

IDPC Briefing Paper

The need for increased transparency: The country correspondence of the International Narcotics Control Board

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The International Drug Policy Consortium (IDPC) is a global network of NGOs and professional networks that specialise in issues related to illegal drug production and use. The Consortium aims to promote objective and open debate on the effectiveness, direction and content of drug policies at national and international level, and supports evidence-based policies that are effective in reducing drug-related harm. It produces occasional briefing papers, disseminates the reports of its member organisations about particular drug-related matters, and offers expert consultancy services to policy makers and officials around the world.

Established in 1968, the International Narcotics Control Board (INCB or Board) is, according to its own literature, the independent and quasi-judicial monitoring body for the implementation of the UN drug control treaties: the 1961 Single Convention on Narcotic Drugs (as amended by the 1972 Protocol), the 1971 Convention on Psychotropic Substances and the 1988 Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances. In performing this role, the Board has essentially three quite different functions: (a) to administer the system of global estimates to ensure the adequate supply for licit 'medical and scientific' uses of substances controlled under the 1961 and 1971 treaties; (b) to monitor the control system for precursor chemicals and recommend changes for the Tables of the 1988 Trafficking Convention; and (c) to play a 'quasi-judicial' role in order to ensure that the provisions of the international drug control treaties are adequately carried out by Governments through the maintenance of 'permanent' dialogue. As such, the Board occupies a central position

within the international drug control framework. Mindful of this, recent years have seen some member states, and sections of civil society, give increasing attention to the fact that the INCB not only sometimes operates at odds with its role as laid out within the treaties, but also pursues practices increasingly out of line with other parts of the UN system.²

It has been discussed elsewhere how questions exist in relation to the Board's engagement with civil society as well as the backgrounds and behaviour in post of INCB members. Serious concerns have also been identified with regard to the Board's 'quasi-judicial' function, particularly in light of the deepening variance in interpretation of the treaties by their owners, the member states themselves. Indeed, in recent years the INCB has often acted as a guardian rather than its intended role as a watchdog of the conventions. Instead of bringing to the attention of member states challenges and dilemmas facing the international drug control system, the Board has become more of a sentinel of the

purity of the conventions, challenging any policy or activity that does not correspond with what it perceives as the original vision of that system. Within this context, the often problematic operating procedures of the INCB can be seen in a number of inter-connected areas relating to its mandate; principally the spirit of dialogue within which the Board is supposed to operate, 'mission creep' (the tendency of the Board to make policy pronouncements that are beyond its mandate) and 'selective reticence' (the tendency of the Board to remain silent when its mandate demands otherwise). All of these issues are of particular salience for the focus of this brief; INCB-country correspondence. After all, it is only with an increase in transparency towards many aspects of its work that adequate scrutiny of the operation of the Board can be brought to bear.

The INCB remains one of the least transparent and most secretive of UN bodies. It meets in secret, and while agendas can now be found on the INCB's website, no minutes of its meetings are published, nor are the analyses by which it arrives at its positions on policy issues. Although retrospective reports are available on-line, the Board's country visits are conducted behind a veil of secrecy. There is no advance publicity, criteria for country selection or opportunities for public forums while Board members are in-country. The governments visited undoubtedly value the chance to discuss their drug policies in confidence. Yet the secrecy surrounding the planning of such visits and the lack of mechanisms for input from health professionals or non-governmental experts surely impedes the effectiveness of the Board's visits. Such secrecy insulates the INCB from healthy dialogue about its focus and priorities. To be sure, the Board's culture of secrecy insulates it from much needed oversight in general; a point well illustrated by current practice surrounding INCB-country correspondence.

Spurious rationales and the confidential correspondence process

In the course of its work, the Board, via its secretariat (an administrative entity of the United Nations Office on Drugs and Crime (UNODC)) and to a lesser extent its president, is every year engaged in thousands of communications and exchange of letters with parties to the conventions. The ostensible function of this process is twofold. It permits the Board to make enquiries and solicit clarification concerning various aspects of national drug control policies and simultaneously allows member states to seek advice concerning the requirement of the treaties. An official reading of the intent of the process is outlined in the 1976 Commentary on the Amending Protocol: 'The continuous contact of the Board or its secretariat with Governments, and especially with their competent technical departments, is likely not only to lend them assistance and to facilitate effective national action, but also quite frequently contribute to such solutions of national questions as would be most in harmony with the interests of the family of nations as a whole'.³ It is difficult to criticise such a perspective. The Board's tendency to act as an ardent defender of the conventions, as evidenced in its Annual Reports and other statements, suggests that such an idealised vision of the process does not always come to pass. Suspicions, however, are difficult to confirm since, as with many INCB activities, all such correspondence remains confidential. Again, like other aspects of its work, the Board justifies this secrecy by reference to its 'independent' nature and the rules of discretion legally established under the treaties. Yet, it is important to highlight that the only mention of confidentiality relates specifically to article 14 of the 1961 Convention, article 19 of the 1971 Convention and to article 12 of the 1988 Convention; all of which speak of scenarios where the Board is of the opinion that the action, or inaction, of a state is endangering the aims of the conventions. These are serious clauses within the treaties inasmuch as they

not only play an important part in a ‘naming and shaming’ process, but can also ultimately result in a drugs embargo. Nonetheless, as a reading of the Commentaries to the conventions reveals, rules concerning confidentiality are in reality intended to protect the countries under INCB scrutiny in relation to those articles, not to conceal details of the operating practices of, and argumentation behind the positions adopted by, the Board itself.⁴ The fact that the INCB has applied these rules to the entirety of its conduct is a purely its own decision, and not related to its mandate as laid out in the conventions. Rather, many of the Board’s practices are relics from the days of the Permanent Central Opium Board, the INCB’s predecessor body dating to the League of Nations.⁵ Indeed, that Article 11 of the 1961 Single Convention permits the Board to develop its own rules of procedure means that these rules are non-binding and legitimately open to change. In this respect, among other things, correspondence with Member States could be made publicly available unless the country involved has requested confidentiality. Embedded procedural practice certainly does not justify the Board’s secrecy in the twenty-first century and its decision not to modernise in accordance with current UN standards, including those maintained by other similar treaty bodies that deal with human rights issues.⁶ The currently opaque operation of the Board also sits increasingly uncomfortably with broader organisation-wide moves to improve accountability and transparency, particularly the development of a so-called ‘Accountability Framework.’ As a report of the Secretary-General noted in 2008, ‘The work of the Organization has grown at a fast pace in the past 10 years, making it difficult for Member States and the Secretariat to see clearly whether the Organization is doing the right things and doing things right. The challenges are great. The Organization is not only expected to do more, but it is expected to work with greater accountability, transparency, efficiency and effectiveness.’ According to the report, transparency and accountability are ‘mutually reinforcing concepts.’⁷

The consequences of an opaque process: a lack of oversight and scrutiny.

A key consequence of the current opaqueness accompanying INCB correspondence is the loss of an important opportunity for external scrutiny and oversight of the activities of the Board, particularly in relation to its mandate in the three core areas mentioned earlier.

First, it is crucial to recall that the Board is required to operate within a spirit of dialogue. This is a key overall characteristic of its mandate. Indeed, Article 9 of the Single Convention refers to ‘*All measures taken by the Board*’ (Emphasis added) taking place in terms of ‘co-operation with Governments’ and via mechanisms for ‘continuing dialogue’. As with confidentiality, the only exception to this spirit of cooperation relates to specific conditions laid out in the 1961 and 1971 Conventions. Article 14 of the Single Convention notably refers to circumstances where ‘the Board has *objective reasons* to believe that the aims of this Convention are being *seriously endangered* by reason of the failure of any party, country or territory to carry out the provisions of the Convention’ (Emphasis added). Within this context, the general mandate established for the Board under the Single Convention, especially after the 1972 Protocol, is quite broad. In fact, the Board ‘may raise with any Government...any question related to the aims of the Single Convention’. But, this broad mandate is restricted to suggesting consultations and asking for explanations.

In recent years, however, the Board, in its Annual Reports and periodic statements as well as in comments by its members and former Secretaries, has openly criticised, often apparently without consultation, the policy choices of states that deviate from its own specific (and highly selective) interpretations of the conventions, yet by any measure do not come under the provisions of Article 14 of the Single Convention. Within this context, it is becoming increasingly important to be able to scrutinise

the approach of the Board in instances where it has engaged in communication with parties that later find themselves in the INCB spotlight within the Annual Report and elsewhere. Indeed, the act of simply sending a letter to a government does not automatically imply a process of ‘co-operation’ and ‘continuing dialogue’.

The second and intimately connected issue of concern relates to what has been called ‘mission creep’; the inclination of the Board to overstep its mandate. The Commentary on the protocol amending the Single Convention notes, ‘the Board may in particular not recommend remedial measures to an individual government without its agreement’. The mandate establishes the Board’s role to be one of assistance to Member States and not to condemn them except in extreme cases of grave violations that undermine the very existence of the treaties, and even then only after a process of consultation. In addition, the INCB has no official remit to reprimand a state for not cooperating with what the Board deems to be the terms of the 1988 Convention. The Board has not always operated within these parameters. As discussed elsewhere, there are a growing number of issues that the Board considers within its competence to make judgements without being requested to do so and without engaging in consultation first. A key example is the Board’s responses to the adoption of the harm reduction approach by a growing number of parties to the conventions. For instance, the Board regularly uses its Annual Report to criticise states operating drug consumption rooms; interventions that, despite robust legal evidence to the contrary, it considers to be in contravention of the drug control treaties.⁸ In some cases, the Board has also arguably undermined its own stated respect for national legal systems by criticising legal rulings on such facilities within member states.⁹ Similarly, the INCB has come perilously close to overstepping its mandate when commenting on tolerant cannabis policies and the ‘decriminalisation’ of drugs for personal use within some member states. Again, without access to INCB correspondence, the Board to a large

degree evades necessary scrutiny and retains substantial autonomy in criticising national policies that it deems to be in contravention of the treaties. This is a particularly egregious state of affairs since, as the Commentary to the 1972 Protocol spells out, the Board ‘has to maintain friendly relations with Governments, *guided in carrying out the Conventions by a spirit of co-operation rather than by a narrow view of the letter of the law*’ (Emphasis added).¹⁰

A third area of unease relates to what can be called ‘selective reticence’ on key issues. Alongside the recent colonisation by the INCB of areas outside its remit as defined by the conventions and their commentaries, there is, on the other side of the coin, a coyness and timidity about certain elements of its role. While engaging in ‘mission creep’ in some areas, the Board sometimes refrains from intervention where circumstances, and its duties under its mandate, would warrant a robust response. This practice can be seen in a number of domains including the Board’s subdued support for opiate substitution therapies, such as those employing methadone and buprenorphine, and, despite some leadership in recent years, its commitment to expanding the provision of opiate medications for pain relief. Also of note is the Board’s reluctance to comment on human rights issues. In its report for 2007 the INCB devoted some discussion to the principle of proportionality and drug related offences noting, ‘Due respect for universal human rights, human duties and the rule of law is important for effective implementation of the international drug control conventions’.¹¹ While this initially appeared to be a partial corrective to earlier statements that the Board was not set up to deal with human rights,¹² the statement has not been matched by clear commitments to the issue within later reports or statements. Just as increased transparency in relation to country correspondence would highlight where the Board has exceeded its mandate in criticising some national policies, so access would do much to reveal where it has failed to suggest consultations and ask for explanations.

What the papers say

With these issues in mind, some effort has been made over the last few years by sections of civil society to encourage parties to the conventions to release their correspondence with the INCB.¹³ Although the response has been limited, the governments of Peru, Switzerland, the Czech Republic, Hungary and The Netherlands released some letters. In combination with previous research, the information gleaned from the official papers of these countries provides a useful, if narrow, insight into the operation of the Board in relation to its correspondence with member states. To illustrate the Board's resistance to transparency, it is noteworthy that after consultations with the Board, one of the member states approached chose not to release the INCB communications, preferring instead to provide only their replies to the Board's missives. Content analysis also shows, perhaps unsurprisingly, that in general the subject matter of letters during specific periods related very closely to the Board's areas of interest as manifest in corresponding Annual Reports. For example, correspondence between the Dutch Government and the Board during the years 2004-2007 focused predominantly upon cannabis policies and various aspects of the coffee shop system. Indeed, in a letter to the Dutch Minister of Foreign Affairs in November 2005, the Board's President, Hamid Ghodse, implies that a 2004 inter-ministerial review of the coffee shops reflected a wholesale renouncement of the separation of markets approach; a policy choice that the Board has long regarded to be contrary to the conventions. While the review in reality was nothing more than a tightened up of the existing coffee shop system, this theme was repeated in several Annual Reports thereafter.¹⁴ This combination of factual inaccuracy and selective focus do nothing to increase member states' confidence in the Board. Similarly, a set of correspondence between the INCB and the Swiss Federal Office of Public Health in 2008 were driven by the Board's enquiries into the revision of the Federal Law on Narcotics and

Psychotropic Substances. Communications with Peru were likewise based around the issue of coca. In the majority of cases, country responses included what were in essence robust legal justifications for particular policy choices, particularly in relation to tolerant approaches to possession for personal use and engagement with various harm reduction interventions. It is fair to conclude, however, that in most instances the inquiries made by the Board were legitimate and within its mandate. That said, even with the restricted sample of letters examined, there were occasions where the Board came perilously close to exceeding, if not stepping over, appropriate boundaries. For instance:

- In the course of its correspondence with the Dutch government, the Board appeared to adopt an inappropriate position on the issue of medical marijuana. Having asked countries where research was known to be taking place to send the Board the findings of studies, the Secretary of the Board, Mr. Koli Kouame, noted, 'The replies received from the relevant countries indicated that the results of such research regarding the therapeutic usefulness of cannabis remained limited'. As discussed in other critiques of the Board's activities, it is not the place of the INCB to make judgements on the nature of scientific studies. Indeed, 'It is not up to the Board to decide whether scientific results are', to quote the Board's 2003 Report, "conclusive" nor whether cannabis has medical usefulness. It is neither within their mandate nor their competence'.¹⁵ In the same set of correspondence, the Board also seemed to question scientific research into the medical co-prescription of heroin; again, an activity beyond its remit. Interestingly, despite the INCB's status as an expert body, in this case it was the Dutch authorities that proactively sent the Board recent research on that particular harm reduction intervention.

- In its correspondence with the Dutch government in September 2005, the Board stated that it would have 'grave concerns' if the authorities did not move to prosecute the presenter of a television programme ('Spuiten en Slikken') if, as proposed, he took heroin and LCD while on the air. The government expressed its ill ease at the situation. However, as the Dutch response made clear, since the Media Act offered no opportunities to prevent televised drug use it was only possible to conclusively determine if a drug related crime had been committed after the act. Moreover, the response continued, 'It should also be noted that the Dutch drug law does not prohibit the use of drugs'. Apart from the inappropriateness of a UN official seeking to get involved in the individual prosecution decisions of a member state, Kouame's letter came close to urging the Dutch authorities to take a course of action that was not in line with its national legislation.
- In an incident in the late 1990s, the Board demonstrated its willingness to circumvent its mandate, and be selective in its engagement with non-state authorities, by acting on information received from state governments rather than from treaty members themselves. In this case, in response to opponents in New South Wales of the then proposed drug consumption room in Sydney, the INCB engaged in communication with Australian Commonwealth authorities informing them that the facility would be in contravention of the international conventions. This took place despite the fact that the Board has the right to propose the opening of consultations with a government only after it has examined information 'submitted by Governments to the Board'.¹⁶

It is true that these are only limited examples of the Board engaging in 'mission creep' and at times deviating from the spirit of dialogue. That said, the sample from which they are drawn

is also limited. It is fair to assume that other correspondence sets would reveal other, and perhaps more significant, anomalies within the operation of the Board. Further insights into the way in which the INCB monitors the implementation of the UN drug conventions would certainly be gained through access to its correspondence with more, particularly non-Western, governments. This might be particularly revealing in relation to the Board's oft-displayed 'selective reticence'. For instance, does the INCB also inquire after the human rights position of drugs users and traffickers in certain countries? Does it remind Members States of the legality of substitution treatment? And what does the Board write about the availability of drugs for medical purposes?

Conclusions

It seems clear that current practice in relation to the Board's country correspondence does much to impede appropriate accountability of its operating procedures. Overall, this shroud of secrecy and lack of scrutiny does little for the image of the body itself, particularly since it is funded from the core UN budget and is consequently in many ways under the 'ownership' of the international community as a whole. The INCB's culture of confidentiality also undermines confidence in its ability to carry out its important mandate in a balanced and sophisticated manner; one that reflects both the realities of the contemporary global drug situation and the plurality of views that exist on how best to deal with it. This is not to say, however, that member states are beyond reproach in this regard. While of course within their rights to maintain confidentiality in relation to issues of their choosing, an increased willingness to make correspondence publically available would improve the functioning of the extant system by helping to ensure that the Board operates according to its mandate as laid out in the conventions. This would go some way to not only reduce the current tensions

within the system, but also set the scene for a serious, respectful and much needed discussion of the many challenges currently facing the international drug control regime. Moreover, parties could gain more immediate benefits from increased openness in relation to how the INCB presents national situations in its Annual Reports. The release of correspondence would reveal where the INCB has chosen not to take on board explanations of particular policy choices. Improved transparency may even enhance the overall quality of future Reports by encouraging the Board to include as a matter of course 'an account of explanations' given by parties; an option well within its rights. 'Experience shows', states the Commentary on the 1988 Trafficking Convention, 'that publicity is perhaps the most potent force in obtaining compliance with treaty provisions'. Member states would do well to appreciate that such a sharp observation has the potential to cut both ways.

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Endnotes

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- 2 For civil society critiques see *A Call to the new Secretary of the International Narcotics Control Board: Ongoing Challenges*, Advocacy Note, International Drug Policy Consortium, February, 2009. <http://www.idpc.net/publications/idpc-advocacy-note-call-to-incb-chair-march-2010>

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Also of relevance are various IDPC responses to the INCB's Annual Report available at <http://www.idpc.net/publications>
- 3 *Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, 1961. Done at Geneva on 25 March 1972*, United Nations, New York, 1976, p. 14
- 4 See for example *Commentary on the Single Convention on Narcotic Drugs, 1961* (Prepared by the Secretary-General in accordance with paragraph 1 of Economic and Social Council resolution 914D (XXXIV) of 3 August 1962) United Nations, New York, 1973, p. 183, *Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, 1961*, *ibid.*, p. 27 and *Commentary on the Convention on Psychotropic Substances. Done at Vienna on 21 February 1971*, United Nations, New York, 1976, pp. 316-318
- 5 Damon Barrett, *Unique in International Relations*, *op. cit.*, p. 32
- 6 *Ibid.*, p. 38.
- 7 Report of the Secretary-General, 'Accountability Framework, enterprise risk management and internal control framework, and results-based management framework,' General Assembly, 19 February, Review of the efficiency of the administrative and financial functioning of the United Nations, Programme budget for the biennium 2008-2009, (A/62/701), Summary and p. 5.
- 8 See for example INCB Report for 2006, paragraph 590, INCB Report for 2007 paragraphs 153 & 154 & Recommendation 9 and INCB Report for 2008 paragraph 161.
- 9 See INCB Report for 2008 paragraph 430
- 10 *Commentary on the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961*, *op. cit.*, p. 11,
- 11 INCB Report for 2007 paragraph 38
- 12 INCB Press Conference, New York, March 7 2007. <http://webcast.un.org/ramgen/ondemand/pressconference/2007/pc070307am.rm>
- 13 This was an initiative of the Transnational Institute Drugs and Democracy Programme.
- 14 See for example INCB Report for 2004 paragraph 220 and INCB Report for 2008 paragraph 180
- 15 *The Erratic Crusade of the INCB*, *op.cit.*
- 16 See Article 14.1 (a) of the Single Convention on Narcotic Drugs. Also see Bewley-Taylor, forthcoming.



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