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# FROM CRIMINALIZATION TO REGULATION: NEW CLASSIFICATIONS OF CANNABIS NECESSITATE REFORM OF UNITED NATIONS DRUG TREATIES

## INTRODUCTION

The world has failed to come to terms with cannabis as a drug. In some countries, cannabis use and trafficking are taken very seriously, while in others they are virtually ignored. This incongruity undermines the credibility of the international system, and the time for resolving global ambivalence on the issue is long overdue. Either the gap between the letter and spirit of the Single Convention, so manifest with cannabis, needs to be bridged, or parties to the Convention need to discuss re-defining the status of cannabis.<sup>1</sup>

The preceding excerpt from the United Nations Office on Drugs and Crime's ("UNODC") annual World Drug Report in 2006 illustrates a growing controversy in the international community about the status of cannabis. Since the mid-1970s, countries have been relaxing their drug laws by enacting decriminalization and depenalization statutes for cannabis,<sup>2</sup> due to the prevailing view that the prior prohibitionist stance is a failure<sup>3</sup>

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1. U.N. OFFICE ON DRUGS & CRIME, WORLD DRUG REPORT 2006, at 186, U.N. Sales No.E.06.XI.10 (2006). [hereinafter 2006 Report].

2. Decriminalization reforms change the status of cannabis use from a criminal to a noncriminal offense. Depenalization occurs when there is a change in the letter or practice of the law that reduces the severity of the criminal or civil penalties. ARI ROSMARIN & NIAMH EASTWOOD, RELEASE A QUIET REVOLUTION: DRUG DECRIMINALISATION POLICIES IN PRACTICE ACROSS THE GLOBE 11 (2012), <http://drogriporter.hu/files/drogriporter/imce/release-quiet-revolution-drug-decriminalisation-policies.pdf>.

3. GLOBAL COMM'N ON DRUG POLICIES, WAR ON DRUGS (2011). The report was developed by global leaders, including Kofi Annan, former Secretary General of the United Nations, Cesar Gaviria, former President of Colombia, Ernesto Zedillo, former President of Mexico, and Fernando Henrique Cardoso, former President of Brazil, and advocated for an end to the prohibition of cannabis. *See generally id.* Kofi Annan stated that "The global war on drugs has failed, with devastating consequences for individuals and societies around the world . . . End the criminalization, marginalization and stigmatization of people who use drugs but who do not harm others." *Id.* at 2. *See also* Juan Forero, *Latin American Countries Pursue Alternatives to U.S. Drug War*, WASH. POST, Apr. 10, 2012, [http://www.washingtonpost.com/world/the\\_americas/latin-](http://www.washingtonpost.com/world/the_americas/latin-)

and has led to increased global violence.<sup>4</sup> Attention has focused on cannabis because, while cannabis smokers account for approximately 75 to 80 percent of all global illegal drug users,<sup>5</sup> the drug is one of the least toxic substances used recreationally.<sup>6</sup>

Since the 2006 report, more nations and states have implemented, or at least seriously discussed, more tolerant drug policies, which extend beyond the legal framework of the current global drug control regime. The United States led the way when Colorado and Washington voters on November 6, 2012, passed referenda to legalize the production, distribution, and sale of cannabis.<sup>7</sup> While those state laws are contrary to federal laws, Attorney General Eric Holder announced on August 29, 2013, that the federal government would not interfere with state governments' implementation of these ballot initiatives.<sup>8</sup> Then, on December 10, 2013, Uruguay became the first nation to legalize

american-countries-pursue-alternatives-to-us-drug-war/2012/04/10/gIQAFPEe7S\_story.html.

4. E.g., Peter Imbusch et. al., *Violence Research in Latin America and the Caribbean: A Literature Review*, 5 INT'L J. CONFLICT & VIOLENCE 87, 108 (2011). (noting four ways that drug flow aggravates crime and violence throughout the Americas. "First of all, they produce local drug use problems, thus resulting in secondary effects on domestic crime problems. Second, drug transactions often involve firearms, and firearms are traded for drugs. Third, movement of drugs nearly inevitably leads to a certain corruption of local law enforcement officials. Fourth, the laundering of the revenues undermines legitimate economic activities."); WORLD BANK [WB], CRIME AND VIOLENCE IN CENTRAL AMERICA: A DEVELOPMENT CHALLENGE, at ii (2011). (concluding that "drug trafficking is both an important driver of homicide rates in Central America and the main single factor behind rising violence levels.")

5. Org. of Am. States: General Secretariat, *The Drug Problems In The Americas*, at 65, OEA/Ser.D/XXV.4 (May 17, 2013).

6. ROBIN ROOM ET AL., CANNABIS POLICY: MOVING BEYOND THE STALEMATE 1 (2008) (The "probability and scale of harm among heavy cannabis users is modest compared with that caused by many other psychoactive substances, both legal and illegal, in common use, namely, alcohol [and] tobacco.").

7. Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES, Nov. 7, 2012, [http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html?\\_r=0](http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html?_r=0).

8. OFFICE OF THE DEPUTY ATT'Y GEN., MEMORANDUM FOR ALL UNITED STATES ATTORNEYS: GUIDANCE REGARDING MARIJUANA ENFORCEMENT (2013) [hereinafter MEMORANDUM].

the production, distribution, and sale of cannabis.<sup>9</sup> These early measures have gained international momentum to the point where there are now twelve states<sup>10</sup> and seven countries with proposals to legalize cannabis in the next few years.<sup>11</sup>

These recent laws have weakened the present international regime that favors prohibition over regulation. These laws are in direct violation of the Single Convention on Narcotic Drugs of 1961 and the 1988 United Nations Convention Against Illicit Traffic on Narcotic Drugs and Psychotropic Substances, both of which ban the legal sale of cannabis for nonmedical use and task signatories to implement a domestic system for limiting the use

9. Matt Sledge, *How Uruguay Legalized Marijuana Dealing*, HUFFINGTON POST (Dec. 12, 2013, 2:16 PM), [http://www.huffingtonpost.com/2013/12/12/uruguay-marijuana-legalization\\_n\\_4433971.html](http://www.huffingtonpost.com/2013/12/12/uruguay-marijuana-legalization_n_4433971.html).

10. The New Hampshire house passed similar legislation to legalize cannabis. Steven Nelson, *Live Free and High: New Hampshire House Votes to Legalize Pot*, U.S. NEWS (Jan. 15, 2014, 5:58 PM), <http://www.usnews.com/news/articles/2014/01/15/new-hampshire-house-votes-to-legalize-pot>. Maryland and New York legislators are also considering a proposed cannabis legalization bill. Pat Warren, *Bill Would Regulate and Tax Marijuana Like Alcohol in Maryland*, CBS BALTIMORE (Jan. 16, 2014, 6:35 PM), <http://baltimore.cbslocal.com/2014/01/16/maryland-marijuana-bill-will-regulate-tax-cannabis-like-alcohol/>; Saki Knafo, *New York Could Be Third State to Legalize Pot*, HUFFINGTON POST (Dec. 11, 2013, 12:35 PM), [http://www.huffingtonpost.com/2013/12/11/new-york-legalize-marijuana\\_n\\_4426553.html](http://www.huffingtonpost.com/2013/12/11/new-york-legalize-marijuana_n_4426553.html). Arizona, California, Massachusetts, Maine, Montana, Nevada, and Wyoming are trying to gather enough signatures to place cannabis legalization questions on their 2014 and 2016 ballots. Faith Karimi, *Alaska Closer to Becoming 3rd State to Legalize Recreational Marijuana*, CNN (Jan. 9, 2014, 8:10 AM), <http://www.cnn.com/2014/01/09/us/alaska-recreational-marijuana-push/>. Thomas H. Clarke, *Wyoming Marijuana Legalization Initiative Submitted for 2016 Ballot*, DAILY CHRONIC (Jan. 15, 2014, 1:15 PM), <http://www.thedailychronic.net/2014/27195/wyoming-marijuana-legalization-initiative-submitted-2016-ballot/>.

11. Switzerland, Spain, Czech Republic, Denmark, Netherlands, Morocco, and Ireland are currently considering legalizing marijuana. Ethan Nadelmann, *What Legalizing Pot in Uruguay Means for the World*, TIME (Aug. 2, 2013), <http://ideas.time.com/2013/08/02/what-legalizing-pot-in-uruguay-means-for-the-world/>; *Ireland May Be the Next Country to Legalize Recreational Marijuana Use*, HUFFINGTON POST (Nov. 11, 2013), [http://www.huffingtonpost.com/the-ireland-may-be-the-next-c\\_b\\_4251992.html](http://www.huffingtonpost.com/the-ireland-may-be-the-next-c_b_4251992.html). Guatemala is also considering legalizing marijuana. Jaime Septien, *En 2015, La Marihuana y la Amapola Podrian ser Legales en Guatemala*, ALETEIA (Apr. 11, 2014), <http://www.aleteia.org/es/politica/noticias/en-2015-la-marihuana-y-la-amapola-podrian-ser-legales-en-guatemala-6165259760959488>.

of cannabis.<sup>12</sup> Even though individual countries are changing their views on cannabis, the UNODC still urges the stringent regulation of cannabis as a result of the drug's increased potency, addictive quality, and connection to mental illness.<sup>13</sup> Furthermore, two intergovernmental bodies, the International Narcotics Control Board ("INCB") and the UNODC, have repeatedly stated that these laws break international treaty obligations.<sup>14</sup> In the wake of this disagreement among individual nations and intergovernmental agencies, the U.N. General Assembly will hold a special session to reconsider the international approach to drug policy in early 2016.<sup>15</sup>

This Note argues that, as states increasingly propose and pass cannabis legislation that directly contradicts current U.N. treaties, future international compliance will be possible only through changes in, or abandonment of, the current regime.

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12. Single Convention on Narcotic Drugs, 1961, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204 (entered into force Dec. 13, 1964); Protocol Amending the Single Convention on Narcotic Drugs, Mar. 25, 1972, 26 U.S.T. 1439, 976 U.N.T.S. 3 (entered into force Aug. 8, 1975) [hereinafter Single Convention]; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, 28 I.L.M. 493 [hereinafter 1988 Convention].

13. See generally 2006 Report, *supra* note 1, at 155–99; Discussion Paper, U.N. Office on Drugs & Crime, Cannabis: A Short Review (2011).

14. Press Release, International Narcotics Control Board, INCB President calls on the U.S. Government to address initiatives aimed at permitting recreational drug use, U.N. Press Release UNIS/NAR/1164 (Mar. 14, 2013); Press Release, International Narcotics Control Board, Uruguay is Breaking the International Convention on Drug Control with the Cannabis Legislation Approved by its Congress, U.N. Press Release UNIS/NAR/1190 (Dec. 11, 2013); U.N. Office of Drugs and Crime, Statement on the Bill Regulating the Production, Sale and Consumption of Marijuana in Uruguay (Aug. 1, 2013), <https://www.unodc.org/lpo-brazil/en/frontpage/2013/08/01-statement-on-the-bill-regulating-the-production-sale-and-consumption-of-marijuana-in-uruguay.html>; U.N. International Narcotics Control Board, Statement by President of the International Narcotics Control Board, Thematic Debate of the Sixty-Sixth Session of the General Assembly on Drugs and Crime as a Threat to Development on the Occasion of the International Day Against Drug Abuse and Illicit Trafficking, UN/V.12-54687(E) (June 26, 2012).

15. *La Asamblea General De La ONU Aprueba Resolucion Presentada Por Mexico Sobre Cooperacion Internacional Contra Las Drogas* [The U.N. General Assembly Approves Resolution Presented by Mexico on International Cooperation Against Drugs], Secretaria de Relaciones Exteriores, 27 de Noviembre de 2012 (Mex.), available at <http://saladeprensa.sre.gob.mx/index.php/comunicados/2149-351>.

Therefore, this Note suggests that the United Nations adopt a new convention for cannabis in order to reconcile the significant inconsistencies between the current treaty and new domestic policies, the latter of which establish a regulated cannabis market. Part I provides an overview of the U.N. drug control treaties, including an explanation of the reasons for the strict regulation of cannabis. Part II outlines new domestic legislative challenges to the treaties, with particular attention focused on the reasons for the global shift from the prohibition of cannabis to its legalization. Part III examines four possible ways to remedy the dichotomy between the current domestic trend to legalize cannabis and international law. Part IV concludes that the United Nations should create a new treaty dealing specifically with the regulation of cannabis.

#### I. THE INTERNATIONAL CANNABIS CONTROL SYSTEM

The framework of international drug control evolved over the past century, beginning with the International Opium Convention of 1912 and continuing through 2014.<sup>16</sup> There are two international drug control treaties currently in effect<sup>17</sup> that directly address cannabis: The 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol (“Single Convention”),<sup>18</sup> and the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (“1988 Convention”).<sup>19</sup> These treaties have among the highest rates of adherence of any multilateral treaty, with 186 and 182 signatories respectively, showing a near universal recognition of the need to

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16. Antonio Costa, Executive Director of the U.N. Office of Drugs & Crime, *A Century of International Drug Control*, 1, 49 (2009). [Hereinafter Costa].

17. The Convention on Psychotropic Substances of 1971, a third international drug treaty, will not be discussed in this Note because of its focus on controlling psychotropic substances rather than cannabis. Cannabis is indirectly controlled by the treaty as a result of the registration of Tetrahydrocannabinol (“THC”), the main active ingredient in cannabis, as a Schedule I ingredient. Convention on Psychotropic Substances, *opened for signature* Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 157 [hereinafter 1971 Convention]. For a detailed analysis of this treaty, see Neil Boister, *Decriminalizing Personal Use of Cannabis in New Zealand: The Problems and Possibilities of International Law*, 3 Y.B. NEW ZEALAND JURISPRUDENCE 55, 61–62 (1999) [hereinafter New Zealand].

18. Single Convention, *supra* note 12.

19. 1988 Convention, *supra* note 12.

regulate narcotics internationally.<sup>20</sup> The treaties focus on the need to control cannabis' production, supply, and consumption, through punitive sanctions and regulation, in order to combat the illicit drug market.<sup>21</sup> This section will explore the development of the drug treaties, including the reasons for such strict regulation of cannabis, compared to more toxic narcotics. An overview of the development of the treaties explains not only why cannabis is controlled in the manner it is, but also why signatory states, and the United Nations, are resistant to change.

### *A. Tracing the Development of International Drug Treaties*

Beginning in the late nineteenth and early twentieth centuries, national and international initiatives began to regulate cannabis as a pain reliever, as part of an overall trend to increase the supervision of medicinal products.<sup>22</sup> During the First International Opium Conference in 1911 and 1912, the first attempt at an international ban of cannabis was supported only by Italy and the United States.<sup>23</sup> While the first treaty failed to include cannabis as a drug needing regulation, the committee recommended that the countries further examine the character of cannabis in order to determine whether future regulation would be warranted.<sup>24</sup> The United States believed that the failure to

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20. Exec. Director of the U.N. Office on Drugs & Crime, Commission on Narcotic Drugs, *Making Drug Control 'Fit for Purpose': Building on the UNGASS Decade*, 3, U.N. Doc. E/CN.7/2008/1 (Mar. 7, 2008), available at <https://www.unodc.org/documents/commissions/CND-Session51/CND-UNGASS-CRPs/ECN72008CRP17.pdf> [hereinafter *Fit For Purpose*].

21. Single Convention, *supra* note 12; 1988 Convention, *supra* note 12.

22. In Germany, the sale of cannabis was limited to pharmacies by the Pharmacy Ordinance of 1972. Danilo Bollotta, et al, *Cannabis Control in Europe*, in *A CANNABIS READER: GLOBAL ISSUES AND LOCAL EXPERIENCES* 97, 100–01 (Sharon Rodner Sznitman et al. eds., 2008). In the United States, the Pure Food and Drug Act of 1906 mandated that any quantity of cannabis be clearly marked on the label of any drug or food sold to the public. Other drafts of national legislation to regulate cannabis further failed, probably because of opposition in the pharmaceutical industry. David F. Musto, *The 1937 Marijuana Tax Act*, in *MARIJUANA: MEDICAL PAPERS 1839-1972*, 419, 419–22 (2007).

23. Bollotta, *supra* note 22, at 101; The U.S. Delegate, Henry J. Finger, stated that cannabis should be banned in legislation proposed by this conference, because many Californians were scared of the “large influx of Hindoos . . . demanding cannabis indica” and who were trying to initiate “the whites into their habit.” Musto, *supra* note 22, at 422.

24. *Id.*

include cannabis was proof of international betrayal and an attempt to nullify U.S. efforts.<sup>25</sup> Other countries, such as Egypt, Turkey, and Greece, shared this U.S. sentiment and began criminalizing cannabis<sup>26</sup> as a means to exert social control over Sufis,<sup>27</sup> whose use of the drug made them unfaithful Muslims and an “unproductive burden on society.”<sup>28</sup>

Cannabis first became regulated internationally at the Second International Opium Convention in 1925, as a result of strong political pressure by Egypt.<sup>29</sup> The treaty, however, controlled cannabis only with respect to transnational trade<sup>30</sup> and less comprehensively than other drugs such as opium, heroin, and cocaine.<sup>31</sup> The weakness of that regulation was partially due to the fact that British and French delegations did not have adequate time to conduct due diligence in their research of cannabis.<sup>32</sup> Delegates from the United States and Egypt refused to sign because of inadequate oversight for hashish.<sup>33</sup>

Despite the controversy over the inclusion of cannabis in the arena of international drug control, European countries began criminalizing domestic possession and use more stringently

25. *Id.* at 424.

26. Bollotta, *supra* note 22, at 100–01. (noting that Egypt made hashish a capital offense in 1868, Turkey made cultivation of cannabis a criminal offense in 1884, and Greece banned the cultivation, importation, and usage of cannabis in 1890).

27. Sufism is a branch of Islam defined by adherence to the idea of an inner, mystical dimension of Islam. JOHN L. ESPOSITO, *Sufism in America*, in THE OXFORD DICTIONARY OF ISLAM (Oxford Univ. Press 2014).

28. Dr. J. Bouquet, U.N. Office of Drugs & Crime, *Cannabis (concluded)* (Jan. 1, 1951), available at [https://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin\\_1951-01-01\\_1\\_page005.html](https://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin_1951-01-01_1_page005.html).

29. Costa, *supra* note 16, at 53–55. Egyptian Delegate M. El Guindy gave an emotional speech at the conference about the negative medical repercussions of cannabis. He claimed that, “the portion of cases of insanity caused by the use of hashish varies from 30 to 60 percent of the total number of cases occurring in Egypt.” *Id.* at 54.

30. David Bewley-Taylor & Martin Jelsma, *Fifty Years of the 1961 Single Convention on Narcotic Drugs: A Reinterpretation*, 12 TRANSNAT’L INST. SERIES ON LEGISLATIVE REFORM OF DRUG POLICIES 4 (2011).

31. Costa, *supra* note 16, at 55.

32. MARTIN BOOTH, *CANNABIS: A HISTORY* 118 (St. Martin’s Press, 1st ed. 2003).

33. *Id.*



than the treaty required.<sup>34</sup> In the United States, cannabis, originally confined to Mexican migrant communities in the southwestern states, began spreading in the 1920s to minority and low income populations in urban areas.<sup>35</sup> After several states independently criminalized cannabis, *The Federal Marihuana Tax Act of 1937* finally banned unlicensed and nonmedical cannabis throughout the United States.<sup>36</sup>

In conjunction with these individualized, national efforts, the 1936 Geneva Convention for the Suppression of the Illicit Traffic in Dangerous Drugs focused on establishing expansive guidelines for penal sanctions that would harmonize domestic drug offenses and penalties.<sup>37</sup> However, the treaty never became law because many delegates objected to the incorporation of international criminal law provisions that would alter domestic legislation.<sup>38</sup> Other countries, such as the United States, objected because they desired even stricter regulation.<sup>39</sup> Though scuttled,

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34. Examples of some European legislation include the United Kingdom's *Dangerous Drugs Act*, 1928 and Germany's second *Opium Law*, 1929. Bollotta, *supra* note 22, at 101.

35. Richard J. Bonnie & Charles Whitebread, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* 1, 92 (U. of VA Press 1974); Even though still not used by mainstream society, newspapers began sensationalizing marijuana through slogans such as "Loco Weed, Breeder of Madness and Crime" and "Marihuana as a Developer of Criminals" at the request of prominent political leaders, such as Harry Anslinger, the head of the Bureau of Narcotics. Musto, *supra* note 22, 425.

36. Booth, *supra* note 32, at 154. By 1937, thirty-eight of the nation's then forty-eight states had banned cannabis. *Id.* at 149.

37. The new treaty ensured the enactment of domestic legislative provisions by each party for the severe punishment of international participation in, conspiracy in, attempts toward and preparatory acts toward the commission of illicit drug trafficking, and, if domestic law provided such acts as criminal, for the illicit cultivation, gathering, and production of drugs. There was an allowance for the extradition of suspected traffickers and the required establishment of related law enforcement measures. NEIL BOISTER, *PENAL ASPECTS OF THE U.N. DRUG CONVENTIONS* 32–36 (2001).

38. *Id.* at 36–39.

39. The U.S. delegation did not sign the Convention because, in their own words, "[T]he stipulation of the Convention did not tend in any increasing measure to effectively prevent or adequately punish the illicit traffic." Boister, *supra* note 37, at 36–39. In total only thirteen countries signed and ratified this convention. Moreover, it only became effective in October, 1939, after the Second World War had started, and drug control priorities had been supplanted by more immediate foreign policy imperatives. Costa, *supra* note 16, at 57.

this Convention became the basis of future international drug laws that are still in effect today.<sup>40</sup>

*B. The Single Convention on Narcotic Drugs, 1961*

Preparations for the Single Convention began after the establishment of the United Nations and the U.N. Commission on Narcotic Drugs (“CND”) in the 1940s.<sup>41</sup> After the Second World War, the volume of illicit traffic grew exponentially, due to the introduction of new narcotic substances and the formation of multinational drug trafficking rings.<sup>42</sup> While traditional colonial powers had been resistant to drug control, because of lucrative drug monopolies in colonies, the process of decolonization made the wealthy nations more amenable to strict drug regulation.<sup>43</sup> Additionally, the United States, which emerged from the war as a dominant political and economic power, had more leverage to promulgate its prohibitive anti-drug ideals.<sup>44</sup>

In 1948, the U.N. Economic and Social Council (“ECOSOC”) adopted a CND sponsored resolution drafted by the United

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40. Boister, *supra* note 37, at 39.

41. *Id.* at 40. The CND initially limited its membership to representatives of sixteen U.N. member states. A 1961 increase to twenty-one made it possible for representation of states with drug addiction problems and for election of non-U.N. members. See U.N. Office on Drugs and Crime, *Twenty Years of Narcotic Control Under the United Nations*, 1, 6 (Jan. 1, 1966), [http://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin\\_1996-01-01\\_1\\_page002.html](http://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin_1996-01-01_1_page002.html) [hereinafter *Narcotic Control*]. The main task of the CND “is to analyze the global situation on drug control, and when necessary, advise ECOSOC on changes to enhance the drug control system.” Daniel Heilmann, *The International Control of Illegal Drugs and The U.N. Treaty Regime Preventing or Causing Human Rights Violations*, 19 CARDOZO J. INT’L & COMP. L. 237, 254 (2011).

42. Boister, *supra* note 37, at 41–42.

43. *Narcotic Control*, *supra* note 41, at 22; Martin Jelsma, *The Development of International Drug Control: Lessons Learned and Strategic Challenges for the Future 2* (Global Comm. On Drug Policies, Working Paper, Jan. 24-25, 2011).

44. *Id.* at 3.

States to consolidate earlier drug treaties into a single convention.<sup>45</sup> In drafting this new treaty, countries saw it as their mission to “benefit the health and welfare of mankind”<sup>46</sup> by preventing drug addiction.<sup>47</sup> This sentiment was expressed in the preamble, which focused on each nation’s duty to “prevent and combat this evil.”<sup>48</sup> The fact that this was the first time that an international treaty used such an emotional word as “evil” to describe the pressing drug problem, while the global illicit drug use problem had dramatically increased, shows the rising concern among world leaders to fight the pressing threat of the drug trade at the time.<sup>49</sup>

The Convention classified cannabis as one of the most dangerous drugs, on par with heroin.<sup>50</sup> Cannabis, cannabis resin, and the cannabis plant were Schedule I substances subject to all control measures by the convention because of the risk of dependence and abuse.<sup>51</sup> In addition, cannabis and cannabis resin were included among Schedule IV substances, which were thought to be particularly dangerous due to their harm, risk of abuse, and

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45. Rick Lines, *Deliver Us From Evil? – The Single Convention on Narcotic Drugs, 50 Years On*, 1 INT'L J. ON HUM. RTS. & DRUG POL'Y 3, 4, 9–10 (2010).

46. Single Convention, *supra* note 12, preamble.

47. Lines, *supra* note 45, at 7, 10 (noting that the Single Convention focuses on the evil stemming from the need to control individual, private actors rather than the state or the people acting on behalf of the state.).

48. Single Convention, *supra* note 12, preamble.

49. Bewley-Taylor, *supra* note 30, at 6–8.

50. Single Convention, *supra* note 12, preamble. The convention divides drugs between four schedules, depending on the perceived toxicity level of each, as well as the need to control the substance use. Schedule I lists substances that have liability to abuse comparable to that of cannabis, cannabis resin, or cocaine. Schedule II lists substances that have addiction-producing properties not greater than those of codeine, but at least as great as those of dextropropoxyphene. Schedule III lists substances that are intended for legitimate medical use, and that the WHO considers not liable to abuse, and that cannot produce ill effects. Schedule IV lists substances that are particularly liable to abuse and to produce ill effects, and do not offset such liability with substantial therapeutic advantages not possessed by substances other than narcotics in Schedule I. *Id.*

51. Bollotta, *supra* note 22, at 102.

extremely limited therapeutic value.<sup>52</sup> As a result, the licit production of cannabis was limited exclusively to medical and scientific purposes.<sup>53</sup>

This double classification requires individual nations to adopt particularly stringent controls to stop cannabis use and trade.<sup>54</sup> According to the Single Convention's Articles 28 and 38, signatory countries should take all practicable measures necessary to prevent its abuse<sup>55</sup> and misuse.<sup>56</sup> This allowed countries to adopt different methods of criminalizing cannabis in order to stop the drug trade.<sup>57</sup> However, the countries only needed to enact legislation that they deemed necessary<sup>58</sup> and not in violation of their constitutions.<sup>59</sup> Governments could choose whether to impose administrative penalties—such as fines, censure, and criminal sanctions—or to avoid penalties altogether for personal possession offenses.<sup>60</sup> This flexibility does not exist for the production, cultivation, or sale of cannabis.<sup>61</sup>

The treaty's ratification resulted in the first official domestic arrests for cannabis offenses in the 1960s and 1970s.<sup>62</sup> Even with the treaty's impact, the United States refused to sign and ratify the treaty until 1967 because of a desire for stricter and more

52. Single Convention, *supra* note 12, art. 2 (5)(b); Bollotta, *supra* note 22, at 102.

53. Single Convention, *supra* note 12, art. 4(c).

54. *Id.* art. 33.

55. *Id.* art. 38.

56. *Id.* art. 28.

57. U.N. Office of Drugs & Crime, *Commentary on the United Nations Convention on Narcotic Drugs 1961*, at 346, U.N. Doc. E/CN.7/588 (1972) [hereinafter *Commentary on the Single Convention*].

58. Bollotta, *supra* note 22, at 103.

59. Single Convention, *supra* note 12, art. 26; Room, *supra* note 6, at 95.

60. *Commentary on the Single Convention, supra* note 57, at 402. This was allowed as long as the countries “use their best endeavors to prevent this possession by all those administrative controls of production, manufacture, trade and distribution, which are required by the Single Convention.”

61. Single Convention, *supra* note 12, art. 22. The Official Commentary explains that prohibition is required as long as there is illicit drug traffic. A government that, for many years and despite its best efforts, has been unable to prevent gross diversion of drugs from cultivation can hardly be of the opinion that the prohibition of such cultivation would not be “the most suitable measure . . . for protection of public health and welfare and preventing the diversion of drugs into the illicit traffic.” *Commentary on the Single Convention, supra* note 57, 275–76.

62. Bollotta, *supra* note 22, at 101.

widespread criminalization, in order to stop the increasingly undesirable drug from gaining more popularity.<sup>63</sup> The United States expressed dissatisfaction with the treaty's lack of enforcement powers in contrast to a prior treaty allowing an international body to impose sanctions on states.<sup>64</sup>

In 1968, as a result of increased pressure from the United States, the International Narcotics Control Board ("INCB"), a thirteen member quasi-judicial body, was created to monitor states' compliance with the treaty and to recommend embargos on noncompliant states.<sup>65</sup> Eventually, the Single Convention was amended through the 1972 Protocol Amending the Single Convention, which granted the INCB greater law enforcement powers to seize plants illicitly cultivated, and to permit the extradition of drug traffickers between the countries that are signatories.<sup>66</sup>

### *C. 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*

Illegal drug production and use increased throughout the 1970s and 1980s, in spite of the Single Convention.<sup>67</sup> In particular, cannabis was considered the biggest illegal narcotic substance in quantitative terms,<sup>68</sup> and its use spread to mainstream society.<sup>69</sup> As a result of increased global consciousness of the dangers of illicit trafficking, countries convened to create the

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63. Bewley-Taylor, *supra* note 30, at 14.

64. *Id.* The 1931 Limitation Convention, a prior drug convention, gave the Permanent Central Opium Board the authority to place an embargo on the export of licit drugs to nations exceeding their drug estimates. *Id.* at 4.

65. Heilman, *supra* note 41, at 255–56.

66. Bewley-Taylor, *supra* note 30, at 14; M.C. Bassiouni, *The International Narcotics Control System: A Proposal*, 46 ST. JOHN'S L. REV. 713, 749–51 (1972).

67. Costa, *supra* note 16, at 65, 67; Jelsma, *supra* note 43, at 5 (noting that the restriction of previously available narcotics led to the inception of a multi-billion dollar international drug trafficking business.)

68. Bassiouni, *supra* note 66, at 755.

69. Booth, *supra* note 32, at 240. The U.S. approach to cannabis regulation changed dramatically in the 1960s, when cannabis became used by mainstream society and shifted from President Nixon's stance of the drug being considered "public enemy number one" to President Carter nearly legalizing cannabis to President Reagan waging the war on drugs. For a more detailed overview see Thomas J. Moran, *Just a Little Bit of History Repeating: The California Model of Marijuana Legalization and How it Might Affect Racial and Ethnic Minorities?* 17 WASH & LEE J. CIVIL RTS. & SOC. JUST. 557, 566–70 (2011).

1988 Convention to expand the scope of the international drug treaties.<sup>70</sup> The central purpose of the treaty was to “promote cooperation among parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension.”<sup>71</sup>

The treaty requires all signatories to enact criminal offenses for the manufacturing, distribution, possession, purchase, or cultivation of cannabis.<sup>72</sup> The U.S. delegation focused on demanding harsh sanctions for non-personal-use offenses, such as money laundering and trafficking, and opposed the inclusion of personal use offenses.<sup>73</sup> Because of the perceived focus on drug-producing countries in Latin America, the Mexican delegation demanded penalization of personal use so that consumption countries also had an onus to enact domestic legislation that would impact their economies as well.<sup>74</sup>

The tension concerning what activities should be regulated led to enforcement distinctions between penal provisions on the supply side and those on the demand side.<sup>75</sup> Article 3(2) of the 1988 Convention created a constitutional limitation exception just for possession, purchase, or cultivation for personal consumption.<sup>76</sup> The constitutional limitation arose because of difficulties encountered by negotiators in formulating precise definitions acceptable to different legal systems,<sup>77</sup> and out of a desire to safeguard state sovereignty.<sup>78</sup> The Official Commentary of the 1988 Convention stresses that this treaty’s provisions do not oblige

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70. Boister, *supra* note 37, at 52.

71. 1988 Convention, *supra* note 12, art. 2.

72. *Id.* art. 3.

73. Melissa T. Aoyagi, *Beyond Punitive Prohibition: Liberalizing the Dialogue on International Drug Policy*, 37 N.Y.U. J. INT’L L. & POL. 555, 579–80 (2005).

74. Krzysztof Krajewski, *How Flexible are the United Nations Drug Conventions* 10 INT’L J. OF DRUG POL’Y 329, 334 (1999).

75. *Id.*

76. ROOM, *supra* note 6, at 163.

77. David P. Stewart, *Internationalizing The War on Drugs: The U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 18 DEN. J. INT’L L. & POL’Y 387, 393 (1990).

78. 1988 Convention, *supra* note 12, art. 2(2).

any penalty to be imposed for drug consumption per se.<sup>79</sup> However, Article 3(1) requires criminalization of any form of supply, cultivation, or possession for sale by confiscating the drugs or extraditing drug traffickers.<sup>80</sup> This differentiation insulates party states from outside pressures when drafting penal provisions for drug users, and allows states, when appropriate, to provide remedies other than incarceration, such as drug treatment and rehabilitation.<sup>81</sup> In sum, these conventions provide Member States with the ability to legalize the personal use of cannabis, but any legalization of the production or sale would be in violation of these treaty obligations.<sup>82</sup>

## II. THE EVOLUTION OF DOMESTIC CANNABIS LEGALIZATION STATUTES

Initiatives to liberalize cannabis control began in the 1970s, when several states in the United States and Netherlands removed criminal penalties for possession of small quantities of the drug,<sup>83</sup> as a result of a general perception that global prohibition was a failure.<sup>84</sup>

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79. U.N. Office of Drugs and Crime, *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in Vienna on 20 Dec. 1988*, at 82, U.N. Doc. E/CN.7/590 (1988) [hereinafter *Commentary on the 1988 Convention*]. In relation to article 3 “it will be noted that, as with the 1961 and 1971 Conventions, paragraph 2 does not require drug consumption as such to be established as a punishable offence.” *Id.*

80. 1988 Convention, *supra* note 12, arts. (3)(1), (5), (6); Stewart, *supra* note 78, at 395–400.

81. Stewart, *supra* note 78, at 39.

82. 1988 Convention, *supra* note 12, art. 3; The International Narcotics Control Board found that the convention does not require criminal prosecution for possession of small quantities of drugs. UNODC, *WORLD DRUG REPORT 2009*, at 167, U.N. Sales No. E.09.XI.12 (2009).

83. Peter Reuter, *Why Has US Drug Policy Changed So Little over 30 Years?* 42 *CRIME & JUST.* 75, 92–93 (2013); JEAN-PAUL GRAND & JOOST BREEKSEMA, *OPEN SOC'Y FOUND, COFFEE SHOPS AND COMPROMISE: SEPARATED ILLICIT DRUG MARKETS IN THE NETHERLANDS* 1, 18 (2013). The 1976 Opium Act, which separated cannabis from other drugs, was not intended to create coffee shop businesses that are legally permitted to sell cannabis, but they emerged afterwards and were tolerated through case law and a policy directive regulating the businesses in 1994. *Id.* at 23.

84. Grand, *supra* note 83, at 17–18; NAT'L COMMISSION ON MARIHUANA & DRUG ABUSE, *MARIHUANA: A SIGNAL OF MISUNDERSTANDING* (1972).

These early laws have led to a worldwide phenomenon where now 25 to 30 percent of countries have decriminalization or depenalization statutes for cannabis.<sup>85</sup> Although these laws depart from the prohibition model, they stop short of full legalization and regulation in order to conform to international drug treaties.<sup>86</sup> The Netherlands, which had the most relaxed of the earlier policies, controls the sale of cannabis in certain coffee shops, but fails to regulate and monitor the cultivation of cannabis.<sup>87</sup> As a result, the coffee shops are perceived to have led to increased crime<sup>88</sup> and to cultivation of more addictive forms of cannabis.<sup>89</sup> In recognition of the loopholes caused by the Netherlands' backdoor approach, the new legalization statutes in Colorado, Washington, and Uruguay create a regulatory framework for the production and sale of cannabis, which puts them in direct conflict with treaty obligations.<sup>90</sup> This section compares these legalization statutes and explains the reasons for their passage in order to show how these isolated measures might indicate a new global trend.

#### *A. The United States*

The 2012 referenda in Colorado and Washington passed in large part due to the dramatic shift in attitude toward cannabis in the United States over the last eight years.<sup>91</sup> The change in sentiment is partially due to a shift in demographics, where the elderly population that most adamantly opposed legalization is

85. ROSMARIN, *supra* note 2, at 11.

86. Grand, *supra* note 83, at 18; ARTHUR DOMOSTAWSKI, OPEN SOC'Y FOUND, DRUG POLICY IN PORTUGAL: THE BENEFITS OF DECRIMINALIZING DRUG USE 1, 26, 47 (2011).

87. Agence France-Presse, *Dutch City of Eindhoven Wants to Grow Their Own Marijuana*, DAILY CHRONIC (Apr. 4, 2013).

88. *Id.*

89. Bruno Waterfield, *Holland to Ban Sale of 'Skunk' Marijuana in Coffee Shops*, TELEGRAPH (Nov. 20, 2012, 4:03 PM), <http://www.telegraph.co.uk/news/worldnews/europe/netherlands/9690851/Holland-to-ban-sale-of-skunk-marijuana-in-coffee-shops.html>.

90. See Section I.B and C for detailed reasoning of why these new laws are in direct conflict with U.N. treaties.

91. In 2002, a national survey showed that roughly two-thirds of Americans opposed legalization of marijuana. Now 52 percent of the population supports it according to Pew. *Majority Now Supports Legalizing Marijuana*, PEWRESEARCHCENTER (April 4, 2013), <http://www.people-press.org/2013/04/04/majority-now-supports-legalizing-marijuana/>.



shrinking, coupled with a growing percentage of adults that admit to having tried cannabis.<sup>92</sup> The change in attitudes also may be the result of successful medical cannabis initiatives in the United States, and coffee shops in the Netherlands, which led the way to introduce more liberal statutes.<sup>93</sup> Furthermore, the states' largest cities, Denver and Seattle, had already placed cannabis possession as a low priority for police and prosecutors.<sup>94</sup>

These referenda also passed for a variety of other reasons, such as conserving public resources, increasing tax revenue and avoiding of discriminatory enforcement.<sup>95</sup> This support stems from the prevailing view that the war on drugs is extremely costly, with approximately \$2.6 billion USD of annual government funding allocated to cannabis enforcement,<sup>96</sup> and nearly half of all national drug arrests being related to cannabis.<sup>97</sup> Furthermore, these initiatives had bipartisan support, even though the justification given differed based on political ideology; liberals mainly viewed this as a moral issue, whereas conservatives perceive this as a states' rights issue.<sup>98</sup> The decisive votes came

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92. *Id.*

93. See Reuter, *supra* note 83, at 93–95; There are currently twenty states and the District of Columbia that have legalized medical marijuana. Jolie Lee & Karl Gelles, *Which States Have Legalized Medical Marijuana?* USA TODAY (Jan. 6, 2014, 4:58 PM), <http://www.usatoday.com/story/news/nation-now/2014/01/06/marijuana-legal-states-medical-recreational/4343199/>.

94. Steven W. Bender, *Joint Report?: The Interplay of State, Federal and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs*, 6 ALB. GOV'T. L. 359, 370 (2013). “Denver voters approved an initiative in 2007 deeming marijuana the city’s ‘lowest’ police priority.” In Seattle, the Seattle city attorney announced that possession was the lowest priority for both the Seattle City Attorney’s Office and the Seattle Police Department.

95. See WILLIAM A. GALSTON & E.J. DIOME JR., *THE NEW POLITICS OF MARIJUANA LEGALIZATION: WHY OPINION IS CHANGING* 10 (2013).

96. See JEFFREY A MIRON, *THE BUDGETARY IMPLICATIONS OF MARIJUANA PROHIBITION* 11, 16 (2005) (finding that in 2002 approximately 20 percent of the \$13.6 billion aimed at drug prevention enforcement was directed at cannabis prohibition.).

97. See FED. BUREAU INVESTIGATION, *CRIME IN THE UNITED STATES 2012: PERSONS ARRESTED* (2013), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/persons-arrested> (finding that in 2012, an estimated 48 percent of all people arrested for drug abuse were arrested for marijuana sale and possession, with a majority of those, 42.4 percent, for possession). In total, there were 749,824 marijuana arrests, more than all violent crime arrests combined. *Id.*

98. GALSTON, *supra* note 95, at 15–16.

from women and Latinos, who historically opposed legalization.<sup>99</sup> However, a majority of both of these groups voted in favor of the referenda as a result of carefully chosen advertisements that highlighted how these initiatives would prevent drug access to youth, generate funds to benefit schools, and positively impact civil rights by lessening the discriminatory nature of drug laws.<sup>100</sup>

On November 6, 2012, ballot initiatives in both Colorado and Washington legalized cannabis by a vote of 54 and 55 percent, respectively.<sup>101</sup> Colorado's Amendment 64, *The Regulate Marijuana Like Alcohol Act of 2012*, authorizes unlicensed legal production of up to six cannabis plants for personal use and non-commercial transactions of up to one ounce.<sup>102</sup> Recreational cannabis shops must obtain government licenses and conform to packaging requirements that specify potency and chemicals used, security specifications, testing requirements, and public safety measures.<sup>103</sup> City governments are allowed to develop further regulations or ban the operation of retail stores.<sup>104</sup> Colorado residents with valid state identification are permitted to buy one ounce at a time, while tourists may buy up to a quarter ounce.<sup>105</sup> In November, 2013, a later referendum approved a combined 25 percent excise and sales tax.<sup>106</sup> The first \$40 million USD of generated revenue will be used for construction of schools, regula-

99. Casey Michel, *The Secret Ingredients for Marijuana Legalization: Moms and Hispanics*, ATLANTIC (Nov. 19, 2012, 2:05 PM), <http://www.theatlantic.com/politics/archive/2012/11/the-secret-ingredients-for-marijuana-legalization-moms-and-hispanics/265369/>.

100. *Id.*

101. Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES, Nov. 8, 2012, [http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html?\\_r=0](http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html?_r=0).

102. COLO. CONST. art. XVIII, § 16(3).

103. *See generally* COLO. CODE REGS. § 212-2 (2013).

104. John Ingold, *A Colorado Marijuana Guide: 64 Answers to Commonly Asked Questions*, DENVER POST (Dec. 31, 2013, 12:30 PM), [http://www.denverpost.com/marijuana/ci\\_24823785/colorado-marijuana-guide-64-answers-commonly-asked-questions](http://www.denverpost.com/marijuana/ci_24823785/colorado-marijuana-guide-64-answers-commonly-asked-questions).

105. *Id.*

106. Matt Ferner, *Colorado Recreational Marijuana Sales Exceed \$5 Million in First Week*, HUFFINGTON POST (Jan. 8, 2014, 7:37 AM), [http://www.huffingtonpost.com/2014/01/08/marijuana-sales-colorado\\_n\\_4552371.html](http://www.huffingtonpost.com/2014/01/08/marijuana-sales-colorado_n_4552371.html).

tion of cannabis stores, and dissemination of educational material discussing the negative impact of cannabis.<sup>107</sup> Cannabis remains unlawful for those under the age of twenty-one, those smoking in open and public spaces,<sup>108</sup> and those driving with more than five nanograms or milliliters of THC in their blood.<sup>109</sup>

Washington's Initiative 502 legalized possession of up to one ounce of cannabis, sixteen ounces in solid form, or seventy-two ounces of cannabis in liquid form, to be consumed within the state's boundaries.<sup>110</sup> Unlike Colorado, cannabis must be purchased from a state licensed retailer and cannot be grown for recreational use or sale.<sup>111</sup> The Washington State Liquor Control Board has authority to promulgate regulations and issue separate licenses for retailers and producers, including setting an exact amount of cannabis that can be grown in each location.<sup>112</sup> Currently, the board has only allocated two million square feet for cannabis cultivation and a maximum of 334 retail stores statewide, but the demand for stores has far exceeded that amount.<sup>113</sup> Current rules are in place to protect public safety, such as making driving under the influence illegal and preventing access to minors under the age of twenty-one.<sup>114</sup> In order to generate tax revenue, Washington implemented a higher tax rate than Colorado.<sup>115</sup>

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107. Ingold, *supra* note 104, at 5.

108. *Id.* at 1.

109. John Ingold, *Colorado Legislature Gives Final OK to Marijuana Driving Limit*, DENVER POST (May 7, 2013, 10:11 AM), [http://www.denverpost.com/ci\\_23189484/colorado-legislature-gives-final-ok-marijuana-driving-limit](http://www.denverpost.com/ci_23189484/colorado-legislature-gives-final-ok-marijuana-driving-limit).

110. Joel Millman, *Washington State Sets Pot Sales Rules: Strict Regulations on Recreational Market*, WALL STREET JOURNAL (Oct. 16, 2013, 6:22 PM), <http://www.wsj.com/articles/SB10001424052702304384104579139831698306604>.

111. *FAQs on I-502*, WASHINGTON STATE LIQUOR CONTROL BOARD (2015), [http://liq.wa.gov/marijuana/faqs\\_i-502](http://liq.wa.gov/marijuana/faqs_i-502).

112. *Id.* at 2.

113. Millman, *supra* note, at 110; Gene Johnson, *State Faces Prospect of Too Many Pot Growers*, HUFFINGTON POST (Jan 7, 2014, 2:07 PM), <http://seatle.cbslocal.com/2014/01/07/state-faces-prospect-of-too-many-pot-growers/>.

114. WASHINGTON STATE LIQUOR CONTROL BOARD, *supra* note, at 111.

115. John Walsh, *Q&A: Legal Marijuana in Colorado and Washington*, BROOKINGS (May 21, 2013), <http://www.brookings.edu/research/papers/2013/05/21-legal-marijuana-colorado-washington>.

While the state initiatives are contrary to international and federal laws,<sup>116</sup> Attorney General Eric Holder announced on August 29, 2013, that the federal government would not interfere with state governments' implementation of these ballot initiatives, as long as they prevent sales to minors, distribution to states that still criminalize cannabis, profit by criminal groups, or prove to be a significant detriment to public health.<sup>117</sup> The Senate Judiciary Committee reiterated this stance and acknowledged the negative consequences of the war on drugs during a congressional hearing on September 10, 2013.<sup>118</sup> Colorado Representative Jared Polis introduced a bill still pending before Congress entitled *Ending Federal Cannabis Prohibition Act* that would remove cannabis from the Controlled Substance Act.<sup>119</sup>

These statements and actions from political leaders show promise that the federal government will not preempt the state initiatives, but the judicial branch and the Drug Enforcement Agency ("DEA") could still prevent state action. The Supreme Court has previously allowed federal oversight of California medicinal dispensaries, granted Congress authority to prohibit local cultivation and use of cannabis that is compliant with state law,<sup>120</sup> and prevented the reclassification of cannabis.<sup>121</sup> In order

116. Cannabis is regulated as a Schedule I substance under the CSA in order to "enable the United States to meet all of its obligations under international treaties." 21 USC §§ 801(7), 801a(2)-(3) (2007). The state statutes violate international law because the treaties are binding on them as well due to the Supremacy Clause in the Constitution. U.S. CONST., art. VI, cl. 2. International treaties have been interpreted by the Supreme Court as binding on local and state governments. In *Asakura v. Seattle*, the court found that a city ordinance that violated an international treaty was unconstitutional because the treaty applied even to local governments. *Asakura v. Seattle*, 265 U.S. 335 (1922).

117. MEMORANDUM, *supra* note 8.

118. *Conflicts Between State and Federal Marijuana Laws: Hearing Before S. Comm. on the Judiciary*, 113th Cong. 7 (2013) (statement of John Urquhart, Sheriff).

119. H.R. 499, 113th Cong. (2013).

120. *See Bender*, *supra* note 94, 376–78. In 2001, the Supreme Court, in *United States v. Oakland Cannabis Buyers' Coop*, stated that the federal government could act because the Controlled Substance Act failed to provide an exception for the medical necessity. In 2005, *Gonzales v. Raich*, established that local cultivation could be banned because of the impact on interstate commerce and the national economy.

121. The federal appeals court in *American For Safe Access v. DEA* in 2013 upheld the DEA's rejection of a petition to reclassify marijuana from its current

to comply with international obligations, the DEA continues to raid medicinal dispensaries despite the Obama administration's repeated requests that it end this practice.<sup>122</sup>

### B. Uruguay

In June, 2012, President Jose Mujica of Uruguay proposed a bill to legalize and regulate cannabis use, after a report from the Defense Ministry recommended this as one way to tackle the rising level of crime.<sup>123</sup> Violence is seen as a relatively new phenomenon in Uruguay that began in 2001 as a result of international cartels using the nation to produce, sell, and traffic drugs.<sup>124</sup> Even though Uruguay still remains one of the safest countries in the world, Uruguayans have an exaggerated sense of their level of domestic insecurity.<sup>125</sup> Another development that led to this bill's creation is a significant increase in the use of cannabis in Uruguay during this same period.<sup>126</sup>

This new law is also an attempt to close a loophole created by a 1974 law, which allowed cannabis for personal use, but prohibited the sale or production of it.<sup>127</sup> The earlier provision proved

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federal status as a dangerous drug with no accepted medical use. The U.S. Supreme Court failed to grant a certification. Paul Armentano, *US Supreme Court Refuses to Review DEA's Denial Of Petition That Sought to Reclassify Cannabis*, NORML (Oct. 8, 2013), <http://blog.norml.org/2013/10/08/us-supreme-court-refuses-to-review-deas-denial-of-petition-that-sought-to-reclassify-cannabis>. A U.S. district court upheld the constitutionality of the CSA's classification of marijuana, in part due to the necessity to satisfy international treaty obligations. *United States v. LaFrosica*, 854 F. Supp. 1338, 1341 (S.D.N.Y. 1973).

122. See Bender, *supra* note 94, 378–79.

123. *Weed All About It*, ECONOMIST (Dec. 11, 2013, 3:36 PM), <http://www.economist.com/blogs/americasview/2013/12/uruguays-cannabis-law>.

124. GEOFFREY RAMSEY, *INSIGHT CRIME, URUGUAY: MARIJUANA, ORGANIZED CRIME AND THE POLITICS OF DRUGS* 13–15 (July 2013) [hereinafter *INSIGHT CRIME*].

125. RAMSEY, *supra* note 124, at 13–14. Even though the country has one of the lowest rates of violent crime and murder globally with 6 per 100,000 inhabitants, a survey conducted by Corporacion Latinobarometro found that Uruguay has one of the largest gaps of the level of perceived insecurity and the rate of actual violence. In May, 2012, 40 percent of the population felt that the main problem facing the country was security and 84 percent felt that crime had worsened in the past two months.

126. U.N. OFFICE ON DRUGS AND CRIME, *WORLD DRUG REPORT 2013*, at 13, U.N. Sales No. E.13.XI.6 (2013).

127. Rosmarin & Eastwood, *supra* note 2, at 35.

problematic because police continuously arrested and detained users under the de facto presumption that they were engaged in the cultivation or trafficking, rather than mere possession of, cannabis.<sup>128</sup> The updated law's main purpose is to use economic resources and government personnel more efficiently in order to combat trafficking of all drugs, including cannabis.<sup>129</sup>

On December 10, 2013, the Uruguayan senate, by a vote of sixteen to thirteen, passed a detailed bill,<sup>130</sup> of which 66 percent of Uruguayans disapprove.<sup>131</sup> The law allows individuals to grow up to six plants, to buy up to forty grams monthly from state pharmacies, and to join membership clubs of fifteen to forty-five people each that may collectively grow up to ninety-nine plants.<sup>132</sup> The considerable regulation of cannabis, such as controlling the amount of THC to ensure the drug's quality<sup>133</sup> and setting a standard national price, serves to compete with, and suppress, the black market.<sup>134</sup> In order to prevent drug tourism, only Uruguayan citizens over eighteen are able to purchase cannabis.<sup>135</sup> The bill promotes public health by mandating educational campaigns on drug consumption for school children,<sup>136</sup> segregating the cannabis market from the market for more harmful drugs, and using the generated tax revenue to develop programs focused on helping people with drug problems.<sup>137</sup>

128. *Id.*

129. RAMSEY, *supra* note 124, at 7. Jose Mujica stated in an interview that "it is not beautiful to legalize marijuana, but it is worse to give people to the drug traffickers." *No Es Bonito Legalizar La Marihuana Pero Peor Es Regalar Gente Al Narco*, LA NACION (Dec. 11, 2013), <http://www.lanacion.com.ar/1646473-jose-mujica-no-es-bonito-legalizar-la-marihuana-pero-peor-es-regalar-gente-al-narco>.

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

131. *Uruguay: 66% Se Oponen A Legalización De Marihuana*, EL SIGLO, (Dec. 29, 2013, 8:27 AM), <http://www.elsiglodurango.com.mx/noticia/483167-uruguay-66-se-opone-a-legalizacion-de-marihuana.html>.

132. Article 5. Proyecto Ley 19.172. [Uru.].

133. *Id.*; RAMSEY, *supra* note 124, at 10.

134. Uki Goni, *Uruguay Sets Price of Legalised Cannabis at \$1 a Gram*, GUARDIAN (Oct. 22, 2013, 1:19 PM), <http://www.theguardian.com/world/2013/oct/22/uruguay-legal-cannabis-1-dollar-gram>.

135. Romero, *supra* note 130, at 2; Article 14. Proyecto Ley N708/13. [Uru.].

136. Article 10. Proyecto Ley N708/13. [Uru.]; Jose Mujica, President of Uruguay, Remarks at the General Assembly (Aug. 8, 2012).

137. *Mujica, supra* note 129.

Colorado, Washington, and Uruguay have allowed for a regulated cannabis market by legalizing the drug's production, sale, and use. However, there are key differences in the justifications provided for, and the implementation of, the laws that reflect cultural and economic disparities. For example, retail stores are private in the United States, but are operated by the government in Uruguay.<sup>138</sup> These variant models were chosen because Uruguayans, unlike Americans, are less suspicious of government interference in their lives and more accustomed to state-run enterprises.<sup>139</sup> Another major difference is that Uruguay's primary motive to pass the bill was to weaken the drug cartels, a reason frequently highlighted by other Latin American countries.<sup>140</sup> In contrast, the United States has wanted to generate revenue and save government resources, which is a reason that some European cities have also mentioned in their attempts to legalize cannabis.<sup>141</sup> In the future, these isolated bills, with important ideological distinctions, will likely become models for change in similarly oriented nations attempting to regulate cannabis.<sup>142</sup>

### III. CHANGING CURRENT INTERNATIONAL DRUG TREATIES TO ALLOW DOMESTIC CHANGE IN THE REGULATION OF CANNABIS PROVES UNWORKABLE

The laws in Colorado, Uruguay, and Washington that create a regulatory market for cannabis clearly breach obligations under the Single Convention and 1988 Convention. There is no liberal interpretation that could reconcile these new laws within the confines of the existing conventions. As a result, a change is needed in the convention or in the respective countries' obligations under the conventions. For instance, the states could alter their international obligations by placing a reservation on the specific portions concerning cannabis, or by withdrawing from

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138. TRANSNATIONAL INSTITUTE, LATIN AMERICA DRUG POLICY DIALOGUE 2013 MALDONADO (URUGUAY) 12 (Apr. 2013).

139. *Id.*

140. RAMSEY, *supra* note 124, at 13.

141. In Rasquera, Spain, the mayor developed an anti-crisis plan in order to relieve the town from public debt by allowing a public company to provide cannabis to adults legally. TRANSNATIONAL INSTITUTE, *supra* note 138, at 10.

142. In 2014, voters in Oregon and Alaska approved cannabis legislation ballot initiatives similar to Washington and Colorado. Dan Merica, *Oregon, Alaska and Washington, D.C. Legalize Marijuana*, CNN (Nov. 5, 2014, 2:39 PM), <http://www.cnn.com/2014/11/04/politics/marijuana-2014/>.

the treaty altogether. Another option would be to change the language of the treaties for all signatories by removal of cannabis from the conventions' schedules or formal amendment. This section will explore the various options that would ease restrictions currently governing cannabis, but would otherwise maintain international compliance with the other requirements of the treaties.

### *A. Denunciation*

Signatories could attempt to unilaterally exit from both of the conventions. In order to initiate the process, the Member States would need to provide written notification to the Secretary-General.<sup>143</sup> The withdrawal would become effective for the Single Convention after the following first day of January, provided that the denunciation is received at least six months prior;<sup>144</sup> and for the 1988 Convention, one year after the Secretary-General receives the denunciation.<sup>145</sup> While the departing state does not need to explain or get consent from other states, exiting with no formal justification could damage a state's international reputation.<sup>146</sup> For this reason, most signatories justify such an action by proving that the treaty was based on a factual error<sup>147</sup> or that, since ratification, there has been a significant change in circumstances.<sup>148</sup>

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143. Single Convention, *supra* note 12, art. 46; 1988 Convention, *supra* note 13, art. 30.

144. Single Convention, *supra* note 12, art. 46.

145. 1988 Convention, *supra* note 12, art. 30.

146. Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1582, 1621–26 (2005) [hereinafter *Exiting*].

147. Vienna Convention on the Law of Treaties art. 48, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

148. *Id.* art. 62. Article 62(1) provides:

A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

*Id.*



In order to prove that an error in reasoning was the basis of strict classification of cannabis in these conventions, signatories could prove that the drafters incorrectly concluded at the time of ratification that cannabis was a dangerous, addictive substance with no beneficial medical value.<sup>149</sup> Alternatively, if signatories concede that the harsh scheduling of cannabis was initially justified, there is now ample evidence to prove the medical utility of the plant,<sup>150</sup> which could provide for significantly changed circumstances. Advocates of cannabis prohibition could state that these grounds justify cannabis use solely for medical reasons, something already allowed by the convention.<sup>151</sup> Another argument for blanket misclassification of cannabis is that the drug arguably poses fewer health risks than alcohol or tobacco,<sup>152</sup> two

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149. The 1952 WHO Expert Committee on Drugs Liable to Produce Addiction made an unsubstantiated declaration that the use of cannabis had no medical justification, which was eventually used as the basis to place cannabis under the strictest control regime. KITTL BRUUN, ET AL., *THE GENTLEMEN'S CLUB: INTERNATIONAL CONTROL OF DRUGS AND ALCOHOL* 196 (1975). This opinion virtually ignored other scientific reports, which unequivocally stated that cannabis is not medically harmful. ("Already in 1944, The La Guardia Committee Report on Marihuana conducted in New York City that stated that 'the practice of smoking marihuana does not lead to addiction in the medical sense of the word' and that 'the use of marihuana does not lead to morphine or heroin or cocaine addiction.' In 1968 the Wootton Report stated that 'the dangers of cannabis use as commonly accepted in the past and the risk of progression to opiates have been overstated' and 'cannabis is less harmful than other substances amphetamines, barbiturates, codeine-like compound.") Bollotta, *supra* note 22, at 107.

150. Marijuana is a useful treatment for glaucoma, nausea in chemotherapy patients, asthma, and multiple sclerosis pain. For studies on medicinal benefits, see NAT'L RES. COUNCIL, NAT'L ACADEMY OF SCI., *AN ANALYSIS OF MARIJUANA POLICY* (1982) (advocating for a reconsideration of cannabis as a result of its use for possible medical treatment for glaucoma and asthma patients); J. JOY ET AL., NAT'L INST. OF MEDICINE RES., *MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE* (1999) (finding that marijuana was effective for nausea and severe weight loss for AIDS and cancer patients).

151. Single Convention, *supra* note 12, art. 4(c).

152. In August 1995, WHO released a report, which concluded "on existing patterns of use, cannabis poses a much less serious public health problem than is currently posed by alcohol and tobacco in Western societies." Martin Jelsma, *Drugs in the U.N. System: The Unwritten History of the 1998 United Nations General Assembly Special Session on Drugs*, 14 INT'L J. DRUG POL'Y 181, 190 (2003). A Canadian report concluded that the "health costs for alcohol and tobacco are much higher than for cannabis. This may indicate that cannabis use involves fewer health risks than alcohol or tobacco." Gerald Thomas & Chris Davis, *Cannabis, Tobacco and Alcohol Use in Canada*, 5 VISIONS J. 5, 11 (2009).

legal substances outside of these treaties' control. A final reason for determining an error is that cannabis is no longer considered a gateway to more harmful drug use.<sup>153</sup> Therefore, the particularly stringent restrictions on cannabis use are not proportionate to the dangers involved.

Alternatively, the Member States could prove a fundamental change in circumstances, either independently or in connection with the error. In order for such a change to be validly invoked, the underlying circumstances essential to the parties' consent to the treaty must have subsequently changed, the change must have been unforeseeable and no fault of the invoking party, and the change's effect must have been so significant as to transform the future performance of the treaty obligations.<sup>154</sup> This reasoning applies for three reasons: the dramatic shift in cannabis usage from isolated usage by minorities to widespread use,<sup>155</sup> the increased reliable, scientific data concerning cannabis' medical benefits,<sup>156</sup> and the resultant unintended consequences of the

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153. Pablo Osvaldo Wolff, the head of the Addiction Producing Drug Section of the WHO from 1949-1955 stated in a report entitled the Physical and Mental Effects of Cannabis that "not only is marihuana smoking per se a danger but that its use eventually leads he smoker to turn to intravenous heroin injections." This reasoning might also provide justification that cannabis was seen as not being as dangerous as other drugs under the strictest control but was rather was seen as a gateway drug to more harmful substances. Bruun, *supra* note 149, at 198-99. Recently, the Institute of Medicine in the United States found that there is little persuasive evidence that the pharmacological properties of cannabis can provoke the switch to hard drugs. THE DUTCH MINISTRY OF FOREIGN AFFAIRS, FAQ DRUGS: A GUIDE TO DUTCH POLICY 1, 7 (2008). A research study concluded that it's the users' personalities and opportunities that determine the risk of using harder drugs rather than the drug's contents. ANDREW R. MORRAL, ET AL., RAND DRUG POLICY RESEARCH CENTER, USING MARIJUANA MAY NOT RAISE THE RISK OF USING DRUGS (2002).

154. Vienna Convention, *supra* note 147, art. 62(1); *but see* Oliver J. Lissitzyn, *Treaties and Changed Circumstances (Rebus Sic Stantibus)*, 61 AM. J. INT'L L. 895, 912 (1967) ("A change in circumstances may be invoked even if it was not "unforeseen" in the absolute sense. The parties may have been aware of the possibility of the change but for various reasons failed to provide for it expressly."); *Id.* at 915 ("Foreseeing" a future event may mean expecting it as inevitable, expecting it as probable, or thinking of it as possible but not likely.").

155. See generally Part I.A & I.C for details on how cannabis became used by more mainstream society by the 1970 and 1980s.

156. See footnote 150 for studies showing the medical usefulness of cannabis.

prohibitionist theory underlying the treaties.<sup>157</sup> The United States and Uruguay could successfully argue that these changes radically transform their obligations and undermine the premises that were essential to their ratification.<sup>158</sup>

However, withdrawal may not terminate the states' treaty obligations, if supporters of cannabis prohibition successfully argue that the obligation to prevent cannabis legalization is part of customary international law under Article 38 of the Vienna Convention on the Law of Treaties ("Vienna Convention.")<sup>159</sup> Advocates of this point of view would need to prove that there is a consistent, general practice of cannabis prohibition that is required by law.<sup>160</sup> If successfully argued, the withdrawn states would still be bound by the treaty obligations, even though no longer signatories.<sup>161</sup> However, given the increasingly lenient treatment of cannabis globally, the number of countries who want to pass similar legislation, and the recent proposal to end prohibition,<sup>162</sup> such a position is not likely to be substantiated.

This approach, however, is likely to fail, even though denunciation appears feasible. Withdrawal is a drastic measure that

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157. Some examples of these unintended consequences include: (1) the growth of a huge criminal black market in order to meet the drug's demand, (2) extensive policy displacement where resources focused on police at the expense of funding public health initiatives, (3) geographical displacement where drug become produced in less regulated areas, and (4) the stigmatization, marginalization, and exclusion of drug users. Fit for Purpose, *supra* note 20, at 10–11. Cannabis legalization in the United States had the opposite effect and has led to a 32% drop in the drug's confiscation at the U.S.-Mexican border in 2014. Ioan Grillo, *U.S. Legalization of Marijuana has Hit Mexican Cartels' Cross-Border Trade*, TIME (Apr. 8, 2015), <http://time.com/3801889/us-legalization-marijuana-trade/>.

158. This argument is more difficult for the United States due to their instrumental role in the adoption of the prohibitionist framework and the strict regulation for cannabis.

159. Vienna Convention, *supra* note 147, art. 38.

160. Michael Byers, *Custom, Power and the Power of Rules Customary International Law From An Interdisciplinary Perspective*, 17 MICH. J. INT'L. L. 109, 136 (1995).

161. *Id.*

162. A draft of a U.N. paper set to be released in the spring of 2014 showed that a growing group of Latin American and European countries desire a public-health approach to be adopted in place of the current prohibition approach. Jamie Doward, *Leaked Paper Reveals U.N. Split over War on Drugs*, GUARDIAN (Nov. 30, 2013, 2:50 PM), <http://www.theguardian.com/politics/2013/nov/30/un-drugs-policy-split-leaked-paper>.

would absolve withdrawing parties from all the treaty's obligations. The drug conventions remain almost universally adhered to<sup>163</sup> and states would hesitate to retreat on their commitments, out of fear of diplomatic backlash.<sup>164</sup> Moreover, the purpose of the legalization initiatives is to provide a regulated, licit cannabis trade, rather than allow the growth of the black market.<sup>165</sup> The states are only liberalizing their prohibitionist approach to cannabis and are unlikely to completely sever ties with the drug conventions' stance for other drugs. As a result, states would be reluctant to use this option.

### *B. Re-accession with a Reservation*

After the denunciation takes effect, states could re-accede to the treaties with a reservation to the scheduling of cannabis.<sup>166</sup> This process differs slightly depending on the treaty. The Single Convention contains specific provisions controlling the reservation process, whereas the 1988 Convention has no specification, and is thus governed by the Vienna Convention.<sup>167</sup>

#### 1. The Single Convention

For the Single Convention, a reservation is allowed, so long as the parties notify the U.N. Secretary-General and no more than one-third of the signatories object to the reservation within a year.<sup>168</sup> After a year, the reserving parties could re-accede, pro-

163. There are 186 signatories to the Single Convention and 182 to the 1988 convention. *Fit for Purpose*, *supra* note 20, at 3.

164. *Exiting*, *supra* note 146, at 1590–91.

165. Charlie Devereux & Lucia Baldamir, *Uruguay Vote May Augur First State-Regulated Cannabis Market*, BLOOMBERG (DEC. 10, 2013, 8:13 AM), <http://www.bloomberg.com/news/articles/2013-12-10/uruguay-vote-may-set-up-first-state-regulated-marijuana-market>.

166. Vienna Convention, *supra* note 148, art. 2(1)(a). “A reservation is a unilateral statement by party when signing, ratifying, accepting, approving or acceding to a treaty whereby its purports to modify or exclude the effect of certain legal provisions as applied to their state. Even though reservations to a treaty used to be made when initially ratifying a treaty, late reservations are increasingly being used.” Laurence R. Helfer, *Not Fully Committed? Reservations, Risk and Treaty Design*, 31 *YALE J. INT’L L.* 367, 382 (2006).

167. ROBIN ROOM ET AL., *ROADMAPS TO REFORMING THE U.N. DRUG CONVENTION* 15 (2012). [hereinafter ROOM – ROADMAPS].

168. Single Convention, *supra* note 12, art. 50(3).

vided that less than one-third of the parties object to the re-accession.<sup>169</sup> As more countries are beginning to relax their stance on cannabis, a reservation could be successful.

Further support for this action's viability is gained from Bolivia's successful challenge to the Single Convention's classification of the coca leaf.<sup>170</sup> Bolivia argued that the Single Convention's restriction of the coca leaf violates the Bolivian constitution by denying the right of the indigenous population to use the leaf for traditional purposes.<sup>171</sup> As a result, the Bolivian government formally withdrew from the Single Convention<sup>172</sup> and re-acceded to the Convention, with a reservation against the ban on the coca leaf and its traditional uses on January 11, 2013.<sup>173</sup> Despite criticism from the INCB,<sup>174</sup> the reservation was allowed

169. Room, *supra* note 6, at 157.

170. Jamie Doward, *Bolivians Demand the Right to Chew Coca Leaves*, GUARDIAN (Jan. 12, 2013, 7:06 PM), <http://www.theguardian.com/world/2013/jan/13/bolivia-drugs-row-chew-coca>.

171. INTERNATIONAL DRUG POLICY CONSORTIUM, BOLIVIA'S LEGAL RECONCILIATION WITH THE U.N. SINGLE CONVENTION ON NARCOTIC DRUGS 1, 2 (2011), available at <http://www.undrugcontrol.info/en/issues/unscheduling-the-coca-leaf/item/2628-bolivias-legal-reconciliation-with-the-un-single-convention-on-narcotic-drugs>.

The state protects the original and ancestral use of coca as cultural patrimony, a renewable natural resource of the biodiversity of Bolivia, and as a factor of social cohesion; in its natural state it is not a narcotic. The revaluing, production, commercialization, and industrialization shall be regulated by law.

Constitucion de 2009 [Constitution of 2009], July 5, 2011, art. 384 (Bol.).

172. Bolivia: Denunciation of the Single Convention on Narcotic Drugs, 1961, C.N.421.2011.TREATIES-28 (June 30, 2011).

173. Press Release, U.N. Office on Drugs and Crime, Bolivia to Re-accede to U.N. Drug Convention, while Marking Exception on Coca Leaf Chewing, available at <https://www.unodc.org/unodc/en/frontpage/2013/January/bolivia-to-re-accede-to-un-drug-convention-while-making-exception-on-coca-leaf-chewing.html> (last visited Mar. 15, 2015).

174. Press Release, International Narcotics Control Board, International Narcotics Control Board Regrets Bolivia's Denunciation of the Single Convention on Narcotic Drugs, UNIS/NAR/1114 (July 5, 2011) ("The Board is of the opinion that while this step by Bolivia may be in line with the letter of the Convention, such action is contrary to the Convention's spirit" as it "would undermine the integrity of the global drug control system, undoing the good work of the Governments over many years to achieve the aims and objectives of the drug control conventions, including the prevention of drug abuse which is devastating the lives of millions of people.").

because only fifteen countries objected to Bolivia's reservation.<sup>175</sup> Bolivia's successful challenge illustrates how other states can propose a similar challenge concerning cannabis regulation in order to allow for the legalization of its use in the domestic sphere to comply with international law.

## 2. The 1988 Convention

According to the 1988 Convention, a party may make a reservation at any time, so long as the reservation is compatible with the treaty's "object and purpose."<sup>176</sup> This raises the question of whether cannabis legalization statutes are incompatible with the convention's object and purpose. Unfortunately, this is a subjective determination, since neither the Vienna Convention nor other treaties provide any guidance about the meaning of this phrase.<sup>177</sup> On the one hand, a state could justify a reservation concerning cannabis, reasoning that the liberalization of cannabis promotes the "health and welfare of mankind" and prevents illicit drug trafficking<sup>178</sup> by allowing for a controlled market. On the other hand, the reservation could be irreconcilable with the treaty because it repeatedly advances a prohibitionist view and specifies that the production of cannabis should be limited to medicinal and scientific purposes.

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175. United States of America: Objection to the Reservation Contained in the Communication by the Plurinational State of Bolivia, C.N.361.2012.TREATIES-VI.18 (July 3, 2012); United Kingdom: Objection to the Reservation Contained in The Communication By The Plurinational State of Bolivia, C.N.719.2012.TREATIES-VI.18 (Dec. 14, 2102); Sweden: Objection to the Reservation Contained in the Communication By The Plurinational State of Bolivia C.N.732.2012.TREATIES-VI.18 (Dec. 21, 2012); Italy: Objection To The Reservation Contained In the Communication By the Plurinational State of Bolivia C.N.750.2012. REATIES-VI.18 (Dec. 28, 2012); Canada: Objection to the Reservation Contained In the Communication By the Plurinational State of Bolivia C.N.751.2102.TREATIES-VI.18 (Dec. 28, 2012); France: Objection to the Reservation Contained In the Communication By The Plurinational State of Bolivia C.N.19.2013.TREATIES-VI.18 (Jan. 3, 2013); Germany: Objection To The Reservation Contained In The Communication By The Plurinational State of Bolivia C.N.57.2013.TREATIES-VI.18 (Jan. 4, 2013); Mexico: Objection To The Reservation Contained In The Communication By The Plurinational State of Bolivia C.N.85.2013.TREATIES-VI.18 (Jan. 9, 2013).

176. Vienna Convention, *supra* note 147, art. 19(c).

177. Edward T. Swaine, *Reserving*, 31 YALE J. OF INT'L L. 307, 315 (2006).

178. Single Convention, *supra* note 12, preamble.

Normally, a reservation does not need to be formally accepted in order to take effect.<sup>179</sup> However, in order for the modification to apply to other countries, non-reserving states would need to formally accept or fail to reject the reservation within one year.<sup>180</sup> In a limited number of circumstances, when the ratification of the entire treaty by all signatories is essential to the object and purpose, all signatories must accept the reservation.<sup>181</sup> Complete acceptance does not seem to be a requirement, since twenty-three Member States have previously made successful reservations to the 1988 Convention.<sup>182</sup>

### 3. Reservation as a Temporary Solution

The reservation process allows specific states to revise their treaty commitments unilaterally in response to the conflicting domestic legislation and according to its precise wishes.<sup>183</sup> The benefit of this approach compared to complete denunciation is that the reserving party remains committed to all of the conventions' provisions except those directly concerning cannabis.<sup>184</sup> Unilateral action may compel other countries that have decriminalization and depenalization statutes to lodge the same or similar reservations concerning the classification on cannabis. Reservations will increase the costs on compliant nations who remain committed to prohibiting cannabis, since the legalization provisions will have a global impact and make prohibiting cannabis harder in other states.<sup>185</sup> Thus, mass reservations could drive modification of the treaties' provisions toward cannabis either through formal amendment or renegotiation.<sup>186</sup>

One fear for the reserving party is that other countries would retaliate by placing economic sanctions as a punishment for the reservation on cannabis.<sup>187</sup> For example, in response to Bolivia's

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179. Vienna Convention, *supra* note 147, art. 20.

180. *Id.* art. 21(3). *See also* Swaine, *supra* note 177, at 316 (noting that non-reserving states and treaty monitoring bodies could implicitly imply reservation by stating that the reservation was incompatible with the remaining portions of the treaty or with other treaties and thus unnecessary).

181. Vienna Convention, *supra* note 147, art. 20(3).

182. ROOM – ROADMAPS, *supra* note 166, at 20.

183. Helfer, *supra* note 165, at 373.

184. *See id.* at 375.

185. Exiting, *supra* note 146, at 1646; Helfer, *supra* note 165, at 371.

186. Exiting, *supra* note 146, at 1646; Helfer, *supra* note 165, at 371.

187. ROOM – ROADMAPS, *supra* note 166, at 24.

actions, the European Commission investigated whether the denunciation justified a withdrawal of economic aid to Bolivia,<sup>188</sup> but ultimately concluded that the denunciation did not warrant such action.<sup>189</sup> Likewise, western countries would be hesitant to enact embargos for two main reasons: the fear that signatory states would withdraw from the conventions entirely, or the recognition that their own domestic legislation and policies concerning cannabis are contrary to the conventions as well.<sup>190</sup> While the international drug regulatory bodies have urged the United States and Uruguay to comply with international drug control treaties, they have failed to insinuate any possible repercussions for failure to comply. Therefore, sanctions are unlikely to be imposed, even if they remain a fear for states considering a reservation.

Another reason to not place a reservation is that the reserving states will no longer participate in international regulation of cannabis, which seems contrary to the aim of the new legislation.<sup>191</sup> As a result, this provides only a temporary remedy in order to regulate the treatment of cannabis under international law.

### *C. Changing the Status of Cannabis*

The Single Convention currently classifies cannabis as one of the most dangerous narcotics subject to regulation.<sup>192</sup> At an international level, cannabis can be deleted from the Single Convention entirely or moved to a lower schedule in order to allow domestic legalization to comply with international law.<sup>193</sup> Most signatory states model their scheduling decisions on the U.N.'s determinations, so the U.N.'s failure to reclassify cannabis

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188. Commission Decision 2012/161, 2012 O.J. (L 80/30).

189. Commission Decision 2013/136, 2013 O.J. (L 75/35).

190. Reservations, *supra* note 165, at 372. Noting that countries are less likely to object to reservations when they secretly want to change their own treaty commitments and that commitment to part of the treaty is a preferable alternative. *Id.*

191. La Nacion, *supra* note 130.

192. See *supra* Part 1. Cannabis is listed in Schedule I and Schedule VI substance, which mandates that all regulative control articles apply in the Single Convention. The 1988 Convention does not schedule drugs.

193. BRUNN, *supra* note 149, at 47.



serves as an impediment for domestic legalization.<sup>194</sup> Unfortunately, according to Article 3(6) cannabis can only be transferred to Schedule II or removed from the Convention.<sup>195</sup> Rescheduling fails to provide a viable solution, since Schedule II still prohibits the cultivation, production, and sale of drugs.<sup>196</sup> Therefore, descheduling is the only option.

Descheduling cannabis begins with a Member State justifying to the U.N. Secretary-General why cannabis is incorrectly scheduled.<sup>197</sup> Next, the World Health Organization ("WHO") Expert Committee would need to issue a recommendation to CND as to whether cannabis should be removed from the schedule based on the extent of the drug's effects in comparison to other drugs.<sup>198</sup> In making this determination, the WHO has "wide discretion" in formulating its final decision, but should be guided by public health concerns, including "the degree of danger which the substance in question presents[,] but also from the need to make useful medicines as easily available as may be compatible with the requirements of their control."<sup>199</sup> Next, the CND would vote by simple majority, as to whether, based on the WHO's recommendation, cannabis should be deleted from the schedule.<sup>200</sup>

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194. In the United States, congress enacted Controlled Substances Act in 1970 for dual purpose (1) to control and regulate the licit and illicit trade in and use of such substances and (2) to implement the U.S. obligations under the Single Convention. 21 U.S.C. § 801a.

195. Single Convention, *supra* note 12, art 3(6).

196. *Id.* art. 2(2). Schedule II substances are subject to the same measures of control as Schedule I substances except for articles 30(2) and (5) which deal with labeling and business transactions respectively. Therefore, the cultivation, production, and sale of drugs would still be illegal under international law according to Article 36.

197. *Id.* art. 3(1).

198. *Id.* art. (3)(iii). There are two stages to the WHO process. Stage one requires WHO to find cannabis is in fact not a) liable to similar abuse and productive of similar ill effects as the drugs in Schedule I or Schedule II, or b) convertible into such drug. The original classification criteria used by the Technical Committee at the 1961 are instructive to examine the "degree of liability to abuse" and "its risk to public health and social welfare." New Zealand, *supra* note 17, at 81. The WHO scientific review process established under the single convention is designed to permit a rigorous and evidence based evaluation of medicines that balances risks of abuse against the benefits obtained through legitimate use. Commentary on the Single Convention, *supra* note 57, at 563.

199. Commentary on the Single Convention, *supra* note 57, at 563.

200. Single Convention, *supra* note 12, art. 3(7).

Finally, a signatory state may appeal the decision to the U.N. Economic and Social Council (“ECOSOC”).<sup>201</sup>

The recent history of relevant actions under these provisions of the international system does not suggest a likelihood of success in removing cannabis from the scope of the treaties. The first impediment to declassification is that the WHO is reluctant to issue a definitive statement concerning the misclassification of cannabis. For example, in August, 1995, the WHO released a report, which concluded that “cannabis poses a much less serious public health problem than is currently posed by alcohol and tobacco in Western societies.”<sup>202</sup> However, the 1997 final version of the report retracted the comparative statement, officially because of scientific judgment, and unofficially due to political pressure from other international leaders.<sup>203</sup> The other problem is that the CND has refused to reschedule other substances such as dronabinol, a type of THC, despite the WHO’s recommendation.<sup>204</sup> Based on this precedent, it is unlikely that cannabis could successfully be descheduled.

#### *D. Amendment*

An alternative way to change the scope of the international drug treaties is to make a formal amendment. The first step in the amendment process is to remove any mention of cannabis from the current treaties, and the second is to change the scope

201. Room, *supra* note 6, at 152.

202. Jelsma, *supra* note 152, at 190.

203. *Id.* Jelsma quotes the 1997 version of the final report, “the group of experts who prepared the review of the current knowledge about cannabis in 1995 included a section in the draft report which attempted to compare what is known about the health effects of cannabis to the health hazards of a variety of licit and illicit drugs with psychoactive effects such as alcohol, tobacco and opiates. However, the reliability and public health significance of such comparisons are doubtful. . . . The quantitative risk of cannabis use are largely unknown in the absence of reliable epidemiological studies, and therefore such comparisons tend to be more speculative than scientific.” *Id.*

204. UNODC, E/CN.7/2007/16, Decision 50/2 (2007). The CND decided not to vote on whether to re-schedule THC, and they request that the WHO make another review when more information is available. The report that the CND found inconclusive was the WHO EXPERT COMMITTEE ON DRUG DEPENDENCE, THIRTY-THIRD REPORT, Mar. 17, 2003, which definitively stated that “the abuse liability of dronabinol is expected to remain very low so long as cannabis continues to be readily available. The Committee considered that the abuse liability of dronabinol does not constitute a substantial risk to public health and society.”

of the treaty's control for all drugs.<sup>205</sup> Any party could propose an amendment by providing a reasonable explanation for the amendment to the U.N. Secretary-General.<sup>206</sup> In order for the amendment to pass, there would need to be unanimous consent among Member States, or, in the event of parties objecting, a vote in a conference convened by the ECOSOC.<sup>207</sup> A unanimous vote is crucial because the ECOSOC is not obligated to call such a conference.<sup>208</sup> The last possible option is for the U.N.'s General Assembly to convene to act on the amendment despite signatories' opposition.<sup>209</sup>

Both amendments are likely to fail because of precedent. The only successful amendment to the treaties was the 1972 Protocol strengthening several provisions in the Single Convention.<sup>210</sup> The other proposed amendment, introduced by Bolivia in 2009 regarding coca leaves, was subsequently rejected as a result of objections made by eighteen countries.<sup>211</sup> As the Bolivian example illustrates, such changes are unlikely to be approved by consensus. Therefore, amendment of the current cannabis control treaties is unlikely to succeed, due to the unwieldy process involved and the conservative nature of most U.N. bodies.<sup>212</sup>

#### IV. IMPLEMENTING A NEW INTERNATIONAL TREATY FOR CANNABIS

As shown in Section III, there is no feasible way to change the status of cannabis within the framework of the current treaty. Since countries, particularly the United States, want to remain

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205. Single Convention, *supra* note 12, art. 47; 1988 Convention, *supra* note 12, art. 31. Regulation would involve the amendment of articles 19, 21, and 36 to exclude cannabis and cannabis resin, while legalization would involve amendment of articles 28, 29, 30, and 31.

206. Single Convention, *supra* note 12, art. 47; 1988 Convention, *supra* note 12, art. 31.

207. Single Convention, *supra* note 12, art. 47; 1988 Convention, *supra* note 12, art. 31.

208. Commentary on the Single Convention, *supra* note 57, at 462–63.

209. *Id.*

210. Bewley-Taylor, *supra* note 30, at 14.

211. Martin Jelsma, *Lifting the Ban on Coca Chewing: Bolivia's Proposal to Amend the 1961 Single Convention* (Amsterdam: Transnat'l Inst., Series on Legislative Reform of Drug Policies, No. 11, 2011), available at <http://www.tni.org/briefing/lifting-ban-coca-chewing>.

212. See Footnote 13 and 14 for statements from the UNODC and INCB denouncing Uruguay and the United States for their action.

adherent to prior drug treaties, the only permanent solution is to formulate a new treaty exclusively for cannabis. The new treaty should be modeled after the WHO Framework Convention on Tobacco Control (“FCTC”), the first public health oriented treaty aimed specifically at tobacco.<sup>213</sup> The FCTC is instructive because of its provisions obligating Member States to control both licit and illicit activities.<sup>214</sup> The fact that this treaty adopts an anti-prohibitionist approach to tobacco provides hope that a future cannabis treaty could likewise move beyond prohibition. This section will suggest ways in which the international community could improve upon the FCTC’s foundation in order to create an effective treaty that countries will adhere to.

In order to ensure that the new treaty absolves Member States of their former obligations concerning cannabis, the parties should place a reservation to the Single Convention and 1988 Convention.<sup>215</sup> The reservation process would be the clearest way to ensure that parties will not be bound to the earlier treaties concerning cannabis. While incompatible treaty obligations concerning cannabis would automatically no longer apply between parties who ratify both treaties, this does not necessarily happen if some signatories fail to ratify the latter treaty.<sup>216</sup> Therefore, the parties should insert a clause that explicitly absolves the ratifiers of any of their prior treaty obligations, again, regarding cannabis.<sup>217</sup>

The FCTC establishes uniform or global minimum standards for countries to follow concerning the regulation of tobacco production, consumption, international trade, trafficking, and advertisement.<sup>218</sup> The recommendations take the force of law only when subsequent negotiated protocols and amendments by all

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213. Foreword to WHO Framework Convention on Tobacco Control, at v, May 21, 2003–June 29, 2004, WHA56.1, 2302 U.N.T.S. 166, 42 I.L.M. 518.

214. FCTC, *supra* note 213, arts. 6–17.

215. See Part III.B for details about how Member States could place a reservation and re-accede to the remaining portions of the Single Convention and 1988 Convention.

216. Vienna Convention, *supra* note 147, art. 30(4).

217. Natasha Balendra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461, 2478 (2008).

218. FCTC, *supra* note 213, arts. 6–17.

parties create specific commitments.<sup>219</sup> The binding commitments only come into effect once there is consensus or three-fourths of the present parties vote in its favor.<sup>220</sup> The establishment of loose guidelines is preferable for cannabis initially, since the consequences of cannabis legalization and divergent domestic laws concerning cannabis remain unknown. Until detailed research shows the impact of legalization, there should not be requirements binding the states.

Even before definitive results become known, states should begin to create a framework to control the distribution and production of cannabis, in order to retard the development of a large cannabis industry that could stifle the creation of an effective future treaty.<sup>221</sup> The tobacco industry's lobbying efforts effectively limited government control of tobacco and weakened the enforcement mechanisms established by the FCTC.<sup>222</sup> Thus, the earlier the discussions start concerning cannabis, the less likely it is that political forces would be influenced by the nascent cannabis industry.

While the specifics for the cannabis treaty are being formulated, the international community should prepare detailed, annual reports concerning the impact of domestic cannabis legalization on a local and international level. The FCTC only requires state reports concerning the implementation of the treaty's recommendations domestically, which lack assurance that the findings are comprehensive or objective.<sup>223</sup> In order to prevent this data collection problem for cannabis, state findings should be crosschecked with nongovernmental organizations and neighboring countries' reports on the international impact of domestic

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219. Melissa E. Crow, *Smokescreens and State Responsibility: Using Human Rights Strategies To Promote Global Tobacco Control*, 29 YALE J. INT'L L. 209, 216 (2004); FCTC, *supra* note 213, art. 23(5).

220. *Id.* art. 28.

221. See generally Heesun Wee, *How Legal Marijuana Could Be The Next Great American Industry*, CNBC (Jan. 14, 2014, 7:51 AM), <http://www.cnbc.com/id/101314084>.

222. Chaun-feng Wu, *State Responsibility For Tobacco Control: The Right to Health Perspective*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 379, 385 (2008).

223. Crow, *supra* note 219, at 214–16; Benjamin Meier, *Breathing Life Into the Framework Convention on Tobacco Control: Smoking Cessation and the Right to Health*, 5 YALE J. HEALTH POL'Y & ETHICS 137, 149 (2003).

legislation.<sup>224</sup> Conferences should be held annually to evaluate the status of cannabis use, trade, and production globally.

After five years of detailed findings, nations should reconvene to formulate a flexible treaty on cannabis that takes into account the criminal justice, public health, and political concerns of possible parties. The specifics of what a negotiated treaty would ultimately look like are unclear at this point because the consensus of international opinion is continuing to evolve, and the legalization of cannabis is new. However, the one crucial aspect of the treaty is that it abandon the prohibitionist stance that has proven to be inefficient, ineffective, and grossly harmful.

#### CONCLUSION

The legalization of cannabis in Uruguay, Colorado, and Washington marks the first time that domestic cannabis laws have directly conflicted with international drug conventions. In response, international bodies have called for the retraction of these domestic laws, even while politicians in other nations have begun to court the adoption of similar laws. This worldwide momentum toward liberalization reflects a growing sentiment that cannabis is disproportionately regulated in international law and highlights the ineffectiveness of prohibition. Since there is no feasible way to change the status of cannabis within the current framework, while ensuring international oversight for the fledgling cannabis market, a new treaty specifically aimed at cannabis is necessary. Implementing a more flexible treaty will allow states to focus their attention on more harmful drugs and enact policies reflective of domestic goals.

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224. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 1, 163–64 (1995). This is similar to the reporting requirements and crosschecking used by the International Labor Organization, which has been very effective.

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