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Meeting regarding Bill C-45 as it relates to Canada's international obligations

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Madam Chair, honourable senators, thanks so much for inviting me to appear before this committee today. The international dimensions of Bill C-45 are of utmost importance not only for Canada itself but for many countries around the world that are moving in the direction of legally regulating the cannabis market. The position Canada will take vis-à-vis the UN drug control conventions could well be a crucial moment in the long and troubled history of international drug control. I sincerely hope that my participation today will be useful for your deliberations and for the recommendations in your final report.

Let me make clear from the outset that I support the policy change proposed by Bill C-45, and that the Transnational Institute has been actively involved in similar drug law reform initiatives around cannabis in other countries, providing expert advice and facilitating meetings to exchange experiences and to discuss the dilemmas countries are confronted with in that process. The international drug control system was built with the aim to protect the health and welfare of humankind, and the current crisis around opioid overdose deaths here in Canada and in the US is a stark reminder of the importance to safeguard its key principles and to improve the functioning of that system.

In that sense, I fully agree with the statements made last month before this committee by Mr. Gwozdecky of Global Affairs that “Canada’s approach is fully compliant with the overarching goals of these conventions”, but also with his acknowledgement that it “will

result in Canada being in contravention of certain obligations related to cannabis under the UN drug conventions”. There’s simply no way around that: denying that reality would be dishonest and disrespectful of international law. And for TNI, and fortunately still for many countries including Canada, respect for international law is crucial for a basic degree of global order and governance. And *pacta sunt servanda*, so Canada runs into a legal problem, just as Uruguay and the US already have, that requires due attention and needs to be resolved at some point in the future.

From that perspective, we started four years ago to explore with a group of international lawyers, UN officials, government representatives and civil society experts, the best options for dealing with those undeniable treaty tensions, and how to move forward with legal regulation of cannabis while respecting basic principles of international law. The outcomes of those consultations are laid down in a recent report “Balancing Treaty Stability and Change: *Inter se* modification of the UN drug control conventions to facilitate cannabis regulation” that we presented in March at the UN Commission on Narcotic Drugs in Vienna. Though the report is only available right now in English, I would like to request that the entire report be made available to the Committee for its consideration (I’ve also brought printed copies for those who want).

I’ve been closely following your Committee’s deliberations of Bill C-45 until now, and I don’t want to repeat things that have been discussed in earlier sessions in some detail already, so allow me to highlight some key points from our report that haven’t received much attention thus far:

- 1 Especially the inclusion of cannabis and coca leaf in the strictest control schedules, has been an historical mistake which has weakened and delegitimized the whole system, and the moment is long overdue to repair those mistakes, refocus priorities and to make the system more evidence-based and ‘fit for purpose’. An important step in that direction is the pre-review process of cannabis currently undertaken by the World Health Organization. The WHO Expert Committee on Drug Dependence is mandated by the treaties to recommend on the scheduling of substances under the 1961 and 1971 Conventions but has never in its history reviewed the current classification of cannabis which was basically copy-pasted from the pre-War treaties into the Single Convention. In June the Expert Committee will meet to discuss the outcomes of the pre-reviews of cannabis, hashish, extracts, THC and dronabinol, and surely proceed to undertake a critical review and provide recommendations for rescheduling. Most likely the WHO will also suggest improvements in the confusing definitions of the various cannabis-related substances in the 1961 Convention and the inconsistency related to the inclusion of the cannabinoids under the 1971 Convention.
- 2 An increasing number of countries are discussing or moving towards legal regulation of the cannabis market. The trend is most visible in the Americas (US States, Canada, Uruguay and several Caribbean countries – Jamaica, St Vincent and the Grenadines,

Antigua, Belize), getting closer to a breakthrough in some European countries (The Netherlands, Switzerland, Spain, Germany) as well as in New Zealand and Australia, but also followed with interest in a few African (Morocco, South Africa) and even Asian (Thailand, Myanmar, India) countries. Reaching a new global consensus to revise or amend the UN drug control conventions to accommodate cannabis regulation, however, does not appear to be a viable political option in the foreseeable future. As the 2016 UNGASS and also the latest CND session have clearly shown, the global consensus on drug policy is fractured beyond repair.

- 3 The nature of the drug control regime limits the formal avenues for consensus-based treaty evolution and modernisation and forces states -like Canada- that want to move forward with reforms they consider to be in the best interest of their citizens but are in contravention of certain treaty obligations, to adopt temporarily a stance of respectful non-compliance, or to take extraordinary measures, such as the choice made by Bolivia to withdraw and re-adhere with a new reservation with regard to coca leaf.
- 4 The option of *inter se* modification, based on article 41 of the Vienna Convention on the Law of Treaties, was specifically designed to find a balance between the stability of treaty regimes and the necessity of change in absence of consensus, and appears to provide a useful safety valve for the state of paralysis of the global drug control regime today. A quote from the Commentary on the Vienna Convention: *“Due to the conflicting interests prevailing at an international level, amendments of multilateral treaties, especially amendments of treaties with a large number of parties, prove to be an extremely difficult and cumbersome process; sometimes, an amendment seems even impossible. It may thus happen that some of the States Parties wish to modify the treaty as between themselves alone.”*
- 5 An *inter se* agreement on cannabis regulation would allow a group of countries to modify certain treaty provisions amongst themselves alone, while maintaining a clear commitment to the original treaty aim to promote the health and welfare of humankind and to the original treaty obligations vis-à-vis countries that are not party to the *inter se* agreement.
- 6 A legally grounded coordinated collective response has clear benefits compared to a chaotic scenario of a growing number of different unilateral reservations and questionable re-interpretations. An *inter se* modification agreement would provide opportunities to experiment and learn from different models of legal regulation, open the possibility of international trade between states with regulated cannabis markets, also enabling for example small cannabis farmers in traditional Southern producing countries to supply the opening regulated licit spaces in the global market.
- 7 *Inter se* modification would facilitate more diversity in parallel control regimes fine-tuned to specific substances and local circumstances, operating on the basis of

established rules around the peaceful co-existence of legal differences in national jurisdictions within the boundaries of international law.

When the *inter se* option came up briefly in earlier sessions of this committee, the opinion was expressed that the mechanism was only intended for countries that wanted to agree among themselves on *stricter* rules than what the treaties require, not to *reduce* treaty obligations. But as we explain in detail in our report, there is no doubt that *inter se* modification can also be applied by a group of countries to derogate from certain treaty provisions. The UN International Law Commission discussed the matter in great detail and concluded that in that case basically the same rules apply for an *inter se* agreement as for a reservation, namely -as Article 41 specifies- that it should not affect the rights of other treaty parties and that it “*does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole*”.

I'd be happy to go into more legal details in answer to questions, but let me mention briefly two important points around the question whether an *inter se* agreement to derogate from cannabis-specific treaty provisions would be permissible under those Article 41 conditions. Firstly, it depends on the nature of the treaty. The prohibition of torture under international law, for example, is an absolute principle from which derogation by means of reservation or *inter se* modification obviously would not be permissible. Similarly, an *inter se* agreement modifying the provisions of a disarmament treaty would be unlawful since it necessarily affects the rights of other parties. But there is more flexibility for treaties where the impact of a specific change between two or more parties *inter se* can be confined to those parties and has no immediate effect on the rights of others or on the object and purpose of the treaty as a whole. The pre-War origins of the international control system basically aimed to prevent the uncontrolled export of certain drugs to states that had prohibited those substances, respecting differences between the domestic laws of the treaty parties. The morally charged 1961 Single Convention perhaps attempted to elevate the policy of drug prohibition to an absolute principle, but that argument is not sustainable, since there are many psychoactive substances-including alcohol- to which the principle is not applied.

That brings me to the second point I wanted to make about the permissibility of an *inter se* cannabis agreement. A majority of countries at least for the short-term foreseeable future will maintain a strict prohibition regime for cannabis, so to what extent are their rights immediately compromised if a group of countries decides otherwise? Of course, similar to the pre-War principles, the regulating countries would promise in their *inter se* agreement to fully cooperate to prevent leakage to countries where cannabis prohibition remains in place. In fact there are quite a few examples in practice that demonstrate the possibility of peaceful co-existence of fundamentally different control regimes for the same substance. The Bolivian derogation from certain treaty obligations regarding the coca leaf does not appear to have affected the rights of other parties in any serious way. Other psychoactive

plants like *khat*, *kratom* and *ephedra*, with stimulant properties comparable to coca, are not controlled under the conventions at all and subjected to widely varying degrees of national controls and prohibitions. But also in the case of cannabis by now there are many years of experience with the legal *medical* cannabis market, allowed under the treaties, but in practice still strictly prohibited in most parts of the world. The rapid boom of the medical cannabis market has taken place apparently without a major impact on those countries that maintained its prohibition. Why would that be different now with the emergence of a legal *non-medical* market in various countries, as long as it is strictly regulated as Bill C-45 plans to do? Plainly, the international drug control system is currently ineffective in preventing the international illegal traffic of cannabis in spite of the near universal prohibition. A strictly controlled legal regulated market is likely to prove more effective in preventing the illicit export of cannabis from regulated jurisdictions in comparison to the current situation. Thus, though it may seem counter intuitive to some, a legally regulated market in a group of countries under an *inter se* agreement may well benefit non-parties to the agreement instead of harming them.

Of course, there will be opposition and the legality of the mechanism will be questioned by some states, as happened with the Bolivian coca reservation. At the time 18 countries registered objections, including Canada, something I hope this government will correct by withdrawing Canada's formal objection against Bolivia, not only to open the path for a future similar exemption for cannabis that Canada will need to obtain one way or another but also out of respect for indigenous rights.

In conclusion, from our consultations with international treaty lawyers, *inter se* modification appears as a legitimate safety valve, and perhaps under current circumstances the most elegant way out for a group of countries to collectively derogate from certain cannabis provisions. Therefore, I hope your committee carefully considers the legitimacy of this option for Canada to resolve the approaching conflict with its international obligations and recommends in your report that the government seriously explores this possibility with the growing number of like-minded countries struggling with the same dilemma.