

## 1 Introduction

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It is my hope that when historians study the work of humankind in the field of drug control, they will write about the next few days as the time when the international community found common ground in the mission to create momentum towards a drug free world in the twenty-first century.

Statement by the United Nations (UN) Secretary-General, Mr Kofi Annan, to the opening of the Twentieth Special Session of the General Assembly, June 1998

As the chairperson's gavel came down on proceedings at the High Level 'Political' Segment of the fifty-second session of the Commission on Narcotic Drugs, it appeared as if it would be business as usual in Vienna, the home of the UN bodies for dealing with what has become known as the 'world drug problem'.<sup>1</sup> The High Level Segment (HLS) brought together representatives from more than 130 countries in March 2009 to conclude a year-long review of progress achieved by the international drug control system against the goals set by the UN General Assembly Special Session (UNGASS) on the World Drug Problem. At that 1998 session in New York, and under the quixotic banner 'A Drug Free World. We Can Do It!', member states agreed a Political Declaration committing themselves to work towards eliminating or reducing significantly the illicit production of coca, cannabis and opium, and the illicit manufacture and trafficking of psychotropic substances, as well as achieving significant and measurable results in the field of drug demand reduction by the then planned review in 2008.<sup>2</sup>

<sup>1</sup> While at the heart of international deliberations on drug policy, this remains a vague term. As the UN itself notes, there is 'not even a clear definition of what is meant by the expression ...' UNODC, *World Drug Report 2010* (New York: United Nations, 2010), p. 31. There is an implicit assumption, however, that by their very inclusion within the schedules of the UN treaties, the non-scientific and non-medical use of certain substances is inherently problematic.

<sup>2</sup> UN, *Special Session of the General Assembly Devoted to Countering the World Drug Problem Together, 8–10 June 1998, Political Declaration, Guiding Principles of Drug Demand Reduction and Measures to Enhance International Cooperation to Counter the World Drug Problem* (Vienna: United Nations, 1999), pp. 5–6

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After six gruelling months of inter-state negotiation, the HLS was also the venue for the announcement of a new Political Declaration and accompanying Action Plan. These soft law instruments, like their predecessors eleven years earlier, would do much to set the direction for international drug control for the next decade or so. During the general debate, a number of states pointed to the obvious fact that the UNGASS goals had not been met and lamented perceived shortcomings within the draft Declaration. Yet, the final acceptance of documents closely resembling those from the UNGASS signalled a general acceptance of the structure and ethos of the UN multilateral drug control system. While agreeing to an 'Integrated and Balanced Strategy to Counter the World Drug Problem,' all delegations in Vienna consequently provided formal and ongoing backing for a now well-established treaty framework; a framework anchored to the doctrine of prohibition.

That differential levels of support existed for prohibition in its punitive form, however, became clear even before applause for the move to close the HLS had subsided. With a delivery that brought the conference hall to a standstill, the German ambassador addressed the floor. He slowly listed twenty-six, predominantly European states, Parties to the UN drug control conventions that wished to add an Interpretative Statement to the already agreed Political Declaration. The Statement itself and the series of hostile country responses that followed it removed what had become an increasingly precarious façade of harmony within the Commission. Moreover, the discordant accord became the most recent and most serious expression of growing disagreement around the central norm of the system for worldwide drug control.

There remains much common ground among the international community on many aspects of the control system, yet diverging views on the non-medical and non-scientific use of a range of controlled substances make drug policy an increasingly contested and transitional area of multinational cooperation. Focusing principally on the years between the 1998 General Assembly Special Session and the HLS, a period for the sake of simplicity referred to here as the UNGASS decade, this study explores the sources, manifestations and sometimes paradoxical implications of this divergence to reveal increasingly serious fractures within the long uneasy consensus on UN-based transnational drug control.<sup>3</sup>

<sup>3</sup> C. D. Kaplan, 'The Uneasy Consensus: Prohibitionist and Experimentalist Expectancies Behind the International Narcotics Control System', *Tijdschrift voor Criminologie*, 26 (1984), 105

There are a number of simple tasks for this introductory chapter. First, employing an international relations perspective, it gives an overview of the multilateral drug control system, including its legal structures, principal actors and historical development. Second, it discusses debates during the UNGASS decade concerning the effectiveness of the system in achieving its core goal. Third, in light of such debates, the chapter outlines the rationales behind some states' moves away from punitive prohibition and introduces a triad of interrelated themes accompanying such a process.

### **The global drug prohibition regime**

The present system for worldwide drug control is based upon a suite of UN treaties; the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol (hereafter sometimes referred to as the Single Convention), the 1971 Convention on Psychotropic Substances and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. These were established by the international community with the core objective of preventing the non-scientific and non-medical production, supply and use of narcotic and psychotropic drugs. 'Although the substance of the drug control conventions is complex,' notes Neil Boister, 'their function is simple ... They provide the legal structure for an international system of drug control by defining measures to be maintained within each state party to these conventions and by prescribing rules to be obeyed by these parties in their relations with each other.'<sup>4</sup> These rules can be categorized according to two principal methods of achieving drug control. First is commodity control. This is the definition and regulation of the licit production, supply and possession of drugs. Or put another way, control of the pharmaceutical market. Second, and what will be the primary focus of the pages that follow, is penal control. Put simply, this is the suppression through criminal law of illicit production, supply and consumption of drugs.<sup>5</sup> The conventions then operate with the intention of creating an appropriate balance between penal sanctions, the degree of real and/or potential harm associated with specific drugs and their therapeutic

<sup>4</sup> N. Boister, *Penal Aspects of the UN Drug Conventions* (The Hague: Kluwer International, 2001), p. 2

<sup>5</sup> The conventions actually explicitly regulate and penalize drug possession rather than consumption. See articles 33 and 36 of the Single Convention, articles 5 and 22 of the 1971 Convention and article 3 of the 1988 Convention. That said, it is clear that commodity and penal controls are ultimately intended to prevent/deter the consumption of drugs on the basis that consumption is impossible without possession.

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usefulness. Indeed, as affirmed in the preambles of all the conventions, an important guiding principle of the treaty framework is a concern for the ‘health and welfare’ of humankind. Within this context, the international control system has developed on the basis of two interconnected tenets. These are that the best way to reduce problems caused by the use of proscribed drugs is to minimize the scale of the illicit drug market and that this can be successfully achieved through a reliance on prohibition-oriented supply-side measures. As such, these examples of ‘suppression’ conventions<sup>6</sup> comprise the constituent elements of what is an increasingly important but still little-known international prohibition regime.

Such patterns of regularized cooperation between states can, according to Stephen Krasner’s standard formulation, be regarded more specifically as a set of ‘implicit or explicit principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue area’.<sup>7</sup> A process of long-term convergence in the field of international drug control has resulted in the construction of what has been usefully described as the global drug prohibition regime (GDPR). Accordingly, as Peter Andreas and Ethan Nadelmann explain, today the vast majority of states are members of a restrictive regime whereby the production, sale and even possession of cannabis, cocaine and most opiates, hallucinogens, barbiturates, amphetamines and tranquillizers outside strictly controlled medical and scientific channels are punished with criminal sanctions in virtually every nation.<sup>8</sup>

At the heart of the GDPR is the Single Convention, an instrument that pays particular attention to plant-based drugs such as opium, heroin and cocaine, and significantly for our discussion, coca and cannabis. Inheriting the scheduling structure of earlier treaties, the Convention places more than one hundred controlled substances in four schedules with the intention that they are categorized according to their perceived liability to abuse and their risks to public health. Indeed, as a consolidating treaty, it brought together and streamlined a complex array of conventions and bureaucratic structures that had been developing since the first binding multilateral agreement on drug control signed in The Hague in 1912.

Greater than the sum of its parts, however, the Single Convention crucially also marked a strengthening of the international system and

<sup>6</sup> Boister, *Penal Aspects*, p. 3

<sup>7</sup> S. D. Krasner, ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables’, *International Organization*, 32 (2) (1982), 185

<sup>8</sup> P. Andreas and E. Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (New York: Oxford University Press, 2006), p. 38

the birth of the contemporary regime. While the pre-1961 foundational treaties were in essence ‘restrictive commodity agreements’,<sup>9</sup> the Single Convention was a stricter and wider-ranging multilateral instrument which, although still addressing the concerns of its predecessors, became more prohibitionist in tenor; including an increased focus upon individual drug users.<sup>10</sup>

This shift away from dealing with non-medical and non-scientific drug use, primarily via trade regulation and a ‘drying up’ of excess capacity, finds its most obvious expression in article 4 (c). This determines the overarching philosophy and normative character of the entire Convention and hence the regime itself. Reflecting the generally prescriptive nature of norms within international affairs, as a ‘General Obligation,’ the article obliges signatory nations, ‘subject to the provisions’ of the convention, ‘to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, *use and possession of drugs*’ (emphasis added). A reading of the Convention reveals a legal disconnect between these obligations and any mandatory penalization of certain forms of conduct.<sup>11</sup> The treaty also contains limited reference to demand-side issues and the medical treatment, care and rehabilitation of ‘drug addicts’. Yet, in privileging a penal and prohibition-oriented approach to all aspects of the drug issue, including non-medical and non-scientific use, the Single Convention redefined the normative order of the international drug control system.<sup>12</sup> Parties must thus look to the prohibitive spirit of the Convention to inform their domestic legal positions since norms must be seen to represent acceptable ‘standards of behaviour’ in terms of not only rights but also obligations<sup>13</sup> and are used to assess the ‘praiseworthy or blameworthy character of an action’.<sup>14</sup> Accordingly, it created a new benchmark against which the legislative actions and general

<sup>9</sup> H. L. May, ‘Narcotic Drug Control – Development of International Action and the Establishment of Supervision Under the United Nations’, *International Conciliation*, 441 (1948), 305

<sup>10</sup> C. Carstairs, ‘The Stages of the International Drug Control System’, *Drugs and Alcohol Review*, 24 (2005), 61

<sup>11</sup> See, for example, articles 33 and 36

<sup>12</sup> See D. Bewley-Taylor and M. Jelsma, *Fifty Years of the 1961 Single Convention on Narcotic Drugs: A Reinterpretation* (Amsterdam: Transnational Institute, Series on Legislative Reform of Drug Policies, Nr. 12, 2011)

<sup>13</sup> S. D. Krasner, ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables’, in S. D. Krasner (ed.), *International Regimes* (Ithaca, New York: Cornell University Press, 1983), p. 2

<sup>14</sup> F. Kratochwil, ‘The Force of Prescriptions’, *International Organization*, 38, 4 (1984), 686. Also see A. Florini, ‘The Evolution of International Norms’, *International Studies Quarterly*, 40, 3 (1996), 364–5

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attitudes of Parties would henceforth be judged. The Convention thus continues to generate a powerful background ‘prohibitionist expectancy’, or framework of ‘appropriateness’, whereby all nations should adopt a fundamentally prohibitionist stance on drug use.<sup>15</sup>

As the bedrock of the current international drug control system, the 1971 and 1988 treaties follow closely the principles, objectives and structures laid out in the Single Convention. Following its passage in 1961, as well as moving to strengthen its provisions, the international community moved to address emerging issues of concern not covered within the instrument. As the nomenclature suggests, these were primarily the illicit use of what were defined as psychotropic substances, such as amphetamines, barbiturates and lysergic acid diethylamide (LSD), and illicit drug trafficking.

Like most UN treaty-based regimes, a number of organizational actors are involved in the functioning and oversight of the three conventions. Among these, the aforementioned CND plays an important role. A functional commission of the UN’s Economic and Social Council (ECOSOC), the CND comprises fifty-three UN member states and is the central policymaking body for the UN drug control system. Its brief includes the conduct of ongoing analysis of the global drug situation and development of proposals designed to combat drug-related problems and reinforce the systems of control. With functions assigned to it by the conventions, the CND is authorized to consider all matters relating to the objectives of the instruments and to oversee their implementation. The CND is assisted in its tasks by the World Health Organization (WHO) and the International Narcotics Control Board (INCB or Board), a treaty body that features prominently throughout this study. This ‘independent and quasi-judicial’ control organ for the implementation of the treaties is the product of a streamlining of the control system brought about by the Single Convention. The Board has the authority to assess worldwide scientific and medical requirements for controlled substances and, more importantly for our discussion, monitors what it deems to be compliance with the provision of the conventions. To varying degrees, both the CND and the INCB rely for administrative and technical support upon the UN Office on Drugs and Crime (UNODC or Office). Established in its present form in 2002, the Office is the UN agency responsible for coordinating international drug control activities. In assisting member states to address ‘interrelated issues of drug control, crime prevention and international

<sup>15</sup> Kaplan, ‘The Uneasy Consensus’, 105, and J. G. March and J. P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New York: Free Press, 1989), p. 23

terrorism in all its forms' it operates a three-pillar work programme. This involves research and analytical work, including publication of the annual *World Drug Report*; activities to assist states in the ratification and implementation of treaties and the development of domestic legislation; and field-based technical cooperation projects.<sup>16</sup>

Within this treaty framework, regime members are afforded a certain degree of discretion in the formulation of national drug control policies. Yet flexibility is limited. The conventions are not self-executing and thus apply indirect control. That is to say that while they impose obligations on states to apply international law, such law is not directly or immediately enforceable by a UN body. The autonomy of domestic law is stressed within all the drug control instruments.<sup>17</sup> This legal reality combines with two other important and complementary factors to generate a certain amount of domestic policy space within the prohibitive parameters of the regime. First, like all multilateral instruments seeking widespread acceptance, the drug control conventions are the products of political compromise and consequently 'saturated with textual ambiguity'.<sup>18</sup> Second, as in other fields of international concern, interpretation of the drug control treaties must be seen as an art not a science.<sup>19</sup> Subjective analysis of many clauses within the conventions consequently creates a certain flexibility, or 'room for manoeuvre', for individual Parties when formulating domestic policies.<sup>20</sup>

Although the case, Parties are required to remain true to the UN drug conventions in line with the 1969 Vienna Convention on the Law of Treaties. Among other things this obliges Parties to interpret treaties in good faith and respect the 'object and purpose' of the conventions.<sup>21</sup> Within the context of international drug control, this means that Parties must adhere to the central prohibitive norm of the global drug control system. Thus while there has long been variation in national policy between Parties to the conventions, a spectrum incorporating policies ranging from quasi-legal coffee shops in the Netherlands to

<sup>16</sup> See [www.unodc.org/pdf/unodc\\_terms\\_reference.pdf](http://www.unodc.org/pdf/unodc_terms_reference.pdf)

<sup>17</sup> K. Krajewski, 'How Flexible are the United Nations Drug Conventions?' *International Journal of Drug Policy*, 10, 6 (1999), 329–38

<sup>18</sup> Boister, *Penal Aspects*, p. 22

<sup>19</sup> M. Akehurst, *A Modern Introduction to International Law* (London: George Allen and Unwin, 1982), p. 164, and A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2007), p. 230

<sup>20</sup> Krajewski, 'How Flexible', and N. Dorn and A. Jamieson, *Room for Manoeuvre; Overview of Comparative Legal Research into National Drug Laws of France, Italy, Spain, the Netherlands and Sweden and their Relation to Three International Drug Conventions* (London: DrugScope, 2000)

<sup>21</sup> Article 26



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zero-tolerance policing of drug users in many parts of the world, the existence of the GDPR regime does a great deal to restrict freedom of action at the national level. For example, should the Dutch government or any other governing authority wish to do so, they would find it extremely difficult to establish a licit regulated market for the recreational use of a drug such as cannabis and remain within legal confines of the regime. In conceptualizing such constraints, it is useful to compare them with the domestic situation in the USA between 1919 and 1933. As Harry Levine argues, the Single Convention stands in much the same relationship to worldwide drug prohibition that the Eighteenth Amendment and the Volstead Act stood in relation to alcohol prohibition. Just as the Eighteenth Amendment restricted the way US states created alcohol policy, so UN legislation currently limits the way sovereign states approach drug laws.<sup>22</sup>

Such a comparison is particularly fitting considering the evolution of the treaty-based drug control system. This process must be understood as a confluence of perceptions, interests, and moral notions among dominant sectors of the more powerful states within the international community. But the role of US protagonists in shaping the GDPR according to their preferred norms cannot be underestimated.<sup>23</sup> Informed to varying degrees by the moral framework underpinning the ‘Noble Experiment’, influential individuals and anti-narcotics groups have since the beginning of the twentieth century worked with considerable success to export US-style prohibition-based policies to the rest of the world. These are built predominantly upon law enforcement and attempts to eliminate supply by targeting producers and traffickers outside the USA and dealers within its borders. It is true that prevention and treatment embody important non-punitive elements within the approach, but zero-tolerance ideology can be seen to include what has been called a war against drug users. This logic is straightforward, if misguided. As Eva Bertram and colleagues explain, ‘strategies to make drugs scarce and costly in order to discourage consumption should be backed by sanctions against consumers themselves. Fear of punishment will act as a deterrent by raising the risks of drug use and will thus lead them to less use and abuse.’<sup>24</sup>

Clearly, all actors involved with the creation of regimes of all descriptions have a rationale for their development. As Robert Keohane notes,

<sup>22</sup> H. G. Levine, ‘Global Drug Prohibition: Its Uses and Crises’, *International Journal of Drug Policy*, 14, 2 (2003), 150

<sup>23</sup> Andreas and Nadelmann, *Policing the Globe*, p. 38

<sup>24</sup> E. Bertram, M. Blachman, K. Sharpe and P. Andreas, *Drug War Politics: The Price of Denial* (University of California Press, 1996), p. 26



those responsible for their construction ‘have purpose in doing so, and the rights and rules of regimes reflect visions of what sorts of behaviour should be encouraged or proscribed’.<sup>25</sup> Initial US interest in the extra-national control of certain psychoactive substances can be explained in part by a growing anxiety among American elites towards their use domestically, especially among particular minority groups. This in turn resulted in a desire to limit the export of such substances to the USA itself. These interconnected concerns conveniently deflected responsibility for behaviour deemed morally unacceptable by the US’s dominant Protestant culture. Yet, as with the construction of other global prohibition regimes, proselytization has also been a fundamental concern. Indeed, a powerful moralistic impulse underpins US efforts to globalize the prohibitive paradigm. America’s Puritan heritage not only delineates US domestic attitudes to the ingestion of certain psychoactive substances, it has also long driven the nation beyond what H. W. Brands calls an exemplarist approach to relations with the wider world.<sup>26</sup> Thus, even with the hard realities of *Realpolitik* sometimes reinforcing but repeatedly eclipsing the goals of US drug diplomacy, the desire for the transnational replication of US-style prohibition has remained constant. Often complemented by unilateral and bilateral endeavours, contemporary international legislation has gone a considerable way towards realizing this goal.<sup>27</sup>

The road to such ideological prominence has been long and not always smooth. Efforts to internationalize what was then its own evolving doctrine of drug prohibition began with the initiation of the Shanghai Opium Commission in 1909. This lay the foundations for the International Opium Convention signed in The Hague in 1912. Coming

<sup>25</sup> R. O. Keohane, ‘The Analysis of International Regimes: Towards a European-American Research Programme’, in V. Rittberger (ed.), *Regime Theory and International Relations* (Oxford: Clarendon Press, 1995), p. 43

<sup>26</sup> H. W. Brands, *What America Owes the World; The Struggle for the Soul of Foreign Policy* (Cambridge University Press, 1998), p. vii

<sup>27</sup> See D. R. Bewley-Taylor, *The United States and International Drug Control, 1909–1997* (London: Continuum, 2001), J. Gerber and E. L. Jensen (eds.), *Drug War American Style: The Internationalization of Failed Policy and Its Alternatives* (New York: Garland Publishing, 2001), W. B. McAllister, *Drug Diplomacy in the Twentieth Century: An International History* (London: Routledge, 2000), K. Bruun, L. Pan and I. Rexed, *The Gentlemen’s Club: International Control of Drugs and Alcohol* (Chicago: University of Chicago Press, 1975), pp. 132–49, J. Buxton, ‘The Historical Foundations of the Narcotic Drug Control Regime’, in P. Keefer and N. Loayza (eds.), *Innocent Bystanders: Developing Countries and the War on Drugs* (Basingstoke, UK: Palgrave Macmillan/Washington: The World Bank, 2010), pp. 61–93, and J. Sinha, *The History and Development of the Leading International Drug Control Conventions* (Report Prepared for the Canadian Senate Special Committee on Illegal Drugs, 2001), [www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/ille-e/library-e/history-e.htm](http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/ille-e/library-e/history-e.htm)

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into force seven years later, this was the first in a series of reinforcing treaties operating during the interwar years under the auspices of the League of Nations. While US endeavour during this period was tenacious, success was variable. Indeed, it was only the possession of hegemonic superiority that created the political conditions necessary for the globalization of US ideals. Many features of the foundational treaties certainly reflected US interests. Yet prior to 1945, the efforts of an eclectic mix of US government agencies, interest groups and what have been called ‘transnational moral entrepreneurs’<sup>28</sup> were often frustrated.<sup>29</sup>

In agreement on the need for some form of regulative framework, other delegations, predominately from European colonial states with an economic interest in the opium trade, resisted a wholesale imposition of Washington’s prohibitive philosophy. Like many other issue areas, a change in the global balance of power after World War II was to have a significant impact upon the realm of transnational drug control. Consequently, just as Washington exploited hegemonial stability to create favourable multilateral regimes in fields such as trade and finance, witness the Bretton Woods system and the General Agreement on Tariffs and Trade (GATT), US delegations utilized newfound economic and geopolitical dominance within the newly formed CND to better align the system to its normative perspective.<sup>30</sup>

As such, the US was intimately involved in the work begun in 1948 for the creation of some sort of ‘unified’ or ‘single’ treaty. Compromises within the document finally agreed in 1961 reflected the inability of the US delegation to cajole successfully other states into fully supporting a prohibitionist viewpoint. Nonetheless, as in other areas of UN activity during this period, its orientation greatly reflected the aspirations and goals of the USA: now a superpower on the world stage and the undisputed driving force of international drug control. Continuing US dominance was demonstrated by the key role its delegations played in the construction and ultimate form of the later drug control treaties, including the amending protocol instigated by the Nixon administration to strengthen the Single Convention in 1972. More recently, that the motif for the 1998 UNGASS not only reflected US conceptualizations of the issue, but also bore a remarkable resemblance to President Clinton’s then recent domestic pronouncements on the issue,<sup>31</sup> was

<sup>28</sup> Andreas and Nadelmann, *Policing the Globe*, p. 43

<sup>29</sup> Bewley-Taylor and Jelsma, *A Reinterpretation*, pp. 8–9

<sup>30</sup> Bewley-Taylor, *The United States*, pp. 16–53

<sup>31</sup> C. S. J. Fazey, ‘The Commission on Narcotic Drugs and the United Nations International Drug Control Programme: Politics, Policies and Prospects for Change’, *International Journal of Drug Policy*, 14, 2 (2003), 165