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How to regulate recreational cannabis in accordance with the Single Convention on narcotic drugs, 1961

Kenzi **Riboulet-Zemouli**

March 2022

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Dedicated to all those persecuted
based upon an interpretation.

Erratum

[22 May 2022]

After publication, a reader noted an incorrect depiction of the language present in the 2016 United Nations General Assembly (UNGA) Special Session, on page 116 of the present document.

In the drafting history of the 2016 UNGA Special Session, the inclusion of the term "flexibility" was not necessarily brought to refer to reforms such as decriminalization and non-medical regulations; instead, the expression "emerging challenges" was the euphemism used by those countries that supported an open discussion about such reforms and their possible conflicts with the treaty system. Ultimately, the delegates agreed on the inclusion of language of a section of the document titled:

> "Operational recommendations on cross-cutting issues in addressing and countering the world drug problem: evolving reality, trends and existing circumstances, emerging and persistent challenges and threats, including new psychoactive substances, in conformity with the three international drug control conventions and other relevant international instruments." (UNGA, 2016 at 17)

In order to more accurately reflect the UNGA document language, the following sentence (p. 116):

« At the 2016 UNGA Special Session focused on drug policies, all UN Member States agreed that the three IDCC "allow for sufficient flexibility for States parties to design and implement national drug policies according to their priorities and needs."[394] *»*

Should read as follows:

« At the 2016 UNGA Special Session focused on drug policies, all UN Member States agreed that the three IDCC "allow for sufficient flexibility for States parties to design and implement national drug policies according to their priorities and needs" while recalling that "emerging and persistent challenges" were to be addressed "in conformity with the three international drug control conventions and other relevant international instruments."[394] *»*

Accordingly, the footnote 394 should read: « UNGA (2016) at 3, 17, *supra* note 118. See also *supra* section "Non-medical use in subsequent practice" in Chapter 4 and notes 266 through 268. »

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ABBREVIATIONS

AMA	American Medical Association
APA	American Psychiatric Association
Single Convention	Single Convention on narcotic drugs, 1961 (unamended)
C61	Single Convention on narcotic drugs, 1961, as amended by the 1971 Protocol
C71	Convention on psychotropic substances, 1971
C88	UN Convention against illicit traffic in narcotic drugs and psychotropic substances (1988)
CCD	*Cannabis*-related controlled drug
CND	Commission on narcotic drugs
COP	Conference of plenipotentiaries
COP61	Conference of plenipotentiaries which concluded the Single Convention
COP71	Conference of plenipotentiaries which concluded the C71
COP72	Conference of plenipotentiaries which concluded the 1971 Protocol (C61)
COP88	Conference of plenipotentiaries which concluded the C88
CRC	Convention on the Rights of the Child
Δ^9-THC	*see:* dronabinol
Dronabinol	*delta*-9-tetrahydrocannabinol (natural and synthetic)
DSM	Diagnostic and Statistical Manual of Mental Disorders
ICD	International Classification of Diseases/International Statistical Classification of Diseases and Related Health Problems
ICJ	International Court of Justice
ILC	International Law Commission
INCB	International Narcotics Control Board
MSP	Medical and scientific purposes
OMSP	Other than medical and scientific purposes
RAU	Recreational use/Adult Use
SUD	Substance Use Disorder(s)
THC	dronabinol and other tetrahydrocannabinol isomers
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNODC	United Nations Office on Drugs and Crime
US/USA	United States of America
USSR	Union of Soviet Socialist Republics
WHO	World Health Organization
WTO	World Trade Organization

PART I.

ACKNOWLEDGMENT.

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1. INTRODUCTION

"One hundred years is a very respectable period and enough time has elapsed to demonstrate the value of our institutions. The international drug control institutions have proven their worth. The licit control system established by the international drug control treaties has expanded from when it was first created, managing an ever increasing number of substances and a continuously rising demand for drugs needed for medical and scientific purposes."

– Hamid Ghodse, INCB President, *Statement at the event marking the centennial of the International Opium Commission in Shanghai*, 2009.[1]

Photo:
Maurice Narkozy
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[1] **Ghodse**, H., "Annex III: Statement made by Hamid Ghodse, President of the International Narcotics Control Board, on 26 February 2009 at the event marking the centennial of the convening of the International Opium Commission in Shanghai, China", In: INCB. (2009), *Report of the International Narcotics Control Board for 2008 [E/INCB/2009/1].* United Nations.

Wandering histories

In order to construe the legal regime for *Cannabis* today, it is necessary to deconstruct its past. The history of international laws and norms, a relatively underdeveloped field,[2] is sometimes characterized by, *inter alia*, hagiographical tendencies[3] or anachronisms.[4] The history of the international drug control Conventions (IDCC), considered "one of the oldest multilateral treaty-based systems in existence,"[5] is not unfamiliar to these tendencies –particularly concerning the *Cannabis sativa* L. plant and its derivatives. Three treaties, embedded in four legal instruments, together make the IDCC:

- Single Convention on Narcotic Drugs, as amended by the 1972 Protocol (hereinafter **C61**):
  - *(1)* "**Single Convention on Narcotic Drugs, 1961**" (Single Convention) concluded at New-York in 1961, and
  - *(2)* "**Protocol amending the Single Convention on Narcotic Drugs, 1961**" (1972 Protocol) done at Geneva in 1972;
- *(3)* "**Convention on psychotropic substances**" (**C71**), Vienna, 1971; and
- *(4)* "United Nations **Convention against Illicit Traffic** in Narcotic Drugs and Psychotropic Substances" (**C88**), Vienna, 1988.

In recent years, the academic world has witnessed the emergence of new, burgeoning, transnational historiographies of global drug control that have untapped a genesis of the current legal framework more complex than what may often be commonly perceived.[6] An unforeseen

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[2] at 27–29 in: **Lesaffer**, R. (2007), "Restricted Access International Law and Its History: the Story of an Unrequited Love", In: Craven, M., Fitzmaurice, M., and Vogiatzi, M. (Ed.s), *Time, History and International Law* (pp. 27–41), Martinus Nijhoff Publishers; see also: **Orford**, A. (2017), "International Law and the Limits of History" In: Werner, W., de Hoon, M. and Galán, A. (Ed.s), *The Law of International Lawyers, Reading Martti Koskenniemi* (pp. 297-320), Cambridge University Press.

[3] at 95, in: **Rodogno**, D., Gauthier, S., and Piana, F. (2013), "What does transnational history tell us about a world with international organizations?" In: Reinalda, B. (Ed.) *Routledge Handbook of International Organization* (pp. 94–105). Routledge.

[4] Although the methodological usefulness (or lack thereof) is a vivid topic of debate which adds depth to the considerations laid out in this essay. For an introduction to that discussion, watch the lecture by **Orford**, A. (2013), *Histories of International Law and Empire*, ESIL Lecture (University Paris 1 Pantheon Sorbonne, 23 January 2013); and for a critical discussion, see **Benton**, L. (2019), "Beyond Anachronism: Histories of International Law and Global Legal Politics", *Journal of the History of International Law* **21**(1):7–40. **Allott**, P. (2015), "Interpretation – An Exact Art", In: Bianchi, A., Peat, D. and Windsor, M. (Ed.s), *Interpretation in International Law* (pp. 373–392). Oxford University Press, at 390–391, and **Warren**, C. A. (2017), "Henry V, Anachronism, and the History of International Law", In: Hutson, L. (Ed), *The Oxford Handbook to English Law and Literature, 1500–1700* (pp. 709–727), Oxford University Press, take insightful steps aside to discuss the place of anachronism in the analyses of international law.

[5] **Colson**, R. (2019), "Fixing Transnational Drug Policy: Drug Prohibition in the Eyes of Comparative Law", *Journal of Law and Society* **46**(S1):73–94, at 73.

[6] An insight to this renewed approach to the history of the early drug treaties and the way the international legal system unfolded with respect to drugs, and *Cannabis* drugs in particular, can be found in: **Campos**, I. (2012), *Home Grown: Marijuana and the Origins of Mexico's War on Drugs,* University of North Carolina Press; **Collins**, J. (2015), *Regulations and prohibitions: Anglo-American relations and international drug control, 1939-1964.* PhD thesis, London School of Economics and Political Science; **Collins**, J. (2020), "A Brief History of Cannabis and the Drug Conventions; Symposium on drug decriminalization, legalization, and international law", *AJIL Unbound* **114**; Collins, J. (2021), "Evaluating trends and stakeholders in the international drug control regime complex" *International Journal of Drug Policy* **90**:103060; Colson (2019) *supra* note 5; **Duvall**, C. S. (2019), *The African Roots of Marijuana*, Duke University Press; **Framke**, M. (2013), "Internationalizing the Indian War on Opium: colonial policy, the nationalist movement and the League of Nations", In: Fischer-Tiné, H. and Tschurenev, J. (Ed.s), *A History of Alcohol and Drugs in Modern South Asia: Intoxicating Affairs* (pp. 155–171), Routledge; **Gootenberg**, P., and Campos, I. (2015), "Toward a New Drug History of Latin America: A Research Frontier at the Center of Debates", *Hispanic American Historical*

aspect of this revisited history has been to deepen our awareness of several such commonly shared misunderstandings about the current Conventions.

But most of the foundational literature –around which scholars and drug policy advocates, as well as governments and international organizations, have articulated their interpretation of the IDCC– does not take this transnational history into consideration, and was consequently based on grounds of an incomplete historical analysis; for John Collins, one of the consequences of these gaps has been the lack of a

> "nuanced account of the emerging state-centric and regional histories of drug control which challenge the uniform international and regime-oriented teleologies of a US drug control mission."[7]

Indeed, much of the historical analyses of international drug control seem to have missed that: while the United States of America (US/USA) have prominently led international relations in the last few decades, generally, their actual geopolitical supremacy started fairly late in the 20th Century, around the end of the cold war.[8] Although they initiated the Shanghai Opium Commission in 1909, they were not leaders in the field of international opium policy, and did not join many of the pre-world war II drug treaties. **With respect to *Cannabis*, in the first half of the century, the isolationist US had been a mostly passive observer of the debates** at the League of Nations –the predecessor of the United Nations (UN).[9] Before 1967, the US was not a Party to (*i.e.* had not joined, signed, or ratified) any international legal instrument which included provisions on the *Cannabis* plant or its products.[10] In 1961, during the Conference of Plenipotentiaries (COP) that concluded the Single Convention on narcotic drugs, the members of the US delegation, led by Harry J. Anslinger, had a weaker voice than they had hoped. **The US**

Review, **95**(1):1–35; **Kendell**, R: (2003), "Cannabis condemned: the proscription of Indian hemp", *Addiction* **98**(2):143–151; **Kingsberg**, M. (2013), *Moral nation: Modern Japan and Narcotics in Global History*, University of California Press; **Kozma**, L. (2011a). "Cannabis Prohibition in Egypt, 1880—1939: From Local Ban to League of Nations Diplomacy", *Middle Eastern Studies,* **47**(3):443–460; **Kozma**, L. (2011b), "The League of Nations and the debate over cannabis prohibition", *History Compass*, **9**(1):61–70; **McAllister**, W. B. (2000), *Drug Diplomacy in the Twentieth Century*, Routledge; **Mills**, J. H. (2003), *Cannabis Britannica, Empire, trade, and prohibition,* Oxford University Press; Mills, J. H. (2016), "The IHO as Actor: The case of cannabis and the Single Convention on Narcotic Drugs 1961", *Hygiea Internationalis,* **13**(1):95–115; **Molano Cruz**, G. (2017), "A View from the South: The Global Creation of the War on Drugs", *Contexto Internacional*, **39**(3):633–653; **Richardson-Little**, N. (2019), "The Drug War in a Land Without Drugs: East Germany and the Socialist Embrace of International Narcotics Law", *Journal of the History of International Law*, **21**(2):270–298; **Scheerer**, S. (1997), "North-American Bias and non American roots of cannabis prohibition", In: Böllinger, L. (Ed.), *Cannabis Science: From Prohibition to Human Right* (pp. 31–36), Peter Lang; **Unterman**, K. (2020), "A History of U.S. International Policing" In: Dietrich, C. R. W. (Ed.), *A Companion to U.S. Foreign Relations: Colonial Era to the Present* (pp. 528–546), Wiley Press; **Windle**, J. (2013), "How the East Influenced Drug Prohibition", *International History Review,* **35**(5):1185–1199. In addition, the author of the present essay has conducted historical research (currently in press) on the international discussions, politics, relations, and law related to *Cannabis* between 1925 and 1961 (understudied period), witnessing first-hand the complexity of the topic, and documenting a forgotten episode (1935-1938 assessments of medical cannabis preparations) and controversial roles of players like Egypt or the *Office International d'Hygiène Publique* (International Office of Public Health).

[7] Collins (2021) at 3, see *supra* note 6.

[8] **Klein**, P. (2003), "The effect of US predominance on the elaboration of treaty regimes and on the evolution of the law of treaties", In: Byers, M. and Nolte, G. (Ed.s), *United States Hegemony and the Foundations of International Law* (pp. 363–391). Cambridge University Press.

[9] See for instance Kozma (2011b); and others in *supra* note 6.

[10] In fact, there was only one multilateral legal instrument mentioning cannabis at all: the Second International Opium Convention concluded at Geneva on 19 February 1925 (at 2–4, 13, 24, in: **League of Nations** (1929) "Second Opium Conference; Convention, Protocol, Final Act; Signed at Geneva on February 19th 1925", *Treaty Series,* **81**:319), that the US never ratified (at 415, in: **Leinwand**, M.A. (1971), "The International Law of Treaties and United States Legalization of Marijuana", *Columbia Journal of Transnational Law,* **10**(2):413–441).

disliked the final text of the treaty[11] **and put off ratification until 1967 after over 50 other countries had already done so.**[12] The US federal government lasted three more years in transposing the non-self-executing provisions of the Single Convention into municipal law (*i.e.*, domestic law).[13] **Yet, the US continues to be considered by many as central in the conclusion of the Single Convention**. Collins explains that:

> "While the US unquestionably served as a key enforcer from the 1970s onwards, the genesis period of the conventions was a much more complex story. Without understanding this genesis and development story from a rigorous historical perspective, international relation theories continually misinterpret the power dynamics, negotiated outcomes and the foundational premises of the system" [14]

Rediscovering these elements suggests that there was a **pivotal political moment within the US**, roughly **around the turn of the 1960-1970s decade** (between the 1967 ratification and "Richard Nixon's declaration of a 'War on Drugs' in 1971 and the creation of the DEA in 1973").[15] However, internationally, "the country's shifting attitudes" only started to be felt much later, around 1980 when the US ratified the 1971 Convention on psychotropic substances (C71).[16] From that point on, an important (and well-documented) *soft power* was deployed to "internationalize US policing," for instance by pressuring countries into "adopting US-style drug-control laws."[17] There is no compelling evidence that this was the case before the 1980s.

The **globalization of US drug policy** that unfolded since then has been characterized by an "**increasing dominance of law enforcement**" which, however, "**came chronologically second** and contingent to a regulatory regime whose main purpose was, in the first place, to establish a licit market."[18]

A substantial repositioning happened (paralleled, it should be noted, by broader changes in international relations[19]) between the times when the *drug control* treaties were concluded, (they were "originally intended simply to rationalize international control efforts"[20] and the licit trade in

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[11] McAllister (2000) at 204–210, see *supra* note 6.
[12] *ibid.* at 215–218. It is not uninteresting to see what countries joined the Single Convention before the US did, on 25 May 1967: Afghanistan, Algeria, Argentina, Benin (Dahomey), Brazil, Byelorussian SSR, Cameroon, Canada, Chad, Ivory Coast, Cuba, Denmark, Ecuador, Egypt, Ethiopia, Finland, Ghana, Hungary, India, Iraq, Israel, Jamaica, Japan, Jordan, Kenya, Republic of Korea, Kuwait, Lebanon, Malawi, Mali, Mexico, Morocco, Myanmar (Burma), the Netherlands, New Zealand, Niger, Pakistan, Panama, Peru, Poland, Senegal, Spain, Sri Lanka, Sweden, Syria, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, the UK, Ukrainian SSR, USSR, and Zambia had all ratified the Single Convention, which entered into force in 1964; see: **United Nations**. (2021a), "Single Convention on Narcotic Drugs, 1961; New York, 30 March 1961", In: *United Nations Treaty Collection; Chapter VI, Narcotic Drugs and Psychotropic Substances*. United Nations.
[13] Specifically with the adoption of the Comprehensive Drug Abuse Prevention and Control Act, 1970 (Leinwand, 1971, at 413n1, 415n10; see *supra* note 10).
[14] Collins (2021) at 8, see *supra* note 6.
[15] Unterman (2020) at 539, see *supra* note 6.
[16] McAllister (2000) at 242, see *supra* note 6.
[17] Unterman (2020) at 540, see *supra* note 6; see also at 514, 535–536 in: **Boister**, N. (2001), *Penal aspects of the UN drug conventions*, Kluwer Law International; **Nadelmann**, E. A. (1990a), "Role of the United States in the International Enforcement of Criminal Law", *The Harvard International Law Journal,* **31**(1):37–76. On this particular aspect, Colson (2019) at 79 (*supra* note 5) notes: "Eventually, states had little option but to 'voluntarily' transplant prohibitionist laws into their national jurisdiction: [...] sovereign decisions were sometimes imposed through a mix of diplomatic and political inducements."
[18] Colson (2019) at 79 (*supra* note 5)
[19] See for instance **Elias**, T. O. (1992), *New horizons in international law (revised and edited by Francis M. Ssekandi - 2nd rev. edition),* Martinus Nijhoff Publishers. See also Koskenniemi (2005), *infra* note 67.
[20] McAllister (2000) at 202, see *supra* note 6.

medical drugs) prior to the "declaration of war" in 1971, and today's common understanding of these treaties as *drug prohibition* (nay *war on drugs*) *instruments*.

This shift took the form of **a theoretical and teleological change in the hermeneutics**[21] of the IDCC… but not in an alteration of the normative framework *per se*:[22] **the Conventions have not changed, it is *how* we interpret these Conventions when implementing them that has changed** –under the influence of US efforts.

As Colson rightfully puts it: the rules as we perceive them today "are founded in dogma that hides from us their contingent nature."[23]

[21] **George**, T. (2020), "Hermeneutics", *Stanford Encyclopedia of Philosophy*, defines hermeneutics as "the study of interpretation. […] Traditionally, disciplines that rely on hermeneutics include theology, especially Biblical studies, jurisprudence, and medicine, as well as some of the human sciences, social sciences, and humanities."
[22] This is true at least for C61 and C71, both chronologically prior to the actual unfolding of the "war on drugs" policy, and importantly anchored in a then-already old-fashioned approach to drug control (see McAllister, 2000, *supra* note 6).
[23] Colson (2019) at 74–75 (*supra* note 5)

Legal hermeneutics and the fringe of vagueness

This essay shows that **this shift of the main interpretive scheme of the Conventions (from *control treaties* to *prohibition treaties*) at times conflicts with the letter of the treaties, leading to absurd or unreasonable conclusions**. It accounts in large part for increased reliance on the subsequent practice of the large number of State Parties, those that have come to align with the prohibitionist agenda; but such a basis to address textual norms is hardly compelling.[24] As René Provost rightfully noted:

> "an opinion may be neither compelling nor authoritative and yet still qualify as a legal interpretation. **Once interpretation moves beyond the rarefied judicial atmosphere, it becomes a way of engaging with others much more than a basis for an unassailable conclusion.**"[25]

The treaties have become an easy tool used to spread prohibitionist policy objectives, for countries that had this agenda (the US in particular). And that has been incorporated into foundational scholarly literature.

Although surprising, the narrative roamings around *control treaties* and *prohibition treaties* can be seen as reflecting a somehow characteristic nonlinear process of norm evolution:[26]

> "norms derive their validity primarily from the shared intersubjective acceptance of their obligatory claims by their addressees and, only secondarily, from their factual enforcement."[27]

In this context, **interpretation** –a word with obscure etymology and meaning, tentatively defined by Robert Kolb as the "intellectual operation by which one seeks to discover the legal meaning of a provision"[28]– is critically relevant, as it has been in international relations from ancient times to our days in every corner of the globe.[29] **Interpretation is an entire part of the "continuum with the making of rules,"**[30] after drafting and adoption, but before implementation. Between the law and its implementation, there is *always* interpretation.

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[24] Subsequent practice is usually only considered only as contextual interpretive elements (see **Crawford**, J. (2012), *Brownlie's Principles of Public International Law (8th edition)*, Oxford University Press, at 365–369) but "textual language should still be the fundamental basis for interpretation" (**Lo**, C. (2017), *Treaty Interpretation Under the Vienna Convention on the Law of Treaties; A New Round of Codification*, Springer Nature, at 210).
[25] **Provost**, R. (2015), "Interpretation in International Law as a Transcultural Project", In: Bianchi, A., Peat, D. and Windsor, M. (Ed.s), *Interpretation in International Law* (pp. 290–308), Oxford University Press, at 302.
[26] **Krook**, M. L. and True, J. (2010), "Rethinking the life cycles of international norms: The United Nations and the global promotion of gender equality", *European Journal of International Relations* **18**(1):103–127, at 122–124.
[27] **Deitelhoff**, N., & Zimmermann, L. (2020), "Things We Lost in the Fire: How Different Types of Contestation Affect the Robustness of International Norms", *International Studies Review,* **22**(1):51–76, at 53
[28] **Kolb**, R. (2016), *The Law of Treaties,* Edward Elgar Publishing, at 128; see also: **Kolb**, R. (2006), *Interprétation et création du droit international. Esquisses d'une herméneutique juridique moderne pour le droit international public*, Éditions Bruylant/Éditions de l'Université de Bruxelles, at 24–28.
[29] **Gardiner**, R. K. (2008), *Treaty interpretation*, Oxford University Press, at 54–55; Kolb (2006) at 32–40 (*supra* note 28); **Korhonen**, O. and Selkälä, T. (2016), "Theorizing responsibility", In: Orford, A. and Hoffmann, F. (Ed.s), *The Oxford Handbook of the Theory of International Law* (pp. 844–861), Oxford University Press, at 847-848; **Merkouris**, P. (2015), "(Inter)Temporal Considerations in the Interpretative Process of the VCLT: Do Treaties Endure, Perdure or Exdure?", In: Ambrus. M. and Wessel. R.A. (Ed.s), *Netherlands Yearbook of International Law 2014; Between Pragmatism and Predictability: Temporariness in International Law* (pp. 121–156), Asser Press; **Özsu**, U. (2012), "Ottoman Empire", In: Fassbender, B. and Peters, A. (Ed.s), *The Oxford Handbook of the History of International Law* (pp. 429–447), Oxford University Press.
[30] **Focarelli**, C. (2012), *International Law as a Social Construct; The Struggle for Global Justice*, Oxford University Press, at 80.

This continuous process of interpretation is generally fueled by what H. L. A. Hart termed the "**fringe of vagueness or 'open texture'**"[31] **inherent to all rules**, but more clearly even for written rules such as treaties: the malleability and fragility of talks and consensus from the past, put into black and white letters at that time, render the hermeneutics of any written rule a much necessary "day-to-day work."[32]

Because **international law is written by many diverse hands**, it tends to settle on least-common-denominator[33] and often uses "imaginative and subtle drafting to bridge the gap between opposing interests."[34] This is what generates treaty norms tainted not only by "imprecision" or an "abstract, ambiguous nature,"[35] but also sometimes even by mistakes,[36] making hermeneutics vital to any attempt of reaching the shared intersubjective acceptance that makes them valid.[37]

This is also why, in interpreting international law like the IDCC, like any other rule, "[a]ny attempt to come up with a definite statement of the law would be futile."[38]

The rules enshrined in **the IDCC were particularly not immune from flaws in their drafting.**[39] The text of the Single Convention originates in an acrobatic merger of "six treaties concluded between the years 1912 and 1936 [...] to which were added three more in the postwar period"[40] all of these being notably "shrouded in ambiguity in order to guarantee both their acceptance by, and their application in, states with very different legal cultures."[41] Adolf Lande, an

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[31] **Hart**, H. L. A. (1994), *The Concept of Law (2nd edition),* Oxford at the Clarendon Press, at 123–154.
[32] Kolb (2016) at 128 (*supra* note 28).
[33] **Chayes** A. and Chayes A. H. (1993), "On compliance", *International Organization,* **47**(2):175–205, at 177–180, 195.
[34] **Aust**, A. (2012), *Handbook of International Law (Second edition),* Cambridge University Press, at 83.
[35] **O'Mahoney**, J. (2014), "Rule tensions and the dynamics of institutional change: From 'to the victor go the spoils' to the Stimson Doctrine", *European Journal of International Relations* **20**(3):834–857, at 839. See also: Allott (2015) at 376–377 (*supra* note 4); **d'Amato**, A. (1993). "Purposeful Ambiguity as International Legal Strategy: The Two China Problem", in: Makarczyk, J. (Ed.), *Theory of International Law at the Threshold of the 21st Century; Essays in honour of Krzysztof Skubiszewski* (pp. 109-121), Kluwer Law International, at 109–110; **van Damme**, I. (2009), *Treaty Interpretation by the WTO Appellate Body*, Oxford University Press, at 112.
[36] Allott (2015) at 380-381, see *supra* note 4.
[37] **Johnstone**, I. (1991), "Treaty Interpretation: The Authority of Interpretive Communities", *Michigan Journal of International Law*, **12**(2):371–419, at 419; **Oppenheim**, L. (1921) "The Future of International Law" In: *Pamphlet Series of the Carnegie Endowment for International Pease,* **39**, Oxford at the Clarendon Press, at 27–30, 35–40; Provost (2015), *supra* note 25.
[38] **Waibel**, M. (2011), "Demystifying the Art of Interpretation", *European Journal of International Law,* **22**(2):571–588, at 576.
[39] **Boister**, N. (1996), "The international legal regulation of drug production, distribution and consumption", *The Comparative and International Law Journal of Southern Africa,* **29**(1):1–15; **Boister**, N. (1997), "The historical development of international legal measures to suppress illicit drug trafficking", *The Comparative and International Law Journal of Southern Africa,* **30**(1):1–21; **Boister**, N. (1998a), *The suppression of illicit drugs through international law (Vol. 1)*, University of Nottingham, at 28, 110–120, 132–135, 160–164; Boister (2001; *supra* note 17) at 13–17; Colson (2019), *supra* note 5; **Lande**, A. (1962), "The Single Convention on Narcotic Drugs, 1961", *International Organization,* **16**(4):776–797, at 787–794.
[40] Lande (1962) at 776, 778, *supra* note 39. See also **United Nations** (1948), *Economic and Social Council Resolution 159 II D (VIII), Simplification of existing international instruments on narcotic drugs (E/RES/1948/159(VII)IID)*; **United Nations** (1964a), *United Nations Conference for the adoption of a Single Convention on Narcotic Drugs, New York, 24 January - 25 March 1961; Official Records, Volume I, [E/CONF.34/24]*, at 20; **UN Division of Narcotic Drugs** (1966), "Twenty years of narcotics control under the United Nations", *Bulletin on Narcotics,* **18**(1):1–60, at 59.
[41] Colson (2019) at 77, *supra* note 5.

eyewitness[42] of the 13 years of negotiations of the Single Convention,[43] deemed that such a textual imprecision in the Convention was "**unavoidable in a work which requires the consent of numerous states of different legal, administrative, social, and cultural backgrounds**."[44]

Textual vagueness, forgotten fragile consensus from the past, "reversed historicization" of the US-led drug war era onto the genesis of the IDCC,[45] changing States and evolving States' interests. All these granularities seem to be smoothed out when one evokes "the prohibition treaties." Yet, nowadays this is the main and mainstream understanding of the IDCC. Such a **conflation between the texts of the drug control treaties and the political atmosphere of prohibitionism that prevailed decades *after* their conclusion is overwhelming and transversal** –almost dogmatic– across continents, stakeholders, and opinions. And this, in apparent contradiction with the fact that different interpretive agents are generally "influenced by their national idiosyncrasies in the interpretation of enactments, and dependent on the method of their school of law."[46]

Axiomatic but mainstream, this cognitive frame of a *treaty-mandated prohibition*, blurring the line between treaty and politics, is the ground in which the majority of epistemic communities[47] that gravitate around the IDCC (let alone its core interpretive community, the three Vienna-based treaty-mandated bodies[48]) have grown their roots.

The recently-rediscovered legal history of the IDCC (complex, transnational, and much closer to provisions on trade aimed at preventing a new "opium war" than to a prohibition or a "war on drugs") questions that classical cognitive frame;[49] it challenges decision-makers, bureaucrats,

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[42] Adolf Lande (1905-1978), Austrian-Swiss national, was deputy Executive Secretary of the 1961 Conference of Plenipotentiaries that adopted the Single Convention (UN, 1964a at xviii; *supra* note 40) and main author of both Commentaries on the Single Convention and the C71. He was also deeply involved in drafting C61 & C71 (**Bayer**, I. (1989), *Development of the Convention on Psychotropic Substances, 1971* [Unpublished manuscript], at 9). Long-time UN civil servant at the core of the nascent drug control apparatus (he held positions at the the Permanent Central Opium Board and the Drug Supervisory Body, former bodies eventually merged onto the current INCB). He also worked for the US government and as a consultant for the pharmaceutical industry (McAllister, 2000, at 225, 232; see *supra* note 6).
[43] McAllister (2000) at 204, see *supra* note 6.
[44] Lande (1962) at 796, *supra* note 39.
[45] Collins (2021) at 2, *supra* note 6.
[46] Oppenheim (1921) at 36, *supra* note 37.
[47] Epistemic communities in this context can be sketched as *social groups of professionals and academics that shape the discursive policies of international law* (see **Bianchi**, A. (2019), "Epistemic communities", In: d'Aspermont, J. and Singh, S. (Ed.s), *Concepts for International Law: Contributions to Disciplinary Thought* (pp. 251–266), Edward Elgar Publishing, at 265; **Haas**, P.M. (1992) "Introduction: epistemic communities and international policy coordination", *International Organization*, **46**(1):1–35, at 3).
[48] INCB, CND, and UNODC are three treaty-mandated bodies headquartered in Vienna, Austria; the fourth one, WHO, is located in Geneva, Switzerland. The three Vienna-based bodies arguably constitute the core "interpretive community" of the IDCC. The term was coined by Ian Johnstone in the context of international law and relations, after Stanley Fish. Johnstone explains that the concept is better defined "in terms of its function in interpretive practice" (Johnstone, 1991 at 376; see *supra* note 37) and is "constituted by a set of conventions and institutional practices that structure the interpretive process" (*ibid.* at 372). Interpretive communities reflect "the power of institutional settings, within which assumptions and beliefs count as established facts" (*ibid.* at 374). See also: **Ege**, J. and Bauer, M.W. (2013). "International bureaucracies from a Public Administration and International Relations perspective" In: Reinalda, B. (Ed.) *Routledge Handbook of International Organization* (pp. 135–148), Routledge, at 140–142. In this regard, this concept should be distinguished from the various *epistemic communities*, diverse networks of knowledge-based experts, reformists or not, which can sometimes *flirt* with and within the interpretive community.
[49] Focarelli (2012) at 80–82, *supra* note 30; **Schachter**, O. (1991), *International Law in Theory and Practice*, Martinus Nijhoff Publishers, at 18–23; **Wählisch**, M. (2015), "Cognitive Frames of Interpretation in International Law", In: Bianchi, A., Peat, D., and Windsor, M. (Ed.s), *Interpretation in International Law* (pp. 331–350). Oxford University Press.

scholars, activists, and the epistemic communities they form part of, as unbiased interpretive agents. Critically, it also influences today's interpretations, insofar it disputes assumptions about international relations and dynamics contemporaneous to the conclusion of the Conventions, thus enabling, at last, an analysis of their text as (or at least closer to) originally intended –not as marketed by some governments in the last few decades.

This new look at the past, its impact on how we see the present, and possibly how we can reach a shared acceptance of the treaties to imagine a future of peace and stability –where treaties can make sense for everyone– is timely.

Recent History

Deitelhoff and Zimmermann suggest that norms "only become visible when they are violated."[50] Arguably, in this regard, the normative aspect of the dogma of the IDCC interpreted as a *global drug prohibition regime*[51] became pellucid to the international community in relation with *Cannabis* in early 2013, after **Uruguay (a State Party to all three IDCC) allegedly overruled the norm of *global prohibition* when its parliament approved domestic reforms "legalizing" the *Cannabis* plant and its products**, not only "hemp" and medicines, but also for the purposes commonly referred to as *recreational* or *adult uses* (RAU).[52]

From its headquarters in Vienna, Austria, the International Narcotics Control Board (INCB) [53] labeled Uruguay as an **outsider to the international community**:[54] Its then-President called the country a "pirate" for "deciding neither to withdraw from the Convention, nor to respect it"[55] while pledging to the monolithic interpretation of the IDCC as prohibition instruments.[56]

In 2018, when discussing a similar "legalization of recreational cannabis," a report of the Canadian Standing Senate Committee on Foreign Affairs verbalized that countries "signatories to [the IDCC] are **committed to prohibiting** the production, sale, distribution and possession of [...] cannabis"[57] thereby assuming, without elucidating, the legal bounds of such a commitment. The INCB lectured Canada comparably to Uruguay, although with less vitriol.[58]

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[50] Deitelhoff and Zimmermann (2020) at 53, *supra* note 27.
[51] The expression is borrowed from Collins (2020) at 280; (2021) at 2 (see *supra* note 6)
[52] This type of reform is commonly referred to as "cannabis legalization" or "marijuana legalization," *e.g.* in: **Panicker**, B. (2015), "Legalization of Marijuana and the Conflict with International Drug Control Treaties", *Chicago-Kent Journal of International and Comparative Law,* **16**:3–50.
[53] INCB is the expert "treaty body" (Kolb, 2016 at 174–175, see *supra* note 28; **UN General Assembly (UNGA)** (2019). *Seventy-third session: Agenda item 82: Resolution adopted by the General Assembly on 20 December 2018: "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" [A/RES/73/202]*, at 5) to the IDCC. It is one of the four organs mandated under the IDCC, alongside the Commission on Narcotic Drugs (CND, the forum of State Parties, see *infra* note 120), the UN Secretary-General (whose mandate is carried on mostly by the UN Office on Drugs and Crime, UNODC), and the World Health Organization (WHO).
[54] **Smetana**, M. and Onderco, M. (2018), "Bringing the outsiders in: an interactionist perspective on deviance and normative change in international politics", *Cambridge Review of International Affairs,* **31**(6):516–536, at 5–7.
[55] **Lidón**, L. (2013). "ONU: La legalización de la marihuana en Uruguay es una actitud de 'piratas'", *La Vanguardia*, 12 December 2013.
[56] **INCB** (2003), *Report of the International Narcotics Control Board for 2002, [E/INCB/2002/1]*, at 28–29.
[57] **Senate of Canada** (2018), *The Subject Matter of Bill C-45: an act respecting cannabis and to amend the controlled drugs and substances act, the criminal code and other acts, insofar as it relates to Canada's international obligations*, at 8. Canada's status has been theorized by some as the curious concept of "respectful temporary non-compliance" (**Jelsma**, M., Boister, N., Bewley-Taylor, D., Fitzmaurice, M., and Walsh, J. (2018), *Balancing treaty stability and change:* inter se *modification of the UN drug control conventions to facilitate cannabis regulation,* Global Drug Policy Observatory; **Walsh**, J. and Jelsma, M. (2019), "Regulating Drugs: Resolving Conflicts with the UN Drug Control Treaty System", *Journal of Illicit Economies and Development,* **1**(3):266–271). On another tone, Canada's reforms are directly used as a case study in the discussion of the concept of treaty repudiation in **Fleming**, S. (2020), "A Political Theory of Treaty Repudiation", *Journal of Political Philosophy*, **28**(1):3–26.
[58] Walsh and Jelsma (2019, at 268; *supra* note 57) relate that:

> "the INCB accused Canada of having 'contributed to weakening the international legal drug control framework and undermining the international rules-based order'. Other than implying that Canada should move to annul its new law, the Board offered no suggestions as to how Canada might reconcile its decision to regulate cannabis with its international legal obligations."

The diplomatic answers of Uruguay[59] and Canada[60] to the INCB, fairly similar in substance, articulated around questioning "why a certain normative obligation should be upheld"[61] –namely, that of prohibition– implicitly assuming "prohibition" as an untouchable legal keystone.

INCB's utterance that "the cultivation, manufacture, possession, purchase and sale of cannabis for *nonmedical* use [...] would contravene the letter and the spirit and essential objectives of the international drug control treaties"[62] (emphasis added) is not exclusive to the treaty-monitoring body: it is widely shared by scholars and analysts across the board.[63] But **the actual treaty provisions mandating the prohibition of such *nonmedical use* are never clearly pointed out** (arguably making such a "definite statement of the law" even more futile).

* * *

Robert Kolb highlights that "[a]ny new or unprecedented legal problem questions the text under a new light" making "new interpretive avenues" necessary, and consequently "implying also a new 'discovery' of the norm."[64] Indeed "[n]orms are dynamic and contested even as they become embedded in institutional practices,"[65] they still undergo:

> "a constant development in relation to both 'external' interactions with other norms, rules and principles, and 'internal' discursive interventions that problematize and (temporarily) fix the meanings of these norms"[66]

thereby resolving rule tensions. Surprisingly, however, none of this happened in 2013 or in 2018, even though the newly questioned historical premises of the treaties were pressing an open-ended reconsideration of the international drug control legal system. Given the above, it is possible that:

(1) The interpretive limitations of reformist stakeholders have constrained the strategies of norm contestation and proposals of reform to a mere challenge of the appropriateness and legitimacy of the IDCC as a "project,"[67] a prohibitionist project, in order to weaken the robustness of the treaties: in this case, "fracturing [the] control system [and] eventual radical alteration through treaty reform".[68] Deitelhoff and Zimmermann call this a strategy of "justificatory contestation" or "validity contestation."[69]

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[59] **Uruguay Presidencia** (2013), *Ley de regulación de cannabis La posición del presidente de JIFE no fue consultada con otros directivos del organismo*, Gobierno de Uruguay.
[60] Walsh and Jelsma (2019), *supra* note 57. See also: Fultz et al., 2017
[61] **Deitelhoff**, N., & Zimmermann, L. (2013). *Things we lost in the fire: how different types of contestation affect the validity of international norms. [PRIF Working Papers, 18]*, Hessische Stiftung Friedens- und Konfliktforschung, at 5.
[62] Something the INCB has been repeating for two decades at least, *e.g.* INCB (2003) at 28–29, *supra* note 56.
[63] To name but a few: **Bayer**, I. & Ghodse, H. (1999), "Evolution of international drug control, 1945-1995", *Bulletin on Narcotics*, **51**(1&2):1–18; **Habibi**, R. and Hoffman, S. J. (2018), "Legalizing Cannabis Violates the UN Drug Control Treaties, But Progressive Countries Like Canada Have Options", *Ottawa Law Review*, **49**(2):427–459; Sinha, J. (2001), *The history and development of the leading international drug control conventions; prepared for the Senate special committee on illegal drugs*, Library of Parliament, Parliamentary Research Branch, at 2.
[64] Kolb (2016) at 134–135, see *supra* note 28.
[65] Krook and True (2010) at 106 (*supra* note 26).
[66] Smetana and Onderco (2018) at 8, *supra* note 54; see also O'Mahoney (2014), *supra* note 35; Krook and True (2010), *supra* note 26.
[67] **Martínez Mitchell**, R. (2020), "International Law as Project or System?", *Georgetown Journal of International Law*, **51**(3):623–689; see also **Koskenniemi**, M. (2005), *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge University Press.
[68] Collins (2021) at 2, see *supra* note 6.
[69] Deitelhoff and Zimmermann (2013), *supra* note 61; (2020) at 58, *supra* note 27.

(2) These approaches of validity contestation arguably acted as a negative *Ergebnisorientierung* (outcome-orientation)[70] for actors defending these reforms: not only policy reform advocates but also State Parties, because "social acceptance of and unconditional deference to expert knowledge prompt decision-makers' recourse to epistemic communities' advice."[71] This may have quashed the mere incentive of looking into the treaties and the eventuality of relying on the "art"[72] of interpretation to "excuse or justify or extenuate a *prima facie* case of breach."[73]

The ever-increasing and unfolding domestic "cannabis legalization" efforts of our days, that some see as nearing *rebus sic stantibus* (the fact that a treaty provision becomes unapplicable due to a fundamental change in circumstances, and can be terminated),[74] prompt the **need for renewed interest in treaty law surrounding *Cannabis*, its products, and its RAU**. Concurrently, the new look at the history of the IDCC, by challenging premises and cognitive biases that transcend epistemic communities, invites a **re-reading and *rediscovery* of the text of the treaties and the context of their conclusion**, possibly opening the way to new "interpretive avenues" –and if not, at least, making sure the map is up-to-date.

In law, as we have seen, various equally-credible interpretations of the same term or disposition are not only possible, but vital,[75] and possibly even more in international law.[76] Parties have to make "a choice which reflects preferences, often lying outside the norm, [...] reasoned and justified according to legal parameters. Notably, on the basis of interpretation."[77] From that perspective, an **unbiased set of interpretive options from which to choose would be preferable**.

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[70] Kolb (2006) at 910–919 (*supra* note 28); Schachter (1991) at 38–39 (*supra* note 49).
[71] Bianchi (2019) at 254, also at 263–265 (*supra* note 47); Haas (1992) *supra* note 47; Johnstone (1991) at 389–391 (*supra* note 37); Rodogno et al. (2019) at 96–97 (*supra* note 3); **Ruiz-Fabri**, H. (2021). "The Puzzle of Interpretation in International Law" In: *Workshop - Interpretation in International Law: Rules, Content, and Evolution (TRICI-Law)*. University of Groningen, Faculty of Law; **Waibel**, M. (2015), "Interpretive Communities in International Law", In: Bianchi, A., Peat, D., and Windsor, M. (Ed.s), *Interpretation in International Law* (pp. 147–165), Oxford University Press.
[72] **ILC** (1967), *Yearbook of the International Law Commission 1966; Volume II [A/CN.4/SER.A/1966/Add.1]*, United Nations, at 218; **Merkouris**, P. (2010). "Introduction: Interpretation is a Science, is an Art, is a Science", In: Fitzmaurice, M., Elias, O. and Merkouris, P. (Ed.s), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (pp. 1–17), Martinus Nijhoff Publishers. For a discussion of this concept, see Allott (2015; *supra* note 4) and the talk: **Ammann**, O. (2021), "The Interpretation of Customary International Law: Art or Science?" In: *Panel 3: Interpretation and Sources of International Law beyond Treaties (TRICI-Law)*, University of Groningen, Faculty of Law.
[73] Chayes and Chayes (1993) at 188, see *supra* note 33.
[74] Crawford (2012) at 378–379, *supra* note 24; Leinwand (1971) at 433–438 (*supra* note 10). On *rebus sic stantibus* and the IDCC, see also Ghodse (2009) *supra* note 1.
[75] Wählisch (2015) at 332, *supra* note 49.
[76] **United States of America *v.* France** (1963), "Case concerning the interpretation of the air transport services agreement between the United States of America and France, signed at Paris on 27 March 1946" (Ago, R., Reuter, P., and de Vries, H., Arbs.), In: *Reports of the International Arbitral Awards*, **XVI**:5–74, at 48.
[77] d'Argent, P. (2017), "Interpreting International Law" in: *International law MOOC*, Université Catholique de Louvain.

This study, by attempting to distance itself from the "orthodoxy of 'prohibition regime' theories"[78] and its influence on treaty interpretation, and via a reliance on standard interpretive tools, easily finds a pathway where **a "cannabis legalization" in good faith is possible, with compliance mechanisms which already exist (*lex lata*)**. Under the light of the interpretation presented in this essay, one can find that:

- **the *drug control conventions* are no more than *conventions controlling drugs***.
- **"prohibition" is present marginally as an escape clause** of a fairly limited reach.
- all activities involving drugs under control which are not related to the medical and pharmaceutical or research sectors (*i.e.*, all "other than medical and scientific purposes") are actively exempted by precisely-defined provisions.
- the above applies to the *Cannabis* plant and all of its products under international control (cannabis, resin, extracts and tinctures) without any kind of specifics of limitation (*e.g.* THC threshold or subtypes of uses) whatsoever.

[78] Collins (2021), see *supra* note 6.

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2. APPROACH

"-Do you admire frankness?
-Yes – within reason.
-Sometimes I'm seized by a raging desire to say everything I think. But I know the world would collapse completely if people were completely candid."

– August Strindberg, *The Ghost Sonata*, 1907.[79]

Photo: Maurice Narkozy/CC BY-SA 4.0.

[79] Strindberg, A. (1907/2012), *The Ghost Sonata* (Carlson, K., Scheid, P., and Trebino, Z., Trad.s), at 39.

This essay consists of a complete review and discussion of the legal arrangements (or lack thereof) of the IDCC which apply to the cultivation of the *Cannabis sativa* L. plant and the production, manufacture, export, import, distribution of, trade in, use, and possession of its derivatives under international control (***Cannabis*-related controlled drugs**, hereinafter **CCD**[80]) used for **recreational use/adult use (RAU)**.

To ascertain this legal regime, the essay adopts a classical, objective, textualist method to the treaties, reading them as they stand[81] –as Fitzmaurice would put it, "subject to the limitations inherent in the fact that they only contain so many articles, phrases, and words."[82] The *letter* of the IDCC is, therefore "the only objective common denominator which can be externally ascertained"[83] while it is acknowledged that, as Krook and True put it:

> "Norms get constructed and, in many instances, evolve over time (1) in response to debates over their 'internal' definition, related to competing meanings of the norm, and (2) in interaction with the 'external' normative environment, consisting of other norms that are themselves 'in process'"[84]

A priori, the interpretive method laid out in the Vienna Convention on the Law of Treaties (VCLT), concluded in 1969,[85] is not retroactively applicable to treaties concluded before the VCLT entered into force, in 1980. Yet, the VCLT is often accepted as reflecting fairly (and codifying usefully) a customary international law which pre-existed its entry into force.[86] In this regard, the International Law Commission (ILC) suggested that the VCLT can be applied "including to treaties which were concluded before the entry into force of the [VCLT]" and to States not a Party to it.[87] Hence this essay, while adopting the textualist method, relies on the sober and flexible normative guidance provided by the VCLT as a benchmark.[88] This allows interaction with teleological and purposive approaches,[89] anticipating interpretive divergences[90] and issues of intertemporality.[91]

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[80] CCDs corresponds to a limited set of products and substances which are listed in the Schedules annexed to the C61 and C71 (regardless of whether they are derived from the *Cannabis* plant or obtained by chemical synthesis): "cannabis," "cannabis resin," "extracts and tinctures of cannabis," and "dronabinol" & other THC isomers (see Chapter 3).
[81] On this approach, see: Gardiner (2008) at 63–64 (*supra* note 29); van Damme (2009) at 111 (*supra* note 35).
[82] **Fitzmaurice**, G. G. (1951), "The law and procedure of the International Court of Justice: treaty interpretation and certain other treaty points", *British Yearbook of International Law,* **28**:1–28, at 7, 9.
[83] Kolb (2016) at 131 (*supra* note 28).
[84] Krook and True (2010) at 105, see *supra* note 26.
[85] **UN** (2005), "Vienna Convention on the Law of Treaties, 1969", *Treaty Series,* **1155**(18232):331–495, at 12–13.
[86] This is still a topic of debate. While some like Allott (2015; *supra* note 4) are still unconvinced, there are merits to such a consideration; see for instance: **Aust**, A. (2000), *Modern Treaty Law and Practice*, Cambridge University Press; Aust (2012 at 83; *supra* note 34); **Gardiner**, R. K. (2003), *International law*, Pearson Education Limited, at 78–92; Gardiner (2008; *supra* note 29) at 12–13, 63–64; Kolb (2016) at 128–131 (*supra* note 28); **Schwebel**, S. M. (1993). "May Preparatory Work be Used to Correct Rather than Confirm the 'Clear' Meaning of a Treaty Provision", In: Makarczyk, J. (Ed.), *Theory of International Law at the Threshold of the 21st Century; Essays in honour of Krzysztof Skubiszewski* (pp. 540–548), Kluwer Law Int'l, at 541, 547; **Shaw**, M. N. (2017), *International Law*, Cambridge University Press, at 707; UNGA (2019) at 2 (*supra* note 53); **Zemanek**, K. (2013). "Introductory note" In: *Vienna Convention on the Law of Treaties, 1969,* United Nations Audiovisual Library of International Law, at 2.
[87] **ILC** (2018), "Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries", In: *Report of the International Law Commission Seventieth session (30 April–1 June and 2 July–10 August 2018) [A/73/10]* (pp. 11–116), at 19.
[88] See Kolb (2016) at 128 (*supra* note 28).
[89] UNGA (2019) at 2 (*supra* note 53). See: Gardiner (2008) at 9–10 (*supra* note 29); Kolb (2006) at 771–773 (note 28).
[90] See: Focarelli (2012) at 93–94, 135–136 (*supra* note 30); **Helmersen**, S. T. (2013), "Evolutive Treaty Interpretation: Legality, Semantics and Distinctions", *European Journal of Legal Studies,* **6**(1):127–148, at 129; ILC (1967; *supra* note 72) at 218–219; Kolb (2006; *supra* note 28); Oppenheim (1921) at 36 (*supra* note 37); Waibel (2011) *supra* note 38.
[91] **Elias**, T. O. (1980), "The Doctrine of Intertemporal Law", *American Journal of Int'l Law,* **74**(2):285–307; **Fernández de Casadevante Romaní**, C. (1996), *La Interpretación de las Normas Internacionales*, Aranzadi, at 225–226.

Noting how "cannabis legalization" was labeled as *deviant* (and generally because of the need for inputs from the sphere of sociological sciences in the field of international law[92]), this essay draws on insights from the interactionist perspective of the sociology of deviance in international relations and norm dynamics.[93] This field of study would diagnose the discursive approach developed as an "applicatory contestation and affirmation" of the Conventions, where it is the *meaning* of the norms that is discussed, as opposed to most literature in the field of drug policy, articulated around "validity contestation" approaches (see "Recent History" in Chapter 1).

Primary sources are therefore favored for the review of legal provisions (echoing the method laid down in Article 31(1), VCLT)[94] in Chapter 3 which also precises the scope of the study, and the review of unclear terms (Articles 31(4), and 31(2)a., VCLT) in Chapter 4: chiefly, both rely on treaty provisions of the Single Convention/C61 (Art. 31(1), (2), and (4), VCLT), C71, and C88 (Art. 31(3)a., VCLT), as well as resolutions and final acts adopted at the four Conferences of Plenipotentiaries (COP): COP61 which concluded the Single Convention, COP71 which concluded the C71, COP72 which concluded the amendment to the Single Convention, making it the C61 in force today, and COP88 which adopted C88 (VCLT Art. 31(2)a.). In addition, the study explored the four official Commentaries (Art. 31(2)b. and 32, VCLT)[95] as well as first-hand accounts by stakeholders participating in, and *travaux préparatoires*[96] of the four COPs (VCLT Art. 32). Chapter 5 analyzes the use of terms in subsequent practice in both municipal systems and internationally (Art. 31(3)b., VCLT), and Chapter 6 discusses questions of intertemporality (Art. 31(3)c., VCLT). Chapter 7 finally addresses the perceived concept of a *cannabis-specific prohibition* and discusses the place of the general idea of "prohibition" in the IDCC.

Research for this essay was conducted between 2016 and 2022; it primarily relied on bibliographical resources from Biblioteca de Catalunya, Universitat de Barcelona, Universitat Pompeu Fabra, and secondarily from the UN Library in Geneva and Vienna, League of Nations Archives, Université de Genève, Université de Paris, internet resources, and first-hand experience of the author and team (acknowledgments *infra* note 420).

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[92] Waibel (2011) at 585, *supra* note 38.
[93] On this, see: Chayes and Chayes (1993; *supra* note 33); Deitelhoff and Zimmermann (2013; *supra* note 61); (2020; *supra* note 27); Smetana & Onderco (2018; *supra* note 54); as well as the volume **Onderco**, M., Wagner, W., and Werner, W. (Ed.s) (2014), *Deviance in International Relations 'Rogue States' and International Security,* Palgrave Macmillan.
[94] *op. cit.* note 85. See also: Aust (2012) at 83–86, *supra* note 34.
[95] Commentary of the Single Convention: *infra* note 114; Commentary of the 1972 Protocol amending the Single Convention: *infra* note 213; Commentary of the C71: *infra* note 105; Commentary of the C88: *infra* note 108. For a discussion on use of Commentaries, see: **Levine**, S.J. (2015), "The Law and the 'Spirit of the Law' in Legal Ethics", *Journal of the Professional Lawyer,* **1**(Touro Law Center Legal Studies Research Paper Series No. 16-01), at 3.
[96] French for "preparatory works," this expression refers to the minutes of the COP and other oral or written statements exchanged in the process of drafting and concluding a given treaty. On the reliance on the *travaux*, see Aust (2012) at 87–88 (*supra* note 34); Gardiner (2008) at 99–108 (*supra* note 29); Kolb (2016) at 134 (*supra* note 28); **McNair**, A. D. (1961), *The Law of Treaties*, Oxford at the Clarendon Press, at 411–412; Schwebel (1996), *supra* note 86.

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3. THE INTERNATIONAL LEGAL REGIME FOR NON-MEDICAL CANNABIS

"Sometimes the absence of something means that it simply isn't there."
– ***Report of the WTO Appellate Body***, 2000 (*infra* note 118).

Photo: Maurice Narkozy/CC BY-SA 4.0.

How is *Cannabis* and its products subject to international law? As a starter, the broad landscape of international law must be screened, to identify any unwritten custom or written instruments applying to *Cannabis* and its products. There is a strong case to make, after Leinwand, that:

> "[t]here are no traditional or customary norms in international law regarding drugs. The international legal norms that do exist are embodied in international agreements and treaties."[97]

Assuming that there is no customary international law[98] –and leaving aside bilateral and regional agreements– a review of legal instruments shows that there is a large number of international treaties with minor or secondary mentions of, or references to *Cannabis*:

- Some provide direct, additional, and topic-specific obligations with regards to products and substances scheduled under the C61 and C71 ("drugs"). This is the case for instance of the UN Conventions on the Law of the Sea (UNCLOS) or the Convention on the Rights of the Child (CRC).
- Others may apply indirectly (no direct mention of "drugs"), in specific contexts. For plants and other drugs present in nature, there are treaties that may enter into play, say the Convention on Biological Diversity or part of FAO's International Treaty on Plant Genetic Resources, which may apply to *Cannabis* seeds or some farming activities.[99] Other treaties would eventually enter into play in specific contexts, such as the Madrid Agreement Concerning the International Registration of Marks of 1891 in the case of application for international trademarks on *Cannabis*-derived medicines.[100]

These instruments define neither the "drugs" nor the activities or type of uses targeted. Instead, directly or indirectly, they defer to what is established elsewhere as "contrary to international conventions" or otherwise "defined in the relevant international treaties."[101] This points at **the existence of legal instruments that are core to the arrangement of *Cannabis*-related international law, by including provisions to which other treaties are referring to**.

These core treaties, of course, are the three IDCC. But among the three IDCC Conventions, **only two treaties –C61 and C71– are central**, because they list activities contrary to them,

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[97] Leinwand (1971) at 414, *supra* note 10.
[98] This could call for a study of its own.
[99] **Riboulet-Zemouli**, K. and Krawitz, M. A. (2021), *Voluntary Contribution to INCB Guidelines on Medical Cannabis – Due Diligence, Good Faith, & Technical Concerns*, FAAAT editions.
[100] See for instance the international registration of the trademark Sativex™ in: **WIPO IP Portal** (2003), "805396 - SATIVEX", *Madrid Monitor*, World Intellectual Property Organization. The "Madrid Agreement" is mentioned here to refer to the "Madrid System," indistinctly of the Agreement's different revisions, amendments, and protocols.
[101] Article 27(1)d., UNCLOS, refers to measures necessary for "the suppression of illicit traffic in narcotic drugs or psychotropic substances" (emphasis supplied) and Article 108, UNCLOS reads:

> "*Illicit traffic in narcotic drugs or psychotropic substances*
> *1.* All States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.
> *2.* Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic." (emphasis supplied)

These provisions for suppression do not apply to any and all traffic (*i.e.* trade), but only to what is elsewhere defined as illicit traffic. See **UN** (1982), *United Nations Convention on the Law of the Sea.* Similarly, Article 33, CRC reads:

> "States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances." (emphasis supplied)

Similarly to UNCLOS, these provisions for the protection of children do not apply to any and all uses, but only to whatuses that are illicit as defined elsewhere. See **UN Office of the High Commissioner for Human Rights** (2022), *Convention on the Rights of the Child.*

and define "drugs." The C61 defines, and has jurisdiction over, the products and molecules called "narcotic drugs," and the activities/uses related to them. The C71 defines a distinct set of molecules called "psychotropic substances," as well as their related activities and uses, but does not include plants or plant products.[102] The C88, as its title suggests, adds a layer of rules, but only concerning the "narcotic drugs" and "psychotropic substances" that are defined respectively in C61 and C71.

Which of the three Conventions?

Concerning *Cannabis* and most of its products, the treaty establishing the core legal framework is the C61: it contains provisions specific to, and definitions of, the *Cannabis* plant and some of its plant parts and products, and it lists some of those in the Schedules annexed to the text of the Convention. These scheduled products are "cannabis," "cannabis resin," and "extracts and tinctures of cannabis," all listed in Schedule I.[103] They are therefore legally defined as "narcotic drugs."

In parallel, the C71 lists *Cannabis*-related products in its Schedules: pure phytocannabinoid molecules found in *Cannabis*. These are pure dronabinol (*i.e.*, *delta*-9-tetrahydrocannabinol or Δ^9-THC) in Schedule II, and other pure tetrahydrocannabinol isomers in Schedule I;[104] accordingly legally defined as "psychotropic substances."

Although both C61 and C71 affect the same plant genus, they do not overlap: the provisions of the C71 do not extend to plants containing psychotropic substances, or plant parts and preparations thereof. Therefore –and contrary to the C61–, **C71 applies only to pure molecular compounds, once they have been separated (isolated)** from the plants.[105]

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[102] Most often, nowadays, the term "drugs" is used as an overarching category that refers to both narcotic drugs and psychotropic substances, meaning, anything under control of either C61 or C71.

[103] **INCB** (2021a). *List of Narcotic Drugs Under International Control prepared by the International Narcotics Control Board, in accordance with the Single Convention on Narcotic Drugs, 1961, and Protocol of 25 March 1972 amending the Single Convention on Narcotic Drugs, 1961 (Yellow List); 60th edition, revision 1*.

[104] Note that "dronabinol" is the international nonproprietary name for Δ^9-THC: both plant derived and synthetic (at 6 in: **WHO** (1984a), "Prop. INN: List 51", *WHO Chronicle,* **38**(2); at 4 in: **WHO** (1984b), "Rec. INN: List 24", *WHO Chronicle,* **38**(6))). There are tetrahydrocannabinol isomers other than dronabinol, which are all listed in Schedule I, C71 (**UN Secretary-General** (2021). *The International Drug Control Conventions; Schedules of the Convention on Psychotropic Substances of 1971, as at 7 December 2021. [ST/CND/1/Add.2/Rev.7]*, at 4–5). Collectively, all tetrahydrocannabinol isomers are referred to as "THC."

[105] The latter is well established. One thing is that, domestically, State Parties may decide to implement the C71 by going beyond its provisions and extending control to the plants or parts of plants containing psychotropic substances. But the C71 is very clear: *per se*, the Convention does not apply beyond pure molecules, except in very limited contexts. The discussions during the COP71 were unequivocal, and the Commentary on C71 made it more explicit (**UN** (1976a), *Commentary on the Convention on Psychotropic Substances [E/CN.7/589]*, at 3, 25, 385). A direct testimony to the negotiations, István Bayer (1989 at 23; see *supra* note 42) confirmed it; more recently, it has been corroborated by the INCB on various occasions (**INCB** (2014), *Contribution of the International Narcotics Control Board to the high-level review of the implementation by Member States of the Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem*, at 68; **Schappe**, H. (2001), *International control of the preparation 'ayahuasca' [INCB-PSY 10/01]*, International Narcotics Control Board) and further explained by scholars (**Tupper**, K. and Labate, B. (2012), "Plants, Psychoactive Substances and the

The C71 has not been particularly focused on in this essay, since the immense majority of **RAU concerns products of the *Cannabis* plant rather than pure isolated compounds**, whose RAU is insignificant.[106] The provisions of the C71 would only come into play in the event of a discussion of the legal framework surrounding these two phytocannabinoids in pure form, which falls outside of the scope of this essay.

Although routinely described as the third treaty of the IDCC, the C88 is not *per se* a drug control instrument, but rather, it is "essentially an international criminal law instrument [...] primarily aimed at combating illicit trafficking of narcotic drugs with instruments of criminal law" [107] which only comes in support of, and complement to the C61 and C71:[108] While both C61 and C71 could make sense alone, if there was no other treaty, the C88 would make no sense without the C61 and C71 to which it constantly refers. The C88 is presented in its preamble as a treaty "directed specifically against illicit traffic and that considers the various aspects of the problem as a whole, in particular those aspects not envisaged in the existing treaties." Its Article 25 specifies that "this Convention shall not derogate from any rights enjoyed or obligations undertaken by Parties [under the C61 or C71]."[109] Penal sanctions and other measures of repression present in the C88 are therefore not *in vacuo*: in practice, they refer directly to what C61 and/or C71 define as "illicit activities," "activities contrary to the Convention" as well as "abuse," and "diversion." From that perspective, **the C88 should be considered in a similar category as treaties such as the UNCLOS or the CRC, rather than to a core drug control treaty like the C61 and C71** undoubtedly are. Emblematic of this reliance upon C61/C71 provisions is C88's Article 3(2), which states:

> "each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption *contrary to the provisions of [C61 or C71]*"[110] (emphasis supplied)

It is not "personal consumption" but rather "personal consumption contrary to the provisions of the C61" that this article targets. Similarly, Article 14(2), C88 requests States to "take appropriate measures to prevent *illicit* cultivation of and to eradicate [...] cannabis plants, cultivated *illicitly* in

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International Narcotics Control Board: The Control of Nature and the Nature of Control", *Human Rights and Drugs,* **2**(1):17–28).

[106] WHO found "no diversion of the pharmaceutical product for nonmedical purposes and no evidence of abuse" for plant-derived dronabinol or other THC isomers in pure forms (**WHO** (2019b), *WHO Expert Committee on Drug Dependence: forty-first report: WHO Technical Report Series, No. 1018*, at 45; also at 48, 55).
In addition, non-CCD *Cannabis* products need to be drawn out of the scope of this essay, in particular plant parts or products that are not mentioned in the IDCC (*e.g.* roots) or in their Schedules (*e.g.* cannabidiol) and who, similarly, are not characterized by their "recreational use."

[107] **van Kempen**, P. H., and Fedorova, M. (2019a), *International Law and Cannabis I: Regulation of Cannabis Cultivation for Recreational Use under the UN Narcotic Drugs Conventions and the EU Legal Instruments in Anti-Drugs Policy*, Intersentia, at 51.

[108] Boister (2001; *supra* note 17); **UN** (1998), *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances [E/CN.7/590]*, at 294–297, 393–396.

[109] The text of the IDCC as currently in force (with final acts and resolutions from the COPs) can be consulted in: **UNODC** (2013), *The International Drug Control Conventions: Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol; Convention on Psychotropic Substances of 1971; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988: with final acts and resolutions*, United Nations, at 124. "[T]he existing treaties" at the time of conclusion of the C88 refers only to C61 and C71, other multilateral agreements having been terminated.

[110] *ibid.* at 129. van Kempen and Fedorova (2019a, at 53) discuss it in great detail –see *supra* note 107.

its territory" (emphasis added).[111] The need to establish as criminal offenses the possession, purchase, or cultivation of *Cannabis* and CCDs, as well as the mandate to eradicate *Cannabis* plants, depends upon what a Party will consider unlawful or illicit under, or contrary to the provisions of, the C61.

In addition to this deference to the C61/C71, the penal obligations contained in C88 are generally largely "open to domestic variation and non-application."[112] In doing so, the C88 only but reenacts the consensus reached by the Parties in 1961. Indeed this is also the case for the C61: just like in the C88, and "although formally binding, the penal provisions prove remarkably soft"[113] in the C61 –as explained in the *Commentary on the Single Convention*, **the obligation of the Parties in terms of criminal justice with regards to the C61 are "rather vague, and [admit] escape clauses** for the benefit of those Governments to which even such vague norms would be unacceptable."[114] A well-known example is the fact that the C61 does not call for mandatory punishments in cases of possession of narcotic drugs for personal use.[115]

Overall, scholars generally coincide in describing the penal aspects of the IDCC as secondary, flexible, timid.[116] They appear to be fundamentally articulated around breaches and infringements to the establishment of a licit market for medical and scientific purposes, in essence inherited from previous drug control treaties.

The central focus of the analysis of the international legal framework surrounding the RAU of *Cannabis*-related controlled drugs (CCDs), therefore, has to be an analysis of the C61. Any understanding of the eventual provisions applying to RAU and subsequent obligations for State

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[111] UNODC (2013) at 149; *supra* note 109.
[112] Boister (2001) at 519, see *supra* note 17.
[113] Colson (2019) at 81 (*supra* note 5). For further discussion on the weakness of the penal provisions included in the Single Convention/C61, see Boister (1996; 1997), *supra* note 39; and **Anslinger**, H. J. (1958), "Report on Progress in drafting the 'Single Convention,' a Proposed Codification of the Multilateral Treaty Law on Narcotic Drugs", *Food Drug Cosmetic Law Journal,* **13**(11):629–697, at 696.
[114] **UN** (1973), *Commentary on the Single Convention on Narcotic Drugs, 1961 [United Nations publication Sales No. E.73.XI.1]*, at 425.
[115] The *Commentary on the Single Convention* at 113–114 (*supra* note 114) explains that the possession of drugs for "non-medical consumption or industrial use is exceptionally permitted by the Single Convention" and that countries can "legally authorize" it, but, beyond and distinct from this exceptional authorization (reviewed in this essay), it is worth signaling that an important scholarship has developed around the analysis of the legal provisions applying to personal possession and use, almost since the Single Convention was adopted (see at 597 in: **Lande**, A. (1976). "The Gentlemen's Club. International Control of Drugs and Alcohol. by Kettil Bruun; Lynn Pan; Ingemar Rexed", *American Journal of International Law,* **70**(3):597–598). From these studies, in particular, the constitutional principles and rules inherent to different domestic legal systems are shown to prevail, in particular regarding the human right to privacy or other aspects related to personal use and consumption. For instance:

> "Article 3(2) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 relieves State parties from the Article's obligation to criminalize drug possession and cultivation for "personal consumption' when doing so would conflict with their constitution or basic concepts of their legal system. Spain relied on Article 3(2) in its decision not to criminalize conduct involving personal consumption" (**Marks**, A. (2019), "Defining 'personal consumption' in drug legislation and Spanish cannabis clubs", *International and Comparative Law Quarterly,* **68**(1):193–223).

Additionally, it was shown that "the burden of proof is on the State to justify criminalisation" of these activities (see **Barrett**, D. (2011), *Is the decriminalisation of possession of controlled substances for personal use consistent with international law?*, International Centre on Human Rights and Drug Policy & International Harm Reduction Association).
[116] Boister (1997) at 15 (*supra* note 39); Colson (2019) at 77–79 (*supra* note 5); **Paoli**, L., Greenfield, V.A., and Reuter, P. (2012), "Change is Possible: The History of the International Drug Control Regime and Implications for Future Policymaking", *Substance Use & Misuse,* **47**(8-9):923–935, at 925–927, 931.

Parties under the IDCC (or indeed any other treaty) first requires finding out what is licit and what is not under the C61.[117]

In this respect, the task starts less easily than one could anticipate, given that **the words "recreational use" or "adult use" are never mentioned in the C61** or indeed in the C71 or C88. Insofar "the absence of something [sometimes] means that it simply isn't there,"[118] the apparent unanimity around these treaties establishing a prohibition of RAU suggests that these concepts should be there, somewhere. At first sight, it is unclear whether another term serves as a straightforward synonym, and if so, which one. In order to find out where the terminology applying to the production of *Cannabis* and use of CCDs for RAU lie, this chapter comprehensively lists (Table 1) and discusses the legal provisions applying to *Cannabis* and CCDs in the C61.

[117] C71 and C88 might however enter into play as a mean of interpretation, *e.g.* as suggested by Article 31(2), VCLT.
[118] **WTO** (2000). *Canada – Term of Patent Protection: Report of the Appellate Body [WT/DS170/AB/R]*, at 24. Cited in Gardiner (2008; *supra* note 29) and van Damme (2009; *supra* note 35). Note that CND and UNGA, in their documentation, routinely mentions the term "recreational," but only in reference to sports, cultural events, and other activities presented as alternatives to the actual RAU of drugs (*e.g.* at 111 in: **UN** (1987a), *Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987 [A/CONF.133/12]*; or at 5 in: **UNGA** (2016), *Thirtieth special session: Agenda item 8: "Our joint commitment to effectively addressing and countering the world drug problem"; 19 April 2016 [A/RES/S-30/1]*).

Table 1. Provisions of the 1961 Single Convention relevant to *Cannabis* and its products

Section	Art.	Text of the Single Convention of 1961 as amended in 1972
Definitions	**1(1)b.**	"'Cannabis' means the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated."
	1(1)d.	"'Cannabis resin' means the separated resin, whether crude or purified, obtained from the cannabis plant."
Scope	**2(1)**	"Except as to measures of control which are limited to specified drugs, the drugs in Schedule I are subject to all measures of control applicable to drugs under this Convention and in particular to those prescribed in article 4 (c), 19, 20, 21, 29, 30, 31, 32, 33, 34 and 37."
	2(6)	"In addition to the measures of control applicable to all drugs in Schedule I, … cannabis [is subject to the provisions of] article 28."
	2(9)	"Parties are not required to apply the provisions of this Convention to drugs which are commonly used in industry for other than medical or scientific purposes, provided that: *a.* They ensure by appropriate methods of denaturing or by other means that the drugs so used are not liable to be abused or have ill effects (article 3, paragraph 3) and that the harmful substances cannot in practice be recovered; and *b.* They include in the statistical information (article 20) furnished by them the amount of each drug so used."
	4(c)	"The parties shall take such legislative and administrative measures as may be necessary: *(a)* To give effect to and carry out the provisions of this Convention within their own territories; *(b)* To co-operate with other States in the execution of the provisions of this Convention; and *(c)* Subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs."
Control measures	**19**	*Requirements on* "Estimates of drug requirements"
	20	*Requirements on* "Statistical returns to be furnished to the Board"
	21	*Requirements on the* "Limitation of manufacture and importation"
	23	*Requirements related to* "National Opium Agencies", also applying for the cultivation of the *Cannabis* plant and the production of cannabis and cannabis resin for medical and scientific purposes, as per Article 28(1).
	28	"1. If a Party permits the cultivation of the cannabis plant for the production of cannabis or cannabis resin, it shall apply thereto the system of controls as provided in article 23 respecting the control of the opium poppy. 2. This Convention shall not apply to the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes.

		3. The Parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant."
	29	*Measures of control of* "Manufacture"
	30	*Measures of control of* "Trade and distribution"
	31	"Special provisions relating to international trade"
	32	"Special provisions concerning the carriage of drugs in first-aid kits of ships or aircraft engaged in international traffic"
	33	*Requirements on the* "Possession of drugs"
	34	"Measures of supervision and inspection"
	37	*Requirements related to* "Seizure and confiscation"
Transitional reservations	**49**	"1. A Party may at the time of signature, ratification or accession reserve the right to permit temporarily in any one of its territories: … *(d)* The use of cannabis, cannabis resin, extracts and tinctures of cannabis for non-medical purposes; and *(e)* The production and manufacture of and trade in the drugs referred to under … (d) for the purposes mentioned therein. 2. The reservations under paragraph 1 shall be subject to the following restrictions: *(a)* The activities mentioned in paragraph 1 may be authorized only to the extent that they were traditional in the territories in respect of which the reservation is made, and were there permitted on 1 January 1961; *(b)* No export of the drugs referred to in paragraph 1 for the purposes mentioned therein may be permitted to a non-party or to a territory to which this Convention does not apply under article 42; […] *(f)* The use of cannabis for other than medical and scientific purposes must be discontinued as soon as possible but in any case within twenty-five years from the coming into force of this Convention as provided in paragraph 1 of article 41; *(g)* The production and manufacture of and trade in the drugs referred to in paragraph 1 for any of the uses mentioned therein must be reduced and finally abolished simultaneously with the reduction and abolition of such uses. 3. A Party making a reservation under paragraph 1 shall: *(a)* Include in the annual report to be furnished to the Secretary-General, in accordance with article 18, paragraph 1 (a), an account of the progress made in the preceding year towards the abolition of the use, production, manufacture or trade referred to under paragraph I; and *(b)* Furnish to the Board separate estimates (article 19) and statistical returns (article 20) in respect of the reserved activities in the manner and form prescribed by the Board. [...]" *[Note: Non-relevant paragraphs have been omitted.]*

Key:
Provision applies to cannabis for all purposes.
Provision applies to cannabis for medical and scientific purposes.
Provision applies to cannabis for other than medical and scientific purposes.
Provision does not apply to cannabis (plant & controlled drugs) since 2021 (Schedule IV withdrawal).
Provision does not apply to cannabis (plant & controlled drugs) since 2000 (expiration of the provision).

Typology of legal regimes

The prevailing provisions for *Cannabis* and CCDs are spread out throughout the Single Convention, and can be presented in different manners.

Typology of the Commentary

The *Commentary on the Single Convention* lists, over two pages, the "various regimes which [the Convention] provides" including the ones for *Cannabis* and CCDs.[119] Reproduced below, that section of the Commentary provides a quasi-comprehensive range of variations in the legal framework applying to *Cannabis* and some of its products under the Single Convention. Although almost all eventualities are enumerated there –including the legal regime that would apply if some "cannabis preparations" were listed in Schedule III (a situation that has not happened to date)– one element was not foreseen: the **withdrawal of "cannabis and cannabis resin" from Schedule IV, C61, which effectively happened, and took legal effect early 2021**.[120] Therefore, the eventual specificities of the legal regime prevailing after such withdrawal are missing from that section of the Commentary. Nonetheless, critical information is provided to understand the basis of the legal arrangements of **Schedule I, which "constitute the standard regime under the Single Convention"**[121] and currently as well the regime of control prevailing for CCDs under the C61.

> "(1) The regime applicable to drugs in Schedule I with the exception of opium, the coca leaf and extracts and tinctures of cannabis in territories in respect of which they have been made the object of a reservation under article 49 by the Parties concerned […]
> (2) The regime applicable to preparations, other than preparations in Schedule III, of the drugs subject to the regime mentioned under (1).
> […]

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[119] *Commentary on the Single Convention* at 49–51; *supra* note 114.

[120] On descheduling generally: The treaty-related process is as follows: 53 State Parties seat at the CND, on a rotating basis. These CND members have the options to amend the content of the Schedules annexed to the C61, on a yearly basis at CND annual meetings, pursuant to Article 3, C61 (*Commentary on the Single Convention* at 74–107, *supra* note 114; Riboulet-Zemouli *et al.* (2021) at 27–32, *infra* note 147; **Riboulet-Zemouli**, K. and Krawitz, M. A. (2022), "WHO's first scientific review of medicinal *Cannabis*: from global struggle to patient implications", *Drugs, Habits and Social Policy*, published online ahead of print 15 March 2022) –the procedure is mimicked in the C71. The provision of flexibility in a treaty via a delegation of the power to amend it to a reduced number of Parties is discussed briefly by McNair (1961 at 748n2; *supra* note 96). As summed up in the *Commentary on the Single Convention* (29; *supra* note 114):

> "The Schedules may be amended in a different way than the other parts of the Single Convention. A special procedure, that of article 3, is provided for their revision. Amendments of the Schedules, but not that of other sections of the Single Convention, can become binding on Parties to that treaty without their express or implied consent."

On descheduling "cannabis and cannabis resin" from Schedule IV (whose implications are discussed in Chapter 7): The CND adopted Decision 63/17 on 2 December 2020, by which it "decided by a roll-call vote of 27 votes to 25, with 1 abstention, to delete cannabis and cannabis resin from Schedule IV of the Single Convention…" (**CND** (2020), "Decision 63/17: Deletion of cannabis and cannabis resin from Schedule IV of the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol" In: *Commission on narcotic drugs: Report on the reconvened sixty-third session (2–4 December 2020) [E/2020/28/Add.1]*, United Nations, at 5). The Decision definitively entered into force in April 2021 (Riboulet-Zemouli and Krawitz, 2022; Riboulet-Zemouli *et al.*, 2021, *infra* note 147). Previously, "cannabis and cannabis resin" had been listed in Schedule IV additionally to Schedule I, while "extracts and tinctures of cannabis" were only listed in Schedule I (and have not been affected by Decision 63/17).

[121] As explained in the *Commentary on the Single Convention* at 51; *supra* note 114.

> (7) The regime applicable to extracts and tinctures of cannabis in territories in respect of which they have been made the object of a reservation under article 49 by the Parties concerned.
> (8) The regime applicable to preparations, other than those included in Schedule III (if any) of such extracts and tinctures
> [...]
> (13) The regime applicable to cannabis and cannabis resin in territories in respect of which they have not been made the object of a reservation under article 49 by the Parties concerned.
> (14) The regime applicable to preparations, other than preparations in Schedule III (if any) of the cannabis and cannabis resin referred to under (13).
> (15) The regime applicable to cannabis and cannabis resin in territories in respect of which they have been made the object of a reservation under article 49 by the Parties concerned.
> (16) The regime applicable to preparations, other than preparations in Schedule III if any, of the cannabis and cannabis resin mentioned in (15) above.
> (19) The regime applicable to cannabis leaves.
> [...]
> (22) The regime applicable to the cannabis plant.
> [...]
> (24) The regime applicable to drugs which are commonly used in industry for other than medical or scientific purposes."

This typology in useful to draw a sets of legal provisions arranged according to the different "classes" of "types" of products, botanical parts, or substances considered:

- *Cannabis* products that <u>are not "drugs"</u> (in the meaning of Article 1(1)j.):[122]
  - *Cannabis* plant; seeds when separated from flowering/fruiting tops; flowering/fruiting tops from which the resin has been removed; stem; roots; etc.:
    - Provisions mentioned in (22) of the above citation;
  - *Cannabis* leaves:
    - Provisions in (19) above;

- *Cannabis* products that <u>are "drugs"</u> (and the focus of this essay):
  - Drugs in Schedule I, when no reservation has been made under Article 49:
    - Provisions in (1) for extracts and tinctures, in (13) for cannabis and cannabis resin (nowadays similar provisions, after withdrawal from Schedule IV);
    - Provisions in (2) for preparations of extracts and tinctures, in (14) for preparations of cannabis and cannabis resin (nowadays similar too);
    - Provisions in (24);
  - Drugs in Schedule I, when a reservation has been made under Article 49:
    - Provisions in (15), for cannabis and cannabis resin;
    - Provisions in (16), for preparations of cannabis and cannabis resin;
    - Provisions in (7), for extracts and tinctures;
    - Provisions in (8), for preparations of extracts and tinctures.

[122] That Article reads: "'Drug' means any of the substances in Schedules I and II, whether natural or synthetic."

Typology in Article 2 of the Single Convention

Back to the text of the treaty, Article 2, C61, titled "substances under control" is proposing its own insightful typology of legal regimes.

Article 2 provides clear references to the provisions prevailing for drugs listed in Schedule I (in its paragraphs 1 and 9), as well as to the **additional dispositions that are specific to CCDs** (paragraph 6) **or to "cannabis plant" and "cannabis leaves," and other the non-"drug" cannabis items** (paragraph 7). It reads as follows:

> "*(1)* Except as to measures of control which are limited to specified drugs, the drugs in Schedule I are subject to all measures of control applicable to drugs under this Convention and in particular to those prescribed in article 4 (c), 19, 20, 21, 29, 30, 31, 32, 33, 34 and 37. […]
> *(6)* In addition to the measures of control applicable to all drugs in Schedule I, […] cannabis [is subject to the provisions of] article 28. […]
> *(7)* The […] cannabis plant, […] and cannabis leaves are subject to the control measures prescribed in article […] 22 and 28; […] and 28, respectively
> *(9)* Parties are not required to apply the provisions of this Convention to drugs which are commonly used in industry for other than medical or scientific purposes, provided that:
> *a*. They ensure by appropriate methods of denaturing or by other means that the drugs so used are not liable to be abused or have ill effects (article 3, paragraph 3) and that the harmful substances cannot in practice be recovered; and
> *b*. They include in the statistical information (article 20) furnished by them the amount of each drug so used"[123]

Another way of presenting these provisions which prevail for CCDs is as follows:

- **Definitions**, in Article 1(1) subparagraphs *b*. and *d*., of "cannabis" and "cannabis resin" (note that there is no definition for "extract and tinctures of cannabis"),
- **Scope of control** and general obligations of State Parties, in Articles 2(1), 2(6), 2(9), and 4(c);
- **Measures of control** for CCDs in Articles 19, 20, 21, 23 (triggered by Art. 28), 28 to 34, and 37;
- Additionally, Article 49 allows for **temporary reservations** related to CCDs, that entail a different tier of measures and obligations.

[123] UNODC (2013) at 27–28; *supra* note 109. Because of the length of Article 2, only sections that are relevant to *Cannabis* and CCDs have been quoted.

Typology of uses

Among this legal landscape, when looking for the terms related to types of consumption and use that may point at RAU, the presence of several "types of uses" recur. These "types of uses" or "types of purposes" (the term "purposes" not only encompasses the "use," but also other activities) are also echoed in other Articles of the treaty that are unrelated to *Cannabis* or CCDs. Each of these "types of uses" is associated with a specific set of provisions:[124]

- Medical and scientific purposes (Article 4(c)) are the central purposes regulated; these types of uses and associated activities, clearly not RAU,[125] are associated with precise dispositions of control, varying according to the Schedule in which the drug is listed;
- "Other than medical and scientific uses" commonly used in industry (Article 2(9)) exempt from the controls applied to "medical and scientific purposes" but subject to specific provisions;
- "Other than medical and scientific purposes" that are traditional (Article 49) subject to specific, temporary provisions;[126]
- Slightly apart, the concept of "abuse and ill effects" is present, but not defined, not linked to a specific legal regime (see Chapter 4), and not associated with the concept of "purpose" (see Annex I).

Medical and scientific purposes (hereinafter **MSP**) **are the main focus of the vast majority of provisions for mandatory or optional control established by the C61.**

The preamble of the Convention lays out the desire to conclude "a generally acceptable international convention replacing existing treaties on narcotic drugs, limiting such drugs to medical and scientific use" concurrently recognizing that (1) "the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes" and that (2) "addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind" –a phraseology geared towards health, medicine, medical uses and the biomedical concept of addiction, although indeed with some archaic terms.[127]

[124] Yet another "regime" of "Special Government purposes" and "special stocks" for that purpose is present in the Convention (a somewhat parallel legal framework defined in Article 1(1)w. and elsewhere in the treaty), but, again, its would require an analysis of its own, which exceeds the scope of this essay.
[125] Some have argued that there may be some beneficial therapeutic or psychological considerations related to use of drugs in the context of "recreation" or "leisure", however, these philosophical considerations go beyond the scope of this essay, which considers as a premise that RAU is distinct from "medical use."
[126] While it is "other than medical and scientific purposes" that is mentioned in Article 49 subparagraph (2)f. In relation to cannabis, subparagraphs (1)d. and (1)e. Of the same Article 49 mention the use of cannabis for "non-medical purposes." On this point, the Commentary precises that "the phrase 'non-medical purposes' in subparagraph (d) means 'purposes other than medical and scientific ones'" (*Commentary on the Single Convention* at 469; *supra* note 114).
[127] Preamble, C61 in: UNODC (2013) at 23; *supra* note 109. See also *infra* section "Raison d'être."

Article 4(c): two tiers, control & exemption

Article 4, C61 is titled "General obligations." It reaffirms and details the "limitation" to MSP contained in the preamble. Article 4(c) which stipulates that:

> "***subject to the provisions of this Convention*, [Parties shall take such legislative and administrative measures as may be necessary] to limit exclusively to medical and scientific purposes** the production, manufacture, export, import, distribution of, trade in, use and possession of drugs."[128] (emphases supplied)

Note that:

- The goal of the Convention, expressed in its preamble, is: "limiting [narcotic] drugs to medical and scientific use."
- On the other hand, Article 4(c) calls to "limit *exclusively* to medical and scientific purposes" (emphasis added).

This difference is notable. Although, at first sight, the phraseology of the preamble could seem more liberal, the apparently more "exclusive" limitation of Article 4(c) is actually balanced by the subjection of the limitation "to the provisions of this Convention." **It is therefore a *relative exclusive limitation***, not an absolute one, given the expression **"subject to" invokes a conditionality or dependence upon other textual elements** within the C61, thus indicating to readers "that they should **cross reference the current clause** they are reading [...] with another clause elsewhere."[129] Textually, therefore, the C61 establishes as a general obligation to limit all activities involving drugs exclusively to medical and scientific purposes (MSP), but subject to exceptions present elsewhere.

The Commentary is crystalline in identifying the clauses to cross-reference:

> "the provisions to which paragraph (c) is 'subject', *i.e.* which are excepted from its application, are article 49, article 2, paragraph 9 [...].
> Article 4, paragraph (c) [requires] Parties, subject to the exceptions expressly permitted by the Single Convention[1], to limit exclusively to medical and scientific purposes the possession of drugs.
> [1] *Article 2, paragraph 9, [...] and article 49*"[130]

So, the provisions to which the "exclusive limitation" is "subject to" (for *Cannabis*) are: Article 49 and Article 2(9).

Notably, both Articles reference "other than medical and scientific purposes" (OMSP): Article 49 allows countries to present temporary reservations allowing continued traditional use for OMSP during a certain period, whereas Article 2(9) allows to exempt drugs "commonly used in industry" for OMSP. The Commentary corroborates this, mentioning "Article 4,

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[128] *ibid.* at 30.
[129] **Hossein** J. (2019), *Legalese - Subject to - What does it mean?*; see also: "Subject to" (2022), In: *Black's Law Dictionary Free Online Legal Dictionary, 2nd Ed.*
[130] *Commentary on the Single Convention* at 110, 402; *supra* note 114. Note: there are other clauses, not relevant to *Cannabis* (*e.g.*, specific exemption for some products derived from coca leaf in Article 27), that are omitted from the quote.

para. (c) together with article 2, para. 9" as examples of "cases in which non-medical consumption or industrial use is exceptionally permitted by the Single Convention."[131]

In short: Article 4(c) establishes a general obligation for State Parties to limit the activities involving narcotic drugs to MSP, while accepting exceptions to said limitation in the case of OMSP. This, *a priori*, seems like if the Convention was attempting to establish a medical sector in a closed-loop, rather than giving that sector the exclusivity. This is supported by the fact that early drug control instruments (*e.g.*, the 1931 Convention for *Limiting* the Manufacture and *Regulating* the Distribution of Narcotic Drugs) hover over a similar concept of *relative exclusive limitation* geared at establishing a stable medical market.

Surprisingly, however, **the INCB never mentions the first part of Article 4(c)** in its analysis of the C61,[132] and, in consequence, never discussed the subsequent dichotomy conveyed by the Convention. **Sheer mention of the seven words "subject to the provisions of this Convention" remains exceptional in scholarly and general literature**; when mentioned, no effort is made into analyzing the clauses cross-referenced by such subjection, even though they are explicit in the Commentary.[133]

The previous drug control instruments (that the Single Convention terminated and replaced) contained a broad range of exemptions. The Single Convention indeed eliminated all exemptions contained in previous treaties that were related to MSP… but it expressly maintained exemptions related to OMSP. The Commentary, again, corroborates that it was "one of the most important achievements of the Single Convention that it ended the exceptions permitted in earlier treaties […] apart from two cases"[134] –Articles 49 and 2(9).

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[131] *Commentary on the Single Convention* at 113–114; *supra* note 114.

[132] Only two examples among dozens: **INCB** (2019b), *Report of the International Narcotics Control Board for 2018 [E/INCB/2018/1]*, at 2; **INCB** (2020), *Report of the International Narcotics Control Board for 2019 [E/INCB/2019/1]*, at 40. See also: Fleming (2020) at 29, *supra* note 57. In INCB (2020, at 17), this omission leads to inconsistencies in a single paragraph:

> "the conventions foster the availability of controlled substances for medical, scientific or industrial use while preventing their diversion into illicit channels. One of the hallmarks of the drug control framework is that it limits the production, manufacture, export, import and distribution of, trade in and possession of drugs exclusively to medical and scientific purposes."

At first, INCB affirms that the IDCC fosters "medical, scientific or industrial use" but in the next sentence it claims that the IDCC limit activities "exclusively to medical and scientific purposes." Where has "industrial" gone? This is the result of the "exclusive limitation" not being balanced by the exemptions for industrial purposes to which it is subject in Article 4(c). Countless inconsistencies linked to the omission of the beginning of that provision punctuate INCB reports.

[133] Leinwand (1971; *supra* note 10) is an exception, quoting the full article and considering it accordingly (at 418–419), although the analysis provided is sometimes inconsistent in some points (at 440). All other essays related to the question of cannabis and the treaties (referenced or not throughout this essay) only mentioned the latter part of Article 4(c), without including the first seven words "subject to the provisions of this Convention." Rarely, like in the policy report by Jelsma *et al.* (2018 at 3; *supra* note 57), the Article is cited in its entirety –in this case, in a footnote, but the authors' analysis and interpretation does not take these seven words into consideration, and do not attempt to cross-reference the clauses to which the limitation is subject to.

[134] *Commentary on the Single Convention* at 72; *supra* note 114. See also Lande (1962) at 781, see *supra* note 39.

Article 49: transitional exemption

Article 49, C61 establishes an exemption from the general regulatory and control obligations of the C61. It contains **transitory clauses allowing to stagger the full application of the Convention.**

The application of Article 49 is limited (1) to coca leaf, opium, and CCDs, (2) to the geographical areas where their use was traditional before 1961, and (3) in time. This last condition is particularly relevant, because **the clauses contained in Article 49 already ceased to be applicable (since 8 August 2000).**[135] For this reason, a detailed study of Article 49 is not relevant.

Nonetheless, it is worth noting that Article 49 explicitly mentions different subsets of OMSP for opium and coca leaves: "quasi-medical use," "smoking," "chewing." Conversely, the vocabulary related to *Cannabis* and CCDs in Article 49 remains limited to two expressions: "non-medical purposes" in Article 49(1)d., and "use of cannabis for other than medical and scientific purposes" in Article 49(2)f. The Commentary notes, on this particular language, that "**the phrase 'non-medical purposes'** in subparagraph (d) **means 'purposes other than medical and scientific ones.'"**[136]

The relevance of Article 49, today, is that it suggests that the traditional non-medical use of *Cannabis* products that existed before 1961 (arguably RAU) is among, or at least assimilable to, the category of OMSP.

[135] That is, 25 years after the entry into force of the last version of the Convention (the amended C61) in 1975, as per subparagraph (2)f. (**UN** (2021b). "Protocol Amending the Single Convention on Narcotic Drugs, 1961 Geneva, 25 March 1972; Status as at 26 October 2021", *United Nations Treaty Collection; Chapter VI, Narcotic Drugs and Psychotropic Substances*; **UN** (2021c), "Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961 New York, 8 August 1975; Status as at 26 October 2021", *United Nations Treaty Collection; Chapter VI, Narcotic Drugs and Psychotropic Substances*). Some analyses may interpret different dates based on the date of entry into force of the unamended text (in 1968). This staggering in time is something common, see **Martín Rodríguez**, P. J. (2003), *Flexibilidad y tratados internacionales*, Editorial Tecnos, at 184–187.

[136] *Commentary on the Single Convention* at 468–469; *supra* note 114.

Article 2(9): industrial exemption

Article 2, paragraph 9, also establishes an exemption from the general obligations of the C61. Contrary to Article 49, however, Article 2(9) is applicable to all scheduled drugs, and contemplates neither time expiration nor geographical limitation. Article 2(9) reads as follows:

> "Parties are not required to apply the provisions of this Convention to drugs which are commonly used in industry for other than medical or scientific purposes, provided that:
> (a) They ensure by appropriate methods of denaturing or by other means that the drugs so used are not liable to be abused or have ill effects (article 3, paragraph 3) and that the harmful substances cannot in practice be recovered; and
> (b) They include in the statistical information (article 20) furnished by them the amount of each drug so used."

Textually, quite clear.

A look at the report of the discussions during the Conference of Plenipotentiaries of 1961 (hereinafter the COP61)[137] –where the Single Convention was negotiated and adopted– shows that **the inclusion of an exemption for the broad concept of OMSP, and the choice to use vague, imprecise, and undefined terms, was a purposeful and acknowledged decision of the drafters**.[138] **The direct applicability of Article 2(9) to CCDs was even verbalized during the negotiations, without any objection being raised**.[139]

Hence, *a priori*, there is no reason to evade the consideration of the application of the exemption contained in Article 2(9) to *Cannabis*-related products used for OMSP –as long as that use is **common in industry**. "Industry," another undefined term in the treaty.

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[137] A Conference of Plenipotentiaries is the convening of Ambassadors vested with full power to negotiate a treaty on behalf of their State's government. Various preliminary drafts of the Single Convention had been discussed between 1950 and 1960, prior to the COP61 (officially "UN Conference for the adoption of a Single Convention on Narcotic Drugs"), but the COP61 was a "*grande finale*" of intense negotiations leading to the current text, from January to March 1961. Most records of the COP61 are included in UN (1964a, *supra* note 40) and UN (1964b, *infra* note 138).

[138] This acknowledgement by the drafters is discussed in great details in Chapters 5 and 6. An good overview is provided by: UN (1964a) at 25, 55, 185 (*supra* note 40) and **UN** (1964b), *United Nations Conference for the adoption of a Single Convention on Narcotic Drugs, New York, 24 January - 25 March 1961: Official Records, Volume II, [E/CONF.34/24/Add. 1]*, at 3, 79, 84, 98–99.

[139] Amidst a discussion wholly focused on cannabis, this statement is made (UN (1964b) at 98–99; *supra* note 138):

> "Mr. VAN NIEUWENBORG (Congo (Leopoldville)) observed that under article 2, paragraph 9(a) of the draft [...], parties would not be required to apply the provisions of the Convention to drugs which were commonly used in industry for other than medical or scientific purposes, provided that they ensured by appropriate methods of denaturing or by other means that the drugs so used were not liable to be abused or have ill effects."

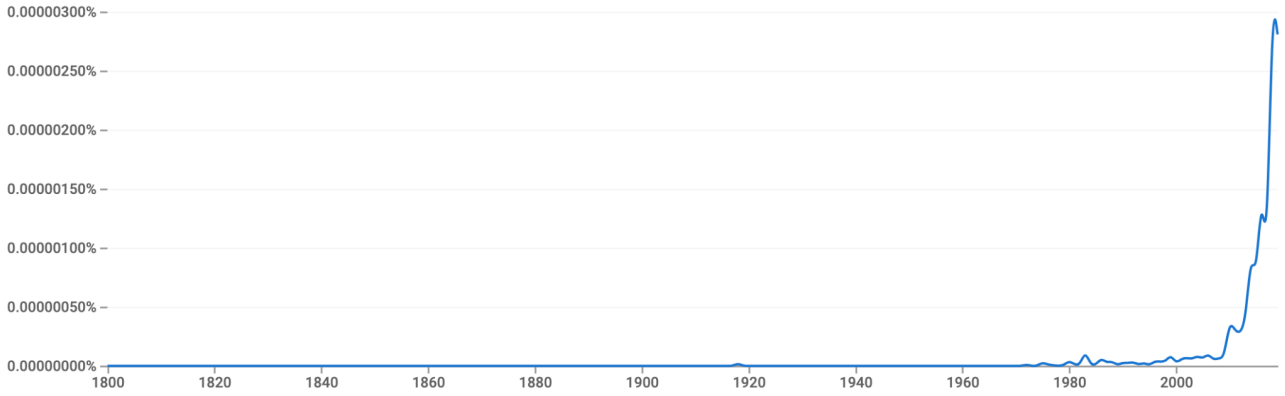
To which the delegate from Australia, chairing that particular meeting, answered:

> "The CHAIRMAN said that, except for the cases covered by that provision [...], extracts and tinctures of cannabis and cannabis resin would have to be retained in Schedule I."

No objection was raised by none of the other countries present in the room (at least: Canada, France, Hungary, Mexico, Sweden, Switzerland, UK, United Arab Republic (Egypt), USA, USSR, as well as one representative from WHO and another from the Drug Supervisory Body, a former intergovernmental organization merged onto the INCB in 1968).

The terms "cannabis industry" are routinely used to refer to the operators of legally-regulated companies, nonprofits, and other establishments working in direct relation with *Cannabis* and CCDs for "nonmedical use" in the jurisdictions where such uses are legally regulated.[140] This phraseology makes sense insofar it is harmonious with the use of "industry" in other contexts (food industry, tourism industry, movie industry, pharmaceutical industry, and even the *illegal drug industry*…): **in legal RAU operations indeed, CCDs are "commonly used in industry for other than medical or scientific purposes."** Although the term appeared relatively recently (Figure 1), it has become generalized in common language.

Figure 1. Presence of the expression "cannabis industry" in English publications, 1800–2019



Using the research queries (cannabis=>industry + industry=>cannabis), case-insensitive, without smoothing, in the joint English corpora 2019 (period 1900-2019).[141]

A number of publications of **bodies such as INCB and the UNODC also use the expression "cannabis industry" to refer to activities undertaken for other than medical and scientific purposes in different legally-regulated contexts** such as the Netherlands or the USA.[142]

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[140] The economic type, legal personality, and industrial models of what "industry" refers to are not detailed in the Convention, which might make sense insofar economic views and approaches to "industry" were, to say the least, divergent at the time. In the case of the "cannabis industries" of today, there are important variations (from jurisdiction to jurisdiction and within them) in the type of structures that are actually producing and/or dispensing CCDs for RAU, where it is legally-permitted. Legal "cannabis industries" may take the form of regular commercial businesses (*e.g.* in some provinces of Canada or US States), partially-regulated entities (*e.g.* the "coffee shops" in the Netherlands), or non-for-profit economic entities such as those following the "cannabis social club" model (which is implemented diversely in municipal law: via national pieces of legislation in Malta and Uruguay, via jurisprudencial rulings in South Africa and Spain, in addition to local-level regulations in Spain).

[141] Google Books (2019), *Ngram Viewer: English corpora, 2019*.

[142] For example, INCB's report for 2005 (**INCB** (2006), *Report of the International Narcotics Control Board for 2005 [E/INCB/2005/1]*) reads:

> "The Government of the Netherlands estimates that the cannabis industry in that country consists of 1,200 retail businesses, employing about 4,600 people. […] the annual turnover of outlets where cannabis is sold and used (so-called "coffee shops")"

The expression is also used in other reports such as INCB (2019b) at 11, 61 (*supra* note 132) or a case study of mention of "cannabis industry" a few lines before a truncated quote of Article 4(c), at 55 in: **INCB** (2016a), *Report of the International Narcotics Control Board for 2015 [E/INCB/2015/1]*. The also uses the word UNODC, see: UN (2020a), at 33.

There seems to be **nothing preventing reading Article 2(9) as applicable to CCDs commonly used in industry**. If Article 2(9) is to be applied to CCDs, there are therefore two further conditions, laid out in subparagraphs (a) and (b), that need to be analyzed.

Subparagraph (a): upstream, prevention and harm reduction

> "provided that: (a) [the Parties] ensure by appropriate methods of denaturing *or* by other means that the drugs so used are not liable to be abused or have ill effects (article 3, paragraph 3) *and* that the harmful substances cannot in practice be recovered" (emphases supplied).

The first of the two requirements in Article 2(9) –subparagraph (a)– is appearing as a precondition or step prior to the actual use of the drug for OMSP (in a way, *upstream* the consumption) which would allow triggering the exemption. The expressions "appropriate methods of denaturing," "other means," "harmful substances," and the concept of recovering in practice, are not defined in the Single Convention nor explained in its Commentary.

Behind a relatively cryptic language, it is possible to attempt summarizing the provision. **In substance, what subparagraph (a) says is**:

1. **What to do**:
    - ensure that the drugs used for OMSP are not liable to "be abused or have ill effects"
    - ***and*** ensure that the harmful substances cannot in practice be recovered.
2. **How to do it**:
    - by appropriate methods of denaturing
    - ***or*** by other means.

On the "how to do it," several elements are worth noting:

- It applies to both avoiding abuse, and avoiding recovery of harmful substances,[143]
- It leaves the choice between "denaturing" or "other means" in the way to apply the provision.[144]

Such a flexibility invites an interpretation of the "what to do" part of the provision which would be consistent with (and possible under) both eventualities: **the meaning of Article 2(9)a. has to**

[143] This is made clear by the absence of a coma after the bracket and before the terms "and that the harmful substances" which could have suggested that the words "by appropriate methods of denaturing or by other means" did not apply to the later part of the provision; it could also have been even more clearly stated by replacing "and that" by "and ensure that" after the bracket and before the terms "the harmful." We have to conclude therefore that the terms "by appropriate methods of denaturing or by other means" apply to both "the drugs so used are not liable to be abused or have ill effects" and "the harmful substances cannot in practice be recovered."

[144] Also present in the C71, this type of requirement is often considered rather "outdated as a safeguard [...] in a world in which codeine is extracted from a tablet containing 3 other ingredients and converted into heroin by a schoolboy" (Bayer, 1989 at 24; see *supra* note 42) –as stated by an eyewitness of the COP71 ("he was UN officer (staff member of the Division on Narcotic Drugs) between 1967 and 1973 [...] also joint secretary of the Technical Committee of the [COP71];" at 1). Given these circumstances, this makes the "other means" not just an option, but a particularly relevant one.

make sense not only for State Parties that would choose "denaturing" the drug, but also for those which would choose "other means." The meaning of undefined terms and unclear concepts in this provision must correspond to something which, in real life, allows to avoid liability to abuse and to avoid the practical recovery of harmful substances by other means than "denaturing."

"Abuse and ill effects" are not defined, not even in Article 3(3) mentioned in this clause (which, in essence, explains that "abuse and ill effects" defines what products or substances ought to be included in the Schedules). But because "abuse and ill effects" are also mentioned in the context of both MSP and OMSP, it is difficult to assimilate that concept with RAU. As extensively discussed in Chapter 4, this concept, associated with "addiction" and other symptoms of illness (Annex I), is most probably referring to substance use disorders (SUD), indeed currently defined as a medical condition. Taking appropriate measures to avoid an increase in diagnoses of a medical condition does seem to make sense in light of the preamble of the C61 which calls for the protection of health and welfare and the fight against "addiction." Because it is present in many instances, in other IDCC treaties, and has a complex drafting history, the concept of "abuse and ill effects" is analyzed in greater detail in the next Chapter.

A more problematic concept to interpret is that of **"harmful substances," not defined or indeed used anywhere else in any of the three IDCC** or their final acts and resolutions. It may seem easy to reach conclusions about these words, for example: "harmful substance is the drug," or "harmful substance is *that thing* within the drug that makes you high."

One has to remark, however, that it is "substances" which should be prevented from recovery via denaturing or other methods, and not the "drugs" as such. This is surprising, insofar as the C61 refers to the products under its scope as "drugs" and not "substances" (contrary to the C71, which defines "psychotropic substances"). What does "substance" come to mean in the context of the C61? In the text of the 1961 Convention, the term "substance" is present on several occasions, appearing as a general term, with a broader meaning that the category of "drugs." "Drug" seems to be a category within that of "substance." Drugs are those particular substances which are listed in Schedule I or II of the C61. Furthermore, the term "substance" is also often used in reference to things that are *not* drugs.[145] What the term "substance" alone means in this provision is difficult to

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[145] Article 1(1)j. reads: "'Drug' means any of the substances in Schedules I and II, whether natural or synthetic" (UNODC, 2013; *op. cit.* note 109; see *supra* note 122). This is echoed in Article 2, titled "Substances under control": indeed, that article also mentions controls to be applied to substances that are not technically "drugs", for instance substances to which emergency controls could be applied by CND, which are not "drugs" until the process of scheduling has taken place, although they might temporarily fall under control. The Commentary says on this regard:

> "The term 'other substances' in clause [Art. 1(1)x.(ii)] includes drugs not covered by this Convention, such as nalorphine or apomorphine, but would also apply to any drug which eventually come to be 'commonly used in industry for other than medical and scientific purposes'" (at 35 in *Commentary on the Single Convention*, *supra* note 114).

In C61, the other mentions of the term are:

- "drugs and other substances" (Art. 1(1)x.),
- "substances which do not fall under this Convention, but which may be used in the illicit manufacture of drugs" (Art. 2(8)),
- "substance not already in Schedule I or in Schedule II" (Art. 3(3)),
- "a preparation because of the substances which it contains is not liable to abuse and cannot produce ill effects" (Art. 3(4)),
- "substances other than drugs in Schedule IV" (Art. 3(5)) here encompassing drugs in other schedules as well as substances not scheduled,
- "substances not covered by this Convention" (Art. 19(1)b., 20(1)b., and 21(1)b.),

ascertain in and of itself, given the broad and inconsistent meaning given to that word in the rest of the treaty.

"Harmful substances" –not just "substances"– are the object of this provision. The extent of what "harmful" comes to represent is maybe even more debatable, but, at first, it is worth mentioning that "harmful" or "harm" are totally absent from the three Conventions, except in this Article 2(9)a. It should also be noted that "harmful substance" is presented as a concept apart from "abuse and ill effects." It is extremely tempting to interpret that the "harmful substance" in CCDs is dronabinol/THC, such an interpretation may lead to absurd or unreasonable conclusions:

- **THC is not listed in the C61**, and therefore not subject to its provisions. While the meaning given to the term "substance" could *a priori* suggest this[146] considering that THC removal is a way of complying with Article 2(9)a. would *de facto* subject THC to the legal regime of the C61. This is not only something expressly recommended against, since it would represent an undesirable outcome for the cohesion of the international legal system, it also **directly contradicts the will of the Parties expressed twice (in 1971 and in 2020) *not to subject* THC to the provisions of the C61**.[147]
- Such an interpretation sees the concept of "harmful substance" as an ingredient of the "drug" –a physical or chemical subset, which would be responsible for the harms of the drug. However, **Article 2(9) applies equally to all drugs in Schedule I**: therefore, it needs to make sense, and have a similar meaning, in all instances and for all drugs. While removing THC from CCDs seems possible, removing morphine from morphine is not. The interpretation considered would therefore be specific to *Cannabis* products (and other plant-based products) and not be applicable to single-compound drugs.[148] Besides the challenge to the laws of physics, this also appears to oppose the fact that the Commentary

- "Any drugs, substances and equipment used in or intended for the commission of any of the offences referred to in article 36" (Art. 37).

[146] See *supra* note 145. For recall, the Parties to the Single Convention could not discuss this during the COP61, since dronabinol had not yet been identified as the key active compound in *Cannabis* plants (it was only identified in 1964). The Parties to the Single Convention reconvened in 1972 to agree on a Protocol amending the Single Convention; they had therefore a chance to amend the text of the treaty to reflect the new discovery, but did not do it.

[147] The will of the Parties, in 1971, was to include THC in the C71. The C61 was already in force and almost all States present at the COP71 were Parties to the C61. In 2020, the Parties, via the mechanism of Schedule amendment contained in the treaties, refused to move THC from the C71 to the C61, reiterating their refusal to see THC subject to the legal provisions of the C61. There is a broad consensus at the CND against having THC (or any other drug or substance) subjected simultaneously to both C61 and C71. This has been expressed by innumerable State representatives during the discussions related to cannabis scheduling, between 2019 and 2020 (for an overview of these discussions, see Riboulet-Zemouli and Krawitz (2022), *supra* note 120; for in-depth review, see: **Riboulet-Zemouli**, K., Krawitz, M. A., and Ghehiouèche, F. (2021), *History, science, and politics of international cannabis scheduling, 2015–2021*, FAAAT editions). See also **WHO** (2010), *Guidance on the WHO review of psychoactive substances for international control [EB 126]*. See also the answer of the representative of WHO's Expert Committee on Drug Dependence to a question of the USA representative asking why the Committee "could not make a recommendation that differentiates between low THC concentration and high THC concentration cannabis resin?" Answer by WHO's representative:

> "It was the Committee's understanding that differentiating cannabis or cannabis resin on the basis of the concentration of the active compounds, particularly delta-9-THC (dronabinol), could be perceived as proposing to change the definitions in Article 1 of the 1961 Single Convention, since these definitions do not currently address concentrations. The Committee sought to avoid such perceptions (whether they would be correct or not) and did, therefore, not make proposals that may be viewed as changing the definitions or creating new sub-categories within the definition of cannabis in Article 1 of the 1961 Convention" (**UNODC Secretariat to the Governing Bodies** (2019), *Questions and answers relating to WHO's recommendations on cannabis and cannabis-related substances Status: 26 November 2019*, at 27).

[148] Otherwise it would require previous intellectual acrobacies, to first conceptualize demorphinized morphine, or decocainized cocaine… Imagining dry water might be more simple. But similarly unrealistic.

and records of the negotiations document the use of (obviously non-demorphinized) morphine under an Article 2(9) exemption, for use in the photography industry.[149]

- The act of **removing THC from CCDs is nothing more than "denaturing."** As discussed above, **while removing THC from CCDs would seem to be one of the ways to comply with subparagraph (a) under the concept of "appropriate means of denaturing," it can not be the only way, or else the sentence would be redundant, and the relevance of the words "or by other means" (other than denaturing) would be annihilated**, which also seems to oppose the principle of ***ut res magis valeat quam pereat***, according to which "the maximum of effectiveness should be given to [an international obligation] consistently with the intention — the common intention — of the parties."[150] Understanding the *non-recoverability* of "harmful substance" as the removal of an active principle renders the subparagraph at least partly absurd, unreasonable, and ineffective.

Because it would be in direct contradiction to repeated decisions of the Parties, because the same provision cannot apply differently to different drugs without it being present in the text, and because such an interpretation would make part of the provision devoid of substance and absurd, the removal of an abuse- or addiction-producing ingredient from the drug (such as **THC removal from CCDs) is not a legitimate interpretation of this provision**.

In that case, what does "harmful substance" mean? The expression is not entirely undefined, since it is visibly demarcated from "abuse and ill effects." If not, why would the Plenipotentiaries choose extraordinary wording instead of writing the provision as: *ensure that the substances liable to abuse or ill effects can not in practice be recovered?* This seems to support the case that **there is not necessarily a direct link between the concept of "harmful substance" in this provision and the ingredients known to have a potential for SUD (like THC)**. The "harmful substance" seems to refer to other harms, not necessarily to addiction and SUD –and these possible harms are of a fairly diverse nature.[151]

The fact that there is no definition of the word "substance," coinciding with diverse meanings of it in the Convention, calls attention to the polysemy of the term "substance" in common language: substance can refer to a physical, material object; but it can also refer to an

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[149] Note that many could define photography as a recreational industry, including UN documentation (see *supra* note 118). On the example mentioned: the Commentary indeed refers to this example of morphine being exempted for its uses in analog chemical photographic processings (at 72 in *Commentary on the Single Convention*, *supra* note 114; for the drafting discussions, see: CND, 1955, *infra* note 289). There is, however, no sign that morphine was "demorphinized" (something obviously impossible), that the removal of any sort of "harmful" ingredient had taken place, or how it was prevented from being "recovered in practice" by photographers (...and what about schoolboys photographers? –see *supra* footnote 144).

[150] On *ut res magis valeat quam pereat*, see: **ILC** (1965), *Yearbook of the International Law Commission 1964: Volume II [A/CN.4/SER.A/1964/ADD.1]*, at 60). See also: Fernández de Casadevante Romaní (1996) at 222–223 (*supra* note 91); Fitzmaurice (1951) at 8 (*supra* note 82); ILC, (1965) at 53–62; ILC (1967; *supra* note 72) at 219; Kolb (2016) at 154–155 (*supra* note 28); Lo (2017) at 243–244 (*supra* note 24).

[151] The literature is profuse about drug-related harms. It is also known that drugs can be associated with harms linked to how they are managed by public policy: the UNODC recognizes that harmful "unintended consequences" may arise in relation with drug policies (see: **CND** (2008), *Making Drug Control "Fit for Purpose": Building on the UNGASS Decade: Report by the Executive Director of the United Nations Office on Drugs and Crime as a contribution to the review of the twentieth special session of the General Assembly; Fifty-first session; Vienna, 10-14 March 2008; Agenda item 3 [E/CN.7/2008/CRP.17]*, at 10–12; **Lines**, R. M. (2017), *Drug Control and Human Rights in International Law*, Cambridge University Press, at 49; **Reuter**, P. H. (2009), *The unintended consequences of drug policies [Report 5]*, RAND Corporation).

essence, *pith*, *gist*. If, in this provision, "harmful substance" is interpreted as an equivalent to **harmful essence, harmful potential, harmfulness, substantific harm –rather than as harmful ingredient, harmful part of the drug–** it follows that no part of the subparagraph are obliterated, and it is possible to **give full effect to the provision by opting for "appropriate other means" instead of "denaturing," as the drafters intended and as the text reads**.

On these premises, and through the lens of the preamble of the Convention, all parts of Article 2(9) make sense and can be applied coherently. Article 2(9)a. can be understood as **exempting drugs provided that State Parties implement effective prevention of substance use disorders** ("ensure [...] that the drugs so used are not liable to be abused or have ill effects") **and harm reduction strategies** ("ensure [...] that the [harms] cannot in practice be recovered"). This approach is supported by the existence of appropriate and efficient means to prevent abuse and addiction and to reduce the harmful impact of drugs, by other means than denaturing: prevention, education, harm reduction programs, but also quality analysis of products, information for consumers on potency, etc.

These upstream exemption conditions can be formulated as follows:

1. **What to do**:
    - avoid substance use disorders
    - ***and*** avoid other potential harms
2. **How to do it**:
    - by appropriate methods of denaturing
    - ***or*** by other means known for prevention and harm reduction.

Subparagraph (b) & Article 20: downstream, statistical reporting

The second condition, in subparagraph (b), is much more straightforward. It consists of sending the INCB an annual statistical reporting of the quantity of drugs used for OMSP. This takes place downstream to the use for OMSP. The subparagraph reads:

> "provided that: [...] (b) [the Parties] include in the statistical information (article 20) furnished by them the amount of each drug so used."

This represents a limited data collection exercise, as compared to the statistical and reporting requirements prevailing for MSP. The Commentary explains:

> "Failure to furnish information under article 2, paragraph 9, subparagraph b would not only constitute a violation of this provision and possibly of article 20, paragraph 1, subparagraph (b), but would also render illegal the non-application of the full narcotics regime prescribed by the Single Convention to the use of the drugs"[152]

[152] *Commentary on the Single Convention* at 73, also at 248; *supra* note 114.

Consequently, reporting to the INCB on "the amount of drugs so used" is a way to appropriately **render legal the non-application of C61's full narcotics regime** to the use of drugs. Subparagraph (b) requires only statistical returns on the "amount used," pointing at Article 20. Article 20 says:

> "1. The Parties shall furnish to the [International Narcotics Control] Board for each of their territories, in the manner and form prescribed by the Board, statistical returns on forms supplied by it in respect of the following matters:
> *(a)* Production or manufacture of drugs;
> *(b) Utilization of drugs for the manufacture of other drugs, of preparations in Schedule III and of substances not covered by this Convention, and utilization of poppy straw for the manufacture of drugs;*
> *(c) Consumption of drugs;*
> *(d)* Imports and exports of drugs and poppy straw;
> *(e)* Seizures of drugs and disposal thereof;
> *(f)* Stocks of drugs as at 31 December of the year to which the returns relate; and
> *(g)* Ascertainable area of cultivation of the opium poppy. [...]"[153] (emphases supplied)

A confusion may arise from the fact that "use" is not mentioned in Article 20. Both "utilization" and "consumption" could be the clauses targeted under Article 2(9)b. Article 1(2) defines "consumption" as the "[supply] to any person or enterprise for retail distribution, medical use or scientific research" and the Commentary on Article 20(1)c. explains that "the figures concerning consumption to be furnished under subparagraph *(c)* relate to consumption for medical and scientific purposes." The INCB has also clarified that "consumption" refers to:

> "the amounts supplied for retail distribution, medical use or scientific research, to any person, entreprise or institute (retail pharmacists, other authorized retail distributors, institutions or qualified persons duly authorized to exercise therapeutic or scientific functions: doctors, veterinarians, hospitals, dispensaries and similar health institutions, both public and private; scientific institutes)"[154]

While the terms "other authorized retail distributors" (and in Article 1(2) "retail distribution") could apply to industrial retailers, all examples given point to "therapeutic or scientific" purposes, [155] and the Commentary clarifies that **"consumption" in Article 20(1)c. has to be understood as this "the meaning of transfer from the wholesale to the retail level" for medical professions and researchers**,[156] and explains:

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[153] Article 20(2) also informs that "The statistical returns [...] shall be prepared annually and shall be furnished to the Board not later than 30 June following the year to which they relate" (UNODC (2013) at 40–41; *supra* note 109).
[154] *Commentary on the Single Convention* at 250; *supra* note 114.
[155] *ibid.* at 44, 47–48.
[156] *ibid.* at 46, 250–251. See also **Berterame**, S. (2021), "Q&A", In: *'Way forward in the control and monitoring requirements of cannabis and cannabis-related substances: INCB Guidelines on the International Drug Control Requirements for the Cultivation, Manufacture and Utilization of Cannabis for Medical and Scientific Purposes' side-event organized by the International Narcotics Control Board during the 64th Commission on Narcotic Drugs, April 13, 2021*, at 36:41

> "the Single Convention sometimes applies the word 'use' for consumption by individual patients or animals, i.e. for 'consumption' in its common meaning. [...] The word 'use' is, however, also employed in other meanings.[22]
>
> [22] *E.g., [...] article 2, para. 9 ('used in industry')*"[157]

As corroborated on the Commentary on Article 20(1)b. about "utilization of drugs…," "the amount of drugs used in industry for other than medical and scientific purposes would also have to be furnished to the Board" with a footnote pointing at Article 2(9)b.[158] The term "used" in Article 2(9) seem to refer to "utilization" in subparagraph *(b)* in Article 20,[159] and because drugs exempted for OMSP are neither used for the manufacture of other drugs, nor preparations in Schedule III, it should be assumed that they fall under "substances not covered by this Convention."

It is not, therefore, the actual consumption by final users that countries are required to report, but the quantities that transit within the industry supply chain.

It is compelling that, in practice, **there already exists a possibility for countries to report** statistical information on a variety of different uses *in industry* under Article 2(9)b. **via Part II.B of the *Form C* –supplied by the INCB to governments** for their reporting. This form indeed includes a large "empty space [...] to report other narcotic drugs and their quantities used for the manufacture of other substances to be reported"[160] which corresponds to Articles 2(9)b. and 20(1)b.

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[157] *Commentary on the Single Convention* at 48; *supra* note 114.
[158] *ibid.* at 248.
[159] Generally, the term "utilization" in the Convention refers to the management of the product at different levels of the supply chain, not to the actual use/consumption by people who use drugs, as commonly understood. Recently, the INCB explained that "utilization" refers to a process of manufacture, not to the final consumer's use (see Berterame (2021) at 36:41, *supra* note 156). In the Convention, we have seen, the term "use" sometimes in its common meaning, sometimes –like in Article 2(9)– it has the meaning of "utilization." See *supra* note and *Commentary on the Single Convention* at 47–48, 227–228, 248–250; (*supra* note 114).
[160] **INCB** (2021b), *Form C; Annual statistics of production, manufacture, consumption, stocks and seizures of narcotic drugs; Single Convention on Narcotic Drugs of 1961: articles 1, 2, 13, 20 and 27, 1972 Protocol amending the Single Convention on Narcotic Drugs of 1961: articles 1 and 10 (20th unedited edition)*.

Article 2(9), **subparagraph (b) consists in a clear compliance mechanism, via statistical reporting on industry stocks and flows, something that can be ascertained externally and allows the INCB to exercise a *de minimis* oversight**. Opposite is subparagraph (a) which includes no such mechanism or assessing authority: the determination of the appropriate means to apply to drugs exempted under Article 2(9)a. is discretionary upon State Parties (however, obviously, in good faith).

Once exempt, drugs cease to be drugs in the meaning of the Convention: they become "other substances." "Cannabis" ceases to be "cannabis in the meaning of the convention," it becomes "other substances" as well insofar it ceases to be under treaty control.

There is, therefore, a positive legal regime for the non-medical use of CCDs in the C61: RAU are not ignored or absent from the treaty, they are regulated under Article 2(9) with measures of harm reduction in subparagraph (a), statistical monitoring in subparagraph (b) and Article 20 also serving as a mechanism to ascertain compliance. It is worth noting that countries that have regulated RAU already implement a monitoring of quantities circulating in the licit market,[161] including for internalized organizational business models such as Cannabis social clubs, which already include systems of internal monitoring and control of the information that Article 2(9)b. requires.[162] It seems therefore possible for these countries to **comply immediately by submitting this information** to INCB as described above (and independently, documenting and evidentiating the public policies and *other means than denaturing* that are applied to reduce harms and prevent SUD).

[161] See for instance the data monitoring page about the "three ways of access to non-medical cannabis" on the website of the Uruguayan Cannabis Agency: **Instituto de Regulación y Control del Cannabis** (2022), *Mercado Regulado del Cannabis: Informes de monitoreo de los principales indicadores de la evolución de las tres vías de acceso vinculadas a la producción, distribución y dispensación del cannabis de uso no-médico de acuerdo a la Ley N° 19.172 y reglamentaciones vigentes.*

[162] About monitoring practices of these entities: see *supra* notes 140 & 161, and **Ghehiouèche**, F. and Riboulet-Zemouli, K. (2016), *Cannabis Social Club. Policy for the 21st century: a social, ethic, human-scale and health-based model addressing the misuse, abuse and potential damages due to cannabis use while countering the unregulated growth of cannabis supply*, UNODC UNGASS 2016 website; **Pardal**, M., Decorte, T., Bone, M., Parés, Ò., and Johansson, J. (2020), "Mapping Cannabis Social Clubs in Europe", *European Journal of Criminology,* **s.n.**:147737082094139; **Belackova**, V. and Wilkins, C. (2018), "Consumer agency in cannabis supply – Exploring auto-regulatory documents of the cannabis social clubs in Spain", *International Journal of Drug Policy,* **54**:26–34; and the report of activities from the Spanish federation of Cannabis social clubs, with two decades of experience of the management of these structures: **ConFAC - Confederación de Federaciones de Asociaciones Cannábicas** (2020), *Informe macroeconómico: fiscalidad de las asociaciones de personas consumidoras de cannabis*.

Article 28: cultivation

If CCDs –the products– are subject to an exemption under Article 2(9), it is not the case for *Cannabis* –the plant– which is not *per se* a controlled drug[163] and therefore not exempt under Article 2(9): Article 2(9) applies only to drugs in Schedule I or II, where the *Cannabis* plant is not listed. **The *Cannabis* plant** does nonetheless fall under the scope of the C61, under provisions specific to it, contained in **Article 23** (titled "National Opium Agencies") and Article 28 ("Control of Cannabis") – see Table 1. **Article 28** is central; it states:

> "1. *If* a Party permits the cultivation of the cannabis plant *for the production of cannabis or cannabis resin*, it shall apply thereto the system of controls as provided in article 23 respecting the control of the opium poppy.
> 2. *This Convention shall not apply to* the cultivation of the cannabis plant exclusively for *industrial purposes* (fibre and seed) or horticultural purposes. […]"[164] (emphases added)

There have been varied interpretations of this Article. The treaty "specifically excludes from control, plants of the genus *Cannabis* that are used for industrial or horticultural purposes" according to WHO's interpretation.[165] Understood that way, the application of the measures of control of Article 23, would only be applicable when cultivation is undertaken for MSP (Article 28(1)), but not for OMSP (Article 28(2)).[166] This would be in line with the two other purpose-based exemptions considered previously (Article 2(9), Article 49) and with Article 4(c).

In sharp contrast with WHO's interpretation, INCB interprets the mention of "(fibre and seed)" between brackets as limitative, as an exhaustive list of products for which cultivation would be exempt.[167] The fact that a two-tiered system is established between paragraphs (1) and (2) is not disputed: it is the scope of the second tier (exemption) that is challenged by INCB's interpretation.

These two diverging interpretations (one which considers cultivation "for industrial […] and horticultural purposes" to be exempt –WHO's–, the other which considers cultivation only "for industrial [fiber and industrial seed] purposes" to be exempt –INCB's) have been a vivid topic of debate, not only between treaty-mandated bodies, but also between State Parties.[168]

Which of the two would be reinforced by a textual examination of Article 28? *A priori*, the alignment of WHO's interpretation with the other provisions for exemption and their similar

[163] As per the definition in Article 1(1)j.; *supra* note 122.
[164] UNODC (2013) at 47; *supra* note 109.
[165] WHO (2019b) at 36; *supra* note 106.
[166] This has already been explored, although from a different angle, in **Riboulet-Zemouli**, K. (2018), *Hemp and the Treaty: Scope and definition of the exemption covering "hemp" in the international drug control Conventions. A total exemption – by purpose*.
[167] This has been in particular made explicit by the representative of INCB during discussions with State Parties, in 2019, who stated that "the 1961 Convention limits the cultivation of cannabis for industrial purposes to fibre and seed" (UNODC Secretariat to the Governing Bodies (2019) at 48, 65–66; *supra* note 147), and that "cultivation of the cannabis plant for industrial purposes other than those explicitly indicated in article 28, paragraph 2, should not be considered licit" (at 11–12), in an interpretation diametrically opposed to that of the Commentary on the Single Convention for which any purpose that is not the obtention of scheduled cannabis medicines is industrial and exempt (*Commentary on the Single Convention* at 312; *supra* note 114).
[168] This is extensively discussed in UNODC Secretariat to the Governing Bodies (2019), *supra* note 147. See also: **Riboulet-Zemouli**, K. (2020), *CBD as a 'narcotic'? Food for thought – Analysis of the European Commission's preliminary conclusions qualifying cannabidiol in food and foodstuff as a narcotic drug*, FAAAT.

dichotomy MSP *v.* OMSP. This invites consideration of the merits of INCB's interpretation. At first sight, **the focus on the two words "fibre and seed" between brackets seems to draw on the doctrine of *expressio unius est exclusio alterius*** (mentioning one thing means excluding the other things). From the onset, it is unorthodox: Lord **McNair extensively warns of such common misunderstandings and calls for a cautious use of the doctrine**.[169] Indeed, by assuming INCB's assertion that "the 1961 Convention limits the cultivation of cannabis for industrial purposes to fibre and seed,"[170] interpretive consequences would be:

- Although the **leaves** of the *Cannabis* plant are not listed in the Schedules, therefore not drugs, the cultivation of *Cannabis* to obtain leaves would be controlled since leaves are neither fiber nor seed. Applying drug control to the cultivation for leaves has not been the practice of State Parties allowing the consumption of leaves, and the INCB has never required the application of controls to the cultivation of *Cannabis* for their leaves; this therefore suggests an inconsistency in this particular interpretation. Thus for the cultivation of leaves to be exempt, the word "leaves" would need to be included in the brackets;[171]
- Similarly, the cultivation for the production of seeds would also need to be under control: flowers (not mentioned in the bracket) are an inevitable step in the development of plants, prior to the obtention of seeds:[172] **would Article 23 need to be applied during the flowering stage, and then waived when the crop fructifies and turns into seeds?** Complex agricultural acrobacies would be involved;
- That interpretation completely **obliterates the words "horticultural purposes:"** what would horticulture look like without flowers, fruits, leaves (and incidentally, without roots and other plant parts, none of which would be exempt under that interpretation);
- Most importantly, what about roots, non-fibre parts of the stem, **what about any part of the plant that is not mentioned in the brackets?**

In addition, the use of the brackets in Article 28(2) questions. Elsewhere in the text, much more explicit formulas are used ("exclusively for," "limit to," one could conceive a formulation such as "cultivation for fiber and seeds used for industrial purposes" as consistent with the language used elsewhere). Ascertaining the reasons behind the use of the brackets calls for the recourse to the *travaux préparatoires* (COP61) in order to confirm a coherent meaning for that provision. This insight from the *travaux* is also justified under the VCLT because **the limitative understanding proposed by INCB leads to ambiguous, obscure, or unreasonable results**.[173]

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[169] On its uses and misuses, see McNair (1961) at 399–410 (*supra* note 96).
[170] *supra* note 167.
[171] This would go against the statement in the *Commentary on the Single Convention* (at 312; *supra* note 114) that "this exemption appears to apply to the cultivation undertaken only for the leaves." It would also generally go against the principle of Another interpretation would lead to supersposed or conflicting –hence ineffective– dispositions. This calls in the maxim of *ut res magis valeat quam pereat*, see *supra* note 150.
[172] This is inescapably true for all plants: it grows (which involves leaves), produces flowers, the flowers turn into fruits, which contain seeds. This is something that was brought to the knowledge of the delegates at the COP61 (UN, 1964b at 61–63, *supra* note 138). All steps before the actual harvest of the mature seed would therefore, following INCB's interpretation, require the full application of the measures of control over cultivation, which is neither reasonable nor the practice of State Parties in regulating the cultivation of *Cannabis* for seed-production.
[173] Article 32(b), VCLT states that, in such instances:

> "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning [...] or to determine the meaning when the interpretation [...] leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable" (*op. cit.* note 85)

Fiber & seed in the intent of the Parties

At the beginning of the COP61, the delegates acknowledged that "[u]nder the terms of the [first] draft Convention, the cultivation of the cannabis plant grown only for industrial purposes would not be controlled."[174] Nonetheless, the first time this question was mentioned in plenary at the COP, European and Asian countries (South Korea, Japan, the USSR, and an important number of European countries) stressed the need to make a much more explicit mention of the exemption of *Cannabis* cultivation "for industrial purposes"[175] and "as an industrial crop"[176] with different countries providing examples of products and uses needing exemption: fiber, seed, indeed, but also oils, elephant feed, textiles, ropes, flavoring agent, windbreak for private gardens, etc.[177] **The discussions never geared around "fiber and seed" but around the term "industrial."**

Eventually, Canada and the UK proposed a rewriting, mentioning "industrial purposes (fiber and seed)."[178] But the proposal was not satisfactory. The Netherlands insisted on broadening the scope by deleting "(fiber and seed)" and replacing it with "and horticultural purposes."[179] Finally, a compromise was reached: keeping both wordings, resulting in the presence of "industrial purposes", "fiber and seed", and "horticultural purposes" in the final sentence. When the delegate of Dahomey[180] mentioned "industrial purposes," the representative from the UK explained:

> "[Article 28] Paragraph 2 had been included to meet the desire expressed by some representatives in the plenary meeting that the article should contain a clear statement on the point"[181]

The will of the COP61 was to include an explicit mention of the exemption for a wide variety of industrial purposes for which the plant was then cultivated in a number of diverse countries[182] and,

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On the unreasonableness of INCB's interpretation, and the absurdity of its consequences for the "hemp" sector, see: Riboulet-Zemouli (2018, *supra* note 166); (2019, *supra* note 168).

[174] UN (1964a) at 59, *supra* note 40.

[175] *ibid.* at 58–62.

[176] *ibid.* at 60.

[177] These multiple uses were discussed on a number of occasions, somehow sporadically and incoherently. See UN (1964a; *supra* note 40) (1964b; *supra* note 138). The COP61 had much more constructive discussions on the "medical and scientific purposes" than on the other ones. See *supra* note 6 (Mills, 2016) for an insightful review of the discussions on MSP, in particular traditional medicine.

[178] UN (1964b) at 44, *supra* note 138.

[179] UN (1964a) at 154–156, *supra* note 40.

[180] Nowadays Benin.

[181] UN (1964b) at 176, *supra* note 138.

[182] An interesting aspect to consider is that numerous countries (where multiple uses of the *Cannabis* plant are ancestral) were not present at the COP61:

- Many areas of the world remained under colonial rule, and were therefore not represented,
- some countries like Nepal (UN, 1964b at 176; *supra* note 138) were absent,
- a number of countries had not been invited, including the German Democratic Republic (*i.e.*, Eastern Germany; UN, 1964a at 204; *supra* note 40), the Mongolian People's Republic, the Korean Democratic People's Republic (*i.e.* North Korea), the People's Republic of Vietnam (UN, 1964a at 8, 11, 14; *supra* note 40), and notably the People's Republic of China (a country that never prohibited "hemp," as explained by **Wang**, Q. and Shi, G. (1999), "Industrial Hemp: China's Experience and Global Implications", *Review of Agricultural Economics,* **21**(2):344–357) which had no seat at the UN until late 1971.

It is submitted that the later accession of these countries to the Single Convention could have relied on the understanding that there was no –or no comprehensive– ban on the cultivation of *Cannabis*. This is relevant in the context of Art. 48, VCLT:

> "1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

from the outset, "[t]here was no question of controlling the cultivation of the plant for industrial purposes"[183] at the COP61.

Getting back to the text of the Single Convention, this infers that **the maxim of *expressio unius est exclusio alterius* ought not to be applied since "its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice"**[184] –as well as an absurd and unreasonable result. It is submitted, instead, that the more common **doctrine of *ejusdem generis* should be preferred**.[185] Meaning "of the same kind," "of the same *genus*," the maxim *ejusdem generis* is often used to ascertain unclear provisions and incomplete drafting: the *genus* –which would be "industrial purposes"– guides the interpretation of the meaning of the following word –here, the list of products between brackets. A list following the *genus* is indicative, illustrative; not limitative. Kolb explains, analyzing a similar list in the *Convention on the Prevention and Punishment of the Crime of Genocide*, that **international jurisprudence tends to follow *ejusdem generis***, by not considering similar listings as exhaustive or limitative: in interpreting a treaty, widening such a list with terms that are not explicitly mentioned in the text –although it "cannot be done in an excessively liberal fashion"– is valid, if the terms are "of the same type from the point of view of the pertinent criterion."[186]

Provided (1) that the pertinent criterion for *ejusdem generis* in this clause is "industrial purposes" or "industrial and horticultural purposes"[187] (2) that "fiber" and "seed" are of the same kind, plant parts used in industry, (3) given the discussions at the COP61, and (4) the general context of the Convention with its numerous purpose-based exemptions, it is not excessively liberal to include other plant part. The fact that "industrial" and "horticultural" purposes are associated, and the discussions at the COP61, suggest that **all plant parts should be considered to fall under the provision. This approach seems to be shared by the Court of Justice of the European Union**, which ruled on a recent case that products "from the *Cannabis sativa* plant in its entirety and not solely from its fibre and seeds" can be lawfully commercialized.[188]

> 2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error. [...]" (*op. cit.* note 85).

See also Leinwand (1971) at 431–433 (*supra* note 10) for further perspectives on this particular point.

[183] UN (1964b) at 108, *supra* note 138.

[184] Lord Justice Lopes, cited in McNair (1961) at 400, *supra* note 96. See Aust (2000) at 249, *supra* note 86.

[185] Kolb (2006) at 734–737 (*supra* note 28); McNair (1961) at 393 (*supra* note 96).

[186] Translation is by the author, from: Kolb, 2006, at 735, *supra* note 28. See a complete discussion in **Linderfalk**, U. (2007), *On The Interpretation of Treaties, The Modern International Law as Expressed in the 1961 Vienna Convention on the Law of Treaties*, Springer, at 303–310; and in McNair (1961) at 399–410 (*supra* note 96).

[187] The concept of "horticultural purposes" is difficult to grasp, and it could be submitted that "horticulture" is no more than another way of saying "industrial purposes," particularly when looking at the meaning given to that term: The *Encyclopedia Britannica* defines horticulture as "the branch of plant agriculture dealing with garden crops, generally fruits, vegetables, and ornamental plants" (**Herklots**, G. A. C., Janick, J., Perrott, R. and Synge, P. M. (2021), "horticulture", *Encyclopedia Britannica*) and the **US Department of Agriculture** (s.d.), *USDA Definition of Specialty Crop*, as "that branch of agriculture concerned with growing plants that are used by people for food, for medicinal purposes, and for aesthetic gratification." The *Commentary on the Single Convention* (at 312; *supra* note 114) says that "the horticultural purposes mentioned in paragraph 2 seem to be of little importance."

[188] See: **Court of Justice of the European Union** (2020), *PRESS RELEASE No 141/20: Judgment in Case C-663/18 B S and C A v Ministère public et Conseil national de l'ordre des pharmaciens*. The Court ruled, *inter alia*, that European Union legislation:

> "must be interpreted as precluding national legislation which prohibits the marketing of cannabidiol (CBD) lawfully produced in another Member State when it is extracted from the Cannabis sativa plant in its entirety and not solely from its fibre and seeds, unless that legislation is appropriate for securing the attainment of the objective of protecting public health and does not go beyond what is necessary for that purpose" (at §97 in: **EUR-Lex** (2020), *Judgment of the Court (Fourth Chamber) of 19 November 2020: Criminal proceedings against B S and C A: Case C-663/18*)

It follows that, of the two interpretations put forward by treaty-mandated bodies, the one from WHO has much more solid grounds than the restrictive one defended by the INCB. As the Commentary on the Single Convention frankly summarizes: **a country**

> **"permitting the cultivation of the plant for the drugs, but also permitting cultivation elsewhere exclusively for *other purposes*, must apply article 23 to the former, but not the latter"**[189] (emphasis supplied).

The Commentary is extremely clear:

> "Paragraph 2 excludes from the scope of the Single Convention, and thus also from the application of its article 23, the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes. This paragraph, however, only emphasizes what follows in any case from paragraph 1 prescribing the control régime applicable to the cultivation of the plant. Paragraph 1 expressly states that this régime applies only to the cultivation of the cannabis plant for the production of cannabis or cannabis resin. Cultivation of the plant for any other purpose, and not only the purposes mentioned in paragraph 2, is consequently exempted from the control régime provided for in article 23."[190]

The "production of cannabis and cannabis resin" is the action of producing these medicines that are under control, for their MSP. "Cannabis" and "cannabis resin," when exempt under Article 2(9), cease to be "drugs" in the meaning of the Convention: they become "other substances"[191] –they are "drugs," "cannabis and cannabis resin" in the definitions of the Conventions when they are under control, that is, for medical and scientific purposes. What stems from this analysis can be expressed by rearranging the words of the Commentary, to express the same thing: **cultivation of the plant for any other purpose than MSP –and not only for industrial, fiber, seed, and horticultural purposes– is consequently exempted**. And, as worded in Article 28(2), this exemption is from the application of "this Convention:" including Article 23, but not only.[192]

Result of a compromise, the text of Article 28(2), its drafting history, the lack of any mention of strict limitation by any Plenipotentiary, but also the context of other exemptions articulated around purposes (Articles 2(9) and 49): **all supports the view of the bracketed "fiber and seed" as illustrative, rather than limitative.**

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[189] *Commentary on the Single Convention* at 314; *supra* note 114.
[190] *ibid.* at 312.
[191] *ibid.* at 35; quote reproduced *supra* note 145. See also at 309: the wording used (cannabis ceases to be cannabis) echoes the *Commentary* which precises that coca leaves –when subjected to an exemption for their industrial use that is overly-specific and complicated– "cease to be "coca leaves", and consequently to be "drugs" in the sense of the Convention." The terms "coca leaf" just like "cannabis and cannabis resin" are not botanical or scientific definitions, they are legal *labels*, which apply to specific products when falling under the regime of the Single Convention, that is, when produced and used for MSP. When produced and used for other purposes, the *legal label* "coca leaf" ceases to apply to the botanical "coca leaf" just like the *legal label* "cannabis" ceases to apply to the actual botanical "cannabis."
[192] As worded in Article 28(2). This suggests, beyond what the Commentary says, that cultivation for OMSP is wholly exempted from the Convention, and not merely from Article 23. Accordingly, for instance, the reporting requirements under Article 2(9) would not need to be extended to cultivation.

This Chapter has shown that **the C61 establishes a consistent dichotomous legal framework: MSP (controlled) & OMSP (exempt), each with their sets and subsets. Both tiers apply comparably to the cultivation of *Cannabis* plants and to the production, manufacture, export, import, distribution of, trade in, use and possession of CCDs.**[193] Plant parts that are not CCDs are outside of control, regardless of the purpose.

But some questions remain open: isn't RAU covered within the concept of "abuse and ill effects"? Is it legitimate to associate "non-medical use" or "OMSP" to RAU? Why are there several exemptions for OMSP and was it in the mind of the drafters that the exemption could apply to CCDs and to intoxicating uses? And isn't there an overarching layer of prohibition specific to *Cannabis* that invalidates the reliance upon Article 2(9)? Each of these questions will be discussed in Part II.

[193] An analogy can be drawn with provisions of the *Chemical Weapons Convention* (Organization for the Prohibition of Chemical Weapons (2020), *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, at 3–5) which regulates the use of certain chemical weapons (and their prohibition) depending on their purposes. An example is *capsicum oleoresin* (commonly known as chili pepper/paprika) which falls under the Convention for military purposes, but is wholly disregarded when used for other than military purposes (**Daft**, S. (2020), "Tear gas and pepper spray are chemical weapons. So, why can police use them?", *The Conversation*).

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PART II.

RESOLUTION.

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4. THE MEANING OF WORDS: ABUSE, ILL EFFECTS, ADDICTION, MISUSE

"Studyin' people a use it, don't abuse it
'Cah the concentration well reputed
That's why herb man dem a the wise one
And it found on the grave a King Solomon."
– Sean Paul, *We Be Burnin' (Legalize It)*, 2005.

Photo: Maurice Narkozy/CC BY-SA 4.0.

Beyond MSP and OMSP, the Conventions contain other terms, we have seen, which could potentially inform the legal status of RAU. These are: ***abuse and ill effects***, ***addiction***, **and *misuse*. A large number of interpretations routinely conflate these three terms with RAU.** Occasionally, *abuse* is interpreted as an equivalent to RAU, or the term is used by some to refer to the way RAU would be called in the Conventions.

> "For those who use cannabis for enjoyment, **when does use become abuse or addiction?** For those who use cannabis as medicine, their use pattern may resemble that of someone who meets established criteria for drug addiction or dependence. How does the clinician differentiate?"[194]

And how does the Convention differentiate? The exercise presented below is slightly distinct from that of the first part of this essay, insofar as the analysis requires to go beyond the question of legal provisions and subsequent obligations, involving a broader discussion –with *the clinicians*, among others– on the meaning of terms that has to be other than textualist: indeed, no definition or indication is provided in the Convention to help ascertain these terms. This Chapter will therefore review the meaning of these terms in the Conventions and both their relevance to, and relation with, the dispositive framework prevailing for RAU. Finally, the precise legal framework (if any) applying to *abuse*, *addiction* and *misuse* will be outlined.

The term "abuse" in the Conventions

None of the three Conventions (or their respective Commentaries) provide any phrased definitional boundaries for "abuse." C61, C71 and C88 have their respective Articles 1 with lists of definitions, but provide none for *abuse* or even for *use*.[195] In the C61, *abuse* is often mentioned with a reference pointing back to Article 3(3) –like we have seen in Article 2(9)– as if it was helping clarify the meaning of that term (the Commentary clarifies that these references specifically point to subparagraph *(iii)* in Article 3(3)). However, Article 3(3)iii. reads as follows:

> "(iii) If the [WHO] finds that the substance is liable to similar abuse and productive of similar ill effects as the drugs in Schedule I or Schedule II or is convertible into a drug, it shall communicate that finding to the [CND] which may, in accordance with the recommendation of the [WHO], decide that the substance shall be added to Schedule I or Schedule II."

This is a circular definition: *abuse* is defined as a characteristic for substances liable to similar abuse as substances which are liable to abuse... A definition which abuses "abuse," and lacks substance!

The four Commentaries are no more helpful: in a total of nearly 1,500 pages, none dare to define *abuse*. The Commentary on the Single Convention extensively discusses the meanings of "medical use," "prescription," "therapeutic function," etc.;[196] the Commentary on the 1972 Protocol is also silent; the Commentary on the C71 introduces reliance on the *Concise Oxford Dictionary* to

[194] **Mathre**, M. (2003), "Cannabis series — the whole story. Part 7: Differentiating between medical use and recreational/social use, abuse and addiction", *Drugs and Alcohol Today*, **3**(3):5–10. Emphasis supplied.
[195] The Commentary on the Single Convention does discuss "use" a bit: see the quote referred to *supra* note 157.
[196] *Commentary on the Single Convention* at 71–73, 110–114, 312–315, 332–333, 337–340, 446–448, 467–469; *supra* note 114.

ascertain certain terms;[197] finally, the one on C88 ambitiously "proposes definitions of terms used in the Convention but not defined under article 1 or under the previous conventions."[198] All four COPs discussed a number of missing definitions and possible new entries to add, but the *travaux* reveal **not a single instance where the definition of "abuse" was on the agenda**.[199]

Inspired by the practice of the International Court of Justice (ICJ), a textual analysis of all the mentions of the word in the three Conventions can be undertaken to help ascertain its meaning.[200] Table A1, in Annex I comprehensively lists all such occurrences. It shows that:

1) while *abuse* appears clearly linked to some fairly strict legal dispositions, it is nowhere directly or objectively associated with RAU;
2) In the C61, *abuse* is often associated with terms that describe a range of medical symptoms (*addiction*, *ill effects*) or healthcare praxis (*early identification*, *medical treatment*, *education*, *care*, *after-care*, *rehabilitation*, *social reintegration*);
3) This is similar in the C71, which adds "public health and social problem" to the list of terms associated with *abuse*;
4) The consistent reliance on "abuse *and* ill effects" rather than "*or* ill effects" in both C61 and C71 (and since 1909) suggests that the two terms are part of a whole.

In determining the content of that term, this silence on the objective meaning of *abuse* invites us to consider, as Linderfalk puts it "the information associated with that utterance according to the intention of the utterer," enlightened by "sentence meaning" (context) and "receiver meaning" (you and I).[201] That invites the adoption of an intention-based approach, and digging into the history of the reliance on the word "abuse" in international drug control law.

The term "abuse" first appeared in an international legal instrument in 1890, in the General Act of the Brussels Conference, the earliest treaty to enact international control over a product used both for MSP and for RAU –namely alcohol.[202] The Act mentions the "moral and material consequences to which the abuse of spirituous liquors subjects the native population."[203] Three decades later, the Shanghai Opium Commission of 1909, discussing opium derivatives, uses in its final resolutions the expression "liable to similar abuse and productive of like ill effects,"[204] a

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[197] See *Commentary on the C71* at 203; *supra* note 105. The reliance on dictionaries is a delicate exercise, see: Ruiz-Fabri (2021) *supra* note 71; van Damme, I. (2011), "*On 'Good Faith Use of Dictionary in the Search of Ordinary Meaning under the WTO Dispute Settlement Understanding'—A Reply to Professor Chang-Fa Lo*", *Journal of International Dispute Settlement,* **2**(1):231–239.
[198] *Commentary on C88* at 26; see *supra* note 108.
[199] UN (1964a; *supra* note 40); (1964b; *supra* note 138); **UN** (1974a), *United Nations Conference to consider amendments to the Single Convention on Narcotic Drugs, 1961, Geneva, 6 - 24 March 1972: Official Records, Volume I*; **UN** (1974b), *United Nations Conference to consider amendments to the Single Convention on Narcotic Drugs, 1961, Geneva, 6 - 24 March 1972: Official Records, Volume II*; **UN** (1991a), *Official Records of the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; Volume I [E/CONF.82/16]*; **UN** (1991b), *Official Records of the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; Volume II [E/CONF.82/16/Add.1]*.
[200] at 238–240 in **ICJ** (2009), "Dispute regarding Navigational and Related Rights (Costa Rica *v.* Nicaragua), Judgment", In: *ICJ Reports 2009*:213–272.
[201] Linderfalk (2007) at 30; *supra* note 186.
[202] at 409–410 in: **Seddon**, T. (2016), "Inventing Drugs: A Genealogy of a Regulatory Concept", *Journal of Law and Society,* **43**(3):393–415.
[203] at 157 in: **Bevans**, C. I. (Ed.) (1968), *Treaties and Other International Agreements of the United States of America: Volume 1 (Multilateral treaties, 1776-1917)*, US Department of State.
[204] at 46 in: "**The Shanghai Opium Commission**" (1959), *Bulletin on Narcotics,* **11**(1):45–46.

phraseology which turned out to have a prosperous imprint. Shortly after Shanghai, in 1912, the Hague Convention introduces *abuse* in direct relation with "*chanvre indien*" (Indian hemp, *i.e.*, a now-outdated synonym of *Cannabis sativa*) by mentioning, in the original French text, the need to study potential risks linked to the "*abus de son emploi.*"[205]

Present in earlier treaties, the word *abuse* is diligently relied upon at the COP61, unchallenged. In one particular occasion, the drafters decided to **replace *abuse* with "improper use,"** although with no clear rationale.[206] In the equally-authentic Spanish text, however, this change has no effect since "improper use" and "abuse" are both translated equally as "*uso indebido,*" and *uso indebido* is the general translation of *abuse* in the Spanish version, suggesting that *improper use* may be a way to define *abuse*. Indeed, the Arabic, Chinese, English, French, Russian, and Spanish texts of the Convention are equally-authentic, and words, therefore, "are presumed to have the same meaning."[207]

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[205] The author suggests "the abuse of its employment" as a literal, but insightful translation. Interestingly, the US Department of State chose to translate it as "misuse" (North-American English translation in: Bevans (1968) at 868, see *supra* note 203; original treaty in French language, at 12 in: **League of Nations** (1922) "Convention Internationale de l'Opium; Signée à La Haye, le 23 janvier 1912", *Treaty Series,* **8**:187).

[206] Precisely, in Article 32(2) related to drugs in first-aid kits in ships or aircrafts during transborder trips. The discussions related in the official records of the COP61 reflect no particular rationale (UN (1964a at 35) *supra* note 40; UN (1964b at 16, 143–144, 269) *supra* note 138) but the Commentary (at 397, *supra* note 114) relates:

> "The term 'improper use' is intended to cover not only 'abuse', i.e. supply to an addict not based on sound medical grounds, but also any use not in accordance with the requirements of medical science or good medical practice, such as the administration on the basis of a false diagnosis, by a wrong method or by a person not having at least such necessary skills as are acceptable under the conditions where the need for the drug arises in the special circumstances of the airplane or vessel involved."

This explanation, which does not fully clarify the intent behind such terminological change, is also curious because it is not mentioned in the COP61's official records. It is submitted that Adolf Lande, who drafted the Commentary, could have been here relating discussions held beyond official meetings (*e.g.* cocktail parties outside the Conference Building) with the British delegation, which pushed the use of "improper use." Further than this, it does not appear that the possibility of providing a definition for abuse was discussed during the COP61. Neither the official records from the COP61 nor accounts from participants make any mention of discussions on an eventual definition of "abuse" or any substantial statement on the topic. For official records, see: UN (1964a) *supra* note 40; (1964b) *supra* note 138. For witnesses and participants, see: Anslinger (1958) *supra* note 113; Lande (1962) *supra* note 39; and **Kinney**, J. A., Christensen, R. A., Kost, A., Tyler, S., Malkerni, R., Noble, J., Riley, K., and Tierney, C. (1972), *Synopsis of the Commentary of the Participants in the Discussion of the Third Draft of the Single Convention on Narcotic Drugs Article By Article Outlining the Third Draft and the Final Convention – Final report, BNDD; Contract No. 71-28 [SCID-TR-5 (Vol.3)]*, US Bureau of Narcotics and Dangerous Drugs.

[207] The quote is from Article 33(3), VCLT (*op. cit.* note 85). For C61 languages, see UNODC (2013) at 58; *supra* note 109. Spanish text of Article 32(2) at 36 in: **UNODC** (2014), *Los tratados de fiscalización internacional de drogas: Convención Única de 1961 sobre Estupefacientes, enmendada por el Protocolo de 1972 de Modificación de la Convención Única de 1961 sobre Estupefacientes; Convenio sobre Sustancias Sicotrópicas de 1971; Convención de las Naciones Unidas contra el Tráfico Ilícito de Estupefacientes y Sustancias Sicotrópicas de 1988; con inclusión de las actas finales y resoluciones pertinentes*. For discussions on the multilingual aspect of treaties, see: Aust (2000) at 202–206, *supra* note 86; Gadiner (2008) at 353–385, *supra* note 29.
Ultimately, the meaning of the terms "abuse and ill effects" in the other official languages of the C61 corroborate the meaning in English:

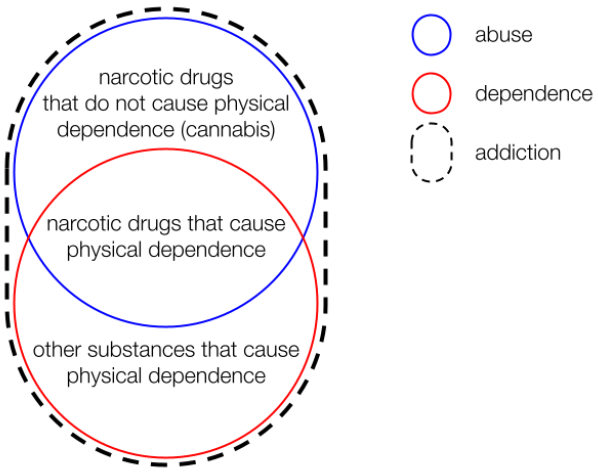
- Arabic: "إساءة استعمال" (with "استعمال" fairly translatable as use and "إساءة" as wrongful, improper),
- Chinese: "滥用" (abuse or misuse; whereas "用" refers to use, consumption, and "滥" to excess) and "恶果" (which can translate into negative outcome, bad result, damaging or unfavorable consequences),
- French: "abus" (=abuse) and "effets nocifs" (noxious, damaging, harmful, or adverse effects),
- Russian: "злоупотребления" (fairly similar to abuse in English) and "вредные последствия" (harms, harmful effects),
- Spanish: "uso indebido" (literally undue use, inappropriate use, improper use) and "efectos nocivos" (noxious, damaging, harmful or adverse effects)

Prior to its amendment via the 1972 Protocol,[208] Article 38 of the original unamended Single Convention, as adopted in 1961, was titled "Treatment of Drug Addicts." Statements in the Commentary on the Single Convention suggest that the term addiction/addict:

> "[covers] not only the abuse of narcotic drugs which cause physical dependence [...] but also the habitual abuse of other substances subject to the Single Convention but not producing physical dependence, such as [...] cannabis and cannabis resin."[209]

The COP61 referred to narcotic drugs as having a "degree of liability to abuse" and at the same time "having addiction-producing or addiction-sustaining properties."[210] The meaning of the terms *abuse*, *addiction* and *dependence* in the apparent understanding of the drafters could be resumed as in Figure 2 below.

Figure 2. Representation of the vision of the terms "abuse," "dependence," and "addiction" by the Plenipotentiaries in 1961.



In 1972, the amendment Protocol brought substantial terminological alterations to Article 38,[211] which was renamed from "Treatment of Drug Addicts" to "Measures against the *Abuse* of Drugs" in a manner that was "almost verbatim, *mutatis mutandis*, to [the C71], [...] more in line with modern views on drug abuse than those of the Single Convention."[212] Beyond Article 38, **the terms *addiction* and *addict* were replaced by *abuse* and *abusers* throughout the C61, except in the preamble, and the language around prevention and medical care was strengthened.**[213]

[208] McAllister (2000) at 235–236, see *supra* note 6.
[209] *Commentary on the Single Convention* at 446; *supra* note 114. This would suggest that "addiction" corresponds to dependence generally, while "abuse" is limited to physical dependence. Such an interpretation makes the case for the analysis pushed forward by Leinwand (1971), *supra* note 10.
[210] *Commentary on the Single Convention* at 86; *supra* note 114.
[211] **UN** (1976b), *Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, 1961 [E/CN.7/588]*, at 83–87.
[212] The quote is from the *travaux* Vol. I (see *supra* note 199: UN, 1974a) at 4–5.
[213] UN (1976b), at 83–89; *supra* note 211.

The amendment consequently introduced the term "abusers" in the English version of Article 36(1), C61; in the French text,[214] it appears as "*personnes utilisant de façon abusive des stupéfiants*" (that literally translates: people making use of narcotic drugs in an abusive fashion). This is reminiscent of the early mention of "*abus de [l']emploi*" in the 1912 Hague Convention, where *abuse* is an *abusive use*. It also echoes the various mentions of *abuse* in the Commentary on the Single Convention as an *excessive use*, for instance, this reference to the obligation for State Parties:

> "not to sell these drugs and preparations to an individual who obviously intends to abuse them, and in any event not to sell *excessive amounts* of them to a single person."[215] (emphasis supplied)

The C71, Article 3(2) echoes this meaning further: psychotropic substances are, under that Article, liable to abuse depending upon their quantity.[216]

In this context, the term *abuse* appears not only intrinsically linked to a medical condition (with or without dependence-related symptoms) but also fundamentally attached to a quantitatively or qualitatively[217] *excessive*, *improper*, or *undue*, in addition to *harmful* or *hazardous* use –characteristics nowadays rather referred to as substance use disorders (SUD). Was it also the case in 1961?

[214] See *supra* note 207.
[215] *Commentary on the Single Convention* at 403; *supra* note 114.
[216] "If a preparation containing a psychotropic substance other than a substance in Schedule I is compounded in such a way that it presents no, or a negligible, risk of abuse and the substance cannot be recovered by readily applicable means in a quantity liable to abuse, so that the preparation does not give rise to a public health and social problem, the preparation may be exempted from certain of the measures of control provided in this Convention in accordance with paragraph 3" at 84 in UNODC (2013), *supra* note 109. As a side note, recently, the INCB expressed a direct relation between the concept of abuse and the "over-consumption of narcotic drugs," in: **INCB** (2019a), *Alert: Over-consumption of narcotic drugs and prescription drug abuse [E/INCB/2019/Alert.13]*.
[217] at 27–29, in: Zinberg *et al.*, 1978 (note *infra*)

Scholars like Dr. Szasz or Dr. Zinberg[218] have denounced a certain puritan heritage that had translated into "medical and legal definitions which ignore both quantity or quality of drug use."[219] The definition of *abuse (and ill effects)* in the international drug control instruments, progressively, yet consistently sketched since 1919, seems at least so far to be immune from Szasz & Zinberg's criticisms![220]

Beyond this look at the substance of *abuse* in the treaties and related texts, its meaning in vernacular English as found in dictionaries does not denote –although dictionaries are "important guides to, but not dispositive of, the meaning of words appearing in treaties."[221]

A review of the word's understanding among the medical community is helpful. The only definition of *drug abuse* by an international health-related body associated with the IDCC was attempted in 1969 by the WHO's Expert Committee on Drug Dependence: "persistent or sporadic excessive drug use inconsistent with or unrelated to acceptable medical practice."[222] This definition recognizes that *excess* is a fundamental characteristic of *abuse*, thus excluding *a priori* non-medical uses that are not excessive from its scope. The same WHO Expert Committee document, elsewhere, mentions "the nonmedical use of [cannabis]" but in a context where it is nowhere reliant upon or unrelated to the concept of *abuse* discussed thereinbefore.[223]

Szasz noted in 1974 that the term "drug abuse is accepted [...] by nearly everyone, nearly everywhere today as a disease whose diagnosis and treatment are the legitimate concern of the physician."[224] Official medical lexica of the American Medical Association (AMA), diagnostic guidelines like DSM issued by the American Psychiatric Association (APA), and WHO's International Classification of Diseases –three important references in the field– incorporated the

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[218] Probably a good starter to their approaches are: **Szasz**, T. (1975), *Ceremonial Chemistry: The Ritual Persecution of Drugs, Addicts and Pusher*, Routledge & Kagan Paul; **Zinberg**, N. E. (1984), *Drug, Set, and Setting. The basis for controlled intoxicant use*, Yale University Press; **Zinberg**, N. E., Harding, W. M., and Apsler, R. (1978), "What is Drug Abuse?", *Journal of Drug Issues* **8**(1):9–35. **Parascandola**, J. (1995), "The drug habit: the association of the word 'drug' with abuse in American history", In: Porter, R. and Teich, M. (Ed.s), *Drugs and Narcotics in History* (pp. 156–167), Cambridge University Press; and Seddon (2016; *supra* note 202) are also insightful readings.

[219] at 17 in: Zinberg *et al.*, 1978 (*supra* note 218)

[220] The approach to "abuse" in the Convention is however not immune from criticisms, one in particular being its sole focus on the biomedical aspect of the issue, which may not be the most relevant to adequately address, in particular, traditional herbal drugs (see **Bouso**, J. C. and Sánchez-Avilés, C. (2020), "Traditional Healing Practices Involving Psychoactive Plants and the Global Mental Health Agenda: Opportunities, Pitfalls, and Challenges in the 'Right to Science' Framework", *Health and Human Rights Journal,* **22**(1):145–150).

[221] at 12 in: **WTO** (2021), "Dispute Settlement Understanding, Article 3 (Jurisprudence)", In: *WTO Analytical Index: Guide to WTO Law and Practice*. See also: Lo (2017) at 163–170 (*supra* note 24); Ruiz-Fabri (2021) *supra* note 71; van Damme (2011) *supra* note 197.

[222] at 6 in: **WHO** (1969), *WHO Expert Committee on Drug Dependence: sixteenth report; WHO Technical Report Series, No. 407*.

[223] *ibid*. at 19–20.

[224] at 9; *supra* note 218.

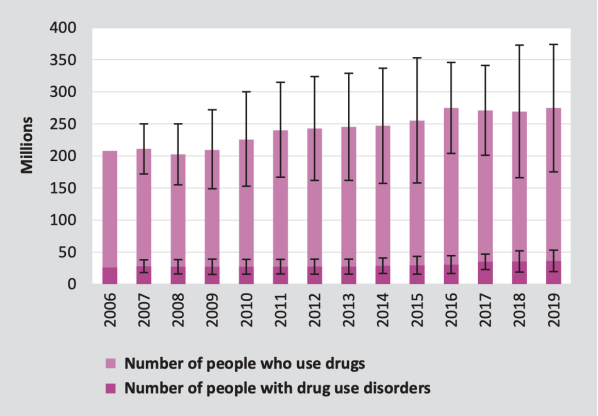
concept of *abuse* in the 1960s. For all three, it went through countless revisions, redefinitions, and reshapings[225] until eventually disappearing, replaced by SUD in the 1990s-2000s.[226]

Generally, the overview of the term in learnt medical texts reveals a correspondence with the meaning of *abuse* in the Conventions, but also, the scientific community acknowledges that the term is, quoting the *Guide to Drug Abuse Research Terminology* [sic], an

> "unstandardized, value-laden, and highly relative term used with a great deal of imprecision and confusion, generally implying drug use that is excessive, dangerous, or undesirable to the individual and community and that ought to be modified[,]"[227]

but nowhere clearly well-matched with, or synonym of RAU. This is nothing but a fair representation of the data from the ground (see Figure 3) which shows that the number of people with drug use disorder is minimal as compared to the number of "people who use drugs" –indistinctly from the purpose for which they use it.

Figure 3. Number of people with drug use disorders globally, 2006–2019



© United Nations, June 2021[228]

[225] APA's DSM has had tumultuous changes and redefinitions (**APA** (1952), *Diagnostic and Statistical Manual: Mental Disorders*, at 14; **APA** (1968), *Diagnostic and Statistical Manual of Mental Disorders (2nd edition)*, at xiv–xv, 45; **APA** (1980), *Diagnostic and Statistical Manual of Mental Disorders (3rd edition)*, at 163–164; **APA** (1995), *Diagnostic and Statistical Manual of Mental Disorders (4th edition)*.) just like WHO's ICD (**WHO** (1957), *Manual of the international statistical classification of diseases, injuries, and causes of death*; **WHO** (1964), *WHO Expert Committee on Addiction-Producing Drugs: thirteenth report: WHO Technical Report Series, No. 273*, at 9, 12–13; **WHO** (1978), *International classification of diseases (9th revision)*; **WHO** (1994), *Lexicon of alcohol and drug terms*, at 4). See also discussions at the AMA in the 1960s (**AMA, Council on Mental Health and Committee on Alcoholism and Drug Dependence** (1966), "Dependence on Amphetamines and Other Stimulant Drugs", *Journal of the American Medical Association,* **197**(12):1023–1027, at 1023; **AMA, Council on Mental Health and Committee on Alcoholism and Drug Dependence** (1967), "Dependence on Cannabis (Marihuana)", *Journal of the American Medical Association,* **201**(6):368–371, at 368, 371). Zinberg (1984 at 25–45, see *supra* note 218) discusses with further medical concerns these terminological errements.

[226] For DSM, see at 835 in: **Hasin**, D. S., O'Brien, C. P., Auriacombe, M., Borges, G., Bucholz, K., Budney, A., Compton, W. M., Crowley, T., Ling, W, Petry, N. M., Schuckit, M., and Grant, B. F. (2013), "DSM-5 Criteria for Substance Use Disorders: Recommendations and Rationale", *American Journal of Psychiatry,* **170**(8):834–851. For ICD, see at 4 in: WHO (1994), *supra* note 225; and at 6C41.1 in **WHO** (2020), *International Classification of Diseases for Mortality and Morbidity Statistics (11th revision)* [accessed 27 September 2020].

[227] Nelson et al (1982) at 33; see also *supra* note 202 (Seddon, 2016) and note 218 (Parascandola, 1995; Zinberg *et al.*, 1978 at 14–15).

[228] Figure at 49 in: **UNODC** (2021), "Booklet 1: executive summary, policy implications", *World Drug Report 2021*.

The term "misuse" in the Conventions

The term *misuse*, like *abuse* (to which it is often assimilated[229]) is not defined in the IDCC. It is only mentioned on one occasion in Article 28(3), C61:

> "The Parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant."[230]

Besides the weak and vague language (constituting the only real provision in the C61 that relates to leaves), since *cannabis leaves* are not *drugs*,[231] it is fair to assume that the term *misuse* is to *cannabis leaves* what *abuse* is to *cannabis drugs* (*i.e.*, CCDs). The Commentary suggests:

> "Parties are not bound to prohibit the consumption of the leaves for non-medical purposes, but only to take the necessary measures to prevent their misuse. This might involve an obligation to prevent the consumption of very potent leaves, or of excessive quantities of them."[232]

The concept of qualitatively or quantitatively (potency or quantity) *excessive* use is now feeling familiar. The fact that Parties can take measures against the *misuse* of the leaves, without having to prohibit all their non-medical uses, marks a distinction between *misuse of cannabis leaves* and *use of cannabis leaves for OMSP* which coheres with the analysis provided for *drugs*, under which *abuse* and *OMSP* do not juxtapose.

[229] Both in common language (see "abuse, *noun*", (2021), In: *Oxford Learner's Dictionaries*, Oxford University Press) and by actor such as **UNODC** (2020a, "Booklet 1: executive summary, impact of COVID-19, policy implications", *World Drug Report 2020*, United Nations, at 5).
[230] UNODC (2013) at 48; *supra* note 109.
[231] *Commentary on the Single Convention* at 315; *supra* note 114.
[232] *ibid.* at 316.

Legal provisions relating to "abuse"

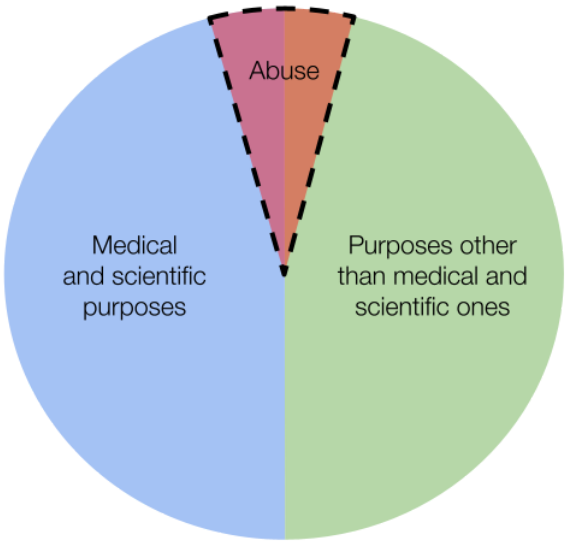
There is no provision for the "prohibition" of *abuse*. Understood as a medical condition (*abuse* is responsible for *ill effects* and *addiction*) it would hardly be imaginable; under what logic would any treaty drafter describe a disease, and thereafter proceed to prohibit it?

Instead, the Convention more coherently addresses *abuse* with measures *a priori*[233] and *a posteriori*:[234] Annex I shows that the only tangible obligations for Parties with regard to *abuse* are those contained in Articles 36(1)b. and 38, which require countries to take measures, respectively penal or sanitary, against *abusers*. The decision is discretionary to States Parties.

However, liability to *abuse* exists both in the context of MSP (Art. 3) and OMSP (Art. 2(9)a.). The concept of *abuse* is not framed under either the legal arrangements for MSP or for OMSP (respectively, control and exemption), no more than it is provided with a definition. The measures against *abuse* are ubiquitous, and transversal to all purposes– MSP and OMSP.

Figure 4 suggests a schematic representation of the various purposes under the C61 and how *abuse* relates to them.

Figure 4. Graphical representation of the "purposes" in the Single Convention



[233] For instance, measures of prevention as in Article 38; the strict control over production and trade for MSP; the criteria of harm reduction contained in Article 2(9)a. for OMSP.
[234] These can indeed be penal measures, but there are also a number of dispositions related to treatment, care, etc.

What stems from this Chapter is that the IDCC understand *abuse* as a type of use, for any purpose (MSP & OMSP), which is liable to induce symptoms of SUD (*ill effects*) including, but not limited to, dependence.

More importantly, **the Chapter shows that it cannot be deduced that in the C61 *abuse* is a synonym of RAU**.

If the C61 is concerned with OMSP at all, it is only to the extent that a particular OMSP could present a risk of *abuse and ill effects*. And this is reflected by the measures of harm reduction and prevention suggested in Article 2(9). But OMSP without SUD is not abuse, and data from the UNODC shows that an overwhelming majority of OMSP occurs without creating SUD.

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5. THE MEANING OF WORDS: NON-MEDICAL USE

"Car bien entendu, il y a je-ne-sais pas combien de façons de se droguer !"
[Because, of course, there are countless ways to take drugs!]
– Félix Guattari, *Interview*, 1985.[235]

"I-weed…" by Lois Weinberger (left); Space invader (right), at MuseumsQuartier, Vienna. Original photo: Thomas Ledl/CC BY-SA 3.0.

[235] **Guattari**, F. (1985), *La question de la drogue (interview)*, at 1:03. Translation into English is of the author.

If RAU was a kind of medical use, it would be possible to allow it under the legal system established for the use of drugs for MSP. The entire discussion arises precisely because it is almost universally accepted that RAU is *not* a MSP. Given that **RAU is not MSP, and is not (always) abuse**, a closer analysis of the meaning of "OMSP" and "non-medical" needs to be undertaken, to verify that no disposition precludes including in it *recreational*, *leisure*, *intoxicating* uses, but also *social*, *ritual*, *spiritual*, or otherwise hard-to-qualify uses that fall under the category "adult use." A similar exercise as that undertaken for *abuse* is required.

In the text of the C61, the nexus between *abuse*, OMSP, and RAU, is enlightened by the absence of the term *abuse* from **Article 49, C61. That Article, which mentions traditional coca leaf chewing, opium smoking, and non-medical use of cannabis –clearly forms of RAU– does not include the word *abuse* whatsoever.** It does include "non-medical" (an indirect reference to OMSP, according to the Commentary).[236] If *abuse* was directly correlated to RAU in the mind of the drafters, it is not absurd to believe that the COP61 would have eventually mentioned the word *abuse* in Article 49. This stresses the **difficulty to believe that the drafters had a will to equate *abuse* to RAU**. Instead, they chose to consider the traditional smoking of CCDs, in Article 49, as OMSP.

The precise meaning of OMSP was already questioned during the negotiations of the Single Convention: early during the COP61, while the draft of Article 2(9) was being discussed, the delegate from the USSR mentioned that "the phrase 'for other than medical and scientific purposes' [...] was also too vague, and there again the drafting should be improved."[237] After this, **the draft Article was submitted twice to an *ad'hoc* drafting committee for in-depth consideration**.[238]

During the two sessions in which the *ad'hoc* committee discussed Article 2(9), **the wording continued to be perceived as too broad and definitely vague**. The perception was shared by both the delegates that required a rewording of the provision and those who defended the draft Article as such.[239] After these two debates on the vagueness of the concept of "OMSP" and options to address it, the *ad'hoc* committee reached no particular conclusion on the meaning of OMSP or on any alternative wording.[240] Instead, they suggested a complete deletion of the provision.

The committee however had a condition: the proposed "**decision on the deletion of this provision should await consideration of the amendment procedure**." The Plenipotentiaries had in mind a "flexible amendment procedure" which would have allowed the Parties to add back a provision like Article 2(9) in the future, if and when a clearer idea of *what OMSP are* was to eventually appear: "then it might be possible to dispense with this provision."[241]

[236] See *supra* note 126.
[237] UN (1964a) at 18; *supra* note 40.
[238] UN (1964b) at 79, 84; *supra* note 138.
[239] *ibid.* at 84.
[240] *ibid.* at 84, 262.
[241] *ibid.*

This was not the case, however, and a narrow amendment procedure was ultimately adopted.[242] As a consequence, **Article 2(9) was maintained, as such, with its acknowledgedly vague wording left untouched**.

Elsewhere during the Conference, in two separate instances, delegates uttered the need to maintain general consistency within the Convention, by harmonizing the various mentions of the expressions MSP and OMSP.[243] It does not seem, however, that these calls were followed by any further consideration of the question, other than those of the *ad'hoc* committee.

The vagueness of the terminology used was acknowledged, but did not raise such sufficient concerns as to warrant a redrafting or to add narrowing qualificatives. More importantly, the COP61 clearly expressed the openness and evolutionary nature of Article 2(9) and its terms "OMSP," putting it in the balance against the possibility of a flexible amendment procedure: the Parties voluntarily wanted to insert some room for maneuver for the Parties, in the future. This particular point is analyzed in greater details in Chapter 6.

After 1961, the complex amendment procedure was nonetheless triggered once: for the 1972 Protocol. But interestingly, the discussions during the COP72 never addressed a possible amendment of Article 2(9) or related provisions on OMSP.[244]

Taking some distance from drug-specific treaties, McNair documents that international adjudications found the meaning of "other purposes" to be "clear" on numerous occasions.[245] Accordingly, it would be necessary that "evidence of contrary intention of the [Parties] is produced to contradict such a clear wording."[246] **It is a long-asserted custom that undefined (or non-consensual) terms should be given their usual and ordinary meaning in common language, as long as that meaning does not contradict *the treaty as a whole*.**[247] There is no evidence of any intention of the Parties to give a narrow meaning to OMSP, and it does not contradict the treaty as a whole: the Convention calls to "combat the evil of drug addiction"[248] and

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[242] It is now Article 47 of the C61, which reads as follows (UNODC, 2013 at 62; *supra* note 109):

> "1. Any Party may propose an amendment to this Convention. The text of any such amendment and the reasons therefore shall be communicated to the Secretary-General who shall communicate them to the Parties and to the [UN Economic and Social] Council. The Council may decide either:
>
> *(a)* That a conference shall be called in accordance with Article 62, paragraph 4, of the Charter of the United Nations to consider the proposed amendment; or
>
> *(b)* That the Parties shall be asked whether they accept the proposed amendment and also asked to submit to the Council any comments on the proposal.
>
> 2. If a proposed amendment circulated under paragraph 1 (b) of this article has not been rejected by any Party within eighteen months after it has been circulated, it shall thereupon enter into force. If, however, a proposed amendment is rejected by any Party, the Council may decide, in the light of comments received from Parties, whether a conference shall be called to consider such amendment."

For some analysis, see Jelsma *et al.*, *supra* note 57, at 13–15.

[243] The delegate from India, in: UN (1964a; *supra* note 40) at 185; and the delegate from the Federal Republic of Germany ("West Germany"), in: UN (1964b; *supra* note 138) at 123.

[244] *op. cit.* note 199.

[245] McNair (1961) at 773, *supra* note 96.

[246] *ibid.* at 370.

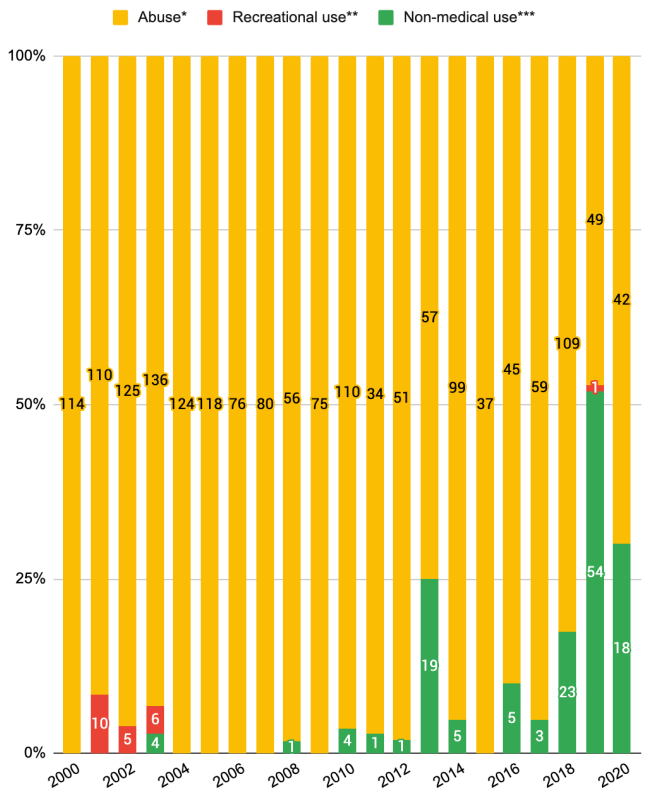
[247] For instance: USA *v.* France (1963) at 38, 45–51, *supra* note 76; ICJ (2009) at 238–240, *supra* note 200; **Permanent Court of International Justice** (1933), "Legal Status of Eastern Greenland; Judgement of April 5th, 1933", In: *Series A/B; Collection of Judgments, Orders and Advisory Opinions; Fascicule No. 53*, A. W. Sijthoff Publishing Company, at 48–52. In addition, this custom is somehow codified in Art. 33(4), VCLT, *op. cit.* note 85.

[248] *Resolution III: Social conditions and protection against drug addiction (Resolutions adopted by the United Nations Conference to consider amendments to the Single Convention on Narcotic Drugs, 1961),* in UNODC (2013) at 20; *supra* note 108.

abuse, but certainly not to combat OMSP, which is consistently exempted in numerous dispositions.

This textual and intention-based analysis of the mentions of both *abuse* and OMSP clarifies that a plain, generic, common meaning is prescribed for both. Not complex semantic constructs stirring a definition of *abuse* as synonym of OMSP, or attempting to define OMSP as excluding RAU. These are not supported by the text or by the *travaux*. RAU is not a medical use, is not a synonym of *abuse*. In the meaning of the Single Convention, when RAU is not excessive or harmful, it is defined as OMSP, non-medical use, **other than medical and scientific use**.

Figure 5. Use of the terms "abuse," "recreational use," and "non-medical use" in Resolutions approved by the Commission on narcotic drugs, 2000–2020



* Similar terms (*e.g.* "abuser") are also accounted for;
** The term "recreation" used in reference to non-drug related leisure activities or facilities is not accounted for;[249]
*** Both "non-medical" and "non medical" are accounted for.

[249] See *supra* note 118.

Non-medical use in subsequent practice

The expression "non-medical" is only present once in the C61, incidentally in direct relation to the RAU of cannabis (Article 49(1)d.). The Commentary, we have seen, explains that such mention of "non-medical" is equivalent to the meaning of "OMSP."[250]

In the six decades since the adoption of the Single Convention, the term OMSP has rarely been used; conversely, **the tendency of all stakeholders to refer to RAU as "non-medical"/"non medical"/"nonmedical" or even "non-medical and non-scientific" uses/purposes has steadily increased**. All four IDCC-mandated organizations have used similar terminological patterns to refer to the RAU of CCDs (and also to the RAU of other controlled drugs).

As Figure 5 shows (*supra* at 78), the CND, which gathers all State Parties, has shown such linguistic trends. Its resolutions, which are approved by consensus and that all Parties have the possibility to negotiate, can "be relevant when assessing the subsequent practice of parties."[251] Beyond the data shown in Figure 5, the use of "non-medical," "non medical," or "nonmedical" in CND resolutions seems to have been introduced after the International Conference on Drug Abuse and Illicit Trafficking of 1987.[252] The mention, in the Conference's outcome document, of the "**legalization of the non-medical use of drugs**"[253] set a standard.

Among the three other treaty-mandated intergovernmental bodies, the WHO has been relying for some time now on the use of terms such as "nonmedical use" for cannabis,[254] THC,[255] and other psychoactive substances alike –whether internationally-controlled[256] or not.[257] **The UNODC[258] defines "drug use" as the "use of controlled psychoactive substances for non-medical and non-scientific purposes."**[259] Generally, the UNODC claims and explains

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[250] See *supra* discussion under section Article 49: transitional exemption in Chapter 3; and *Commentary on the Single Convention* at 468–469 (*supra* note 114).
[251] UNGA (2019) at 3, *supra* note 53.
[252] Convened by the UNGA, held under the auspices of the CND, in Vienna, the 1987 Conference impulsed and guided multilateral action: it was instrumental, one year before the COP88 and adoption of the C88, as well as in subsequent decades (**Oppenheimer**, T. M. (1990), "Projections for the future development of international drug control policies", *Bulletin on Narcotics,* **42**(1):3–14; UN (1991b; *supra* note 199) at 8, 10, 53, 77, 272, 304–307). The 1987 Conference even made its way into the Final act and in the very text of the C88 (see *supra* note 109: UNODC, 2013, at 112, 149).
[253] UN (1987a), *supra* note 118.
[254] WHO (1969) at 19–20 (*supra* note 222); WHO (2019b) at 45, 52–55 (*supra* note 106). Notably, see the title of the report dedicated to the RAU of CCDs: **WHO** (2016), *The health and social effects of nonmedical cannabis use*; see also at 4 in: **WHO** (2004), *Neuroscience of psychoactive substance use and dependence*; and at 17, 20–22, 28, 31, 38 in: **WHO** (2018), *WHO Expert Committee on Drug Dependence: fortieth report; WHO Technical Report Series, No. 1013*.
[255] at 37–45, 55, in WHO (2018), *supra* note 254.
[256] WHO (2004) at 4, 75, 94–95 (*supra* note 254); WHO (2019b) at 6, 8 (*supra* note 106).
[257] WHO (2019b) at 29, 32 (*supra* note 106).
[258] Although not directly mentioned in the treaties, the UNODC is part of the United Nations Secretariat (it incorporated the former Division on Narcotic Drugs which was directly dependent upon Secretary-General), it is *de facto* vested with the mandate of UN Secretary-General under the Conventions, and performs some of its functions; it can therefore, in practice, be considered the treaty-mandated organism.
[259] UNODC (2020a, *supra* note 229) at 57. As a side note, UNODC explains that they mention the terms misuse "only to denote the non-medical use of prescription drugs" (at 15 in: **UNODC** (2020b), "Booklet 2: drug use and health consequences", *World Drug Report 2020*).

that it uses "recreational purposes" and "non-medical purposes" as synonyms:[260] it uses these mentions in direct reference to the "cannabis industry," to "legalization,"[261] and to "measures regulating the non-medical use of cannabis in Canada, the United States of America and Uruguay."[262] Finally, an analysis of INCB reports shows that, similarly, the body routinely refers to the "legalization of non-medical use of cannabis,"[263] "legalization of cannabis for non-medical purposes"[264] and even directly mentions "**legalizing non-medical (so-called "recreational") cannabis use.**"[265] It does so in reference to Canada, Mexico, the Netherlands, Uruguay and the USA –all allowing some form of licit RAU. **It cannot be disputed that INCB, UNODC, WHO and the CND, when using the terms "non-medical" use/purpose, refer to RAU.**

A look at IDCC-related resolutions adopted by the UN General Assembly (UNGA) is of peripheral, non-determinative value for interpretation,[266] yet, of guiding interest: UNGA's normative statements adopted unanimously "may be a means for the determination or interpretation of international law"[267] because the COP61, in its final acts, "took note that the Convention was approved without prejudice to decisions or declarations in any relevant General Assembly resolution."[268] Three UNGA Special Sessions dedicated to controlled drugs have been

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[260] at 44, 48 in: **UNODC** (2018), "Booklet 3: market analysis of plant-based drugs", *World Drug Report 2018*; and at 7, 35 in: **UNODC** (2019c), "Booklet 5: cannabis and hallucinogens", *World Drug Report 2019*; and: UNODC (2020b at 23, *supra* note 259).

[261] UNODC (2020a at 33; *supra* note 229).

[262] at 7, 14, 19, 22–35 in: UNODC (2019c), *supra* note 260.

[263] INCB (2003) at 28, *supra* note 56; (2019b) at 11, *supra* note 132.

[264] INCB (2020) at 40, *supra* note 132.

[265] INCB (2019b) at 2; *supra* note 132. This particular report is especially interesting with more that 20 references to the expression "cannabis for non-medical" use/purposes. A number of these mentions appear self-contradictory in light of the thesis developed in this essay, such as:

> "The legalization of the use of cannabis for non-medical purposes in some countries represents a challenge to the universal implementation of the treaties [...]. INCB reiterates that the conventions limit the use of controlled substances, including cannabis, exclusively to medical and scientific purposes, and remains engaged in continuous dialogue with the Governments of countries in which the use of cannabis for non-medical purposes has been legalized." (at iii),

and a number of statements such as:

> "the legalization of the use of cannabis for non-medical purposes undermines the international legal drug control framework and constitutes a dangerous precedent for the respect of the rules-based international order" (at 26),

or

> "The legalization of non-medical use of cannabis contravenes the international drug control treaties. Universal and full implementation of the treaties is put at serious risk because States parties, such as Canada and Uruguay (as well as states in the United States), have legalized cannabis for non-medical use. The actions of those countries and state jurisdictions undermine the treaties" (at 11),

as well as this **justification of its highly questionable position, based on a truncated quote of the C61**:

> **"the legalization and regulation of cannabis for non-medical and non-scientific purposes would be a violation of the provisions of the international drug control conventions, notably the 1961 Convention as amended, which includes, in its article 4 (c), the general obligation for States parties to 'limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs'"** (at 25).

And, beyond its complaints, the INCB also describes the legal systems implemented by using the terms *non-medical cannabis*, for instance: "methods for obtaining psychoactive cannabis for non-medical use: purchase in pharmacies; home cultivation; and membership of clubs" (at 69).

[266] UNGA (2019) *supra* note 53.

[267] at 278 in: **Institut de Droit International** (1988), *Yearbook Vol. 62, Part II; Session of Cairo 1987; Deliberations of the Institute during Plenary Meetings*, Éditions A. Pedone; see also Fernández de Casadevante Romaní (1996; *supra* note 91) at 121–137, 283–284; **Fernández de Casadevante Romaní**, C. (2007), *Sovereignty and Interpretation of International Norms,* Springer, at 63–75, 243–244; **Schachter**, O. (1993). "New Custom: Power, *Opinio juris* and Contrary Practice", in: Makarczyk, J. (Ed.), *Theory of International Law at the Threshold of the 21st Century; Essays in honour of Krzysztof Skubiszewski* (pp. 531–540), Kluwer Law International.

[268] at 12, in: UNODC (2013), *supra* note 109.

held in 1990, 1998, and 2016; all unanimously adopted their final outcome document, resolution or declaration. The little supplementary insights they provide is that:

- The 1990 and 1998 outcomes do not mention *non-medical* and refer to *abuse* in a similar way as the Conventions do (although distinguishing "use" from "abuse");[269]
- The 1998 and 2016 outcomes refer to the principles of *harm reduction*, in relation with *abuse*: the Assembly has called for public policies to "[reduce] the adverse consequences"[270] and "[minimize] the adverse public health and social consequences of drug abuse;"[271]
- The 2016 outcome document mentions on three occasions the "non-medical use and misuse of pharmaceuticals containing narcotic drugs and psychotropic substances" without clearly defining what that refers to.[272]

Besides these three Special Sessions on drug policy, in 2015, UNGA's resolution 70/1 setting out a global agenda for sustainable development mentioned *abuse*: "prevention and treatment of substance abuse, including narcotic drug abuse and harmful use of alcohol,"[273] in a context echoing the meaning of *abuse* as a medical condition (*abuse* for narcotic drugs seems to equate *harmful use* for the non-controlled drug alcohol, both appearing as subsets of *substance abuse*).

At last, Article 31(3)b., VCLT, as well as customary practice[274] invite an **analysis of the way Parties have subsequently referred to these terms in their application of the treaties** (beyond CND's consensus resolutions), and particularly, how RAU is referred to in municipal law. The exercise is delicate, insofar few State Parties have enacted the reforms in question. However, broadening the scope to regulations at the local level and law-making pronouncements by Supreme Courts, Annex II presents a textual analysis of the way RAU is defined, or otherwise referred to, in 6 nationwide and 18 local pieces of law related to RAU.[275]

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[269] at 3, in: **UNGA** (1998), *Twentieth special session: Agenda items 9, 10 and 11: "Declaration on the Guiding Principles of Drug Demand Reduction"; 10 June 1998 [A/RES/S-20/3]*.
[270] *ibid.*
[271] UNGA (2016) at 4, 6, *supra* note 118.
[272] *ibid.* at 14, 15, 17.
[273] at 16, in: **UNGA** (2015), *Seventieth session: Agenda items 15 and 116: "Transforming our world: the 2030 Agenda for Sustainable Development": 25 September 2015 [A/RES/70/1]*. Note that this resolution is relevant because, since its adoption, it has been gaining weight by getting increasingly referenced in other UNGA declarations (such as the UNGASS 2016 on drug policies, see *supra* note 118) and other pieces of soft law.
[274] *USA* v. *France* at 60–61 (*supra* note 76); Kolb (2006) at 479–480 (*supra* note 28); Shaw (2017) at 102 (note 86).
[275] The pieces of legislation consulted include: 228–258 in **Aotearoa/New Zealand Government, Secretary for Justice** (2020), *Cannabis Legalisation and Control Bill, exposure draft for referendum*; **Arizona Legislative Council** (2020), *Proposition 105 requirements [December 2020]*, Arizona State Legislature; **California Department of Public Health** (2019), *California Code of Regulations, Title 17, Division 1 - DPH-17-010 Cannabis Manufacturing Licensing*; **California Legislative Information** (2017a), *Bill Text - AB-133 Cannabis Regulation*; **California Legislative Information** (2017b), *Bill Text - SB-94 Cannabis: medicinal and adult use*; **Colorado General Assembly** (2013a), *House Bill 13-1317, Concerning The Recommendations Made In The Public Process For The Purpose Of Implementing Retail Marijuana Legalized By Section 16 Of Article XVIII Of The Colorado Constitution, And, In Connection Therewith, Making An Appropriation*; **Colorado General Assembly** (2013b), *House Bill 13-1318, Concerning The Recommendations Made In The Public Process For The Purpose Of Implementing Certain State Taxes On Retail Marijuana Legalized By Section 16 Of Article XVIII Of The Colorado Constitution, And, In Connection Therewith, Making An Appropriation*; **Colorado General Assembly** (2013c), *Senate Bill 13-241, Concerning The Creation Of A Program In The Department Of Agriculture To Regulate Industrial Hemp Production, And, In Connection Therewith, Making An Appropriation*; **Colorado General Assembly** (2013d), *Senate Bill 13-283, Concerning Implementation Of Amendment 64, And, In Connection Therewith, Making And Reducing An Appropriation*; **Colorado Legal Resources** (2020), *Constitution Document Page, Art. XVIII, Section 16*; **Commonwealth of Massachusetts** (2016), *Chapter 334 of the Acts of 2016 (189th General Court)*; **Commonwealth of Massachusetts** (2019), *Massachusetts General Laws c.94G, Regulation of the use and distribution of marijuana not medically prescribed*; Commonwealth of Massachusetts (2020), *Massachusetts General Laws c.94C, Controlled substances act*; **Constitutional**

The textual analysis of these 24 pieces of municipal law shows that there is a large **disparity in the choice of terms**. A preference seems to appear for "personal use" (n=15, in US States and abroad) and "adult use" (n=9, exclusively in the US). Less pieces of legislation mention "recreational" (n=5) or refer to RAU as "non-medical" (n=3: Uruguay, and the US States of California and Massachusetts). More importantly, the law adopted in Malta in 2021 refers to **"responsible use," defined as "use of cannabis for purposes other than medical or scientific purposes."**[276] No instance of RAU being referred to as "abuse" was found. Instead, when pieces of municipal legislation mention "abuse," it is –similarly to the Conventions– as SUD.

This Chapter shows **a clear tendency to refer to RAU as OMSP/non-medical –both discursive and in terms of enforcement– that is consistent over time and among stakeholders**. **Nothing in subsequent practice contradicts the definition of RAU as OMSP.**

Court of South Africa (2018), *Case CCT 108/17: Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton (CCT108/17) [2018] ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC); 2019 (1) SACR 14 (CC) (18 September 2018)*; **DCMJ** (2015), *Ballot Initiative 71 became law at 12:01am, Thursday, February 26, 2015*; **General Assembly of the State of Connecticut** (2021), *Bill No. 1201: An Act Concerning Responsible and Equitable Regulation of Adult-Use Cannabis*, Connecticut General Assembly; at 123–174 in: **General Assembly of Virginia** (2021), "Chapter 551 [H 2312]", *in: Virginia Acts of Assembly, 2021 Reconvened Special Session 1*, Division of Legislative Automated Systems; **Houses of Parliament, Jamaica** (2015), *Dangerous Drugs (Amendment) Act 2015*, Government of Jamaica; **Illinois General Assembly** (2019), *Public Act 101-0027, Cannabis Regulation and Tax Act*; **Massachusetts Department of Revenue** (2019), *Regulation 830 CMR 64N.1.1: Marijuana Retail Taxes*; **Michigan Legislature** (2018), *Michigan Regulation and Taxation of Marihuana Act*; **Montana State Legislature** (2021), *67th Legislature: House Bill 701*, Montana Legislative Services Division; **Olson Hagel & Fishburn LLP** (2015), *Submission of Amendment to Statewide Initiative Measure - Control, Regulate and Tax Adult Use of Marijuana Act, No. 15-0103*; **Oregon Liquor Control Commission** (2020), *Chapter 845, Division 25, Recreational Marijuana*; **Oregon State Legislature** (2019), *Oregon Revised Statutes: Chapter 475B, Cannabis Regulation, 2019 edition*; **Parliament of Canada** (2018), *Statutes of Canada 2018, Chapter 16 An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts Assented to June 21, 2018 Bill C-45*; **Parliament of Malta** (2021), *Bill No. 241: AN ACT to establish the Authority on the Responsible Use of Cannabis and to amend various laws relating to certain cannabis activities*; **República Oriental del Uruguay, Junta Nacional de Drogas** (2019), *Control y Regulación del Mercado de Cannabis – regulation and Control of Cannabis Market*; **State of Alaska, Office of the Lieutenant Governor** (2014), *An Act to tax and regulate the production, sale, and use of marijuana in Alaska*; **State of Maine** (2020), *Rule Chapters for the Department of Administrative and Financial Services, Chapter 18*; **State of Maine, Office of the Secretary of State** (2016), *Maine Citizen's Guide to the Referendum Election, Tuesday, November 8, 2016*; **State of Nevada, Cannabis Compliance Board** (2020a), *Nevada Revised Statutes: Title 56: Regulation of Cannabis: Chapter 678A: Administration Of Laws Relating To Cannabis*; **State of Nevada, Cannabis Compliance Board** (2020b), *Nevada Revised Statutes: Title 56: Regulation of Cannabis, Chapter 678D: Adult Use Of Cannabis*; **State of Nevada, Cannabis Compliance Board** (2020c), *Regulations Of The Nevada Cannabis Compliance Board*; **State of Nevada, Secretary of State** (2014), *Initiative Petition – statewide Statutory Measure: initiative to regulate and tax marijuana*; **State of New Mexico** (2021), *House Bill 2, 55th legislature, First Special Session*, New Mexico Legislature; **State of New York** (2021), *Senate Bill 854-A: 2021-2022 Regular Sessions in Senate*, New York State Senate Open Legislation; **State of Oregon, Secretary of State** (2014), *Full text of initiative petition #53*; **State of Washington, Secretary of State** (2011), *Initiative Measure No. 502*; **Suprema Corte de Justicia de la Nación** (2021), "Sentencia dictada por el Tribunal Pleno de la Suprema Corte de Justicia de la Nación en la Declaratoria General de Inconstitucionalidad 1/2018, así como los Votos Aclaratorio del señor Ministro Juan Luis González Alcántara Carrancá, Concurrente del señor Ministro Javier Laynez Potisek, y Particulares de la señora Ministra Yasmín Esquivel Mossa y de los señores Ministros Alberto Pérez Dayán y Jorge Mario Pardo Rebolledo" in: *Diario Oficial de la Federación, Estados Unidos de México, Julio 2021, 13 (Jueves 15 de julio de 2021)* (pp. 177–234); **US Government Publishing Office** (2015), *An Act making consolidated appropriations for the fiscal year ending September 30, 2015, and for other purposes*; **Vermont General Assembly** (2018), *Act No. 86: an act relating to eliminating penalties for possession of limited amounts of marijuana by adults 21 years of age or older (H.511) As Enacted*.

[276] at 27 in: Parliament of Malta (2021), *supra* note 275.

6. ON TIME & INTERTEMPORALITY

"there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied. [...] where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration,' the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning."

– International Court of Justice, *Costa Rica* v. *Nicaragua*, 2009, at 242–243 (*supra* note 200).

Photo: Maurice Narkozy/CC BY-SA 4.0.

The "intention *as expressed in the words used by [the Parties] in the light of the surrounding circumstances*"[277] (original emphasis) was: to provide a broad exemption of OMSP, and additionally, it was not to define RAU as "abuse" and not to rule RAU out from being part of OMSP. This is supported by the essentially textualist interpretation discussed in this essay.[278]

So far, however, the interpretation proposed has jumped between 1961 and 2022: studying terminology and state of mind at the time the treaties were concluded, but sometimes relying upon policy reforms or vocabulary of the 21st Century. **Custom prescribes, in first instance, to rely upon the general principle of contemporaneity**, or *tempus regit actum*: **analyzing a treaty within the normative context that was contemporaneous at the time of its conclusion**.[279]

However, the principle of **intertemporal law** can sometimes be invoked: although still much debated today,[280] the intertemporal doctrine considers that **treaty interpretation can sometimes depart from the original context of the treaty's negotiation and conclusion, to "follow the conditions required by the evolution of law."**[281] A famous adjudication by Judge Max Huber in 1928 set a precedent in the development and articulation of intertemporality in treaty interpretation. Rosalyn Higgins synthesizes **the "Huber rule"** as one walking on **"two legs:"**[282] the *first leg* would be the *tempus regit actum* approach, the *second leg*, a dynamic, evolutionary interpretation which would take into account the development of international law, practice, and custom.

Since the *first leg* (or *tempus regit actum*) remains the preferred approach, methods exist to **identify situations which calls into question the temporality of a particular provision** and might require reliance upon the *second leg* of the Huber doctrine: there can be an explicit mention in the text, a presumed intention of the Parties made explicit in the *travaux*, the subsequent practice Parties,[283] but it can also be the guidance of "a wider principle [...] by reference

[277] Lord McNair, cited by Aust (2000) at 188, *supra* note 86.
[278] Essentially textualist, yet, enlightened by supplementary means when the text remains obscure –and when it doesn't, as a matter of fluidity, reconciling textualism and intentionalism (Gardiner (2008) at 141–298, 310–350, *supra* note 29).
[279] On *tempus regit actum*, see **Institut de Droit International** (1975), *Annuaire Vol. 56; Session de Wiesbaden 1975*, Editions S. Karger SA, at 539.
[280] **Bjørge**, E. (2014), *The Evolutionary Interpretation of Treaties*, Oxford University Press; Helmersen (2013; *supra* note 90) at 133; **Higgins**, R. (1993), "Some observations on the inter-temporal rule in international law", in: Makarczyk, J. (Ed.), *Theory of International Law at the Threshold of the 21st Century; Essays in honour of Krzysztof Skubiszewski* (pp. 173–181), Kluwer Law International; Merkouris (2010; *supra* note 72); (2015; *supra* note 29); Schwebel (1993; *supra* note 86); **Wheatley**, S. (2020), "Revisiting the Doctrine of Intertemporal Law", *Oxford Journal of Legal Studies,* **41**(2):484–509
[281] at 14 in: **Permanent Court of Arbitration** (1928), *The Island of Palmas Case (or Miangas); United States of America v. The Netherlands; Award of the Tribunal [1925-01] The Hague, 4 April 1928* (Huber, M., Arb.).
[282] **Higgins**, R. (1997), "Time and the Law: International Perspectives on an Old Problem", *The International and Comparative Law Quarterly,* **46**(3):501–520. The dictum including that much-debated development intertemporal doctrine in the field of international law, uttered by the adjudicator Max Huber, can be read in: Permanent Court of Arbitration (1928), *supra* note 280. For an introduction to the discussions, see Elias (1980) *supra* note 91; **Institut de Droit International** (1973), *Annuaire Vol. 55; Session du Centenaire Rome — Septembre 1973*, Éditions A. Pedone, at 9; Shaw (2017) at 708, *supra* note 86; Wheatley (2020), *supra* note 280.
[283] UNGA (2019) at 4, *supra* note 53; Elias (1980) at 293, *supra* note 91.

to the objects and purpose"[284] expressing the overall rationale of the norm –its *ratio legis* or *raison d'être*.[285]

Since "both doctrine and judicial practice seem to have no problem in accepting the possibility of transposition of the rationale behind intertemporal law to the interpretative process," [286] it is worth analyzing at this stage which *leg* of the *Huber rule* applies to Article 2(9).

In our effort to interpret an old treaty for the needs of our days, maintaining a good faith-approach, and staying loyal to the original intent of the parties, an analysis of **the weight of intertemporality in the provisions discussed** can further enlighten –confirm or challenge– the way this essay, and possibly readers after it, interpret the terms of the C61 that are vague, and/or those that have evolved since 1961.

Besides one case (Malta, whose framing of its domestic RAU law fully supports the interpretation presented so far) there is no documented subsequent practice of State Parties on *Cannabis*-related municipal dispositions framed in the terms of Article 2(9) that could be analyzed (insofar the author is aware). Consequently, **this Chapter first attempts to assess the views and intent of the drafters as to a possible evolutionary nature of that Article, before analyzing the *ratio legis* –object(s) and purpose(s)– of the C61**.

[284] Higgins (1997) at 519 (*supra* note 282); see also: Elias (1980) at 304 (*supra* note 91); Higgins (1993) at 177–181 (*supra* note 280); Kolb (2016) at 158 (*supra* note 28); and Merkouris (2015, *supra* note 29) generally.

[285] Lo (2017 at 257, *supra* note 24) notes that:

> "although the decision on whether to adopt the evolutive or contemporaneous interpretation mainly concerns the identification of an ordinary meaning to be given to a treaty term or provision, it does not mean that such issue does not exist in connection with the contextual and teleological interpretations."

On another note, it should be remarked that terms sometimes naturally –and undisputedly– evolve. For instance, where the preamble of the Single Convention refers to "mankind," it is universally assumed that this corresponds to what we refer to nowadays as "humankind," and not only to men…

[286] Merkouris (2010) at 129, *supra* note 72.

Article 2(9): voluntarily evolutionary

In researching which *leg* of the *Huber rule* should be followed, Panos Merkouris suggests that "what was **the intention of the parties with respect to the effect that time would have on the content of the rules**"[287] can be determinative. In this respect, a look at the COP61 is mandated. The *ad'hoc* drafting committee (previously mentioned), after its two sessions discussing the wording of OMSP in Article 2(9), wrote in its final report:

> "Some delegations felt that the provisions of [Article 2(9)] were unnecessary and should be deleted as they provided for **a future condition** which might never arise. It was the consensus of opinion in the Committee that a decision on the deletion of this provision should await consideration of the amendment procedure ([draft] article 54[, nowadays Article 47]). If a **flexible** amendment procedure was adopted then it might be possible to dispense with this provision" (emphasis supplied)[288]

Indeed the Parties, at that time, envisioned "the new convention" as a flexible one, wanting it to:

> "provide for foreseeable **future developments** which otherwise could be met only by the uneconomical and relatively slow process of amendment. [...] Provision should therefore be made for the possibility of industrial use not only of synthetic, but also of natural narcotics."[289]

In 1973, the Commentary, about Article 2(9), relates:

> "It was mentioned in the Plenipotentiary Conference, during the discussion of the draft of the paragraph under consideration, that the provision was of no immediate practical importance, but had been inserted to anticipate possible future developments. The developments appear still to be in the future at the time of this writing."[290]

And in commenting Article 4:

> "the provisions to which paragraph (c) is 'subject', *i.e.* which are excepted from its application, are article 49, article 2, paragraph 9 (whose practical importance seems highly hypothetical)"[291]

The clauses contained in Article 2(9) are vested of a special importance in the drafting history of the C61: they are among the few that survived previous drug control treaties, and at the COP61 "the final text is literally the same as the draft"[292] (the wording of Article 2(9) was originally included in the second draft of the Single Convention, in 1955, and was altered before the COP61).[293] During

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[287] Merkouris (2015) at 152, *supra* note 29.
[288] UN (1964b) at 84, 262; *supra* note 138. See also *supra* Chapter 5.
[289] **CND** (1955), *Commission on Narcotic Drugs, Tenth session, Summary Records of the two hundred and seventieth meeting [E/CN.7/SR.270]*, United Nations.
[290] *Commentary on the Single Convention* at 72; *supra* note 114.
[291] *ibid.* at 110.
[292] *ibid.* at 72.
[293] *Commentary on the Single Convention* at 110; *supra* note 114. For the discussions leading to the inclusion of the early Article 2(9) in the second draft of the Single Convention, they are actually documented as early as 1955, when the provision was inserted in the draft by the CND. The discussions were as follows. The concept was introduced by the delegation of Turkey (CND (1955) at 14, *supra* note 289):

> "Parties would be free to exempt from narcotics control synthetic narcotic substances which were widely used in industries other than the drug industry, if by denaturing or other means they prevented misuse and if they furnished relevant statistical information"

these six years, although the text was not altered, it was much debated. Its practical relevance was acknowledged to be only hypothetical and forwards-looking; from the outset the provisions of Article 2(9) were made to provide **flexibilities for *situations that may or may not arise*** in a necessarily unforeseeable future (in the mind of people living in the 1950s-1960s). Hence the fact that **Article 2(9) was put on the balance with no less than an Article relating to the amendment of the Convention as a whole**.

Besides the clear will of the drafters to frame Article 2(9) under *second leg* of the *Huber doctrine*, the dynamic character of the exemption is reinforced by the reliance on vague language such as "appropriate methods of denaturing *or other means*" (again, "other" which it is customary to consider of a broad meaning unless clearly stated otherwise in the treaty).[294] Ahead of the COP61, the wording of this "denaturing or other means" clause was actually changed by the CND: the very first language introduced in 1955 mandated denaturation.[295] The expression "commonly used in industry" also evolved in the mid-1950s: the discussions initially mentioned "industries other than the drug industry" which was not retained in the final wording. **There were proactive steps, at that period, to loosen the narrowness of the terms used in the definition of the exemption in Article 2(9).**

The mention of "or other means" for the tackling of "ill effects" and "harms" can also be analyzed as an open-ended, forward-looking provision. The drafters did not know, at the time, a number of facts about drug consumption, actual harms, and efficient methods to address them –it simply had not yet been studied at the time. And stakeholders, at the time, were aware that they were crafting laws on topics about which scientific and legal knowledge was prone to rapidly evolve

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However, it was subsequently decided (*a contrario* to what had been agreed on at the previous 9th CND session of 1954; *ibid.* at 13) that the regimes for natural and synthetic drugs should be harmonized "since there was no reason for discrimination in this respect between two types of drugs" (at 15). The discussions continued accordingly:

> "The opinion was expressed that the new convention should not provide for highly improbable contingencies. There was no indication that any narcotic drug existed or was likely to be developed which might be widely used in industry for other than medical and scientific purposes.
>
> It was contended, on the other hand, that cases did occur in which chemicals used for technical purposes turned out to have useful medical properties also. Furthermore, *the new convention should provide for foreseeable future developments which otherwise could be met only by the uneconomical and relatively slow process of amendment*. Even today morphine was used in certain processes of photography. Provision should therefore be made for the possibility of industrial use not only of synthetic, but also of natural narcotics.
>
> At its 278th meeting, the Commission decided by 8 votes to 5, with 2 abstentions, that, under the new convention, parties should not be required to apply the narcotics regime to narcotic drugs (synthetic or natural) which would be widely used in industry for technical purposes, provided that they prevented misuse by appropriate measures, in particular by denaturing, and that they accounted statistically for such use." (emphasis supplied)

This was discussed at that same session that debated other cannabis-related measures (medical uses, control over cultivation, but also the exemption over cultivation for industrial purposes, etc.; at 23–25). It is also enlightening to note that the concept of "non-medical use" was predominant as a way to refer to the RAU of cannabis (at 12, 18, 48), or coca leaves (at 7), as well as the "misuse of cannabis plants" was discussed on several occasions (during discussions as to whether or not to provide a specific prohibition for cannabis, see below). The CND finally adopted an article for the second draft, formulated as follows:

> "The Parties are not bound to apply the provisions of this Convention to narcotic drugs which are ordinarily used in industry for other than medical or scientific purposes provided:
>
> *(a)* That they take measures to ensure by appropriate methods of denaturing or by other means, that the narcotic drugs so used are not liable to abuse or to produce ill-effects [...] and that it is not possible in practice to recover the harmful substances from the final product; and
>
> *(b)* That they include in the statistical information furnished by them [...] figures relating to the quantity of each narcotic drug so used" (at 48).

[294] McNair (1961) at 773, *supra* note 96, and related discussion.

[295] "appropriate measures, in particular by denaturing" see *supra* note 289 & 293.

and change.[296] Nowadays, it is known that public health strategies, prevention and harm reduction, labeling, drug testing, measures against unsubstantiated medical claims, and other public health strategies can help curb the burden of risks and harm associated with the consumption of CCDs. The UNGA acknowledged these policies and called upon the Parties to implement them, twice, in 1998 and in 2016.[297] Harm reduction policies arose in *the future*, seen from 1961; the inclusion of "or other means" in Article 2(9) is allowing the Parties to implement what they subsequently agreed on in General Assemblies (in 1961's future): using other methods and policy approaches than "denaturing" to reduce the harms and likelihood to cause SUD.[298]

Still, wouldn't it be *going too far* by saying that the drafters of the Single Convention included flexible provisions that would cover harm reduction or cannabis legalization? Chayes and Chayes provide an interesting perspective about this:

> "**Treaty drafters do not foresee every of the possible applications –let alone their contextual settings.** Issues that are foreseen often cannot be resolved at the time of treaty negotiation and are swept under the rug with a formula that can mean what each party wants it to mean. Economic, technological, scientific, and even political circumstances change. All these inescapable incidents of the effort to formulate rules to govern future conduct frequently produce a zone of ambiguity within which it is difficult to say with precision what is permitted and what is forbidden."[299]

Supported by Sondre Torp Helmersen:

> "That treaty drafters intended terms to evolve does not presuppose that they could have foreseen the exact interpretive results reached by a future interpreter, or that they intended a specific future interpretation to prevail."[300]

If the flexible provisions were not added to cover such developments as harm reduction policies or RAU-related reforms are developments –then for what? These developments happen in the same State Parties as those who adopted the Single Convention and its flexible provisions. Only, later on in time. Plenipotentiaries knew, back in 1961, that time would come when they would need a leeway relating to the core of the treaty's controls. Between amendment and exemption, they made their choice.

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[296] The drug-related discussions at the CND in the 1950s and 1960s, and at the COP61, reflect, in many fields, a feeling of ongoing progress and of unexpected possibilities that may arise in the future, in a number of fields: botany, illegal activities, drug discovery in the pharmaceutical sector, but also possible science-based tools to guide control policies, novel industrial uses, political changes… See at 32–33, in: **UN** (1952), *Commentary on the Draft Single Convention; Note by the Secretary-General [E/CN.7/AC.3/4/Rev.1].* Another example: the CND was utterly interested in learning about new research related to the breeding of *Cannabis* plants to increase yield of products used in industry while reducing the *resin content* (see for instance: CND, 1955, at 25; *supra* note 289).
[297] See *supra* notes 252 and 253.
[298] Not only did the UNGA called Parties to the IDCC to implement harm reduction measures, but such measures are presently already implemented in most jurisdictions where RAU has been legally regulated, as reported in the World Drug Report: UN (2019c) at 36–49, *supra* note 260.
[299] Emphasis supplied. Chayes and Chayes (1993) at 188, see *supra* note 33.
[300] Helmersen (2013) at 135 (*supra* note 90).

Article 2(9) *v. rebus sic stantibus*

It should also be presumed that the Parties want to allow themselves, in the future, to continue to have ways to comply while possibly changing approaches. **Yes, the drafters wished to put an end to the countless exceptions and exemptions of previous drug control instruments. But they also did not want to totally tie their own hands –and they wanted a treaty that could last, regardless of what the future could bring.** After all, one of the functions of treaty law-making is to prevent the obsolescence of international law –or *rebus sic stantibus*– "the implications that the obligations under a treaty are terminable in the event of a fundamental change of circumstances."[301] Perhaps for this reason, the voluntary inclusion of evolutionary clauses is not uncommon in international law. The quote of the ICJ in opening of this Chapter recalls that negotiators sometimes give an evolving meaning to some terms or contents and, in such case, "**account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied**"[302] particularly when the drafters of said terms invite us to do so.

The context, 60 years after the conclusion of the C61, is one where CCDs are used for "non-medical purposes" in an "industry," and in a growing number of Parties; it is that of parties that apply other means than denaturing, to other uses than medical ones. Unclear terms in Article 2(9) should be understood accordingly.

The provisions in Article 2(9) appear to have been left deliberately open to an evolutionary interpretation, regardless of where that could lead. The fact that this broad exemption was put on the balance with another forward-looking flexibility clause (the amendment procedure) reinforces the fact that **the drafters wanted a margin of maneuver, come what may. Between the easy amendment and the broad exemption, they chose the exemption.**

Article 2(9) *v.* Article 49: non-conflicting exemptions

The evolutionary perspective on the exemption contained in Article 2(9) and its potential application to RAU is reinforced by **the other temporal aspect of the Single Convention: Article 49**.

While it may seem at first sight that the presence of **two provisions exempting the same thing –RAU– in Articles 2(9) and 49** are conflicting, three elements allow us to distinguish between the two exemptions, and give effect to *ut res magis valeat quam pereat* –an effective, harmonious, non-conflictual interpretation of the regime of exemption:[303]

[301] Crawford (2012) at lxxxiv, 355–356, *supra* note 24.
[302] ICJ (2009) at 242–243, *supra* note 200.
[303] for *ut res magis valeat quam pereat*, see *supra* note 150.

1) the specificities of the exemption laid out in Article 49 (particularly in paragraphs *(2)*, *(3)*, and *(4)*, see Table 1 and section Article 49: transitional exemption in Chapter 3) are distinct from those of Article 2(9): while the former provide for a number of burdensome reporting requirements both up and downstream (communication of progress reports, estimates, and other statistics mandated under Articles 18, 19, and 20), the latter only requires reporting downstream (Article 20);[304]
2) the "traditional" characteristic of the OMSP uses and activities liable to be exempt under Article 49,[305] versus the "common use in industry" characterizing the OMSP exempted under Article 2(9) differentiate the **two types of OMSP: traditional *v.* industrial**;
3) while the COP61 agreed on an **Article 49 as a temporary regime, limited in time**, and planned for short to medium-term purposes, **Article 2(9) "had been inserted to anticipate possible future developments"**[306] and not only it **was thought to gain relevance and start being applied in an unidentified future**, but it also **contains no expiration date**.

The role of *time* is central in the articulation of these two exemptions: over time, there would be a **handover of the regime for non-medical uses, from Article 49 to Article 2(9)**. Concerning *Cannabis*: the Convention mandates that traditional "hashish consumption [would] be outlawed throughout the world"[307] after the phase-out period of Article 49, but allows non-traditional consumption which could arise in a distant future, as far as it is or would be "common in industry."

Accordingly, even after 8 August 2000, the "non-application of the full narcotics régime" to scheduled drugs used for "other than medical or scientific purposes, *i.e.* common industrial uses"[308] would be legally possible –as long as the two conditions mentioned in Article 2(9) are met– thus providing a **direct way to avoid *rebus sic stantibus***, developments that would render the treaty lapsed (and, because of the lack of elasticity in the amendment process, could lead to defection of some Parties, or *non liquet*).[309]

[304] UN (1964a) at 55, *supra* note 40.
[305] Article 49, paragraph 2, subparagraph a, subjects the application of the Article to activities that "were traditional [...] and were permitted on 1 January 1961" (for a discussion, see: *Commentary on the Single Convention* at 469–471; *supra* note 114).
[306] *ibid.* at 72.
[307] Lande (1962) at 795, *supra* note 39.
[308] *Commentary on the Single Convention* at 73, *supra* note 114.
[309] Denotes a situation of absence of, or lacuna in the law, leading to non-justiciability. See: **Fastenrath**, U. and Knur, F. (2019), "Non liquet", In: *Oxford Bibliographies*.

Raison d'être

Any interpretation, and particularly the reliance on the intertemporal rule to interpret unclear terms, need to be framed by, and aligned with the "object and purpose" of the treaty under scrutiny. From its very first report until today, INCB has carried the voice of the drafters, stressing to State Parties the need to balance the treaty's rationale (its *ratio legis*, its object and purpose, its underlying *raison d'être*) when considering their national obligations under the IDCC.[310] In the case of RAU-related reforms, INCB warned:

> "that each government should within its own jurisdiction maintain efficient national controls and to this end should apply both the letter and the spirit of the treaties."[311]

Without adopting a teleological interpretation (which would wholly articulate its hermeneutics around the *ratio legis* of the treaty), **an analysis of the *raison d'être* of the Single Convention would not only assist in solving the issue of intertemporality and in interpreting the treaty, but also in implementing it, and in providing a broader understanding of *what the treaty is*, generally**.

According to the Commentary, Article 4(c) reflects the *object* of law in the field. Indeed, as seen in Chapter 3, an important part of the general obligations, scope, and aims of the Single Convention are defined in Article 4(c) –and it exempts OMSP. The Commentary notes:

> "[t]he object of the international narcotics system is to limit exclusively to medical and scientific purposes the trade in and use of controlled drugs. From the beginning this has been a basic principle of the multilateral narcotics system, although all the treaties providing for it authorize some exceptions."[312]

Again we find this dichotomy framing **a *quasi-exclusive* limitation: "limit exclusively," but subject to exemptions.** The exception that proves the rule. Remarkably however, and as previously noted, this language is specific to Article 4(c): for instance, **the preamble does not contain the word "exclusively"** –unfortunately, the Commentary does not discuss or indeed even reproduce the preamble.

The preamble is relevant because its addition was contemplated by the Plenipotentiaries precisely as a way to express clearly the *raison d'être* of the Single Convention.[313] As emphasized by the delegate of Brazil during plenary discussions at the COP61:

> "The preamble of any treaty or convention [is] an important part of it and in the case of the Single Convention still more so, because it [is] going to consolidate and bring up to date the provisions of nine existing multilateral instruments of unquestionable importance, [...]. A preamble [is] not a mere formal introduction, but rather dealt with ***the substance of a treaty***; it [is] a statement of purposes and a justification of the aims of the negotiation; and, because it help[s] to understand the

[310] First report, at 11, in: **INCB** (1968), *First Report of the International Narcotics Control Board [E/INCB/1]*; and recently, for example, at iv, in: **INCB** (2016b), *Availability of Internationally Controlled Drugs: Ensuring Adequate Access for Medical and Scientific Purposes Indispensable, adequately available and not unduly restricted*.
[311] at 10, in: **INCB** (1971), *Report of the International Narcotics Control Board on its work in 1971 [E/INCB/13]*.
[312] *Commentary on the Single Convention* at 110; *supra* note 114.
[313] It is relevant generally, see: Gardiner (2008) at 195n162, 196–197 (*supra* note 29) on the ascertainment of the *raison d'être* of a treaty relying on its preambles.

> intentions of negotiators, it ha[s] ***a juridical force for the purposes of interpretation***" (emphases supplied)[314]

The expression of justifications, purposes, intentions, substance, and spirit in the preamble of the C61 was not an understatement for its drafters. They agreed on a preamble reading as follows:

> "The Parties,
> Concerned with the *health and welfare of mankind*,
> Recognizing that the *medical use of narcotic drugs* continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes,
> Recognizing that *addiction to narcotic drugs* constitutes a serious evil for the individual and is fraught with social and economic danger to mankind,
> Conscious of their duty to *prevent and combat this* evil,
> Considering that effective measures against *abuse of narcotic drugs* require coordinated and universal action,
> Understanding that such universal action calls for international co-operation guided by the same principles and aimed at common objectives,
> Acknowledging the competence of the United Nations in the field of narcotics control and desirous that the international organs concerned should be within the framework of that Organization,
> Desiring to conclude a *generally acceptable international convention replacing existing treaties on narcotic drugs, limiting such drugs to medical and scientific use, and providing for continuous international co-operation and control for the achievement of such aims and objectives*,
> Hereby agree as follows"[315] (emphases supplied)

A detailed and convincing study of the preambles of the IDCC and the *ratio legis* they contain has already been done by Richard Lines.[316] He calls for caution in differentiating:

> "two separate concepts, the first being the immediate or utilitarian object and purpose of the treaty, and second being the ultimate goals or *telos* of the treaty, the state of affairs the treaty hopes to achieve."[317]

A general application of such a distinction is debatable,[318] but Lines' analysis shows that it seems fit to the IDCC. Under this lens, **the *utilitarian object* appears to be the control of, and quasi-exclusive limitation to, medical and scientific purposes of certain activities**[319] and "effective steps to prevent drug addiction" and abuse;[320] and **the overarching *telos*, or**

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[314] UN (1964a) at 19–20, *supra* note 40.
[315] At 23 in UNODC (2013), *supra* note 109. See an insightful commentary in Lines (2017) at 122–125, *supra* note 151.
[316] **Lines**, R. M. (2014), *The 'fifth stage' of drug control: international law, dynamic interpretation and human rights (PhD thesis)*, Middlesex University; Lines (2017) at 122–125, *supra* note 151.
[317] Lines (2017) at 114; *supra* note 151.
[318] For a discussion, see: Linderfalk (2007) at 207–211, *supra* note 186. Such a distinction in the *ratio legis* is still enigmatic to some: **Buffard**, I. and Zemanek, K. (1998), "The 'Object and Purpose' of a Treaty: An Enigma?", *Austrian Review of International & European Law*, **3**:311–343; Gardiner (2008, *supra* note 29) at 189–194. In addition, it should be noted that in the preceding quote, Lines surprisingly uses "object and purpose" as a whole to refer to the "immediate or utilitarian" part, where other authors only refer to it as "object" and associate "purpose" with the "*telos*."
[319] Lines (2017) at 115–121; *supra* note 151.
[320] The preamble of the Single Convention is recalled in the final resolutions adopted by the Plenipotentiaries of the COP72 (see "Resolution 3: Social conditions and protection against drug addiction" in: UNODC, 2013, at 20, *supra* note 109), suggesting that this is the *raison d'être* understood by the Parties:

> "Recalling that the Preamble to the Single Convention on Narcotic Drugs, 1961, states that the Parties to the Convention are 'concerned with the health and welfare of mankind' and are 'conscious of their duty to prevent and combat' the evil of drug addiction"

Interestingly, Leinwand (1971) at 417, 429 (*supra* note 10) already noted this exactly 50 years ago.

ultimate goal being the "health and welfare of [hu]mankind."[321] In other words, the *raison d'être* of the Convention is to coordinate State Parties' regulations of certain drugs liable to SUD, in order to advance the health and welfare of humankind. This is generally the vision adopted by countries where RAU-related reforms have taken place, but not only.[322]

That is reasonable, provided the preamble does not limit "exclusively," and also mentions this concept of limitation in the context of a "generally acceptable international convention," a priori not one extreme or particularly partisan.

In addition, **"limiting" is not a goal *per se***, but a means, a medium. The limitation could very well have been applied to reach different goals than health and welfare: say, regulating the economy, preventing environmental harms, fostering development, etc. But the aims expressed are those of health and welfare.

Since "health" is centrally codified under, and in relation to, the right to health (established in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights), not only **human rights might have a relevance in the hermeneutics of the IDCC in our days**, but this confirms the embed of the *raison d'être* of the Single Convention within a domain of international law –human rights– which, from the outset, is meant to progressively develop and evolve (and has done so). **This seems to confirm that the object and purpose of the C61 do not close the door to an intertemporal analysis of the treaty.**[323]

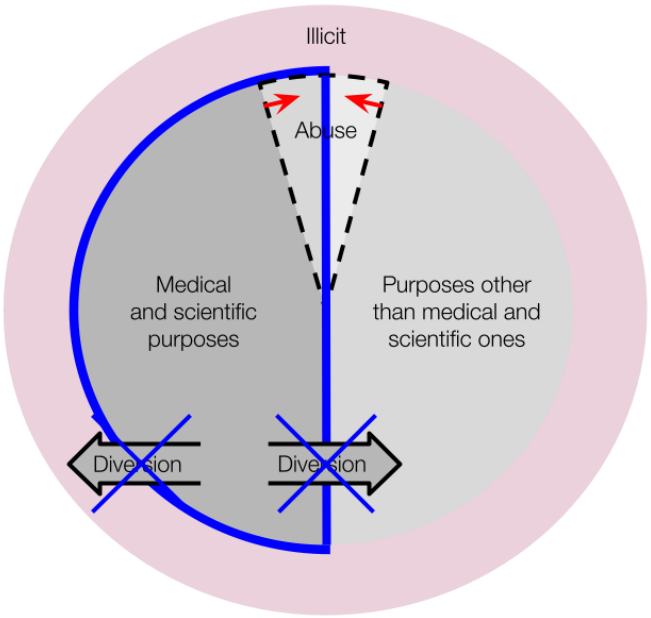
This analysis of a health-focused *ratio legis* also coheres with the finding (in Chapter 3) that **the overwhelming majority of provisions concern medical uses, clinical research, and medicines**: "drugs" is a noun without double meaning in common language, where it relates either to a medication, or in certain contexts, to a medication liable to SUD. But always medication, first.[324] There are no "drugs" that do not have, or have had, some sort of use, even remote, in medicine and healthcare.[325] Narcotic drugs are those drugs falling under the scope of the Convention –that is, nothing more than some medications that have potential for abuse and ill effects. Establishing strong controls to ensure access for MSP on the one hand, and to avoid abuse on the other hand, while disregarding those purposes that are neither related to MSP –all of this is perfectly in line with the view of **a treaty whose focus is health and the regulation of medicines, a treaty that only applies to (and controls) such purposes**.

In that meaning, the "limitation" applied to the medical and research sectors somehow has the meaning of establishing a closed-loop system for MSP. A closed-loop system which enables "to

[321] on *telos*: Linderfalk (2007) at 211–217; *supra* note 186.
[322] see for instance in: Jelsma *et al.* (2018) at 8–12, *supra* note 57.
[323] Higgins, 1993, *supra* note 280, at 174–176. This is arguably in line with Article 31(3)c., VCLT (*op. cit.* note 85), see: Aust (2012) at 86–87, *supra* note 34.
[324] Essential reading on the meaning of "drug:" Seddon (2016) *supra* note 202; Parascandola (1995) *supra* note 218.
[325] This has, however, recently started to change: since the mid-2010s the rapid addition to the Schedules of the Conventions of a series of new psychoactive substances (which have been recently discovered or identified, and have not always had the time to be eventually used in medicine) has brought a fundamental, if not teleological change to the international legal drug control system, bringing under international control the first "drugs" that have never been used in medicine –although some may argue that some forms of RAU could be assimilated to self-medication, which is yet another debate (not only the possible association of RAU with medical use, but also the "self-" part of it…).

ensure the availability of narcotic drugs for such purposes," echoing as well the concept of "diversion" present throughout the text –diversion: the breaking of that closed-loop.

Figure 6. Graphical representation of the utilitarian object of the Single Convention



Red: reducing the extent of abuse, for all purposes; blue: separation (limitation) between MSP and other purposes, including by avoiding "diversion."

Title

The title of an international instrument in a way also contains "a description of its purpose."[326] Article 31(2), VCLT, invites indeed to "**look at the treaty as a whole, including the title, preamble** and any annexes."[327]

In the case of the C61, the title is sober: "Single Convention on narcotic drugs, 1961." The "Single" refers to the fact that it fusions the previous nine treaties into one. But the **reliance on the word "on" denotes**, as compared to these previous drug-related instruments that the Plenipotentiaries had on the table during the COP61: their title included words like "**suppression**" (in the title of three treaties) or expressions such as "**limiting**" or "limiting and regulating."[328] The drafters arguably also had in mind other treaties concluded before 1961, which

[326] Aust (2000) at 332–334, *supra* note 86.
[327] Aust (2012) at 84, see *supra* note 34.
[328] The titles of the nine previous drug-related instruments that the Single Convention replaced (*Commentary on the Single Convention* at viii, *supra* note 114):
- *With "suppression:"* Agreement concerning the *Suppression* of the Manufacture of, Internal Trade in, and Use of Prepared Opium (1925), Agreement concerning the *Suppression* of Opium Smoking (1931), and Convention for the *Suppression* of the Illicit Traffic in Dangerous Drugs (1936);

commonly referred to "suppression," or used words as "**punishment**," "**abolition**," or "**banning**" in their titles.[329]

The title of the Single Convention was discussed throughout the COP61. Some delegations had initially proposed "General Convention on Narcotic Drugs" or "Consolidated Convention on Narcotic Drugs." Afghanistan and Aotearoa/New Zealand defended "Single Convention on Narcotic Drugs," Turkey and the Philippines "Convention of 1961 on Narcotic Drugs;" France didn't want the "Single," and Peru argued in favor of "Revised General Convention on Narcotic Drug." Constructively, India "suggested that the Conference should adopt two titles, one indicating the exact character of the Convention, and a shorter title for general use." **Every single title proposed used the word "on" drugs.** The final title was agreed at the final plenary meeting, with important participation in the discussions: the need for a self-explanatory title was expressed, but no delegate suggested relying on any *stronger* term.[330]

In subsequent agreements: the C71 mimicked the C61 in the sobriety of its title, and reliance on "on," but the C88 departed from that, being titled *"against" illicit traffic* (and not "on"). Note however that, in comparison with other treaties (like the "Convention for the *Suppression of the Traffic* in Persons and of the Exploitation of the Prostitution of Others"), the C88 addresses *illicit traffic*, not merely *traffic*. In addition, the particular traffic "against" which C88 is, in its title, is the one defined as illicit under the C61 or the C71 (see "Which of the three Conventions?" in Chapter 3). Still, comparing the titles of C61 and C88 is insightful; for Lines:

> "This would suggest that while the object and purpose of the 1988 treaty may well involve preventing or prohibiting an activity, that of the 1961 and 1971 Conventions are broader, different or at least more nuanced and open to interpretation."[331]

The drafters of the Single Convention, notwithstanding options to do so, did not use any connoted word in the title. They wanted a self-explanatory title: "Single Convention <u>on</u> narcotic drugs, 1961." Not "against," "suppression," or "limiting."

- *With "limiting:"* Convention for *Limiting* the Manufacture and Regulating the Distribution of Narcotic Drugs (1931), and Protocol for *Limiting and Regulating* the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium (1953);
- *Without much qualificatives:* International Opium Convention (1912 & 1925), Protocol amending the Agreements, Conventions and Protocols on Narcotic Drugs [...] (1946) known as "Lake Success Protocol", Protocol Bringing under International Control Drugs Outside the Scope of the Convention of 13 July 1931 (1948) known as "Paris Protocol."

[329] Other examples of treaty titles that clearly express the scope of the instrument include: Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications (1923), Convention on the Suppression of traffic in persons (1949), Convention on the Prevention and Punishment of the Crime of Genocide (1949), Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1950), Supplementary Convention on the Abolition of Slavery, tlie Slave Trade, and Institutions and Practices Similar to Slavery (1956), and also the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (1963) which is almost contemporaneous. See: **UN** (1961), *Multilateral Treaties Deposited with the Secretary General, Supplement No. 1, 331 December 1960 [ST/LEG/3/Rev.1]*, United Nations Treaty Collection.

[330] This is discussed throughout the *travaux* and in a number of CND reports prior to 1961. For the final plenary, see: UN (1964a) at 212, *supra* note 40.

[331] Lines (2017) at 116; *supra* note 151.

A Framework Convention on the Control of Some Medicines

The Single Convention is perhaps characterized by its timidity (starting from its title) and its numerable gaps and silences.[332] These gaps have to be analyzed in light of today's circumstances, because that is what the drafters intended.

Indeed, the Plenipotentiaries wanted a "generally acceptable" Convention: it would *follow the first leg* of the *Huber rule* of intertemporality –albeit with some room for future evolving interpretations generally (this is suggested by the drafters' framing of the Convention's *telos* with language evoking the evolving corpus of international human rights law, but also by their explicit mention of the relevance of future UNGA declarations; see under "Non-medical use in subsequent practice" in Chapter 5). Beyond that, they also made explicit that Article 2(9) needed to *walk on the second leg* of the doctrine, to allow triggering future adjustments of the legal scheme, since the Convention includes no simple amendment procedure.

The Single Convention protects health and welfare, introduces non-self-implementing measures of control limited to MSP, separates MSP from OMSP, monitors the utilization of OMSP in industry, and introduces guidelines of penal measures against breaches to the controls established.

If the proposal of India's delegate at the COP61 had been followed, the longer subtitle "indicating the exact character of the Convention" could have been: **Framework Convention on the Control of Some Medicines within the Medical and Pharmaceutical Sectors.**

To echo the reflections of Colson, this might be the contingent nature of the treaty, hidden behind the dogma of prohibition.[333]

[332] On silence in international law provisions, see: van Damme (2009) at 115–116, see *supra* note 35.
[333] Colson (2019) at 74–75, *supra* note 5.

Although the focus should not be placed solely upon the "object and purpose" of a treaty,[334]its analysis does reinforce the mostly-textual interpretation outlined in this essay. **In the context of the continued "unintended consequences" of prohibition-oriented drug policy** –which seriously undermine health and welfare of all and arguably also some dispositive provisions of the IDCC–,[335] **the interpretation proposed, which embeds public health harm reduction strategies into any licit exemption of RAU, is giving effect to both rules of *ut res magis valeat quam pereat* and *pacta sunt servanda*.**[336]

[334] Allott (2015) at 377, see *supra* note 4.
[335] UNODC Director-General found that the system of exclusion, marginalization, and stigmatization of people who use drugs (that directly derives from prohibition-oriented policies) renders those with SUD "unable to find treatment even when they may be motivated to want it" (CND, 2008 at 11, *supra* note 151), not only hampering health and welfare generally, but also directly contravening the provisions of Article 38, C61. In addition, the obligation to ensure access and availability is seriously undermined by "the unequal distribution of [narcotic drugs and psychotropic substances for MSP], as well as the barriers and impediments that cause this inequality" (INCB, 2016b at 77, *supra* note 310) and their "lack of availability" which "represents a pressing public health problem in many regions of the world" (**INCB** (2019c), *Press release, 31 October 2019 – Ensuring availability of controlled medicines, treaty compliance and challenges in the world drugs situation to be discussed at INCB session in Vienna. [UNIS/NAR/1392]*, UN Information Service). As another example, UNODC deplored the "funds [...] drawn away into public security and the law enforcement that underpins it" and in relation to it, "public health [...] displaced into the background" (CND, 2008 at 10). Generally, UN Special Rapporteur on the Right to the Highest Attainable Standard of Health, Anand Grover, explained in 2010 that: "criminalization and excessive law enforcement practices [...] undermine health promotion initiatives, perpetuate stigma and increase health risks to which entire populations —not only those who use drugs— may be exposed" (**UNGA** (2010), *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health: Sixty-fifth session, Item 69 (b) of the provisional agenda [A/65/255]*). For further discussion of these "unintended consequences," see *supra* note 151, and Barrett (2011), *supra* note 115.
[336] For *ut res magis valeat quam pereat* (principle of effectiveness) see *supra* note 150. *Pacta sunt servanda* is the customary principle that "agreements are binding and are to be implemented in good faith" (at lxxxiv, 81 in Crawford, 2021, *supra* note 24). For the VCLT, it is an "universally recognized" rule defined in Article 26 as follows: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

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7. PROHIBITION, IN THE TEXT?

"In order that the Convention might be generally accepted, and to avoid any constitutional difficulty at the time of its adoption, the prohibition should take the form of a recommendation only. In the last analysis countries themselves must decide"

– Konstantin Rodionov, Ambassador Extraordinary and Plenipotentiary of the USSR, *UN Conference for the adoption of a Single Convention on Narcotic Drugs* (*supra* note 40; at 18)

Photo: Maurice Narkozy/CC BY-SA 4.0.

Few elements, if any, frontally contradict the interpretation discussed so far. One may prefer to focus on the intention of the drafters reflected in the *travaux*, on the Commentaries, on the teleological *ratio legis*, the interpretation holds. Even ignoring intertemporality and sticking to a fully contemporaneous reading supports the interpretation proposed: in the end, the meaning of "other," "industry," or "abuse" have not been fundamentally changed.

The analysis of the text and its premises shows that **the Plenipotentiaries did not seem to be particularly interested in a *crusade* against RAU**, generally –or if so, they somehow managed to keep it out of any record. The main focus seemed to be finding consensus on a single instrument merging nine previous treaties, which had already been debated during ten years at the CND without still being perceived as "generally acceptable" … and they had only the three months to finish it.[337]

However, it is routinely assumed that the Plenipotentiaries had a specific anti-*Cannabis* agenda, which must have translated into somehow stronger treaty provisions than those of other drugs. Indubitably, a number of Parties had such an agenda at the time. But did all Plenipotentiaries? And did they pass on the *Cannabis*-specific prohibitionist perspectives into the text? Did they somehow add a specific layer disenfranchizing *Cannabis* in a way that would prevent the application of Article 2(9)? As the ILC remarks:

> "the text must be presumed to be the authentic expression of the intentions of the parties; [...] in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties."[338]

To verify that, a final step in the consideration consists in analyzing in greater detail if and how the Parties expressed a clear and specific intent to prohibit *Cannabis* or CCDs regardless of the clauses for exemption discussed hereinbefore. In subsequent sections, the possibility of prohibitive dispositions specific to *Cannabis* "intoxication" or to its "possession," is also reviewed.

[337] Interestingly, the Plenipotentiaries were short on time, even after ten years, and the COP61 decided to add night and week-end sessions of negotiation to be able to finish in time.
[338] ILC (1967) at 220, 223, *supra* note 72.

"Prohibition of Cannabis:" intentionally written out

In the decade preceding COP61, the first draft of 1951,[339] second (1956)[340] and third drafts (1958)[341] of what was to become the Single Convention had, as their main focus, to "replace [the previous nine drug control instruments] and also include provisions for the limitation of the production of narcotic raw materials."[342] However, these drafts all contemplated a number of "controversial questions"[343] which departed from this *generally acceptable* aim; notably:

> "the cultivation of the cannabis plant for the production of cannabis drugs and such production were prohibited except for such small amounts as governments or licensed and closely supervised scientific institutes might need for research purposes."[344]

But the provision for a mandatory prohibition –not really "generally acceptable"– met strong resistance, both during the preparatory discussions at the CND throughout the 1950s[345] and at the COP61.[346] Lande relates that such a power given to "an international organ to prohibit, with mandatory effect on governments, the use of particularly dangerous narcotics even for medical purposes" (among other of the initially drafted provisions) "gave rise to considerable differences of opinion at the [COP61]."[347] Few countries supported vesting a treaty (and its mandated international bodies) with such a power. Even countries which valued and implemented prohibitions, such as the USSR, considered that any form of prohibition should be recommended, never mandated, and that "the effectiveness of control would depend primarily on the scrupulous observance of the provisions of the national law."[348]

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[339] **UN** (1951), *Draft of the Single Convention [E/CN.7/AC.3/3]*; and at 32–34, in: UN (1952), *supra* note 297.
[340] **UN** (1956), *Commission on Narcotic Drugs, Twelfth session, The Single Convention, Second Draft [E/CN.7/AC.3/7/Corr.1]*, at 74–75.
[341] **UN** (1958), *Commission on Narcotic Drugs, Third Draft of the Single Convention on Narcotic Drugs [E/CN.7/AC.3/9]*, at 14.
[342] UN (1948), *supra* note 40.
[343] *Commentary on the Single Convention* at 65; *supra* note 114.
[344] Lande (1962) at 786, see *supra* note 39.
[345] Anslinger (1958) at 692–694 (*supra* note 113); Leinwand (1971) at 419n20 (*supra* note 10).
One example of the efforts deployed to balance, minor, or condition prohibition –among many other possibles, this example is echoing the introductory discussion of this essay: During the discussions of the first draft, at the 10th CND meeting (UN, 1955, *supra* note 289, at 14–15):

> "The United States introduced an amendment [...] according to which a party would not be required to apply prohibition to a given narcotic drug if it notified the Secretary-General to that effect within a certain period of time. [...] The adoption of this amendment –its opponents pointed out– would deprive the prohibition of its mandatory character and thus of most of its value"

The votes among the then-15 States represented at the CND were as follows:

> "Canada, [Republic of] China, Mexico, Poland, the Union of Soviet Socialist Republics, the United Kingdom and the United States voted in favour of the amendment; Egypt, France, Greece, India, Iran, Peru, Turkey and Yugoslavia voted against it." (at 15)

At the same meeting, "the proposal to prohibit in the new convention 'particularly dangerous narcotic drugs' (natural and synthetic)" was agreed on. Shortly after, "[i]t was also pointed out that drugs already established in medical practice for some time should not be affected and that the measures of prohibition should be limited to new drugs, [...] A proposal to this effect was adopted." Consequently it was agreed on "that all new narcotic drugs, natural and synthetic alike, which have particularly great addiction-producing properties not offset by substantial therapeutic advantages not obtainable from less dangerous drugs should be subject to the regime of prohibition."
[346] Insightful accounts of the meetings in: Mills (2016*; supra* note 6) at 110–112. See also: UN (1964a; *supra* note 40) at 58–62, 153–156; (1964b; *supra* note 138) at 44, 106, 174–178, 272, 283, 288, 307.
[347] Lande (1962) at 786–787, see *supra* note 39.
[348] UN (1964a; *supra* note 40) at 18.

An Article titled at first "Prohibition of Indian hemp," then "Prohibition of Cannabis," was present in all three drafts.[349] But behind the title, it was hiding a deep uncertainty as to the way where the international community would decide to go. The *Commentary on the Draft Single Convention*, from 1952, explains:

> "It is [...] not possible at present to define in detail under what conditions measures such as the following are useful and feasible [...]: licensing cultivators of all Indian hemp plants, totally prohibiting all cultivation of the Indian hemp plant, up-rooting Indian hemp plants which grow wild, destroying Indian hemp (i.e., the tops of the plant) by cultivators, prohibiting removal from the field of any part of the plant except the mature stalks and the seeds, concentrating cultivation in a limited region. The provisions of the draft in this respect are therefore sufficiently general to cover the different situations in different countries. It is assumed that countries should also be required to make *reasonable* sacrifices in the international interest. The draft, therefore, formulates two conditions for the obligation of a country to adopt any of the measures mentioned before:
>
> *(a)* Such measure must be necessary for the prevention of the diversion of Indian hemp drugs into illicit channels.
> *(b)* Its adoption may reasonably be expected from the country in question; i.e. the opposing interests of the country concerned and of the international society of States must be weighted to determine what can 'reasonably' be expected. It may be mentioned that one of several of these measures have already been adopted by various national legislations."[350] (original emphasis).

The title of the Article "Prohibition of Cannabis" did not make its way onto the final C61, it was changed to "Control of Cannabis" (current Article 28). But the broad scope of options (the flexibilities) already present in the first draft were kept, but splitted and spread out throughout the text.

For instance, the dispositions related to the cultivation of *Cannabis* for MSP, licensing, etc, have been merged onto those of Article 23 (titled "National Opium Agency" but which regulates *Cannabis* as well; see *supra* "Article 28: cultivation" in Chapter 3). Importantly, **instead of a *Cannabis*-specific disposition for prohibition, the mechanism giving the option to prohibit was split and embedded into two general dispositions applying beyond this sole plant:**

- **Article 2(5)**: The listing of CCDs in Schedule IV, which allows to prohibit CCDs as well as other drugs in that Schedule, and
- **Article 22**: "Special Measures related to Cultivation" which allows the option to prohibit *Cannabis* cultivation as well as that of other plants.

Even though CCDs are not subject to Article 2(5) anymore since the amendment of Schedule IV on 2 December 2020,[351] an analysis of Schedule IV can still inform about the intent of the Parties when placing in it "cannabis and cannabis resin." Indeed, **instead of *Cannabis*-specific prohibition**

[349] *ibid.* at 58–62; (1964b; *supra* note 138) at 44, 174–178, 272, 283, 289.
[350] UN (1952) at 33, *supra* note 297.
[351] For the detail of the process by which the CND withdrew from Schedule IV the two CCDs that were listed in it from 1961 to 2021, see *supra* note 120. As seen earlier, the annexes of a treaty are indeed relevant to its interpretation.

clauses, the COP61 decided to "include cannabis in Schedule IV, thus leaving governments free to prohibit the production of cannabis or not, as they saw fit."[352]

Moreover, the strong prohibition originally proposed under Schedule IV was softened during the COP61, since **the drafters ultimately "opposed a provision [...] which would have established a mandatory prohibition** of [...] drugs in Schedule IV except for small amounts for research purposes" settling the final treaty as a "compromise which leaves prohibition to the *judgement*, though theoretically not to the *discretion*, of each [Party]"[353] (original emphasis). Article 2(5), C61, which includes the provisions for drugs in Schedule IV, says:

> "(a) A Party shall adopt any special measures of control which in its opinion are necessary having regard to the particularly dangerous properties of a drug so included; and
> (b) A Party shall, if in its opinion the prevailing conditions in its country render it the most appropriate means of protecting the public health and welfare, prohibit the production, manufacture, export and import of, trade in, possession or use of any such drug except for amounts which may be necessary for medical and scientific research only, including clinical trials therewith to be conducted under or subject to the direct supervision and control of the Party."

First of all, it should be noted that nowhere does the option to prohibit MSP exist: if there is a possibility of prohibition in Article 2(5), it is only for OMSP. This option to prohibit OMSP, however, does not appear as anything close to an obligation. Lande summarizes it: the C61 "[does] not provide for a mandatory prohibition"[354] but only stipulates that:

> "a party *should* prohibit narcotic drugs declared to be particularly dangerous by the Commission, 'if in its opinion the prevailing conditions in its country render it the most appropriate means of protecting the public health and welfare'"[355] (emphasis supplied)

Termed in a flexible manner, and in direct relation to the *ratio legis*, **prohibition is present as an escape clause *ab intra***[356] from the general rule of control –hence, **general rule of non-prohibition**. Notably, the escape clause for prohibition of drugs in Schedule IV seems framed in an evolutionary perspective, being reliant upon "the prevailing conditions." The action of time, here as well, may change these conditions and thereafter the "opinion" of the Party as to the application of prohibition, interrogating again intertemporality.

In relation with the action on time as well, and with subsequent practice: the CND is the central forum of the State Parties to the C61, and was created "to provide machinery whereby full effect may be given to the international conventions relating to narcotic drugs."[357] **The fact that the CND removed "cannabis and cannabis resin" from Schedule IV, reverting the explicit decision by drafters to hereby provide an option for prohibition, "may**

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[352] UN (1964a) at 61, *supra* note 40.
[353] *Commentary on the Single Convention* at 66; *supra* note 114.
[354] Lande (1962) at 790, *supra* note 39.
[355] *ibid.* at 790–791.
[356] **Koremenos**, B. (2016), *The continent of international law: explaining agreement design*, Cambridge University Press, at 124–126; Martín Rodríguez (2003) at 138, *supra* note 135.
[357] **UN** (1946), *"Commission on Narcotic Drugs." Resolution I(9) of the Economic and Social Council of 16 February 1946 (document E/20 of 15 February 1946), on the establishment of a Commission on Narcotic Drugs, supplemented by the action taken by the Council on 18 February 1946 concerning the appointment of representatives of fifteen Members of the United Nations as members of this Commission*.

contribute to the interpretation of [the] instrument when applying articles 31 and 32," VCLT, according to the ILC.[358]

On *Cannabis* cultivation (but not CCDs), the possibility to prohibit was placed by the drafters within Article 22 altogether with other plants from which scheduled drugs can be obtained. Article 22 reads as follows:

> "*1*. Whenever the prevailing conditions in the country or a territory of a Party render the prohibition of the cultivation of the opium poppy, the coca bush or the cannabis plant the most suitable measure, in its opinion, for protecting the public health and welfare and preventing the diversion of drugs into the illicit traffic, the Party concerned shall prohibit cultivation.
> *2*. A Party prohibiting cultivation of the opium poppy or the cannabis plant shall take appropriate measures to seize any plants illicitly cultivated and to destroy them, except for small quantities required by the Party for scientific or research purposes."

Like for Article 2(5) on Schedule IV, Article 22 presents **a flexible escape clause**: the Article is titled "Special measures" not "general measures;" the optional application of prohibition is context-sensitive (conditioned to "prevailing conditions" and the "opinion" of each Party) and **framed under the rationale of public health and welfare of the treaty**.[359]

A look at the rest of the treaty shows the wording "prohibit"/"prohibition" appears only twice: the parties can prohibit the "exports of consignments to a post office box" or to "a bonded warehouse." These are however insightful provisions, since they show that the authors of the Single Conventions knew how to word a prohibition clause, when they wanted to. Article 31 contains the two only provisions of the Single Convention that contemplate a mandatory prohibition. They are direct and well-formulated:

> "*8*. Exports of consignments to a post office box, or to a bank to the account of a Party other than the Party named in the export authorization, *shall be prohibited*.
>
> *9*. Exports of consignments to a bonded warehouse *are prohibited* unless the Government of the importing country certifies on the import certificate [...] that it has approved the importation for the purpose of being placed in a bonded warehouse [...]"[360]

There was no intent of the Parties to mandate prohibition, generally. It appears also that the Parties did not agree on specially-crafted prohibition measures regarding *Cannabis* and CCDs, rather they purposefully deconstructed most *Cannabis*- or CCD-specific dispositions. **The optional disposition on crop cultivation in Article 22, together with the original placement in Schedule IV, are the only remanence of the proposed "prohibition of cannabis" contained in the first drafts**: it corresponds to the final position adopted by the

[358] Conclusion 12(3) of the ILC on the role of subsequent agreement and subsequent practice in the interpretation of treaties refers to the "practice of an international organizations in the application of its constituent instrument" which seems to point out at the CND's exercise of its mandate to amend the schedules annex to the IDCC (UNGA, 2019 at 5; *supra* note 53). See also McNair (1961) at 748n2 (*supra* note 96). Alternatively, it can be considered that the "constituent instrument" that established the CND was resolution 9(I) of UN's Economic and Social Council (UN, 1946, *supra* note 357). Nevertheless, this resolution vested the CND with similar mandates under previous instruments, and the CND itself took over bodies which, under the League of Nations, were constituted by previous agreements (McAllister, 2000, *supra* note 6) –a chicken-or-egg situation.
[359] For a discussion, see: *Commentary on the Single Convention* at 275–277, *supra* note 114; *Commentary on C88* at 296–297, *supra* note 108.
[360] UNODC (2013) at 51, *supra* note 109.

drafters, after a decade of negotiations. Six decades after the conclusion of the Single Convention, it can be suggested that the final position of the Parties, with the amendment of the Schedules, is no longer to recommend the prohibition of CCDs as an option.[361]

The drafters discuss "Cannabis intoxication"

A critical insight that *the drafters were not in a crusade against RAU* is provided by the easy acceptance, at the COP61, of an additional and comprehensive exemption for the "social, but legitimate, use" of *Cannabis* leaves,[362] described during the discussions as "innocuous"[363] at the same time that they were acknowledged to be "mildly intoxicating." **The intoxicating use of *Cannabis* leaves is described as "other uses" and it is considered separately from "abuse" on several occasions during the COP61.**[364]

Even countries domestically enforcing a complete prohibition of *Cannabis* at the time, and advocating it internationally (like Brazil and Canada) did not raise objections at these statements. **The fact that the Plenipotentiaries accepted without problem that intoxicating uses of a plant subject to the Convention could be totally possible under an exemption seems incompatible with the intransigent and prohibitionist views we often attribute them.** It contradicts the tale of the Single Convention establishing a blanket, comprehensive ban of any intoxication with *Cannabis* products other than for medical uses.

The drafters did not choose to refer to the term "intoxicating" in the provisions on *Cannabis* leaves in Article 28(3) (see section "The term 'misuse' in the Conventions" in Chapter 4) which was not uncommon at the time.[365] "Intoxication" does not appear anywhere in the text of any of the three IDCC. But the fact that they chose not to include "intoxication" in the Convention, and instead rely on MSP, OMSP, and abuse, is relevant. In addition, **that the Plenipotentiary discussed an intoxicating use of *Cannabis* products as possible and distinct from abuse, is of prime relevance to the interpretation developed in this essay**.

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[361] Although it can be argued on the basis of Article 39 that States can still prohibit OMSP ("a Party shall not be [...] precluded from adopting measures of control more strict or severe than those provided by this Convention [...] as in its opinion is necessary or desirable for the protection of the public health or welfare"), which is not covered by obligations to ensure access and availability, it may be difficult to defend the prohibition of MSP, provided the treaty obliged State Parties to ensure sound availability of narcotic drugs for healthcare.

[362] Indeed, contrary to drugs in Schedule I like CCDs which are exempt under Article 2(9), *Cannabis* leaves are not drugs and are only subject to a specific clause in Article 28(3), which makes them exempt from any control whatsoever, including from statistical reporting under Article 20. A country exempting CCDs and also exempting "leaves," would have to report annually on the amount of CCDs used for OMSP, but not on the amount of leaves so used.

[363] UN (1964a) at 186, *supra* note 40.

[364] UN (1964b*;* see *supra* note 138) at 174, full discussions at 174–178. Leinwand (1971; *supra* note 10) also briefly discusses the plenipotentiaries' decisions with regards to *Cannabis* leaves and the impact it has on treaty interpretation.

[365] The term "intoxication" was not uncommon at the time, and in this field; for instance, the UN had published in its *Bulletin on Narcotics* a detailed article by Dr. Bouquet –who had been a central international expert on *Cannabis* since the times of the League of Nations– directly titled "Cannabis intoxication" –see: **Bouquet**, J. (1951), "Cannabis III: Cannabis intoxication", *Bulletin on Narcotics,* **3**(4):22–45."

Depenalization v. legalization: in the text

The "possession" for personal use, the last piece of the chain –from the "industry" to the final consumer– is the only remaining piece not analyzed so far. An Article –the shortest of all– is dedicated to it. Article 33, titled "Possession of drugs," was not amended in 1972. It simply establishes that:

> "The Parties shall not permit the possession of drugs except under legal authority."

Article 33 is echoed by the provision of Article 36(1) which reads:

> "Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that [...] possession [...] of drugs contrary to the provisions of this Convention [...] shall be punishable offences when committed intentionally"

Be it for MSP under the relevant provisions, or for OMSP under the provisions of Article 2(9), possession is "under legal authority" and is consequently not "contrary to the provisions of this Convention." The Commentary is reassuring: a Party to the C61

> "cannot legally authorize the possession of drugs for other than medical and scientific purposes, except in the cases in which non-medical consumption or industrial use is exceptionally permitted by the Single Convention.*[31]*
>
> *[31]* Article 4, para. (c) together with article 2, para. 9... and article 49."[366]

Non-medical consumption *and* industrial use are exceptionally permitted indeed by Article 4(c) together with Article 2(9), that is now clear; consequently, and consistently, countries can legally unauthorize possession for non-medical consumption and industrial use.

The way Article 33 is termed could, however, suggest an implicit prohibition of other types of possession for RAU, outside of these two schemes, and in particular **personal possession of CCDs obtained via home cultivation** –therefore not acquired under the legal authority of a regulated *Cannabis* industry under Article 2(9). The Commentary seems to confirm this:

> "Article 33 must be read in connexion with article 4, paragraph (c) requiring Parties, subject to the exceptions expressly permitted by the Single Convention, to limit exclusively to medical and scientific purposes the possession of drugs. It has therefore been stated in the comments on that paragraph that apart from these exceptions, Parties may not authorize the possession of drugs for other purposes."[367]

The statement is immediately followed by a nuance:

> "It may be repeated here that some Governments consider that they are not required to punish the unauthorized possession of drugs by addicts for their personal use, because the word "possession" as used in article 36, paragraph 1, covers only possession for distribution, and is not meant to include possession for personal use; but even if this view is not accepted, there cannot be any doubt that Parties need *not* consider unauthorized possession of drugs for personal use to be a "serious" offence within the meaning of article 36, paragraph 1, liable to punishment by imprisonment or other

[366] *Commentary on the Single Convention* at 113–114; *supra* note 114.
[367] *ibid.* at 402.

> penalties of deprivation of liberty. They may choose to impose minor penalties such as fines or even censure.
> Whatever the position the Parties may take on this question of penal sanctions, it does not affect their obligation under article 33 not to permit the *unauthorized* possession of drugs for personal consumption, like any other possession of drugs without legal authority. If they choose not to impose penalties on the unauthorized possession for personal use, they still must use their best endeavours to prevent this possession by all those administrative controls of production, manufacture, trade and distribution which are required by the Single Convention, and whose basic objective is the prevention of the abuse of drugs and therefore also to prevent the unauthorized possession by addicts."[368]

Much could be said –and has already been debated by many– on these provisions and the Commentary provided. At first, the words "under legal authority" should be valued against alternative formulations which may have had different implications: indeed, the drafters chose to use the broad concept of "legal authority." They could have referred to *possession for other than medical and scientific uses*, or they could have specified *the legal authority of this Convention*. The need to subject the penalization of possession in Article 36(1) to the constitutional limitations of each Parties could support the fact that **"legal authority" refers to the broader legal system in a given country**. Given that many State Parties include the fundamental right to privacy embedded in their legal systems, or in their Constitutions, the possession for personal use in private contexts would thus fall under the concept of "legal authority."

What stems from this is that not only the possession of CCDs for MSP can be authorized under the licit medical system established under the C61 and the possession for OMSP under its licit system of exemption, but **there is no requirement for the penalization of the possession of CCDs obtained in the private sphere, in countries where private activities are protected by the authority of domestic human rights legislation.** This is along the lines of what several high courts have actually ruled in recent years (notably the Constitutional Courts of Georgia, and South Africa, and the Supreme Court of Mexico).[369]

In a way, these findings suggest a new way to define and differentiate the often-opposed concepts of "depenalization"/"decriminalization" and "legalization" in terms of international norms: **decriminalization would be the waiving of criminal sanctions over an use/possession recognized as "unauthorized"** (under an interpretation of Articles 33 and 36(1)), while **legalization would correspond to the wholly authorized possession/use for OMSP for which there are no sanctions requiring to be waived** (under an interpretation of Articles 4(c), 2(9), and 28).

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[368] *ibid*., emphasis added.
[369] The cases in these three States Party to the C61 are briefly explained in: **European Monitoring Centre for Drugs and Drug Addiction** (2019), "Cannabis control and the right to privacy", *EMCDDA's Cannabis drug policy news*. The conclusions reached by these high courts is not inconsistent with a certain interpretation of the Convention; indeed, the *Commentary* itself (at 402) admits that countries can "choose not to impose penalties on the unauthorized possession for personal use" but should still "use their best endeavours" to, in the end, achieve the goals of the Convention. It is submitted that a health-oriented, harm reduction-led approach to personnel activities related to home cultivation would be a way to cohere with the ratio legis and general scope of the treaty

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8. CONCLUSION

"'Words, words, words.' (*Hamlet speaking*, and longing for something beyond words)"
– William Shakespeare, *Hamlet*.[370]

Photo: Maurice Narkozy/CC BY-SA 4.0.

[370] As quoted in Allott (2015) at 388, see *supra* note 4.

In summation, **what perhaps better characterize the Single Convention with regards to the adult uses of *Cannabis* products are its axiological lacunæ, tolerated incompleteness, deliberate gaps, and voluntary silence**.[371] The silences of the treaty on many matters that the drafters actually acknowledged are difficult to ignore.

Purposes other than medical and scientific ones (to which RAU belongs) are purposes that "the system does not seem to regulate, matters as to which it seems not to speak."[372] After all, "**there is no problem with coming to the end of a treaty and concluding that the treaty simply did not intend to resolve a particular matter**."[373] This is true of recreational use and the Single Convention, a treaty that, from the outset, "was to be a self-contained instrument and was intended to replace the others."[374] No more.

And, it goes without saying, Parties are not bound to adopt measures that are not expressly or impliedly required by the treaties[375] or by established custom.[376]

Prohibition of recreational use? As the most pragmatic of all lawyers would be tempted to say: "'**If the drafters had meant to say that, they would have said it.**'"[377]

* * *

So why is it still assumed by most that the Single Convention is a ruthless prohibition instrument? The introductory discussion of this essay highlights, as likely part of the explanation, the weight of the **historically-biased vision of a *mandatory treaty prohibition***, acting across epistemic communities as a stereotypical cognitive frame which, according to Wählisch,

> "impose[s] a subconscious layer of interpretation of terminology, which makes it difficult for judges, legal advisers, or advocacy groups to distance themselves from their predefined assumptions in order to be self-reflexive about their own blind spots and the perceptions of others about the law."[378]

More than 60 years after the conclusion of a drug control treaty, and 50 since the declaration of a "war on drugs" which was to dramatically alter the way we perceive the treaty, such an **effort of self-reflexion and distanciation is urged**.

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[371] Sometimes referred to as *planwidrige Unvollständigkeit*, see: Kolb (2006) at 778–798 (*supra* note 28); or van Damme (2009) at 110–117 (*supra* note 35).
[372] **Quane**, H. (2014), "Silence in international law", *British Yearbook of International Law,* **84**(1):240–270.
[373] van Damme (2009) at 117, see *supra* note 35.
[374] UN (1964b) at 78, see also at 206–207; *supra* note 138.
[375] This wording is used by the *Commentary on the Single Convention* at 403; *supra* note 114; see more generally Quane (2014), *supra* note 372, at 253–260.
[376] Nothing indicates that the prohibition of *Cannabis* is part of customary international law. See at 414, in: Leinwand (1971) *supra* note 10.
[377] Allott (2015) at 374, 383 (see *supra* note 4).
[378] Wählisch (2015) at 347, *supra* note 49.

The international legal regime for non-medical cannabis

This essay has outlined an analysis which reconciles the textual dichotomy MSP *v.* OMSP, the intention-based, purposeful curtailing of prohibition, with the teleological focus[379] on the health and welfare of humankind into a single interpretation that coheres. **The many silences, the place of prohibition as an escape clause *ab intra*, and purposefully-added clauses of exemptions sketch a legal landscape that coheres with an authorization of the RAU of *Cannabis* products** (and related activities) in domestic legal systems, provided that States Party to the Single Convention:

1. *In order to align with the preamble and ratio legis, and comply with Articles 2(9)a. and 38 (preventing abuse of CCDs) and Article 28(3) (preventing misuse of leaves):*
   they **ensure that non-medical *Cannabis* products are safe and minimally harmful**, **and reduce the burden of SUD** or to otherwise undermine public health and welfare –by any appropriate mean;

2. *In order to comply with Articles 2(9)b. and 20(1)b.:*
   they **furnish annual statistics to the INCB** (via Form C, Part II.B) on the amount of non-medical CCDs handled in the legal industry.

In addition to maintaining separate, on the one hand the medical, pharmaceutical, and research sectors, on the other hand the non-medical cannabis industry and industrial hemp sectors, in order to comply with Article 4(c) and 28(1) & (2).

Parties willing to "legalize cannabis" have **legal grounds to move forwards *de lege lata*** (or ***lex lata***: without the need for a change in the law as it is currently)[380] under fairly precise establishing provisions[381] including a compliance mechanism –and no other obligations regarding production, manufacture, export, import, distribution of, trade in, use and possession. In practice, **it does not affect the performance of other treaty provisions (related to MSP or to other drugs) or the performance of their obligations by other Parties**.[382]

This framework for OMSP, summed up in Table 2, is reinforced by its match, in large part, with the five "primary conditions" found by van Kempen and Fedorova as arising from positive obligations under international human rights law.[383]

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[379] Helmersen (2013) at 129 (*supra* note 90); Kolb (2006) at 767–771; (2016) at 146 (both *supra* note 28).
[380] *Lex lata* (meaning: the law as it is, as it exists, as currently laid down) is to oppose to *lex ferenda* (or *de lege ferenda*: the law as hoped, as expected, as desired, or in the words of Crawford (2012) *supra* note 24, at lxxxii: "the law as it should be if it were to accord with good policy").
[381] Koremenos (2016) at 158–162, *supra* note 356.
[382] The Parties' commitments under all other obligations are unaffected, and continued international cooperation and compliance with other dispositive provisions in good faith is entirely possible.
[383] The conditions listed by van Kempen and Fedorova (2019a at 229–233, see *supra* note 107, together with **van Kempen**, P. H., and Fedorova, M. (2019b), *International Law and Cannabis II; Regulation of Cannabis Cultivation and Trade for Recreational Use: Positive Human Rights Obligations versus UN Narcotic Drugs Conventions*, Intersentia) are, in essence: RAU regulations should have a relevant human rights-based interest, substantiate the claim of a more effective protection of human rights (than prohibition), be reliant upon democratic processes and support, be established in a closed-loop in order to avoid disruptions to neighboring territories, and "ensure discouragement, limitation and increased public awareness of the risks associated with recreational use." See also analyses of the interaction between the IDCC and international human rights law: **Boister**, N. (1998b), *The suppression of illicit drugs*

Table 2. Summary of international legal provisions for medical & non-medical *Cannabis*

Activity	Relevant provisions of the Single Convention	
	Medical and scientific purposes	Other than medical and scientific purposes
Cultivation	Article 28(1)	Article 28(2)
All other activities in the supply chain involving: **"Cannabis"** *(flowering/fruiting tops)* **"Cannabis resin"** **"Extracts and tinctures of cannabis"**	Article 2(1) Article 2(6) Article 19 Article 20 Article 21 Article 23 Article 28 Article 29 Article 30 Article 31 Article 32 Article 33 Article 34 Article 37	Article 2(9) Article 20(1)b.
Measures of prevention of substance use disorders ("abuse") & harm reduction	Article 38	Article 2(9)a.

A standard regime

The Plenipotentiaries had agreed on two special regimes for CCDs: Article 49 and Schedule IV. Both are now lapsed; consequently, **there is no special regime for CCDs anymore.**[384] In 2022 and onwards, CCDs are only subject to the **standard regime of Schedule I**, which allows their non-medical use under the above-mentioned conditions.

From the past regime, however, remains **a residual ban of part of OMSP: traditional non-medical uses.** Theoretically, while non-traditional OMSP can be lawful under Article 2(9) and related dispositions, specifically-traditional ones cannot under Article 49. This seems to account for discrimination, and constitutes an important ethical concern (as it should have since the start), not to mention that it probably conflicts with the Indigenous and Tribal Peoples Convention (ILO Convention 169) and a number of international human right law instruments, and seem highly at odds with the UN declaration on the rights of indigenous peoples.[385]

through international law (Vol. 2), University of Nottingham, at 546–549; **Bone**, M. L. (2015), *How can the lens of human rights provide a new perspective on drug control and point to different ways of regulating drug consumption? A thesis submitted to The University of Manchester for the degree of Doctor of Philosophy in the Faculty of Humanities*, University of Manchester School of Law, at 113–115, 116–117, 137–148.

[384] Only a special regime for cultivation remains.

[385] One could think about the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, or the many international instruments against discrimination. There are many peoples throughout the world for whom *Cannabis* is of great traditional, cultural, or spiritual importance. It is suggested that a Party willing to regulate RAU, and concerned for the rights of these communities, could legally locate "traditional uses" under the provisions of Article 2(9), balancing in an uniform regulation of RAU for all, a standard industry

Noteworthily in this respect, a limitation of the interpretation presented in study is that **it does not automatically apply to other controlled herbal drugs** with both traditional and modern industrial uses (**coca leaf and poppy**), but regulated under specific dispositions and heir of their own drafting history.[386] These deserve their own scrutiny, that could be well aided by a new comparative exercise on the different international legal regimes of (or said to be of) prohibition, both within the IDCC and with non-drug related treaties.[387] However, **Article 2(9) *a priori* applies to any other drug in Schedule I or II** (other than the two above-mentioned plants under special regimes). Nevertheless, exemption is subject to the same two criteria (harm reduction & statistical reporting): because a Party will need to show, in good faith, that actual measures are taken (and possible) to prevent SUD, avoid harms, and reduce the burden over public health, the exemption might not so easily extrapolate to all drug, some presenting challenging potential of harms, that insufficient knowledge may not allow to easily or adequately prevent or reduce under Article 2(9)a –contrary to the **well-studied CCDs, their perfectly-known harms, and the broad range of public health responses to minimize and prevent them.** For drugs other than CCDs, it is submitted that multi-criteria risk-benefit analyses in addition to an assessment of the effectiveness of tailored prevention and harm reduction measures would be required, in each particular country and context, on a case by case basis.

The take from this reflection is that **the validity of the exemption under Article 2(9) correlates to the ability to demonstrate the efficacy of a set of harm reduction and public health-related measures implemented (in addition to INCB reporting).**[388]

It is not an automatic *open bar* for a drug utopia.

(whatever the form it takes) and supplementary, tailored non-drug control measures to re-establish legally a traditional or indigenous *Cannabis* RAU industry.

[386] See discussions on the specific exemption applying to coca leaves: UN (1964a) at 55, *supra* note 40.

[387] Rare are the "prohibition treaties" that allow such flexible, broad exceptions, while including mechanisms of compliance for such exemption. See for example the Convention for the Suppression of the Traffic in Persons which penalizes prostitution "even with the consent of that person" (**UN Office of the High Commissioner for Human Rights** (s.d.), *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*; see also **Fox**, J. A. (2021), "International Law After Dark: How Legalized Sex Work Can Comport with International and Human Rights Law", *Chicago Journal of International Law,* **22**(1):285–222). For a reflexion on how and why to do this, see **Koskenniemi**, M. (2009), "The Case for Comparative International Law", *Finnish Yearbook of International Law,* **20**:1–8. For a previous such exercise, which the interpretation presented in this essay may challenge in some aspects, see **Nadelmann**, E. A. (1990b), "Global Prohibition Regimes: The Evolution of Norms in International Society", *International Organization,* **44**(4):479–526.

[388] The WHO (2019b, *supra* note 106, at 40) found that the potential for harm linked to the consumption of CCDs is real, yet limited. In adults, it is essentially related to mild events such as: temporary "dizziness and impairment of motor control and cognitive function [...] anxiety, depression and psychotic illness" and withdrawal symptoms include only "gastrointestinal disturbance, appetite changes, irritability, restlessness and sleep impairment."

Interpretation of Article 2(9) in the diplomatic arena

The overall interpretation suggested **reconnects a contemporary interpretation with the legal history and original intent of "drug control" in the last century**, which initially

> "required neither the interdiction of these intoxicating drugs nor their criminalization. Instead, [they] established commodity control through the creation and regulation of a licit drug market restricted to legitimate purposes with the ambition to monitor supply and eliminate leakage."[389]

It supports the view of the IDCC as a neutral and somehow down-to-earth "system" of non-self-implementing *framework controls* and their escape clauses, obligations and their exemptions. It focuses on medicines and medical and scientific contexts. Nowhere is any element suggesting a prohibition-oriented "project": prohibition was always one among other options on the table, as it continues to be.

Truely, **the Single Convention is a Framework Convention on the Control of Some Medicines within the Medical and Pharmaceutical Sectors**, not concerned with other than the medical, pharmaceutical, and clinical research sectors, and with escape clauses allowing the implementation of stricter measures (including prohibition), in some countries, under some contexts, for some drugs.

Even the INCB, on its FAQ webpage, states that the "main objectives of the legal framework of the International Drug Control Treaties"[390] are:

> "To prevent the *illicit production*, cultivation, manufacturing and trade in controlled substances as well as their abuse.
> To ensure the *adequate availability* of controlled substances for *medical and scientific* purposes.
> To provide a system of *control* for the international movement of controlled substances for *licit purposes*.
> To provide a *legal basis for international cooperation*, such as mutual legal assistance, extradition and the exchange of information among national law enforcement agencies" (emphasis is original)

Not prohibition, but rather control "for licit purposes" (licit MSP & licit OMSP) and the prevention of "illicit" activities (both illicit MSP & illicit OMSP) and "abuse" (in the context of both MSP & OMSP). Again, **drug control does not equal drug prohibition.**

[389] Colson (2019) at 78, *supra* note 5.
[390] **INCB** (2022), *INCB Learning: Frequently Asked Questions*. It is also stated that the goal of the C61 merely "Provides a framework for the international control of narcotic drugs, replacing all former drug control treaties" and "Establishes [the] International Narcotics Control Board."

In dubio mitius

While the interpretation outlined in this essay will be compelling to some, it may not convince everyone. It will probably, however, have the merit to question a number of aspects, if not raise doubts, among all readership.

If at this point, and "in spite of all pertinent considerations, the intention of the Parties still remains doubtful,"[391] it is submitted that the practice of international courts should be followed: these have tended, in comparable situations, to **rely on the maxim *in dubio mitius***,[392] probably an acceptable way forward for countries not particularly keen on accepting legal RAU. *In dubio mitius* recognizes that, just like in the present case,

> "some questions of treaty interpretation may not have a single permissible answer, even after an application of the customary rules of treaty interpretation, and instead allow for legitimate disagreement or 'doubt'. In such circumstances, in dubio mitius provides treaty interpreters with a solution, advising them to limit the scope of vague provisions to a normative core that can be deduced with sufficient certainty"[393]

Conspicuously, if uncontestable normative core there is, it is that of a Framework Convention on the Control of Some Medicines within the Medical and Pharmaceutical Sectors, which establishes clear, written provisions regulating these sectors and preventing SUD with the ultimate goal of improving public health. This core is not debatable, unchallengeable; it does not vary depending on the interpreter. Conversely to other elements –prohibition, criminalization of OMSP– which are not only debatable, but open to diverse interpretations.

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[391] at 26 in: **Permanent Court of International Justice** (1929), "Case relating to the Territorial Jurisdiction of the International Commission of the River Oder; Judgement No. 16", In: *Series A; Collection of Judgements; No. 23*, A. W. Sijthoff Publishing Company.

[392] *In dubio mitius* (translating approximately as: "more leniently in case of doubt") can also sometimes be found referred to as *in favorem debitoris*. See: Linderfalk (2007) at 280–282, 310–311 (*supra* note 186); Lo (2017) at 247 (*supra* note 24); McNair (1961) at 462–463 (*supra* note 96). According to **Fahner**, J. H. (2021), "In Dubio Mitius: Advancing Clarity and Modesty in Treaty Interpretation", *European Journal of International Law,* **32**(3):835–862, at 835: "Although declared defunct time and time again, in dubio mitius keeps surfacing in international legal practice, as states continue to invoke the principle before international courts and tribunals."

[393] Fahner (2021) at 835, *supra*.

Contestation, harm reduction, and *pacta sunt servanda*

At the 2016 UNGA Special Session focused on drug policies, **all UN Member States agreed that the three IDCC "allow for sufficient flexibility for States parties to design and implement national drug policies according to their priorities and needs."**[394] This seems to speak directly to the flexibilities provided for by Article 2(9), and it corresponds well to the priorities of some State Parties –Canada, Germany, Malta, Uruguay… *A priori* indicating a compatibility between the interpretation presented and the views of the international community.

But at the CND, in Vienna, the debates are often heated.[395] Because, in international law like elsewhere, *qui tacet consentire videtur si loqui debuisset ac potuisset* (principle of acquiescence, or tacit acceptance[396]) it is likely that the eventual adoption of the interpretation suggested in this essay by a Party would be answered with at least some objection.[397]

The interpretation of a legal norm "is at once a call for solidarity, a statement of aspirations, a claim to legitimacy, and a definition of identity."[398] If the country that is moving forwards with RAU reforms implements appropriate prevention and harm reduction measures ("other means"), maintains a health-focused approach, and reports to the INCB, it is **respecting the *pacta sunt servanda* rule**.[399] In this context, it may be hard to find grounds upon which to base an opposition, except maybe on details of compliance with Article 2(9)a. In this view, **any objection raised, because of the very nature of the exemption under Article 2(9) centered around harm reduction and statistical reporting, could only but provide an opportunity to recenter heated CND discussions on questions of international law and on health-related matters.** Indeed, what would contestations oppose? Policy claims? Definitions of abuse, of SUD, of harms? Appropriateness of measures to reduce them? Society has been begging for these important topics to be substantially discussed at the CND; **the reliance on Article 2(9) can only but provide a treaty-based opportunity to discuss these topics.**

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[394] UNGA (2016) at 3, *supra* note 118. See also *supra* section "Non-medical use in subsequent practice" in Chapter 4 and notes 266 through 268.
[395] Discussions related to the IDCC in Vienna are often of a rather moralist tinge (see Collins (2021), *supra* note 6) and are diverting us –as Hart (1994 at 227–232, see *supra* note 31) would put it– from the subject matter. In this case: drug (health) control (law). On recent heated *Cannabis*-related discussions at the CND, see: UNODC Secretariat to the Governing Bodies (2019) & Riboulet-Zemouli *et al.* (2021), both *supra* note 147.
[396] Remaining silent with respect to a particular action is an implicit acceptance of that action; see: Aust (2000) at 200, *supra* note 86; Crawford (2012) *supra* note 24; Kolb (2006) at 497, *supra* note 28; McNair (1961) at 429, *supra* note 96; UNGA (2019) at 4, *supra* note 53.
[397] On objections raised by other Parties, see: Gardiner (2008) at 93; see *supra* note 29. It may also be anticipated that INCB could raise objections and oppose the interpretation presented. Nevertheless, this seems quite unlikely: no only it could be a desirable outcome for concerns of self-interest (the interpretation outlined is indeed the only to contemplate a role for the INCB in the legal RAU sector, as compared to the myriad of treaty reform proposals that rather contemplate the discontinuation of the body), but the maintenance of an uniform basic statistical monitoring of the RAU sector at the global scale can generally be considered as a good idea, to provide insightful data for science to analyze and to inform policy-making. The data collected by the INCB could feed into the work of UNODC and WHO in the field.
[398] Provost (2015) at 291, see *supra* note 25.
[399] See *supra* note 336.

Paretho superiority

In this possible diplomatic journey, countries convinced of the need to move forwards with *Cannabis* policy reforms legally authorizing RAU in their territories should acknowledge that the interpretation presented here creates **a context where the "outcome makes at least one actor better off and no actor worse off relative to the *status quo*"**[400] (sometimes called a situation of "*Paretho superiority*"), provided the reforms are undertaken within the boundaries of a State's territory.

In such a case, ***in favorem libertatis* should be invoked**. Tracing its origins back to Francisco de Vitoria,[401] this doctrine postulates that States should opt for **the interpretation which limits the least their freedom whilst not undermining that of other Parties**, neither within their jurisdiction nor internationally.[402]

In favorem libertatis cannot be claimed in all circumstances, but when it has been ascertained that **no ban is formulated expressly, implicitly, via analogies, via general principles of law, or via fundamental intrinsic values**[403] –as this essay has shown is the case for the non-medical use of cannabis under the IDCC. In this case, in the words of Charles Cheney Hyde, *in favorem libertatis* becomes:

> "a dictum supplemental to reasons which in themselves have afforded sufficient grounds for the conclusions actually reached concerning the sense in which the contracting parties employed the terms of their choice."[404]

[400] For a discussion, see at 5, in: Koremenos (2016), *supra* note 356.
[401] at 78, in: **de Vitoria**, F. (1532/1967), *Relectio De Indis, O Libertad de los Indios* (edición crítica y bilingüe por L. Pereña y J.M. Pérez Prendes), Consejo Superior de Investigaciones Científicas; for a discussion, see also at 107, 115, in: **Kolb**, R. (2003), *Réflexions de philosophie du droit international. Problèmes fondamentaux du droit international public : Théorie et philosophie du droit international*, Éditions Bruylant / Éditions de l'Université de Bruxelles.
[402] USA *v.* France (1963) at 57–58, *supra* note 76; see also: Kolb (2016) at 156 (*supra* note 28).
[403] Robert Kolb (2003 at 109–110, 114–116; *supra* note 401). Carefully ascertaining that no such ban exists, in order to prevent a likely illegitimate *Lotus case*-like general presumption of residual freedom. See: Focarelli (2012) at 278–283 (*supra* note 30); Kolb (2003) at 112–114, 335–337, 780 (*supra* note 401); (2006) at 687–709 (*supra* note 28); Linderfalk (2007) at 282–284 (*supra* note 186).
[404] Cited by McNair (1961) at 386; *supra* note 96.

Moving forwards

On the first page of the *Act to establish the Authority on the Responsible Use of Cannabis*, adopted on 14 December 2021 by the Parliament of the Republic of Malta, and which enacts a series of legal changes and establishes regulations allowing the development of a not-for-profit non-medical *Cannabis* industry,[405] it is stated:

> "it shall be the function of the Authority to regulate the use of cannabis for purposes other than medical or scientific purposes and to carry out work [...] to implement harm reduction from the use of cannabis."

This piece of legislation, the most recently approved at the time of publication of this report, relates to the introductory clause of Article 2(9) by mentioning C61's terminology "purposes other than medical or scientific." In addition, it articulates to it the implementation of "harm reduction from the use of cannabis," thereby echoing the provisions of Article 2(9) subparagraph *(a)*.[406] If the "Authority on the Responsible Use of Cannabis" instituted by that law, once established, were to collect data on the amount of CCDs utilized annually in the legal system instituted and send it the dedicated Form to the INCB –complying with subparagraph *(b)*– **Malta would be the first country to have an internationally-compliant legal *Cannabis* legislation since the Single Convention entered into force.**

Though not conclusive as to the general meaning of the C61, such a step has "considerable probative value" because it contains a "recognition by a party of its own obligations under an instrument."[407] It may also participate in "revitalizing the validity of a norm for its addressees"[408] and **alleviating rule tensions and the risks of norm decay or non-compliance cascade**, in line with requirements for peaceful change called by under international legal order.[409]

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[405] In connection with this: the economic type, legal personality, and business or industrial models of what "industry" refers to are not detailed in the Convention. Therefore, the fact that something be *a priori* "commonly used in industry" does not prevent municipal law from filling the gaps *a posteriori* by further regulating the details under, and extent to which this use should be "common" (or not) according to domestic criteria (see also *supra* note 140 and related discussion). Generally, natural resources, which are indeed commonly used in industry, are subject to different economically-, socially- and culturally-sensitive models. In addition, other layers of regulations than those embedded in drug control treaties, or those embedded in other treaties (*e.g.*, conservation, environmental protection, access and benefit-sharing, or other regulatory dispositions internal to a specific industrial field in domestic legislation) can impact the industrial policies of a country. The fact that a drug could be commonly used in industry under Article 2(9) and exempt from the controls of the C61 would not preclude governments from adopting further rules regulating this specific industry domestically (including up to a potential ban, which may be framed, no in terms of drug control and health but, for instance, in the case of certain fragile ecosystems, to protect endangered plant species, etc.). That RAU be exempt from one Conventions does not mean governments are resourceless from regulating it according to the domestic criteria they see fit, including, like in Malta, via an integrated, non-profit industrial model.

[406] In addition, the non-profit model arguably minimizes part of the risks associated with the development of a profit-oriented industry generating income with the sale of CCDs. The Cannabis social club model is closer to the farmer's market than to the supermarket, with inherent barriers to scalability. See for example: **Belackova**, V. (2020). "'The Good, the Bad, and the Ugly Weed': How Consumers in Four Different Policy Settings Define the Quality of Illicit Cannabis", *Contemporary Drug Problems,* **47**(1):43–62; **Belackova**, V., Tomkova, A. & Zabransky, T. (2016), "Qualitative research in Spanish cannabis social clubs: 'The moment you enter the door, you are minimising the risks'", *International Journal on Drug Policy,* **34**:49–57; **Parés-Franquero**, Ò., Jubert-Cortiella, X., Olivares-Gálvez, S., Díaz-Castellano, A., Jiménez-Garrido, D. F. & Bouso, J. C. (2019), "Use and Habits of the Protagonists of the Story: Cannabis Social Clubs in Barcelona", *Journal of Drug Issues,* **49**(4):607–624.

[407] at 135–136, in: **ICJ** (1950) "International status of South-West Africa, Advisory Opinion", In: *ICJ Reports*:128–219).

[408] Deitelhoff and Zimmermann (2020) at 58, *supra* note 27. See discussion *supra* section "Legal hermeneutics and the fringe of vagueness" in Chapter 1.

[409] *ibid.*, and Deitelhoff and Zimmermann (2013), .

Ultimately, an articulation of domestic reforms with the interpretation proposed in this essay provides an astute approach to norm evolution that does not involve the burdensome processes, resources, and legal stances required by most of the other scenarios sketched so far, all either *de lege ferenda* or direct non-compliance.

Indeed, **until now, the other options on the table for countries decided to "legalize cannabis" were: objection, simple withdrawal, withdrawal followed by a reaccession with reservation, general amendment, separability of clauses, further steps to deschedule CCDs,[410] or "respectful noncompliance"**–[411] none of which seem to have contemplated the provisions discussed in this essay, even be it to discard them.[412] More recently, respected scholars elaborated a detailed

> "*Inter se* option for treaty modification, whereby a group of two or more like-minded states could conclude agreements among themselves that permit the production, trade, and consumption of cannabis for non-medical and non-scientific purposes, while minimizing the impact on other states and on the goals of the drug conventions"[413]

[410] This most likely requires an amendment of the treaty in addition to the amendment of Schedule I by the CND –and particularly, to amend Article 2(6) where the terms "cannabis" are included: "In addition to the measures of control applicable to all drugs in Schedule I, [...] cannabis [is subject to the provisions of] article 28" (see Table 1 and Riboulet-Zemouli and Krawitz, 2022, *supra* note 120).

[411] To mention but a few scholarly works: **Bewley-Taylor**, D., Jelsma, M., Rolles, S. & Walsh, J. (2016), *Cannabis Regulations and the UN Drug Treaties, Strategies for Reform*, WOLA; **Fultz**, M., Page, L., Pannu, A. & Quick, M. (2017), *Reconciling Canada's Legalization of Non-Medical Cannabis with the UN Drug Control Treaties*, Global Strategy Lab; Leinwand (1971) at 420–439 (*supra* note 10); Panicker (2015; *supra* note 52); Room, 2012; **van Kempen**, P. H. & Fedorova, M. (2018), "Regulated Legalization of Cannabis through Positive Human Rights Obligations and Inter se Treaty Modification", *International Community Law Review,* **20**(5):493–526; van Kempen & Fedorova (2019a at 139-205; *supra* note 107); Walsh and Jelsma (2019; *supra* note 57); **Zwicky**, R., Brunner, P., Caroni, F. & Kübler, D. (2021), "A Research Agenda for the Regulation of Non-Medical Cannabis Use in Switzerland", *Zürcher Politik- & Evaluationsstudien,* **20**, Institut für Politikwissenschaft, Universität Zürich. Public administrations and international organizations also, such as **Organization of American States** (2013), *Scenarios for the drug problem in the Americas, 2013-2015*, at 36–37.

[412] This accounts almost for diagnosing a patient without examining him or her closely. Surprisingly, in a report seeking to reconcile Canada's "legalization of Non-Medical Cannabis" with the IDCC, Fultz *et al.* (2017, at 21, *supra* note 411) do not make a single mention of Article 2(9) or of the concept of OMSP, reaching the surprising conclusion that C61's "scientific purposes exemption is the most persuasive justification available to the Government of Canada for legalizing cannabis." **Lines**, R. M. and Barrett, D. (2018), "Cannabis Reform, 'Medical and Scientific Purposes' and the Vienna Convention on the Law of Treaties", *International Community Law Review,* **20**(5):436-455, find the analysis of Fultz *et al* little convincing, but nevertheless, they state the following:

> "Cannabis is also specifically addressed in several provisions of the 1961 Convention, each one outlining structures for wider suppression. These include Article 22 on prohibiting cannabis cultivation and destroying plants, Article 28 on limiting cannabis production only to industrial and horticultural purposes while preventing misuse and illicit traffic and Article 49 on phasing out traditional use. The preamble, meanwhile, refers to the 'evil' of addiction and the duty of States to 'combat this evil'. Drug abuse, it continues, requires 'universal action'. These provisions do not describe a treaty context in which recreational cannabis production, sale and use was considered a legitimate interpretive option for States."

This shows how commonplace are the lack of questioning of the conflation between *addiction/abuse* and RAU, and the failure to address Article 2(9). Another such example is the review of the IDCC in relation with cannabis RAU published by van Kempen and Fedorova (2019a), see *supra* note 107. Besides an impressive work, the mention of Article 2(9) is only present once, and in a footnote. Finally, in their proposal of an *inter se* amendment to the C61, Jelsma and colleagues (2018; *supra* note 57) also omit consideration of Article 2(9), even though they articulate their idea around the concept of adding "and other purposes" (*ibid.* at 19–24) alongside "medical and scientific" a questionable approach since "other purposes" are already indeed addressed elsewhere in the treaty. These examples are indicative of the extent of the gaps in the field, even among the most highly qualified publicists.

[413] Jelsma *et al.*, 2018, *supra* note 57, at 7.

Is there really the need for a modification of a treaty that already includes a fairly broad legal scheme precisely allowing these activities under Articles 2(9), 20(1)b., and 28(2)? Thanks to the horizontality of international norms:[414]

> "if one state or group of states is willing to commit enforcement resources, it may be able to short-circuit cumbersome organizational procedures and pursue improved levels of compliance by its own decision."[415]

In this case, the enforcement resources are fairly limited to **compliance with the two conditions** listed above. Robert Kolb depicts what such a situation could resemble:

> "a great number of States bound by a multilateral treaty agree on a certain interpretation, but that some States parties dissent. In such a case, if there is a broadly agreed interpretation, the term sometimes used is 'quasi-authentic interpretation'. **This interpretation is not binding on the States having disagreed to it. However, it may bind the States agreeing to it. It can be construed as an *inter se* agreement, an admission, or sometimes give rise to estoppel**" (emphasis added)[416]

Overcoming the need for an *inter se* treaty modification or more radical approaches *de lege ferenda*, it is possible to **reach an *inter se* agreement *de lege lata* between countries regulating RAU** in their territories, regarding the interpretation of the treaty. Without amendment.[417]

Undertaken in good faith, within a public health approach, without affecting obligations related to MSP, and complying with Article 2(9) –thus anticipating and managing the estoppel[418]– the approach outlined in this essay, although limited to "cannabis," has the potential to genuinely **enhance the health-centered and science-based dimensions of drug-related norms internationally**, reinforcing the IDCC and the rule of law generally, in harmony and complementarity. Countries, which will not stop moving towards *legalization*, have a **respectful and compliant option** to do so in good faith,[419] while instigating international peace and stability, avoiding the otherwise substantial risk of non-compliance cascade, defection, fragmentation, or *non liquet* –that is more real now than ever.[420]

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[414] Higgins (1997) *supra* note 282.
[415] Chayes and Chayes (1993) at 203, *supra* note 33.
[416] Kolb (2016) at 131, *supra* note 28. Emphasis is original.
[417] It might be noted that even in the eventuality of a State moving forwards with an *inter se* treaty amendment, it might be more appropriate to frame it under the dispositions of exemption for OMSP than under the MSP provisions.
As a side-note: to avoid possible confusions between the proposal routinely referred to by its proponent as "*inter se* amendment" strategy (see *supra* note 13 and associated quote; Jelsma *et al.*, 2018, *supra* note 57; van Kempen and Fedorova, 2018, *supra* note 411) and the *inter se* (interpretive) agreement outlined hereinbefore, it might be referring to the later as "*inter partes* agreement" instead of "*inter se* agreement."
[418] Crawford (2012) at 406–408, see *supra* note 24.
[419] Since "*bona fides* [good faith] ends when the person becomes aware [...] of facts which indicate the lack of legal justification for his [or her] claim" (at 140, in: **Walker**, D. M. (1980), *The Oxford Companion to Law*, Clarendon Press), proponents of a mandatory prohibition for cannabis enshrined in the treaties should reassess the validity of their interpretation, hard to now reconcile in good faith with the provisions, intention, or goals of the treaties at stake.
[420] **ACKNOWLEDGMENTS**: This essay would never have been possible without the support of, and critical inputs from Michael A. Krawitz and Farid Ghehiouèche. The author would like to express his appreciation to them, as well as Jason Adelstone and Julie P. Fry, for thorough review and constructive criticism and comments on earlier versions of this essay; and for enlightening discussions along the years to Bernhard Beitzke, Pavel Pachta, Stefano Berterame, Khalid Tinasti, Alfredo Pascual, Simon Anderfuhren-Biget, Boris Baňas, Amy King, Laury Renard, Renaud Colson, Luis Lidón, Diego Olivera, Martin Jelsma, Amber Marks, and Masha Fedorova; and for swift and constructive proofreading, to Amy

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ANNEXES.

ANNEX I. Text, context, and use of "abuse"

Table A1. Comprehensive list of mentions of the term "abuse" in the three international drug control Conventions

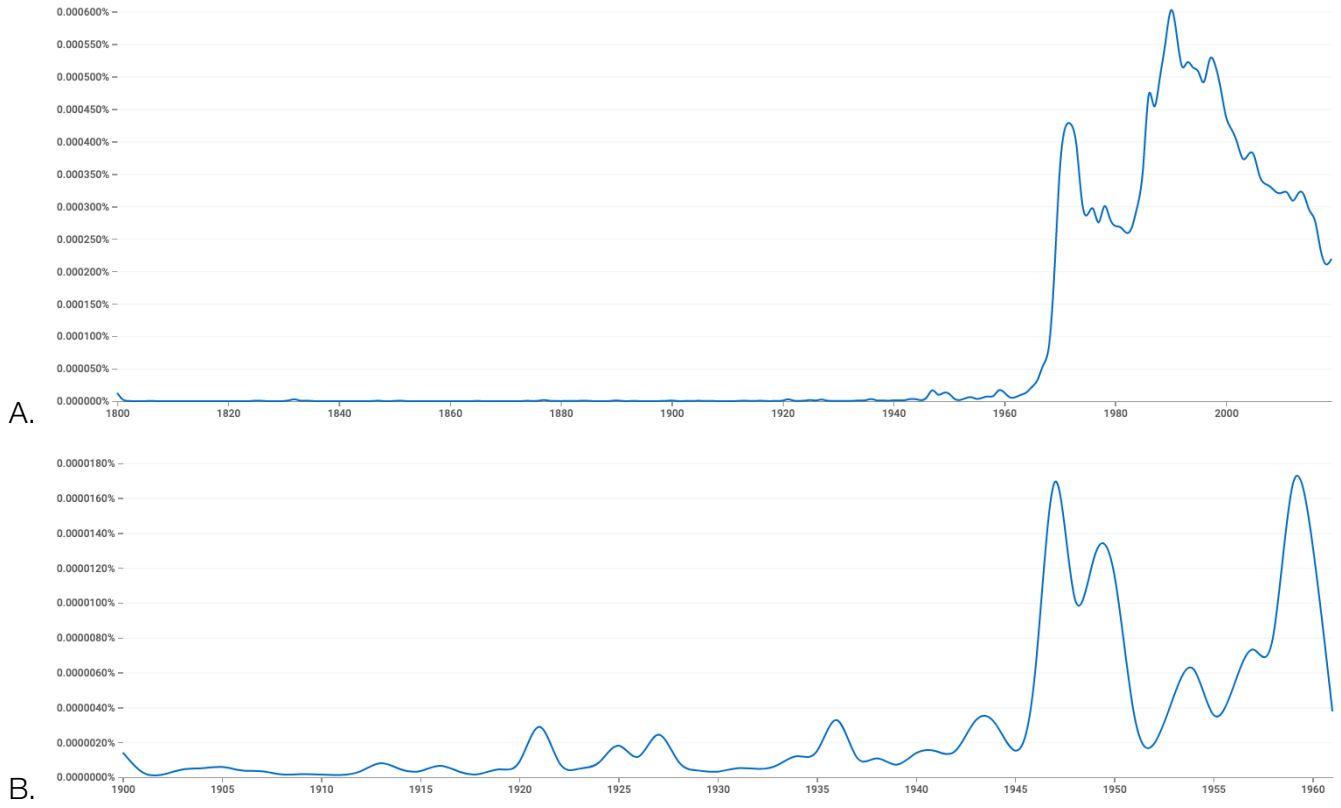
Convention	Article	Mention	Remarks
Single Convention on narcotic drugs, 1961 (as amended by the 1972 Protocol)	Preamble	"Recognizing that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind, Conscious of their duty to prevent and combat this evil, Considering that effective measures against **abuse** of narcotic drugs require coordinated and universal action"	*The first occurence of the term is linked (although not directly associated or correlated) to the concepts of "addiction" and "evil" (see also: Lines, 2014, at 87–101,* supra *note 316)*
	Article 2(9)	"Parties are not required to apply the provisions of this Convention to drugs which are commonly used in industry for other than medical or scientific purposes, provided that: (a) They ensure by appropriate methods of denaturing or by other means that the drugs so used are not liable to be **abused** or have ill effects (article 3, paragraph 3) and that the harmful substances cannot in practice be recovered"	*"Abuse" is associated with, or complemented by, "ill effects"*
	Article 3(3)	"Where a notification relates to a substance not already in Schedule I or in Schedule II, … (iii) If the [WHO] finds that the substance is liable to similar **abuse** and productive of similar ill effects as the drugs in Schedule I or Schedule II or is convertible into a drug, it shall communicate that finding to the Commission which may, in accordance with the recommendation of the [WHO], decide that the substance shall be added to Schedule I or Schedule II"	*Article 2, paragraph 9, and Article 3 paragraphs 4 and 5 point at this sentence when mentioning "abuse and ill effects" suggesting this paragraph should be seen as a reference for the understanding of what "abuse" refers to.*
	Article 3(4)	"If the [WHO] finds that a preparation because of the substances which it contains is not liable to **abuse** and cannot produce ill effects (paragraph 3) and that the drug therein is not readily recoverable, the Commission may, in accordance with the recommendation of the [WHO], add that preparation to Schedule III"	*"Abuse" is associated with, or complemented by, "ill effects"*
	Article 3(5)	"If the [WHO] finds that a drug in Schedule I is particularly liable to **abuse** and to produce ill effects (paragraph 3) and that such liability is not offset by substantial therapeutic advantages not possessed by substances other than drugs in Schedule IV, the Commission may, in accordance with the recommendation of the [WHO], place that drug in Schedule IV"	*"Abuse" is associated with, or complemented by, "ill effects"*

	Article 36(1)b.	"Notwithstanding the preceding subparagraph, when **abusers** of drugs have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such **abusers** shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of article 38"	*Added by the 1972 amendment.*
	Article 38 (heading)	"Measures against the **abuse** of drugs"	*Amended in 1972, with the replacement of "addiction" by "abuse"*
	Article 38(1)	"The Parties shall give special attention to and take all practicable measures for the prevention of **abuse** of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved and shall coordinate their efforts to these ends"	*The original, unamended Convention mentioned "the provision of facilities for the medical treatment, care and rehabilitation of drug addicts." The amendment replaced it with "the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved"*
	Article 38(2)	"The Parties shall as far as possible promote the training of personnel in the treatment, after-care, rehabilitation and social reintegration of **abusers** of drugs"	*Added by the 1972 amendment*
	Article 38(3)	"The Parties shall take all practicable measures to assist persons whose work so requires to gain an understanding of the problems of **abuse** of drugs and of its prevention, and shall also promote such understanding among the general public if there is a risk that **abuse** of drugs will become widespread"	*Added by the 1972 amendment*
Convention on psychotropic substances, 1971	Preamble	"The Parties, ... Noting with concern the public health and social problems resulting from the **abuse** of certain psychotropic substances"	/
	Preamble	"The Parties, ... Determined to prevent and combat **abuse** of such substances and the illicit traffic to which it gives rise"	/
	Preamble	"The Parties, ... Believing that effective measures against **abuse** of such substances require coordination and universal action"	/
	Article 2(4)a.	"If the [WHO] finds: (a) That the substance has the capacity to produce (i) (1) A state of dependence, and (2) Central nervous system stimulation or depression, resulting in hallucinations or disturbances in motor function	*"Abuse" is associated with, or complemented by, "ill effects"*

	or thinking or behaviour or perception or mood, or (ii) Similar **abuse** and similar ill effects as a substance in Schedule I, II, III or IV"	
Article 2(4)a.	"If the [WHO] finds: … (b) That there is sufficient evidence that the substance is being or is likely to be **abused** so as to constitute a public health and social problem warranting the placing of the substance under international control, the [WHO] shall communicate to the Commission an assessment of the substance, including the extent or likelihood of **abuse**, the degree of seriousness of the public health and social problem and the degree of usefulness of the substance in medical therapy, together with recommendations on control measures, if any, that would be appropriate in the light of its assessment"	*"Abuse" is associated with, or complemented by, "public health and social problem"*
Article 3(2)	"If a preparation containing a psychotropic substance other than a substance in Schedule I is compounded in such a way that it presents no, or a negligible, risk of **abuse** and the substance cannot be recovered by readily applicable means in a quantity liable to **abuse**, so that the preparation does not give rise to a public health and social problem, the preparation may be exempted from certain of the measures of control provided in this Convention in accordance with paragraph 3"	*"Abuse" is associated with the concept of "quantity" as well as with "public health and social problem"*
Article 4(b)	"In respect of psychotropic substances other than those in Schedule I, the Parties may permit: … (b) The use of such substances in industry for the manufacture of non-psychotropic substances or products, subject to the application of the measures of control required by this Convention until the psychotropic substances come to be in such a condition that they will not in practice be **abused** or recovered"	/
Article 16(1)b.	"The Parties shall furnish to the Secretary-General such information as the Commission may request as being necessary for the performance of its functions, and in particular an annual report regarding the working of the Convention in their territories including information on: … (b) Significant developments in the **abuse** of and the illicit traffic in psychotropic substances within their territories"	/
Article 20 (heading)	"Measures against the **abuse** of psychotropic substances"	/
Article 20(1)	"The Parties shall take all practicable measures for the prevention of **abuse** of psychotropic substances and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved, and shall coordinate their efforts to these ends"	*"Abuse" associated with "prevention" and with "early identification, treatment, education, after-care, rehabilitation and social reintegration"*
Article 20(2)	"The Parties shall as far as possible promote the training of personnel in the treatment, after-care, rehabilitation and social reintegration of **abusers** of psychotropic substances"	
Article	"The Parties shall assist persons whose work so requires to gain an understanding of the problems of **abuse** of	

	20(3)	psychotropic substances and of its prevention, and shall also promote such understanding among the general public if there is a risk that **abuse** of such substances will become widespread"	
	Article 22(1)b.	"Notwithstanding the preceding sub-paragraph, when **abusers** of psychotropic substances have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to punishment, that such **abusers** undergo measures of treatment, education, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of article 20"	
UN Convention against illicit traffic…, 1988	Preamble	"The Parties, ... Desiring to eliminate the root causes of the problem of **abuse** of narcotic drugs and psychotropic substances, including the illicit demand for such drugs and substances and the enormous profits derived from illicit traffic"	*Abuse includes "illicit demand"*
	Article 3(4)c).	"Notwithstanding the preceding subparagraphs, in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug **abuser**, treatment and aftercare."	*"Abuse" associated with "treatment and aftercare"*
	Article 5(5)b.(i)	"Contributing the value of such proceeds and property, or funds derived from the sale of such proceeds or property, or a substantial part thereof, to intergovernmental bodies specializing in the fight against illicit traffic in and **abuse** of narcotic drugs and psychotropic substances"	/
	Article 14(4)	"The Parties shall adopt appropriate measures aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances, with a view to reducing human suffering and eliminating financial incentives for illicit traffic. These measures may be based, *inter alia*, on the recommendations of the United Nations, specialized agencies of the United Nations such as the World Health Organization, and other competent international organizations, and on the Comprehensive Multidisciplinary Outline adopted by the International Conference on Drug **Abuse** and Illicit Trafficking, held in 1987, as it pertains to governmental and non-governmental agencies and private efforts in the fields of prevention, treatment and rehabilitation. The Parties may enter into bilateral or multilateral agreements or arrangements aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances."	*References the Political Declaration resulting from the International Conference on Drug Abuse and Illicit Trafficking (see* supra *note 118, at 88–90), which, on its turn, differentiates "misuse", "abuse," and "non-medical use"*

Figure A1. Use and abuse of the term “abuse” in relation with “drugs” or “substances” in English publications, 1910-2019.



A: Using the research queries (abuse=>drug + abuse=>substance), case-insensitive, without smoothing, in the joint English corpora 2019 (period 1800-2019).
B: Using the research queries (abuse=>drug + abuse=>substance), case-insensitive, without smoothing, in the joint English corpora 2019 (period 1900-1961).

Source: Google Books Ngram Viewer, 2019.

ANNEX II. How are recreational/adult uses referred to in domestic law?

Table A2. Terms used to refer to non-medical use in pieces of municipal law from Canada, Jamaica, Malta, Mexico, South Africa, Uruguay, USA.

Jurisdiction	Bill, Law or Regulation	Definition provided for "recreational" or "adult uses" or other terms used
Canada *Nationwide legislation*	Government Bill (House of Commons) C-45 – An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts (2018)	Only few mentions of cannabis "use" in relation with prevention; no adjective or qualificative to the term "use."
Jamaica *Nationwide legislation*	Dangerous Drugs (Amendment) Act 2015	"Religious purposes."
Malta *Nationwide legislation*	Bill No. 241: AN ACT to establish the Authority on the Responsible Use of Cannabis and to amend various laws relating to certain cannabis activities (2021).	The Bill includes "use of cannabis for purposes other than medical or scientific purposes" in its first section, but generally refers to "responsible use" in its title and refers generally to this term, except on rare instances where it mentions "personal use" (at 18–20).
Mexico *Supreme court ruling*	General Declaratory Judgement of Unconstitutionality by the Supreme Court of Justice of the Nation (1/2018) effective	Refers on some occasions to "the use of this substance for various purposes, such as recreational use (§§ 73, 75), but generally uses "recreational purposes" or "leisure purposes" and eventually "leisure-recreational" (§ 21, voto particular Mª Esquivel Mossa)
South Africa *Constitutional court ruling*	Case CCT 108/17 – Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening)...	The ruling mentions "the use or possession or cultivation of cannabis in private by an adult person for his or her own consumption in private." It otherwise often mentions "personal consumption"
Uruguay	Law No. 19172 – Regulation and Control of Cannabis (2013)	Mentions once "psychoactive cannabis for recreational use" (Article 14) and otherwise relies on the terms "psychoactive use," "non-medical use," or "non-medicinal use of psychoactive cannabis"
	Decree No. 120/014 (2014)	Refers to "non-medical psychoactive cannabis use" in the headings of Title I.
United States,	Measure 2 – An Act to tax and regulate the production, sale, and use of	Mentions "personal use" (Section 17.38.020)

Alaska	marijuana in Alaska (2014)	
United States, Arizona	Proposition 207 – Smart and Safe Arizona Act (2020)	Mentions “adult use,” or “responsible adult use,” eventually also mentions “personal use”
United States, California	Proposition 64 – Control, Regulate and Tax Adult Use of Marijuana Act (2016)	Mention of “nonmedical marijuana” (Section 2, A.), “nonmedical use” (Section 2, B.). Reference is made to "adult-use intoxicating substances" (Section 6, Division 10, 26014)
	Senate Bill No. 94 – Cannabis: medicinal and adult use (2017)	Use without distinction “adult use” and “adult-use”.
	Assembly Bill No. 133 – Cannabis Regulation (2017)	
	California Code of Regulations, Title 17, Division 1	Mentions that “‘Adult-use Market’ means the products intended for sale at a retailer or microbusiness to individuals 21 years of age and older and who do not possess a physician’s recommendation” (Article 1, §40100 (c))
United States, Colorado	Amendment 64 – Colorado Constitution, Article XVIII, Section 16[i]	Refers to “personal use” in subsection (3)
	House Bill 13-1317	/
	House Bill 13-1318	Refers to “personal use” in the definition of “consumer”
	Senate Bill 13-241	/
	Senate Bill 13-283	/
United States, Connecticut	House Bill 1201 – Responsible and Equitable Regulation of Adult-Use Cannabis Act	Refers to “use or possession of cannabis by a person that does not violate …” the law.
United States, District of Columbia	Initiative Measure 71 - Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Act of 2014	Mentions “personal use” in its title and on several occasions.
	Consolidated and Further Continuing Appropriations Act, 2015 – Division E, Title VIII	Mentions: “None of the funds contained in this Act may be used to enact any law, rule, or regulation to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any schedule I substance [...] for recreational purposes” (Section 809 (b))
United States, Illinois	Illinois House Bill 1438 - Cannabis Regulation and Tax Act (2019)	Mentions “personal use” in Article 10.

United States, Maine	Question 1 - An Act to Legalize Marijuana, enacted as IB 2015, c.5 (2016)[q]	/
	Department of Administrative and Financial Services Regulations 18 691 Chapters 1–5[r]	Presence of "Adult use marijuana product," where *adult use* serves as an adjective (defined as "a marijuana product that is manufactured, distributed or sold by a marijuana establishment" in section 1.4(4)) but no definition for the act of "adult use."
United States, Massachusetts	Question 4 - An Initiative Petition for a Law Relative to the Regulation and Taxation of Marijuana (2016)[s]	Mentions "Personal use of marijuana" in the headings of Section 7.
	MGL c.94G – Regulation of the use and distribution of marijuana not medically prescribed[t]	The title mentions "use [...] of marijuana not medically prescribed"
	830 CMR 64N.00: Marijuana Retail Taxes[v]	/
	935 CMR 500.00: Cannabis Control Commission, Adult Use of Marijuana[w]	Mentions "adult-use" as an adjective, and defines "Adult-use Cannabis" and "Adult-use Cannabis Products" (see section 500.002), but do not define "adult use" although referring to it as an activity (*e.g.*, "local licensing requirements for the adult use of Marijuana" in section 500.101 (a)10).
United States, Michigan	Proposal 1 - Michigan Regulation and Taxation of Marihuana Act (2018)[x]	Mentions "personal use"
United States, Montana	House Bill 701.	Refers to "adult-use" as a qualificative of products, licenses, and regulations, and uses "use" or "personal use" for the purposes of consumption.
United States, Nevada	Question 2 - Initiative to Regulate and Tax Marijuana (2015)[y]	Mentions "personal use" in the headings of Section 6.
	Nevada Revised Statutes, Title 56: Regulation of Cannabis (as of 2020)[z]	"'Adult use of cannabis' means: 1. The possession, delivery, production or use of cannabis; 2. The possession, delivery or use of paraphernalia used to administer cannabis; or 3. Any combination of the acts described in subsections 1 and 2, by a person 21 years of age or older." (NRS 678A.075) By opposition: "'Medical use of cannabis' means: 1. The possession, delivery, production or use of cannabis; 2. The possession, delivery or use of paraphernalia used to administer cannabis; or 3. Any combination of the acts described in subsections 1 and 2, as necessary for the exclusive benefit of a person to mitigate the symptoms or effects of his

		or her chronic or debilitating medical condition, as defined in NRS 678C.030." (NRS 678A.215) The text otherwise refers to "adult use" as the activity, and "adult-use" as an adjective (*e.g.* in "NRS 678D.410 License required for transportation of cannabis for adult use and adult-use cannabis products; exceptions"[aa])
	Regulations of the Nevada Cannabis Compliance Board, NCCR 1-14 (2020)[ab]	Mentions "adult use" as an adjective, *e.g.*: "adult use cannabis products," "adult use cannabis establishments," "adult use retail sales"
United States, New Mexico	House Bill 2 – Cannabis Regulation Act (2021)	Mentions "legalizing cannabis products for adult use," "adult-use intoxicating substances," and "cannabis consumption"
United States, New-York	Senate Bill 854-A – Marijuana Regulation and Taxation Act (2020)	Mentions "an individual's legal use of consumable products, including cannabis in accordance with state law," "an individual's legal recreational activities, including cannabis in accordance with state law," "adult use," but preferably relies upon "personal use"
United States, Oregon	Oregon Legalized Marijuana Initiative, Measure 91 (2014)	Mention of "personal use"
	Oregon Revised Statutes, Chapter 475B, Recreational Use of Cannabis (2019)	
	Oregon Liquor Control Commission – Chapter 845, Division 25, Recreational Marijuana	
United States, Vermont	House Bill 511 – An act relating to eliminating penalties for possession of limited amounts of marijuana by adults 21 years of age or older (2018)	Mention of "personal use"
United States, Virginia	H. B. 2312 (HB 1815/SB 1406) – An Act [...] relating to marijuana; legalization of simple possession; penalties	Refers to "personal use" also mentions "adult sharing" meaning "transferring marijuana between persons who are 21 years of age or older without remuneration"
United States, Washington	Initiative Measure 502 – An Act Relating to Marijuana (2012)	Opens with the mention of "adult marijuana use"

All references are present in the text, *supra* note 275.

ANNEX III. Single Convention: *Dos and Don'ts* of interpretation

When reading the treaty,

Do:

- consider that "abuse" means *substance use disorder*;
- distinguish "illicit activities" from "all activities" or "uses contrary to" from "all uses";
- keep in mind that some obligations are balanced with subjections, exemptions, or escape clauses;
- keep in mind that the cannabis industry is an industry commonly using cannabis for non-medical purposes.

Do <u>not</u>:

- consider that "abuse" means *recreational use*;
- consider that "illicit activities" means "all activities" –there are licit ones as well (apply the same reasoning to expressions like: "contrary to this/the Convention," etc.);
- ignore parts of the text (like "subject to…" or """);
- interpret what is not written anywhere in the treaty: instead, interpret the text;
- forget the differences between obligations and non-binding provisions.

By following these rules, you can understand the drug control treaties in a sound and consistent manner.

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In the current legal landscape, it is possible to craft policy that combats drug abuse and drug harms, protects human rights, and complies with international drug control law in good faith, by regulating the recreational uses of cannabis products rather than outlawing them. This essay proposes exactly that solution.

The international drug control Conventions establish the international legal regime for cannabis, but they are silent on "recreational" or "adult use." However, they do include broad exemptions in the case of "other than medical and scientific uses in the context of industry." They are not prohibition treaties, but **Framework Conventions on the Control of Some Medicines within the Medical and Pharmaceutical Sectors**. Shortcomings in the history of the drug control Conventions, and the current hegemony of one particular interpretation (articulated around prohibition), may have impacted our interpretive frames and discouraged legal scholarship from the study of these **exemptions for non-medical uses**, purposefully added in the treaty.

Via an applicatory contestation of the Conventions reliant on **classical methods of treaty interpretation**, this essay underlines the **relevance of these exemptions in the context of domestic "cannabis legalization"** efforts. The legal scheme which applies to the *Cannabis* plant and its derivatives is two-fold: (1) activities related to medical and scientific purposes are under control, (2) activities for "other than medical and scientific purposes" are exempt from control, provided that two requirements are met: implement effective measures to avoid harms & provide reasonable statistical reporting to the INCB.

This **existing, good faith, legitimate international legal regime for adult-use cannabis** opens an alternative pathway for decision-makers, appeasing rule tension and rerouting international relations on *Cannabis* matters onto less conflictual tracks.