policy of harm reduction that diverted individuals found in possession of small quantities of cannabis to an administrative body issuing civil penalties such as the suspension of individual rights, treatment and fines.⁸⁶ The INCB denounced the draft law in its 1999 Annual Report, stating that the treaties “...require that drug use be limited to medical and scientific purposes and that States parties make drug possession a criminal offence.”⁸⁷ It has since moderated its stance, commenting in 2005 that “exempting small quantities of drugs from criminal prosecution is consistent with international drug control treaties.”⁸⁸

Under depenalization and decriminalization, the possession of cannabis for recreational use remains statutorily prohibited. However, under *de jure* legalization, characterized by the explicit allowance for the culture, production, marketing, sale and use of cannabis, would not benefit from the same latitude as the former measures.⁸⁹ As noted in the INCB’s 2016 Annual Report, a regulated market for cannabis such as the one being considered in Canada, would

⁸⁵ Rosalie Pacula et al, "What Does It Mean to Decriminalize Marijuana? A Cross-National Empirical Examination" (Paper delivered at the 24th Arne Ryde Symposium, Lund, Sweden, 13-14 August, 2004), (2005) 16 *Advances in Health Economics and Health Services Research*.

⁸⁶ *Ibid* at 10.

⁸⁷ International Narcotics Control Board, *Report of the International Narcotics Control Board for 1999* (Vienna: United Nations, 2000) at 56.

⁸⁸ International Narcotics Control Board, *Report of the International Narcotics Control Board for 2004* (Vienna: United Nations, 2005) at 80.

⁸⁹ Werner Sipp, “Statement by Mr. Werner Sipp, President of the International Narcotics Control Board (INCB)” (Statement delivered at the Fifty-ninth Session of the Commission on Narcotic Drugs, 14 March 2016) online: <www.incb.org>.

unequivocally contravene Canada’s international legal obligations under the three UN drug control treaties. Directly addressing the Canadian government’s cannabis legalization initiative, the INCB noted:

“[t]he limitation of the use of drugs to medical and scientific purposes is a fundamental principle that lies at the heart of the international drug control framework, to which no exception is possible and which gives no room for flexibility. The Board urges the [Canadian] Government to pursue its stated objectives — namely the promotion of health, the protection of young people and the decriminalization of minor, non-violent offences — within the existing drug control system of the Conventions.”⁹⁰

ii) *Drug Control and the International Human Rights System*

Beyond the confines of the drug control treaties, some human rights experts posit that Parties can justify non-compliance with punitive-prohibitionist provisions through their competing obligations under the international human rights system. Human rights constitute one of the three pillars of the UN, alongside peace and security and development. All UN member states must abide by the Charter of the United Nations (UN Charter) which enshrines “universal respect for, and observance of, human rights and fundamental freedoms for all...”⁹¹ as well as the *Universal Declaration of Human Rights*,⁹² the rights therein now considered as inalienable customary law. As the legal instrument governing all members, Article 103 of the UN Charter maintains that obligations under the Charter must prevail over obligations under any other international agreement.⁹³

⁹⁰ International Narcotics Control Board, *Report of the International Narcotics Control Board for 2016* (Vienna: United Nations, 2017) at 31.

⁹¹ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 [UN Charter] at s 55(c).

⁹² *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948).

⁹³ *Ibid* at s 103.

Until recently, the international drug control regime operated largely in isolation from the international human rights system.⁹⁴ Spurred by inflammatory language that describes drug addiction as a “serious evil,”⁹⁵ the global drug control community’s political vision of a drug-free world habitually promoted a fear-based response to drugs and an approach that some civil society advocates have described as “overwhelmingly prohibitionist.”⁹⁶ As Anand Grover, former UN Special Rapporteur on the Right to Health, noted:

...[the] international system of drug control...focused on creating a drug free world, almost exclusively through use of laws, enforcement policies and criminal sanctions...[resulting] in countless human rights violation.⁹⁷

In 2015, in an open letter, the current UN Special Rapporteur on the Right to Health, Dainius Pūras, described the impact of drug control on the right to health as “a cross-cutting theme across the entire market chain, arising from an often violent illicit drug market, and highly punitive and repressive State responses.”⁹⁸ In that same year, the UN High Commissioner for Human Rights submitted a report to the UN Human Rights Council outlining right-to-health violations through both a lack of access to treatment for drug users due to direct denial or to the deterring effects of fearing prosecution and stigmatization, and apprehension of harm reduction interventions, such as drug consumption sites, in states with heavily punitive regimes.⁹⁹

Beyond the overarching concern for the health and welfare of mankind cited in the

⁹⁴ Damon Barrett and Manfred Nowak, ‘The United Nations and Drug Policy: Towards a Human Rights-Based Approach’, in Aristotle Constantinides and Nikos Zaikos (eds), *The Diversity of International Law: Essays in Honour of Professor Kalliopi K. Koufa* (Leiden, Brill : Martinus Nijhoff, 2009) at 455.

⁹⁵ *Single Convention*, *supra* note 4 at Preamble.

⁹⁶ Damon Barrett et al, *Recalibrating the Regime: The Need for a Human Rights-Based Approach to International Drug Policy* (London: Beckley Foundation, 2013) at 5.

⁹⁷ *Report submitted by Anand Grover, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UNGAOR, 65th Sess, UN Doc A/65/255 at 2. [2010 Special Rapporteur Report]

⁹⁸ Dainius Pūras, “Open Letter by the Special Rapporteur on the right of everyone to the highest attainable standard of mental and physical health, Dainius Pūras, in the context of the preparations for the UN General Assembly Special Session on the Drug Problem (UNGASS), which will take place in New York in April 2016” at 2.

⁹⁹ *Report of the United Nations Human Rights High Commissioner for Human Rights*, UNHRC, 30th Sess, UN Doc A/HRC/30/65 (2015) 6.

preambles of the Single Convention and the Psychotropics Convention, the Trafficking Convention contains the only reference to respecting “fundamental human rights” in the process of carrying out treaty obligations.¹⁰⁰ Such vague references to human rights have been repeatedly criticized by UN bodies and officials outside of the drug control regime, including Dainius Pūras who noted in his open letter that “such language...becomes meaningless unless underpinned by clear and explicit human rights standards and principles.”¹⁰¹ By explicitly allowing Parties to adopt more strict or severe measures of drug control, the treaties have also had the effect of facilitating human rights abuses ranging from excessive use of force in law enforcement to the denial of harm reduction initiatives in the name of a ‘drug-free world.’¹⁰² As the US delegate to the UNGASS 2016 acknowledged, the rhetoric on the war on drugs “...unintentionally became a war on people who use drugs.”¹⁰³

In some cases, non-compliance with the UN drug control treaties has been justified by asserting that the drug control regime has an indirect but influential link to human rights abuses.¹⁰⁴ At UNGASS 2016, Uruguay stated that cannabis legalization became a national priority after the country led the “...critical and realistic reflection on the negative impacts on human rights brought about by...drug policies agreed at the international level in the last 50 years.”¹⁰⁵ Some have suggested that Canada should similarly concede its inability to reconcile

¹⁰⁰ *Trafficking Convention*, *supra* note 6 at s 14(2).

¹⁰¹ Dainius Pūras, *supra* note 98.

¹⁰² Damon Barrett et al, *Recalibrating the Regime: The Need for a Human Rights-Based Approach to International Drug Policy* (London: Beckley Foundation, 2013); Navi Pillay, “Statement by Ms. Navi Pillay, High Commissioner for Human Rights, High Level Review of the Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem, Commission on Narcotic Drugs, Vienna, 13-14 March 2014.

¹⁰³ Jamie Bridge, *The United Nations General Assembly Special Session (UNGASS) on the World Drug Problem: Report of Proceedings* (London: International Drug Policy Consortium, 2016) at 6.

¹⁰⁴ Neil Boister, “Waltzing on the Vienna Consensus on Drug Control? Tensions in the International System for the Control of Drugs” 29:2 LJIL 389 at 395.

¹⁰⁵ National Drug Board, *Impact of the World Drug Problem in the Exercise of Human Rights: Uruguayan Contribution to the Implementation of the Resolution “Contribution of the Human Rights Council to the Special Session of the General Assembly the World Drug Problem 2016”* (Geneva: United Nations, 2015).

adherence to a prohibitive drug control regime with its superseding international human rights obligations in order to move forward with legalization plans.¹⁰⁶ The stated goals of Bill C-45 to protect the health and safety of the public, and in particular the young, as well as the Recommendations in the Final Report of the Task Force on Cannabis Legalization and Regulation to anchor legislation in the protection of vulnerable citizens¹⁰⁷ give weight to such justification.

There are some limitations, however, to citing human rights as a justification for treaty non-compliance. First, as outlined by the International Law Commission's Study Group on the Fragmentation of International Law, it is generally expected that when two or more norms bear on a single issue, utmost effort be made to interpret provisions such that they give rise to a single set of compatible obligations.¹⁰⁸ Harmonization becomes especially important where the conflict of obligations is difficult to clearly define. As international legal scholars Currie et al. explain, the language of the UN Charter has a "promotional quality" that does not "define, much less impose, a series of binding human rights obligations on states parties."¹⁰⁹ Caution should be exercised when citing a concern for human rights, for it is susceptible to being used as a 'catch all' solution for the reform of provisions that have had an indirect effect on human rights.

On a political level, the UN General Assembly has repeatedly noted that efforts to counter the 'world drug problem' should be reconciled with concerns for human rights. In its 2015 annual resolution entitled "International Cooperation Against the World Drug Problem," the UN

¹⁰⁶ Damon Barrett and Rick Lines (25 May 2016), comment on Steven Hoffman & Roojin Habibi, "International Legal Barriers to Canada's Marijuana Plans" (16 May 2016) Canadian Medical Association Journal.

¹⁰⁷ Canada, *supra* note 23 at 14.

¹⁰⁸ International Law Commission, "Chapter XII: Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law" in *Yearbook of the International Law Commission, 2006, Volume II, Part II* (New York: United Nations, 2006) 175 at 178.

¹⁰⁹ John H. Currie, Craig Forceese and Joanna Harrington, "International Human Rights Law" in *International Law: Doctrine, Practice and Theory*, 2nd ed, (Toronto: Irwin Law, 2014) 11 at 600.

General Assembly reaffirmed that drug control efforts should be “carried out in full conformity with the purposes and principles of the Charter of the United Nations and other provisions of international law...and for all human rights and fundamental freedoms” while simultaneously urging Parties to “implement as a matter of priority, all the provisions”¹¹⁰ of the drug control regime.

This is also the position adopted by Parties to the regime itself, who reaffirmed in the final outcome document emerging from 2016 UNGASS an “...unwavering commitment to ensuring that all aspects of demand reduction...and supply reduction...are addressed in full conformity with the purposes and principles of the Charter of the United Nations, international law and the Universal Declaration of Human Rights.”¹¹¹ Complementing the UN Special Rapporteur on the Right to Health’s conclusion that drug use and possession be decriminalized and depenalized,¹¹² the INCB recently stated that Parties “should be guided by the principle of proportionality in the determination of penalties” and that there is enough “flexibility provided for by the conventions to offer alternatives to conviction or punishment for drug-related crimes of a minor nature.”¹¹³

IV. How to Reconcile International Treaty Obligations with National Cannabis Legalization Plans

As the situation currently stands, Canada is an active contributor to the global war on drugs. Unlike other police-reported crimes, drug offences have increased over the past decade, with the rate of reported cannabis possession offences increasing by 28% and representing more

¹¹⁰ *International Cooperation Against the World Drug Problem*, GA Res 70/82, UNGAOR, 70th Sess, UN Doc A/RES/70/182 (2015).

¹¹¹ *Our joint commitment to effectively addressing and countering the world drug problem*, UNGAOR, 30th Spec Sess, 1st Plen Mtg, UN Doc A/S-30/L.1 (2016).

¹¹² Pūras, *supra* note 10.

¹¹³ International Narcotics Control Board, Press Release, UNIS/NAR/1301, “INCB concludes 117th session - Board finalizes 2016 reports, reiterates importance of the principle of proportionality” (18 November 2016).

than two-thirds of offences under Canada's *Controlled Drugs and Substances Act* in 2013.¹¹⁴ An estimated 500,000 Canadians carry a criminal record from the simple possession of cannabis and must contend with its negative consequences, including the diminution of employment opportunities, impacts on child custody and visitation rights, and difficulties while travelling abroad.¹¹⁵ Had the Supreme Court of Canada found that criminalization of the simple possession of cannabis breached rights enshrined in the *Canadian Charter of Rights and Freedoms*, Canada's proposed legalization scheme may have been justified under treaty escape clauses deferring to the constitutional or basic principles of the Party's legal system.¹¹⁶ The Canadian jurisprudence on this matter, however, provides no such pretext.¹¹⁷ To respect the rule of international law and strengthen the Canadian government's commitment to multilateralism, there are only a few legal pathways to be considered.

i) Treaty Reform

As the 2016 UNGASS proceedings revealed, Parties continue to sidestep discussions around the adequacy of the treaties, especially in relation to the legal status of cannabis possession and use.¹¹⁸ Yet these discussions have already taken place at national and subnational levels, including in Uruguay and in the US states of Colorado, Washington, Oregon and Alaska. Referendums in 2016 added the US states of California, Maine, Massachusetts and Nevada to the list.

¹¹⁴ Jillian Boyce, Adam Cotter and Samuel Perreault, *Police-Reported Crime Statistics in Canada, 2013* (Ottawa: Statistics Canada, 2014) at 20.

¹¹⁵ Jean-François Crépault, *Cannabis Policy Framework, October 2014* (Toronto: Centre for Mental Health, 2014) at 6.

¹¹⁶ *Single Convention*, *supra* note 4 at s 4(c), s 36(1)(a); *Psychotropics Convention*, *supra* note 5 at s 22(1)(a); *Trafficking Convention*, *supra* note 6 at s 3(2).

¹¹⁷ CED 4th (online), Narcotic Control, "Canadian Charter of Rights and Freedoms: Life, Liberty and Security" (VI.11.(d)) at § 219.

¹¹⁸ Bridge, *supra* note 103 at 2.

There has never been a more appropriate time to trigger reform on the status of cannabis in the UN drug control treaties. Under the treaties, any Party may propose an amendment to a treaty provision, along with reasons supporting these changes, in writing to the UN Secretary-General. The Secretary-General must then convey the proposed changes to all Parties and ECOSOC. At the discretion of ECOSOC, a Conference of Parties (COP) may be convened to consider the amendment, or the amendment can be referred to all Parties for review. Parties have a period of 18 months to lodge their rejection of the proposal to the Single Convention or Psychotropics Convention,¹¹⁹ or a period of 24 months for changes proposed to the Trafficking Convention.¹²⁰ Under the Single Convention and the Psychotropics Convention, the amendment takes effect immediately if it is not faced with any objections. Amendments to the Trafficking Convention are deemed to be applicable only to Parties that explicitly notify their wish to be bound. In the case where an objection has been lodged, the amendment may still be approved by ECOSOC, barring its application to the objecting Parties, or it may reject the amendment entirely. A COP may also be convened to further consider the amendment.

While most modern treaties explicitly provide for a COP mechanism subjecting them to periodic review, the procedure is lacking from the drug control treaties which predate the UN. In the case of the international drug control system, treaty amendment finds precedent in the 1972 Protocol amending the Single Convention for which a COP was convened.¹²¹ In support of the changes proposed, the US government emphasized the importance of building on the foundation of the Single Convention, “since a decade [had] given a better perspective of its strengths and

¹¹⁹ *Single Convention*, *supra* note 4 at s 47(2); *Psychotropics Convention*, *supra* note 4 at s 30(2).

¹²⁰ *Trafficking Convention*, *supra* note 6 at s 31(1).

¹²¹ *1972 Protocol*, *supra* note 33.

weaknesses.”¹²² This position is relevant once again today.

The topic of how to proceed with treaty reform merits a discussion beyond the scope of this article. Broadly speaking, however, since the last COP, Bolivia has been the only Party to attempt treaty reform with a view to removing the obligation to prohibit the chewing of coca leaf under the Single Convention. In 2009, their attempt was blocked by 18 Parties, whose objections cited preoccupations with creating a political precedent that might weaken the international drug control regime and send the wrong signal.¹²³ Party hesitations to opening the floodgates to regime amendment may therefore loom large over the treaty reform process.

One approach for Canada may be to trigger wholesale reform by merging all three treaties into a new Combined Convention featuring a periodic review mechanism, and a series of provisions that embody a more tolerant, evidence-based and legally consistent approach to drug possession and use.¹²⁴ The negotiation of a new Combined Convention may also afford Parties the opportunity to reconcile the contradictions inherent to the UN’s current drug control system and ground it more firmly in human rights.¹²⁵ Alternatively, to minimize consensus destabilizing variables, amendment may be pursued especially as it pertains to the provisions impacting cannabis legalization. In this regard, a singular focus on amending Article 3(2) of the Trafficking Convention may be sufficient to remove the burden on Parties to criminalize or otherwise prohibit cannabis possession and consumption for recreational use. Regardless of the type of amendment pursued, the most reassuring path would be to ally with like-minded Parties with a view to initiating reform on cannabis.

¹²² David Bewley-Taylor et al, *Cannabis Regulation and the UN Drug Treaties: Strategies for Reform* (Amsterdam: Transnational Institute, 2016) at 9.

¹²³ David Bewley-Taylor et al, *The Rise and Decline of Cannabis Prohibition: The History of Cannabis in the UN Drug Control System and Options for Reform* (Amsterdam: Transnational Institute, 2014) at 64.

¹²⁴ Bewley-Taylor, *supra* note 124 at 9.

¹²⁵ Bewley-Taylor, *supra* note 125 at 64.

ii) Treaty Reservation

Upon signing, ratifying, accepting, approving or acceding to a treaty, a Party may issue a unilateral statement (or reservation) in writing to the UN Secretary-General modifying or excluding the legal effect of certain provisions within the treaty.¹²⁶ Reservations allow Parties to withhold from specific legal obligations while remaining in compliance with international law and the treaty framework. They must, however, demonstrate a good faith interpretation of treaty provisions, and be compatible with the ‘object and purpose’ of the treaty.¹²⁷ They may generally also be made after ratification, but in this case, unless dealt with by specific provisions within the treaty, the written reservation must be circulated to all treaty Parties. A 12-month window is given for Parties to lodge their objection with the UN Secretary-General.¹²⁸

Owing to Article 50(1) of the Single Convention, post-ratification reservations are not permitted unless they affect provisions specified under Article 49 or 50(2).¹²⁹ Reservations can be made at the time of treaty accession, however.¹³⁰ In the latter scenario, the reservation becomes valid unless more than two-thirds of Parties object to the reservation within 12 months. The Psychotropics Convention provides for a similar reservation procedure.¹³¹ Lacking a specific provision on reservations, a Party wishing to make reservations to provisions within the Trafficking Convention must follow the procedures established within the Vienna Convention, which would involve communicating the reservation to the UN Secretary-General, circulating it to all Parties to the treaty, and if not objected to formally within 12 months, allowing the entry into force of the reservation.¹³² Consequently, if Canada were to deposit a reservation while

¹²⁶ *Vienna Convention*, *supra* note 25 at s 2(1)(d).

¹²⁷ *Ibid* at s 19.

¹²⁸ *Ibid* at s 20(4)(b).

¹²⁹ *Single Convention*, *supra* note 4 at s 50(1).

¹³⁰ *Ibid* at s 50(3).

¹³¹ *Psychotropics Convention*, *supra* note 5 at s 32(3).

¹³² *Vienna Convention*, *supra* note 25 at s 20(5).

remaining party to the treaties, it may seek to do so by depositing a reservation with respect to the only provision across the three treaties that mandates the criminalization of cannabis for personal use – Article 3(2) of the Trafficking Convention.

A less common mechanism equating to a post-ratification reservation is denunciation followed by re-accession to the treaty with reservations. While the Vienna Convention does not explicitly prevent states from ratifying and making reservations to a treaty once they have withdrawn from it, some experts maintain that the procedure allows Parties to select which obligations to uphold and which to flout, undermining the consensus that binds Parties to a treaty and diluting the good faith interpretation of treaty provisions and *pacta sunt servanda*.¹³³ It may also expose the reserving Party to reputational damage, as apparent from the negative reactions elicited by Trinidad and Tobago and Guyana’s denunciation and subsequent re-accession to the *International Covenant on Civil and Political Rights*.¹³⁴ Nevertheless, it has been argued that allowing states to re-accede with reservations is more constructive than excluding the country from the treaty framework entirely, especially in the context of human rights.¹³⁵ Given that the instances where countries have denounced treaties and re-acceded with reservations to specific provisions have all taken place since the late 1990s, use of this procedure may also indicate that the mechanism is used for contending with treaty provisions that do not evolve with social norms and scientific and medical knowledge.

In the context of the international drug control regime, the procedure gained precedent through actions taken by the Bolivian government with regards to coca leaf in 2013. Coca leaf

¹³³ Laurence Helfer, “Not Fully Committed? Reservations, Risk and Treaty Design” 31:1 (2006) Yale J Int Law 367 at 372.

¹³⁴ Björn Arp, “Denunciation Followed by Re-Accession with Reservations to a Treaty: A Critical Appraisal of Contemporary State Practice” 61 (2014) Netherlands International Law Review 141 at 155.

¹³⁵ Glenn McGrory, “Reservations of Virtue? Lessons from Trinidad and Tobago's Reservation to the First Optional Protocol” (2001) 23:3 Human Rights Quarterly 769.

chewing, a popular Bolivian cultural and medical practice, is at odds with Article 49(2)(e) of the Single Convention, which requires that the practice “...be abolished within twenty-five years from the coming into force of this Convention.”¹³⁶ In 1976, Bolivia acceded to the Single Convention by the transitional reservation provided under Article 49(1)(c) which allows Parties to temporarily permit coca leaf chewing. The 25-year period for this transitional reservation lapsed in 1991. After efforts to amend relevant provisions under the Single Convention failed, Bolivia denounced the treaty and sought to re-accede with a reservation allowing for the consumption and use of the coca leaf for cultural and medicinal purposes. The objections of 15 countries, including the US, fell short of the 62 (one-third of Parties) required to block the entry into force of the reservation.

While ultimately successful, Bolivia’s example also foreshadows the ire of the international drug control community if unilateral actions to legalize cannabis nationally were taken on the basis of this procedure. In 2011, the INCB stated that Bolivia’s actions contravened the Convention’s “spirit” and that “the international community should not accept any approach whereby Governments use the mechanism of denunciation and re-accession with reservation in order to free themselves from the obligation to implement certain treaty provisions.”¹³⁷ Objecting Parties reasoned that the procedure was contrary to good faith in treaty relations¹³⁸ and against established customary law prohibiting late reservations.¹³⁹ To date, no reservation to any of the

¹³⁶ *Single Convention*, *supra* note 4 at s 49(2)(e).

¹³⁷ International Narcotics Control Board, Press Release, UNIS/NAR/1114, “International Narcotics Control Board Regrets Bolivia’s Denunciation of the Single Convention on Narcotic Drugs” (5 July 2011).

¹³⁸ Objection by Italy to Bolivia’s reservation, UN Doc. C.N.750.2012.TREATIES-VI.18 (Depositary Notification) (28 December 2012).

¹³⁹ Objection by Finland to Bolivia’s reservation, UN Doc. C.N.95.2013.TREATIES-VI.18 (Depositary Notification) (8 January 2013); Objection by the Netherlands to Bolivia’s reservation, UN Doc. C.N.102.2013.TREATIES-VI.18 (Depositary Notification) (8 January 2013); and Objection by Ireland to Bolivia’s reservation, UN Doc. C.N.101.2013.TREATIES-VI.18 (Depositary Notification) (9 January 2013).

drug control treaties has been blocked by the threshold number of Party objections.¹⁴⁰ Given the Bolivian precedent, the mechanism of denunciation followed by re-accession and reservation may be a viable path forward for the cannabis legalization in Canada.

A further but little-known mechanism of reservation available under the Vienna Convention is the establishment of an *inter se* agreement. The approach describes a scenario where a Party may modify the legal effects of certain provisions between itself and another like-minded Party or Parties, if these changes are in line with the object and purpose of the treaty and do not detract from the full enjoyment of the provision for the non-agreeing Parties.¹⁴¹ The *inter se* agreement was originally drafted in the Vienna Convention with the evolutionary nature of multilateral treaties in mind, the intent being to allow like-minded Parties to build an alternative framework over time.¹⁴² It has frequently been used in the context of Parties who are willing to take more effective or far-reaching measures for the realization of the object and purpose of the treaties.¹⁴³ Some have noted that it could also be the most elegant recourse to modifying obligations under the drug control treaties, while avoiding the more cumbersome and lengthy requirements of treaty modification or withdrawal.¹⁴⁴ If Canada were to initiate an *inter se* agreement, it could expect the collaboration of several Parties, including Uruguay, The Netherlands and Jamaica. As proponents of this view concede, however, it would be “uncharted legal territory,” with a paucity of practical examples to draw upon from any arena of international treaty law, especially for circumstances like these for which *inter se* agreements

¹⁴⁰ Robin Room, “Reform by Subtraction: The Path of Denunciation of International Drug Treaties and Reaccession with Reservations” (2012) 23 *International J Drug Policy* 401 at 402.

¹⁴¹ *Vienna Convention*, *supra* note 25 at s 41.

¹⁴² International Law Commission, “A/CN.4/SR.745 - Summary Record of the 745th Meeting: 15 June 1964” in: *Yearbook of the International Law Commission, 1964, Volume I*, (New York: United Nations, 1965) 139 at 144.

¹⁴³ International Law Commission, *supra* note 92 at 182.

¹⁴⁴ Bewley-Taylor et al, *supra* note 124 at 11.

were not designed.¹⁴⁵ It is also unlikely that an *inter se* agreement would be seen to be in line with the object and purpose of the UN drug control treaties and it could be detracting from the full enjoyment of treaties for the non-agreeing Parties.

iii) Treaty Denunciation

All three drug control treaties allow for a Party to denounce the treaty upon written notice to the UN Secretary-General. A denunciation, however, would not take effect immediately and the time from notice deposition to treaty denunciation vary according to the treaty. Under the Single Convention and the Psychotropics Convention, a notice to withdraw becomes effective the first day of January, provided that it was received by the Secretary-General on or before the first day of July of the preceding year. If the notice was received after the first day of July, it is treated as if it had been received on or before the first day of July of the following year. Thus, a notice to withdraw from the Single or Psychotropics Conventions can take effect at the earliest six months after the date of deposition of the notice to withdraw (assuming the notice is received earlier than July 2nd).¹⁴⁶ As for the Trafficking Convention, the notice of withdrawal can only take effect one year after the date of receipt of notice to the Secretary-General.¹⁴⁷

The Vienna Convention allows Parties to cite a historical “error”¹⁴⁸ or a “fundamental change of circumstances”¹⁴⁹ when depositing a notification to withdraw from a treaty. Citing insurmountable obstacles to reconciling the regime’s object and purpose with national priorities, Canada could denounce all three drug control treaties, or simply the Trafficking Convention containing specific reference to cannabis possession for personal use. Although denunciation is a

¹⁴⁵ *Ibid.*

¹⁴⁶ *Single Convention, supra* note 4 at s 46(2); *Psychotropics Convention, supra* note 5 at s 29(2).

¹⁴⁷ *Trafficking Convention, supra* note 6 at s 30(2).

¹⁴⁸ *Vienna Convention, supra* note 25 at s 48.

¹⁴⁹ *Ibid* at s 62.

rare occurrence in international law, it is not without precedent in the Canadian context. In 2013, Canada withdrew from the widely adhered-to *UN Convention to Combat Desertification*,¹⁵⁰ the reason being, according to former Foreign Affairs Minister John Baird, a disinterest “in continuing to support bureaucracies and talkfests.”¹⁵¹ Canada also controversially exited the Kyoto Protocol in 2011.¹⁵² As denunciation without re-accession has never occurred in the context of the international drug control treaties, the degree and nature of the impact of treaty withdrawal is uncertain. However, treaty denunciation in the context of international drug control will likely carry certain political and reputational consequences, such as the rebuke of the INCB and committed Parties such as the US, the risk of economic sanctions, and the removal of Canada from proceedings of the international drug control regime except where observers are allowed.

Canada’s denunciation of the treaties may also hinder its fast-growing market for the legal export of cannabis. Federally licensed medical cannabis producers in Canada already export to Brazil, Chile, Croatia, Germany and New Zealand, all of which are Parties to the drug control regime. Some experts peg the value of the global market for medical cannabis as high as \$100 billion per year in the next five to ten years.¹⁵³ Parties to the regime have access to the legal trade and regulation of narcotic drugs and psychotropic substances for medical and scientific purposes under Article 30 of the Single Convention and Article 12 of the Psychotropic

¹⁵⁰ Canada’s Notification to Withdraw from the United Nations Convention to Combat Desertification in those Countries Experiencing Serious And/Or Desertification, Particularly in Africa, UN Doc C.N.204.2013.TREATIES-XXVII.10 (Depositary Notification) (28 March 2013)

¹⁵¹ Wayne Kondro, “Canada Pulls Out of U.N. Treaty to Combat Desertification”, *Science* (29 March 2013), online: <www.sciencemag.org>.

¹⁵² Canada’s Notification to Withdraw from the Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN Doc C.N.796.2011.TREATIES-1 (Depositary Notification) (15 December 2011)

¹⁵³ DJ Summers, “The legal international cannabis trade already exists and we mapped it” *Leafly* (4 March 2017) online : <https://www.leafly.com/news/industry/legal-international-cannabis-trade-already-exists-mapped>.

Convention.¹⁵⁴ As an external entity, import of cannabis from Canada would fall under the definition of illicit traffic provided in Article 3(1)(a)(i) of the Trafficking Convention, which maintains that Parties must: "...adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally...the transportation, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 [Single] Convention, the 1961 [Single] Convention as amended or the 1971 [Psychotropics] Convention."¹⁵⁵

iv) Rescheduling Cannabis

The drug control treaties authorize the World Health Organization (WHO) to make recommendations to reschedule or de-schedule listed substances on the basis of medical and scientific analysis and the addictive properties of drugs. Modifications proposed by the WHO's Expert Committee on Drug Dependence (ECDD) must be submitted to the UN Secretary-General and voted upon by the CND. Modification of the Schedules within the Single Convention requires the agreement of a simple majority of all CND members present and voting.¹⁵⁶ For the Schedules within the Psychotropics Convention, modification requires the acceptance of a two-thirds majority of CND members.¹⁵⁷

As natural cannabis extracts are doubly listed within Schedules I and IV of the Single Convention, and synthetic THC is listed in Schedule II of the Psychotropics Convention, separate voting criteria would have to be satisfied in order to successfully reschedule it so as to allow cannabis's legalization. However, it is worthwhile to note that the initial scheduling of

¹⁵⁴ *Single Convention*, *supra* note 4 at s 30; *Psychotropics Convention*, *supra* note 5 at s 12.

¹⁵⁵ *Trafficking Convention*, *supra* note 6 at s 3(1)(a)(i).

¹⁵⁶ *Single Convention*, *supra* note 4 at s 3.

¹⁵⁷ *Psychotropics Convention*, *supra* note 5 at s 17.

cannabis-related substances was never subject to a formal review of the ECDD.¹⁵⁸ In their 2016 ECDD Report, the Committee agreed to ask the WHO Secretariat to prepare pre-review documentation on cannabis-related substances, including THC, cannabis plant, cannabis resin and cannabidiol, and hold a special session on cannabis in 2018 to decide on whether the scheduling of any cannabis-related substances needs to be modified.¹⁵⁹

While substance rescheduling may remove part of the barrier to the treaties' prohibitionist stance on cannabis, the drug is also subject to specific provisions within both the Single Convention and the Trafficking Convention. The Single Convention's provision on the "control of cannabis" mandates Parties to "adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant."¹⁶⁰ Within the Trafficking Convention, "appropriate measures" must be taken to "prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as...cannabis plants."¹⁶¹ Under the penal provision, the Trafficking Convention also requires establishing as a criminal offence "the cultivation of...cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the [Single] Convention..."¹⁶² As such, beyond the bureaucratic nature of the rescheduling process, the interpretation of cannabis-specific provisions within the UN drug control treaties poses a further barrier to the legalization of cannabis.

V. Final Remarks

The consensus on international drug control policy, once exhibited through the high rate of accession to the UN drug control treaties, has fractured considerably over time. Parties are

¹⁵⁸ Bewley-Taylor, *supra* note 125 at 61.

¹⁵⁹ World Health Organization, *Annual Report 2016: Essential Medicines and Health Products* (Geneva: World Health Organization, 2017) at 33.

¹⁶⁰ *Single Convention*, *supra* note 4 at s 28(3).

¹⁶¹ *Trafficking Convention*, *supra* note 6 at s 14(2).

¹⁶² *Ibid* at s 3(1)(a)(ii).

increasingly experimenting with national drug control policies that challenge traditional interpretations of their international obligations. With respect to cannabis, this experimentation has ranged from the non-enforcement of existing criminal laws on drug possession and use, to the diversion of offenders to non-criminal channels, to the recent legalization of cannabis at national and subnational levels. The latter approach has pushed the legal limits prescribed by the treaties.

While imperfect, each of the pathways outlined above allow Canada to legalize cannabis while respecting international law. Although the prospects for consensus-driven treaty reform may seem discouraging, it should not be assumed that a human rights-centred, evidence-informed and legally consistent regime for all Parties is beyond the realm of possibility. As a member of the G7, Canada is in an ideal position to advocate for this change and should view the growing sentiment of tolerance towards cannabis in the international community as an opportunity to not only initiate the passage of a public health-oriented legal framework within Canadian borders, but to achieve this more broadly for the benefit of all Parties of the drug control regime. While a monumental undertaking, this would firmly place the Canadian government in a position of leadership in a multilateral setting, a coveted national priority as indicated by Canadian Prime Minister Trudeau's Mandate Letter to the Minister of Foreign Affairs.¹⁶³

The remaining options each present their own set of advantages and disadvantages. Canada may choose to denunciate and re-accede to the treaties with reservations, a procedure bolstered by the precedent of Bolivia, but almost certainly draw criticism from the INCB and the treaty membership. Canada may also propose a rescheduling of cannabis-related substances, but

¹⁶³ Trudeau, *supra* note 28.

cannabis is also the subject of specific provisions within the Single Convention and the Trafficking Convention, and the utility of this approach would depend on amendments to those clauses.

Barring treaty reform or amendment as options, Canada could theoretically pursue an *inter se* agreement with likeminded Parties to interpret provisions related to cannabis as permitting its legalization, and in this way further advance the case for treaty reform in the near future. However, this approach has never been used in the context of the international drug control regime, *inter se* agreements were not designed for these kind of circumstances, and the official interpretation of the treaties and the UN bodies administering them definitively view the legalization of cannabis for recreational use as contravening the object and purpose of the treaties.

The most direct course of action, of course, would be to denunciate the treaties and forge ahead with national priorities. While sending a clear message to the international community, this approach may also excise Canada from the global drug control ‘conversation,’ potentially lead to its exclusion from the legal trade of narcotic drugs and psychotropic substances, and detract from Canada’s reputation as a champion of multilateralism. More fundamentally, if the Canadian government aims to stand firm by its promise to legalize and regulate cannabis for recreational use by summer 2018, the requisite time required to notify the UN Secretary-General of treaty denunciation has already passed.

Above all, it must be emphasized that while international treaties are integral to world peace and order, their effectiveness is hinged upon a good faith cooperation of all parties. As aptly stated by former President of the UN General Assembly Vuk Jeremić, “to strengthen trust between nations...respect for accepted norms and standards cannot be ambiguous or

selective.”¹⁶⁴ The unprincipled interpretation of provisions, even where such provisions may be outdated or out-of-step with current medical opinion and scientific evidence, undermines the delicate balance of peace, order and stability offered by international treaty law. Canada should make every effort to reconcile its desire to legalize cannabis with its longstanding record of respecting the rule of international law and being one of its greatest promoters. Consequently, Canada should, at minimum, withdraw from the drug control treaties out of respect for the rule of international law.

Beyond concern for the international community, Canada could seek a principled approach to squaring its national priorities with its international legal obligations in the regime, by acknowledging that the contemporary drug control regime was fashioned under different political and scientific circumstances and that the current global ‘war on drugs’ has unacceptably contravened the human rights of people around the world. Far from an obstacle, the Canadian government’s commitment to pursuing a public health-promoting and evidence-informed legal framework for cannabis in compliance with international treaty law is also an opportunity to further strengthen its multilateral agenda. By triggering long-awaited discussions about reforming or amending the international drug control regime, Canada can become a progressive agent of change, not only within its borders, but also for all Parties seeking to adopt a better approach to drug policy.

¹⁶⁴ United Nations, Press Release, GA/11290, “World Leaders Adopt Declaration Reaffirming Rule of Law as Foundation for Building Equitable State Relations, Just Societies” (24 September 2012).