

To: **Senator A. Raynell Andreychuk**  
Chair, Standing Senate Committee on Foreign Affairs and International Trade  
Cc: AEFA Senate Committee members  
Re: Bill C-45 and international obligations  
From: Martin Jelsma (TNI), David Bewley-Taylor (GDPO), and John Walsh (WOLA)

Amsterdam, Swansea, Washington D.C., 27 March 2018

Dear Senator Andreychuk,

We have been following with great interest your Committee's deliberations on 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 international obligations. Legal tensions are growing within the international drug control regime as Canada and several other countries move towards or seriously consider legal regulation of the cannabis market for non-medical purposes. Having worked within the field of international drug policy for over 20 years, we've recently been exploring the best options for dealing with those treaty tensions with a group of international lawyers and representatives of countries like Uruguay, the Netherlands, Switzerland, Colombia and Jamaica. As a result we presented an in-depth report on "Balancing Treaty Stability and Change: *Inter se* modification of the UN drug control conventions to facilitate cannabis regulation" at the UN Commission on Narcotic Drugs (CND) in Vienna earlier this month.<sup>1</sup> With this letter we take the liberty to provide some comments on the recent discussions and testimonies in your Committee, aiming to add nuance to the key arguments presented and to bring to your attention some points and options that in our view merit more consideration in the ongoing debate.

**Firstly**, we'd like to express our appreciation for the recognition by Mark Gwozdecky of Global Affairs in his testimony on Wednesday 21 March, that "*Canada's proposed approach to cannabis will result in Canada being in contravention of certain obligations related to cannabis under the UN drug conventions*". As we argue in our report, denying the reality of partial non-compliance or hiding behind dubious legal arguments to accommodate regulated cannabis markets does little for the integrity of the regime, undermines respect for international law more broadly and is not sustainable. We also agree with Mr Gwozdecky that drug conventions should not be an inflexible set of norms, that they should evolve according to the national circumstances and priorities of countries, and that "*withdrawing from that framework would be an excessive and unnecessary response and would also be detrimental to both Canada's and the international community's interests*". Based on our own informal dialogues involving officials from numerous governments, UN agencies, and legal scholars, we can also confirm that the position Canada takes in this regard is

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<sup>1</sup> Martin Jelsma, Neil Boister, David Bewley-Taylor, Malgosia Fitzmaurice and John Walsh, *Balancing Treaty Stability and Change: Inter se modification of the UN drug control conventions to facilitate cannabis regulation*, GDPO/ TNI/WOLA, March 2018. To download the paper: [https://www.tni.org/files/publication-downloads/stability\\_change-inter\\_se\\_mofication\\_gdpo-tni-wola\\_march\\_2018.pdf](https://www.tni.org/files/publication-downloads/stability_change-inter_se_mofication_gdpo-tni-wola_march_2018.pdf).

For a video registration of the CND side event on *Regulating cannabis in accordance with international law: Options to explore*, Vienna, 16 March 2018, see: <https://www.tni.org/en/article/regulating-cannabis-in-accordance-with-international-law>

followed with great interest abroad, and that several other countries are keen to examine together with Canada the best way to align the new posture with international obligations. Jamaica, for example, said at the recent CND that *“we maintain that the current international drug control architecture does not allow for the requisite policy space to design appropriate domestic policies suited to changing national realities”*, and called for a *“mechanism to review the drug control architecture and propose a recalibration of the response of the international community in keeping with evolving realities”*.<sup>2</sup> As we argued in an *iPolitics* opinion article last December, acting unilaterally may not be in Canada’s best interests; it could be wiser to act in concert with like-minded states.<sup>3</sup>

**Secondly**, we’d like to correct some assertions made by Steven Hoffman of York University during his testimony on March 22:

- (a) Regarding the timeline for a withdrawal procedure, Prof. Hoffman said it would take a full year to come into effect, and that therefore if the *“cabinet today signalled its withdrawal, we wouldn’t be able to legally legalize cannabis under these treaties until July 1, 2019”*. The 1961 UN Single Convention, however, specifies that if formal notification of withdrawal from the treaty is submitted before July 1, it takes effect on January 1 of the next year; if notification is submitted after July 1, then withdrawal takes effect a full year later. In the case of the 1988 Convention, a party may denounce the Convention at any time, and it shall take effect one year after the date of receipt of the notification (article 30).
- (b) With regard to reservations, Prof. Hoffman said that to obtain a reservation while being part of a treaty (e.g., without first withdrawing from it), *“the treaties specify that you need to have enough countries positively grant Canada the exception it would be requesting. When Bolivia tried that for coca leaf, there weren’t enough countries that were willing to go out of their way to give Bolivia the exception. I don’t think Canada would get it either”*. The treaties, however, do not mention such an option, and Bolivia never attempted that route. In fact, what Bolivia attempted first was to propose a treaty amendment. This is fundamentally different from a reservation since it would apply to all parties and therefore requires almost unanimous consent. In-depth understanding of the Bolivian case rests on the fact that one of our group, Martin Jelsma, acted as an expert advisor to La Paz during that country’s successful efforts to realign its international obligations with domestic policy shifts vis-à-vis coca.
- (c) Regarding treaty flexibilities, Prof. Hoffman refers to a *“constitutional override”*, claiming *“that the treaties don’t expect countries to violate their own constitutions in order to be in compliance with the treaties”*. However, while the penal provisions of the 1961 and 1971 conventions are indeed subject to *“constitutional limitations”*, that escape clause does not exist for the obligations under the 1988 Convention except for offences related to personal use.

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<sup>2</sup> Statement by Ms. Lishann Salmon, First Secretary, Permanent Mission of Jamaica to the United Nations, Geneva, Sixty-first Session of the Commission on Narcotic Drugs, Vienna, 13 March 2018. [http://www.unodc.org/documents/commissions/CND/CND\\_Sessions/CND\\_61/Statements/61st\\_CND\\_General\\_Debate\\_Statement\\_Jamaica.pdf](http://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_61/Statements/61st_CND_General_Debate_Statement_Jamaica.pdf)

<sup>3</sup> John Walsh, Tom Blickman, Martin Jelsma and Dave Bewley-Taylor, *“Yes, legalizing marijuana breaks treaties: We can deal with that”*, *iPolitics*, 11 December 2017. <https://ipolitics.ca/2017/12/11/yes-legalizing-marijuana-breaks-treaties-not-problem/>

(d) With regard to federal responsibility for treaty adherence at state level, Prof. Hoffman said: “*It is on the U.S. federal government to work with its states to make sure it is in compliance with international treaties, but it’s hard to hold that federal government culpable, given they’ve taken a strong adherence to the treaties as a policy ... From a legal perspective, it’s hard to blame them*”. From an international law perspective, however, that is an untenable position. As the watchdog of the UN drug control treaties, the International Narcotics Control Board, has repeatedly underscored: “*Regardless of whether they are federal or unitary States, all parties to the conventions have a legal obligation to give effect to and carry out the provisions of the convention within their own territories*”.<sup>4</sup>

**Thirdly**, Prof. Mark Kleiman of New York University referred in his March 22 testimony to our report and specifically to the option of *inter se* modification of the drug conventions. In response to questions, Prof. Hoffman immediately discarded the option by saying that it is “*a mechanism intended to allow countries to have stricter rules than what their treaties require ... It’s not designed as a way to allow countries to reduce the obligations. It would work in the opposite case, not this case.*” We strongly disagree with Prof. Hoffman’s view on this matter. As we explain in full detail in our report, while relatively uncommon as a practice in international law, *inter se* modification could also be applied by a group of treaty parties to derogate from certain obligations (*contra legem*), subject to conditions regarding the rights of other parties and the overall object and purpose of the treaty. In fact, from our consultations with international treaty lawyers, *inter se* modification appeared as a legitimate safety valve, and perhaps under current circumstance even the most appropriate one, for collective action by a group of parties to adjust the drug control treaty regime and make it fit for purpose again to address the drug policy challenges of today.

We very much hope that these comments prove useful for your deliberations and the elaboration of your report. Please feel free to ask any questions for further clarification on the points raised above or on Canada’s options with respect to the UN drug control treaties more generally. Should you feel it beneficial, we would be happy to provide testimony to your Committee as you move towards filing your report at the end of next month.

With our highest regard,

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<sup>4</sup> United Nations, *Report of the International Narcotics Control Board for 2015*, 2 March 2016, p. 55, para. 404. [http://www.incb.org/documents/Publications/AnnualReports/AR2015/English/AR\\_2015\\_E.pdf](http://www.incb.org/documents/Publications/AnnualReports/AR2015/English/AR_2015_E.pdf)