

## INTRODUCTION TO THE SYMPOSIUM ON DRUG DECRIMINALIZATION, LEGALIZATION, AND INTERNATIONAL LAW

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The UN Drug Conventions have nearly universal membership. For decades, the Conventions were widely interpreted as requiring signatory countries to criminalize the cultivation, distribution, sale, and possession of the substances that the Conventions listed in their most restricted schedules. These schedules included cannabis. However, over the past few years, countries around the globe have decriminalized or legalized the personal use of cannabis for medical and recreational purposes.<sup>1</sup> A number of states—including Uruguay, Canada, and eleven states in the United States—have established new regulatory frameworks for governing legal cannabis markets.<sup>2</sup> This symposium explores the implications of the current proliferation of cannabis liberalization reforms for the international drug regime, and for the development of international law and local practice more broadly. Are decriminalization and legalization reforms in conflict with states' treaty obligations, in letter or in spirit? Is this a moment of transformation for the international drug regime, or an existential threat to its future? While of great practical importance, these dynamics also bear more broadly on questions of how regimes interact (such as drug prohibition, human rights, and public health regimes), how treaties and international institutions evolve and change, and how domestic politics, law, and practice bear on the development and transformation of international law.

The global spread of cannabis liberalization reforms illustrates the bottom-up, horizontal, and (more generally) multidirectional character of international legal change. The rapid spread of decriminalization and legalization initiatives by U.S. states and localities have acutely challenged U.S. federal policy after the United States, for decades, had championed an expansive interpretation of international obligations to criminalize the personal use of drugs.<sup>3</sup> In Latin American countries, which have long been subject to international pressure to toughen their anti-drug laws, constitutional courts (including in Colombia, Argentina, and Mexico) have struck down laws criminalizing the personal use of cannabis on the grounds that they violate individual rights to autonomy and privacy. International organizations such as the International Narcotic Control Board, the UN Commission on Narcotic Drugs, and the UN Office of Drugs and Crime face increasing pressure to reconsider their traditional commitments to prohibitionist drug policies in light of growing criticism of the adverse consequences of such

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<sup>1</sup> Ely Aaronson, *The Strange Career of the Transnational Legal Order of Cannabis Prohibition*, 4 UCI J. OF INT'L, TRANSNATIONAL, & COMP. L. 78 (2019); DAVID R. BEWLEY-TAYLOR, *INTERNATIONAL DRUG CONTROL: CONSENSUS FRACTURED* (2012); Neil Boister, *Waltzing on the Vienna Consensus on Drug Control? Tensions in the International System for the Control of Drugs*, 29 LEIDEN J. INT'L L. 409 (2016).

<sup>2</sup> Robert Howse & Antonia Eliason, *A Higher Authority: Canada's Cannabis Legalization in the Context of International Law*, 40 MICH. J. INT'L L. 327 (2019); Sam Kamin, *Legal Cannabis in the US: Not Whether but How?*, 50 U.C. DAVIS L. REV. 981 (2015); ROBERT MIKOS, *MARIJUANA LAW, POLICY, AND AUTHORITY* (2017).

<sup>3</sup> Robert Mikos, *Marijuana Localism*, 65 CASE W. RES. UNIV. L. REV. 719 (2015).

policies on human rights, public health, and human development. Such criticisms have spurred the World Health Organization, the UN Development Programme, and other UN entities to become increasingly involved in drug policy debates. Their increasing involvement has helped reconfigure the ideas, interests, and institutions that underpin the development and (potential) transformation of this important field of transnational crime governance.

The essays in this symposium explore political, interpretive, and normative questions raised by the current wave of cannabis liberalization initiatives. They provide empirical insights that are pertinent to current theoretical debates about the nature of the interaction between international and domestic legal change and practice. In a recent edited volume examining the transnational legal ordering of criminal justice policies in a wide variety of issue areas (from human trafficking and money laundering to capital punishment and prison conditions), we have highlighted the central role of domestic actors in shaping the meaning of international norms.<sup>4</sup> This work forms part of a broader effort to reframe analysis from dichotomized representations of international and domestic legal processes, and to capture the recursive interactions between top-down, bottom-up, and horizontal processes of transnational norm-making.<sup>5</sup> The development of drug policies in the coming years will provide a rich testing ground for theories elucidating the interactions between international and domestic lawmaking processes, with important normative implications.

In the opening essay of this symposium, John Collins explains the historical evolution of the international drug control treaties.<sup>6</sup> Collins traces the political debates during the League of Nations era that led to cannabis' classification as an internationally controlled substance. He then examines the controversies over the wording and interpretation of prohibition norms in the UN Drug Conventions. Building from recent historical work that moves beyond the conventional, U.S.-centric perspective on the development of the international drug control regime, he shows how greater emphasis on the contingency, flexibility, and complexity of the Conventions empirically supports a pluralist understanding of the regime's norms and purposes. This pluralist understanding offers support for the legitimacy of domestic efforts to abandon the prohibitionist interpretive frame that dominated countries' policy agendas in previous decades.

David Bewley-Taylor's essay assesses the current and future development of the drug prohibition regime.<sup>7</sup> He shows that the Conventions contain a number of textual ambiguities and escape clauses that provide signatory states with considerable latitude to apply their penal provisions in accordance with their domestic policy preferences. In addition, the indeterminacy of the Conventions allows regime actors (such as the International Narcotic Control Board) to absorb and ultimately endorse normative shifts towards decriminalization. However, Bewley-Taylor observes that, in contrast to the Conventions' ambiguity about the legitimacy of decriminalization reforms, efforts to legalize non-medical and non-scientific uses of cannabis might be irreconcilable with the Conventions' language and spirit. The essay examines the limits of recent interpretive efforts to accommodate the operation of legally regulated cannabis markets within the ambit of the Conventions. It also considers the strategies that countries seeking to build a supranational structure for the regulation of legal cannabis markets might deploy.

Antonia Eliason and Robert Howse consider the potential use of international norms concerning public health, human rights, and rights of indigenous peoples to spur new thinking about drug policy, particularly in light of its

<sup>4</sup> [TRANSNATIONAL LEGAL ORDERING OF CRIMINAL JUSTICE](#) (Gregory Shaffer & Ely Aaronson eds., 2020). *See also* Ely Aaronson & Gregory Shaffer, *Defining Crimes in a Global Age: Criminalization as a Transnational Legal Process*, LAW & SOC. INQUIRY (forthcoming) (providing a framework, grounded in multiple empirical examples, for analyzing the changing nature of criminalization processes under current conditions of transnationalization).

<sup>5</sup> [TRANSNATIONAL LEGAL ORDERS](#) (Terence C. Halliday & Gregory Shaffer eds., 2015).

<sup>6</sup> John Collins, *A Brief History of Cannabis and the Drug Conventions*, 114 AJIL UNBOUND 279 (2020).

<sup>7</sup> David Bewley-Taylor, *Politics and Finite Flexibilities: The UN Drug Conventions and Their Future Development*, 114 AJIL UNBOUND 285 (2020).

racist and colonial heritage.<sup>8</sup> In recent years, a coalition of UN entities, such as the World Health Organization, the UN Development Programme, and the Joint UN Programme on HIV and AIDS, have addressed the grave social costs of the “war on drugs.” To illustrate the potential and limits of recent efforts to infuse progressive ideals into drug policy, Eliason and Howse analyze the International Guidelines on Human Rights and Drug Policy—a document summarizing this coalition’s main findings and policy recommendations. They find that the new emphasis on reconciling drug policies with states’ human rights responsibilities helps to legitimize domestic policy experimentation with non-punitive responses to drug use. However, the current framing of the tensions between drug policy imperatives and human rights norms does not contest the centrality of the criminal enforcement model and thus does little to promote structural change in light of the systemic failures of the prohibitionist agenda. The critical reading offered by Eliason and Howse demonstrates that many of the challenges lying ahead for the international drug control system invoke the classic quandary of whether the master’s tools can be used to dismantle the master’s house.

In the next essay, Robert Mikos assesses the development of cannabis research policy in the United States to explore broader questions about the two-way relationship between international law and national drug policies.<sup>9</sup> The UN Drug Conventions have long been criticized for impeding the development of scientific research to test the medical potential of cannabis. As one observer recently wrote, such impediments create a Catch-22 dynamic in which “marijuana cannot be moved from Schedule I to Schedule II unless there is a clinical evidence of medical benefit, but that evidence cannot be obtained so long as it remains in Schedule I.”<sup>10</sup> Mikos’s essay shows how the Trump Administration has adopted a stricter interpretation than that held by its predecessors with respect to the Conventions’ restrictions on medical cannabis research. He argues that the Trump Administration may be using international law as a convenient excuse to block policy reform that it opposes on substantive grounds, but that it cannot otherwise stop without incurring political costs. Importantly, in light of the significant influence of the United States on the development of international drug policy, these instrumental uses of international law “at home” have powerful impacts abroad, perpetuating the Catch-22 situation that has long inhibited liberalization of the legal norms governing medical uses of cannabis.

Álvaro Santos explores the driving forces that facilitate the diffusion of decriminalization and legalization reforms in Latin America.<sup>11</sup> After decades in which Latin American countries were subject to severe pressure to adopt a “tough on crime” approach that predominantly focused on strengthening the enforcement capacities of policing and penal institutions, they are increasingly adopting more flexible interpretations of their international obligations. Santos discusses the harmful consequences of the repressive policing and penal strategies adopted by Latin American governments during the “war on drugs” era. He highlights the important role played by domestic civil society actors in spurring national legislatures and courts to adopt cannabis law reforms, highlighting the ways in which such reforms address human rights and public health concerns, as well as political economy considerations. The increasing diversification of drug policies in the Americas reflects a watershed in which governments are designing new legal strategies to regulate markets that had long been viewed as criminal. The future development of legalization regimes in the region will provide a rich laboratory for comparative analysis of the consequences of different models for regulating drug markets. Substantively, such legalization processes potentially could curtail the human rights violations that proliferated during the decades-long international “war on drugs.”

<sup>8</sup> Antonia Eliason & Robert Howse, *Towards a Global Governance Regime: The Inadequacies of the UN Drug Control Regime*, 114 AJIL UNBOUND 291 (2020).

<sup>9</sup> Robert A. Mikos, *Using One Dying Regime to Save Another: The Influence of International Drug Conventions on United States’ Cannabis Research Policy*, 114 AJIL UNBOUND 296 (2020).

<sup>10</sup> JERROLD WINTER, *OUR LOVE AFFAIR WITH DRUGS: THE HISTORY, THE SCIENCE, THE POLITICS* 41 (2020).

<sup>11</sup> Álvaro Santos, *Drug Policy in the Americas: A Welcome Challenge to International Law*, 114 AJIL UNBOUND 301 (2020).

In the final essay, Constanza Sánchez Avilés examines recent developments in cannabis law reform in European countries, and assesses the prospects for the development of a more coherent cannabis policy at the European Union level.<sup>12</sup> Avilés surveys the variety of national cannabis policies in force today in EU countries, ranging from *de jure* decriminalization in Portugal to strict prohibition in Sweden, with different levels of *de facto* decriminalization in countries such as Spain, Germany, and the Netherlands. The considerable divergence of national preferences in the area of cannabis policy, and the constraints posed by the principle of subsidiarity and allocations of competence within the constitutional structure of the Union, have so far hindered the development of EU regional drug policies. However, this deferential approach faces increasing pressure in light of movement towards the legalization of recreational cannabis in Luxembourg, the growing legalization of medical cannabis across the region, and pressure to agree on a common EU position in international drug policy fora. Avilés concludes by highlighting the advantages of a diversity of drug policies in Europe in terms of generating knowledge regarding policy successes and failures, while emphasizing the potential value of greater EU involvement in international fora in this area.

Legal cannabis markets are here to stay. Their future evolution will continue to steer debates about the interpretation of the UN Drug Conventions and about the need to develop more flexible tools of transnational legal ordering to address the governance challenges posed by legal and illegal markets. This symposium helps clarify the challenges that lie ahead in this rapidly changing area of international law. It shows that these challenges are best viewed in transnational terms, as international law interacts with national and subnational law and practice in a changing and highly contested normative landscape.

<sup>12</sup> Constanza Sánchez-Avilés, *Cannabis Policy Innovations and Challenges for EU Coordination in Drug Policy*, 114 AJIL UNBOUND 307 (2020).