

INCB Hearing on the Use of Cannabis for Medical and Non-Medical Purposes

Statement by Prof. David R Bewley-Taylor, Transnational Institute, May 7th, 2018.

Let me begin by thanking members of the Board for this opportunity to offer evidence at this important hearing. Such a process is a welcome addition to the INCB's operating practices and it is my hope that it represents further evidence of an increasing willingness to engage with various sectors of civil society in pursuit of the Board's work as mandated by the UN drug control conventions.

My statement here today relates principally to the use of cannabis for non-medical and non-scientific purposes and how recent changes in policy approach relate to the international drug control regime. Indeed, as is well known, while shifts have already taken place at different levels of governance in two sovereign nations, an increasing number of member states are discussing or moving to implement legal regulation of the cannabis market.

It seems evident, therefore, that serious engagement by states with the concept of regulated markets to protect the health and welfare of their citizens can no longer be categorized as aberrant and outlying behaviour. Mindful of the democratic foundations of such shifts and associated debates within a growing number of member states it seems unlikely that the emerging trend will simply dissipate and fade away. Rather, the already significant tensions within the regime around cannabis look set to increase. To be sure, while not always seeing eye to eye with the interpretative position of the Board, I find it hard to disagree with its now well-versed position that regulated cannabis markets exceed the flexibility afforded states by the UN drug control treaties.

The increasingly pressing question then is, what to do about this reality? We are after all no longer dealing in abstractions. More precisely, how can states, with due regard for international law, reconcile treaty obligations with democratically mandated policy shifts at the national level and, as an important and associated point, what role can the Board play in this process?

Although procedures exist within the conventions, reaching the necessary levels of agreement to revise or amend them to accommodate cannabis regulation does not appear to be a politically viable option in the foreseeable future.

Within this context, myself and colleagues 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 the undeniable treaty tensions emerging around cannabis, and how to move forward with legal regulation of the substance while respecting basic principles of international law. The outcomes of those consultations are laid out in a recent report "Balancing Treaty Stability and Change: *Inter se* modification of the UN drug control conventions to facilitate

cannabis regulation”. This was launched in March at a CND side event, is available online and I have brought some hard copies with me today for members of the Board and the secretariat.

As you will see, the report covers in considerable detail a range of issues, including an overview of the current policy landscape and the extant regime’s limited capacity for change, before focusing specifically on the option of modification *inter se*. For the purpose of this hearing, it is worth highlighting several key points.

As alluded to earlier, the nature of the drug control regime limits the formal avenues for consensus-based treaty evolution and modernisation. Consequently, states that want to move forward with reforms they consider to be in the best interest of their citizens, but that are in contravention of certain treaty obligations, are forced to consider a number of options.

States wishing to avoid untidy and legally dubious approaches can take extraordinary measures, such as the choice made by Bolivia to withdraw and re-adhere with a new reservation regarding the coca leaf. In other instances, the best option might be to adopt temporarily a stance of respectful non-compliance in the understanding that, in addition to implementing national policy shifts, authorities would work to resolve international legal tensions. Mindful that the ‘Bolivia’ option may not be the most appropriate for cannabis and that temporary respectful non-compliance cannot by its very nature be a long-term fix, *inter se* modification becomes attractive.

Based on article 41 of the Vienna Convention on the Law of Treaties, the mechanism was specifically designed to find a balance between the stability of treaty regimes and the necessity of change in the absence of consensus and appears to provide a useful safety valve to break from the state of paralysis in the regime today. As the Commentary on the Vienna Convention points out: “*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.*” (emphasis added)

Indeed, an *inter se* agreement on cannabis regulation would allow a group of countries to modify certain treaty provisions amongst themselves, 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.

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.

As with more or less all aspects of international law, the *inter se* option is naturally open to debate. For example, it might be argued 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 (ICL) discussed the matter in great detail and concluded that basically the same rules apply for an *inter se* agreement as for a reservation.

Conscious of the remaining time available, I'd like to conclude by briefly mentioning two important points around the question of whether an *inter se* agreement to derogate from cannabis-specific treaty provisions would be permissible under Article 41 conditions.

First, it is important to consider the nature of the specific treaties involved. Examples do exist within international law where the prohibition of certain activities as laid out within conventions, and developed over time through customary practice into absolute principles, cannot be derogated from by means of reservation or *inter se* modification. In these instances, state behaviour is influenced by peremptory norms of international law; norms that are so fundamental to the international legal order that they are not open to derogation or suspension, even on the express consent of states. Instances of these limited *jus cogens* prohibitions include genocide, torture, slavery and discrimination.

As a reading of the 1961 Single Convention on Narcotic Drugs, its commentary and travaux alongside the Vienna Convention on the Law of Treaties and the extensive work of the ICL on the issue clearly shows, this can in no way be applied to the non-medical and non-scientific use of drugs, including cannabis.

The morally charged Single Convention perhaps attempted to elevate the policy of drug prohibition to an absolute principle. That argument is not sustainable, however, since there are many psychoactive substances - including alcohol - to which the principle is not applied. Moreover, it is important to note that from the earliest years of the current regime the obligation to prohibit the production and use of cannabis via penal measures has not been fully implemented by a number of states parties to the conventions. Mindful of these, and other lines of argument, there is simply no credible basis to any claim that the general treaty obligation to limit drugs exclusively to medical and scientific purposes comes even close to having achieved the status of *jus cogens* or peremptory norms under international law.

Second, a majority of countries - at least for the short-term foreseeable future - will maintain a strict prohibition regime for cannabis. Consequently, to what extent are their rights immediately compromised if a group of countries decides otherwise? Of course, 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 instances in practice that demonstrate the possibility of peaceful co-existence of fundamentally different control regimes for the same substance. Credible examples can also be drawn from medical cannabis markets.

From our research and consultations with international treaty lawyers, therefore, *inter se* modification appears to be a legitimate safety valve, and perhaps under current circumstances the most elegant way for a group of countries to collectively derogate from certain cannabis provisions and - crucially - retain respect for international law. Amidst increasing tensions within the regime, it certainly seems worth serious consideration by states seeking to resolve difficult legal dilemmas generated by democratically mandated policy shifts concerning cannabis and treaty obligations made in a very different era. In fulfilling its key role as a source of expert advice to member states, I am confident that the INCB will continue to work closely with such nations, notably at this point Canada, and look forward to learning more about how members of the Board intend to facilitate constructive dialogue around this increasingly pressing issue. It seems as if the INCB's position to simply call on countries to abstain from moving towards legal regulation of the cannabis market is no longer tenable. The real question now is how best to facilitate that irreversible trend and, with due respect for international law, generate a much-needed increase in flexibility within the regime.