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THE INTERNATIONAL NARCOTICS CONTROL BOARD ON CANNABIS: A CRITIQUE OF THE REPORT FOR 2018

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Introduction

Celebrating its 50th anniversary, the International Narcotics Control Board (INCB or Board, see Box 1) today finds itself operating within a UN-based international drug control system facing unprecedented challenges; challenges that stem not only from a growing and increasingly complex global drug market, but also a divergence of views among member states on how best to deal with it. It is within this context that March 2019 saw the publication of the Board's Annual Report for 2018.

The Annual Report represents a key document within the UN drug control system. It plays an important role in not only providing an analysis of the 'drug control situation world-wide and potential situations that may endanger the objectives of the international drug control treaties', but also in setting the subsequent tone of debates and identifying areas that it feels are of concern. Indeed, writing in 1973, the authors of the *Commentary on the Single Convention on Narcotic Drugs, 1961* highlighted how 'The Board's reports publishing its observations and recommendations may be the organ's most potent instrument for the promotion of effective international and national drug control, the power of public opinion being a very important element in the strength of the international drug control régime'.

As can be seen over the past 45 years or so, the potency of the Report has arguably shifted away from the public and more towards influencing opinion within the UN's central policy-making body on the issue of drugs, the Commission on Narcotic Drugs (CND). For this reason, it is vital that the Board presents balanced, accurate and impartial information within its Reports in their entirety, including the thematic chapter.

Box 1 The INCB: Role and composition

The INCB is the 'independent, quasi-judicial expert body'[4] that monitors 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 Organization (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 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.

Since 1992, the first chapter of the Annual Report has, according to a former President and longstanding member of the Board, 'addressed a

specific drug-related theme of international importance' with the themes 'chosen each year on the basis that it reflected current concerns related to the conditions prevailing in the world at that time'.[5] It is perhaps no surprise then that within the current international policy environment the focus of this year's Chapter I is cannabis – more precisely 'Cannabis and cannabinoids for medical, scientific and "recreational" use: risk and benefits'.

The INCB's attention to and stance on cannabis, including its use for medical purposes, has fluctuated over the years.[6] Yet today it is faced with an increasingly pressing dual dilemma: how to approach the concomitant expansion of – sometimes poorly controlled – medical markets and the shift by a growing number of jurisdictions to implement legally regulated markets for non-medical and non-scientific cannabis use. The latter being a policy choice that is beyond the boundaries of the UN drug control regime.

Including analysis of Chapter I and other sections of the Report as appropriate, this report aims to provide a critique of the Board's discussion of cannabis. Such an exercise is underpinned by the view that the Reports are said to provide 'valuable insight into the values and beliefs which underlie the Board's approach to the problems with which it deals'.[7] While the Board itself has a tendency to conflate the two, our report begins with an examination of the discussion of non-medical use before shifting attention to medical cannabis schemes. It concludes with several observations and suggestions concerning the INCB's ongoing work to, in the words of its President, 'address the challenges faced and to promote public health and well-being through effective drug control'.[8]

Non-medical cannabis use

As IDPC is always keen to highlight in its analysis of the Annual Report, the publication represents a notable accomplishment in terms of data collection and synthesis. In relation to developments in national policies concerning cannabis, this year's Report contains much useful information that allows the reader to get some sense of the dynamic situation at the global level.

For example, among other issues the Board gives special attention to cannabis in its 'Evaluation of overall treaty compliance' subsection 'New developments with regard to treaty compliance in selected countries'. Here, for instance, the Report focuses on the South African Constitutional Court's ruling that 'prohibition of private possession and consumption of cannabis and the cultivation of cannabis for personal use was unconstitutional' (Paras. 193-195 & 362). Within the context of its follow-up of recommendations made during the Board's 2015 mission, mention is also made of the situation in Italy, where a draft law on 'legalization' was considered but not adopted (Para. 286). And, apparently keen to highlight that the liberalising trend is not universal, the Report choses to highlight Cameroon's 'large-scale national media campaign' in early 2018 to 'raise awareness of the dangers posed by the cultivation and consumption of cannabis and other narcotic drugs' (Para. 376), as well as 'alternative development initiatives as a way of curbing the illicit cultivation of cannabis by young people' (Para. 377).

Among descriptions of 'Major developments in North America', the Board notes the October 2018 ruling of the Supreme Court of Mexico 'that a prohibition of the use of cannabis for non-medical purposes was unconstitutional on the basis that adults had a "fundamental right to the free development of the personality" without interference from the State' (Para. 445). In addition, the Report contains reference to the INCB's recent mission to the Netherlands, noting not only the '"toleration" of the non-medical use of "soft drugs", a category which includes cannabis', (Para. 236) but also the ongoing existence of the 'so-called "coffee shops"' and planned municipal-level experiments regarding the regulation of backdoor supply (Para. 767).

There are similarly descriptive sections focusing on the situation within Uruguay (Para. 525), the USA – both in terms of what the Board refers to as 'recreational' and medical use at the subnational level (for example, Paras. 446, 473 & 474) as well as Canada. Indeed, perhaps unsurprisingly, the Report gives considerable attention to Canada at various places within the text, including in relation to its recent mission to the country. As is the case with references to other states, in some instances the Board provides a useful overview of legislative developments (e.g. Paras. 444 & 464).[9]

Accompanying such coverage is the usual, and largely justifiable, comment concerning the relationship between national policy shifts and States Parties' commitments under the UN drug control conventions. For instance, in reference to the situation in South Africa, it is noted how the Board will 'continue monitoring the developments' and also continue 'to *engage in dialogue* with the authorities

of South Africa *to facilitate the full compliance* of the country with the provisions of the international drug control treaties, including those related to limiting the use of controlled substances to medical and scientific purposes' (emphasis added) (Para. 196).[10]

Moreover, in relation to states where legal tensions between national legislation and treaty obligations already exist, for example the USA (Para. 475) and the Netherlands (Para. 768), the Report deploys various versions of the now familiar phrase that 'The Board wishes to reiterate that article 4 (c) of the 1961 Convention restricts the use of controlled narcotic drugs to medical and scientific purposes and that measures providing for non-medical use are in contravention of that Convention' (Para. 475. Also see in the overall Recommendations section at Para. 852).

Additionally, where Canada is concerned, the Report stresses the view that: 'Through the passage of Bill C-45, the Government of Canada *has chosen* to put itself in a situation of default of its international obligations, not only under the 1961 Convention as amended but also the 1988 Convention, which obliges States parties to establish as criminal offences under their domestic law the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale and delivery on any terms whatsoever any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention' (emphasis added) (Para. 172). Despite such an unequivocal statement, it is important to keep in mind here that the INCB has not been given a mandate to monitor compliance of the 1988 Convention, except for its precursor control regime, precisely because 'certain articles deal with matters that can be of a highly political character'[11] dealing, as they do, 'with matters of criminal law and its enforcement that go beyond the scope of the earlier conventions into areas touching more closely on the sovereignty and jurisdiction of States'.[12]

As has been the case in the past few years, the Report for 2018 also gives prominence to the issue of treaty obligations within its overall 'Recommendations'. In calling for 'the Governments of countries in which the use of cannabis or cannabis derivatives for non-medical, "recreational" purposes has been permitted to take steps to bring the entirety of their territories *back into* compliance with the international drug control conventions and their obligations thereunder', (emphasis added) Recommendation 2 highlights the 'health and welfare objectives' of the treaties. This position is further reinforced with reference to the 50th anniversary of the establishment of the INCB (Para. 855), with Recommendation 3, stressing 'that the provisions of internal law cannot be used as justification for failure to meet the requirements of a treaty'. Significantly, in what appears to be an attempt to add further pressure on states currently exceeding the limits of flexibility with the conventions, the Board choses to emphasise the reaffirmation of universality expressed at the 2016 UNGASS. In this regard, it notes how adherence to the treaties is 'undermined by the developments *in a few countries* that have legalized or permitted the use of cannabis for non-medical purposes or that have tolerated its legalization at the subnational level' (emphasis added) (Para. 851).

IDPC has noted on various occasions since 2012 that the Board is correct to view the implementation of regulated markets for non-medical and non-scientific use to be in contravention of the current drug control regime.[13] Consequently, while there may remain legal grey areas around the 'coffee shop' system, references to relevant sections of the drug control treaties, especially article 4 (c) of the Single Convention, are in the main valid and justifiable. Yet, despite its mandate to 'provide the mechanism for a continuing dialogue between Governments and the Board',[14] it is unfortunate that in addition to describing policy developments and, on occasions, resultant conflicts with the conventions, the Board also uses the Report to exert pressure on countries by attempting to apportion blame for undermining the *entire* treaty system; a point that will be explored further below. Moreover, and as discussed in detail elsewhere,[15] it is regrettable that the INCB retains – in this instance – a very narrow interpretation of its mandate and continues to mechanically repeat a 'treaties say no' mantra. This looks set to be increasingly untenable as more member states appear set to implement regulated markets of one type or another; processes that, as noted above, often include decisions of constitutional and supreme courts over which the Board has absolutely no authority and for which the treaties contain specific escape clauses. In addition, while aware of specific circumstances, it should be stressed that federal authorities in both Uruguay and Canada deliberately and democratically *chose* this policy option expressly to protect the health and welfare of their citizens, particularly young people. Resultant conflicts with

the drug control conventions are consequently epiphenomenal rather than deliberate as is suggested. Mindful of the realities on the ground, it is arguable therefore that rather than simply calling on states to take steps to bring the 'entirety of their territories back into compliance' through what is inferred to be a rolling back of legislative initiatives, the Board should be assisting states in seeking other routes to reconcile domestic policy choices with treaty commitments. Today, the UN drug control system is arguably experiencing its most profound challenge in terms of loss of consensus and divergence of member state approaches to dealing with the 'world drug problem'. Within this context the international community requires the Board's undoubted expertise and experience to help navigate the uncharted and increasingly choppy waters ahead – within the spirit of impartiality.

Unfortunately, further analysis of the Report suggests that this is unlikely to be the case. There are several significant instances where the Board is selective in its presentation of evidence and makes unsubstantiated claims concerning the likely consequences of shifts towards regulated markets; neither of which do much to enhance the INCB's credibility and related capacity to help unlock the current impasse around cannabis. While inter-connected, these can be arranged under several headings:

Selectivity

In its description of the 63rd regular session of the Inter-American Drug Abuse Control Commission (CICAD), the Board chooses to refer to a presentation made by the Mexican National Council Against Addiction, CONADIC. In this regard, it is highlighted how the representative 'stressed the harmful effects that the legalization of cannabis for non-medical purposes could have on individuals and society as a whole' (Para. 489). It is perfectly reasonable to include such information within the Report. One wonders, however, why such prominence was not given to other presentations at the event, including those with a critical view of traditional law enforcement-oriented policy approaches. Indeed, though not deemed worthy of mention, another presentation at the CICAD session cited a statement from Colombia at the UN General Assembly in 2012 calling for the need to 'conduct an in-depth review, analysing all available options, including regulatory or market measures, in order to establish a new paradigm that would impede the flow of resources to organised crime groups'.[16]

The Report also devotes some space to the August 2018 launch of the report of the Regional Commission on Marijuana of the Caribbean Community (CARICOM), *Waiting to exhale: Safeguarding our future through responsible social-legal policy on marijuana* (Para. 414). In so doing, it highlights the Commission's recommendation that 'the end goal of CARICOM should be to establish a regulated framework for cannabis, similar to that for alcohol and tobacco' before going on to reiterate that 'the 1961 Convention limits the use of cannabis exclusively to medical and scientific purposes, as a fundamental principle that lies at the heart of the international drug control legal framework and that cannot be derogated from' (Para. 414). As at other points within the Annual Report where the Board gives attention to actual or discussed policy shifts, there is no mention of the factors and evidence base that have led to such a recommendation (in relation to Canada and Bill C-45, see Para. 174.) For example, while keen to highlight the legal tensions that would result from the implementation of regulated markets within the Caribbean, the Report chooses not to note the Commission's view that 'The analysis of the comprehensive information gathered indicates that the current legal regime for cannabis/marijuana, characterised as it is by prohibition and draconian criminal penalties, is ineffective, incongruous, obsolete and deeply unjust' or that 'There is considerable consensus amongst Commissioners about the nature and thrust of law reform, in particular, the move away from criminalisation towards a responsibly regulated, public health/rights based approach'.[17]

Issues with evidence

At several places within the Report, the Board highlights its concern that regulated markets lead to a reduction in perceptions of harm and/or risk, higher rates of cannabis use, particularly among young people, and subsequent adverse effects on public health. Although references to this relationship, predominantly regarding the USA and Canada, include various qualifiers such as 'may' and 'likely' (Paras. 60 & 63), it can be argued that the certainty with which the Board approaches the issue elsewhere (e.g. Para. 174), including within the prominent Recommendations section of the Report (Para. 853), is supported by a limited evidence base. Indeed, while not questioning the quality of the research itself, the 'perception' argument throughout the entire Report appears to be based upon two US-focused studies focusing on medical cannabis schemes;[18] a point that will be discussed further below. Although it is worth pointing out here how

at the 2019 CND, the Swiss delegation addressed this issue stating that 'we find it interesting that the Board would comment on public perception without any scientific evidence. This is not within their mandate as a quasi-judicial body'. Rather it was highlighted, 'It is in the mandate of the WHO'.[19]

Moreover, on a related issue, the Board can be challenged in its attempts to draw parallels with control frameworks for other psychoactive substances. The Report notes that 'Experiences with alcohol and tobacco suggests that legalization will reduce the perceived risks of using cannabis' and is therefore 'likely to increase cannabis use among young adult users' (Para. 63). While this is a clear risk, evidence exists to suggest that well designed, targeted and implemented public health strategies around, for example, tobacco – including public education and awareness campaigns – can reduce use, particularly among youth.[20] This is precisely the approach that is being employed by Canadian authorities in relation to non-medical cannabis use.[21] Indeed, Canada explained to the CND in November 2018 that 'rates of cannabis use in Canada have been among the highest in the world – particularly among our youth', and that concern over that reality was an important consideration in the decision to change course. The Canadian delegate to the intersessional meeting stressed that 'our former approach, which relied on criminal prohibition of cannabis, was not successful in discouraging cannabis use nor in protecting the health and safety of Canadians'.[22] Omission of any comment on the holistic and integrated approach being adopted in Canada is particularly injudicious bearing in mind the Board's explicit reference to media campaigns in Cameroon.

Additionally, aware of what might be legitimately regarded as a steady trickle of states moving in one way or another towards the consideration or implementation of regulated markets, the Board is keen to make some significant statements concerning the implications for international drug control. Alas, these are, in several instances, also problematic. For example, while it is reasonable for the INCB to highlight how treaty contraventions around cannabis puts *'full'* (emphasis added) implementation at 'serious risk', it is perhaps an exaggeration to claim that the actions of countries like Uruguay, Canada and, via state-level shifts, the USA 'may also encourage other States parties to follow their example and use it as a justification for doing so'. (Para. 61).

It is difficult to find evidence suggesting that any of the aforementioned states have held up their domestic policy approaches as an example for other countries to follow. Rather, both Uruguay and Canada have made specific statements to the contrary.[23] Similarly, no evidence currently exists to suggest that, instead of considering their own unique circumstances, states are directly influenced by decisions within these jurisdictions. While this is the case, within a policy environment where knowledge exchange and lesson learning are regarded as best practice, one can only hope that any positive outcomes of the policy shifts are closely studied and, where appropriate, taken on board.

Regarding the INCB's view that the implementation of regulated markets 'undermine[s]' the treaties, it is also important to recall how, aware of differing circumstances, Canada, Uruguay and the USA have all emphasised ongoing commitment to the treaty system. Further, the Board is on thin ice when it argues, in the thematic chapter, that 'The legalization of non-medical cannabis use in some States *will* make it more difficult to enforce international drug control treaty provisions in neighbouring States that do comply with those provisions' and that 'It *will* be more difficult, for example, to prevent cross-border trafficking in cannabis products from States that have legalized non-medical cannabis use to neighbouring countries that have not done so' (emphasis added) (Para. 66). Again, although perhaps not unreasonable to hypothesize and warn of such a potential dynamic, there is little evidence to suggest this is the case. A nation like Canada has given considerable attention and resource, including in relation to law enforcement, to ensure that it operates a tightly regulated and closed system. In fact, the opposite argument could as easily and perhaps more convincingly be hypothesized: the global prohibition regime cannot boast having been very effective in curbing international illicit trafficking of cannabis, so a tightly state-controlled regulation could well prove more effective in preventing cross-border trafficking.

Singling out Canada

It appears as if the Board finds it politically expedient to give special attention to Canada. This can be seen in several places. For example, the 'incompatibility of Bill C-45' with the drug control treaties is flagged up as constituting a 'dangerous precedent for the respect of the rules based international order' (Para. 173). Remarkably similar in approach to that of the Russian Federation at the reconvened session of the 61st session of the CND in December 2018 (four months prior to the publication of

the Annual Report),[24] one wonders if the tactic was specifically chosen to exert pressure on Canada by playing on Ottawa's long tradition of good global citizenship. With this in mind, it is possible to argue that candid admission of being in 'contravention of certain obligations related to cannabis', remaining committed to protecting to the health and welfare of its citizens[25] and engaging in continuing dialogue with the Board is actually more respectful of international law than other more 'untidy legal justifications'[26] posited by other 'errant' jurisdictions.

Elsewhere, the Report notes that 'In the exercise of its mandate, the Board will remain seized of the matter and will continue to engage with Canada and *other members of the international community in addressing it*' (emphasis added) (Para. 175). This appears both unusual and an unjustified overstepping of its mandate since the INCB is normally only supposed to maintain dialogue with Parties to the conventions in a bilateral fashion. With no readily available evidence to suggest that this approach has been deployed before in the absence of an invocation of Article 14 of the Single Convention, such a move might be seen as an attempt to recruit member states holding a similar perspective to that of the INCB to apply influence unavailable to the Board in isolation. It will be recalled that Article 14 represents what can be regarded as the 'nuclear option' for the Board to 'ensure the execution of the provisions of the Convention'. Accordingly, if the Board has 'objective reasons to believe that the aims of [this] Convention are being seriously endangered by reason of failure of any Party, country or territory to carry out the provisions of [this] Convention' it can – after consultation and dialogue – recommend other states parties to stop importing and exporting drugs for licit purposes to and from a state deemed to have triggered the Article; the only tangible sanction the Board has at its disposal. While usually only discussed in relation to Afghanistan (since 2000), it is noteworthy that the topic received wider attention at the 2019 CND. Then, in response to the presentation of the INCB Report for 2018, China, Japan and the Russian Federation all mentioned Article 14 as a measure that the Board could deploy in response to the implementation of regulated markets for non-medical cannabis.[27] Moreover, at the same Commission session the Russian Federation also keenly introduced and energetically supported a resolution aiming to enhance the role of the Board in achieving the universal adherence to the drug control conventions. Such incidents could be seen as evidence of growing levels of coordination between the INCB, or some parts of the body, and some states favouring the status quo.[28]

Medical use of cannabis

With the number of states engaging in one way or another with medical cannabis markets increasing dramatically in recent years,[29] the Report for 2018 – as is required and expected – devotes considerable space to the issue across the whole publication. For example, the Board provides descriptions of the situation under 'New developments with regard to overall treaty compliance' (Denmark and Poland, Paras. 176-180 & 189-192 respectively) and its 'Country missions' (Germany, Luxembourg and Switzerland, Paras. 217, 226 & 245).

Elsewhere information is provided in relation to Italy (Paras. 291-292), Lesotho (Para. 365), Mexico (Para. 447) Canada (Paras. 476-477), Peru (Para. 522), Paraguay (Para. 523), Colombia (Para. 524), several European states (including Germany, Luxembourg, France, Czechia and Sweden, Para. 762), the United Kingdom (Para. 766), Australia (Para. 823) and New Zealand (Para. 824). Such well-constructed coverage is informative.

A more problematic approach is adopted within Chapter I, however. Here, the Board at times not only offers inaccurate, misleading and incomplete analysis (some of which also relates to its position on non-medical use), but also seriously exceeds its mandate. Examples of these inter-related issues include the following:

Mandate problems

A sizeable part of Chapter I is devoted to the 'medical uses of cannabinoids, including adverse effects, medical use of approved cannabinoids and special access schemes' (Paras. 22-45). While some material here, as within other chapters, comprises useful descriptive overviews of different circumstances around the world, much attention is given to the medical efficacy of cannabis and the reoccurring call for evidence of safety and effectiveness. For example, referring to the use of a variety of preparations containing cannabinoids, the Report notes: 'They are used in the belief that they will alleviate a wide range of symptoms, often in the absence of high-quality evidence that they are safe and effective (Para. 22).

This view is echoed within the Report's Recommendation 1(a), where the 'Board reiterates that:… Governments that wish to establish special-access schemes to allow for the medical use of cannabinoids should do so only where there is evidence of

efficacy and safety…' as well as the chapter's conclusions and recommendations. Here, the Report stresses that authorities must 'ensure that medicinal cannabinoids are used in accordance with evidence on their safety and effectiveness' (Para. 67. Also see Paras. 69 & 71), before going on to provide a brief overview of evidence from clinical trials (Para. 68).

While no doubt a valid concern, it is simply not one that falls within the Board's mandate. It can be implied from a reading of the conventions and accompanying commentaries that the Board may take a 'very broad view' of what issues might be included within the Annual Report.[30] Medical assessments of scheduled drugs, however, clearly fall within the purview of the WHO and its Expert Committee on Drugs and Drug Dependence (ECDD) which, it should be noted, has just released its own findings and recommendations on cannabis scheduling.[31]

Moreover, while the lines are blurred around whether the recommendations offered can be regarded as 'technical assistance', it is useful to note the view that 'assistance must however be within the Board's competence, and should not overlap with assistance which might be given by other intergovernmental bodies...'[32]

Adoption of such a position is not unique to this year's publication. An analysis of the Annual Reports since 1980 reveals an increase in attention to, and criticism of, medical cannabis as implementation of schemes has become more widespread; a trend that shifts away from the purely descriptive to the critical as the years go by.[33] Indeed, in commenting on cannabis in 2003 the Board placed the onus on governments 'not to allow its medical use unless conclusive results are available indicating its medical usefulness'.

As one critique at the time pointed out 'it is not up to the Board to decide whether scientific results are "conclusive" nor whether cannabis has medical usefulness. It is neither within their mandate or competence'. To take a position on the term 'medical and scientific purposes' as used in the conventions, the analysis continues, 'is to take a political stand'.[34] Such a view remains valid and has more salience today bearing in mind, as noted above, the growing number of states towards which the Board's views are presumably aimed.

In choosing to focus on the issue within the thematic chapter this year, it can be argued that the INCB deliberately chose to increase the pressure that it began to build in the Annual Report for 2017;[35] a choice that distracts from focusing on its core responsibilities to work cooperatively with states to 'facilitate effective national action to attain the aims' of the Single Convention, and where appropriate, its sister treaties.[36]

Reticence towards, and narrow views on, medical cannabis

Throughout Chapter I, the Board also adopts a problematic approach by putting medical cannabis and medical use in quotation marks. This has several implications. First, in reinforcing a far more negative, even dismissive, view of the issue than in previous Reports, the use of quotation marks implies that cannabis has no genuine medical utility; a view that again is beyond the Board's competence and may unfortunately lead some states to disregard the needs of patients within their borders who may benefit from its use.

Second, 'scare quotes' are used in reference to the cannabis plant to indicate that – according to the INCB's own treaty interpretation – only the medical use of cannabinoids in pharmaceutical preparations constitutes legitimate medical use. For instance, the Report notes how 'Under the [1961] Convention, cannabinoids may be evaluated in controlled clinical trials to assess the benefits and harms of their use in medicine' (Para. 7), but that '[a]ttempts to market and promote the medical use of cannabis products as "herbal medicines" are inconsistent with the classification of cannabis and its derivatives under the 1961 and 1971 conventions. Pharmaceutical-quality cannabinoids should be approved for clearly defined medical uses by the country's pharmaceutical regulatory system' (see Para. 14-15 and Recommendation 1 (a)).

The Board also restates its position, without any legal substantiation, 'that personal cultivation of cannabis for medical purposes is inconsistent with the 1961 Convention as amended because, inter alia, it heightens the risk of diversion' (Paras. 12 & 52). The INCB's principal message therefore seems to be that 'the medical use of cannabinoids is allowed under the international drug control treaties' only under strict conditions (Para. 67)[37] and that 'medical cannabis' programmes have 'been used by advocates of cannabis legalization to promote the legalization of non-medical cannabis use' and 'to create a de facto legal cannabis market for non-medical users' (Para. 57).

Without denying the fact that medical cannabis regimes in some US states have certainly distorted the legal line between medical and recreational uses, and that control of quality standards is essential for any type of medicine, the distinction the INCB tries to make between pharmaceutical cannabinoids and cannabis plant materials has no discernible basis in the drug conventions whatsoever. Moreover, in commenting on the smoking of cannabis for medical purposes (Paras. 13 & 849), a good case can be made that the Board is overstepping its mandate in defining how medical cannabis should be administered.

Such an overall stance should perhaps come as no surprise. At the June 2018 ECDD meeting to review cannabis, the two INCB representatives present (Galina Korchagina, INCB Member from the Russian Federation, and Rossen Popov, Deputy Secretary of the INCB Secretariat) advised the Expert Committee 'that when considering the possibility of using cannabis derivatives for the treatment of certain health conditions, it is most appropriate to avoid the notion of "medical cannabis". This is intended to ensure that when reference is made to medicinal products, it is understood to refer to products that have been appropriately tested, have passed a full scientific evaluation including clinical trials and are licensed as medicines'.[38]

More issues with evidence

Closely linked with the Board's discussion of regulated markets for non-medical cannabis use, the Report puts significant emphasis on the role of medical cannabis programmes in lowering the perception of the risks associated with non-medical cannabis use. As a corollary, the INCB also puts forward the proposition that medical cannabis frameworks contribute to the 'legalization of non-medical cannabis use, contrary to the international drug control treaties' (see, for example, Paras. 1 & 70).

Admittedly, this perspective is adopted in some respects within the context of 'poorly controlled programmes' (Foreword, Paras. 5, 70 & 850) and is targeted predominantly at those operating in North America. For example, within the thematic chapter, the idea of poor regulation is addressed as follows: 'Under medical cannabis programmes implemented in Canada and possibly in some other States, and in some states in the United States, the medical use of cannabinoids is poorly regulated. Those programmes are inconsistent with the international drug control treaties in failing to control cannabis production and supply. They fail to ensure that good-quality medicines are provided under medical supervision and they enable cannabis and its derivatives to be diverted to non-medical use' (Para. 72).

Nonetheless, these inter-connected issues are open to challenge for several reasons. First, while perhaps politically attractive, the concept of medical schemes lowering perception of risk is not as clear cut as suggested. Indeed, although prominent within Chapter I, the view is based – as noted earlier – on a relatively limited and still emerging evidence base. Moreover, in 'cherry picking' the cited research, the Board ignores not only the complexity of the issue area, but also some evidence that runs counter to that foregrounded by the Report. For example, while acknowledging some correlation, the one cited study states that 'A exception to these trends is the finding that perceived harmfulness of cannabis use *increased* among 8th graders [13-14 year olds] in states with medical marijuana laws after passage of MML [medical marijuana laws], compared with states without marijuana laws' (original emphasis).[39] Further, the journal article also notes that, although research shows that MMLs may have played a role in increased use among adults, 'the prevalence of cannabis use had not changed markedly among adolescents, except for a possible slight decrease among younger teens, and many studies suggest that MMLs are unrelated to increases in adolescent cannabis use'.[40]

Second, and in a similar fashion to the weaponisation of quotation marks, while 'medical marijuana' may have, as research suggests, in some instances 'smoothed' the transition to 'legalisation' in the United States, effectively promoting the process as inevitable is unfortunate since this might generate unwarranted reticence and create problems concerning the availability of, and access to, medicine and pain relief; an issue that the Board's coverage elsewhere in the Report deserves commendation. Third, who decides which medical schemes are poorly regulated? As alluded to above, there is little dispute that some US state-level schemes have been, as the Board highlights (Paras. 49 & 50), operated in an overly relaxed manner and one which puts them at odds with treaty obligations.[41] Yet, the same surely cannot be said for the situation within other jurisdictions, including Canada. Here various court rulings have adjusted the medical cannabis framework to ensure not only symmetry with constitutional rights but also alignment with international drug control treaty commitments.[42]

Conclusions

The Board's position on cannabis as reflected in the Annual Report for 2018 can be seen to fall short of expected standards at several levels. It is fair to conclude that in places it is unbalanced, inaccurate and some way from impartial. Indeed, through its largely negative attitude on, and narrow definition of, medical cannabis schemes, the INCB, or more precisely the authors of the thematic chapter, look as if they are attempting to cast a chilling pall over a rapidly expanding field of medicine that has the potential to help many people suffering from a range of aliments and conditions. Caution must certainly be taken regarding appropriate regulation and scientific evidence. Yet, the extent to which the Board oversteps its mandate on this issue is surprising and also the Board's own performance with regard to the scientific evidence they present to sustain several of its assumptions does very little for its credibility. It does, on the other hand, do much to reflect a disregard for the expertise and authority of the WHO and to undermine the good work and progress made by the INCB in other areas, including ironically, on the related topics of human rights and access to controlled medicines. It is worth pointing out, however, that despite some positive recommendations from the ECDD critical review of cannabis, there is a worrying similarity of view between the Committee and the Board regarding natural cannabis extracts and pharmaceutical preparations.[43]

In conflating its attitude towards medical cannabis use – similar in many ways to that deployed against the harm reduction approach during the so-called UNGASS decade[44] – with its critical attention to non-medical frameworks, the Board attempts to generate negative symmetry and effectively warn states away from medical programmes on the basis that they will inexorably lead to cannabis 'legalization' and an increase of 'recreational use'. In some instances, complex relationships between the two certainly seem to exist. However, where states follow democratic processes to implement regulated markets for non-medical cannabis use for a range of intricate reasons such as a concern for health, privacy and crime prevention, it is unfortunate that INCB continues to simply repeat its 'treaties say no' mantra and refuses to address the widely questioned effectiveness of the strict prohibitive approach it continues to promote as the answer.

Though correct in its assertion that non-medical markets operate beyond the boundaries of the drug control conventions, the time is surely right for the Board to deploy its 'independent expertise and experience, accumulated over half a century'[45] to assist states in recalibrating their relationship between a domestic policy choice deemed most appropriate to specific national circumstances with treaty obligations dating to a very different era; both in terms of our understanding of the properties of cannabis itself and market interventions intended to eliminate its non-medical and non-scientific use. During a period when leniency towards cannabis offenses was seen as a serious threat to the control system, the 2006 *World Drug Report* recommended that 'Either the gap between the letter and the spirit of the Single Convention, so manifest with cannabis, needs to be bridged, or parties to the Convention need to discuss redefining the status of cannabis'.[46] Despite the Board's efforts at dissuasion, more states are likely to find themselves at odds with their obligations under the drug control conventions making such a view more pressing today than ever. It is vital, therefore, that member states finally take up this call and, moreover, that the INCB plays a constructive role in the discussion.

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Endnotes

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8. E/ International Narcotics Control Board (2018), *Report of the International Narcotics Control Board for 2018*, p. v, https://www.incb.org/documents/Publications/AnnualReports/AR2018/Annual_Report/Annual_Report_2018_E_.pdf
9. Elsewhere regarding Canada, the Board mentions its 'written submission to the Standing Senate Committee on Foreign Affairs and International Trade' (Para. 168). As discussion elsewhere reveals, this was far from accurate in its reading of international law. See: International Drug Policy Consortium (August 2018), *Response to the INCB Annual Report for 2017*, p. 13-14, http://fileserver.idpc.net/library/IDPC-Response-to-INCB-Report-for-2017_EN.pdf; Transnational Institute (May 2018), *In a bid to intimidate Canada on cannabis regulation, INCB is reckless and wrong*, https://www.tni.org/en/article/in-bid-to-intimidate-canada-on-cannabis-regulation-incb-is-reckless-and-wrong
10. Mindful of the fact that the South African Constitutional Court ruling refers to possession and cultivation for personal use, it is worth noting that that decriminalisation is permitted under both the 1961 and 1988 treaties if grounded on constitutional principles. See: Jelsma, M. (January 2011), *The development of international drug control: Lessons learned and strategic challenges for the future,* Working Paper for the first meeting of the Global Commission on Drug Policies, http://www.globalcommissionondrugs.org/wp-content/themes/gcdp_v1/pdf/Global_Com_Martin_Jelsma.pdf
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12. *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988,* United Nations, New York, 1998, p. 374
13. See, for example: International Drug Policy Consortium (August 2018), *IDPC Response to the INCB Annual Report for 2017*, p. 12, http://fileserver.idpc.net/library/IDPC-Response-to-INCB-Report-for-2017_EN.pdf
14. Article 9 (5) Single Convention as Amended by the 1972 Protocol
15. See, for example: International Drug Policy Consortium (August 2018), *IDPC Response to the INCB Annual Report for 2017*, p. 12, http://fileserver.idpc.net/library/IDPC-Response-to-INCB-Report-for-2017_EN.pdf
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19. See: International Drug Policy Consortium (June 2019), *The 2019 Commission on Narcotic Drugs and its Ministerial Segment: Report of Proceedings: Taking stock of the implementation of the commitments made to jointly address and counter the world drug problem, in particular in light of the 2019 target date*, https://idpc.net/publications/2019/06/the-2019-commission-on-narcotic-drugs-and-its-ministerial-segment-report-of-proceedings
20. See for example: Chapman, S. (2007), 'Falling prevalence of smoking: how low can we go?', *Tobacco Control,* **16**(3): 145-147; Harvey, J. & Chadi, N. (2016), 'Preventing Smoking in children and adolescents: Recommendations for practice and Policy', *Paediatric Child Health*, **21**(4): 209-214; Wang, T.W., et al (2018), 'Tobacco Product Sue Among Middle and High School Students – United States, 2011-2017', *Morbidity and Mortality Weekly Report,* 67: 629-633. It is also worth noting that while claiming that evidence from Washington State challenges the view that regulated markets 'restrict minors' access to cannabis' (Para. 64) no reference is provided
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30. See: Single Convention on Narcotic Drugs (as amended by the 1972 Protocol), Article 15, 'Reports of the Board': 'The Board shall prepare an annual report on its work and such additional reports as it considers necessary containing also an analysis of the estimates and statistical information at its disposal, and, in appropriate cases, an account of the explanations, if any given by or required of Governments, *together with any observations and recommendations which the Board desires to make*' (emphasis added). The Convention's Commentary also notes that 'Article 15 does not impose any restrictions on the Board in regard to the kind of information, observations and recommendations which its reports may obtain. Both the International Narcotics Control Board and its predecessor the permanent Central Board have taken a very broad view of what they may include in these documents. They have on several occasions not only reported on the implementation or non-implementation of the provisions of the narcotics treaties, but have also given a comprehensive review of the international control régime…' See: *Commentary in the Single Convention on Narcotic Drugs, 1961,* United Nations, New York, 1973, pp. 199-200. Also see: *Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, 1961*, United Nations, 1976, p. 11 and the Board's website. This states that 'Based on its activities, INCB publishes an annual report that is submitted to ECOSOC through the Commission. The report provides a comprehensive survey of the *drug control situation* in various parts of the world. As an impartial body, INCB tries to identify and predict dangerous trends and suggests necessary measures to be taken. The annual report is supplemented by technical reports on narcotic drugs and psychotropic substances, giving a detailed account of estimates of annual legitimate requirements in each country as well as data, the licit production, manufacture, trade and consumption of these drugs worldwide' (emphasis added). See: International Narcotics Control Board, 'Mandate and functions', https://www.incb.org/incb/en/about/mandate-functions.html. Additionally, see: International Narcotics Control Board (2019), *Report of the International Narcotics Control Board for 2018*, 'About the International Narcotics Control Board', 'Reports', p. 128, https://www.incb.org/documents/Publications/AnnualReports/AR2018/Annual_Report/Annual_Report_2018_E_.pdf
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35. See: International Drug Policy Consortium (August 2018), *Response to the INCB Annual Report for 2017*, pp. 11-12, http://fileserver.idpc.net/library/IDPC-Response-to-INCB-Report-for-2017_EN.pdf. This report notes that 'having reminded readers of the "indispensable" nature of narcotic drugs as laid out in the preamble of the Single Convention…' the Board recommends that 'practice is based on available scientific evidence… As such, the INCB generates a self-reinforcing circular argument by placing itself as the arbiter of what is or what is not sufficient or conclusive scientific evidence'. 'Moreover', it continues, 'it should be recalled that while the ECDD plays the lead role in recommending to the CND the status of substances within the international drug control framework, its decisions are based on analysis of the scientific research predominantly produced by and within member states and this is ultimately informing member state decisions on medical cannabis'
36. Article 9 (5), Single Convention on Narcotic Drugs as Amended by the 1972 Protocol
37. By referring 'only to cannabinoids that have been extracted from the plant or synthesized, have had their safety and effectiveness evaluated in controlled clinical trials and have been licensed for use as medicines' (Para. 4), the Report also overlooks research concerning medical use of the whole of the cannabis plant and the 'entourage effect'. See, for example: Sanchez-Ramos, J. (June 2015), 'The entourage effect of the phytocannabiniods,' *Annuals of Neurology*, **77**(6)
38. World Health Organization (2018), *WHO Expert Committee on Drug Dependence*, *Fortieth report,* WHO Technical Report Series 1013, p. 8, https://apps.who.int/iris/bitstream/handle/10665/279948/9789241210225-eng.pdf?ua=1. Due to the timing of the publication, the Report only mentions in a footnote the WHO ECDD meeting in November 2018 during which a critical review of cannabis and cannabis-related substances took place (p. 2). At that meeting, however, the ECDD referred to various medical cannabis programmes where cannabis products have been fully authorised. See: Washington Office on Latin America, Transnational Institute & Global Drug Policy Observatory (2019), *The first-ever critical review of cannabis: A mixture of obvious recommendations deserving support and dubious methods and outcomes requiring scrutiny*, p. 12, https://www.wola.org/analysis/policy-brief-whos-first-ever-critical-review-cannabis/
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40. Ibid., p. 21.
41. This is the case regarding a number of issues, including as the Report notes in relation to the establishment of a national cannabis agency (Articles 23 & 28 of the Single Convention as amended by the 1972 Protocol) (Para. 8). However, while it is stressed that 'The agency must provide annually to INCB estimates of the quantities of the drug that will be used for medical purposes', it is unclear on what basis it also claims that it must 'provide estimates of the number of patients who will be treated with the drug' (Para. 8)
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43. Washington Office on Latin America, Transnational Institute & Global Drug Policy Observatory (2019), *The first-ever critical review of cannabis: A mixture of obvious recommendations deserving support and dubious methods and outcomes requiring scrutiny*, pp. 10-11, https://www.wola.org/analysis/policy-brief-whos-first-ever-critical-review-cannabis/
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In this report, IDPC provides a critique of the INCB's discussion of cannabis in its Annual Report for 2018.