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International Drug Policy Consortium

A global network promoting objective and open debate on drug policy

IDPC response to the 2012 Annual Report of the International Narcotics Control Board

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Introduction

Despite its unprecedented nature within the history of the international drug control regime, and regardless of warnings to the contrary, the Plurinational State of Bolivia's withdrawal from the 1961 Single Convention on Narcotic Drugs on 1 January 2012 did not result in a collapse of the United Nations (UN) based control system. That said, there is a strong case that, although marking the centenary of the regime, 2012 will be seen as the beginning of the end of the treaty system in its present form and the re-structuring of a policy world apparently so cherished by many members of the International Narcotics Control Board (INCB or Board. See Box 1). In November last year, following democratic ballot initiatives, two US states began moves to establish regulated markets for cannabis. And, amidst high-level debates within Latin America concerning a review of the current control paradigm, at the same time as events with the US, the elected government within Uruguay began serious consideration of a similar regulated approach to the non-medical and non-scientific use of drugs at a national level; a process that is now well on its way to becoming law.[1] Individually these moves are significant. Combined, they represent the most momentous challenge the modern treaty framework has faced. With this as a backdrop, the tone and content of the *Report of the International Narcotics Control Board for 2012*[2] tells us much about how the Board is looking to operate within such a dynamic, challenging and, for the Board, apparently threatening environment. It is also informative in terms of the approach taken by the INCB's new President and how, if at all, it differs from that of his predecessor Professor Hamid Ghodse, to whose memory the Report is dedicated.

In terms of scope, it must be said that the publication once again presents an impressive amount of technical information on the state and functioning of the international drug control system; a system constructed with the aim of managing the global licit market for narcotic and psychotropic substances for medical and research purposes while simultaneously suppressing the illicit market. The Report consequently makes some valuable contributions on many issue areas, including – in some respects – with regard to the phenomena of New Psychoactive Substances (NPS), internet pharmacies and the illicit use of prescription medicines. Additionally, it is useful as a record of the progress of parties to the drug control conventions relative to resolutions made within the Commission of Narcotic Drugs (CND or Commission). Unfortunately, the Report also reflects the Board's ongoing habit of exceeding its mandate, particularly this year in terms of generating what can be called 'narratives of conformity'; a process that, as will be demonstrated here, is prominent within the President's foreword and this year's thematic chapter. Moreover, it reveals the continuation of an unwillingness to comment on other important issues that appear to be within the Board's purview and warrant its attention.

Box 1. The INCB: Role and composition

The INCB is the 'independent and quasi-judicial' control organ for the implementation of the 1961 Single Convention on Narcotic Drugs (as amended by the 1972 Protocol), the 1971 Convention on Psychotropic Substances and the precursor control regime under the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The Board was created under the Single Convention and became operational in 1968. It is theoretically independent of governments, as well as of the UN, with its 13 individual members serving in their personal capacities. The World Health Organisation (WHO) nominates a list of candidates from which three members of the INCB are chosen, with the remaining 10 selected from a list proposed by member states. They are elected by the Economic and Social Council (ECOSOC) and can call upon the expert advice of WHO. In addition to producing a stream of correspondence and detailed technical assessments arising from its country visits (all of which, like the minutes of INCB meetings, are never made publicly available), the INCB produces an annual report summarising its activities and views.

In an effort to address some noteworthy aspects of the document, this response to the Board's *Annual Report* for 2012 (INCB Annual Reports are usually published in the spring the following year) is organised under four inter-related headings. As such, the following sections examine issues within the President's foreword to the Report, the Board's approach to 'shared responsibility' in the thematic chapter, reactions to the shifting policy scene and its ongoing (and still unacceptable) silence on a range of issues relating to harm reduction, human rights and access to essential medicines.

The Foreword to the Report: A shared responsibility to agree with the INCB?

The function of any foreword is to frame the subsequent document: to set the parameters within which it should be read and understood. This year, the Board's new President, Mr. Raymond Yans, demonstrates little reticence in carrying out this objective. Concentrating on the concept of 'shared responsibility', the topic of the thematic chapter, it leaves us with few doubts about how Mr. Yans wishes this concept to be understood. Consequently, we will predominantly examine the Board's framing of the debate concerning the concept of shared responsibility, and by implication the drug control system more widely. The next section of this response will consider the concept itself.

In its first substantive paragraph, the Foreword informs us that: 'International cooperation to address the global drug problem is founded upon the principle of shared responsibility'. It goes on to elaborate that principle in terms of mutual commitment to shared goals and 'complementary policy and joint action'. The overwhelming majority of the world's nation states have signed up to the three United Nations drug control conventions, which, we are told, represent 'the best available tools for addressing the global drug problem and for protecting humanity from drug abuse' and from the effects of illicit drug production, cultivation and trafficking. There is no broader awareness whatsoever here of the kind heard previously from other parts of the UN drug control apparatus. For example, in 2008 the Director of the UN Office on Drugs and Crime (UNODC), Antonio Maria Costa, acknowledged that the drug control system itself has had consequences that were large scale and pernicious, if unintended.[3] Indeed, unlike that produced by Mr. Costa, Mr. Yans' analysis follows

on from that of Professor Ghodse and leaves little room for ambiguity or uncertainty, dividing up the world between sharply demarcated if simplistic zones of good and bad, which has about it the flavour of a religious world view. In fact, the drug control discourse as exemplified in the Foreword does carry with it the moral residue of those nineteenth century religious movements that were its historical antecedents – the middle-class anti-opiumists of the United States (USA) and the United Kingdom (UK).[4]

The Foreword continues, outlining the contours of its principle of shared responsibility, by which Mr. Yans wishes to communicate considerably more than the traditional sense of the term as used at the CND. At the Commission, the concept has been invoked to argue that the drug control system has paid too much attention and assigned too much responsibility to countries where drug crops have been cultivated, and that the nations of the rich, developed world, with their consumer markets and youth cultures in which drug demand was centred, should carry more of the burden of the international response. There is also a growing appreciation within the Commission of the responsibility of 'Northern' states to focus more on precursor control, money laundering and to contribute meaningful funding for alternative development programmes. In this Report, however, the Foreword seeks to redefine the concept of shared responsibility to represent both cooperation between member states and much greater levels of policy integration amongst intra-state mechanisms, so that health, education, economic development and law enforcement work together to restrict drug use, along with civil society and the private sector. This reference to coordinated action on social, economic and political dimensions in some respects parallels IDPC's own vision, and is to be welcomed. However, it is immediately followed by a more disturbing trend evident in the Report, and especially the Foreword, toward the conflation of shared responsibility with adherence to the conventions as interpreted by the Board, and a consequent commitment to the kind of drug control system that the Board wishes to see.

Mr. Yans argues that the principle of shared responsibility is evident in the 'global debate on drug policy that is under way between Governments at the regional level and also within Governments'. He contends that, the 'INCB welcomes and supports initiatives of Governments aimed at further strengthening international drug control within the framework of the international drug control conventions'. However, the Board 'note(s) with concern' that this global debate has included proposals for the legalisation of the possession and cultivation of cannabis for non-medical purposes. It insists that the implementation of such measures would violate the conventions and 'undermine the *noble objectives* of the entire drug control system' (emphasis added), which seek to restrict the use of drugs to medical and scientific purposes.

Entrance into this debate in such terms arguably places the INCB on some dubious ground, for while the mandate and functions of the Board are carefully elaborated in the text of the Single Convention of 1961,[5] it is fair to say that these functions are technical in nature. The Board is mandated to attempt, in cooperation with Governments, to limit the cultivation, production, manufacture and use of drugs to medical and scientific purposes and therefore correct to point out that 'legalisation' would be contrary to the treaties. However, as a creation of the drug control conventions, its role within them is not to act as champion of this particular arrangement of drug control, as opposed to another. The question of whether the drug control system might be better if modified or abandoned in favour of some other now preferred by some of the owners of the treaties, the member states themselves, is not a technical but a political question, which does not fall within the remit of the INCB.

Nonetheless, the INCB does, routinely and vigorously, participate in debates concerning the future of the existing drug control system, and Mr. Yans' Foreword continues to do so, effectively claiming that the principle of shared

responsibility obliges us all to support the drug control system in its present shape and structure. He claims that those proposing the establishment of regulated markets in cannabis 'ignore the commitment that all Governments have made to promote the health and well-being of their communities', and that such measures run counter to a 'growing body of scientific evidence' (to which no references are provided) that illicit drug use is harmful to health, particularly that of young people. This contention appears, however, to be almost wilfully inaccurate, since those advocating for regulated markets usually deploy health as one of the grounds on which their position is based. Moreover, nobody is proposing that cannabis be made legally available to young people below the age of majority. These arguments demonstrate a trend that has characterised many of the Board's interventions in recent years; the body appears to find it difficult to accept the possibility that those who disagree with it may be well motivated. It is as if the INCB is arguing that the conventions forbid any consideration of an alternative system to regulate the production, exchange and use of drugs. They do not; and there is no 'shared responsibility' to agree with the INCB.

Moreover, to contend dogmatically that the current treaty system is immutable wilfully ignores the history of the regime and the reality that it has already experienced significant and formal change; namely through the Protocol Amending the Single Convention on Narcotic Drugs in 1972. It was an appreciation among the drafters of the Single Convention that circumstances may alter over time, which, as with many international treaties within a range of issue areas, led to the inclusion of provisions for amendment. Today, a product of incremental development and negotiated political compromises, the three conventions contain many inconsistencies.[6] Consequently, arguing that the time has come for a significant modernisation of the regime, much like the USA, the UK and Sweden successfully argued in 1972, is a perfectly legitimate discussion. Though dependent on the national priorities of parties, such an update and adaptation to new scientific insights may even include taking cannabis out of the UN control system altogether and leaving it to governments to decide the best policy for the control or regulation of the non-medical and non-scientific cannabis market.

The Foreword dismisses any such discussion, arguing that proposals for regulated markets would not, as their exponents claim, eliminate their illicit equivalents. Indeed, the Board goes further, claiming that 'organized criminal groups would get even more deeply involved, for instance by creating a black market for the illicit supply of newly legalized drugs to young people'. On this point, Mr. Yans apparently prefers not to engage with the uncomfortable reality that such black markets already exist, both for young people and those who are not so young; they are massive in scale and are managed, not by democratically elected officials, but by criminals whose sole concern is to maximise profits. The Board's implicit faith in the current regime leads it to contend that: 'To target the organized crime and violence associated with the illicit trade in drugs, the most effective tool is primary prevention of drug abuse, coupled with treatment and rehabilitation, and complemented by supply reduction measures, as provided for in the conventions'. The problem with this familiar prescription is that, to date, the record of primary prevention has not been impressive.[7] The other measures advocated by the Board consist essentially of more of the same. A growing number of governments are becoming frustrated with the lack of progress achieved by recourse to these measures;[8] while in the global community of civil society, momentum is perceptibly gathering for a change in the direction of drug policy, underpinned by what seems to be a half century of social and cultural shift in attitudes towards the use of intoxicants. As IDPC has had cause to reiterate,[9] the Board's response toward this process of cultural change has so far consisted of a mix of denial and aggressive defence of the current prohibition-oriented approach.

Thematic Chapter: The principle of shared responsibility

We mentioned above how the term 'shared responsibility' has generally functioned in the debates of the international drug control system as a coded reminder to the countries of the developed world that the 'world drug problem' has its roots in demand as much as supply. And these disputes reflect the historical orientation of the regime, which has been weighted heavily in favour of supply-control.[10]

In the thematic chapter, the Board undertakes the redefinition of the concept, seeking to expand it beyond the limits of its historic usage. It begins with a brief survey of the principle of shared responsibility in international law, where it appears in many fields, and is, therefore, not specific to drug control. Shared responsibility 'provides the framework for a cooperative partnership among a community of parties' (Para. 1), and involves a common understanding of a shared problem, a common goal, and common and coordinated action toward it. A sketched and highly selective narrative then follows the principle at work in the sphere of drug control, leading to the establishment of the international conventions, which form an 'institutional framework for shared responsibility'. The 1961 Single Convention on Narcotic Drugs is noted for breaking new ground insofar as it includes provisions for the 'treatment and rehabilitation of drug abuse' (Para. 6). The achievements of the drug control system have depended upon the agreement of parties 'to work together, act collectively and cooperate to reduce the illicit production of, trafficking in and abuse of drugs and address the health, social and criminal aspects of the illicit drug trade' (Para. 10). The principle of shared responsibility was, we are told, extended and deepened across the last decades of the twentieth century, featuring in the Special Sessions of the UN General Assembly devoted to drugs and the resultant declarations and action plans. Finally, the chapter traces the principle operating in drug policy across other institutional settings, such as the European Union and the Organisation of American States, and in the work of NGOs in the 'Beyond 2008' civil society forum.[11] It is evident that the concept, as proposed by the Board, is thoroughly infused with the principles of democracy; however, how does this democratic rhetoric play out in the context of a detailed critical examination of the real practices and relationships of the drug control regime?

The chapter attempts to answer this question by recourse to a number of cases where 'good practices' of shared responsibility are demonstrated. Chosen first is the area of licit drug control, where, we are informed, 'the strict control exercised by States parties, combined with the efficient administration of regulatory systems and voluntary controls – today applied almost universally – have substantially reduced the diversion of these drugs' (Para. 25). This is a familiar argument, deployed previously by UNODC as an indicator of the regime's alleged success;[12] however, it is a rather poor selection as an example of shared responsibility. As IDPC previously noted, the 1919 ratification of the International Opium Convention of 1912 by most of the significant players in the drugs trade of the early 20th century was not the result of an altruistic outbreak of shared and common responsibility, but was, rather, forced on some countries (Germany, Turkey) by others (the USA, the UK), in the wake of the allied victory in the First World War.[13]

The second example of good practice listed by the Board consists of the 'Shared Responsibility' project, a public information campaign initiated by the government of Colombia in 2008 and intended to raise awareness, 'particularly in Europe and North America, of the social and environmental damage caused by cocaine manufacture and abuse' (Para. 27). Both this and the previous example of preventing the diversion of licit drugs can just as easily be used to demonstrate the failures of the present system; when tighter controls on the international licit traffic were introduced by the Geneva Conventions of 1925 and 1931,

traffickers adapted by investing in the first sector of the supply chain. That is, they no longer simply trafficked drugs that were diverted from licit pharmaceutical production, but produced and manufactured these products illicitly themselves.[14] Likewise, when the Colombian government and its US backers suppressed coca and cocaine production, coca plantations and illicit cocaine laboratories moved to more remote and inaccessible regions, such as national parks, where their environmental effects were more devastating.[15]

The third set of examples refers to the field of drug trafficking and the supply reduction efforts that seek to interdict it; these are notoriously difficult to characterise as successes in any more than the short term, since what normally follows the suppression of one trafficking group is its replacement by others, and/or the transition by consumers to a new substance which remains more readily available. Sometimes these new groups fight for control of the trade, which results in an upturn in violence;[16] in other cases, the suppression of a drug has resulted in the adoption by users of much more dangerous substances and methods of ingestion, as in Asia where opium-smoking was successfully curtailed only to be replaced by the injection of heroin.[17] The same kind of displacement effects apply in the fourth and final case of 'good practice', judicial cooperation between national states. While localised benefits may or may not accrue, in the long term the results are questionable.

Here the Board does acknowledge the existence of 'challenges' for shared responsibility in drug control. It is surely correct in arguing that the old theoretical and political divide between drug-producing and drug-consuming states lacks validity in the contemporary setting. As it observes: 'To varying degrees, all countries are drug-producers and drug-consumers and have drugs transiting through them' (Para. 38), a situation it finds exemplified by the issue of synthetic drugs. The Board continues by arguing that international cooperation must be buttressed by action at the national level; all levels of government and society should act together to prevent 'drug abuse', which remains – especially in wealthy countries – 'one of the important factors of the drug problem' (Para. 41). Governments should therefore utilise their health and educational systems to 'send clear messages to young people and society as a whole' (Para. 41).

Alternative development poses another challenge, the text observes, insofar as it can only succeed when adequate security and stability is achieved, under the rule of law. Other problems facing actions in the context of shared responsibility include the new forms and scope of organised criminal groups, the widespread 'abuse' of prescription medications and the internet pharmacies from which they can readily be accessed, and what the Board refers to as 'unregulated markets'. Presumably the reference here is intended to be toward new psychoactive substances (NPS), but the use of the phrase is indicative of the INCB's failure at times to adequately conceptualise the contemporary landscape in which drug policy is played out. By implication, if it regards the NPS markets as 'unregulated', then illicit markets for drugs such as cannabis, opiates and cocaine must be viewed as *regulated*. It is thus evident that the Board has failed to grasp one of the key criticisms underpinning the growing movement for the reform of drug policies, namely, that governments have effectively abandoned their role in regulating the huge global market in the non-medical use of drugs, effectively handing control to organised criminal groups. These groups are driven almost entirely by profit, and their conduct is not moderated by the intervention of the state, which has the power to represent the public and individual health interests of consumers, as it does in the production and consumption of other goods, and to impose quality controls upon them.

Alluding to the decision of the voters of the US states of Washington and Colorado to permit the existence of a regulated market in cannabis, the Report also notes that, while nearly all states

are signed up to the conventions, 'the Board has drawn the attention of Governments to the need for treaty obligations to be implemented consistently at all levels of government'. (p. 46). In some countries, however, 'while there is full compliance with the conventions at the national level, policies and measures at the state, provincial or municipal level are not in line with the provisions of the conventions' (Para. 46).

The paragraphs outlining the conclusions and recommendations of the Board with regard to shared responsibility largely reiterate the points raised in the preceding account. The Board calls for the principle to go beyond mere rhetoric, and in the centennial year of the International Opium Convention of 1912, argues that 'it is critically important that Member States embrace shared responsibility as a foundation of international drug control...in order to safeguard public health and reduce the risks that drug problems will pose to future generations' (Para. 51). In practice, the principal component of this embrace appears to consist in the allocation of more resources to primary prevention. The Board encourages governments to promote the greater involvement of civil society, which is of course welcome, as is the general conception of an integrated set of responses to address the poverty and absence of opportunities that restrict the life-chances of so many. Overall, however, the principle of shared responsibility as advocated by the Board remains too focused on the same methods that have failed in the late twentieth and early twenty-first centuries, and does not take adequately into account those critiques that drive the processes of reform, especially those now underway in Latin America and some states in the USA.

Reactions to the shifting policy scene

As is to be expected, beyond references within the President's Foreword and the thematic Chapter, the rest of the Report for 2012 also devotes significant space to actual and possible shifts in drug policy at various levels of governance. After all, it has been an extremely dynamic 12 months in terms of relationships between the provisions of the conventions, constitutional arrangements and the development of policy space at the national and sub-national level.

Having given considerable attention in last year's Report[18] to the Plurinational State of Bolivia's moves to withdraw from the Single Convention and to re-accede with a reservation on the traditional use of the coca leaf, it is no surprise that the issue was given prominence in the 2013 publication. It will be recalled how the endeavours of La Paz to bring various constitutional and international treaty commitments into line was presented as a fundamental challenge to the integrity of the UN's international drug control framework. Having had no success in preventing the denunciation – although arguably more success in ensuring that this was the only course of action open to Bolivian officials – this year's Report approaches the issue in terms of regret, admonishment and nervousness.

Stressing that, during its December 2011 mission to the country, it had 'met and exchanged views with the President of the Plurinational State of Bolivia and the highest national authorities on matters relating to the implementation of the provisions of the international drug control treaties' (Para. 89), the Board laments La Paz's decision not to reconsider withdrawal from the 1961 Convention (Para. 90). Outlining the process for re-accession – something that even last year when still drafting the Report it must have known was likely to be a formality – the Board welcomes Bolivia's intention to re-join the treaty. This positive view, however, comes with a number of critical riders. The Report sets the mood music for its view of the issue by highlighting how the INCB 'is disappointed at the Government's decision'. It then takes the opportunity to 'point out that irrespective of the denunciation of the Convention by the Government, and the proposed re-accession

to the Convention with a reservation, coca leaf remains a narcotic drug under the provisions of the 1961 Convention, and all aspects of national and international control upon its cultivation, production, import, export and use will continue to remain in force' (Para. 92). This is somewhat ingenuous since, for Bolivia, not all of these aspects of control remain in force; the approved reservation exempts La Paz from the obligation to implement these controls domestically with regard to cultivation, distribution and use of coca leaf in its natural form. As such, they only remain in force for the rest of the parties, a situation that limits Bolivia's possibilities for the export of coca and coca products.

Picking up where it left off in the Report for 2011, the Board also casts Bolivia as somewhat of a rogue nation and 'reiterates that universal adherence to the 1961 Convention and the other international drug control conventions, which together form the basis for the international drug control regime, is an indispensable requirement for the effective functioning of international drug control' (Para. 93). On this point, it once again argues that the 'reservation proposed' by Bolivia is 'contrary to the 'fundamental object and spirit of the 1961 Convention'. As IDPC noted in 2012, this interpretation is open to dispute,[19] and it is consequently interesting – welcome even – that the Board this year does say that such a view is its opinion (Para. 93), rather than stating it as a fact. That said, given the Board's ability to influence debates, both national and international, around readings of the treaties, it is disappointing that it still does not offer any explanatory legal analysis. It is also a point of concern that, despite prefacing the sentence with the past participle verb 'believes', the Board argues that Bolivia's actions '*might* create a dangerous precedent with incalculable consequences that could jeopardize the very fundament of the international drug control regime in the long run' (Para. 93, emphasis added). This point is hammered home when the Report 'calls upon' Bolivia to 'consider the implications of its actions' and once again invokes the reframed concept of shared responsibility to chastise the, albeit minor, deviation from the prohibitive ethos of the treaty system (Para. 94).

As noted above, it is clearly within the Board's mandate to assist parties in resolving tensions between national legislation and the requirements of the treaties, 'in a spirit of cooperation rather than a narrow view of the letter of the law'.[20] Yet, is it really within its purview to engage in such apocalyptic crystal ball gazing? Moreover, while clearly nervous that 'if the international community were to accept an approach whereby States parties used the mechanism of denunciation and re-accession with reservations to overcome problems in the implementation of certain treaty provisions, the integrity of the international drug control system would be undermined' (Para. 93 & also see para. 512), there is no recognition of the unique circumstances surrounding Bolivia's position and La Paz's efforts to reconcile its 2009 Constitution and a number of international treaty commitments with the Single Convention. Within such a context, it seems dubious to criticize a country for using legitimate mechanisms within the Convention on the grounds that such a process might encourage other parties to follow suit. On this point, it is worth noting that far from being at the vanguard of calls for a significant revision of the current treaty system, Bolivia is, if not hostile, then at least lukewarm towards propositions for significant treaty revision in other parts of Latin America. The Board would arguably have a stronger legal case regarding treaty integrity and 'object and purpose' were it refer to a state or sub-national territory seeking to absolve itself of treaty commitments regarding the recreational use of a drug like cannabis, for example.

Indeed, while IDPC often interprets the treaties differently to the Board, there is no disagreement with its technical position regarding the ongoing moves in the US states of Colorado and

Washington towards the 'legalization of cannabis for non-medical purposes' (Para. 80). As touched upon earlier, following the outcomes of ballot initiatives in November 2012, both states are working towards the creation of regulated cannabis markets, including production, whereby individuals who are 21 years old and over will be able to buy the drug for recreational purposes from special shops that will be subject to state-level taxes. Resultant tensions between US federal law and these democratically initiated state level policy shifts have done much to ensure that the precise details of the planned regulative frameworks, or indeed a detailed response from Washington D.C., remain to be seen. Nonetheless, it is difficult to challenge the Board's view within the main body of the text that: 'This constitutes a significant challenge to the objective of the international drug control treaties to which the United States is a party' (Para. 81) and that: 'the legalization of cannabis for non-medical and non-scientific purposes would be in contravention to the provisions of the 1961 Convention as amended by the 1972 Protocol' (Para. 451). It is on far shakier ground, however, where it attempts to link an increase in daily cannabis 'abuse' among US high school students with both medical marijuana programmes and the reformist debate within the country. Without any evidence regarding causation to substantiate the claim, the Report states: 'Those increases were accompanied by decreases in the perception of risks associated with the use of cannabis' and that, 'this development occurred in the context of campaigns promoting the legalization of cannabis for medical purposes as well as the decriminalization of cannabis for non-medical purposes' (Para. 507). This may be a valid argument. However, without appropriate evidence, attempts to construct or allude to such links undermine the Board's legitimate arguments concerning breach of the Single Convention.

While this is the case, the Board is once again correct in its legal assessment of any realisation of policy proposals in Latin America. Within the Special Topics section and under the heading 'Global Drug Policy Debate', the Board takes note of 'recent calls for a review' by member states 'of the approach to the global drug problem' and once again commends 'initiatives by Governments aimed at further enhancing international drug control, undertaken in conformity with the international drug control conventions' (Para. 256). The Board goes on to stress, however, its 'concern' regarding 'recent declarations and initiatives reported from some countries in the Western hemisphere proposing the legalization of the possession of narcotic drugs and psychotropic substances for purposes other than medical or scientific use, and the decriminalization of the cultivation of cannabis plant for non-medical use'. This wording is somewhat confusing since the proposals described are arguably legitimate within the current parameters of the treaties.[21] Nonetheless, 'In this regard', it continues, 'the Board notes with deep concern a proposal by the Government of Uruguay before the Parliament of Uruguay that would allow the State to assume control over and regulation of activities related to the importation, production, acquisition of any title, storage, sale and distribution of cannabis or its derivatives, under terms and conditions to be determined by a regulation, for the purpose of non-medical use' (Para. 257). If such an initiative 'were to be implemented', the Report points out, it 'would be contrary to the provisions of the international drug control conventions' (Para. 258 & also see Para. 513). This is a fair assessment of the situation. What is more problematic, however, is the broader narrative within which it is placed. In a similar fashion to its comments regarding Bolivia and the coca leaf, the Board argues that: 'Non-compliance by any party with the provisions of the international drug control treaties could have far-reaching negative consequences for the functioning of the entire international drug control system' (Para. 258), an issue to which we will return.

Selective reticence – Harm reduction, human rights and access to essential medicines

Although it is fair to conclude that the Report for 2012 does not contain the explicit examples of 'mission creep' it did last year (commenting upon the relationship between federal government and territories,[22] for example), there are unfortunately still many instances of what we have come to define as 'selective reticence'. This is particularly noticeable with regard to a number of inter-connected issues; human rights, harm reduction and access to essential medicines.

As was the case within the Report for 2011, the previously contentious issue of harm reduction remains ostensibly a background concern. Such an ongoing lack of negative comment can in many respects be regarded as, if not progress, then at least positive stasis. Gone are the scare quotes and open hostility towards many aspects of the health-oriented approach to dealing with drug use. Indeed, in terms of content analysis, the at one time apparently toxic phrase appears only once, and then in relation to its inclusion within the Australian Drug Control Strategy for 2010-2015 (Para. 809). Similarly, within the 'National legislation, policy and action' sections of the regional overviews, a number of harm reduction interventions are mentioned in an essentially neutral fashion. This is particularly the case for Opioid Substitution Therapy (OST), including both methadone and buprenorphine. Widespread engagement with the intervention across the globe would have made a lack of mention absurd and its unremarkable inclusion to some extent reflects the relatively uncontroversial place of OST within the UN drug control system. Aspects of the Report for 2012, including its position on OST, do however still present cause for concern.

First, the Board once again takes issue with drug consumption rooms. Although these operate in a number of jurisdictions, including since November 2011 an 'experimental' scheme in Copenhagen that receives critical comment within the Report (Para. 752), the Insite facility in Vancouver clearly remains a particular point of annoyance and one again targeted for special mention. As alluded to above, this year the Board is more sensitive to the authority of the Canadian Supreme Court's ruling in favour of Insite. However, we are forcefully reminded that 'provision of such facilities for the abuse of drugs is contrary to the international drug control treaties, particularly article 4 of the 1961 Convention, under which States parties are obligated to ensure that the production, manufacture, import, export and distribution of, trade in and use and possession of drugs are limited exclusively to medical and scientific purposes' (Para 71). This, as we have discussed in previous responses to INCB Reports, represents a narrow interpretation of the Single Convention and runs counter to legal advice from within the UN itself. One wonders if the Board's ongoing preoccupation with Insite in particular is politically motivated and related to the legal tussles between the government of Steven Harper and the authorities within Vancouver. Perhaps some members of the Board, or its secretariat, feel that once again emphasising the view that drug consumption rooms are not permitted within the current treaty framework will assist the Harper administration in its quest to close the facility down.

Second, while its position on Insite is to be expected, if not excused, it is disappointing that the Board continues in its failure to explicitly acknowledge the efficacy of needle and syringe programmes (NSPs) in halting the spread of blood borne diseases among people who inject drugs. This is a particularly stark omission relative to its willingness – in the face of policy shifts – to give advice on the future of the international drug control system and the laudable decision to emphasize the overarching concern for 'health and welfare' within all the conventions. The Report contains 30 references

to HIV/AIDS and unavoidably recognises not only the prevalence of injecting drug use but also the links between people who inject drugs and HIV/AIDS. When providing an overview of Asia, for example, the Report states: 'Drug abuse by injection was reported by almost all countries of the region'. Highlighting that injecting is not only associated with opioids, it continues to note that 'Drugs that are commonly injected included heroin, amphetamine-type stimulants and benzodiazepines. The high prevalence of HIV among people who abuse drugs by injection remains a serious public health risk in some countries' (Para. 609). In relation to Europe, the Report notes that 'In 2011, a significant increase in new cases of HIV infection based on a high HIV prevalence among injecting drug users was reported by Bulgaria, Greece and Romania' (Para. 732). Similar statements concerning most regions of the world can be found throughout the document. What is harder to find, however, are references to NSPs. Despite its operation in 86 countries and territories,[23] the Report only mentions the intervention twice; in relation to availability in the Middle East (Para. 725)[24] and India (Para. 627). Such an approach gives the disingenuous impression that NSPs are a rarely used policy option, rather than a well-established, widely used and scientifically proven approach to preventing the spread of HIV/AIDS and other blood borne diseases, including hepatitis, among people who inject drugs.

On a related and important point, moreover, where the Board does note the existence of harm reduction interventions, they are never regarded as 'welcome' components of a Party's drug policy approach. For example, the Report notes that: 'In February 2012, the All-India Institute of Medical Sciences initiated methadone maintenance treatment, as part of a pilot project, with assistance from the UNODC Regional Office for South Asia. The project currently provides treatment to about 250 injecting drug abusers at five sites in the country'. It goes on to simply conclude that, 'An increase in the size of the programme is currently under consideration' (Para. 649). The lack of enthusiasm, and by implication encouragement, for this is in marked contrast to other parts of the Report where the Board enthusiastically 'welcomes' moves to strengthen law enforcement measures (e.g. Paras. 63, 103, 111, 124, 126, 150, 191) and 'international drug control within the framework of the international drug control conventions' (for example in the President's Foreword, p. v, and para. 256). Indeed, in its reluctance to commend or encourage health-oriented approaches that are not abstinence-based, it seems there has been little change from last year's Report. Then, when discussing treatment, the Board privileged the goal of drug-free individuals over 'simply seeking to reduce some of the harm associated with continued levels of drug misuse'.[25]

A third area of concern relates directly to the concept of treatment. As is to be expected, there are numerous references to drug treatment programmes within the Report. Nowhere, however, does the Board engage in discussion of what is meant by acceptable drug treatment that adheres to fundamental human rights standards. Rather there is an assumption that all drug treatment is beneficial. This of course is not the case. Indeed, despite a country visit by Board members to Brazil in August 2012, there is no mention of the practice of forcing of crack users into treatment – a move regarded by the federation of psychologists as bad clinical practice and a rights violation.[26] In this regard, the Report also notes that 'In China at the end of 2011, there were over 220,000 people receiving drug abuse treatment in compulsory treatment centres' (Para. 611). However, as Daniel Wolfe highlights, what the Board does not point out is that these centres 'are forced labour camps that violate international law by arbitrarily detaining people and abusing them inside', and 'offer no form of treatment shown to be effective'.[27] Research by Human Rights Watch reveals severe sexual and physical abuse of people who use drugs inside Chinese centres.[28] The

organisation has also revealed shocking abuses within centres in Cambodia, Laos and Vietnam.[29] Again, however, there is no comment, with the Board only noting, but not commending, Cambodia on the expansion of the UNODC-supported community based and voluntary drug treatment programme 'as an alternative to compulsory treatment' (Para. 612).

The Board continually records its 'concern' in the Report when mentioning Parties who it believes should be doing more to reduce the scale of the illicit market, or in contexts in which it feels the present drug control system is under threat (for example Paras. 257, 332, 411, 847). In failing to comment, even by noting 'concern' for the situation in cases such as the Cambodian camps, the Board is arguably bordering on condoning such human rights violations. These practices of omission also highlight its increasing isolation on human rights issues within the wider UN system. Twelve UN agencies, including the UNODC with which the Board shares a secretariat, have called for the closure of compulsory centres for drug users (CCDUs) like those in China.[30] Moreover, at about the same time the INCB Report for 2012 was released, another part of the UN, the Special Rapporteur on Torture (itself also a watchdog), released a report on torture in healthcare settings. This publication unequivocally condemned CCDUs.[31] Speaking at the March meeting of the Human Rights Council, the Special Rapporteur Juan Mendez stated that such centres were guilty of cruel, inhuman and degrading treatment.

On a related point, the Report also fails to mention the death of 14 people who use drugs in a locked treatment facility in Peru in 2012. The omission is particularly striking since another of the Board's missions visited that country, only months after the horrific event. What is more, only days before the visit, more people perished in a fire in a Peruvian religious 'therapeutic community', itself an approach to treatment that remains far from convincing. Wolfe points out that such fires are not uncommon, with patients in drug treatment in Russia, Kazakhstan and other countries also burning to death as 'they struggled against locked doors and windows'.[32] On these points, the Board remains silent.

A fourth and similarly alarming instance of selective reticence is the Board's continuing silence on executions for drug offences. IDPC has highlighted this issue in previous reports and briefs,[33] and regards the ongoing lack of comment on this point in particular to be emblematic of an apparently systematic lack of awareness of the intersection between human rights and drug control. Mindful of the lack of comment regarding rights violations within treatment facilities, it is curious that, after a mission to the country, the Board chooses to comment on Saudi Arabia's 'commitment' in the fight against 'drug abuse and trafficking' (Para. 115). There is no 'concern' for the Saudi authorities' use of the death penalty for drug offenders. This is the case even though, according to Human Rights Watch, the country executed at least 69 people between January and September 2012 – September being the month when the INCB made its visit – many for drug offenses.[34] While not going so far as to commend its efforts, the Board also makes no comment on the anti-drug policies of a country like Iran (for example, Para. 673). Here, drug offenses can easily trigger the death sentence. It is true that since the late 1990s, Iranian authorities have established harm reduction and treatment programmes that include NSPs and methadone maintenance treatment centres. On the flip side of such a progressive health oriented approach, however, are draconian laws concerning possession. In 2010 new measures were introduced that, among other things, lowered the quantity of drugs an offender had to possess to be subject to the death penalty. The following year, authorities executed over 600 people, more than 80 per cent on drug related offenses. Hundreds were also executed last year, including many Afghan nationals. As Rebecca Schleifer noted in *Foreign Affairs* earlier this year, 'Making matters worse, alleged

offenders are tried in courts that routinely violate due process rights and offer little chance of appeal, even if the defendant is facing capital punishment'.[35] The lack of comment on these and other drug offense-related rights violations is another example of the Board's increasingly isolated stance on human rights within the UN system. The UN Human Rights Committee has condemned the use of the death penalty for any drug offences. And reports from civil society, particularly Harm Reduction International, clearly articulate that the execution of alleged drug offenders is contrary to international law.[36]

That – once again – one of the few mentions of human rights within the Report for 2012 relates to the rights of journalists in Mexico to report on drug-related violence within the country (Para. 480) – not the role of governments policies in contributing to such violence[37] – suggests that there has been little movement since Professor Hamid Ghodse made his now infamous statement of intent at the 2012 CND. During discussions about the INCB and human rights at the NGO Informal Dialogue with the Board he was asked 'Is there no atrocity large enough that you will not step outside your mandate to condemn it?' The then President of the INCB replied, 'No. 100 per cent not.'[38]

Finally, while, as noted above, the Board mentions Parties' engagement with OST throughout the Report, it fails to comment on circumstances where there are bans on the WHO-listed essential medicines methadone and buprenorphine. This shortcoming is not new. Yet such neglect is increasing the tensions and contradictions within the Report. This is particularly so as the Board seeks to use the concept of 'shared responsibility' to stress the overarching goal of the treaties to protect health and welfare of humanity; a narrative clearly designed to defend a system in distress. For example, while the Board legitimately draws attention to evidence that laboratories in Latvia are producing methadone, which was believed to be illegally exported across its eastern border (Para. 776), nowhere, does it mention that both methadone and buprenorphine are forbidden within the neighbouring Russian Federation, a country with an HIV epidemic predominantly concentrated among people who inject drugs. Again, this puts the Board at odds with other parts of the UN. Not only do WHO and UNODC agree that the drugs are central for the treatment of dependent heroin users, but Juan Mendez's recent report also notes that bans on methadone and buprenorphine are inhuman and degrading.[39]

Lack of comment on the Russian ban also sits uncomfortably with other sections of the Report itself, including – as noted above in relation to regulated cannabis markets – Mr. Yans' reference to governments' commitment to promote the health and well-being of their communities. Indeed, after discussion of 'Diversion of pharmaceutical preparations containing narcotic drugs and psychotropic substances', including explicit mention of methadone and buprenorphine (Paras. 303-315) the Board notes: 'Last but not least, Governments should make every effort to ensure that measures to strengthen control of the supply and distribution of controlled substances should never jeopardize the availability of those substances for medical treatment'. This is a position fully endorsed by IDPC. However, it is difficult to reconcile with other parts of the report that reflect the Board's well-embedded obsession with diversion of drugs for non-medical purposes over adequate access for medical use. While keen enough to chastise Bolivia for seeking to align various treaty and constitutional commitments, the Board talks in sweeping terms about access to 'medical treatment', including pain relief, but chooses not to cite specific cases where countries are failing to ensure sufficient supply of essential medicines, an issue well within its purview.[40] The Report also once again reveals the INCB's increasing tendency to exceed its mandate in relation to scheduling. While within the mandate of WHO, specifically its Expert

Committee on Drug Dependence, the Board appears unable to resist attempting to influence the debate on which drugs should come under international control; a process evident in relation to its position on ketamine (Paras 316, 322, 594 & 694).[41]

Conclusions

All in all then, the Report for 2012 provides an interesting insight into the views of the Board during this current period of flux. As ever, it contains some valuable material and in some respects is arguably much the same as previous offerings. In that vein, it seems clear that a change of President has done little to alter the Board's worldview. The Report still demonstrates considerable and worryingly selective reticence, particularly in relation to human rights. Indeed, at the recent Harm Reduction International Conference in Vilnius, Stephen Lewis, the UN Secretary-General's Special Envoy for HIV/AIDS in Africa (2001-2006) and currently a Commissioner on the Global Commission on HIV and the Law, roundly condemned the Report's lack of attention to human rights issues – some of which fall under the right to health – and criticized Mr. Yans' 'obsession with criminalization'.[42] Beyond the recurring issues discussed above, it also includes the now well-established practice of criticising medical marijuana programmes (this year in Canada, Para. 68 and the USA, Para. 221), the Dutch coffee-shop system (Para. 457) and gives a special mention to the activities of the World Forum Against Drugs (Para. 747); a practice that suggests only NGOs favouring and promoting a drug free world approach are active and generating worldwide support.

Again this year, IDPC's main concern with the Report, however, is the Board's increasingly subtle, but still arguably illegitimate, tendency to exceed its mandate in relation to the controversial issue of treaty reform. This is of growing concern at a time when the international community requires technical assistance and advice rather than a simplistic 'treaties say no' approach to a multifaceted and cross-cutting issue area. As argued elsewhere, the Board is a watchdog rather than a guardian of the conventions,[43] and as such should be working to reconcile differences between States' positions and perspectives as debates unfold, or, as in the case of the USA, sub-national jurisdictions follow democratically selected alternatives to the current prohibition oriented paradigm. It is quite right that the Board points out potential or actual breaches with the UN drug control treaties and it will be fascinating to see how Washington D.C. deals with the predicament in which it finds itself in relation to regulated cannabis markets at the state level.

However, it is, as we noted earlier, on decidedly unstable ground when it gives the impression that states do not have the right to consider alternative approaches and consequent revision of aspects of the conventions. If this were the case, the treaties would not contain provisions concerning modification and amendment and there would have been no option for states to amend the Single Convention as they did in 1972. Indeed, as UNODC's predecessor pointed out in the 1997 *World Drug Report,* 'Laws – even the international conventions – are not written in stone: they can be changed when the democratic will of nations wishes it'. It has been noted elsewhere that this statement certainly underplays the political complexities of treaty revision.[44] But it is fundamental to understanding the nature of the drug control regime; a regime that, like all others, is far from immutable. In understanding and playing upon the nature of any potential revision process, the Board has arguably exceeded its mandate by looking to develop politically motivated narratives of conformity, including the redefinition of 'shared responsibility'. These portray revision-oriented states as villains of the peace rather than democratically

elected countries seeking what they feel are better ways to manage the complexities of drug use and the accompanying markets. Such representation is especially egregious when some producer and transit states feel that the failure of 'shared responsibility' has resulted in increased market violence and forced a reconsideration of policy approach.[45]

To be sure, debates about what would be the best way for the global community to approach the issue of drug use are, quite simply, beyond the competence of the Board, and belong elsewhere in the UN system: at the General Assembly, the Economic and Social Council (ECOSOC), the CND. Moreover, while the precise limits to the INCB mandate are a matter of legal interpretation and dispute, it is clear that on philosophical and ethical grounds, the Board places itself in an invidious position by its entry into this kind of political debate: since it itself is a creation of the conventions, from which it draws not only its authority but its very existence, how can it be expected to exercise impartial judgement in debates centring on the value of the conventions? In this regard, it is worth recalling the Board's operating practice during its early years. Then, when presenting the report to the annual meetings of the CND, the INCB President Paul Reuter is said to have always concluded: 'Gentlemen, you are the judges'.[46] One wonders if the loss of such an awareness of the Board's place within the UN system will lead to its irrelevance – an unfortunate scenario during a period when the international community is in need of expert advice. It is becoming increasingly apparent that, whether the INCB likes it or not, the drug control regime is entering into a period of significant change, particularly in relation to the recreational use of cannabis. The Board's special role in the system and its potential to act as a repository of balanced and technically informed advice makes it well placed to assist member states to negotiate this transition. However, without the necessary flexibility and nuance from the Board, countries are likely to do it alone, leaving the INCB discarded as an irrelevance and the regime in a state of chaos. If the Board can rise above its ingrained prohibitive fundamentalism, it may yet be able to guide member states through the current process of change in what was always intended to be a mutable and responsive system. The ball, for a little while longer, is in its court.

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