



High compliance, *a lex lata* legalization for the non-medical cannabis industry

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

Executive Summary

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In the current legal landscape, it is possible to craft policy that combats drug abuse and 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 such a 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 driven legal scholarship away 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 all controls, provided that two requirements are met: effective measures to avoid harms & 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 tensions and rerailing international relations on *Cannabis* matters on less conflictual tracks.

Keywords: Cannabis, international law, treaty interpretation, drug control, 1961 Single Convention, recreational use, non-medical use, abuse, compliance, intertemporality, international relations

OUTLINE OF CONTENTS

Part I: Acknowledgment

1. INTRODUCTION

The “war on drugs” was impulsed in the 1970s in the USA and internationalized from the 1980s onwards. Like any war, it has been associated with distorted information, one of which being that “the prohibition of cannabis” is enshrined in treaty law, and impossible to avoid.

Yet, the main treaty on cannabis –**1961 Single Convention on narcotic drugs (C61)**– was written before the “war on drugs” even started. During the negotiations, in 1961, US representative and of cannabis prohibition enthusiast Harry **Anslinger left the room; USSR ambassador defended that “prohibition should take the form of a recommendation only;”** the Popular Republic of **China and half of Africa were not even present;** and the countries left replaced all mentions of “cannabis prohibition” by “cannabis control;” they also inserted clear flexibilities, directly exempting non-medical use and related activities.

It would be anachronistic to describe the text of the Single Convention as a “drug war” treaty: **The C61 is not a “drug war” nor is it a prohibitionist treaty;** it is an interpretation, applied retrospectively to the treaty after 1961, which is prohibitionist.

The lack of any strong rule-based grounds for the criticism of Uruguay and Canada by advocates of prohibition evidenced the need to pay a closer attention to the interpretations of the C61, which, as many treaties, is the delicate result of a complex compromise of governments from the past. **Interpretation (or hermeneutics)** are a **normal part of the continuum of lawmaking:** idea, drafting, consensus, adoption, interpretation, then implementation...

2. APPROACH

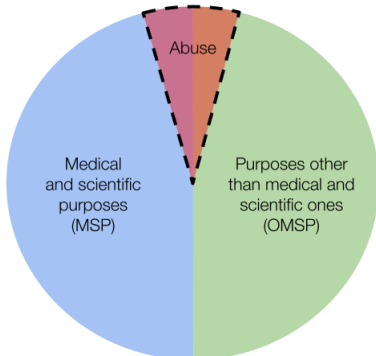
The method used relies primarily on a textual analysis of the C61, but it also seeks to confirm unclear elements in the text of the treaty via analyses of preparatory works and minutes from the drafting negotiations, as well as elements of teleological interpretation. It seeks to rely on the general rules of international law, and customs and precedents in treaty interpretation.

3. TREATY REGIME FOR NON-MEDICAL CANNABIS

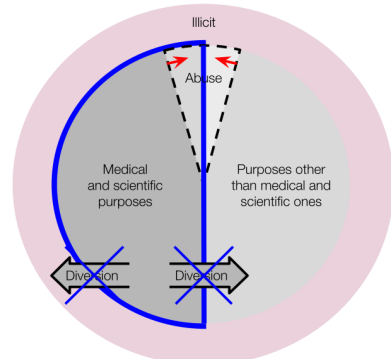
The C61 is the treaty that regulates *Cannabis* and its products. Other drug control Conventions of 1971 and 1988 entirely point at the C61 when it comes to *Cannabis*). **However, the words “Recreational use”/“Adult Use” (RAU) are never mentioned in the C61 or the 2 other Conventions.**

As the WTO Appellate Body once stated: sometimes the absence of something means that it simply isn't there... Chapter 3 details all provisions related to *Cannabis* in the C61 to try to find out *if* RAU is present somewhere, and if so, which treaty provisions govern it. It finds **two “classes” of uses: medical & scientific (MSP) v. other than medical and scientific (OMSP).** There is also “abuse” but it refers to “substance use disorders” and is somehow an added layer on top of MSP and OMSP: both types of uses can be liable to “abuse.”

Types of uses + “abuse” in the C61



Object/goal of the C61 (*ratio legis*)



Red: reduce the extent of abuse, for all purposes.
Blue: limit between MSP and OMSP (incl. avoiding diversion)

The C61 is the treaty that regulates *Cannabis* and its products. Other drug control Conventions of 1971 and 1988 entirely point at the C61 when it comes to *Cannabis*). When the 1988 Convention calls to criminalize an activity, it refers to activities that are illicit under the C61. The focus needs therefore to be placed on C61.

However, the words “Recreational use” or “Adult Use” (RAU) are never mentioned in the C61 or indeed in the 2 other Conventions.

It follows that, if RAU is not a medical use, it is other than medical and scientific use: recreational/adult use is OMSP.

Article 4: « *The parties shall take such legislative and administrative measures as may be necessary: (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.* »

The section in red is always truncated when Article 4 is quoted. **But these words are fundamental: not quoting them is a bias.**

The C61 does not limit cannabis to medical and scientific purposes: this limitation is subject to the exemption for OMSP. These provisions were purposefully added by the drafters, who knew it applied to cannabis. They are repeatedly explained in the official Commentary on the C61.

What that means, is that **the Convention separates MSP (which are subject to heavy controls) from OMSP (which are exempt)**. For both MSP & OMSP, countries have to prevent abuse (= avoid substance use disorder). However, there is a different tier of applicable measures that States ought to apply for each purpose: MSP or OMSP. The tier for OMSP is far less stringent than that of MSP.

More precisely, Article 4(c) subjects the limitation to **Article 2(9)**.

Article 2(9) is the central regime for non-medical cannabis. It lays down **two conditions** for this exemption to be compliant with the C61:

- 1) Application of **effective measures to reduce the potential abuse and harm** from cannabis products for OMSP (Art. 2(9)a.). It can be “denaturing” but it can be other “appropriate means” to reduce harm.
- 2) **Annual reporting**, under Article 20(1)b.: send to INCB the amount of cannabis managed by the OMSP industry annually (Art. 2(9)b.). INCB already has included a section for that in its Form C (Part II.B).

International legal provisions for medical & non-medical *Cannabis*

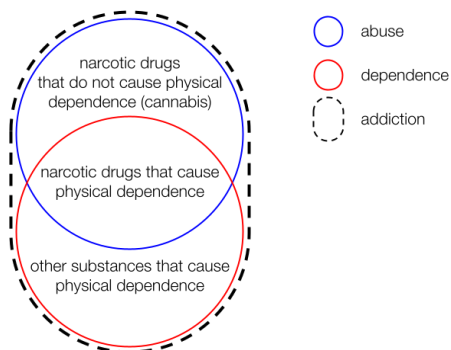
Activity	Relevant provisions of the C61	
	MSP (medical)	OMSP (non-medical)
Cultivation	Article 28(1)	Article 28(2)
Control over activities in the supply chain involving:	Article 2(1)	Article 2(9)b.
“Cannabis” (<i>tops</i>)	Article 2(6)	Article 20(1)b.
“Cannabis resin”	Article 19	
“Extracts and tinctures”	Article 20	
	Article 21	
	Article 23	
	Article 28	
	Article 29	
	Article 30	
	Article 31	
	Article 32	
	Article 33	
	Article 34	
	Article 37	
Prevention of substance use disorders & harm reduction	Article 38	Article 2(9)a.

Part II: Resolution

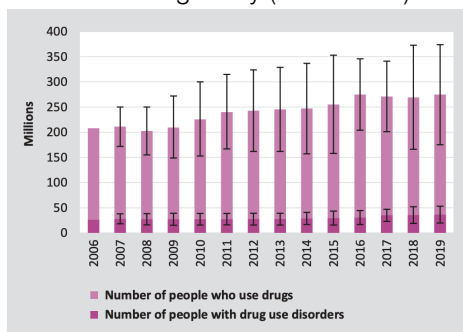
4. THE MEANING OF WORDS: ABUSE, ILL EFFECTS, ADDICTION, MISUSE

It is clear that the drafters had a common understanding of “abuse” which, at the time, was already distinct from “drug use” and was associated with “ill effects” and other qualifications of a disease. The provisions that apply are discretionary to governments: either penal measures or, more logically for an illness, measures of prevention, care, and treatment. Nowadays “abuse” is often replaced by “substance/drug use disorder.” It is never a synonym of all RAU.

How the drafters of the C61 perceived “abuse,” “dependence,” and “addiction”



Number of people with drug use disorders globally (2016-2019)



© United Nations, World Drug Report 2021

5. THE MEANING OF WORDS: NON-MEDICAL USE

The use of “non-medical” to designate RAU is reviewed in Chapter 5. In the C61, “OMSP” and “non-medical use” are interchangeable. Since 1961, **the vast majority of stakeholders – governments, INCB, UNODC, WHO– has referred to RAU as a “non-medical use.”**

Recently, one country legalized recreational cannabis for “other than medical and scientific purposes” making a direct link with Article 2(9) of the C61.

6. ON TIME & INTERTEMPORALITY

Article 2(9) refers to “other than medical and scientific uses common in industry” which invokes the “cannabis industry.” There are other vague terms. To be sure that we can interpret this in our modern understanding of “industry” we need to study the possible intertemporality of treaty provisions at stake.

While **normally treaties have to be analyzed in their original context** (here, 1961), sometimes the drafters leave **some provisions open for future variability**. Chapter 6 shows that this is precisely the case for Article 2(9) and the drafters of the C61 wanted a flexible exemption that could be used in the future, instead of an easy option to amend the treaty.

To confirm this, a dig into the “*raison d’être*” (rationale, object & purpose) of the treaty is necessary. Not only does it confirm it, but it also reinforces the view of C61 as a **Framework Convention on the Control of Some Medicines within the Medical and Pharmaceutical Sectors**.

7. PROHIBITION, IN THE TEXT?

Prohibition is neither heavily present in the text nor a clear intention of the drafters. In initial drafts there was a clear “Prohibition of Cannabis” but the discussions led to its change into “Control of Cannabis.” Any mandatory prohibition, not only for *Cannabis*, was intentionally written out. Prohibition is present in the final C61 only as one possible option (an escape clause from the general regime of control).

The fact that the drafters discussed the concept of “Cannabis intoxication” without particular problem and knew it would continue, legally, without any problem.

The only question for which tensions seems to remain is the one of non-industry RAU cannabis, chiefly, home-grown and personal cultivation. Because the C61 is also subject to the constitutional provisions of each country, many of which protect the right to undertake harmless activities in the private sphere, this seems to be outside of the scope of the Convention.

8. CONCLUSION

Axiological lacunæ, known incompleteness, deliberate gap, voluntary silence– this is perhaps what better characterizes the C61 with regards to the recreational / adult uses of *Cannabis* products. The many acknowledged silences of the drafters on key matters are difficult to ignore. OMSP are purposes that “the system does not seem to regulate, matters as to which it seems not to speak.” 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.”**

Countries are not bound to adopt measures that are not expressly or impliedly required by the treaties. As any pragmatic lawyer would conclude: **“If the drafters had meant to say that, they would have said it.”**

The many silences, the place of prohibition as an escape clause *ab intra*, and the purposefully-added clauses of exemption, everything sketches a legal landscape allowing the RAU of *Cannabis* products.

(1) Ensuring that non-medical *Cannabis* products are safe, not harmful, and not liable to SUD or to otherwise undermine public health and welfare –by any appropriate mean– is the way to align with the preamble and *raison d’être*, and comply with Articles 2(9)a. and 38 (preventing abuse of cannabis products) and Article 28(3) (preventing misuse of the leaves).

(2) Sending annual statistics to the INCB (via Form C, Part II.B) on the amount of non-medical cannabis products handled in the legal industry, thus complying with Articles 2(9)b. and 20(1)b.

In addition, maintaining separate, on the one hand MSP sectors, on the other hand OMSP sectors (cannabis industry and industrial hemp) allows compliance with Article 4(c) and 28(1) & (2).

Nothing more.

Both the text and the legal history of the C61 support this interpretation, as well as subsequent actions and practice by different parties. The Single Convention includes profusion of detailed regulations for the medical market, and on the other hand **(1) it has no direct and clear provision on recreational uses, (2) it includes clear intertemporal flexibilities on the non-medical uses, and (3) prohibition merely an optional, escape clause, limited to extreme situations.**

Parties willing to “legalize cannabis” are provided with fairly precise establishing provisions, **legal grounds to move forwards *de lege lata*** (or ***lex lata*** = without the need for a change in the law as it is currently), a compliance mechanism (statistical reports), and no further obligations regarding production, manufacture, export, import, distribution of, trade in, use and possession. The concept of “industry” is not defined and can encompass the different existing forms, including non-profit industry models.

The interpretation presented affects neither the performance of other treaty provisions (MSP or other drugs) nor the performance of their obligations by other countries. Additionally, it echoes the obligations of countries under international human rights law (outlined by scholars [van Kempen and Fedorova](#)). It gives the State Parties to the C61 the ability to **overcome many of the rule tensions experienced in recent years** with regards to “cannabis legalization” in some countries. It essay could enlighten efforts to regulate adult uses of cannabis in compliance with the Single Convention for other State Parties.

How to regulate non-medical cannabis today in compliance with the Single Convention on narcotic drugs?

include the annual tonnage of non-medical cannabis in the reporting to the INCB (Form-C, Part II.B)

implement effective prevention of use disorders and harm reduction policies (ensure in good faith that appropriate means are implemented to reduce harms and risk of use disorders from legal non-medical cannabis products).

Download the full report:

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Kenzi **Riboulet-Zemouli**
March 2022



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The image shows the cover of a report. At the top, the title "High compliance, a lex lata legalization for the non-medical cannabis industry" is written in bold black font. Below it, the subtitle "How to regulate recreational cannabis in accordance with the Single Convention on narcotic drugs, 1961" is in a smaller black font. The author's name "Kenzi Riboulet-Zemouli" and the date "March 2022" are listed below the subtitle. The central part of the cover features a photograph of a green grasshopper resting on a large, vibrant green leaf. The grasshopper is facing right, and its body is a bright green color. The leaf has prominent veins and a slightly serrated edge. The background is a soft, out-of-focus green. At the bottom of the cover, the text "FAAAT editions" is printed in a small, black font.

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