

Response to the 2011 Annual Report of the International Narcotics Control Board

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Introduction

With the International Narcotics Control Board (INCB or Board) coming under increasing scrutiny in recent years – from both sections of civil society and some member States – it was perhaps no surprise that in May 2011 Board members would again elect the experienced and combative Professor Hamid Ghodse as President, his eleventh time since 1993. Consequently, it was also predictable that the *Annual Report* of the INCB for 2011 would be similar in its defensive tone and outlook to that for 2010 when Professor Ghodse also presided over the report's production.¹ As is the norm, the publication presents an impressive array of technical information on the state and operation of the international drug control system: a system constructed with the aim of managing the global licit market for narcotic and psychotropic substances for medical and research purposes while simultaneously suppressing the illicit market. In so doing it makes some valuable contributions in a number of areas, for example in relation to promoting wider access to essential medicines and States' obligations relative to their decisions within the Commission on Narcotic Drugs (CND). However, the Board's periodic – and now familiar – pronouncements on what it perceives to be the strengths and weaknesses of the system as it relates to national level policies relating the illicit market continue to reveal the deep-seated and systemic shortcomings of the INCB as a properly functioning and, during a clear period of change within the international drug control system increasingly important treaty body. Once more, this year's *Report* demonstrates the Board's inclination to apply

a very narrow and selective interpretation of the drug control conventions and engaging in the resultant practice of exceeding its mandate in some areas, particularly where it deems member States to have pursued policies that deviate from the prohibitive ethos of the treaty system; a process brought to the fore by recent moves by the Plurinational State of Bolivia. Concomitantly, the *Report* for 2011 also reveals the Board's worrying habit of remaining silent on other areas that are within its purview and merit its attention. Furthermore, this year the President of the Board uses his Foreword to the *Report* to perpetuate a number of erroneous narratives concerning not only the history of the international drug control system, but also the role of NGOs within its construction. While justified by the centenary of the drug control system in 2012, this approach highlights growing questions concerning the academic rigour of the Board's work as presented in its annual reports. As such, the admittedly positive aspects of the *Report* are still largely overshadowed by familiar negative practices and positions.

The INCB is the 'independent and quasi-judicial' control organ for the implementation of the drug control treaties. The Board was created under the 1961 Single Convention on Narcotic Drugs 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.² 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.

This response to the Board's *Annual Report* for 2011³ (INCB Annual Reports are usually published in the spring the following year) is organised under 5 inter-related headings. The following sections consequently explore issues surrounding the Board's homage to the Hague Opium Convention; the flaws within its thematic chapter on 'social cohesion, social disorganization and illegal drugs'; the INCB's hostility towards the endeavours of Bolivia to adjust its position towards the Single Convention on Narcotic Drugs and coca; the continuation of mission creep and a proclivity of the Board to operate beyond its mandate and the reoccurrence of selective reticence, specifically the lack of comment on issues relating to human rights and harm reduction.

Homage to the Hague Opium Convention

The Foreword dedicates this year's *Report* to the hundred year anniversary of the adoption of the International Opium Convention at the Hague. This 'homage to the conventions' has been a theme that the United Nations drug control regime has made much of in recent years, the centenary of the Shanghai Commission of 1909 representing a similar opportunity to celebrate the perceived achievements of a century of the present control system. IDPC has elsewhere responded in detail to the claims implicit in this theme, and we refer interested readers to the documents referenced below.⁴ We will provide a brief overview of the essential argument here. The foundation of the argument is that, 'Prior

to the adoption of the 1912 Convention, the world was experiencing an abysmal situation with regard to drugs', and that, '(t)he signing of the 1912 Convention reflected the recognition at that time of the need for international cooperation in drug control'.⁵ The 'abysmal situation' mentioned here is primarily a reference to conditions prevailing in late imperial China, where, it has been claimed by UNODC, 'perhaps one in four men was a drug addict'.⁶ While specific figures are speculative and unreliable, it is a matter of general agreement among historians that opium-smoking was indeed widespread in China. However, the degree to which this was problematic, and may be reasonably characterised as a 'plague' of drug dependence, has been the subject of considerable debate following recent research.⁷ New research has questioned the accuracy of the formerly accepted historical picture of China as a civilisation corrupted and destroyed by pervasive drug dependence. In fact, much of China's opium was consumed for medicinal purposes, as was the case across most of the world, for opium was central to the practice of medicine, and was often a life-saving therapeutic at a time when few effective remedies existed. Opium functioned as the aspirin of its day, and was present in most households as a treatment for the gastro-intestinal conditions which were amongst the chief causes of mortality. For this reason, much more opium was produced in 1912 than now. Contrary to the argument of the UN drug control agencies, the reduction in the production and use of opium is not the result of drug control, but stems primarily from the increase in the range of medical therapeutics and the expansion of the public health infrastructure (clean water, sewerage, etc).

In terms of the recreational or pleasurable uses of the drug, the situation was characterised by varied and complex cultures of opium smoking, some of which were highly advanced and paralleled the wine-drinking cultures of Western Europe. Opium use was well integrated with the rituals of daily social life. While

examples of problematic use did of course exist, the stereotypical 'opium sot'⁸ who had lost everything as a result of an overwhelming craving – a figure represented as the norm by Christian missionaries and Chinese nationalists with their own specific, narcophobic agendas – was actually quite rare. This more nuanced and complex picture of opium use is now generally recognised by historians of drug culture as much closer to the reality of early twentieth century China than the old 'narcotic plague' scenario deployed by the INCB in the Foreword to the *Report*.

The Foreword also links the anti-opium movement of the late nineteenth and early twentieth centuries to a certain notion of responsibility on the part of NGOs. 'The centennial of the adoption of the 1912 Convention is an appropriate occasion for recalling the tremendous efforts by those *progressive* non-governmental organizations and to acknowledge the positive response of Governments at that time. It is important to note that, also today, many non-governmental organizations promote the right of people to be free from drug abuse' (emphasis added).⁹ This discourse, which we have seen develop in recent years, attempts to reframe debates around the involvement of NGOs, the most dynamic and influential of which have arguably, in the twenty-first century, tended to represent those advocating reform of the present international drug control system. The results of the work of reform-oriented NGOs can be seen in the change in the tone of global debates around drug regulation, which have become much more informed and sophisticated over the past decade, and much more ready to consider substantial revisions to current arrangements. The quoted INCB paragraph seeks to forge a link between those NGOs presently advocating a 'drug free world' with their early twentieth century equivalents, who are spoken of in laudatory terms, as if to show that the Board still has some elements of civil society on its side, too. Moreover, in framing the debate in this way,

the Board implicitly labels elements that do not favour the status quo as regressive. This one-eyed view of the civil society debate on drug policy is another symptom of the bias in the INCB approach – the division of the world into 'good' member States and advocacy groups (i.e. those that support the world view of the most prominent INCB members), and 'bad' member States and NGOs (i.e. those who propose or implement reforms that move away from zero-tolerance or repressive strategies).

A similar point can be made regarding the text's references to alleged 'right to be free from drug abuse and addiction'.¹⁰ The appeal to freedom is a powerful tool in a world where democratic rhetoric and values carry a considerable charge, and the INCB is clearly determined to try to associate its own viewpoint – that the drug control conventions are sacrosanct and must be defended in their present form at all costs – with the ideas of freedom and human rights. It is notable too that the deployment of human rights language is becoming an increasingly central factor in drug policy debate, and one in which the defenders of the status quo have so far not fared well. The Board is understandably keen to couch its position in human rights terminology. This point will be discussed further below.

Moreover, in establishing its arguments, the Foreword refers repeatedly to a historical situation that never existed – namely, the coming together of a unified 'international community' to defend public and individual health by setting up the drug control system anchored in the Hague Convention of 1912. As IDPC has pointed out on previous occasions, the motivation of the group of countries that devised the early control system was extremely complex, comprising elements of the motivation claimed by the Board but mixing these with a range of geopolitical and economic imperatives.¹¹ The absence of a unified community of interests is demonstrated by the fact that the general ratification of the Hague Opium Convention depended on it being included in the peace

treaty of Versailles, concluded in 1919, which brought to a close the First World War. This was the only way that recalcitrant producing nations such as Germany and Turkey could be prevailed upon to sign.¹²

The thematic chapter: Drugs, dislocation and impoverished analysis

The thematic chapter customarily included in the INCB's *Annual Report* is this year entitled, 'Social cohesion, social disintegration and illegal drugs'. Discussion of drug use often takes place in a historical and cultural vacuum, and the attention of UN agencies to these highly complex issues is, in principle, a welcome development. However, it is questionable whether the INCB is the appropriate UN body to undertake such an analysis and to subsequently issue recommendations; arguably, it lacks the necessary expertise (there are, for example, no sociologists or historians listed among its membership), and perhaps most importantly, making such enquiries and recommendations take the Board far outside the terms of its mandate.

The chapter begins in terms that are frankly apocalyptic: 'The abuse of illegal drugs is one of the greatest challenges that the world is facing today. Occurring in all countries, from the richest to the poorest, it is a problem that involves all groups and, increasingly, all ages, fuelling global crime, corruption and terrorism, generating unimaginable wealth for the few and limitless harm for the many, costing millions of lives and threatening the very sustainability of communities the world over' (Para. 1).

Having identified 'drug abuse' amongst all groups, however, it quickly becomes clear that the focus of the argument is actually directed at marginal communities in which drug consumption has become endemic, resulting in a 'vicious spiral of individual and collective harm' (Para. 3).

The central argument of the chapter then begins to develop, using a conceptual framework borrowed, without acknowledgment, from the functionalist school of sociology. 'Societies are by their very nature more than the accumulation of a large number of discrete individuals' (Para. 7), we are told, not unreasonably. Where social norms provide a shared sense of identity and purpose, the result is 'a strong sense of community'. This social cohesion is viewed by the Board as constituting the 'health' of communities – a 'healthy' society is one without conflicts over norms. However, what the world is experiencing now is a breakdown of the social norms that bind communities together. 'When societies are fractured, with little sense of cohesion, there are likely to be multiple problems, of which drug abuse and criminality may be only the most visible signs' (Para.8).

The INCB uses these ideas to develop a very specific argument. Rather than considering the issue of drug use and related criminality as a structural one in which entire societies are implicated, there is, as the chapter unfolds, an increasing focus upon 'marginal communities'. The most disturbing feature of the Board's analysis, as observed by Harm Reduction International (HRI),¹³ is the binary 'them-and-us' dynamic that recurs throughout. This is the case despite the authors' awareness of this dynamic and its presence in social and political life, as demonstrated in paragraph 13, where it is pointed out that those dwelling in these urban 'no-go areas' may develop a strong sense of sub-cultural identity (an identity separate from that of the mainstream society), while those in the wider society in their turn regard the inhabitants of such spaces as a distinct species, a fearsome population of 'others'.

Having laid out the terms of its argument that drug use both stems from and feeds into 'social disintegration', the chapter's next section enumerates what it sees as the reasons for this fragmented state under the heading 'threats to social cohesion'. It lists persistent social inequality

(as demonstrated across the domains of health, welfare, education, etc.), migration, political and economic transformation, emerging cultures of excess, individualism and consumerism, shifts in traditional values, conflict/post-conflict societies, rapid urbanisation, breakdown of respect for law, and a local drug economy as constituting such threats. Clearly, any analysis that utilises such broad categories is going to have some purchase; there can be few who would argue with the view that at least some of these factors play a role in problematic forms of drug use, as well as in countless other social problems and conflicts. However, most of them are inextricably bound up with the historical and social development of the modern world over the past few centuries: migration, urbanisation, individualism, the transformation of traditional or pre-modern values systems, to mention some of the most obvious, are virtually synonymous with the advent of the modern world. Simply put, without these phenomena there would *be* no modern societies. In bemoaning the effects of globalisation, industrialisation and urbanisation, the INCB comes close to wishing that we could all return to some utopian state of safe, stable and cohesive societies that never really existed. This wishful thinking may be attractive, but the role of the INCB is to help member States deal with the realities of the current challenges they face in a globalised and fragmented world.

The chapter contains two more sections, the third entitled 'Responding to the problem', and the final laying out a series of recommendations. The 'Responding' section is symptomatic of the binary division mentioned above, beginning as it does: 'At the present time, governments, community agencies and voluntary groups in countries around the globe are implementing initiatives aimed at tackling *the multiple problems posed by these marginal communities*' (emphasis added) (Para. 33). Unlike the early sociologists such as Emile Durkheim, Karl Marx and Max Weber, or the many thinkers who perceived social problems as being part of the global landscape,¹⁴ the INCB sees the problems

of the modern world as being *posed by* 'these marginal communities'. Such an analysis is fundamentally flawed in that it ignores the context of political and economic modernisation that has facilitated the growth of drug markets and consumption.¹⁵ Although the INCB had acknowledged the role of political and economic transformation in 'social disintegration' under the earlier section 'threats to social cohesion', it now inconsistently attributes social problems to marginal communities.

The policy recommendations enumerated at the close of the chapter begin with a call for drug prevention measures: 'Governments must ensure the provision of drug abuse prevention services, especially in communities experiencing social disintegration' (Para. 50a). Although an extraordinarily feeble response, in view of the profound implication of these 'marginal communities' within the broader structure of modern societies, the ensuing policy recommendations are reasonable in and of themselves. However they contain too much emphasis on 'drug abuse',¹⁶ as though drug use by itself were a cause of social disintegration. In fact, throughout history there are many examples of drug use functioning as a medium of social integration, from the British public house¹⁷ to the peyote rituals of the Wixaritari people of Mexico.¹⁸

In summary, the Board demonstrates in the thematic chapter an inadequate ability to offer sound sociological analysis of the nature of drug use and markets. That the thematic chapter does not provide any references for the sweeping claims it makes about the role of marginalised communities is simply another indication of the fact that, while choosing to engage with such a wide ranging and complex issue area, the Board is not well-equipped to make a substantive contribution to sociological debates about drug use and markets.

Bolivia, coca and the integrity of the international drug control system

Having effectively side-stepped the issue in last year's *Report*,¹⁹ the *Report* for 2011 devotes considerable attention to The Plurinational State of Bolivia's moves to adjust its position relative to Article 49 of the 1961 Single Convention, which obliges parties to abolish the practice of coca chewing within 25 years of the convention coming into force. As has been discussed in detail elsewhere, Bolivian authorities have been working for a number of years to correct what is now seen by many as an historical error in the scope of the Single Convention.²⁰ After efforts to amend Article 49 of the treaty were blocked by a US led coalition in 2011, La Paz chose to withdraw from the 1961 Convention with the intention to re-accede with a reservation on the coca issue; a move that came into effect on 1 January 2012. This was realistically the only option left open to the government in its quest to reconcile its treaty obligations with Bolivia's 2009 Constitution obliging the State to 'protect native and ancestral coca as cultural patrimony' and stating that 'in its natural state' coca 'is not a narcotic'.²¹ In line with its commitment to all the other aspects of the Single Convention, the Bolivian government is consequently currently seeking to re-join the treaty with a reservation upholding uses of coca in its natural state within Bolivian territory. Despite the unique circumstances surrounding the process, as the first formal challenge to the prohibitive ethos at the heart of the global drug control regime, the INCB, unsurprisingly but not necessarily legitimately, adopts a highly critical view.

Exploiting the questionable narrative concerning a century of successful international drug control within the President's Foreword, Bolivia's move, or more accurately the precedent that it may set, is presented as a threat to the integrity of the UN-based drug control system (p. v). This is a theme picked up in the Special Topics section of the *Report* where no less than 11 paragraphs are devoted to the issue (Paras. 270 – 280.

Also see Para. 483). Here the Board notes 'with regret the step taken by the Plurinational State of Bolivia to denounce the 1961 Convention as amended by the 1972 Protocol, to which it had previously acceded'. The *Report* goes on to argue that, 'The Board is concerned that while the course of action is technically permitted under the Convention, it is contrary to the fundamental object and spirit of the Convention. If the international community were to adopt an approach whereby States parties would use the mechanism of denunciation and re-accession with reservations to overcome problems in the implementation of certain treaty provisions, the integrity of the international drug control system would be undermined. The Board feels obliged to make Governments of States parties aware of that danger' (Para. 279).

In tandem with references to the issue within the Foreword, this key paragraph reveals several points of concern vis-à-vis the Board's position on Bolivia's endeavours. First, and as highlighted by HRI,²² as laid out in the *Report* it is difficult to follow the Board's argument that while Bolivia's course of action is 'technically permitted' it runs contrary to the 'fundamental object and spirit' of the Single Convention; the latter phrase presumably a reference to the 'object and purpose' of a treaty under Article 19 of the Vienna Convention on the Law of Treaties. It is generally the case that reservations running counter to the 'object and purpose' of a convention are considered invalid. Mindful of the centrality of this point to the Board's hostility towards Bolivia's actions, it would have been useful, expected even, for the statements to be accompanied by some explanatory legal analysis referring not only to the 'object and purpose' of the Single Convention, but also Article 36 (1) regarding constitutional provisions,²³ Article 49 on Transitional Reservations and Article 50 on Other Reservations. Without this, there is more than a whiff of arbitrariness. This is particularly the case when one considers the *Commentary to the Single Convention*. This explicitly notes that, 'By operation of article 50, paragraph 3 a Party

may reserve the right to permit the non-medical uses as provided in article 49, paragraph 1, of drugs mentioned therein, but also non-medical uses of other drugs, without being subject to the time limits and restrictions provided for in article 49'.²⁴ Perhaps such a simplistic presentation of the issue is the result of a continuing lack of expertise within the Board on international law.

Second, the Board adopts a very selective and narrow view of what constitutes protection of the international drug control system's integrity. It is quite legitimate to argue that Bolivia's efforts to remove the inconsistencies surrounding the ongoing use of coca around two decades after it should have been phased out is in itself an attempt to protect the integrity, or cohesion, of the system. This was a point alluded to by the INCB itself in 1995.²⁵ The current position consequently raises questions like those posed by John Walsh, senior Associate at the Washington Office on Latin America (WOLA). Reflecting on this year's *Report*, he asks, 'Why does the Board consider the international drug conventions to be so fragile? How do one country's legitimate efforts to reconcile its treaty obligations with its own constitutional requirements represent an existential threat to the entire system in the eyes of the INCB?'²⁶ Aware of the current divergence of opinion on a range of issues – including the decriminalisation of drug possession for personal use and harm reduction – there is much to be said for the view that 'cracks in the so-called Vienna consensus are reaching breaking point' and that the 'INCB is in distress and no longer capable of responding to challenges [to the UN drug control system] in a rational manner'.²⁷ Surely it is a sign of a healthy treaty regime that it can be subject to review and refinement over time, without the fundamental structure of the regime being compromised. As it has been noted elsewhere, international regimes of all types do as a matter of course undergo change and the Board's defensive position can be regarded as the response of an international bureaucracy under threat.²⁸

When looking beyond the global drug control regime, it is also important to recall that La Paz is not only moving to reconcile its obligations as laid out in the Single Convention with those in its new Constitution, but also with a range of international legal obligations and 'basic norms of human rights and indigenous peoples' rights operating concurrently'.²⁹ The Board, however, also fails to recognise, or chooses to ignore, the significance of such system-wide tensions and attendant commitments. This can be seen as the failure of a purposive UN treaty body that, despite erroneous statements to the contrary, is not entitled to operate in a drug policy vacuum or silo – an important point to which we will return. Further, as IDPC has had reason to highlight on previous occasions, rather than acting as an ardent defender or guardian of the conventions, it is the INCB's role to act as a watchdog and assist in the resolution of emerging areas of tension between situations within States and the conventions.³⁰ Far from acting as an 'honest broker' in helping Bolivia to resolve its dilemma, in opposing the legal moves of a sovereign State and party to the Single Convention in vague terms regarding the 'spirit' of the Convention that are driven by more general concerns regarding the perceived sanctity of the UN drug control treaties, it can be argued that the Board has exceeded its mandate. This was an issue recently highlighted by the Bolivian Ambassador to the Netherlands. Disputing the Board's hostile position, Roberto Calzadilla Sarmiento stated that despite its critical statements, 'The INCB and its Secretariat are limited in their mandate to suggesting consultation, establishing dialogue and requesting explanations from states and not to judge'.³¹

The continuation of mission creep: Conventions and constitutions

As in previous reports, this year's publication once again contains instances where the Board can indeed be seen to be exceeding its mandate or engaging in what we can refer to as mission

creep. Prominent among these are the INCB's positions on two related issues; the Canadian Supreme Court decision on the Insite facility in Vancouver and sub-national policies involving tolerant policy positions on cannabis – including decriminalisation of possession for personal use and in regard to medical cannabis schemes. Both are discussed in Special Topics under the title, 'Application of the international drug control treaties in countries with federal structures' (Paras. 281–290). As this suggests, the INCB's core concern here is that, 'The international drug control treaties must be implemented by States parties, including States with federal structures, *regardless of their internal legislation*, on their entire territory' [Emphasised added] (Para. 281. Also see 287, 289, 428, 429 and 437). In other words, and admittedly in line with Article 27 of the 1969 Vienna Convention on the Law of Treaties, the Board is deploying the argument that under international law, provisions of national law cannot be invoked to justify non-compliance with the international drug control conventions.³²

While this is the case, the Board once again downplays the legal complexity of the situation, particularly the relationship between the drug control conventions and State constitutions. For example, within the *Report* the Board 'expresses its concern about the decision of the Supreme Court of Canada, permitting a "drug injection room" to continue to operate in Vancouver'. It continues to state that, 'Under international law, by virtue of the hierarchy of norms, the provisions of internal law cannot be invoked to justify non-compliance with provisions of the international drug control treaties to which a State has become a party. Those treaties do not permit the use of controlled drugs for any purposes except medical and scientific purposes' (Para. 289). Putting aside the dubious legal nature of its stance on the legitimacy of drug consumption rooms,³³ the Board also appears to overlook the fact that the validity in international law of the Supreme Court decision rests on Article 3(2) of the 1988 Convention Against Illicit Traffic in

Narcotic Drugs and Psychotropic Substances relating to the primacy of a State's constitution. Indeed, in the Insite case the Supreme Court was ruling on Canada's Charter of Rights and Freedoms, which forms part of the country's constitution.³⁴ As such, in this instance as in others, 'the general "hierarchy of norms" is difficult to uphold in the case of treaty provisions that only oblige a party to take certain measures explicitly "subject to its constitutional principles and the basic concepts of its legal system"' as stated in Article 3(2).³⁵

Similarly, although in a less direct fashion, it can be argued that the legal case underpinning the Board's displeasure towards state level decriminalisation and medical cannabis schemes within the United States of America is weakened due to a lack of consideration of this legal dynamic. Indeed, while rightly described by experts as a 'remarkably complex' intersection of legal systems, is generally agreed that within the US the constitution prevails over all treaties.³⁶ And added to this, as California Attorney General, Bill Locker, noted in relation to the issue of medical cannabis, 'Under the Constitutional Principles of dual sovereignty, the federal government cannot force state officials to enforce federal laws'.³⁷ Consequently, as noted elsewhere in relation to previous INCB statements within this contentious legal zone – and despite being the focus of one of this *Report's* recommendations (Para. 812) – 'it is highly debateable whether or not it is the Board's place to question constitutional arrangements within sovereign States'.³⁸

The reoccurrence of selective reticence

As IDPC noted last year, since – as with the practice of mission creep – selective reticence seems now to be very much part of the Board's operating culture, it is no surprise to find further examples of such timidity on a number of inter-related issues within the current *Report*.

Human rights

The *Annual Report* reveals the continuation of the Board's inadequate grasp of the important intersection between international human rights norms and obligations, the international drug control treaties and national level policies that operate with reference to them. Such a shortcoming can be seen in reference to a number of issues throughout the document. For instance, in reference to the provision of treatment and rehabilitation within the Foreword, the President of the Board states that the drug control conventions recognise that 'being free from addiction is a human right' (p. iii). While this is a somewhat vague yet deliberate attempt to link human rights to the ethos of the present drug control regime – none of the treaties refer to abstinence and human rights – it is difficult to argue against the basic sentiment concerning the problems associated with drug dependence. However, the approach is problematic. Further, despite the centrality of human rights to the issue of drug control policies as operationalised and the increasing engagement with the issue by other parts of the UN drug control apparatus,³⁹ this is one of the few mentions of human rights within the entire document. In fact, the only other time they are mentioned is in relation to the rights of journalists reporting on the drug-related violence (and human rights abuses) in Mexico (Para. 440). However, as highlighted by HRI, it has been expressly stated by the Committee on Economic, Social and Cultural Rights that 'The right to health is not to be understood as the right to be healthy'.⁴⁰ Consequently, 'What the INCB has failed to recognize is that human rights are legally enforceable. To claim that a person has a right to be free from addiction is, in effect, to say that every time someone becomes drug dependent the State in question is in violation of its human rights obligations'. HRI continue to point out that 'Being free of addiction is certainly a laudable personal or policy goal, but it is not a human right. Instead, it is drug treatment, rehabilitation and harm reduction that are specifically recognized as components

of the right to health. Correspondingly it is the absence of available, accessible, acceptable and sufficient quality services that renders a state in breach, not the presence of addiction'.⁴¹

The Board's position on the 'right to be free from addiction' also appears to lead to problems in relation to forced treatment. Put simply, in a world where there is a right to be free from addiction, forced treatment could potentially be justified as an attempt to realise human rights.⁴² This relates to a broader debate concerning the disease model of drug dependence, with, as Craig Reinerman points out, the construction providing not only a 'humane warrant for necessary health services' but also the 'legitimation of repressive drug policies' including forced treatment.⁴³ It is telling that while once again other parts of the UN system, including the UNODC, have made statements calling for the closure of drug detention centres,⁴⁴ the INCB fails to comment upon or condemn them.⁴⁵ Rather, it simply notes their operation in certain countries. In reference to China, for example, the Board reports that 'compulsory treatment centres, together with community-based treatment units, provided drug treatment and rehabilitation services to about 360,000 drug abusers in 2010, a significant increase from 2009' (Para. 583).⁴⁶ This statement is made without any mention of evidence that such centres expose people to arbitrary detention, forced labour, beatings and other rights abuses.⁴⁷ More worryingly, although the Board 'welcomes the steps taken in Viet Nam to improve the treatment and rehabilitation of drug abusers' it also 'encourages the Government to reinforce the existing facilities' (Para. 117). These include vast detention centres where human rights abuses are rife.⁴⁸ The Board's lack of awareness of human rights issues can also be seen in its unqualified comments on or support for a range of policies that have human rights implications. These include anti-trafficking measures in countries like Iran (Paras. 634 and 680) and Myanmar (Para. 89) where hundreds of people have been extradited to China where they face the death penalty.⁴⁹

As with previous reports, this year there is once again no critical commentary upon the tragic conditions and human rights implications surrounding the 'war on drugs' in Mexico.⁵⁰ In relation to an INCB Mission to the country in October 2011, the Board notes 'A number of successes have been achieved in the area of law enforcement and the criminal organizations involved in drugs and precursor trafficking have been weakened' (Para. 87). Later in the *Report* the issue is picked up again: 'The Government of Mexico has continued to take vigorous action to disrupt drug trafficking activities, to dismantle drug trafficking syndicates and prevent and repress drug-related acts of violence'. In reference to these activities the Board 'acknowledges the strong commitment shown by the Government of Mexico through the decisive measures it has taken to address the country's drug related problems and encourages the Government to ensure that appropriate attention is given to prevention measures' (Para 426). In so doing, however, the INCB fails to comment upon the role that the militarised approach adopted by Mexican authorities, and supported by the USA, plays in generating 'unprecedented levels of violence': violence that it admits is a response of 'drug trafficking organizations' to what it defines as the 'Government's resolve' (Para. 426). Similarly, elsewhere in the *Report* the Board reveals a lack of concern about, or even support for, a militarised law enforcement approach to disrupting drug markets. The resultant violence and associated human rights violations are given little heed in Chapter 1 either in relation to criminal gangs in 'marginal communities' (Para. 17) in general or in Brazil in particular (Para. 34). As mentioned above, the only reference to the human rights implications of the current situation in Mexico relate to journalists who report on the violence. Finally, mindful of the close relationship between the military and the practice in Colombia, it is important to highlight that the Board remains silent on the issue of aerial fumigation. This practice has disastrous consequences in terms of damage to health,

food crops and the environment and has been flagged as an issue of concern by a number of bodies within the UN system.⁵¹

Harm reduction

As with human rights, the Board's position on the closely related issue of harm reduction remains contradictory and confusing. On the one hand, and in a move away from overt hostility displayed in previous reports, the limited use of the term once again appears without scare quotes (Paras. 594, 650, 712, 717, 769) and a range of harm reduction interventions, particularly opioid substitution therapy (OST), including methadone maintenance treatment, are often mentioned in a neutral fashion. That said, in addition to the Board's continuing opposition to drug consumption rooms on the erroneous grounds (and contrary to their own legal advice)⁵² that they are in contravention of the drug control conventions, a number of concerns remain. First, the Board continues to emphasize, if not privilege, its concern for the diversion of licit medicines into illicit markets, particularly in the case of buprenorphine, over the expansion of treatment (see for example Para. 196 and in relation to Mauritius Para. 375). Second, in the case of Mauritius, OST seems to be equated with 'drug abuse'. This is the case despite its place on the WHO model essential medicines list and its status as a core component of the HIV response promoted by UNODC, WHO and UNAIDS.⁵³ Third, despite numerous references to HIV prevention and in excess of 40 references to HIV/AIDS more broadly, there remains limited explicit acknowledgement of the clinically proven efficacy of needle and syringe programmes. The intervention only receives two mentions; in relation to the introduction of programmes in Kenya (Para. 378) and Mauritius (Para. 374). This is the case even though in other parts of the *Report* the Board makes a clear connection between the spread of blood borne diseases and injecting drug use. For instance, it notes that in South Asia, 'The abuse of drugs by injection has contributed to an increase in the

HIV and hepatitis C infection rates' (Para. 588) and that 'Central Asian countries have some of the fastest-growing levels of HIV infection, with drug abuse by injection accounting for over 60 per cent of cases with HIV infection' (Para. 687). The source of such reticence can be found, however, within the recommendations at the end of Chapter one. Here, presenting what is a complex issue requiring multiple and integrated approaches in a simplistic and binary formulation, the Board opines that 'Treatment should be based on enabling individuals to become drug-free rather than simply seeking to reduce some of the harm associated with continued levels of drug misuse' (Para. 50g).

Conclusions

Mindful of the preceding discussion, what then can we conclude about the *Report* for 2011? What does it tell us about the current operation of the Board? It is fair to say that, as has been the case with all recent INCB reports, the document contains some valuable material and constructive comment – or in some cases constructive lack of comment – on a number of issues. While questions might legitimately be asked about the need for a document that in its present form in many respects duplicates the information presented in the UNODC's *World Drug Report*, the Board's *Report* does provide an extensive overview of the current drug control situation throughout the world. It also contains valuable statements that follow up on important CND decisions concerning essential medicines. Further, although it contains the now obligatory criticism of the Dutch coffee shops (Para 718), it continues the approach of last year's report by not criticising legitimate moves by Parties to the conventions to 'decriminalize' the possession of drugs for personal consumption, in this case in regard to the Czech Republic (Paras. 77–79), and adopts a less confrontational, if unsupportive, stance on harm reduction.⁵⁴ Unfortunately, its overall quality and worth in

terms of a balanced analysis and the provision of an 'account of the explanations...given by or required of Governments' as demanded by the Single Convention⁵⁵ is seriously undermined by a series of significant failings; failings that arguably demonstrate fundamental problems with the working culture of the body itself.

We have, in previous reports on the operation of the Board, highlighted its tendency to engage in the practice of mission creep. As evidenced here this pattern of behaviour is arguably becoming more pronounced as tensions within the regime increase and particularly as one nation, admittedly for a unique set of reasons, has taken the unprecedented step of denouncing the Single Convention. Bolivia's move to withdraw and re-accede with a reservation on coca is indeed one of the many contemporary 'challenges in drug control' that Professor Ghodse refers to in his Foreword to the *Report*.⁵⁶ However, rather than seeing this – and other less dramatic moves away from the prohibitive ethos of the conventions – as a challenge to the system that must be repelled at all costs, including via pronouncements and positions beyond its mandate, the Board should treat it as an admittedly demanding or difficult task to be resolved in terms of 'co-operation with governments' and via 'mechanisms for continuing dialogue'.⁵⁷ The Board needs to accept that regimes of all descriptions change over time⁵⁸ and that as a watchdog of the treaties that underpin the global drug control regime it should be working to reconcile differences between States' positions and perspectives as the process unfolds. Instead, the Board has further embraced a defensive stance and apparently retreated to a bunker of denial.

Such pathological behaviour can also be seen in relation to the flip side of mission creep; selective reticence. Other contemporary challenges facing the regime come in the form of emerging conflicts between national policies operated within the framework of the drug control treaties and those relating to other UN multilateral

instruments and regimes. While including a range of issue areas, this is particularly pressing in relation to human rights. Consequently, it is not acceptable for a UN treaty body that is funded from the regular UN budget – and engages via its President with the UN's Secretary General⁵⁹ – to simply ignore conflicts between drug control and the organisation's human rights norms as we have seen again in this year's report. It should be recalled that the UN General Assembly has stated in numerous resolutions that international drug control must be carried out in conformity with the UN Charter and in particular with full respect for human rights.⁶⁰ The preference to side-step such issues is especially alarming in relation to the use of the death penalty for drug offences. This was the case with the Board, and Professor Ghodse in particular, both at the launch of the *Report* and at the CND in March 2012 earlier in the year. It was then claimed that it is beyond the mandate of the Board to comment or define a position on the death penalty. When asked "is there no atrocity large enough that you will not step out of your mandate to condemn it?", Professor Ghodse replied, "No. 100 per cent not."⁶¹ This is an especially weak response considering that the Board often

exceeds its mandate in other areas that it deems to be of concern. Moreover, as the UN's quasi-judicial mechanism tasked with monitoring the implementation of the drug control treaties, the INCB is in fact a critical partner in ensuring that these treaties are not implemented in a vacuum and reflect broader obligations of international treaty and customary law.

That this has not been the case reflects another important dimension of the Board's silo thinking and unwillingness to address a range of complex intersecting issues. While choosing to engage with them the Board appears to avoid, and due to its composition may in fact be incapable of providing, sophisticated analysis on important issues related to recreational and problematic drug use in an era of globalisation and rapid social and cultural change, and the intricacies of international, human rights and constitutional law. This is unfortunate because today the international community needs a versatile body capable of managing the myriad complexities thrown up by the shifting interests of its member states more than at any time since the creation of the modern system of multilateral drug control in 1961.

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

Endnotes

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- 2 See http://www.incb.org/incb/en/membership_actual.html for current membership. Since ECOSOC elections were held in April 2011 and new members did not take their places until May 2012, not all those currently on the Board were involved with the drafting of the *Report* for 2011. While not involved in the election process in 2011, Francisco Thoumi (Colombia) was elected to replace Camilo Uribe Granja (Colombia) after he stepped down in early 2012.
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