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International Drug Policy Consortium

IDPC RESPONSE TO THE INCB ANNUAL REPORT FOR 2015

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Executive summary

The Annual Report of the International Narcotics Control Board (INCB or Board) for 2015 is, like the broader international drug policy debate, coloured by what was then the approaching United Nations General Assembly Special Session (UNGASS) on the world drug problem of April 2016. A number of key themes are reflected in the Report, including the abolition of the death penalty for drug-related offences; the defence of the international drug control conventions, and the availability of controlled drugs for medical and scientific uses. This might be summarised in what the President terms in his Foreword 'the right way in drug policy'.

As is increasingly the case, the Report is highly informative as regards the contemporary drug landscape. In addition, this is complemented by a reduction in explicit political content, a trend that has featured over recent years. Prior to this trend, the Annual Reports tended to be filled with examples of the Board exceeding its mandate. Shortcomings do continue, with the Board often failing to comment or recommend with respect to issues on which it should, and which sit squarely within its mandate. One of the most blatant instances is the neglect of criticism of Russia's failure to provide opioid substitution therapy (OST). Furthermore, while there is much to be welcomed in the Board's support for the principles of human rights, it is often expressed in vague language. There is a reluctance to speak out regarding human rights violations, though the explicit critique in August 2016 of the 'war on drugs' in the Philippines represents a promising exception.

IDPC's response to the Board's 2015 Report is organised under four interwoven headings: (i) an analysis of Mr. Sipp's (President of INCB) Foreword; (ii) an exploration of the Report's thematic chapter, entitled 'The Health and Welfare of Mankind: challenges and opportunities for the international control of drugs'; (iii) an examination of the Board's relationship with drug control and human rights; and (iv) an annex that mirrors the INCB's own, standalone booklet on the Availability of controlled drugs for medical and scientific uses.

In addition, the topic of regulated cannabis is also raised by the Annual Report, doubtless with the forthcoming Special Session in mind. While it tolerates the decriminalisation of consumption, the Board argues that cannabis markets such as those in the USA and Uruguay transgress the fundamental principles of the 1961 Single Convention on Narcotic Drugs. Finally, this leads on to IDPC's analysis toward the Board's attitude to its own role, and to the question of the 'ownership' of the conventions and the drug control system built upon them.

As has been visible for the past few years, the INCB is undergoing a period of transition, in accordance with the wider control regime of which it is a part. The 2015 Report is both an actor and a reflection of this transition. IDPC will continue to follow the process of change.

Introduction

During 2015, the rapidly approaching UNGASS dominated debates around international drug policy, with member states engaged in the fraught process of drafting the Outcome Document to be agreed at the UN in New York in April 2016. This was, perhaps unrealistically, to be 'a short, substantive, concise and action oriented document', that proposed 'ways to address long-standing and emerging challenges in countering the world drug problem'.[1] The drafting of any multilateral consensus position is problematic at the best of times. Where drug policy is concerned, current circumstances compound the difficulties. Increasingly diverse national perspectives on how to deal with ever more complex and fluid illicit drug markets ensured that diplomats and UN officials in Vienna spent long hours in complex and frequently frustrating negotiations. Simultaneously, underlying such a tense process was the related and profound, yet often strangely ignored, fact that the international drug control system due to be discussed at the UN headquarters in the spring of 2016 was itself experiencing an unprecedented set of 'emerging challenges'. Prominent among these were how to deal with the implementation by authorities within Uruguay and, at the subnational level, the United States of America of legally regulated cannabis markets for non-medical and non-scientific purposes. This is an approach widely regarded to be beyond the confines of the extant treaty framework and one that reveals an often stark disconnect between the existing prohibition-oriented UN drug control architecture and the policy choices increasingly pursued within the territories of some state parties to the conventions.

With all this in mind, the content, focus and tone of *Report of the International Narcotics Control Board for 2015* (published March 2016) is, in the main, what was to be expected. As IDPC is always keen to point out, in terms of scope, the publication represents an impressive feat of data collection, synthesis and presentation. As is the norm, it contains much useful 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 scientific purposes while simultaneously suppressing – and ultimately eliminating – the illicit market in those drugs. The *Report for 2015* is informative in what it tells us about the state of markets for and some recent government responses to what we might call traditional drugs – opioids, cannabis and Amphetamine-Type Stimulants (ATS) – as well more recent phenomena such as Novel Psychoactive Substances (NPS) and the misuse of prescription drugs. It also talks in places of the challenges posed by 'drug trafficking' via the internet, although the Board once again fails to mention dark net crypto-drug markets. On the internet issue and others, the Report provides useful information regarding resolutions from the Commission on Narcotic Drugs (CND), states' progress relative to such decisions as well as steps relating to country engagement with monitoring systems, including in relation to precursor chemicals. It is also noteworthy that, as is the case with publications from the United Nations Office on Drugs and Crime (UNODC) regarding Annual Report Questionnaires, the INCB highlights the lack of reliable data in many areas of concern and poor reporting from countries concerning estimates for licit drug requirements.

Beyond such accounts of the functioning of the international drug control system and the 'world situation', the Report for 2015 is also insightful in terms

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 the 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.

of how the Board (see Box 1), including its new president, views the state of the international system during a period of extraordinary flux and challenge and in the lead up to the UNGASS. Indeed, as is clear from its opening pages, the Report, and accompanying publications, is presented as part of the INCB's contribution to the debates leading to the New York meeting. Beyond the usual 'Recommendations to Governments, the United Nations and other relevant international and national organizations', the intention is to influence discussions in a manner in line with its reading of both state obligations within the conventions and the current world situation. It is therefore commendable that the Board reiterates its opposition to use of the death penalty for drug-related offences and continues to encourage states to improve access to controlled medicines. The latter is a topic to which the INCB devotes a separate and complementary publication, *Availability of internationally controlled drugs: Ensuring adequate access for medical and scientific purposes*. Both of the issues are crucial in terms of the intersection between human rights and drug policy; an increasingly prominent topic of debate and rhetoric at the international level. Indeed, in recent years, multinational policy discussions have become increasingly replete with apparently unifying, yet still often vague, language pointing to the importance of human rights and health for conceptualisation and implementation of drug policy under the extant treaty system.

In this regard, the Report for 2015 represents the continuation of the welcome trend for a less politicised, more balanced and appropriate approach to fulfilling one of its roles under the 1961 Single Convention on Narcotic Drugs.[2] Gone are the days when much analysis of the annual reports could be filled with examination of examples of possible mission creep, reflecting the inclination of the INCB to exceed its mandate. That said, as we will see in the pages that follow, some shortcomings remain. These include ongoing examples of selective reticence – an unwillingness to comment on important issues that appear to be within the INCB's purview – and in respect to the way the Board approaches the confluence of drug policy and human rights as well as the UN drug control system's relationship with human rights norms and international law more broadly.

In an attempt to address some of these issues, this response to the INCB Annual Report for 2015 is organised under four inter-connected headings, and this year includes a special annex. It begins with an analysis of the President's Foreword before moving onto discussion of the thematic chapter. Thereafter it examines a number of issues surrounding the Board's approach to human rights. These include controlled medicines – a section that is complemented by an analysis of the Board's supplementary report on the topic, *Availability of internationally controlled drugs,* in the Annex – harm reduction and its reaction to shifts in the drug policy landscape.

Foreword to the Report: Enter President Sipp

As is the norm, the Foreword to this year's Annual Report is written by the INCB President. Having taken on that position in 2015, the publication is consequently the first under Mr. Werner Sipp's Presidency. A member of the Board since 2012, Mr. Sipp is rare among INCB Presidents inasmuch as he comes from a legal background.[3] Considering the current interpretive tensions around treaty obligations, this is clearly a useful perspective.

With this in mind, the President begins his foreword boldly, asserting that 'Currently, there is a global debate taking place on "the right way in drug policy"'. The Board, he goes on to say, 'will participate in this debate, given its mandate to monitor implementation of and compliance with the three international drug control conventions'. Mindful of the timing of the publication, within this context it is unsurprising that Mr. Sipp quickly moves on to highlight the importance of the UNGASS and the Board's role within it. In so doing, the President reminds readers that the UN General Assembly decided to convene a special session to 'review progress in the implementation of the 2009 Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem and to assess the achievements and challenges in countering the world drug problem'.

As remains the case within almost all official pronouncements from the Board, the task is set up to take place 'within the framework of the three international drug control conventions' and, as is increasingly the case, '*other relevant United Nations instruments*' (Italics added). This secondary qualifying clause remains a welcome addition to the ritualised reference to the drug control treaties. Nonetheless, amidst the ongoing high-level debates about human rights and health it is arguably a missed opportunity. Here the President, especially because of his legal background, could have added some

precision to what remains a vague nod in the direction of important values, norms and member state commitments emanating from other – yet related – parts of the UN system. This is particularly so since later in the Foreword he refers to the drug control system as being a balanced one that, among other things, is 'driving towards…compliance with international human rights standards'.

Indeed, in a perhaps overly optimistic fashion, Mr. Sipp goes on to suggest that the special session '*should* lead to a *rethinking and refocusing* of the world's drug control priorities and promote global cooperation in countering drug abuse and drug-related crime, while affirming that the global capacity to resolve these issues requires commensurate global political and legal commitment' (italics added). While undoubtedly a welcome sentiment, within the context of the Foreword and the Board's default position as 'custodian' of the treaties (Para. 46), the extent of any process of recalibration of priorities called for by the President would remain constrained by the parameters of the present treaty architecture – parameters that offer considerable but still bounded flexibility.

With this as a backdrop, Mr. Sipp stresses how the INCB is 'uniquely placed to contribute to the current discussions on international trends and emerging threats in drug control'. As such, the President continues, 'It will contribute the insight and experience it has accumulated over decades of monitoring the implementation of the drug control conventions and identifying achievements, challenges and weaknesses in drug control' as well as 'highlighting and clarifying the approaches and principles underlying the international system for drug control and making recommendations based upon the conventions'.

As elements of the Board's contribution to the UNGASS process, the President flags up the Annual Report for 2015, the supplementary report on the availability of internationally controlled drugs and the report on precursors. In addition, Mr. Sipp also turns his attention to this year's thematic chapter. Focusing on the 'health and welfare of mankind' and the international drug control system, the chapter is clearly intended to present the Board's preferred overarching narrative within which to assess policy shifts in the current policy landscape and approach related debates at the UNGASS. This includes 'most of the relevant aspects of the global drug problem and most of the critical points in the ongoing debate on the "the right way to do drug policy"'. Indeed, as will be discussed further below, the message is that 'the system in place, *when fully implemented*, contributes to protecting the health and welfare of people worldwide and ensures balanced national approaches that take into account local socioeconomic and sociocultural conditions' (emphasis added). To be sure, the President argues that 'Even with the reality of the constantly shifting contours of the drug problem' the conventions 'have proved their value as the cornerstone of international cooperation in drug policy'. As is often the case in any discussion concerning the health of the international drug control system itself, Mr. Sipp also points to the almost universal ratification of the treaties and reaffirmation through Political Declarations as proof that within the international community the 'desire to counter the world's drug problem is shared globally'.

Although valid to some extent, the presentation of ratifications of hard law instruments and support for consensus soft law declarations is a somewhat blunt assessment of the current situation.[4] It is undoubtedly true that most states wish to address the 'world drug problem' in a balanced and holistic fashion and in cooperation with other members of the international community. That said, as the debates about the 'right way in drug policy' (as highlighted in the President's Foreword) reveal, there is increasing diversity and pluralism in the way nation states approach illicit drug markets within their own borders. In many cases, decisions are being made today in response to market environments unforeseen many years ago when states parties agreed the 'boundaries' – to use the terminology within the Foreword – of legitimate policy during treaty negotiations and later when they became signatories and Parties to the conventions. This is a process that has led to the creation of legally regulated cannabis markets in a number of jurisdictions; a policy option, it should be recalled, the Board legitimately deems to be beyond the confines of the current treaty framework (see below).

Indeed, it is becoming increasingly well understood that a combination of complex and dynamic markets operating in different geographic and 'socioeconomic' and 'sociocultural' spaces means any notion of a singular 'right way' to deal with them is fraught. The inherent, though limited, flexibility within the treaties themselves is the result of recognition by their drafters of the need, admittedly within a prohibition-oriented framework, for some policy latitude – an issue touched upon by Mr. Sipp within the Foreword. It is becoming ever clearer,

however, that for many authorities 'the right way' to deal with the specificity of their piece of the 'world drug problem' may no longer be in line with all aspects of the drug control conventions as they currently stand. As a result, although much of the Foreword's discussion of the achievements (e.g. control of the licit trade), shortcomings of (e. g. access to essential medicines and reduction in 'illicit demand') and permissible latitude within the international system is valid, presentation of the international system in its current form as 'the right way' to deal with the 'world drug problem' seems increasingly strained and problematic. Consequently, Mr. Sipp's position that '…it remains imperative that Governments give due regard to the letter and spirit of the drug control conventions in the elaboration of future policies' and that 'States will continue to have their own practical and operational approaches to addressing local drug problems, but compliance with the conventions means *fully* implementing the underlying principles and obligations' (emphasis added) appears ever more quixotic; particularly where cannabis is concerned.

Moreover, we have reached the point where parties to the conventions are openly disagreeing on a diverse range of issues, significantly among them use of the death penalty for drug-related offences. This means that it is all the more urgent for the Board, including the president in his Foreword to the INCB annual reports, to add clarity, not just to the 'approaches and principles underlying the international system for drug control' but also to the notion that drug policy must be conducted in line with 'other relevant United Nations instruments'. As has been ably argued elsewhere, policy pluralism is an inevitable and not unwelcome response to the ever-changing nature of illicit drug markets.[5] Yet, within an increasingly diverse policy landscape, policies must not only be evidence-based but also conducted in accordance with UN principles on human rights.[6]

Finally, the mention of evidence here also leads to an interesting insight into the Board's view – or at least that of the President – of policy development. Although mentioning the importance of national policies that are 'grounded in evidence', there remains on a number of occasions a lack of clarity on this issue within the Foreword. First, the meaning of the following sentence is unclear: 'The first chapter of this publication…shows that the current framework is both comprehensive and cohesive, promoting the application of scientific knowledge, proportionally and in *moderation*' (emphasis added). Second, in reiterating the function of the Board's reports and supplements to 'provide an update on functioning of the system and deliver[s] an analysis of developments in world drug situation' the President points out that 'Any proposals to work outside the framework of the treaties undermine the broad-based consensus upon which the drug-control system is founded'. Such a comment is reminiscent of the response of the INCB President in 1996 to a statement that Dutch cannabis policies were working. Then Dr. Oskar Schroeder is said to have replied, 'I'm not really interested if it's working or not working. What I'm interested in is what you are doing within the lines of the international treaty. That's what we have to check. We're not really interested if it works or not'.[7] Indeed, the impression given that the evidence base should be trumped by concerns for treaty adherence provides another example of the Board's increasingly awkward position negotiating the relationship between its mandated role and the rapid pace of policy change in the world beyond Vienna.

Thematic chapter: More of the same (literally?)

As has been the case since 1992, the opening chapter of this year's INCB Annual Report is thematic. Not for the first time, and unsurprisingly bearing in mind the Board's position within the control system, it features a defence of the international drug control regime and the treaties that underpin it. The chapter is entitled, *The health and welfare of mankind: Challenges and opportunities for the international control of drugs*; a subject that was clearly selected with the 2016 UNGASS in mind.

The thematic chapter is composed of ten discrete sections organised to run from A to J. As expected, the first section (A) focuses on the core aims of the international drug control conventions, and, drawing on language from the preambles of the conventions, is headed 'Health and welfare as the main objectives of the international drug control treaties'. The core objective of the conventions, claims the text, resides in the protection of individual and public health and welfare. Signatory governments are required to restrict scheduled drugs to medical and scientific uses; alongside this goal they are obliged to take preventative measures, and provide treatment, education and aftercare to people who use drugs.

The 2016 UNGASS offered a point at which to undertake a critical assessment of the global

drug situation and the present drug control policies, observes the Board, and to review the ways in which the principles of the regime have been implemented in practice. With this in mind, it is noted that the world has changed, and that drug control measures have changed with it; it is 'therefore necessary to consider how policy changes to address emerging challenges can be achieved within the existing international legal drug control framework' (Para. 2). Once more, even as it recognises the impact of change in the worldwide social environment, the INCB emphasizes as always the 'almost universal support' enjoyed by the present regime, and that any change must be encompassed within it.

The second section (B) again addresses the topic of drugs and the health and welfare of mankind. It is interesting here that the Board acknowledges that the 'use of substances to influence mood, sensation, perception and cognition is a near-universal human phenomenon' (Para. 3); it is a point remarked upon by several scholars.[8] The INCB alleges, however, that 'many of those substances pose the risk of addiction or, more largely, problematic patterns of use and abuse among people who take them'.[9] This is a generalisation that stretches the reality it attempts to describe. Indeed, the UNODC implicitly recognises this fact, pointing out in its 2015 *World Drug Report* that some 246 million people used controlled drugs in a nonmedical way in 2013, while 27 million of these were classified as 'problem users'.[10] In other words, approximately one out of ten develop problematic use, in stark contrast to the moral panic surrounding recreational drug use.

The Board acknowledges that various factors may influence the ways in which an individual's or a community's drug use may progress, citing the substance, the individual, the social setting, and the mode of administration. Though this narrative lacks historical and cultural complexity, it introduces some level of social influence to the Board's argument.[11] The risks associated with drug use, it argues, are what leads governments to place these psychoactive substances under control. Moreover, it declares that whether or not they are controlled, these substances are unique in the sense that their customers are not under voluntary or rational control. Furthermore, the recent flux of NPS, whose short- and long-term effects remain unknown, has added further layers of risk to drug consumption.

Nonetheless, as the Report comments, the conventions imply the understanding that drugs have indispensable medical uses, and represent an indispensable source of relief from pain and suffering. The Board is aware that access to pain relief is highly unevenly spread, with consumption concentrated in the wealthy regions of the world. It alleges that the international conventions do not require any specific mode of drug dependence treatment, and urges states to base their therapeutic measures on scientific evidence. Nonetheless, the INCB fails to make any public criticism of Russia, a country which is notorious for its failure to provide humane and scientifically-grounded therapy for people dependent on drugs.[12]

The third section (C) of the chapter discusses the three drug control conventions and their results. It acknowledges the difficulty of assessing the results of the conventions, as there is no counter-factual on which to base such an assessment. According to the INCB, in 1906/7, prior to the adoption of international drug control, global opium production stood at 41,600 tons, with a world population of 2 billion people. However, these figures are far from reliable, and if the year 1908 had been chosen it would have been much less.[13] Meanwhile, it continues, the *World Drug Report 2015* estimated illicit world opium production at 7,554 tons, with a global population of over 7 billion. The Board is here repeating the containment narrative familiar to the UNODC, which implies that the international drug control regime has maintained global opium levels at a fraction of the previous levels. It should be noted, however, that the 1906/7 figure includes licit production – indeed, there was no international distinction between classifications of licit and illicit at this time. Moreover, at the dawn of the twentieth century, opium was a near universal medicine, and could not be meaningfully compared with that produced illicitly in our own era.[14]

The Board goes on to illustrate the issue of regulated drugs for non-medical uses by reference to alcohol and tobacco, citing alcohol as a source of violence and tobacco as a source of harm to health. As it points out: '…alcohol and tobacco kill many times more the number of people than controlled substances do' (Para. 13). It argues that were other drugs to be made legal for non-medical use, they would generate equally high levels of harms to health. Both the containment narrative and the comparison with alcohol and tobacco represent attempts by the INCB to compensate for the lack of a counter-factual or control group against which to measure the present arrangements; neither stands on solid ground.

The next section of the thematic chapter refers to the socioeconomic and sociopolitical context of drug control. The initial point is well-made: 'Addressing social, economic and political issues that can create opportunities for violence and drug use may be as valuable as the efforts directly targeting the drugs themselves' (Para. 16). It claims that hunger, poverty, inequality and other social factors act as drivers for 'abuse', or, as it may be more accurate to say, for problematic and harmful forms of drug consumption. The Board claims that drug control must be part of a comprehensive approach that includes individuals, families, and communities. These measures should aim at producing resilient people and societies, and robust institutions that resist the impact of corruption.

Social health and challenges (E), the subsequent segment, returns to the theme that health and welfare require the prevention and reduction of social harm. Using the metaphor of the social body, it acknowledges that drug control measures can themselves generate social harm: 'An important social harm is the impact of the incarceration of drug users, for whom incarceration can have significant financial, familial and occupational influences' (Para. 18). This is a welcome insight that would have been beyond the INCB a decade ago. More familiar is the insistence that 'violence is perhaps the most visible and pernicious outcome of drug trafficking' (Para. 24). The Board argues that such violence springs from territorial disputes between traffickers, breakdown of law and order in states, and corruption. This section also refers to the corruption of state officials, which remains a constant challenge for drug control, while the internet represents one of the newest problems.

The subsequent section (F) is entitled 'Supply reduction efforts and their limitations'. The title immediately signals an understanding that supply reduction cannot achieve all the objectives of drug control, as the Board conceives them. Notwithstanding, the first point to be made is that 'in any drug control system, supply reduction and the enforcement of regulations will always be an important element of an integrated and balanced approach' (Para. 29). The text then notes that in recent years, efforts to suppress illicit drug supplies and drug use have been the object of criticism on the grounds that they are regarded as 'failed policies' (Para. 30).

The Board argues that this logic is 'questionable' as nobody 'has advocated abandoning the global response to AIDS or hunger because those problems have not been eliminated' (Para. 30). Instead, the INCB believes that enforcement efforts help to raise drug prices, and thereby reduce demand. This is a popular argument amongst those who advocate repressive methods, but the Board indicates that its understanding is not without subtlety, since higher prices, it reminds us, can exacerbate the problems associated with the market. The total revenue available to traffickers can be increased by overly repressive approaches, providing a further incentive to criminal actions. 'Law enforcement policy', claims the Board, 'therefore needs to be carefully designed, keeping in mind both the objective of drug control and the possible unintended results' (Para. 32).

Following on from this, the chapter then deals with (G) the principle of proportionality which, it contends, is a principle recognised by the international drug control conventions, and guides a state's responses to acts prohibited by law or custom. The principle permits punishment of an act, so long as it is not disproportionate to the severity of the crime. The drug control treaties offer alternative measures to punishment, including treatment, education and aftercare, in the case of relatively minor offences. The Board reminds governments that the conventions do not require the incarceration of drug users, but they do oblige states to criminalise supply-related actions, 'while encouraging them to consider prevention, treatment and rehabilitation as alternatives to punishment' (Para. 35). The INCB could make explicit recommendations on the question of proportionality, but refrains from doing so. In a similar vein, the INCB fails to raise concerns about the fact that women now constitute the fastest growing prison population worldwide, with incarceration rates mainly driven by the imposition of disproportionate penalties for minor drug offences. In countries like Argentina, Brazil and Costa Rica, women incarcerated for drug offences represent up to 60% of the female prison population.[15] In Thailand, this goes up to 82%.[16] Yet, the INCB remains silent both on this concerning situation and on steps undertaken by some countries – such as Ecuador or Costa Rica – to reduce incarceration rates for minor offences.[17]

'Drug control', the chapter reminds us in its following section (H), 'must be consistent with international human rights standards' with the Board emphasizing that states parties 'need to make full use of international instruments to protect children from drug abuse and ensure that national and international drug control strategies are in the best

interest of the child' (Para. 36). In a relatively recent position, the Board also declares that it has advised those states continuing to use the death penalty for drug-related offences to consider abolishing capital punishment for these types of offences. Furthermore, it notes that violence can threaten efforts to safeguard human rights, although it is perhaps noteworthy that the section on human rights is among the smaller segments of the chapter. This is surprising given the prominence afforded to the issue within the president's Foreword.

Unintended consequences (section I) reprises some of the ideas of the *World Drug Report 2009*, in which the problematic side effects of the international drug control are explored.[18] These are blamed on the unbalanced implementation of the system's measures, with the Board arguing that the idea controlled drugs should be made licit for non-medical uses in an attempt to mitigate them is flawed. Rather, it contends, these unintended consequences can be prevented or managed by the application of the existing drug control measures in a balanced way, with the 'victims' of trafficking given education and treatment.

The final section (J) sets out the Board's conclusions and recommendations, returning to the ways in which human health and welfare can be promoted by drug control. It draws attention to the fact that drugs are medicines, but can also 'cause serious harm to health' (Para. 40). Likewise, drug policies can prevent harm but can also result in unintended damage. The INCB concludes that permitting the non-medical consumption of controlled drugs would not be an adequate solution to the problem. It claims that states parties have made important progress in recent years, while acknowledging that some existing policies – 'militarised law enforcement, policies that neglect human rights, over-incarceration, denial of medically appropriate treatment, inhumane or disproportionate approaches' – are not in accord with the conventions. 'It is recommended that States approach the forthcoming UNGASS with the goal of reinforcing what works while modifying what does not' (Para. 41). The litany of 'what works' repeats the measures already discussed throughout the chapter: governments should counter international crime; improve the transparency of institutions to confront corruption; provide education on treatment; strengthen social ties and employ evidence-based treatment, and provide alternatives to punishment. 'However', the report stresses, 'prevention of substance abuse in society in general, and in particular among young people, should remain the primordial objective of government action' (Para. 44). The message of the Board is clear: the conventions are effective only if States fulfil their treaty obligations.

And so, despite a welcome acknowledgment of many shortcomings of the current system, the thematic chapter ends where it began, and where the Board has so often trodden before: with the defence of the international drug control treaties in their current form. As has been discussed elsewhere, there appear to be innate tensions surrounding the Board's role within the international drug control regime. On the one hand it is, according to the conventions, a monitor or watchdog whose duty it is to oversee the compliance of states with the principles of the treaties, describe the global situation and bring attention to challenges and dilemmas.[19] On the other, the Board has often taken upon itself to be guardian of the conventions with an obligation to defend the treaties as they stand from the efforts of reformers – even if such efforts come from member states, themselves the true owners of the treaties.

As can be seen in a reading of recent Reports, we appear to be witnessing a welcome shift in approach whereby the Board is acting much more as a monitor and watchdog than an ardent guardian that engages in behaviour exceeding its mandate in order to criticise national policies and choices that deviate from its perspective. Nonetheless, as the content and tone of the thematic chapter demonstrate on occasion the Board (itself a creature of the regime) still slips into defensive mode; even if this is less aggressive than in the past. This is the case even as its expertise is urgently required in assisting member states to deal with ever more complex and dynamic illicit drug markets as well as their obligations to not only the drug control treaties, but other aspects of international law more broadly, prominent among them human rights.

The INCB on human rights and human wrongs

In addition to Mr. Sipp's references to the importance of drug policy to respect human rights within the foreword, the issue is, unsurprisingly, mentioned at various points within the main body of the text.[20] This is the case within the thematic chapter where human rights receive some attention, in particular in relation to the death penalty. Specifically, the Report notes that 'The Board has [also] advised

all countries that continue to retain the death penalty for drug related offences to consider abolishing capital punishment for this category of offences' (Para. 36).

As IDPC has noted in previous publications and comments on the actions of the Board,[21] such a position on the death penalty for drug-related offences is a welcome corrective to its previous silence on the issue. That said, in terms of missed opportunities, it can be argued that the INCB still remains overly timid. Indeed, within both chapters II and III ('Functioning of the international drug control system' and 'Analysis of the world situation') there is no reference to the actions of the Indonesian government or countries like China and Pakistan that regularly execute drug offenders or keep many on death row. Furthermore, following a mission to the Islamic Republic of Iran in May 2015, the Report only notes that 'The Government of the Islamic Republic of Iran continues to apply corporal punishment and the death penalty for drug-related offences' (Para. 179). Discussions of the recent legislative amendment in India, which includes the repeal of the mandatory imposition of the 'death penalty in case of a repeat conviction for trafficking large quantities of drugs (sic)', does trigger a more appropriate response from the INCB. Here the Report states, 'INCB takes note of this development and again encourages those States which retain and continue to impose the death penalty for drug-related offences to consider abolishing the death penalty for such offences' (Para. 537). Once again this is a welcome comment. However, rather than being hidden in the text, surely an issue as central as this is worthy of more prominence, such as explicit mention within the Chapter IV, 'Recommendations to governments, the United Nations and other relevant international and national organizations'.

The Board's reluctance to be more vocal and specific on drug policy-related human rights violations does not end there, although the INCB must be commended for adopting a more inclusive approach to human rights than in previous years.[22] For example, as noted in the thematic chapter, 'In addition to indirect and unintentional consequences for human rights via lawless, corrupt and arbitrary governance, violence can threaten efforts to safeguard human rights'. Having correctly identified a governance deficit as a threat to human rights, the Board goes on to state 'This is especially true when drug trafficking and corruption weaken legitimate institutions of governance and contribute to the failure of national authorities or prevent weak States from developing robust structures (Para. 37). This is a valid line of argumentation. Yet, such a stance downplays the role of the policy choices of legitimate governments in undermining human rights. For example, although drug-related violence in the Americas is mentioned (e.g. 'Highlights' p. 43 & Para. 400), there is once again no acknowledgement of the role of a militarized response to burgeoning drug markets in increasing the levels of violence, including in relation to Mexico. This is despite a statement within chapter I that such an approach has no place within the treaty framework. Moreover, while it is to be expected that the Report makes note of the suspension by the Colombian government of aerial spraying of coca bush with glyphosate in May 2015, it is unfortunate that the Board does not view the practice in terms of human rights violations. This is especially so in view of the fact that 'The National Narcotics Council established a technical commission to explore alternative means of eradication, and the country is now exploring the use of other herbicides that may be used in aerial spraying' (Para. 461).[23] Further examples of omission and incongruity of approach can be found with regard to a number of other inter-related issue areas, including harm reduction and access to controlled medicines.

Harm reduction

In line with the ongoing trend within the content and tone of recent annual reports, the Report for 2015 certainly represents an improvement in its handling of the harm reduction approach, specifically in relation to interventions targeted at people who inject drugs. For example, while it was not expected that the Board would come out in favour of drug consumption rooms, it is interesting to note the continuation of the more low-key reaction to the intervention displayed in last year's Report. Rather than an outright condemnation of the approach as contrary to the terms of the drug control treaties as had long been the case, the Report for 2015 notes the intention to establish 'low risk consumption rooms' in France, expresses ongoing concerns that such facilities 'may not be' consistent with the provisions of the conventions and points to 'ongoing dialogue on this matter' (Paras. 137-140). The Board also simply describes the domestic legal status of a 'supervised consumption site' in Canada (Insite) and the fact that 'additional applications for the establishment of drug consumption rooms have been received by Health Canada and are currently under consideration' (Para. 410). As we noted in our response to the Annual Report

for 2014,[24] such an approach is in line with the 2002 report to the INCB by the Legal Affairs Section (LAS) of the UN International Drug Control Programme. Titled *Flexibility of treaty provisions as regards harm reduction approaches,* this outlines multiple legal arguments justifying 'Needle or Syringe Exchange', Substitution and Maintenance Treatment' and 'Drug Injection Rooms' under the terms of the treaties.[25] That said, and with the status of the LAS document still in dispute, there remains an innate awkwardness towards harm reduction in general within the INCB. This is a position that may reflect differing views amongst the Board members, the secretariat or even be a product of the drafting process itself. Whatever the case, it does little to solidify the INCB's high order rhetorical commitment to the importance of human rights values, norms and member state obligations in the pursuit of drug policy goals.

On the positive side, in addition to appropriate mention of OST throughout the Report, this year there is some, although admittedly comparatively limited, reference to needle and syringe programmes (NSP) (11 versus 4 mentions respectively). This is in contrast to last year. It will be recalled that the Annual Report for 2014 inexplicably – and perhaps wilfully – failed to mention this scientifically proven health- and rights-oriented intervention. This was the case despite its widespread deployment and growing uptake by a broad range of authorities – both geographically and in terms of politics and culture – to help prevent the spread of blood-borne infections among people who inject drugs.[26]

Regarding OST, this year's Report notes, for example, the launch of new 'opiate substitution treatment' programmes, including within a prison setting, in Morocco (Para. 147), 'noticeable steps to address the emerging problems generated by increasing levels of drug abuse and the need to provide the affected population *with adequate treatment*, *including opioid substitution therapy*' in Moldova (emphasis added) (Para. 185), the opening of programmes in Nairobi, Kenya (Para. 351) and Ramallah, Palestine (Para. 648) and the operation of OST in India (Paras. 537, 581 & 582), Bangladesh, Nepal, the Maldives and Lebanon (Paras. 581, 587 & 649). As can be seen from these examples, as in the main descriptive statements regarding the state of the global policy landscape, there is in some instances an implicit acknowledgement of the health benefits of OST. Indeed, further approval for the intervention can also be found in the Report's analysis of the situation in Eastern Europe. Here, in relation to the high prevalence of 'opioid abuse' within the sub-region, the Board notes its 'concern' regarding 'the reported suspension of opioid substitution treatment in the Autonomous Republic of Crimea and the city of Sevastopol since March 2014, which reportedly has had *serious consequences on the patients who were receiving such treatment*' (emphasis added) (Para. 720). This is obviously a welcome comment, although one is left wondering if underlying geo-political and ideological tensions within the CND and beyond help explain why the issue was not given more prominence within the publication.

While less numerous, incorporation of references to NSPs within the Report includes their operation, along with OST, as part of 'comprehensive packages for HIV prevention among drug users' within Bangladesh, India and Nepal (Para. 581), the establishment of a programme as part of a new strategy in Kyrgyzstan (Para. 607) and the institution of a '"targeted short-term needle exchange programme"' in the US state of Indiana. The result of an executive order by the State Governor, the latter was in response to a 'public health emergency in a rural southern county of the state that had been heavily affected by an HIV outbreak linked to intravenous drug use' and the injection of dissolved oxymorphone tablets (Para. 440). It is also instructive to note that, in relation to the fact that East and South East Asia continues to have the 'largest number of people who inject drugs', the Board again presents OST and NSPs together as appropriate interventions in dealing with high HIV prevalence rates among people who inject drugs. Here it notes that 'As evidence regarding the effectiveness of different services and treatment programmes' including NSP and OST, 'becomes more accepted in countries, it is expected that more targeted service programmes will be implemented in the region' (Para. 528).

Considering last year's glaring omission, inclusion of such references to NSPs is certainly progress. The same can be said regarding the Board's, if still implicit, acknowledgement of the benefits for both this intervention and OST.[27] Nonetheless, mindful of the INCB's overarching emphasis on health and human rights within the President's Foreword and more implicitly in the thematic chapter, it is unfortunate that the Report is not more proactive in encouraging authorities to engage with these interventions or in highlighting instances where they are outlawed. Such gaps are emphasized further by the numerous and realistically unavoidable descriptions of the relationship between injecting drug use, the sharing of needles and the prevalence of HIV and other blood-borne pathogens.[28] Although

noted in many parts of the world, this is particularly striking in the Report for 2015 in relation to the Philippines (Para. 154), Southern Africa (including sub-Saharan countries like Kenya, Senegal, Uganda and Tanzania) (Para. 344), East and South East Asia (Para. 528) and Eastern and South-Eastern Europe (Para. 774 and 'Highlights' on p. 43). This region continues to have the 'highest prevalence rates of persons who inject drugs'. More specifically, according to the Report, 'Approximately 40 per cent of the estimated global number of persons who abuse drugs by injection and are living with HIV reside in Eastern and South-Eastern Europe'. As the Board notes, 'Ukraine reported a prevalence rate of HIV infection of 6.7 per cent among injecting drug users' while according to the WHO 'the Russian Federation and Ukraine have rates of mortality due to HIV/AIDS of over 40 per 100,000 population' (Para. 721). Indeed, as the Report also points out, estimates for Eastern Europe are 'heavily influenced by the high prevalence of drug abuse by injection in the Russian Federation'. This is a country, it should be recalled, that explicitly prohibits harm reduction measures, including OST. It is therefore disappointing that the INCB once again chooses not to comment on the situation. In fact, in contrast to the previous Report, Moscow's ban on OST is not even acknowledged.

Such selective reticence is particularly awkward when compared to other sections of the Report where the Board is more than willing to encourage authorities to engage with particular policy approaches and activities or commend them on specific policy choices. More often than not, explicit statements to this effect pertain to law enforcement activities rather than those relating to health- and human rights-oriented interventions. For example, regarding the Philippines, 'The Board notes that there remain challenges to be addressed, including illicit cannabis cultivation in high-altitude areas of the country that are of difficult access and are often not reached by the eradication efforts of the law enforcement authorities'. As such 'The Board *encourages* the Government of the Philippines to take further action in this regard' (emphasis added) (Para. 155). In relation to Nigeria, the Board '*welcomes* measures taken against illegal cultivation of cannabis plant and against drug trafficking' (Para. 209), but only '*notes* that continued efforts need to be made in the area of drug abuse prevention and availability of treatment' (emphasis added) (Para. 210). A cursory analysis of the phrase 'the Board urges' (or variations thereof) is also instructive on this point. While it is used 19 times within the Report, on only 3 occasions does it relate directly to what can be considered health and human rights aspects of drug policy; scientific evidence for treatment approaches (Para. 10) and access to controlled medicines (Recommendations 4 and 14. Paras. 766 & 776). Other instances generally refer to engagement with monitoring mechanisms and treaty obligations.[29]

That the Board continues to avoid offering encouragement for and direction on interventions such as OST and NSP is all the more incongruous due to its suggestions at various points in the Report for states to consider UN agency guidance on other aspects of drug policy. For example, in relation to prevention activities by Venezuela, the INCB notes that 'The Government may also wish to take into consideration the International Standards on Drug Use Prevention prepared by UNODC in an effort to further refine the prevention strategy and approaches' (Para. 195). Moreover, and quite rightly, on a number of occasions the Board 'encourages' governments to use the *Guide on estimating requirements for substances under international control* when developing approaches to ensuring access to controlled medicines, including opioids for the treatment of pain; for instance, in relation to Nigeria, Pakistan and Serbia (Paras. 211, 214 & 222). In light of the inclusion of these documents, it is curious that the Board chooses not to point governments in the direction of the WHO, UNODC and UNAIDS *Technical guide for countries to set targets for universal access for HIV prevention, treatment and care for injection drug users*[30]. This important guidance includes both OST and NSPs as part of a comprehensive package of interventions. Similarly, the Board once again avoids any criticism of compulsory drug treatment, and at no point in its numerous mentions of the topic of treatment does the Board refer states to appropriate guidance such as the UNODC's 2012 *Treatnet quality standards for drug dependence treatment and care services*.[31]

Further inconsistencies in approach can be seen in relation to the use of terminology. While the Board has moved beyond placing every mention of the phrase harm reduction in quotation (or if you prefer scare) marks, there are points in this year's Report where this is the case. To be fair, references to the 'harm reduction' policy in France (Para. 138) and 'harm reduction' as part of the Islamic Republic of Iran's five pillar approach – as opposed to the Moroccan 'national action plan on harm reduction' (Para. 147) – may simply reflect wording within the original national documentation. If not, the occasional use of quotation marks might be seen as a

manifestation of the ongoing debates around the approach and the still politically incendiary nature of the term itself. Indeed, it is interesting to note use on several occasions of the CND approved language, or variations thereof, concerning 'reducing the adverse health and social consequences of drug abuse' (e.g. p. iv & Para. 647). This is a phrase understood by many governments, UN agencies and NGOs to be a proxy for harm reduction.[32] Ultimately, therefore, although the Board remains reticent in urging countries to engage with both OST and NSPs within the main body of the Report, it is to be commended for the fundamental principles laid out within Recommendation 3. Here, among other welcome references to proportionality and the consideration of alternatives to conviction and punishment, the INCB stresses that 'Reducing the adverse health and social consequences of drug abuse is an essential element of a comprehensive demand reduction strategy'. The report goes on to say that 'States should provide effective and humane assistance to people affected by drug abuse, including both medically appropriate and evidence-based treatment' (Para. 755).

Controlled medicines

As with the Board's improving – though still problematic – approach to harm reduction, it must also be commended on its ongoing efforts to raise the profile of the crucial issue of access to controlled substances for legitimate medical and scientific purposes. Indeed, under Mr. Sipp's presidency the issue has retained the prominence that his predecessor, Dr. Naidoo, did much to establish. Having been flagged up in the foreword, the importance of states ensuring access to controlled medicines features frequently throughout the Report proper, including significant framing paragraphs (e.g. Para. 48), as well as being the topic of *Availability of internationally controlled drugs: ensuring adequate access for medical and scientific purposes* (see Annex below). In chapter I, the Board highlights global inequities regarding 'access to medicines containing controlled substances', pointing out that 'The imbalance in the availability of opioid analgesics is particularly worrying, as the latest data show that many of the conditions that require pain management, particularly cancer, are prevalent and increasing in low-income and middle-income countries' (Paras. 8 & 9). With this in mind, beyond simply noting where access is poor, the Board also often 'requests' or 'encourages' specific governments to take steps to ensure adequate availability, for example in relation to Brazil (Para. 203), Cuba (Para. 205), Nigeria (Para. 211), Pakistan (Para. 214), Peru (Para. 218) and Serbia (Para. 222). As mentioned above, on a number of occasions this includes the Board's proactive encouragement of governments to make use of the *Guide on Estimating requirements for substances under international control,* prepared by the WHO and the INCB (for example Paras. 203, 211, 214 & 222). It is also positive to see the Report give space to instances where states have taken substantive steps to improve circumstances. Prominent among these is the reference to the Organization of American States' Inter-American Convention on Protecting the Human Rights of Older Persons (Para. 453) and changes to the law in India (Paras. 532 & 536).

Bearing in mind the importance of access to controlled medicines not only to the functioning of the drug control convention framework, but also in relation to international human rights instruments, it is pleasing to see the issue given prominence in the Board's recommendations. As Recommendation 4 states, 'Adequate access to narcotic drugs and psychotropic substances for medical purposes can be improved through corrective action by States that should address the regulatory, attitudinal, knowledge-related, economic and procurement-related aspects identified as the causes of inadequate availability' (Para. 766). Nonetheless, as has long been the case with regard to this most fundamental of issues, a cautionary note is required. As Recommendation 4 also points out, 'Striking a balance between overprescribing and underprescribing requires continuous study and an ongoing review of policies'. This reference to overprescribing is valid and concerns improper practices and resultant potential dependence on prescription drugs. However, it also hints at the Board's long standing preoccupation with the diversion of licit medicines to illicit drug markets, which is an important underlying reason for lack of access to pain medication in many countries in the first place.[33]

As IDPC has had reason to comment in the past, it is important that the INCB retain an appropriate balance in its approach to the issue of access to and availability of medicines.[34] To be sure, concern for diversion and policies directed towards dealing with illicit markets should not eclipse the enabling components of the treaty system and access to medicines. The centrality of this concept is stated at various points in the Report for 2015, for example where it notes that 'INCB has urged Governments, in their implementation of the treaty obligations incumbent upon them, to take a balanced approach to the formulation of drug policy. Such an approach

should have the welfare of humankind at its centre and should reflect… the need to control licit trade in controlled substances to prevent their diversion for trafficking purposes while not hindering their availability for legitimate medical and scientific purposes' (Para. 48). While this is the case, it is difficult to ignore the multiple references within the text to concern for diversion (around 80 in total), the Board's role in generating 'narcophobia' (see below) and conclude that when it comes to detail the Board retains its historic leaning towards drug control and the national and international apparatus that go with it.

Reactions to the shifting policy landscape

The limits of flexibility

Although the international drug control system is currently within a period of unprecedented internal tension, strain and, on some issues, fracture, the Report for 2015 remains remarkably and admirably staid in its reaction to the shifting policy landscape. Rather than resorting to hyperbolic claims regarding the imminent collapse of the entire treaty framework, as was the case under the presidency of Raymond Yans with regard to Bolivia's adjustment of its relationship to the 1961 Single Convention on Narcotic Drugs, the Board by and large simply describes policy shifts that deviate from the prohibitionist ethos of the drug control system. On occasion, as is appropriate to its role and mandate, it also notes its concerns regarding relevant treaty obligations.

While this is the case, the INCB is abundantly clear on its interpretation of the limits of flexibility within the existing treaty framework. Indeed, in relation to the 'Evaluation of overall treaty compliance' the Report prefaces detailed attention to circumstances within specific countries and regions with the following statement: 'The Board wishes to reiterate that the 1961 Convention establishes, in its article 4 ("General obligations"), that the parties to the Convention shall take such legislative and administrative measures as may be necessary to give effect to and carry out the provisions of the Convention and to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs'.

Moving on to discuss the so-called safeguard clause and source of flexibility regarding drug possession,[35] it goes on to note, 'In addition, article 3, paragraph 2, of the 1988 Convention sets forth the obligation for each State party, subject to its constitutional principles and the basic concepts of its legal system, to adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption' (Para. 131).

Decriminalisation

Within this context, the Report proceeds to describe, rather than unreasonably challenge or criticise, various notable policy shifts. For example, and demonstrating the INCB's current acceptance of the decriminalisation of the possession of drugs for personal use, the Report outlines the legal background to the introduction of thresholds in Ecuador (Paras. 132 & 134). It comments only that 'The Board is engaged in an active dialogue with the Government of Ecuador regarding the conformity of its legal framework on possession with its international obligations under the drug control treaties' (Para. 134). Admittedly, the lack of reporting on such a dialogue makes it difficult to assess the tone and level of criticism directed at Ecuador's decriminalisation policy.

The situation is similar, with the same caveats, with regard to policy shifts in Jamaica. Here amendments to the Dangerous Drugs Act early in 2015 established a threshold, with possession of up to 2 ounces of cannabis by an adult, 'including for religious purposes…reclassified as a non-criminal offence' and subject to a fine (Paras. 141 & 358). The amendment also permits each household to cultivate up to five cannabis plants and allows for a cannabis licensing authority to be established to monitor the distribution of cannabis for scientific and medical purposes (Para. 365). Unsurprisingly, the Board again 'underlines' the obligations on states laid out in article 4 of the Single Convention (Para. 142). It also 'stresses' the 'importance of universal implementation of the international drug control treaties by all States parties and urges the Government of Jamaica to review implementation of its obligations under international drug control treaties and ensure that implementation of domestic legislation does not contravene the provisions of the international conventions to which Jamaica is a party' (Para. 143). That said, there is no rebuke. Rather, as with Ecuador, the Board points out that it will continue to monitor developments in Jamaica and, in line with its mandate under the Single

Convention,[36] 'looks forward to continuing its dialogue with the Jamaican authorities on matters related to the implementation of the drug control conventions' (Para. 143). Elsewhere in the Report, the Board notes again in a matter of fact manner that it 'continues to closely follow drug policy developments in Central America and the Caribbean' (specifically, Jamaica, Costa Rica and Guatemala) and 'underscores that Governments, whenever considering potential changes to their national drug legislation and policies, should take steps to ensure that those changes are consistent with their obligations under the three international drug control conventions' (Para. 359).

Medical cannabis

Moreover, unlike last year's Annual Report where the Board arguably slipped into mission creep and exceeded its mandate regarding its stance on medical marijuana schemes,[37] comments on developments in Italy (Para. 181), Costa Rica (Para. 366) and Canada (Paras. 411 & 412) within the Report for 2015 are more than reasonable. In fact, beyond descriptive accounts, the INCB only chooses to point out, quite rightly, that the Italian authorities are required to establish a national cannabis agency and associated reporting requirements 'pursuant' to the Single Convention.

Regulated cannabis markets

As is to be expected, and as the Board is required to do under its mandate, this year's Report also highlights the INCB's view that the establishment of regulated cannabis markets in both the USA and Uruguay exceed the inherent flexibility within the existing treaty framework. Regarding the former, the Board 'reiterates its view that measures taken in various states of the USA to legalise the production, sale and distribution of cannabis for non-medical and non-scientific purposes are inconsistent with the provisions of the international drug control treaties'. The Report then proceeds to stress that the 'INCB wishes once again to draw attention to the fact that the 1961 Convention as amended establishes that the parties to the Convention should take such legislative and administrative measures as may be necessary "to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs"'. It continues to note that 'The limitation of the use of controlled substances to medical and scientific purposes is a fundamental principle which lies at the heart of the international drug control legal framework which cannot be derogated from'.

This is a position that is valid if it is considered in terms of a state remaining within the bounds of the treaty framework rather than as an absolute prohibition on state behaviour, particularly if driven by a rights- and evidence-based imperative, as touched upon above.

Finally, in a legitimate counter interpretation of the Single Convention to that provided by the US Federal government, the Board points out that 'Regardless of whether they are federal or unitary States, all parties to the conventions have a legal obligation to give effect to and carry out the provisions of the convention within their own territories' (Para. 404).

Having outlined the state of play in Uruguay, the Report similarly notes that 'Once again, INCB wishes to draw attention to its view that the legislation permitting the non-medical use of cannabis is contrary to the provisions of the international drug control conventions, specifically article 4, paragraph *(c)*, and article 36 of the 1961 Convention as amended by the 1972 Protocol, and article 3, paragraph 1 *(a)*, of the 1988 Convention' (Paras. 458 & 778). As shown in a number of publications focusing on the operation of the Board, over recent years IDPC has not always agreed with the INCB on treaty interpretation and the delineation of its mandate. On this issue, however, it is essentially in accord, although there remains a need for the Board to use its expertise in helping to better manage the changes taking place within the current system. This point will be explored further below.

All that said, however balanced in the INCB's description and comment of regulated cannabis markets, it is perhaps insightful to note inclusion within the Report of a number of negative reports pertaining to the policy shifts within some US states. These include an unsupported claim that 'high supply of cannabis' within the country is partly due to 'diversion from states within the United States that allow cannabis production for nonmedical purposes and for medical cannabis programmes' (Para. 399), 'spillover' of cannabis into neighbouring states (Paras. 399 & 423), and lawsuits against Colorado by Nebraska and Oklahoma concerning the legality of its regulated market and a 'nuisance burden' due to increased trafficking (Para. 403). Additionally, the Report chooses to note that 'The Drug Enforcement Administration has also found that the legalization of cannabis in some states has not eliminated

the illicit market for the drug in those states due to high taxes and other state-imposed restrictions on the legal cannabis' (Para. 423) and that 'An increasing number of cases of ingestion of cannabis edibles by young children has also been reported in the United States, particularly in states that have legalized the drug for non-medical purposes' (Para. 444). These are all obviously legitimate issues of concern. One wonders, nonetheless, if the Board will be as eager to report on any positive outcomes of the policies within these, and other US states that appear to be following suit, when more data becomes available.[38]

Conclusions

There is much to commend in the INCB's Report for 2015. The Board's most recent annual report contains a great deal of valuable information concerning illicit markets, access to controlled medicines and government responses thereto. It is also noteworthy that it once again highlights the need for governments to improve both data capture and return in order for the Board to get a better understanding of the global situation, including with regard to medicines. Indeed, the continuation of attention to the issue of access to controlled substances for medical and scientific purposes is a trend that is to be welcomed. The same can be said for the Board's ongoing condemnation of use of the death penalty for drug-related offences. However, as has been discussed here, there remain problems relating to the emphasis given to both issues within the Report – a situation that arguably reflects the Board's ongoing struggle to adapt to the changing policy environment and find its place within it.

Specifically, while the Board is certainly moving away from viewing drug policy within a vacuum, a challenge flagged up by the Board itself in its Report for 2014, there remains an unevenness in its approach to the intersection between drug policy and human rights. For example, while the recommendation to abolish the death penalty is contained within the text, it finds no place in the overall recommendations. Moreover, although the centrality of access to controlled medicines is writ large within the bookends of the Report (i.e. the Foreword and Recommendations) there is a tendency for the Board's aversion to diversion to dilute its stance on improving access throughout the Report. Similarly, while the Board includes reference to both, it continues an unwillingness to recommend scientifically proven rights- and health-based harm reduction interventions such as OST and NSP.

In much the same way, there remains within the Report somewhat of a disconnect between what we might call the Board's high-order rhetoric on human rights and the details of concomitant obligations of states to the drug control conventions *and* human rights instruments. As IDPC noted in its conclusions regarding the INCB Report for 2014, it is fair to argue that the Board should consider naming specific pieces of hard and soft law that need to be taken into consideration by state parties in order to guide their development and implementation of policy. It is true that within any consensus-operated multilateral setting there is a need for a degree of vagueness of terminology. This is necessary in order to garner sufficient support for a range of outcomes from hard law treaties to annual CND resolutions. That said, the centrality of human rights to drug policy and, at the time of publication of the Report, the forthcoming UNGASS, surely necessitates greater specificity. Indeed, Mr. Sipp stressed within his Foreword that among the contributions to the UNGASS the Board was to identify, 'achievements, challenges and weaknesses' as well as highlight and clarify the 'approaches and principles' underlying the drug control system. Within the context of current debates on the centrality of health and human rights, it can be argued that all these points should be applied to the relationship between drug policy and international law more broadly. It is IDPC's hope, therefore, that the Board will continue in its efforts to highlight human rights obligations, but also embrace the opportunity of the annual report to be more specific in its guidance; an important task in the years leading up to the next high-level review of international drug policy in 2019.

This date is also crucial for clarification of current debates around legally regulated cannabis markets and the existing UN drug control framework. This is an issue that has taken on more significance with the announcement of the intention of the Canadian government to implement such an approach in 2017. Although often adopting a different interpretative perspective on a number of issues, IDPC agrees with the Board's interpretation of treaty obligations vis-à-vis the establishment of regulated markets for non-medical and non-scientific purposes. With regard to cannabis, it does not, however, concur with the INCB's view that 'Legalization of the use of internationally controlled narcotic drugs and psychotropic substances for non-medical purposes is not an adequate response to the existing challenges' posed by illicit markets (Para. 763). In light of specific circumstances, evidence and democratic process (both direct and indirect), this is a decision

for member states. What remains problematic in this regard is how to reconcile resulting policy shifts with obligations under the drug control treaties. The current situation regarding Uruguay and the USA, both involving untidy legal justifications,[39] is highly unsatisfactory not just in terms of international drug policy but also with respect to international law more widely. The Board consequently finds itself in an awkward position when, in relation 'legalization' it 'urges all governments to review the implementation of their respective obligations under the international drug control treaties and to ensure that domestic legislation does not contravene the provisions of the international conventions to which they are parties', while at the same time 'looks forward to continuing its dialogue with all authorities on matters related to the implementation of the drug control conventions' (Recommendation 16 in Para. 778).

True dialogue is difficult when the Board opposes a specific policy choice, and will not acknowledge that the UN drug control system in its current form may no longer be appropriate to some contemporary challenges facing some states parties. It can be argued that this is a systemic consequence of the Board's place within the drug control framework. However, it is telling that within the Report for 2015 the Board does admit that the existing system is in need, and therefore presumably capable of, change; albeit in this case a process involving a strengthening of the current approach in handling new challenges. These include calls to 'review of existing regulatory models' in dealing with the internet (Para. 654), the 'limited ability' of the current system 'to keep pace with large numbers of emerging chemicals' (Para. 268) and a recommendation that 'States approach the review to be undertaken through the special session of the General Assembly with the goal of reinforcing best practices, *while modifying measures that have not worked and expanding the options* used to cope with new drugs, social developments, the use of the Internet for illicit purposes and money-laundering (emphasis added. Recommendation 1 in Para. 673).

With regard to cannabis, the Board is clearly incapable, or perhaps unwilling, to admit that some aspects of the conventions have 'not worked' for some states. As is obvious, the belief remains that when implemented fully the conventions are appropriate to the task in hand. While this is the case, it is not unreasonable to request the Board to assist states that have chosen to expand their options to reconcile their policy choices regarding drug treaty commitments and, especially in light of the discussion above, international law more broadly. This might be a realistic proposition. During the 59th Session of the CND and its Special Segment in March 2016, the issue of the INCB and the ownership of the conventions was raised at the informal civil society dialogue with the current President, Mr. Sipp. The President explained that while the INCB could tell States what is and what is not in the conventions, when it came to the opposing reform of the conventions themselves, this is 'not our business'. He continued to note that 'it is possible that states may come up with other options' and that 'if the international community makes another convention or changes existing ones, we will still work with these'.[40] As observed in IDPC's Proceedings Report on the 59th CND, 'Only a few years ago it would have been sacrilege for an INCB President to consider openly engaging with a reformed treaty framework'.[41] While this may only reflect the views of the President, it is IDPC's hope that such a position is not asphyxiated by the Board's ingrained conservatism, as evidenced at times within this year's Report, and becomes more formalised and prominent as we approach 2019. Failure to do so risks not only the relevance of the INCB within the international drug control system, but also paradoxically the integrity of the system itself.

Annex: The INCB and access to controlled medicines – An analysis of *Availability of internationally controlled drugs: Ensuring adequate access for medical and scientific purposes. Indispensable, adequately available and not unduly restricted*

In an attempt to assist states parties to the UN drug conventions in their provision of controlled drugs for medical and scientific purposes – one of the core obligations of the drug control treaties – the INCB decided to publish a special report on the topic in January 2016, a month or so before the UNGASS. The report is a standalone document of approximately 80 pages, and is regarded as a supplement to the Annual Report; in this section we will examine its themes and contents.

Prefaced by INCB President Werner Sipp, the Report begins by reiterating that some decades ago, the international community resolved 'to make adequate provision to ensure, and not to unduly restrict, the availability of drugs that were considered indispensable for medical and scientific purposes'. However, Mr. Sipp observes that 'too many people still suffer or die in pain or do not have access to the medications they need'.[42]

Presently, approximately 5.5 billion people have limited or no access to these medicines – some 75 per cent of the global population, overwhelmingly located in developing countries. Around 92 per cent of the morphine used worldwide is consumed in those wealthy countries in which 17 per cent of the population lives: primarily the USA, Canada, Western Europe, Australia and New Zealand.

Mr. Sipp notes that the Report deals with both narcotic drugs and psychotropic drugs, whereas the early documentation of the Board tended to concentrate on narcotic drugs. This is particularly important, he writes, since psychotropic substances are employed in cases of mental illness, which, according to the WHO, affect hundreds of millions of people and their families.[43] Despite this, most countries allocate less than 2 per cent of their health budgets to mental health (Exec. sum. Page iii).

This failure to provide access to controlled drugs for medical and scientific purposes, writes Mr. Sipp, runs counter to the obligations of the drug control conventions and subsequent CND and ECOSOC resolutions and article 25 of the Universal Declaration of Human Rights.

Following the Preface, chapter I of the Special Report focuses further on the theme of the drug control conventions, health and human rights. It opens with the concept of the *pharmakon*, a term developed in the work of French philosopher Jacques Derrida (though no recognition is made of this fact by the Board). The *pharmakon* is a term borrowed from classical Greece, and refers to a substance that is both a therapeutic and a poison, thereby expressing the double meaning that cultures have found in their encounter with drugs. 'Dealing with the difficult balance between "remedy" and "poison" has been a longstanding problem in many societies' states the INCB, and was 'at the heart of the development of the international drug control system as outlined in the Single Convention on Narcotic Drugs as amended by the 1972 Protocol and the Convention on Psychotropic Substances of 1971' (Para. 3). Parties to these conventions established a dual obligation, to restrict the use of controlled drugs to medical and scientific purposes, and to ensure that those who needed them as medicines received them without undue restriction.

Through chapter I, the Board traces the growth of the principle of access to controlled medicines as a health and human right, from the preambles of the 1961 and 1971 conventions through a series of human rights instruments, CND and ECOSOC resolutions, the World Health Assembly and regional intergovernmental organisations. Access to controlled drugs has, as a result, become an increasingly prominent feature of the drug control regime in recent years, and its failure the topic of a growing criticism.

Narcotic drugs

According to the Board, the inadequate distribution of opioid analgesics such as morphine is not the result of a lack of supply; indeed, the Board professes itself concerned about increased levels of stocks, and believes that levels will remain high for the foreseeable future. However, as mandated by the conventions, it is the INCB that collects data on stocks, and administers the system of estimates. Consequently, the Board decides what is sufficient

and what is not, and its system of estimates has been critiqued by clinical researchers, as we will see below.

Pain and suffering associated with cancer and HIV, to quote two of the most serious conditions, go unmet in much of Africa and Asia, Central America, Eastern and South-Eastern Europe and small states in Oceania. In addition, in countries where consumption is high, rural districts often continue to lack palliative care services. The Board informs us that impediments to availability include a lack of proper medical training, an undue 'fear of addiction', difficulties in sourcing, cultural attitudes toward drugs and anxieties concerning diversion into the illicit market. This, in turn, leads to insufficient levels of prescription and dispensing. Problems can 'be exacerbated in the context of unclear, stigmatising legislation, insufficient legal knowledge among health professionals, or harsh penalties for unintentional violations' (Exec. sum. on p. ix).

Many of the reasons given as obstacles to access to narcotic drugs are derived from the Board's 2014 survey of countries, which sought views regarding the availability and access to drugs for medical and scientific purposes, to which 107 government authorities responded (Para. 48). The problem in such surveys is the inherent subjectivity implicit in the responses; in addition, there is no single dose of opioid to which each person will respond; appropriate dosage must be individually tailored, which renders any statement of need uncertain.

The INCB employs the concept of 'defined daily doses for statistical purposes' in calculating amounts needed per country, but this does not signify a suitable quantity for an individual. Indeed, the Board acknowledges that the concept is 'not free of a certain degree of arbitrariness' (Para. 43). 'Other researchers have attempted to develop more adequate data.[44] For example, this is attempted by a group of clinicians via the development of an 'Adequacy of Consumption Measure (ACM)'. Making use of three major indicators of pain producing morbidity – cancer, HIV and injury – these researchers estimated per capita requirements of controlled pain medications for 188 countries. Their calculations were based on an adequacy level derived from the top 20 countries of the Human Development Index on the assumption that these countries would most likely have 'an opioid analgesics consumption that is more or less adequate to their need'.[45]

The study generates some startling discrepancies between the figures used by the Board and the alternative method envisaged. If we examine the global picture using the method established by these authors, the dimension of unmet need is dramatic. 'In 2006', they report, 'the world used a total of 231 tons of morphine equivalents. If all countries increased their consumption to adequate levels, the required amount would be 1,292 tons, or almost 6 times higher'.[46]

According to the response of governments to the INCB's 2014 survey, only four reported that the actions of the Board constituted an impediment to access to controlled drugs (Para. 152). Most asked for the provision of training in order to improve availability of access, information and education regarding the system of estimates and assessments. However, it is unclear that these authorities are fully able to recognise the sources of their anxiety. Many of the countries surveyed mentioned their need for 'awareness-raising programmes to address fears relating to prescribing or dispensing narcotics' (Para. 153). When the historical context is recalled and the INCB's role in continually provoking anxieties linked to the addictive properties of narcotic drugs, it is certainly likely that the INCB has played a considerable role in forging obstacles to the adequate use of controlled drugs, as a source of 'narcophobia'.[47]

Psychotropic substances

According to the Board, 125 substances are currently controlled under the terms of the Convention on Psychotropics Substances of 1971. Once again, access to these substances appears to be especially problematic in low and middle-income countries. Here, it is estimated that approximately four out of every five individuals requiring mental, neurological or drug dependence treatment fail to receive it; the substances include well known and widely used preparations of diazepam, lorazepam, buprenorphine and phenobarbital, all of which feature on the WHO Model List of Essential Medicines needed for a basic health care system.[48]

Production of psychotropic drugs has fluctuated considerably over the past decade; for example, buprenorphine has risen considerably, while the antiepileptic phenobarbital has plummeted, with Africa, Asia and parts of Oceania falling well below the global average, having dropped by approximately 30 per cent between 2004 and 2013. Overall, there are still major gaps in provision in controlled medications classified under the Convention on Psychotropic Substances of 1971. Once again, the Board

draws on its 2014 survey amongst States Parties to explore the impediments to access.

The primary issue according to governments is a lack of awareness and training among healthcare professionals, with 33 countries citing this issue. Second came 'problems in sourcing' featuring in 29 responses, with 'fear of addiction' in an identical place. Then came 'limited resources', 'fear of diversion', 'cultural/social attitudes', 'control measures applied to international trade', 'fear of prosecution/sanction', 'onerous regulatory framework', and 'action by the Board' (with one response). It is notable that fears surrounding psychotropic drugs loom large in these responses, whether cultural, professional, or legal in nature.

The Board reports with obvious satisfaction that only one country reported that its own actions were identified as an obstacle. However, as discussed in the foregoing passages, if one examines the historical and social context, the INCB has clearly acted as a source of narcophobia.

Availability of controlled drugs for opioid dependence

The special report includes a chapter on opioid dependence (no longer having regular recourse to the term 'abuse'), in which it notes that while methadone and buprenorphine are employed as analgesics, they are also used extensively in the treatment of opioid dependence (Para. 254). According to the INCB, consumption, production and stocks of both of these substances have showed a 'steady increase' over the past 20 years (Para. 255). The Board's historical 'selective reticence' is apparent with respect to Russia, which has prohibited OST,[49] without public comment from the Board. In the 2014 Survey carried out by the INCB, 67 per cent of respondent governments reported using OST in the treatment of drug dependence (Para. 256). It is noted that the use of methadone for treatment is increasing in Africa and South-Eastern Europe (Para. 257).

The special report includes a short chapter on the availability of controlled drugs in emergency situations. As the Board observes, 'Simplified control measures are in place for the provision of internationally controlled medicines for emergency medical care' (Para. 75). These measures were devised by the INCB, together with the WHO, in 1996. They remove the requirement for import authorisations, and competent authorities (government or government authorised) may permit the export of controlled drugs to affected countries, without import authorisations or estimated requirements. The Board is currently seeking to increase governments' awareness of their existence.

Conclusions: And a consideration of the changing Board?

The final chapter represents the Board's conclusions and recommendations in view of the situation as regards access to controlled drugs. It begins with a declaration: 'The regulatory machinery that countries have established to implement the provisions of the international drug control conventions needs to be reviewed' (Para. 268). It acknowledges that most studies indicate that, when they develop legislation and regulations, some countries are concerned primarily with preventing diversion and 'abuse'. This can 'make it difficult or almost impossible for people in need to obtain opioid analgesics' (Para. 268).

The Board has, it says, expressed its concern at this predicament, but while some countries have taken action, others are yet to address the issue. It recommends that these countries review national legislation, regulation and the administration of its drug control arrangements; allow a greater number of healthcare staff to prescribe controlled drugs; take measures to restrict the emergence of unregulated markets in narcotic drugs and psychotropic substances; modify prescription arrangements, including, where required, extending the period of validity of prescriptions to enable patients to obtain medicines when they need them; remove legal sanctions for unintentional mistakes in the handling of prescriptions by clinicians; improve national inter-agency cooperation, particularly between health and drug control; and, finally, make updated legislative and administrative measures available to the medical and pharmaceutical communities. Other recommendations reiterate measured already discussed.

The international drug control conventions are organised along dual lines; one, the enabling dimension, which seeks to provide states with a set of humanitarian and health tools; the other, repressive dimension, which seeks to suppress the use of drugs for non-medical purposes, and to curtail ways of life in which non-medical drug use plays a part. This special report from INCB is a detailed, practical and principled document, and should be of considerable assistance to governments for the enabling component of the treaties, which have for too long

been focused on their repressive, law enforcement and punitive dimension.

Nonetheless, it must be noted that the Board once again stays silent on matters about which it should speak, and sometimes – although admittedly in recent years on fewer occasions – speaks about things of which it had better remain silent. Over the past few years, IDPC and other civil society organisations have drawn attention to problems likely to cluster around public health if the Board continues to support regimes such as that of China, which has repeatedly attempted to bring ketamine under the control of the Convention on Psychotropic Substances of 1971.[50] Ketamine is vital as an anaesthetic throughout much of poor and rural Africa and Asia, and lacking its ready availability, surgeons would probably be compelled to practice without anaesthesia. This would be an appalling state of affairs. Yet the report fails to mention the debates and tension surrounding ketamine: indeed, the substance is not referred to at all throughout the Special Report's 80 pages. Similarly, as mentioned above, it fails to bring Russia to task over its prohibition of OST, which is in direct contravention of the treaties, at least in principle.

The INCB has recently taken considerable steps to shake off its image as the dinosaur of the drug control regime, the conservative force that fights every attempt at reform. As discussed above, it has spoken out recently against the death penalty for drug offences,[51] and, at the time of writing, has made a public statement condemning President Duterte's murderous war on drug users in the Philippines.[52] It has repeatedly called upon the international community to improve access to controlled drugs for medical and scientific purposes. Yet the contradictions remain, as we see from the failure to address the ketamine issue, in which the Board's own actions are liable to negatively impact on the availability of anaesthesia in the developing world. Clearly, important steps have been taken, but there remains a way to go.

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The IDPC response to the INCB Annual Report for 2015 includes an analysis of the President's foreword, the thematic chapter, as well as a number of issues related to human rights, access to controlled medicines, decriminalisation and regulated markets. The report ends with an analysis of the Board's supplementary report on availability of internationally controlled drugs for medical and scientific needs.

The International Drug Policy Consortium (IDPC) is a global network of NGOs that promotes 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 harms. IDPC members have a wide range of experience and expertise in the analysis of drug problems and policies, and contribute to national and international policy debates. IDPC offers specialist advice through the dissemination of written materials, presentations at conferences, meetings with key policy makers and study tours. IDPC also provides capacity building and advocacy training for civil society organisations.