

**THE INCB REPORT FOR 2022, REGULATED CANNABIS
MARKETS AND INTERNATIONAL LEGAL TENSIONS:
A MISSED OPPORTUNITY**

JULY 2023



Executive summary

- In its Annual Report for 2022, the International Narcotics Control Board (INCB or Board) once again presents an impressive overview of the state of international drug control relative to the provisions of the UN drug control conventions. It identifies several familiar themes and issues and includes a welcome ongoing focus on ensuring the availability of controlled substances for medical and scientific purposes. Indeed, although not without its problems, it is positive to see the Board continue to highlight the importance of human rights in the implementation of a range of drug control policies.
- Mindful of the increasing attention within international discussions given to the adoption by some States of regulated cannabis markets for adult recreational use, it is no surprise that chapter one of the Report is devoted to ‘Analysis of the trend to legalize non-medical use of cannabis’. The discussion here expands on the INCB’s reoccurring attention to the issue found elsewhere within the publication. As is to be expected from such an important body within the international drug control system – and one that does much to set the narrative for inter-state deliberation – much of the analysis is balanced and fair. The Board provides a useful overview of the current state of play and many of the imperatives behind policy shifts towards what it refers to as cannabis ‘legalization’.
- Such a constructive contribution to the debate is, however, seriously undermined elsewhere by the Board’s awkward approach to the topic. Beyond misrepresentation of issues, questionable tone and use of language, the Report’s attempt to present various models of regulated cannabis markets as unmitigated failures that have not achieved the objectives of jurisdictions adopting the policy approach is highly problematic. This is particularly the case since the Board ignores its own caveats concerning, among other things, complexity, research methodologies and incomparability of jurisdictions; an approach that ultimately results in eye catching, but contradictory and apparently disconnected, conclusions.
- Moreover, while the Board is correct to continue to highlight to Member States the incompatibility of regulated cannabis markets with the conventions in their current form, it devotes surprisingly little attention to addressing resultant legal conflicts. It is certainly encouraging to see the Board move more into line with other parts of the UN system by embracing the flexibility within the conventions and pointing to decriminalisation of possession of cannabis for personal use as a legitimate policy choice. That said, even in the context of ‘room for manoeuvre’ within the conventions, simply repeating the ‘treaties say no’ mantra on legal regulation will not help resolve the current legal predicament. Furthermore, attempts to frame the three conventions as *lex specialis* is flawed and dangerous vis-à-vis the relationship between international drug control and human rights obligations.
- As a creature of the conventions, the INCB once again finds itself in an unenviable position. Although the operation of regulated markets is undoubtedly a challenge to States parties and the integrity of the international drug control system, ‘legalization’ also represents a significant – maybe existential – challenge for the Board itself. In unsuccessfully attempting to force some jurisdictions to denounce regulated markets and reverse policy choices already in place, the INCB continues to find itself in a fundamental predicament that puts its very place and standing within the system under the spotlight.
- Rather than misrepresenting the evidence base, carelessly deploying principles of international law and – perhaps – threatening sanction procedures, a more pro-active and positive contribution to current debates would be for the INCB to publish a special supplementary report examining the options for States to engage with regulated markets and remain within the boundaries of international law. In so doing the Board could use its considerable expertise and place within the system to stimulate discussion and explore different scenarios for the direction in which the international drug control framework could evolve considering changing circumstances and perceived needs of some Parties to the conventions.

Introduction

With the global impact of the coronavirus disease (COVID-19) pandemic receding, although certainly not disappearing, the Report of the International Narcotics Control Board (INCB or Board, see Box 1) for 2022 returned to more familiar themes and issues. Prominent among these is a welcome ongoing focus on the obligation of members of the international drug control regime to ensure the availability for their populations of controlled substances for medical and scientific purposes; an issue that the Board continues to legitimately highlight in relation to achievement of Sustainable Development Goal 3 on health and wellbeing. Indeed, recognising the centrality of this issue, this year's Annual Report is accompanied by a special supplement.¹ Building on the Board's previous work in the area and echoed in the Report for 2022, this, as INCB President Jagjit Pavadia highlights in her Foreword, confirms the persistent and worrying disparities in the consumption of opioid analgesics for the treatment of pain and in the consumption of psychotropic substances for the treatment of various mental health and neurological conditions. The latter is also identified as a topic for increased attention in terms of stigmatisation. This is another welcome indication of the INCB's continuing awareness of the twin issues of stigma and discrimination and, although not entirely without its problems, ongoing attention to human rights more broadly. To be sure, while there continues to be no recognition that the regime itself can be seen as one amongst a host of impediments to appropriate access,² it is positive to see the Board continue to devote attention to the critical issue of availability of, and access to, controlled substances for medical purposes.

If this situation, particularly within many African states, can be regarded as one face of what has become known as the 'opioid crisis',³ then the more recent and arguably better known variant in North America can also be identified within the publication as a key issue. This is particularly so in relation to the emergence of highly potent synthetic non-fentanyl opioids. These, as the Report demonstrates, are linked to an increasing number of overdose deaths which is

exacerbating the opioid overdose crisis associated mainly with the use of illicitly manufactured fentanyl. A grimly familiar theme within the Board's recent reports. Similarly, and mindful of the 1st November 2022 cut-off date for inclusion of data in the Annual Report for that year, ongoing large scale opium poppy cultivation and opium production in Afghanistan become apparent once again as prominent themes. Despite the radical change in circumstances within the country, this is nothing novel. Yet it is encouraging to see Jagjit Pavadia explicitly call upon the 'de facto authorities' to improve prevention and treatment in the country for all people who use drugs, in particular women. As recent research reveals, while treatment services have long been under-resourced and often of dubious quality, the plight of people who use drugs under the Taliban is horrific.⁴ How the Board, like the rest of the international community, deals with authorities in Kabul is a substantial challenge within uncharted territory. Another emerging area of concern is what the Board presents as a surge in illicit cocaine production and trafficking. As such the Board encourages governments to address the relating growing threat to public health in a coordinated manner. Of note here is the fact that an emphasis is placed on law enforcement interventions. This is a move that seems to be in tune with an increasing trend in Vienna, home of the international drug control apparatus, towards programmes focusing on crime as opposed to health. A related example is the recent United Nations Office on Drugs and Crime's *Global Report on Cocaine 2023*.⁵

All the above are important themes to emerge from the Board's, as ever, impressive synthesis and presentation of a vast array of information across a range of regional and national policy settings worldwide. However, a standout issue – particularly in terms of the stability of the regime itself rather than market-related challenges to individual Members States and the international community more broadly – is the trend towards regulated markets for adult non-medical cannabis use in various jurisdictions. Reflecting the INCB's increasing concern, this is highlighted not only at various points throughout the Report but is also the focus of chapter one. This is significant since, as the president notes,

‘Each year, the first chapter of our annual report focuses on a specific issue *as a contribution* to drug policy discussions at national and international levels’ (emphasis added). The chapter’s ‘Analysis of the trend to legalize the non-medical use of cannabis’ is deemed to be particularly relevant because ‘in recent years a growing number of states have adopted policies that permit the use of cannabis for non-medical and non-scientific purposes’ and is consequently framed as ‘a significant challenge for the States parties to the drug control conventions’.

Focusing predominantly on an analysis of chapter one, but also including other sections of the Report as appropriate, this report aims to offer a fine-grained critique of the Board’s latest formal and high profile discussion of regulated cannabis markets.⁶ In so doing, as in previous IDPC-GDPO responses to the INCB’s annual publication,⁷ the exercise is underpinned by the view that the Reports ‘provide valuable insight into the values and beliefs which underlie the Board’s approach to the problems with which it deals’.⁸

Mindful of the ongoing, and arguably increasing, tensions around diverging views on cannabis policy among members of the extant international drug control regime, any insights that can be gleaned into the INCB’s current perspective would seem to be particularly valuable and timely. Within this context, this report begins with an overview of what can be regarded as the scene-setting components of the Report’s discussion of cannabis before critically examining the Board’s view of the purported impact of what it generally refers to as cannabis ‘legalization’. Analysis then moves on to an exploration of the INCB’s stance on resultant conflicts with prohibition-oriented State obligations as laid out in the regime’s core legal instruments. It concludes with several observations and suggestions concerning the Board’s ongoing and ever more challenging and problematic work. Particularly – as is noted within the President’s Foreword – its commitment to ‘supporting Governments in the full implementation of the three drug control conventions...’ Overall, the view is presented that the Annual Report for 2022 represents a missed opportunity in contributing to the practical resolution of an ever-pressing systemic dilemma.

Box 1. The INCB: Role and composition

The INCB is the ‘independent, quasi-judicial expert body’⁹ 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 formally 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.

Setting the scene: Largely balanced, but hints of things to come

As one would expect, at many places within chapter one the Board does a good job describing the current state of the cannabis market (Paras 3-16), policy and legislative developments (Paras 17-40), different models for ‘legalizing the non-medical use of cannabis’ (Paras 41-58) and different policy approaches (Para 59-72). This complements other parts of the Report and aims to set the scene for the more analytical sections to follow. For example, we are reminded that ‘Cannabis has been the world’s **most widely used illicit drug**’ (original emphasis) and that ‘In 2020, approximately 209 million people used’ the substance, a figure ‘representing 4 per cent of the global population’. ‘Over the past decade’, the Report continues, ‘cannabis cultivation has trended upward, and the number of people who use cannabis has risen by 23 per cent’ (Para 4).

Reaffirming the scale of the market, the Report also highlights that **‘The illicit cultivation, production, trafficking and use affects all regions** (original emphasis), and that ‘Production of cannabis, originally destined for internal markets and concentrated in certain developing countries, has shifted to a more globalized form of production, as now found in virtually every country’ (Para 5).

Elsewhere there are useful discussions and definitions of key terms within policy approaches and debates on cannabis that, ironically, result from the global picture the Board describes; legalization, decriminalization, and depenalization (For example Para 18 including an information box). Reflecting a now well-established policy trend, the Report also includes a brief discussion of the use of cannabis for medical purposes (See, for example, Paras 10, 11, & 19). While it is possible to argue that the Board, if obliquely, continues to unfairly privilege preparations manufactured by the pharmaceutical industry over herbal cannabis,¹⁰ it is fully justified in pointing out that ‘In some cases’ medical programmes were implemented ‘without due consideration of the provisions’ of the Single Convention’ (Para 10 & 19. Also see Para 33). Furthermore, it is difficult to argue against the view that the emergence of medical cannabis schemes contributed to the normalisation of the substance and changed ‘the public perception of cannabis use, thereby preparing the ground for further steps towards legalization’ (Para 33. Also see Para 91). As long ago as 2004, it was noted how, what was referred to as the ‘medical marijuana effort’ in the USA had ‘probably aided the broader anti-prohibitionist campaign’ in several ways.¹¹ As discussed below, while it is possible to question the use of the term ‘trivialization’ in relation to commercialisation and cannabis use (Para 12. Also see Paras 105 & 106), the INCB is also not alone in being concerned about the role of large companies and the resulting corporate capture of the emerging licit industry (both medical and non-medical) in many jurisdictions. Market entry by corporate entities driven solely by the pursuit of profit and power, as is being witnessed in some parts of the world, can result in numerous negative outcomes.¹² This is especially, although not uniquely,¹³ the case in traditional cannabis producing regions. As one analysis observes, ‘If the construction of the

global cannabis prohibition regime was an historic mistake, then a transition towards a legally regulated market that concentrates profits in a handful of Big Pharma, Ag, Tobacco and Cannabis companies, while locking out small-scale farmers in the Global South, only serves to further this damaging legacy’.¹⁴ That said, it is one thing to draw attention and attempt to mitigate potential negative consequences of ‘Big Cannabis’ and another to deploy its perhaps inevitable involvement as an argument against regulated markets altogether. This is particularly the case given the options for, and existence of, non-corporate market frameworks also noted in the Report.

As is to be expected, the Board provides an accurate account of policy developments around the world. Having noted early in the publication that ‘Over the last decade, a growing number of States have pursued policies with the aim of allowing and regulating the use of drugs, in particular, cannabis, for non-medical and non-scientific purposes’ (Para 1), the reader is provided with a comprehensive global overview of that trend. As such, a combination of information within chapters one, two (‘Functioning of the International Drug Control System’) and three (‘Analysis of the World Situation’) provides a succinct state of play as of 1 November 2022 for Uruguay (Para 21), Canada (Para 22. Also see Para 256), the state level within the USA (Para 23. Also see section headline and Paras 577-578), Mexico (Para 24. Also see Paras 586-587),¹⁵ Jamaica (Para 25), Malta (Paras 26 & 27. Also see Paras 271-274) and other European countries (Germany, Italy, Luxembourg, the Netherlands, and Switzerland – Para 27. Also see Paras 282, 283, 852-854) as well as South Africa (Para. 28. Also see Paras 290-294) and Thailand (Para 30. Also see Paras 265, 267 & 270). While previously stressing that ‘the number of States having formally legalized drug use is still small in relation to the total number of states worldwide’ (Para 2), the Report notes unavoidably that ‘Globally, more and more countries are in the process of preparing similar legal frameworks which allow and regulate the non-medical supply and use of cannabis’ (Para 31). Additionally, accurately reflecting the complex nature of the policy landscape, the Board points out that ‘There is a great diversity of regulations to counter the cannabis problem, resulting from diverging

interpretations and applications of the international conventions’ including the decriminalisation of possession for personal use, medical use and ‘the legalization of cannabis use for non-medical purposes’ (Para 32).

Another important component of the scene-setting section of the thematic chapter, and indeed to some extent other mentions of cannabis within the rest of the Report, is the discussion of the ‘rationale behind legalization’. This is framed in a manner with which many advocates of drug policy reform, particularly those in favour of regulated cannabis markets, would find hard to disagree. ‘The proponents of legalization put forward different reasons for taking this step’, we are told, but ‘They all share the assumption that the current drug control system has failed and must be replaced because it was not able to effectively counter the global and domestic drug problems. They believe that strict approaches to prohibition have not deterred drug use and have also had unintended consequences and caused collateral problems (Para 34). Most ‘proponents’ of cannabis ‘legalization’ tend to favour some form of modernisation and reform rather than a complete dismantling of the regime, including its role in regulating the licit pharmaceutical market and ensuring access to drugs for medical purposes.¹⁶ Moreover, far from basing views on an assumption, it is usual for evidence to play a role in determining reformist positions. That said, such a statement is reasonably accurate and captures the core arguments behind policy trends. In a remarkable display of cognitive dissonance, however, there is no awareness here of earlier descriptions of the large and expanding scale of the market (see Paras 4-6) and how this has influenced the discussion and, in increasing cases, the adoption of revised approaches in different parts of the world. Nonetheless, the Board lays out – admittedly again with some utility – a range of rationales, including those relating to public health (Paras 35 & 36), the reduction of illicit activities, markets, and drug-related violence (Paras 35 & 39), the reduction of stigmatisation (Para 38), the undermining of criminal organisations (Para 39), the generation of tax revenue and employment opportunities (Para 40), and improvements in the human rights of people who use cannabis, including in relation to

‘cultural or religious tradition’ (Para 37). Expanding on its earlier discussion of international policy variation, the Report then goes on to note how the ‘various rationales’ described ‘translate into different legalizing frameworks allowing the use of cannabis for non-medical purposes (Para 41) before providing a useful section on the different models deployed for ‘legalizing the non-medical use of cannabis’ (Paras 41-57). As the overview section ably demonstrates, ‘The combination of the different policy goals and regulations leads to a range of diverging legalization models’ (Para 42) and it is justifiably noted that ‘one can say that there are as many models as there are jurisdictions that have legalized the non-medical use of cannabis’ (Para 58).

The first half of the thematic chapter consequently contains much useful information and provides a largely balanced and accurate account of many important aspects of the issue. Nevertheless, it also hints at the more problematic and uneven direction of travel to follow. At times, the Board’s representation of issues, tone and use of language is questionable. For instance, descriptive sections include phraseology reinforcing the perspective that reform-oriented nations persist as heretical outliers not only operating counter to the majority view of the international community, but also representing jurisdictions that have simply capitulated their role within an immutable collective endeavour: ‘Most States worldwide still consider cannabis use to be illicit and *remain committed* to the prohibition of both its production and its consumption for non-medical/scientific purposes’ (Para 32) (emphasis added). Moreover, although recognising in places that alternative policy approaches are referred to as ‘regulated markets’ (Paras 1, 18 & 937) – a term denoting purposefully designed regulative control frameworks – the choice is made to privilege the term ‘legalization’ throughout the Report. Perhaps unintentional, within this context it is nonetheless more suggestive of the idea of free market legalisation where drugs are ‘legal and available for essentially unrestricted sale in a free market, like other consumer goods’;¹⁷ a model that no jurisdiction has ever considered, let alone implemented. Mindful of the Board’s role in influencing debates and framing narratives, this is

unfortunate. Additionally, in describing policy shifts in a growing number of States, the terminology is at times evocative of a physician’s description of the spread of a pathogen where, in this case, rather than the human body, the host is the body politic and by extension the international drug control regime. For instance, the reader is informed that ‘This legalization began a decade ago in the Americas and is now *manifesting* itself in Europe and other regions’ and that ‘While Asia and Africa have not yet been as widely *affected*, recent developments in South Africa and Thailand may portend changes to come’ (emphasis added) (Para 2). Similarly, elsewhere it is noted how ‘This trend, first established in the Americas, *has spilled over* to Europe’ (Para 20).

The Report also rightly acknowledges that a range of issues associated with cannabis ‘are perceived as important challenges by many Governments and by the international community’ (Para 15). However, it then goes on to note that ‘Many Governments are unsure about the continued relevance of controls in their own country, *find it difficult to implement related policies* and in some cases are looking for alternative solutions’ (Para 15) (emphasis added). Although the first clause of this sentence is accurate in relation to the state of the cannabis market and the long-term experience of the ineffectiveness of prohibitive approaches, it can be argued that when viewed together the second and third clauses are a misrepresentation of the reality on the ground. Far from liberalising policy as a response to an inability to properly apply punitive approaches as the Board seems to suggest, a range of authorities are seeking or have sought ‘alternative solutions’ having fully reassessed existing punitive policy approaches and considered them to be failing and inappropriate for their specific circumstances. The important role of the democratic process underpinning many policy shifts should also not be forgotten. Such examples are telling in what they reveal about the Board’s stance on cannabis regulation and the predicament in which it finds itself, and which will be discussed further below. Yet they are in many ways eclipsed by the Report’s problematic attempts to analyse the impacts of ‘legalization’.

Analysing the impact of cannabis legalisation and regulation: Ignoring caveats

Having provided the necessary context for more focused analysis, the Board embarks on what appears to be the core objective of the thematic chapter; simply highlighting what it judges to be the myriad shortcomings of regulated cannabis markets and portraying it as a failed policy choice. Although it is difficult to claim that policy shifts within jurisdictions are driven by the Board’s chosen areas of analysis, the INCB consequently explores the ‘impact of legalisation’ across a range of domains, namely consumption (Paras 81-89), public health (Paras 90-96), road safety (Paras 97-98) and the illicit cannabis market and the economy (Paras 99-111). By any standards, such an endeavour is extremely challenging in terms of scope, data availability and comparability as well as methodological complexity and comparability, among other things.¹⁸

Cognizant of this, it is welcome to see the Report devote considerable space to outlining some of these evaluative challenges. This begins with a statement acknowledging an undeniable fact: ‘Evaluating the changes caused by legalization is difficult’ (Para 73). Explaining further, the reader is informed that ‘To assess those changes, it is important to compare data before and after implementation of legalization and to compare data from both legalizing and non-legalizing jurisdictions’. ‘However’, the Report continues, ‘a simple pre/post design does not necessarily prove a strong causal relationship between the law, its implementation and statistical results. Some increases may be due to changes in reporting or measurement or to completely different factors’. As an example, the Board explains that ‘it is obvious that there is a greater willingness on the part of individuals to report the use of cannabis if that use is not illegal – and therefore a higher reported rate of use after legalization does not necessarily indicate that actual prevalence has increased’. Similarly, in terms of another source of prevalence data, it is observed how ‘increases in the number of emergency visits and hospitalizations might be due to the greater awareness of doctors, who, after the policy change, are more likely

to screen or confirm acute cannabis intoxication using urinalysis’ (Para 73). Moreover, the Report touches on the inescapable fact that ‘The effect of legalization depends largely on the specific context of the country that has legalized cannabis, namely on the pre-existing conditions before legalization in that country, such as the degree of development of the legal cannabis market or the existence of an important illegal market and the previous level of illicit consumption’. It is then noted how ‘It also depends on the specific set of regulations of the individual legalization model and its political implementation, including the varying degrees of permissiveness and restriction’. All of which leads to the valid conclusion that ‘the outcome of legalization in one country cannot easily be compared with other countries. Nor can outcome measures be replicated in other countries’ (Para 74).

It is not necessary to reprise here in full the Board’s cautious – initially at least – approach to evaluation and the often conflictual nature of different sets of research findings (Paras 73-80). It is worth noting, nevertheless, how the Board draws attention to the fact that a ‘growing number of studies on the impact of legalization... sometimes report diametrically opposed results and conclusions’. ‘These conflicting results are often due to the data and methods used and which implementation dates and policies were considered’ (Para 79), it validly explains, before concluding that ‘Given this multifaceted and complex picture, it is hardly possible to make *general statements* and conclusions on the impact of legalization’ (emphasis added) (Para 80). Furthermore, it is also noted how ‘In many States, the time since these laws have come into *effect is too short to produce valid data* and to judge the full effects of legalization’ (emphasis added) (Para 115. Also see Paras 116 & 940).

This, unfortunately, is exactly what the chapter proceeds to do; an approach amplified in the President’s foreword where all nuance is lost. Ignoring its own caveats, and in a somewhat awkward fashion, the Board attempts to provide a cogent analysis before going on to draw eye catching, but contradictory and apparently disconnected, conclusions. In addition, the Report reveals the INCB’s reluctance to recognize evidence of any

positive impacts resulting from jurisdictions’ shift to regulated markets. What has been referred to elsewhere as ‘Wilful Blindness’.¹⁹ Examples of what ends up being a confused, confusing, and ultimately unconvincing approach can be seen in several of the Board’s chosen areas of focus.

Consumption, public health, and organised crime: Some balanced analysis

In relation to consumption, for instance, the Report highlights that ‘In all legalizing jurisdictions, an increase in cannabis use can be observed in the general population’ while accurately noting that ‘In most of these jurisdictions, cannabis use was higher than in other countries prior to legalization’ (Para 82). Among other things, regarding ‘consumption among youth’ it is pointed out that ‘some studies suggest that the prevalence of use among youth may have increased, while other studies suggest that prevalence did not change or may have even declined after legalization’ (Paras 85 & 86). This is no doubt a valid synthesis of some of the existing research findings. It might have been useful, nonetheless, to have also mentioned more general research concerning the concept that there is not necessarily a direct relationship between prevalence of use and drug-related harm. As Robert J. MacCoun and Peter Reuter noted in 2001, ‘it appears that drug prevalence and drug-related harms are only loosely coupled’.²⁰ In their seminal exploration of the concept of harm, they highlight that ‘Some categories of harm are primarily attributable to drug prohibition and its enforcement’ while others ‘appear to be intrinsic properties of a drug and its psychopharmacological effects on the user’.²¹ Consequently, it is pointed out that a change in approach ‘might reduce the harmfulness of drug use yet increase the prevalence and intensity of drug use’.²²

Where public health is concerned, the Report gives the example of emergency department visits and hospitalisations due to ‘excessive cannabis use’ (Para 92), although there is no acknowledgement of earlier comments regarding possible increases in reporting within regulated markets. On perceptions of risk, we are informed that this decreased

among students aged 13-17 in Uruguay, did not change significantly among twelfth grade students in Washington state or among any grades in Colorado, and even increased among regular cannabis users in Canada (Para 95). It should be noted that this is at odds with earlier general comments concerning ‘trivialization’ and ‘reduced perceptions of the harm associated with cannabis use’ (Para 12. Also see Paras 7 & 941). It is also observed that, while there are a limited number of studies on how regulated cannabis markets have influenced the use of other substances, no clear relationship can be identified (Para 96). Similarly, the Report notes that ‘Studies of the effects of cannabis legalization on traffic accidents have produced diverging findings’ (Para 97). And finally, it is noted how ‘In general terms, there is a lack of systematic evidence on the impacts of cannabis legalization on organized crime in all legalizing jurisdictions, which makes it difficult to draw conclusions and develop evidence-based practices’ (Para 103). Indeed, this is a particularly complex research domain, with some studies revealing evidence of policy shifts leading to inadvertent changes in the operation of drug trafficking organisations and an accompanying reduction in violent crime.²³ Providing adequate, if not abundant, references from what is a rapidly expanding field of study, and one which often throws up a host of inconsistent findings, such analysis is consequently in the main fair and balanced.

Undermining balance with self-contradiction

It is largely undermined, however, by prominent statements within both chapter one and other parts of the Report. For example, the Board notes that ‘evidence available to assess the impact of legalization on society and individuals is limited’ (Para 110) and that ‘The causality between legalization and statistical changes in the respective jurisdiction is often not clear’ (Para 111. Also see Para 115). But, despite its own warnings about the use of general statements, it goes on to note: ‘However, one can say, *in general terms*, that legalization has not achieved the objectives pursued by its proponents (Para 111. Also see Para 116). This is a stance reiterated prominently in not only the President’s Foreword but also Chapter IV, ‘Conclusions and recommendations to

governments, the United Nations and other relevant international and national organizations’ (Para 940). Similarly, having commented on the difficulties of drawing conclusions on the ‘full effects of legalization’ due to the length of period since adoption, it states that ‘In summary, *based on the relatively short time of implementation*, it can be observed that, to date, legalization has not succeeded in addressing the most pressing problems...’ (Para 116). Considering the complex dynamics and associated time lags after the implementation of new approaches,²⁴ it is fair to say that a decade after the first jurisdiction adopted regulated cannabis markets, the circumstances remain far from perfect. As is the case with most complex policy issues, particularly in relation to what can be regarded as a ‘wicked problem’ such as drug control, they never will be. It will be recalled that a ‘wicked problem’ can be defined as a problem that is difficult or impossible to solve because of incomplete, contradictory, and changing requirements.²⁵ ‘But’, as has been noted, surely ‘the relevant question is not whether legalisation models can resolve all problems associated with cannabis. Rather the focus should be if legalisation is indeed bringing improvements and reducing a range of harms compared to the situations that prevailed under prohibition’.²⁶ The Board’s narrow-minded view ignores that, in the 60 years since the adoption of the Single Convention, the global drug control regime has failed to effectively address those ‘pressing problems’ as was originally envisaged and as the INCB continues to claim is possible.²⁷ Indeed, despite the Report’s view that ‘arguments can be made about the success of the *implementation of the conventions*’ (emphasis added) (Para 113), States are moving towards regulated markets precisely because in their view, where cannabis is concerned, the fundamental architecture of the existing global regime has not only failed to resolve those problems, it has actually exacerbated them. Such a reality led several Member States to push back on the Board’s conclusions in the Plenary of the Commission on Narcotic Drugs this March.²⁸

Purposefully myopic on the positive effects of legal regulation

The Board’s negative portrayal is reinforced by the reluctance at various points in chapter one

to recognise any constructive impacts brought about by the introduction of regulated markets, whatever their form and policy objectives. This is particularly noticeable when the Board discusses one of the main objectives of the policy shift: to eliminate or diminish the illicit cannabis market. The Report stresses that ‘the market for illegal supply persisted in all legalizing jurisdictions’ and drawing on research from the World Drug Report 2022 illustrates this by giving the examples of ‘from approximately 40 per cent in Canada to nearly 50 per cent in Uruguay and 75 per cent in California’ (Para 99. Also see Para 116). While problematic in terms of measurement and consequently far from definitive, these figures certainly demonstrate that illicit markets remain resilient and that cannabis regulation has not proved to be the ‘solution’ that some proponents had hoped, and perhaps sometimes overclaimed during debates surrounding policy shifts. Preferring to frame the policy option in terms of reducing overall harm, few analysts and advocates ever presented regulated markets as a ‘silver bullet’. As an important 2010 research programme concluded, ‘The principal aim of a cannabis control system should be to minimize any harms from cannabis use. In our view this means grudgingly allowing use and attempting to channel such use into less harmful patterns’.²⁹ Yet, as noted elsewhere, if the decreases in the scale of illegal cannabis markets acknowledged by the INCB ‘had been reached through law enforcement measures in states adhering to cannabis prohibition regimes, the Board would have likely hailed it as a tremendous achievement’.³⁰ This view is shared by another critical response to the Annual Report which argues that ‘Under any objective analysis, this would be applauded as a major success rather than criticized as a failure’.³¹ Instead, ‘the diminished size of illicit markets’ is ‘described as an unsatisfactory aspect of legalisation, even as the trend toward diminished illicit markets continues in legalising states’.³² Indeed, recent survey data from the Canadian government’s annual Cannabis Survey show that ‘More Canadians than ever are purchasing cannabis primarily from regulated suppliers instead of illicit ones’³³ and that according to Statistics Canada, ‘the gap between’ the country’s ‘legal and illicit cannabis markets continue to widen’ since the introduction of regulated markets at the federal level in 2018.³⁴

On a related point – and recalling the Board’s acknowledgement of a paucity of systemic evidence concerning the impact of regulated markets on organised crime – it is also interesting to note the implicit recognition of market restructuring and the Board’s view on the redistribution of sources of supply. The Report states that ‘illicit markets have been partly reduced, but they still survive and flourish in some countries’ before going on to say that ‘Organized crime has been widely replaced by an expanding cannabis industry which aims to make profit by increasing sales without regard for public health’ (Para 116). As mentioned above, there is certainly widespread and justified concern around the involvement of large companies in the regulated market and the risks associated with corporate capture. Questions, nonetheless, can be raised concerning the Board’s implication that large, often Canadian, companies are analogous with organised criminal groups.

Variation across jurisdictions and in some instances the adoption of regulative models aiming at reducing the power of large corporations should be acknowledged.³⁵ Yet, there is certainly some truth behind the view that in many places enterprises often appear to put profits above concerns for public health.³⁶ Moreover, learning from licit markets for other psychoactive substances, it is not unreasonable to be wary of undue influence on emerging regulative frameworks.³⁷ That said, one wonders to what extent such behaviour can be equated with the activities of organised crime groups? This is especially so regarding violence associated with dispute settlement and competition in the illicit market. Here, comparative advantage goes to drug trafficking organisations ‘willing and able to engage in violent activity’ and consequently international markets, including those related to cannabis, ‘tend to be controlled’ by those with a ‘high capacity’ for violence.³⁸ It should also not be forgotten how research reveals not only the ineffectiveness of law enforcement interventions against drug trafficking organisations,³⁹ but also how they often result in an escalation in violence.⁴⁰ In this respect surely some reduction in the scope of the illicit market via regulation is better than none? Despite the warranted concerns about ‘Big Cannabis’, the fact that it does operate in the licit sphere means legal

constraints do exist and that, given the nascent state of the non-medical cannabis industry, there is still potential to learn lessons from, and avoid the pitfalls of, longstanding markets for psychoactive substances, particularly the tobacco trade.⁴¹

In addition, the Board faults legal regulation for falling short in terms of criminal justice reform. To be sure, much greater progress can and should be made to address the ‘continued existence of systemic institutional discrimination’ (Para 37) in many countries’ criminal justice systems. This is the case in jurisdictions that have legally regulated cannabis, as well those that have not. That said, ‘just as legal regulation will not resolve all problems related to cannabis, it will not, by itself, resolve the profound inequities and enormous excesses that characterise so many countries’ criminal justice systems’.⁴² However, once again it is fair to argue that ‘some progress in reducing those problems is better than no progress’. Moreover, ‘the Board’s argument that removing only one category of offence is insufficient to achieve wider criminal justice reforms begs the question of whether greater criminal justice reforms might indeed be achieved through the legal regulation of substances beyond cannabis’.⁴³

As is abundantly clear from not only a reading of the Report but also from even the most cursory glance at the burgeoning literature, research findings into the impact of regulated cannabis markets on an array of issue areas is complex, seldom comparable, and frequently contradictory. In short, lessons can be learned, but caution must be applied. Mindful of the myriad variables at play across the relevant jurisdictions and the resulting lack of definitive – and crucially – universally applicable evidence either side of the debate, the choice of the topic as the focus of the thematic chapter is unfortunate and arguably misguided. It is true that, in line with its mandate, the Board may take ‘a very broad view’ of what issues might be included in the Annual Report.⁴³ Yet in terms of those States that have already adopted regulated markets, surely it is up to the appropriate authorities to assess levels of success and failure of policy shifts relative to their core goals. For instance, while not mentioned in the Report, in September 2022 Health Canada announced the launch of a legislative review of the

Cannabis Act four years after its implementation. Mindful of the structure of the regulated market within the country, a good case can be made that provincial and territorial governments should also follow suit.⁴⁴ At the federal level, the review aims to focus particularly on the health and cannabis consumption habits of young persons, the impact of cannabis on indigenous persons and communities, and the impact of the cultivation of plants in a housing context.⁴⁵ The process follows the government’s yearly surveys since 2018 highlighting the latest consumption trends to allow it to adjust policies and programmes.⁴⁶ Interestingly, drawing on the 2022 survey results, some commentators conclude that ‘cannabis legalization is working effectively’.⁴⁷ Where the remaining Parties to the conventions are concerned, whether they are considering a policy shift or not, the Board seems to be perilously close exceeding its mandate. Rather than presenting information revealing the complexity of the picture, the Board ends up attempting to construct a simple overarching narrative within which regulated markets are presented as an unmitigated failure. One cannot help feeling that the Board would have better served Member States by deploying its undeniable expertise to explore the ever-increasing tensions within the existing regime created by policy shifts on cannabis. This, however, is an issue that receives remarkably little attention. And even then, as we shall see, some of the conclusions are dubious.

International legal analysis: Limited and questionable

As is to be expected, the Board devotes considerable space throughout the report – not only in chapter one – to the incompatibility of regulated markets with the conventions in their current form. This is an interpretation that most analysis, including that by IDPC and GDPO, concurs.⁴⁸ With this in mind, and within the context of the INCB’s discussion of decriminalisation and depenalisation, the Report outlines the scope within the regime for a range of policy approaches, including alternatives to conviction and punishment, proportionality, and discretion regarding prosecution in ‘conformity with the domestic law of a Party’ (Para 60), before concluding in no uncertain

terms that ‘By contrast, the concept of legalization which allows and regulates the supply and use of drugs for non-medical purposes is in contradiction to the obligations set out in the drug control conventions’ (Para 62. Also see Para 64). In what now has a kind of ritualistic feel about it, the Board explicitly – and with legitimacy – lays out the relevant articles within the treaties. Specifically, article 4 (c) of the 1961 Single Convention on Narcotic Drugs (as amended by the 1972 Protocol), article 5, paragraph 2 of the 1971 Convention on Psychotropic Substances and article 3, paragraph (a) (i) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Para 63).⁴⁹ These, among other places, are not only repeated in chapter two, ‘Functioning of the international drug control system’ (‘Overall treaty compliance’) where the situation in individual States, or sub-national jurisdictions therein, are discussed (for example Para 855 & Para 252), but also in the prominent recommendations section (Para 942).

Embracing flexibility

In contrast, and as is to be expected bearing in mind the attention given to the policy approaches in chapter one, the Report stresses how, ‘within certain limits’, ‘measures to decriminalize or depenalize the personal use and possession of small quantities of drugs are consistent with the provisions of the drug control conventions’ (Paras 60 & 61). Once again highlighting its view that the conventions themselves remain appropriate to the current conditions within all Member States and that the expanding nature of the market and associated harms lie solely with their suboptimal implementation rather than any structural shortcomings (Para 113), the INCB goes on to point out that the control system ‘offers a large margin of flexibility and allows States to reach the objectives they pursue within its ambit’. ‘The purpose of the conventions is to protect youth, improve public health, avoid unnecessary criminalization and constrain the illicit market and related organized crime’ (Para 113),⁵⁰ it continues before urging Member States that ‘Instead of legalizing the non-medical use of drugs, Governments may more effectively use the flexibilities contained in the conventions’ (Para 114). A view, again, reiterated in the Report’s overall recommendations section (Para 939).

That the Board is now so keenly encouraging use of the considerable ‘room for manoeuvre’⁵¹ within the conventions is certainly a positive move that is to be commended. Indeed, despite mention that it has ‘consistently explained’ that the depenalization and decriminalization of possession for personal use is permitted within the extant boundaries of the treaty framework, readers may recall the INCB’s initial – and fierce – hostility towards the Portuguese authorities in the years immediately following the significant policy shift to decriminalise the possession of all drugs for personal use in 2001.⁵² Moreover, as noted elsewhere, in pushing this position the Board in some ways ‘distances itself from those countries that continue with a hard-line, zero tolerance policy’.⁵³ To be sure, ‘Although nothing in the UN drug control conventions themselves forces those countries to change their position, there is an increasing recognition, including by the INCB itself, that many tangible consequences of hard-line, zero-tolerance policies are contravening human rights obligations’.⁵⁴ Mindful of the tacit support shown elsewhere in the Report to those countries that, as noted above, ‘remain committed to the prohibition of both its production and its consumption for non-medical/scientific purposes’ (Para 32), such an approach might be seen as a necessary trade-off designed to mitigate threats to regime stability and ultimately preserve the control architecture in its current form.

Beyond flexibility: Ignoring possible pathways, including questionable legal interpretations

Such an approach, however, can only ever go so far. It might be argued that pursuit of this tactic will play some role in influencing the decision-making processes within States contemplating a significant policy shift where cannabis is concerned. Yet, it barely seems plausible that those jurisdictions that have already adopted regulated markets will admit the error of their ways and roll them back. In these cases, rather than adopting the now disappointingly familiar ‘nyet mantra’,⁵⁵ the Board could do much to help resolve systemic tensions by using its expertise to explore various pathways that could

enable legally regulated non-medical cannabis markets to operate in accordance with international law.

It is unnecessary to go into details here, but recent years have seen serious discussions develop around several options in this regard.⁵⁶ A combination of procedure and (geo)politics would likely throw up a range of scenarios and obstacles for each. Nonetheless, a number of potentially viable approaches have emerged (See Box 2). Despite growing interest in these and other options⁵⁷ within not just academia and reform-oriented international NGOs, but also some Member States themselves, the Board chooses to largely ignore these possible pathways, preferring instead to steadfastly defend what it perceives to be the immutability of the regime. Where it does engage, the approach is questionable.

For instance, when referring to ‘legal arguments’ used to ‘justify legalization’, the Report notes that some governments claim that regulated markets ‘may be in compliance with the conventions because it pursues the overall goal of the conventions, which is to preserve the health and welfare of humankind and respect human rights principles such as the rights to freedom, privacy and personal autonomy as enshrined in the several international human rights instruments, which take precedence over the drug control conventions’ (Para 65). It goes on to stress that ‘Due respect for universal human rights and the rule of law are crucial for the effective implementation of the international drug control conventions’. This is a fair point. Yet it also argues that ‘*there is no conflict of norms* between the international drug control conventions and other international human rights instruments’ (emphasis added). This view is problematic. At the very least, examples of conflict can be found at various points within the 1961 Single Convention. As Lines discusses, a case in point is in relation to article 49 and the obligation to phase out the traditional use of coca, cannabis, and opium. This is in clear violation of economic, social, and cultural rights in general and specifically the rights of Indigenous Peoples.⁵⁸ Further issues are raised

in the Board’s view that ‘By ensuring availability of and accessibility to controlled substances for medical and scientific purposes and preventing drug abuse, the conventions are aimed at protecting the right to life and health’. It can be argued that treaty obligations on ensuring access to controlled substances for medical purposes are indeed ‘complementary with some human rights obligations and contribute to their fulfilment, such as the right to health and the prohibition of inhuman and degrading treatment’.⁵⁹ And this why it is so important that the INCB continues to highlight the issue of access to controlled substances for medical purposes. That said, as is noted elsewhere, ‘to suggest these obligations’, and those ‘preventing drug abuse’ are ‘aimed at protecting the right to life and health is a bit of a stretch’.⁶⁰ Indeed, as Lines points out, the concept of the ‘right to the highest attainable standard of health’ did not exist in international law when the Single Convention was adopted, and the Covenant on Economic, Social and Cultural Rights was not adopted until 1966 and did not enter into force until 1976. Consequently, it appears as if the Board is arguing that the ‘aim’ of the 1961 Convention ‘is to promote a human rights obligation that did not exist in international law at the time the treaty was drafted and did not enter into treaty law for more than 15 years later’ – an impressive feat for any international legal instrument. Other normative conflicts and inconsistencies in legal reasoning can be identified. However, since a previous IDPC-GDPO response to the Board’s Annual Report explored in detail inherent tensions within the body’s evolving position on human rights there is no need to revisit the full analysis here. The conclusions, nonetheless, still stand. Despite welcome progress in acknowledging the centrality of human rights to the area, the Board’s stance is awkward since ‘by their very nature the drug control conventions must be seen as part of structural human rights risk’ and conflicts between the drug control and human rights regimes remain fundamental. It is no surprise that for the INCB, a creature of the drug control regime, drug policy objectives will always remain paramount.⁶¹

Box 2. Pathways and options for legally regulated non-medical cannabis markets in accordance with international law

- **Coca leaf model:** One option would be to denounce the 1961 Single Convention and subsequently re-accede with a reservation regarding cannabis. Although controversial, this route is anchored in the treaty itself and has a precedent. In 2012 La Paz successfully used the procedure to allow for the cultivation, trade, and consumption of the coca leaf within Bolivia. The country using the denounce-and-re-accede option runs the risk of being blocked, however, if more than one-third of the parties to the convention object to the re-accession with a new reservation.
- **Inter se modification:** Another option available to like-minded nations rather than a single State would be an *inter se* modification,⁶³ a procedure specified in Article 41 of the 1969 Vienna Convention on the Law of Treaties in which two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty between themselves alone. This approach would also prove to be politically controversial but would not be subject to the risk of being blocked by objecting countries, as in the case of the unilateral procedure of denouncing and re-acceding to the treaty. Moreover, if an expanding group of like-minded nations were to agree on an *inter se* modification, an alternative parallel control regime that allows for legally regulated adult recreational cannabis, including inter-State trade, would be likely to eventually emerge.
- **Positive human rights route:** An additional avenue, or rather one that would support and complement these two options, is based on

the argument that States can justify cannabis regulation in terms of positive human rights obligations. In this case it is argued that regulated cannabis cultivation and trade may offer a better opportunity for states to comply with their positive human rights obligations. Under this approach, 'a state can be obliged to permit, under regulation, cannabis cultivation and trade for recreational use if and only if such regulation ensures a better protection of e.g., the right to health, the right to life, the right to physical and psychological integrity (the right not to be subjected to inhuman treatment) and the right to privacy than a prohibitive drug policy as prescribed by the international drugs conventions does.'⁶⁴ This is far from an abstract notion. Although the way it was approached led to it being legitimately referred to by some analysts as an 'untidy legal justification',⁶⁵ the government of Uruguay has indeed claimed that the adoption of regulated cannabis markets is justified because it pursues the overall treaty goal to protect the health and welfare of humankind with full respect for human rights principles, which take precedent.

While all these approaches separately may cause political and practical difficulties for States, it has been argued that 'a cumulation of these options can have a combined strengthening effect and indeed present a legally sound and politically viable opportunity to regulate cannabis for recreational use without denouncing the whole UN drug control system.'⁶⁶ All that said, the need for some sort of regime reform and modernisation appears increasingly pressing.

Deploying *lex specialis*: Flawed and dangerous

All that said, along with the use of several other legal concepts and lines of reasoning in response to ‘legalization’,⁶⁷ the Board’s introduction into its argumentation of one in particular is especially worthy of further attention. In concluding the arguments advanced on human rights, the Report highlights the INCB’s belief that ‘The three conventions, as *lex specialis*, make more specific the way that human rights must be observed in the area of drug control’ before going on to note that ‘The conventions reflect the international community’s view that the most effective way to promote human rights in the field of drug control is to limit the use of drugs to medical and scientific purposes’ (Para 66). Far more so than mention of *pacta sunt servanda* (Para 121) and the idea that ‘agreements must be kept’, this is a bold and untested claim. To be sure, invoking the principle that special law (*lex specialis*) derogates from general law (*lex generalis*) so that the ‘more detailed and specific rule will have priority’ where there are questions of interpretation⁶⁸ is highly problematic. As the International Law Commission has shown in its study on the fragmentation of international law and normative conflicts, even beyond the realms of drug policy the principle is contested and complex.⁶⁹ Moreover, as Line’s analysis of the issue demonstrates, within the relatively narrow issue area of international drug policy, the Board’s perspective is not only legally dubious, but also potentially dangerous.

For *lex specialis* to apply, the two conventions or obligations in conflict must address the same subject matter. It can be argued that in some areas, such as ensuring access to controlled medicines, this is indeed the case. Here questions concerning complementarity or conflict can be raised. That said, complementarity between the right to health and drug control in this specific aspect of regime intersection does not necessarily mean that the drug control conventions themselves and in their entirety represent *lex specialis*. This is ‘very different to the INCB’s argument’ that the three conventions ‘represent *lex specialis* for human rights obligations generally when those rights issues take place in the context of drug control’. Moreover, when

introducing the concept of ‘special rules’ prevailing over the interpretation of ‘general rules’ it is important to consider a temporal element. Specifically, the widely accepted concept that newer laws or obligations ‘update or give added detail/nuance to the application of older laws’.⁷⁰ As alluded to above, the Board’s argument appears to be based on the opposite assumption. The way *lex specialis* is framed within the Report suggests that a ‘treaty obligation drafted in 1961 – before the right to health was even codified in international law – now defines the limits of how newer law is interpreted’.

Such an approach is dangerous because it has the potential to not only limit future legal evolution but also allow interpretation of normative conflicts to privilege drug control over human rights obligations in later instruments. This may not be the Board’s intention. Nevertheless, there is a risk that it might be deployed by those States still wedded to punitive prohibition and hostile to human rights across a range of drug policy interventions. Indeed, it is fallacious to contend that it is the view of the international community that the most effective way to promote human rights in the field of drug control is to limit the use of drugs to medical and scientific purposes. Discussion of human rights within Vienna, including by the INCB and most Member States, is a relatively recent – although welcome – phenomenon. And, importantly, as captured by the phrase ‘parallel universes’ to describe the evolution and operation of the two regimes,⁷¹ there was little if any discussion of human rights during the drafting of the drug control treaties, particularly in the period leading up to 1961. There is much, therefore, to be said for Lines’ view that the Board is usurping the contemporary human rights discourse and erroneously placing itself as ‘the adjudicator of human rights and drug policy’.⁷² Such a misplaced, and arguably desperate, approach is eerily reminiscent of the INCB’s attempt in 2018 to intimidate the Canadian government by claiming that the general treaty obligation to limit drugs exclusively to medical and scientific purposes had achieved the status of *jus cogens* or peremptory norms under international law.⁷³ Both approaches, especially in the absence of references to academic literature or UN documents supporting these controversial claims, do little for the credibility of

the Board during a critical period in the lifecycle of the international drug control regime.

Concluding comments

Early in chapter one, the INCB highlights the fact that ‘The question of how to deal with cannabis and cannabis-related substances, their increasing consumption and supply and the related consequences and problems is a controversial issue which has occupied a large space in the international drug control discussion in recent years’ (Para 3). This is a fair point. In bringing its analysis to a close, it concludes that ‘The apparent tension between’ the general obligation to limit the use of narcotic drugs exclusively to medical and scientific purposes, ‘and the trend towards legalization must be addressed by the signatories to the three drug control conventions’ (Para 121). Again, as their owners, it is undeniably true that it is ultimately the responsibility of the States Parties to the conventions to resolve the ever-increasing pressure between international legal obligations and policy choices at the national and subnational level. That said, despite a full chapter on the topic of cannabis ‘legalization’, over the course of its latest Annual Report the Board once again misses an opportunity to make a constructive contribution to the discussion and support States in seeking some sort of realistic resolution to the dilemma. It is certainly positive that this year’s Report highlights the flexibility within the conventions and in so doing effectively supports the decriminalisation of possession for personal use. While perhaps not as explicit in its backing as other agencies and bodies, this stance brings the INCB more into line with other parts of the UN system.⁷⁴ This might be read as a cautious shift towards a more productive attitude in general, focusing more on the overall treaty objectives rather than a strict implementation of the letter of each provision. Answers to the systemic challenges that confront the treaty system today, however, will not be found ‘within the flexibility provided by the conventions’.⁷⁵ Conscious that some States feel it necessary to go further, it is difficult to see how the Board is fulfilling its mandate to ‘assist Governments in implementing the international drug control conventions’ (Paras 122 & 131) in a spirit of ‘ongoing’ or

‘continuing dialogue’ (Paras 122, 131 & 152) by simply repeating its ‘treaties say no’ mantra.

What might be regarded as a failure of responsibility is compounded this year by the Board’s unhelpful misrepresentation of the evidence on cannabis ‘legalization’ and the way it ultimately ignores many of its own caveats on the complexity and incomparability of jurisdictions following this policy choice. As the representative of the Netherlands noted at the Commission on Narcotic Drugs in March 2023, ‘We have to be open minded and curious about what works and what doesn’t work. And we should not jump to conclusions when we do not have a sufficiently complete picture’.⁷⁶ It will be interesting to see the success, if any, of the Board’s apparent objective of deterring States from pursuing regulated markets by portraying them simply as unmitigated failures. Despite some impact on shaping the narrative at the international level in this regard,⁷⁷ it seems unlikely that the impetus for policy shifts within those States considering change will be stymied by the Board’s misplaced travails. If anything, the approach has done much to undermine the credibility – and indeed currency – of what remains an important body within the international drug control regime. The same can be said for the Report’s approach to the interpretation of international law. As discussed, while the INCB is on firm ground vis-à-vis states’ obligations on the prohibition of the non-medical use of cannabis, its deployment of the principle of *lex specialis* in its analysis of legal arguments to ‘justify legalization’ is not only highly suspect but also potentially dangerous where the prioritisation of drug policy over human rights is concerned. Unfortunately, the tactic comes across as the use of ever more desperate and unconvincing forms of legal argumentation to defend the extant drug control architecture at precisely the time when States require nuanced expertise and guidance.

It certainly remains incumbent on the signatories to the conventions currently in non-compliance on the issue of cannabis to work with the Board to reconcile national policy choices with treaty obligations and international law more broadly. The use by States of ‘legal gymnastics in search of interpretive loopholes’ is far from ‘risk free’ and the

act of ‘free riding’ not sustainable.⁷⁸ A potentially productive route forward might be the creation of a group – formal or informal – of like-minded nations, including those currently considering the adoption of regulated markets. Such a move would not only allow for coordinated action and lesson learning between jurisdictions, but also do much to counter the INCB’s narrative that States Parties seeking alternative approaches to cannabis are isolated outliers within the regime.

Moreover, while the current situation is justifiably presented as a challenge to States parties, it should not be forgotten that this is also a significant – maybe existential – challenge for the Board itself. The INCB continues to find itself in a fundamental predicament that puts its very place and standing within the system under the spotlight. To be sure, one wonders what route the Board will pursue if its attempts at dissuasion via the Report and other means fail and further States adopt regulated cannabis markets. While the confidential nature of the process makes it difficult to assess, article 14 of the Single Convention will surely be part of the Board’s calculus. Indeed, it seems very likely that the INCB has already invoked the Convention’s only sanction mechanism against one or more States. As discussed in last year’s IDPC-GDPO analysis of the INCB Annual Report, such an approach, however, is not without its problems and risks for the Board.⁷⁹

With this in mind, perhaps a more pro-active and positive contribution would be for the Board to choose to publish a special supplementary report as it has done this year in relation to access to internationally controlled drugs for medical and scientific purposes. At the very least, accepting rather than ignoring the fact that treaty regimes of all varieties evolve over time, this could stimulate discussion and explore different scenarios for the direction in which the international drug control system could develop considering the changing circumstances. This is not as outlandish a suggestion as it might initially appear. A previous attempt in that direction was the

supplement to its 1994 report. Within the Foreword of *Effectiveness of the International Drug Control Treaties*, the President of the INCB, Hamid Ghodse, pointed out that in ‘assessing the impact of the international drug control treaties’ the Board was ‘determined not to shy away from highlighting where necessary, the shortcomings of the present system’. In this vein the Supplement contained a section on ‘Possible future adjustments in the international drug control treaties’.⁸⁰ The current Board, and critically its secretariat, may benefit from a similar approach, but this time including examination of options beyond the existing legal framework. Failure to engage in some way with the natural process of systemic evolution and change risks the INCB drifting into irrelevance on one of the most important issues facing the international drug control regime.

This risk is surely amplified as the international community approaches the mid-term review of progress made since the adoption of the *2019 Ministerial Declaration on strengthening actions at the national, regional and international levels to accelerate the implementation of joint commitments made to jointly address and counter the world drug problem*.⁸¹ It is hard to imagine how discussions of both human rights and regulated cannabis markets will be absent from negotiations, both in public and – as is increasingly the case – behind closed doors.

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This analysis offers a fine-grained critique of the INCB's latest formal and high profile discussion of regulated cannabis markets, within its Annual Report for 2022.