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**The International Drug Control
Treaties:
How Important Are They to
US Drug Reform?**

COMMITTEE ON DRUGS & THE LAW

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The International Drug Control Treaties: How Important Are They to U.S. Drug Reform?

The way the world looks at drug control is changing. There has been a growing awareness of the issue for the past decade, as well as increasing public outcry over what many see as a failure of the once popular “war on drugs.”

Nowhere is this battle more pronounced than in the so-called “marijuana wars,” which are slowly growing into an old-fashioned standoff between the states and the federal government. As of August 2012, seventeen states (and the District of Columbia) have passed laws legalizing medical use of marijuana, several states have introduced initiatives to outright legalize the use of recreational marijuana, and now there are two proposed federal bills designed to lift the ban on marijuana. The Gallup polls show that at least 70% of Americans support legalizing marijuana for medical use and now over 50% are in favor of its legalization for recreational use as well.

With so much movement in the area and so much public support, many are asking, what’s the holdup? Why is the federal government so vehemently resisting the liberalization of a policy that seems to be inevitable?

Lately, all eyes have been on the Obama Administration, which, with the reversal on its marijuana policy, has baffled the drug reform community and often, the public at large. One of President Obama’s campaign promises was to leave the issue of medical marijuana to state governments, stating, “I’m not going to be using Justice Department resources to try to circumvent state laws on this issue.” Indeed, his Administration first declared a policy of non-enforcement against medical marijuana dispensaries operating in full compliance with state laws. Over the past year, however, the Administration has backtracked, famously announcing a “crackdown” on not only dispensaries, but also landlords, banks, media outlets and all but the sickest of patients taking advantage of the medical marijuana laws.

So why the switch? Drug reformers are flummoxed by the change in tune. Ethan Nadelmann, who many see as the voice of the drug reform movement in the U.S., said recently of the Administration’s new position, “None of this makes any sense in terms of public safety, health or fiscal policy.” Even Mr. Nadelmann seems stumped by the current situation.

Meanwhile, more liberal marijuana laws seem to be sprouting up everywhere in countries around the world: Denmark, Spain, the UK, and now Uruguay and Colombia, to name a few. World leaders and former leaders across Europe and most recently, Latin America, have been speaking up in increasing numbers, all saying the same thing: It’s time for the world to start thinking about legalization.

Given that there is so much domestic and international pressure, what could possibly account for the Administration’s resistance? Is it simply that drug reform is lower priority when compared to looming issues such as the economy and unemployment? Or is there more at stake?

We at the New York City Bar Association’s Committee on Drugs & the Law suspected that the problem was more complicated. We formed a special subcommittee to study the true implications of international law on domestic drug policy reform. Members of the subcommittee travelled to Vienna to attend the yearly sessions of the United Nation’s Commission on Narcotic Drugs in 2011 and 2012, and interviewed current and former diplomats and dignitaries working at the international level of drug control, in order to gain a more thorough and politically informed understanding of the worldwide drug control system and its implications for domestic drug policy. The Committee’s findings—ongoing, as this area is vast and complex—have thus far been extremely enlightening.

While everyone seems to have an opinion on drug reform, one thing most of the legal analyses have in common is that they are limited in scope to domestic factors. Missing from even the most sophisticated analysis conducted in the U.S. is a discussion about the international legal system—as embodied in three international drug control treaties to which the U.S. is signatory. Through our work, we have grown to understand the vast importance of these treaties in the world of international relations, as well as to domestic drug reform.

The International Drug Control Treaties

Many, if not most, Americans have little awareness that the international drug treaties exist at all, and if they do, they have only vague notions of how the system works. Myths and stories abound when it comes to drug laws in foreign countries—for example, many believe that marijuana is legal in Amsterdam (it's not), or that the treaties don't apply to the states (they do). It is clear then that any explanation of the system should start with the basics—the international drug control treaties.

The 1961 Single Convention and its Progeny

Present day international drug control has its roots in The 1961 Single Convention on Narcotic Drugs. Prior to the Single Convention, there had been a number of earlier treaties dealing with international drug control, beginning in 1912 with the International Opium Convention. The old system of treaties was superseded in 1961 when the member countries saw the need to “start fresh,” by enacting the Single Convention.

The Single Convention forms the basis of the global drug control regime as it exists today. At its heart, the Single Convention limits use and possession of opiates, cannabis and cocaine, to “medicinal and scientific purposes.” Recreational use is not permitted in any form under the Single Convention. Rather, the Convention created a classification system that divides drugs into four schedules, establishing differing degrees of regulation for each schedule, which serves as the model for most national scheduling systems, such as the Controlled Substances Act in the United States. The Single Convention also established the International Narcotics Control Board (the “INCB”) whose purpose is to monitor treaty compliance among the signatory nations.

In addition to the 1961 Single Convention, two other international treaties have a direct bearing on international control of narcotics and psychotropic substances. These are the 1971 Convention on Psychotropic Substances, which, enacted after an upsurge of drug use in the 1960s, added certain synthetic, prescription, and hallucinogenic drugs (including LSD) to the list of controlled substances. The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was enacted in response to an increase in trafficking. The 1988 Convention required member countries, for the first time, to criminalize possession for personal consumption. Notably, the 1988 Convention did not specify how users were to be punished; only that “possession, purchase or cultivation for personal consumption” be made a criminal offense. The 1988 Convention specifically states that its implementation should be accompanied by prudence and is subject to each party's “constitutional principles and basic concepts of its legal system.”

These three international treaties constitute the international law concerning the control of narcotic drugs and psychotropic substances. The treaties are not “self-executing,” meaning that each country must enact laws implementing the treaties in their own jurisdictions. The Conventions are legally binding pursuant to the 1969 Vienna Convention on the Law of Treaties—a country “may not circumscribe its obligations under the treaties by enacting a conflicting domestic law.”

On the other hand, there is no international police force standing at the ready to force countries to fulfill their obligations. The INCB has no real power to enforce them: its powers are limited to “quiet diplomacy,” or “blaming and shaming.” In extreme cases, the INCB can recommend an embargo on all prescription medicines coming into or going out of a country. In our interview with former U.S. Assistant Secretary of State for Narcotics and current INCB member¹ Melvyn Levitsky, he noted that this is “not a strong provision,” since, for humanitarian reasons, it is highly unlikely such a measure would ever be taken against a country.

Why does all this matter in the U.S.?

To many Americans, the United Nations is often seen as a remote, foreign body that is very far away and doesn’t really do much of concern to life in the States. It is rarely seen as a power that has an effect on the laws and policies in this country.

To the contrary, in the case of drug control, international law has more influence on domestic legislation than most Americans realize or frankly, would want to admit. In fact, one of the most striking characteristics of the international drug control system is its overriding concern with the domestic affairs of the member countries, including the United States. The United States is actually very limited in what it can legally do vis-a-vis its international treaty obligations, regardless of what policy changes make sense for its own citizens.

In the United States, the federal Controlled Substances Act of 1970 (the “CSA”) was enacted in part to meet America’s obligations with respect to the scheduling system established in the Single Convention; there is a complex mechanism in place to ensure that the scheduling systems directly correspond, if not exactly mirror, one another. The Attorney General, who is in charge of scheduling under the CSA (and who has delegated this authority to the Administrator of the Drug Enforcement Administration), is not free to reschedule a substance such as marijuana to a less restrictive schedule absent a decision from the Commission on Narcotic Drugs, and ultimately a recommendation from the World Health Organization.

Many would argue that the international treaties don’t legally apply to the states. Technically, it is true that treaties are concerned primarily with federal law, but this does not exempt state and local governments from the requirements of international law. While each state has its own drug laws and controlled substances acts (many of which mirror the CSA), federal law preempts, or overrides, state law when it covers the same subject matter. And since the Supremacy Clause of our nation’s Constitution places international treaties on the same legal footing as federal law, both the Conventions and the federal drug laws preempt any conflicting state law. So it could be said that while the international treaties do not, as a legal matter, directly apply to the states, as a practical and political matter, they do. The result is that the federal government finds itself obliged to enforce federal law over state law in order to fulfill its international treaty obligations. No wonder Obama is unwilling to bend on the issue—he simply may feel that he has no choice given the U.S.’s international obligations.

Current Status of the International Drug Control System

The United Nation’s Role in Administering the System

The international Conventions do not sit on a shelf somewhere overseas collecting dust; complex mechanisms are required to implement the dual objective of the treaties, which is to both eliminate the flow of substances used for illicit purposes, and to ensure the availability of necessary medicines.

¹ Ambassador Levitsky emphasized that his statements are his own personal opinions only and do not reflect the views of the INCB.

The international drug control system and the treaties are governed by a complex set of United Nations organizational bodies. The Commission on Narcotic Drugs (the “CND”), consisting of delegates from 53 countries, is the main governing body. It meets every year to review the policies enacted under the treaties and to guide current and future policy. The United Nations Office on Drugs and Crime (the “UNODC”) is the body primarily responsible for implementing policies enacted by the CND and has its own budget, which it uses for a variety of drug control programs around the world. The INCB has perhaps the most interesting role, as “guardian” and enforcer of the treaties, and publishes yearly reports on the supply versus the demand of prescription medicines and the “behavior” of various countries regarding compliance with the treaties. Some recent issues addressed by the INCB have been whether safe injection sites comply with the treaties, the INCB’s distress over medical marijuana in the U.S., and what it sees as “drug tourism” in Amsterdam.

Criticisms of the International Legal System

While the international drug control system certainly has its supporters, it also has its detractors: for years, criticism of the system and the “war on drugs” has been mounting, both from inside and outside the United States. In June of 2011, the “Global Commission on Drug Policy,” an organization formed to “bring to the international level an informed, science-based discussion about humane and effective ways to reduce the harm caused by drugs to people and societies,” released a scathing report, crowning years of research by a multitude of organizations from almost every social discipline. The Commission said point blank:

“The global war on drugs has failed, with devastating consequences for individuals and societies around the world. Fifty years after the initiation of the UN Single Convention on Narcotic Drugs ... fundamental reforms in national and global drug control policies are urgently needed.”

The commission’s report and the prestige of its board (which includes the former presidents of Colombia, Mexico, Brazil, and Switzerland, the Prime Minister of Greece, a former US Secretary of State, and a former Secretary-General of the United Nations) give new force and political momentum to a movement that has been building for some time.

Numerous international NGOs have likewise been increasingly vocal in their criticisms of the system, citing the monumental costs of the current policy, both economically and from a human rights perspective. Mike Trace, the former Deputy Drug Tsar of the U.K. who now serves as Chair of both the International Drug Policy Consortium (IDPC) and the Global Commission, pointed out to us the “clear contradictions between what the drug control treaties try to do, and what the various human rights treaties do.” Organizations such as IDPC, Transnational Institute, Harm Reduction Coalition, the Beckley Foundation, and Harm Reduction International lobby for drug control based on a public health model rather than on punitive sanctions.

Governmental bodies have also occasionally commented on the state of the system. The European Parliament has taken the position that “...the policy of prohibiting drugs, based on the UN Conventions of 1961, 1971 and 1988, is the true cause of the increasing damage that the production of, trafficking in, and sale and use of illegal substances are inflicting on whole sectors of society, on the economy and on public institutions, eroding the health, freedom and life of individuals...”

Finally, and perhaps most striking, is the recent organization of Latin American heads of state, who, at the recent Summit of the Americas held at Cartagena, Colombia, confronted President Obama with evidence of the destruction caused by the current policy and implored him to consider regulation and commercialization as an option. According to our discussions with

Gustavo de Greiff, former Attorney General of Colombia and also former Colombian Ambassador to Mexico, “*The majority of the representatives of the American countries, as well as the Caribbean, were for abandoning the actual strategy and replacing it with a regulation of production, commercialization, and consumption.*” Following the conference, President Obama stated that “*The United States will not be going in this direction ... I personally, and my Administration’s position is, that legalization is not the answer.*”

Trends for Compliance with the Treaties

If the treaties are so destructive, and there is no real enforcement, then why does almost every country in the world remain signatory to and, for the most part, faithfully comply with them? Pressure from the United States (and fear of losing aid) is certainly a major factor. But many experts point to the reputational aspect of international law—many countries do not want to be seen as uncooperative—in effect, “pariahs”—in the international community.

Instead of withdrawing from or disregarding their obligations under the treaties, many countries have reacted over the years by pushing the outer limits of what is technically allowable, or by broadly interpreting the language of the treaties.

The treaties themselves allow a certain amount of flexibility in their interpretation. For example, while the 1988 Convention requires that countries make possession for personal consumption a criminal violation, it does not specify what the punishment must be. Portugal’s “decriminalization” laws take advantage of this grey area and dictate that offenders are diverted to education classes, treatment sessions, or are given a fine. Holland continues to maintain laws on its books criminalizing possession of marijuana, but exercises a policy of non-enforcement when it comes to marijuana sold in its famous “coffee houses.” In the U.S., many argue that “medical use” is not defined in the treaties and therefore, medical marijuana is technically allowed (the INCB and the DEA do not share this view).

These measures—non-enforcement, decriminalization/depensation, and medicalization—known as “soft” challenges to the treaties, skirt the problem by simply limiting compliance to “technical compliance” in law, while allowing for de facto policies more in keeping with the desired policy change within each country.

Until recently, the only challenges to the treaties have been “soft” challenges. It would seem that nations have gone to great pains to stay within technical compliance as much as possible while still enjoying more liberal drug control environment within their own borders.

That is, until the Bolivian coca leaf challenge.

The Bolivian Coca Leaf: Opening the Door for Wider Reform?

The coca leaf has been used for centuries in Bolivia and other South American countries for medicinal, religious and cooking purposes. The traditional chewing of the coca leaf, in particular, is at odds with the 1961 Single Convention, which banned the practice but allowed 25 years for it to be phased out. When the phase-out period expired, Bolivia not only did not halt the practice, but, in 2009, passed an amendment to its Constitution allowing four years for the Bolivian government to “*denounce and ... renegotiate the international treaties that may be contrary to the Constitution.*” Bolivia formally applied to the Commission on Narcotic Drugs to amend the Single Convention to eliminate the ban on the coca leaf, but the amendment was rejected when 18 member countries filed objections. The Bolivian government then took the unprecedented step of formally withdrawing from the 1961 Single Convention. The withdrawal took effect in January 2012, at which time Bolivia filed a request to re-accede to the Convention with a reservation against the ban on the coca leaf and its traditional uses. Since the reservation must be permitted

unless it is blocked by one-third of the member countries, many believe it may very well be successful.

This move by Bolivia is extremely significant in that it is the first “hard” challenge to the treaties in the history of UN drug control. It is also particularly significant to many in the U.S. as it may very well open the door to another “hard” challenge—marijuana regulation in the United States.

It is interesting—but not surprising—that Bolivia’s request to amend the Single Convention was blocked by a group of countries led by the United States calling themselves “friends of the Convention.” In rallying against the amendment, the reasons cited not scientific research or indeed any evidence that the coca leaf was harmful, but that the legalization of the coca leaf would “undermine the spirit” of the treaties.

The situation begs the question once again—why does the U.S. Administration continue to oppose any law that falls short of the strict prohibitionist policy? Is it because it sees the parallel between the Bolivian coca leaf legalization and legalization of marijuana laws, and wants to nip that parallel in the bud (so to speak)? Or is there something more important at stake?

What the Coca Leaf Means for Marijuana Reform

If President Obama is simply against the use of marijuana on ideological grounds, he is right to be concerned. The parallel between the Bolivian coca leaf and the U.S. marijuana situation is indeed hard to deny: like the coca leaf in Bolivia, marijuana could be said to be deeply ingrained in the American culture (after all, haven’t three of our presidents admitted to using it?)

At this point, several states have introduced “tax and regulate” legislation. On June 23, 2011, for the first time, a bill was introduced in the United States House of Representatives, H.R. 2306, the “Ending Federal Marijuana Prohibition Act of 2011,” which would remove marijuana from the Schedule I of the Controlled Substances Act (21 U.S.C. 812(c)), allowing the import and export of marijuana into and out of any state which chooses to allow such import or export.

While it could be argued that the state tax and regulate laws would not technically violate the treaties, the federal bill is another matter. If enacted, the law would most certainly place the United States in violation of its treaty obligations. In the end, Bolivia withdrew from the Convention because it could not reconcile its domestic law with its international obligations. If a federal law were to pass in the United States that was irreconcilable with its treaty obligations, could the U.S. find itself in a similar position?

And then what? While it’s easy to see that other countries who are signatories to the treaties (particularly developing nations) would suffer consequences from “sanctions” imposed by the U.N. and the U.S., it is unclear what the implication would be if the situation were reversed and the U.S. was the target. Would the U.S. lose its control position in the international drug control system—a position it has painstakingly built over the last century—and would that loss of control translate to other areas of foreign policy? Who would be the “pariah” then?

A Complicated International System—what does the future hold?

According to John Collins, Ph.D candidate in the Department of International History at the London School of Economics and an expert on the history of post-war drug control, the 1961 Single Convention itself was “*the product of an extremely complex interplay of forces: geopolitical, economic, cultural, diplomatic, and personal.*” One thing that is evident is that U.S. drug control is intertwined in some very complex ways with the international system as a whole.

Indeed, when we asked Melvyn Levitsky whether the U.S. could ever truly become the “pariah” of the international community, he said, “*We signed the International Crime Convention, but we’re not members of the International Criminal Court... We’re not members of the international anti-mining convention, which has been signed by virtually every country in the world. Why, because of Korea. We don’t want to take the mines out of Korea because the North Koreans could come down with their million-man army and invade. Are we a pariah?*” In other words, probably not—but, it’s complicated.

Viewed in this context, there may be some very real reasons why President Obama is staunchly opposed to even the most informal discussion about marijuana legalization—it certainly tends to place his extreme about-face with respect to the issue in a new light.

Indeed, if marijuana is legalized, what will become of the treaties and the international system as a whole? The options for reform under the treaties as they stand today are severely limited. On the other hand, one could say that revision of the treaties, or even entry into a new treaty system, is inevitable given the eroding of the system by the “soft” challenges, and now the blatant “hard” challenges posed by the Bolivian coca leaf reservation and—especially—pending marijuana legalization laws in the U.S. After all, if the system stops working, isn’t it best to change the system? According to Melvyn Levitsky, “*It’s perfectly legal within the international system to not sign a convention because you don’t agree with it, or withdraw from the convention if there’s a way to do it.*”

But if international drug control is such a bedrock of international relations, what else might change if those laws are reformed? To what extent would it affect the U.S.’s relationship with other countries—for example, the Russian Federation, currently a major influence in the Commission on Narcotic Drugs and staunchly opposed to legalization? What about China?

We may be about to find out. At the 55th Session of the UN Commission on Narcotic Drugs held in Vienna this past March, high level member country delegates sat side by side with NGO representatives at a luncheon and, for the first time, politely debated the future of the Conventions. Mike Trace speculates that “quiet diplomacy” surrounding the marijuana issue may already be underway. Even Gustavo de Greiff said of the recent Summit of Americas meeting that he “*had some dose of optimism ... because it was the first time that the drug problem was publicly discussed by the highest public functionaries of the region and that the public became aware that the matter merits to be examined.*” At its glacial pace, the international system may at last be unraveling – and with it, possibly the end to the “standoff” between the Administration and the drug reform community. What other changes are close behind?

As they say, change is never easy, but ever interesting. In the case of international drug control, reform could prove to be not so much mood-altering, as world-altering.

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