



INTERNATIONAL DRUG POLICY CONSORTIUM

**Response to the 2007 Annual Report of the
International Narcotics Control Board**

EMBARGOED – 00.01, WEDNESDAY 5th MARCH 2008

MARCH 2008

Response to the 2007 Annual Report of the International Narcotics Control Board

EMBARGOED – 00.01, WEDNESDAY 5th MARCH 2008

The International Drug Policy Consortium (IDPC) aims to promote objective and open debate on the effectiveness, direction and content of drug policies at national and international level, and supports evidence-based policies that are effective in reducing drug-related harm. Based on the findings of our research and written work, the Consortium engages with officials and politicians in national governments and international agencies – through correspondence, face-to-face meetings and involvement in conferences and seminars – to promote effective policies, thereby making the most up-to-date research and practice knowledge available to decision makers. You can find out more about our work, and download all reports, from our website - www.idpc.info

SUMMARY

In this brief paper, the IDPC provides an initial view on the contents of the 2007 Annual Report of the INCB, launched on the 4th March 2008. Our members recognise that, with this report, the INCB has taken some important positive steps in emphasising the importance (and the presence in the drug control conventions) of the principle of proportionality in the enforcement of the global drug control regime. In addition, the report moderates some of its language regarding, and general resistance to, harm reduction. However, we believe that these welcome elements of the report will be rendered meaningless if the Board does not consistently reflect these principles in its ongoing work with national governments and other UN agencies. Of greater concern is the continuing intransigence shown towards the issue of indigenous use of coca products in Bolivia. Where there is an unresolved inconsistency within the drug control conventions, and between drug control and other international obligations and treaties, the role of the INCB should be to highlight these dilemmas and help governments to find a resolution, instead of issuing rigid and non-universal declarations. The report also disappoints in the absence of development or analysis of the implications of its statement regarding the importance of universal human rights and the rule of law as the context for drug control.

BACKGROUND

On Tuesday 4th March 2008, the International Narcotics Control Board (INCB) will hold press conferences in Vienna and New York to launch its latest Annual Report. As is customary, the 2007 Annual Report (containing a review of the Board's work in the previous calendar year) is launched shortly before the annual meeting of the Commission on Narcotic

Drugs (CND), at which officials from United Nations member states meet to review progress in implementation of the global drug control system. This year's meetings, and therefore the reports from the INCB, are particularly important as they will feed directly into the high-level political review of the operation of the drug control system in the 10 years since the United Nations General Assembly Special Session on drugs in 1998. This high level political meeting proposed ambitious objectives towards *'eliminating or significantly reducing the illicit cultivation of the coca bush, the cannabis plant and the opium poppy by the year 2008.'*

The International Narcotics Control Board is, according to its own literature, the independent and quasi-judicial monitoring body for the implementation of the United Nations international drug control Conventions. It has essentially three functions: (a) to administer the system of global estimates to ensure the adequate supply for licit "medical and scientific" uses of substances controlled under the 1961 and 1971 treaties; (b) to monitor the control system for precursor chemicals and recommend changes for the Tables of the 1988 Trafficking Convention; (c) to play a 'quasi-judicial' role in order to ensure that the provisions of the international drug control treaties are adequately carried out by Governments.

The Annual Reports of the Board contain detailed technical information on its oversight of the system for making controlled drugs available for legitimate medical and research uses. The reports also summarise the Board's engagement with member states on issues related to their implementation of the UN Drug Control Conventions. Further, the 2007 report continues the recent trend in which the Board, in the introductory chapter, discusses a particular drug policy issue, and puts forward its own

opinions on the issue under discussion. This briefing from the International Drug Policy Consortium (IDPC) gives a short description of some of the key substantive issues covered in the INCB Annual Report, (The 'Chapter 1' on Proportionality in Law Enforcement; the INCB position on coca leaf in Bolivia; the tensions between drug control and human rights; and the INCB statements on harm reduction), and states the view of IDPC members on the positions taken by the Board in these policy debates. It can be read in conjunction with a longer IDPC publication (IDPC Briefing Paper 7 – http://idpc.info/php-bin/documents/IDPC_BP_07_INCB_TensionsAndOptions_EN.pdf) that provides a more detailed analysis of the INCB's track record.

CHAPTER 1 – PROPORTIONALITY IN LAW ENFORCEMENT

Our first observation is to congratulate the INCB for choosing this subject for attention in the 2007 Annual Report. The challenge for all member states is to find a balance between their obligations under the drugs conventions to enact and enforce laws that prohibit the cultivation, distribution and possession of controlled drugs, and their obligations under human rights and other UN treaties. The purpose is then to ensure that these actions respect the human rights of their citizens, are proportionate, and follow due legal process. Despite the complex and sensitive policy implications of this balance, national and international drug policy debates have not tended to give much attention to the tensions between these often competing responsibilities. The recently published Beckley Foundation Report on Drug Control and Human Rights (Beckley Foundation Drug Policy Programme Report 13 – http://idpc.info/php-bin/documents/BFDPP_RP_13_Recal_Regime_EN.pdf) lists numerous examples where activities pursued by governments in pursuit of drug control objectives have resulted in abuses of international standards and norms of human rights and judicial process. We therefore welcome the Board's decision to bring attention to one of these areas of concern in this year's report.

The text of chapter 1 of the 2007 report provides a clear description of the principle of proportionality. Essentially, member states are responsible for ensuring that their enforcement actions against the drug market and drug users are:

- prescribed by law – in other words, allowed for in national legislation;
- not applied in an arbitrary manner;
- in pursuance of a legitimate aim, such as the protection of national security, public order or safety, public health or morals, or the protection of the human rights of others;
- proportionate to that aim, meaning that the state limits or infringes on the human rights of its citizens no more than necessary for the purposes of achieving the legitimate aim.

The INCB gives its own interpretation of the references to this concept in the conventions, and their associated commentaries. They emphasise that the principle of proportionality in relation to the punishment and prosecution of drug related offences incorporates mutual respect for national sovereignty as long as the conventions, the rule of law and human rights standards are met (Foreword; Para 10; Para 21). The attention to the principle of proportionality in this Report is described as arising from the INCB's concern regarding the effects that disproportionate responses by some countries can have in undermining the aims of the international conventions. The Board goes on to suggest specific questions that governments should address when considering or reviewing drug control policies and programmes:

- (a) Is the particular response necessary?
- (b) To what extent can the response result in the achievement of the desired objectives?
- (c) Does the response legitimately go beyond what is needed?
- (d) Does the response comply with internationally accepted norms concerning the rule of law?
- (e) When the offences have international aspects, is there effective international casework cooperation between the different agencies and parties?

They clearly state that if the answer to any of the above questions is no, justice may not be done, making the response to the offending manifestly disproportionate. (Para 9). This displays clear and consistent advice to governments in a sensitive policy area, and should be built upon in the Board's ongoing work. There are many member states (for example those that continue to implement the death penalty for drugs offences, or those that rely on widespread arrest and imprisonment of drug users) that need to consider their own track record against the INCB's questions very carefully.

A consistent theme throughout the report is the need for member states to distinguish clearly, as is stated in the conventions, between the severity of punishment for 'major' and 'minor' offenders, and the INCB gives a clear and welcome statement that 'enforcing the law against minor offenders only is contrary to the conventions and contrary to the principle of proportionality' (Para 46).

The report then goes on to draw attention to three situations where member states have to be careful not to contravene one of the above principles of proportionality:

- Incarceration, and prison conditions. The INCB acknowledges the problem of the growing numbers incarcerated around the world, and the fact that drug users typically account for a significant proportion of the prison population in some countries (Para 23; Para 26). The problem is aggravated due to the disparity in the conditions of jails, many of them failing to comply with the minimum standards of hygiene, health or human rights provided by the UN Standards and norms in criminal justice. Consequently the INCB recommends governments to improve the availability of health-care and treatment programs for drug abuse in prisons; and the consideration of alternatives to imprisonment when dealing with less serious offences (Para 60-d).
- Discriminatory application of enforcement and punishment. Two potential problems are highlighted here. First, the risk that enforcement actions become too focussed on low-level users and dealers, who are more visible and easy to prosecute than some of those who profit most from illegal markets. (A related concern is with legislative systems that do not adequately distinguish between petty and major drug law offences, leading to unjust sentences). Second, the arbitrary targeting of enforcement and punishment on particular groups – either in terms of geography (where levels of arrests, or severity of punishments, are significantly different in neighbouring jurisdictions), ethnic or cultural background (where enforcement is disproportionately concentrated on minority groups), or type of drug (where enforcement against users of different drugs is applied differently, and is not justified in terms of their respective harms).
- Appropriate and proportional punishment. When deciding on the appropriate levels of punishment for drug law offences, governments should consider the key questions that the INCB articulates, and avoid the application of excessive punishments that cannot be justified according to the principle of proportionality, or in terms of their effectiveness in reducing the drug trade. Punishments that are not proportionate or consistently applied can bring the law into disrepute, create unnecessary pressure on criminal justice and prison systems, and undermine efforts to tackle health and social problems.

We have repeatedly called for the INCB to take a more proactive approach, within the flexibilities afforded by its mandate, towards drawing member states' attention to areas of tension

in the implementation of the drug control conventions, and helping them to reconcile these through balanced policies that comply with international obligations. We are therefore heartened to see an attempt to do this in this year's Annual Report, and in particular the Board's acknowledgement of the need for drug policies to be more co-ordinated. In this sense, we are encouraged by the Board's acknowledgement that drugs should not just be viewed through a criminal justice perspective (Para 20, Paras 50-53), and their emphasis in focusing more on problem solving rather than producing absolute solutions (Paras 20-22).

However, the positive aspects of the Board's choice of subject, and the tone taken in its coverage of that subject, are tempered by disappointment at some of the things the report does not say. There are numerous instances where member states are apparently in breach of this principle of proportionality in their pursuit of drug control objectives:

- Countries carrying out drug control operations that involve extra-judicial infringements of privacy, arrests, incarceration and killings.
- Countries applying the enforcement of their drug laws in an arbitrary or discriminatory manner, for example against particular types of drug user, or particular ethnic groups, or by applying the same level of penalties for higher as well as for lower risk drugs.
- Countries applying aggressive eradication measures such as aerial spraying, or enforcing bans on illicit crop growing in places where no alternative livelihoods are in place.
- Countries applying disproportionately harsh penalties to drug offenders, including long periods of incarceration, or even the death penalty, for possession or minor supply offences. These punishments, in jurisprudential terms, are entirely out of proportion – for example, related to scales of penalties for violent crimes, where there is direct and deliberate harm to a victim. They are also difficult to justify as being necessary for the protection of public order or public health, as the deterrent effect of such sentences has not been demonstrated.

However, despite there being no shortage of infringements of this important principle, that is enshrined in both the human rights and drug control conventions, the INCB makes no attempt in this report to bring attention to these situations and call on member states to take action to rectify any abuses. Moreover, the INCB has paid little attention to this issue in the hundreds of country visits, and consequent correspondence, that it has engaged in over the years. Analysts and observers have been dismayed to read INCB statements relating to their visits to countries that are

clearly breaching this principle of proportionality, in which the issue is ignored or, amazingly, the actions of the government in question are referred to with approval.

This omission in the Board's report, and in its ongoing work, relates to a wider concern that we have about the operation of the INCB –its selective interpretation of its mandate. On the one hand, the Board has been quick to take public and inflexible positions on any issue it considers representing a weakening of countries' commitment to a law enforcement approach to drug control (for example, harm reduction services, or any relaxation of drug laws). However, it is slow to react, or remains totally silent, when breaches of obligations occur under other aspects of the drug conventions, or other UN treaties. If this report signals the beginnings of an attempt to redress this imbalance, then we warmly welcome it.

Another concern arises with the differences between earlier drafts of Chapter 1 of the 2007 Report, and the final published version. As is customary, the first draft of Chapter 1 is produced for the INCB by a suitably qualified external consultant. This early draft included a strong emphasis on the flexibility that member states have within the conventions in constructing their own drug laws and enforcement practices. This emphasis is largely absent from the final version, in which the tone is more distinct in calls for the need for consistency. Specifically, the section on conclusions and recommendations changed significantly from expert draft to final version – the conclusions section in early drafts (that included a call that 'countries with high rates of imprisonment of minor drug offenders should consider non-custodial responses in appropriate cases') was removed from the final version. The 15 recommendations proposed by the consultant were reduced and significantly amended in the final document, with notable removals including:

- A recommendation that member states ensure that all their drug law casework complies with UN Standards and Minimum Rules on Treatment of Prisoners, Non-Custodial Measures, and Administration of Juvenile Justice.
- A recommendation that member states conduct evaluations of the effectiveness and impact of different drug law casework and sentencing options.
- A recommendation that donors and the UNODC strengthen their support for developing countries' in building more effective drug law casework systems.

Although, none of these recommendations are particularly radical, it seems that the Board members considered them to be inappropriate for inclusion in the report.

COCA LEAF AND THE INCB VISIT TO BOLIVIA

As a result of the 2006 INCB report (that gave clear signals regarding the Board's concerns over Bolivia's national policy towards the coca leaf) the Bolivian government extended an invitation to the Board to visit the country in order to enlighten them on their new strategy on drugs control and coca leaf policies. The 2006 report had expressed concerns that these policies "*could serve as a precedent and may send the wrong message to the public if it is allowed to stand*".¹ Bolivian governments have protested against this for decades.

Although the Board's visit was interpreted as generally positive on the Bolivian side, the 2007 INCB report shows no signs of an increased sensitivity towards the Bolivian claim on the rights of their indigenous population, and the general public, to consume the coca leaf in a traditional manner by chewing the leaf, and even goes as far as to consider drinking coca tea, as "*not in line with the provisions of the 1961 Convention*".² The Board considers Bolivia, Peru and a few other countries³ to allow such practises to be in breach with their treaty obligations, and insists, "*each party to the Convention should establish as a criminal offence, when committed intentionally, the possession and purchase of coca leaf for personal consumption*".⁴

The fact that this would involve prosecuting several million people does not seem to be proportional to the claimed crime, particularly since most consumers use the coca leaf for beneficial health purposes, and coca tea drinking a well-recognized practise to counter altitude sickness. The absurd call by the Board contradicts their own forward to the report that talks about "*respect for national sovereignty, for the various constitutional and other fundamental principles of domestic law – practice, judgements and procedures – and for the rich diversity of peoples, cultures, customs and values*".⁵

Although the 1961 Convention established that "*Coca leaf chewing must be abolished within twenty-five years from the coming into force of this Convention*",⁶ when this temporary rule came to its end, the then democratically elected governments of Bolivia and Peru managed to have part of the damage done reverted in the 1988 Convention, by having a partial recognition included, stating "*The measures adopted shall respect fundamental human rights and shall take due account of traditional licit use, where there is historic evidence of such use*".⁷

1 INCB report 2006, paragraph 361

2 INCB report 2007, paragraph 217

3 Probably the Board is referring here to Argentina, Chile and Colombia, where chewing and tea drinking are practised by some groups and in certain regions of these countries.

4 INCB report 2007, paragraph 219

5 INCB report 2007, Foreword

6 Single Convention 1961, Article 49, Par 2 e)

7 United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, article 14, paragraph 2.

In this year's report, the Board denies the validity of this article, or any reservation made by parties, since it does not "*absolve a party of its rights and obligations under the other international drug control treaties*"⁸.

The INCB makes its worst mistake to refer to the coca leaf with the false assumption that harm is inflicted upon people's health when consuming the coca leaf, when referring to "*the role it plays in the progression of drug dependence*"⁹. This claim bears no scientific or medical evidence, and is exclusively based on a long forgotten and obsolete study done in 1950 in which racial prejudice and questionable methodologies were used.¹⁰

The approach adopted towards this complex and sensitive issue in the report demonstrates a surprising ignorance and insensitivity not suitable for a UN body, particularly following their visit to Bolivia, and after the recent adoption of the Declaration of the Rights of Indigenous Peoples.

TENSIONS BETWEEN UN DRUG CONTROL AND HUMAN RIGHTS SYSTEMS

Paragraph 38 of the INCB report states that "*Due respect for universal human rights, human duties and the rule of law is important for effective implementation of the international drug control conventions. Non-respect for them can prejudice the ability of the criminal justice system to enforce the law, can lead to discriminatory disproportionate responses to drug offending and can undermine the conventions*" This is an extremely welcome statement that appears to reverse the Board's assertion in its March 2007 press conference regarding their reluctance to discussing human rights. However, this statement is not matched by a clear commitment to human rights in the remainder of the report. Some examples can illustrate this:

- Throughout the report, people who use drugs are referred to as "drug abusers", stigmatising and dehumanising language that can exacerbate prejudice and lead to further human rights violations and discrimination against some of the most marginalised and vulnerable people in our communities.
- The Board notes the significant drug seizures in Viet Nam and China in 2007 but fails to comment on the human rights abuses occurring in the name of drug control in both countries. Chinese officials, in the run up to the Olympic

Games 2008, announced plans to round up a million drug users and place them in compulsory detoxification centres. Both countries impose the death penalty for drugs offences in violation of international human rights law, and both actively execute drug offenders. The Board visited Viet Nam in 2007, yet fails to mention the death penalty in its report.

- Despite a visit to Brazil in the same year as one of the largest police incursions into Rio's favelas to fight Brazil's 'war on drugs', the Board makes no mention of the many deaths that resulted from a drug war that claims children and those unconnected with drug trafficking as some of its main victims. In the first half of 2007, official police records showed that 449 people had been killed during such operations. Children, recruited into drug gangs, are considered legitimate targets and are shot at without hesitation. Extrajudicial killings by the police are common, with poor, black, boys being the main targets. Impunity for such crimes is almost total, recorded not as "murder", but "resistance followed by death".
- As discussed above, cultural and indigenous rights are entirely ignored in the Board's handling of the coca leaf and coca chewing issue. Despite the adoption by the General Assembly in 2007 of the UN Declaration on the Rights of Indigenous Peoples, which recognises the right to practise and revitalise cultural traditions and customs, and the right of indigenous peoples to protect their cultural heritage and traditional knowledge, the Board has ignored the cultural aspects of coca chewing and has stated that it must be abolished (para 216).
- The Board fails to comment positively on harm reduction efforts by States parties to the conventions aiming at fulfilling the right to health, nor do they comment on the many countries where police targeting of clinics has prevented programs from delivering services critical to HIV prevention and health promotion
- The Board remains silent on the human rights abuses perpetrated in Thailand during Thaksin Shinawatra's 'war on drugs' in 2003/4. This lack of condemnation from the appropriate UN bodies may be contributing to the Thai government's current willingness to consider another wave of such extreme enforcement tactics.

While the Board's statement on human rights is very welcome, it must not be an empty gesture. The full implications of human rights compliant drug control, and the Board's responsibilities must be made clear. Respect for human rights is not just "important" for effective drug control. It is essential and it is obligatory.

⁸ INCB report 2007, paragraph 220

⁹ Idem, paragraph 48

¹⁰ Economic and Social Council: Official record Fifth year, twelfth session: Special supplement No11: report of the Commission of Enquiry on the Coca Leaf, May 1950. New York; United Nations, 1950 (E/1666-E/CN.7/AC.2/1)

HARM REDUCTION – CATCHING UP, OR HOLDING BACK?

As in years past, the Board highlights the problem of HIV epidemics fuelled by injection drug use. The 2007 report mentions HIV 54 times. On harm reduction measures to reduce such HIV infections, the 2007 report demonstrates some small positive changes. In contrast to the report on 2006 and 2005, where provision of sterile syringes went unmentioned, the Board notes provision of sterile syringes in its review of developments in countries including Viet Nam, Malaysia, and Australia, as well as 24 European Union member States (paras 510, 511, 706, 653 *inter alia*). The Board cannot refrain from sounding cautionary notes—the INCB calls on Australia to ensure that sterile syringe programs in New South Wales, for example (para 706), are carried out in compliance with the provisions of the international drug control conventions, despite previous declarations from the Board and legal experts that such programs do not violate any convention. When calling for adequate services for drug offenders in prison (para 26), the Board does not mention needle exchange, despite clear guidance by WHO and other authorities about the benefits of such services in penal institutions. Instead, the Board calls on governments to ensure that access to illicit drugs in prisons is terminated (para 60 (d)). Nonetheless, compared with the silence in previous years, these mentions of needle exchange are important.

The phrase harm reduction is used in the report on 2007 without scare quotes. This should be unremarkable given the endorsement of increased availability of harm reduction by all member States in the 2001 Declaration of Commitment on HIV/AIDS and multiple other United Nations documents such as the 2008 United Nations Office on Drugs and Crime discussion paper (endorsed by the INCB) on reducing the adverse health and social consequences of drug use. However, it is a notable departure for the INCB. The Board also matter-of-factly notes the implementation of addiction treatment with methadone or buprenorphine in countries including the United States, the Islamic Republic of Iran, Canada, Viet Nam, Malaysia, and all European Union member States (paras 99, 510, 511, 653 *inter alia*).

Those hoping that the Board would more actively pursue its mandate to ensure adequate availability of licit drugs for medical purposes, however, will find little cause for optimism in the report on 2007. As in years past, and despite the call of the UN drug conventions for treatment, rehabilitation, and aftercare for drug abuse, the Board does not congratulate or note with approval the implementation of new methadone programs to address what in Asian countries has been a growing problem of injecting drug use and associated HIV infection. Indeed, the Board continues to see such expansion of treatment primarily in terms of risks of diversion of legal medicines to illegal markets, calling on countries to strengthen control measures on methadone and

buprenorphine. The Board notes with concern the lack of adequate access to opioids for pain management (paras 97, 208-213), yet makes no comment on the shortage or illegality of methadone or buprenorphine treatment for addiction in countries across the former Soviet Union and Asia. In fact, the comment that supply of such treatment has risen slightly or decreased in many developing/transitional countries (para 276)—a development that should provoke alarm from the body responsible for helping countries to accurately estimate need for methadone or buprenorphine—is not accompanied by any expression of concern. In a report that contains multiple paragraphs on the danger of celebrity drug use, this omission is striking.

As in years past, the 2007 report does express strong opposition to medically supervised safer injection facilities, (paras 161, 369), saying that such programs are in contravention to international drug control treaties. The INCB's recommendations include a call for countries with safer injection sites to close those facilities and instead provide appropriate "evidence-based" programs (Recommendation 24, at para 734). This demand is itself in tension with the evidence, since the benefits of safer injection facilities have in fact been documented in peer-reviewed literature and include fewer deaths from overdose, more referrals to treatment services, and a reduced risk of HIV and hepatitis transmission through decreased syringe sharing. The INCB does not mention the 2002 analysis of the Legal Affairs section of the UN International Drug Control Programme, which detailed arguments justifying safer injection facilities, as well as other harm reduction programs, implying that such programs do not contravene drug conventions. The Board's call for the cessation of efforts to provide "safer crack" kits (para 369) was similarly undocumented.

Finally, the Board does extend welcome attention to the question of drug treatment, rehabilitation and reintegration, noting that programs need clearly articulated objectives and evaluation, that treatment should be comprehensive and evidence-based, and that treatment should be available in prisons (paras 56, 505). This, and the Board's call for suitable facilities and close cooperation between criminal justice and health agencies (para 56), are important, though the 2007 report remains silent on the many known instances in which criminal justice authorities decided to place large numbers of drug users in compulsory treatment that does not meet minimum medical standards. In China, for example, where UNODC estimates that as many as 340,000 are interned in compulsory detoxification and re-education through labour centres, the Board restricted itself to observing that treatment should be "comprehensive and evidence based," (para 505) but makes no mention of the compulsory labour, lack of access to medication-assisted treatment, or human rights abuses reported in such facilities. The Board visited Viet Nam in 2007 and notes the country's efforts to strengthen HIV prevention and treatment. While expressing concern about relapse and offering a general reminder of the importance of

evaluating different modalities for drug abuse treatment (para 539), the Board omits mention of what UNODC estimates to be more than 50,000 drug users interned for as long as five years in facilities that offer no HIV treatment and little drug treatment besides “moral re-education” and labour at low wages. The Board’s note that treatment does not need to be voluntary to be effective (para 57) is similarly notable for its failure to address the ethical or human rights issues involved in compulsory treatment at the country level. The Board, for example, notes that the Russian Federation is considering legislation on compulsory treatment and the establishment of special medical centres (para 664) without noting that Russian authorities have banned the best studied and most effective forms of medication-assisted treatment.

Taken as a whole, the 2007 Annual Report shows some signs of a more balanced approach by the INCB to the real policy dilemmas that governments face in designing and implementing their drug control policies. While this is welcome, the method of operation of the Board, and its approach to these issues, still fall a long way short of what is necessary for it to play a positive and objective role in helping governments to find the right balance between their drug control obligations, and wider policy objectives related to social development, public health, and human rights protections.