

(RE)FRAMING REGIME PERFORMANCE:

A CRITIQUE OF THE INCB REPORT FOR 2020 AND ITS SPECIAL REPORT CELEBRATING THE ANNIVERSARIES OF THE 1961 AND 1971 DRUG CONVENTIONS

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Executive Summary

- Last year marked the anniversaries of the 1961 Single Convention on Narcotic Drugs and the 1971 Convention on Psychotropic Substances. Consequently, in addition to its Annual Report for 2020, the International Narcotics Control Board (INCB or Board) launched a supplementary Special Report celebrating 60 and 50 years respectively of two of the core UN conventions underpinning the international drug control regime.
- Both reports are impressive documents that provide a wealth of useful information concerning the current state of international drug policy, with the Board continuing to demonstrate a welcome adjustment of stance on a range of issues including harm reduction and human rights more generally. As in previous years, the INCB's criticism of states' use of the death penalty for drug-related offences is central to its analysis. Other issues, notably the social and economic impact of COVID-19, a hidden epidemic of drug use among older persons, and stigma are discussed lucidly within the Annual Report.
- Within the reports, however, there remains a fundamental tension regarding the Board's assessment of the operation and performance of the international regime of which it is an integral part. This is particularly the case in relation to the Special Report tasked to celebrate the 1961 and 1971 Conventions.
- The INCB acknowledges some shortfalls in relation to both availability of internationally controlled substances for medical and scientific purposes and efforts to deal with various facets of illegal drug markets; unavoidable admissions given current realities. However, in a determined effort to deflect attention away from the problematic aspects of the regime itself, the Board sets out to (re)frame regime performance by focusing attention on impressively high levels of treaty adherence and shifting responsibility for failures away from the overarching treaty framework and on to States Parties themselves.
- Although States Parties are of course ultimately responsible for not only the construction of the regime but also the implementation of drug policy within their jurisdictions, such an approach ignores the powerful normative expectations generated by the regime; expectations that have in myriad ways since 1961 influenced state policy choices and often privileged punitive prohibition-oriented approaches above others. Moreover, both reports continue to promote the erroneous view that the drug control conventions and human rights instruments are complementary and mutually reinforcing. Such an approach side-steps manifold conflicts and tensions and overlooks the fact that the drug control regime continues to have an influential relationship with human rights abuses: while it does not prescribe them, it does much to structure systems that employ them at a national level.
- In its analysis the Board notes a series of 'Challenges' that were not known when the 1961 and 1971 Conventions were adopted. Many of these relate to the rapidly evolving character of the illegal market. The Board also includes human rights, non-medical cannabis use and the shift towards regulated markets for adult use within some jurisdictions within this category.
- In response to these 'Challenges' the INCB suggests the need to 'create new normative tools and instruments and possible additional voluntary ways of international collaboration'. In this regard the onus does fall entirely on Member States, and it is fitting for them to take up the challenge, modernise the regime and bring it more in line with contemporary realities.

Introduction

With 2021 marking significant anniversaries of two of the core UN drug control conventions, the International Narcotics Control Board (INCB or Board, see Box 1) supplemented its Annual Report for 2020¹ (launched in March 2021) with a special commemorative publication, *Celebrating 60 Years of the Single Convention on Narcotic Drugs of 1961 ‘... a generally acceptable international convention ...’ and 50 Years of the Convention on Psychotropic Substances of 1971 ‘... an international convention is necessary ...’*² While both are self-contained, several familiar themes can be discerned across the documents.

It is certainly difficult to ignore the welcome evolution in outlook experienced by the Board in recent years. This is identifiable in relation to a range of issues, notably a softening in stance and adoption of a positive position on the harm reduction approach and human rights more generally, particularly in relation to overt criticism of the death penalty and extrajudicial responses to what within the UN system are referred to as illegal drug markets. It is within this context that the Annual Report for 2020 covers a wide range of important issues. This includes a valuable thematic chapter, ‘A hidden epidemic: the use of drugs among older persons’. An issue that is often overlooked within policy debates at all levels of governance, here the INCB shines a much-needed light on the need to combat stigma and the role of language within this process. And, aware of the Report’s power to name and shame and ability to create resilient framing narratives that are often embraced and repeated by Member States, it is important to note the Board’s critical position on compulsory drug treatment,³ concerns regarding human rights violations in East and Southeast Asia (particularly in relation to the Philippines),⁴ and issues around the availability of and access to narcotic drugs and psychotropic substances for medical purposes, including during the COVID-19 pandemic.

Unsurprisingly, the pandemic receives considerable attention and is deployed to highlight the centrality of the drug control regime to the international community’s response. Having legitimately presented the ‘devastating societal and economic impact’ of COVID-19, the Annual Report stresses how the pandemic ‘has also shown that international collaboration and solidarity are essential for safeguarding health and well-being across our interconnected world’. ‘The international drug control system’, it continues, ‘is an example of multilateralism

Box 1 The INCB: Role and composition

The INCB is the ‘independent, quasi-judicial expert body’⁵ that monitors the implementation of the 1961 Single Convention on Narcotic Drugs (as amended by the 1972 Protocol), the 1971 Convention on Psychotropic Substances and the precursor control regime under the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

The Board was created under the Single Convention and became operational in 1968. It is theoretically independent of governments, as well as of the UN, with its 13 individual members serving in their personal capacities. The World Health Organization (WHO) nominates a list of candidates from which three members of the INCB are chosen, with the remaining 10 selected from a list proposed by member states. They are elected by the Economic and Social Council and can call upon the expert advice of the WHO.

In addition to producing a stream of correspondence and detailed technical assessments arising from its country visits (all of which, like the minutes of INCB meetings, are never made publicly available), the INCB produces an annual report summarising its activities and views.

in action...’⁶ There is no doubt some truth in the view that the international drug control system has played an important role in helping to ensure that those requiring medicine during the pandemic have received it. That said, even in this relatively narrow context (temporally if not spatially), the notion of ‘multilateralism in action’ touches upon one of the reoccurring dilemmas to be found within INCB publications in recent years. How, in fulfilling its mandate to prepare reports containing analysis of the drug control situation worldwide and moving away from its traditionally narrow conception of the issue area, can the Board credibly argue that the current regime in its entirety remains fit for purpose? This, as sustained civil society analysis has revealed, is an issue that is implicit within all Annual Reports.⁷ It is, however, especially stark within this year’s Special Report.

To be sure, considering the acute pressures upon, and resultant tensions within, the extant international drug control regime, any celebration of two of the core conventions upon which it is built requires careful drafting and presentation. And so it is with the Board's supplementary report. This, as is appropriate, focuses on the aspects of the conventions for which it is mandated, has 'direct operational responsibility', and 'has received information from State parties over time'. Consequently, as the Report states, 'The analysis includes the status of treaty adherence to the 1961 and 1971 Conventions, the availability of internationally controlled substances for medical and scientific purposes, the functioning of the control system, the role of the Board in monitoring compliance and penal provisions, and reflects on current and future challenges to the international drug control system'.⁸

In examining these areas, the authors perform an extremely careful balancing act between commending what are deemed to be successes of, and acknowledging the ongoing challenges faced by, the regime. Such an exercise, nonetheless, is inherently problematic. Maintaining an upbeat and generally celebratory perspective necessarily requires some sleight of hand. This, in many ways, is due to considerable structural impediments. Put simply, it is difficult for the Board, as a creature of the drug control system – recall that it was a creation of the Single Convention and as such is not a UN organ – to offer an objectively critical review of a system within which it is inextricably embedded. As with other organisations, therefore, there is a natural tendency to focus on institutional processes rather than more problematic regime outcomes.

Within such a context and focusing predominantly on an analysis of the Special Report, this critique by the International Drug Policy Consortium (IDPC) and the Global Drug Policy Observatory (GDPO) examines how the INCB seeks to (re)frame regime performance and defend failures in achieving its core goals. It begins by exploring different approaches to evaluating regime effectiveness before moving on to discussion of competing perspectives on normative frameworks. The concluding discussion considers the challenges facing the regime, acknowledged or otherwise.

Evaluating regime performance

Unsurprisingly, the exercise of positive framing begins in the foreword. Here, endorsing their enduring relevance to the multilateral control of an ever more

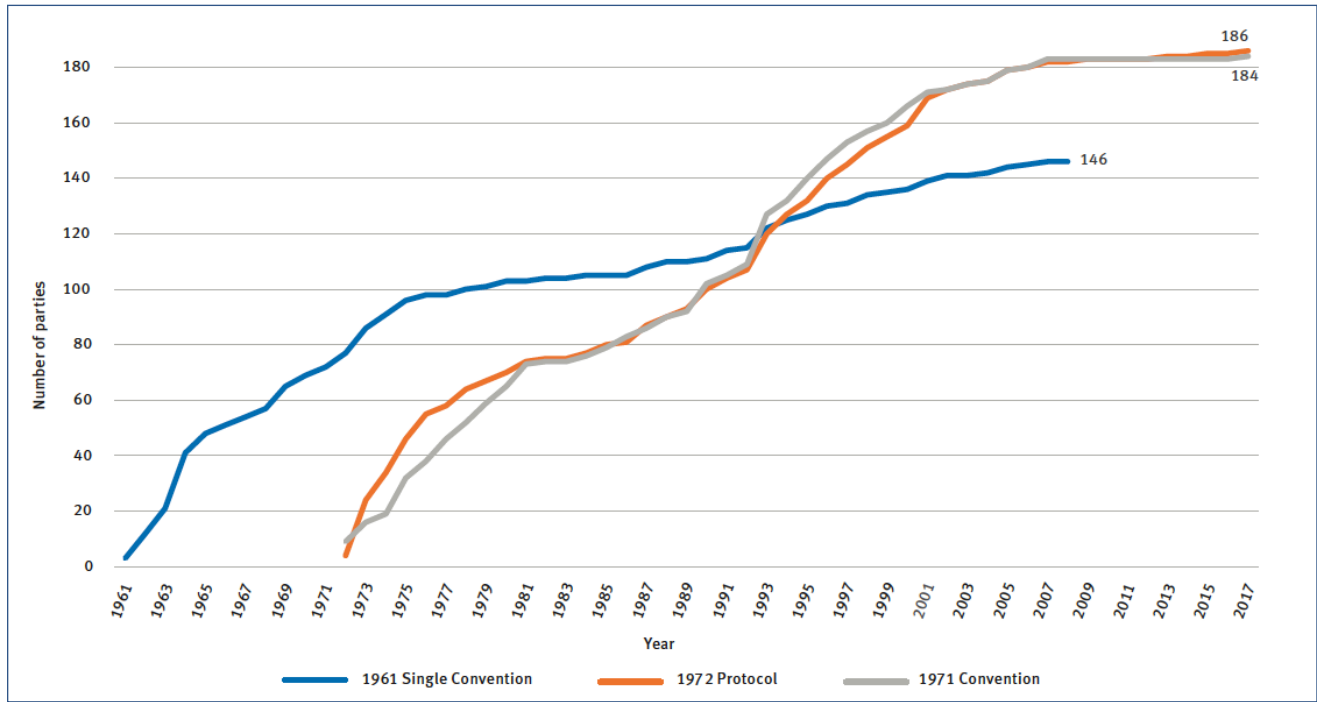
complex global drug market, the Board's President informs readers that 'Even with the reality of the constantly shifting contours of the drug problem, the 1961 Convention, the Convention on Psychotropic Substances of 1971 and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 have proved their value as *cornerstones* of international cooperation in drug policy' (emphasis added). He continues by highlighting, 'The fact that the conventions have been almost universally ratified by States underscores that the desire to counter the world drug problem is shared globally' before noting how 'States have regularly reaffirmed their commitment to working within the framework of the three international drug control conventions and the subsequent resolutions and political declarations'.⁹ At a surface level, even the most cursory glance at Commission on Narcotic Drugs (CND or Commission) resolutions, other soft law instruments and indeed observation of Commission sessions themselves confirm this perspective. States, as regime members and, as the Board is often keen to point out, owners of the underpinning conventions do frequently use the term 'cornerstones' when referring to the conventions. Although nuanced in recent years to sometimes incorporate the phrase 'other relevant international instruments', contiguous deployment of the term 'cornerstone' with any mention within UN forums of the drug control treaties has apparently become expected diplomatic etiquette.¹⁰

Critical comments, however, are also forthcoming. Although the official UN records have a propensity to downplay or omit such views, it is not unknown for states to criticise both specific facets of the current control framework and on occasion the regime in its entirety.¹¹ This is usual in the operation of any regime. In this case, such behaviour tends to be driven by states' frustration with what is perceived to be the inability of the international drug control framework to effectively achieve its core goal. This, as laid out in the preambles of the conventions and reiterated in most of the Board's publications, is the protection of the health and welfare of humankind. For Parties to the conventions, such an altruistic aim is often distilled down to a more limited concern for protecting what is perceived to be the health and welfare of individuals living within their jurisdictions.

Treaty adherence

Within this context, it is interesting to see how the Board deals with the crucial issue of evaluating regime performance. It has been long been recognised that the number of state ratifications is not a

Figure 1. Ratification of the 1961 Convention, the 1972 Protocol and the 1971 Convention



good measure of regime effectiveness.¹² It is true, as the Board notes, that the drug control conventions can certainly claim impressive levels of ratification, and indeed adherence¹³ (see Figure 1).¹⁴ We are reminded that ‘Almost all States Members of the United Nations are parties to the three conventions: 95 per cent for the 1961 Convention, 93 per cent for the 1971 Convention and 97 per cent for the 1988 Convention, representing some 99 per cent of the world’s population.’¹⁵ With some justification, the INCB consequently holds the system up as ‘one of the most successful achievements in international cooperation.’¹⁶ This is to be expected since the Board plays a key role in encouraging those states remaining outside the regime to become parties of the conventions. As in previous years, in the recommendations section of this year’s Annual Report, the INCB ‘reiterates’ the importance of universal ratification and ‘urges all States not yet having become parties to one or more’ of the instruments ‘to do so without delay.’¹⁷

Such high levels of ratification demonstrate the ongoing willingness of most states to engage collaboratively with a multilateral endeavour intended to ‘deal with cross-border issues of mutual interest to sovereign States’¹⁸ and one that requires the enduring attention of what has become known as a global governance approach. It is fair to conclude then that the regime displays notable robustness, or resilience, and can be considered a ‘resilient social structure possessing a considerable degree of “staying power”’.¹⁹ This is reflected in the ‘regime’s impressive ability to sustain, and even increase

membership over time’. As set of ‘open treaties’, ‘states have for many years continued to accede to the drug control conventions and as often noted by the proponents of the extant system, in terms of regime membership, the figures are indeed strikingly high.’²⁰

Nevertheless, ‘such impressive levels of adherence...do much to obscure a more textured and revealing analysis of the regime’s true status.’²¹ Evaluating regime effectiveness is a different and more intricate exercise.²² This is especially so in relation to a complex multiple component regime with a global purview. Initial scholarly consideration of regime evaluation more generally went so far as to observe that, ‘[T]here are severe limitations to what we can expect from efforts to evaluate regimes...this suggests the importance of giving some consideration to non-consequentialist approaches to the evaluation of regimes.’²³ Yet, despite such pessimistic beginnings, since the early 1980s what has been called the regime ‘effectiveness community’ has endeavoured to develop workable approaches to what is without a doubt a challenging undertaking. These can involve different perspectives and a combination of layered criteria.²⁴ Nonetheless, a more straightforward approach concerning what can be called ‘high order goal achievement’²⁵ remains instructive.²⁶ Framed in this way and adopting a so-called internal perspective that judges regime performance against its own specific benchmarks,²⁷ the ‘higher level of goal achievement, the higher level of effectiveness of the regime in question.’²⁸

Evaluating regime effectiveness

Where international drug control is concerned, consideration of the extent to which the regime has achieved its core goal clearly must be broken down into separate but inter-related components. In many ways associated with the operation of a range of what have been called ‘suppression regimes’,²⁹ examination of these elements is often particularly difficult in terms of empirical confirmation and accurate data relating to the condition of the dependant variable. That is to say, the ‘problem’ with which the regime is concerned.

In this regard, it must be recalled that much of the Board’s work on the ‘world drug problem’ as mandated by the treaties involves the monitoring and regulation of the global legal trade in drugs for medical and scientific purposes. As in most years, the INCB itself recognises in its Annual Report for 2020 deficiencies in the ‘accurate and timely’ provision of statistics by States on ‘the manufacture of, consumption of and international trade in internationally controlled substances as required by the treaties and resolutions of the Economic and Social Council and the Commission on Narcotic Drugs’.³⁰ With this in mind, the Special Report stresses that ‘Fifty and sixty years after the adoption of the two conventions, the INCB, *according to the data at its disposal*, can state that the international system of control, despite the challenges encountered, has been able to achieve international control of the licit production, trade and consumption of controlled substances’ (emphasis added). Keen to flag up what is deemed to be a significant success of the 1961 and 1971 Conventions, it goes on to note, ‘*There is virtually no diversion* of narcotic drugs or psychotropic substances from licit manufacture and international trade to illicit trafficking, even though the number of drugs under the international narcotics control regime has increased substantially’ (emphasis added).³¹ The final section of the Special Report also notes that in this regard the conventions have been ‘especially effective’.³² This is a fair point. Perhaps unsurprisingly, however, nowhere is the fundamental dilemma of the dual imperative nature of the regime acknowledged. As long as there remains – for many complex reasons – an appetite for the non-medical and non-scientific use of certain psychoactive substances, any previous leakage from the legal market is bound to be replaced by other sources. It can be argued that the 1961 and 1971 instruments did ‘very little to prevent the emergence of the large-scale *illicit* production and trade that had developed in response to the control regime’ (original emphasis). This reality provided the

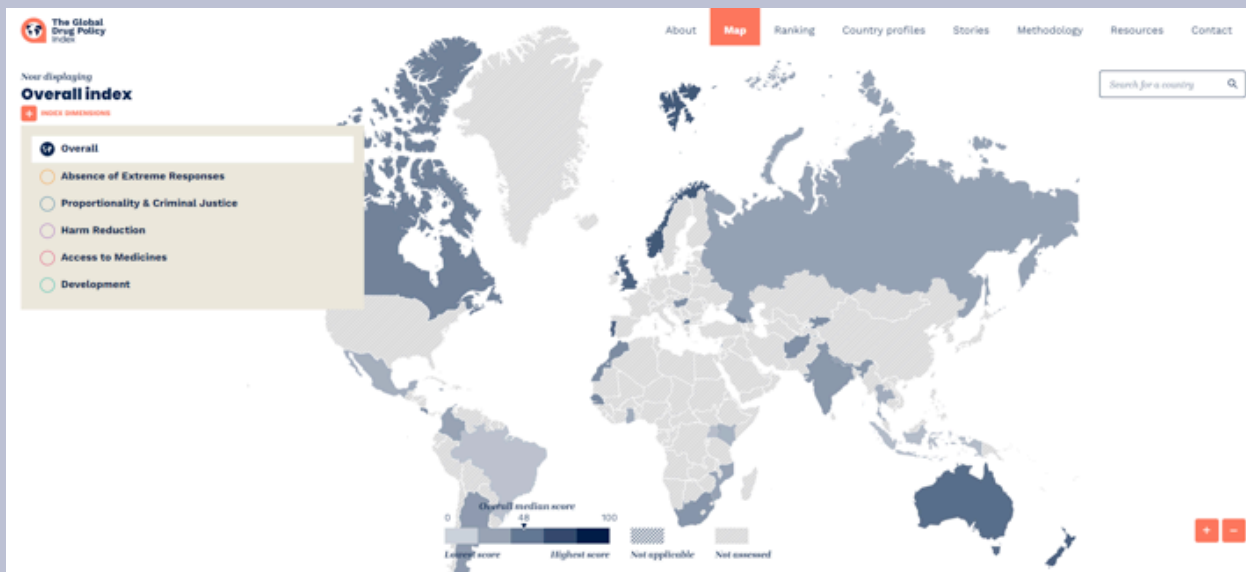
‘rationale for drafting the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances’.³³ That said, the Board is careful to highlight the only partial nature of the regime’s success in relation to the legal market. ‘At the same time’, notes the President in his foreword, ‘it is important to recognize that the goal of ensuring availability and accessibility of narcotics and psychotropic substances for medical purposes has not at all been achieved to a satisfactory extent at the global level’. Such a ‘lack of progress on this principle aim of the international drug control system’ is also explored more fully in the report itself.³⁴

As with its assessment of the regime’s management of the legal market, the special report also acknowledges regime failures relating to the illegal market. In so doing it is noted in the foreword how ‘...the goals of reducing the illicit cultivation, trafficking and non-medical use of drugs and providing treatment and rehabilitation services to people suffering from drug dependence...cannot be considered to have been addressed effectively’.³⁵ Again, this is explored at other points within the report, including within the chapter on ‘Challenges’.³⁶ Considering the increasing scale and complexity of the ‘world drug problem’, as well as related policy responses and a range of subsequent systemic tensions, such an approach was inescapable. Gone are the days when a UN agency could attempt to erroneously set up market ‘containment’ against historical comparators as a success.³⁷ Again, here data issues have a role to play.

Data issues

As with all regimes, there is an intimate relationship between quality and availability of data and any robust and meaningful assessment of effectiveness. Arguably, however, where international drug control is concerned, the connection is particularly challenging. First, the very nature of the illegal drug market ensures that drug policy evaluation within member states, and consequently in relation to the international framework within which their national policies operate, inevitably suffers from problems relating to accurate data capture, particularly in relation to the illegal use of drugs. As in previous years, this concern can be seen throughout the Board’s Annual Report for 2020, especially, although not uniquely, in relation to Africa.³⁸ From the relatively little that is known about illegal markets within this – and indeed other data-poor regions – it is likely that improved statistics on the trafficking and use of drugs would render the global picture even larger and more complex than it is currently presented.

Box 2 The Global Drug Policy Index: A civil society assessment of regime performance³⁹



Within the context of both structural and political barriers to meaningful assessment of regime performance, recent years have seen civil society fill the space left by UN bodies and Member States. A recent example of this trend is the development of the Global Drug Policy Index.

This composite Index is a unique accountability tool that documents, measures, and compares national-level drug policies that operate beneath the overarching regime framework. It provides each country with a score of 0 to 100, where 100 represents alignment of a selected core of drug policies and – crucially – their implementation with the UN recommendations on human rights,

health and development, as laid out in the UN System Common Position on drugs.⁴⁰

The Index is composed of 75 indicators that run across five dimensions: The absence of extreme sentencing and responses to drugs, such as the death penalty; the proportionality of criminal justice responses to drugs; funding, availability, and coverage of harm reduction interventions; availability of internationally controlled substances for pain relief; and development. The first iteration of the Index was released in November 2021 and evaluates the performance of 30 countries covering all regions of the world, for the year 2020.

Second, in a similar fashion to any evaluation of the legal market, consideration of the illegal cultivation, production, trafficking and consumption of drugs is an exercise that involves the identification of appropriate metrics and related indicators. Despite occasional protestations to the contrary from bodies like the United Nations Office on Drugs and Crime (UNODC), such a process is not always immune to politicisation.⁴¹ On this point it is worth recalling the words of Bente Angell-Hansen, Norway's former Ambassador to Austria and Head of the Norwegian Mission to the United Nations, Vienna. Speaking on the issue of metrics at the reconvened CND session in 2017 she evoked the maxim, 'If you have a problem that you don't want to do anything about – don't measure it.'⁴²

To be sure, as the intersection between the drug control regime and others, such as those relating to health and human rights, becomes more pronounced, so the choice of metrics becomes far wider than the traditional preoccupation with flows, scale and what might be termed 'process indicators': quantities of illicit drugs seized, hectares of drug crops destroyed by law enforcement agencies, as well as in some instances the number of people arrested for drug-related offences. An increasing systemic focus on the health consequences of drug use in recent years, including within INCB publications, should certainly be recognised as progress. Nonetheless, despite much needed attention given to drug prevention and treatment, it can be argued that UN evaluation processes often continue to ignore the impact of

drug policies themselves on individuals and communities in which they live.

Within this context, what is termed an 'external perspective' on regime effectiveness becomes increasingly fitting. In this case, analysis evaluates 'how far achievements of the regime correspond to normative claims'.⁴³ Consequently, while the Board characterises the regime as 'a balanced system that is geared towards improving public health and welfare' and one that promotes, among other things, the importance of 'human rights standards',⁴⁴ work remains to be done in assessing regime performance in these terms⁴⁵ (see Box 2), a point to which we will return.

Explaining regime failures: The Board's narrative of effectiveness

Mindful of the body's central role within it, especially in relation to the 1961 and 1971 Conventions celebrated in the Special Report, how then does the Board seek to explain regime failures and ineffectiveness? It is plausible to suggest that the authors deploy an interrelated twin approach to deal with this awkward question. Both come with a degree of validity. But, designed in many ways to deflect responsibility from the shape of the extant control architecture, they are not without their problems.

The 'no regime' counterfactual and state responsibility

To begin with, it is interesting to read how the Board directly addresses the issue of evaluation within the *Celebrating 60 Years* 'Background' chapter. Here it highlights how 'An assessment of the impact of the conventions should consider that the *implementation of measures* under the conventions may not be the only (or even the main) factor influencing the achievement of their aims. Cultural, social, economic and other factors also influence the behaviour of drug producers, traffickers and users' (emphasis added). Incorporating the issue of empirical limitations, the Report goes on to note that, 'Cause and effect can also be difficult to measure because the data on drug production, use and trafficking are often insufficient and poor quality, and not all countries collect data in a manner that allows for meaningful analysis'. It concludes this line of reasoning by stating, 'Finally, it is also difficult to reflect on and compare the current situation with what could have happened with the world drug problem in the absence of international agreement on drug control measures under the conventions'.⁴⁶

Combined with legitimate concerns around paucity of data, such a broader contextual perspective and a nod towards what is known as the 'no-regime counterfactual' approach is not unreasonable. It has been noted that when attempting to assess the impact of a regime and the extent to which it has 'been able to solve the problem it was set up to deal with...the influence of other drivers is so strong and difficult to measure that applying this indicator is usually exceedingly difficult'.⁴⁷ Equifinality – the idea of multiple causal pathways leading to the same outcome – is recognised in a range of policy areas.⁴⁸ This includes, for instance, the role of social conditions in the illegal use of drugs in different countries.⁴⁹ That said, the Board's perspective arguably misses an important part of the logic. There is no dispute that the no-regime counterfactual is significant when considering the relationship between the implementation of drug control measures and the associated condition of the illegal market. And here, interestingly, the Report ignores the obvious counterfactual parallel of legal markets for medical use (of heroin, cocaine and amphetamines for example). However, the existence of the regime has had a clear and attributable impact on the *type* of measures implemented and policy choices made by States parties to the conventions. This distinction is crucial. Although the impact on the illegal market and hence the factors leading to the attainment – or otherwise – of the convention's aims may remain uncertain, it introduces issues associated with policy, rather than simply drug, related harm and appropriate metrics and indicators.

This point connects with the second strand of the Board's regime effectiveness narrative; the role of States parties in implementing their obligations under the conventions. Not without considerable justification, the Special Report is replete with references to the key role played by states in the proper functioning of the regime. Not only are the drug control conventions non-self-executing, requiring 'enabling acts before they can function inside a country',⁵⁰ but national administrations are of course also responsible for implementing drug policy (regarded here as a set of laws and programmes⁵¹) within their jurisdictions. With this in mind, the Report repeatedly reiterates that the regime remains largely fit for purpose and indicates that where problems do exist the responsibility lies with member states themselves. For example, within the foreword, the President stresses that 'On this dual anniversary, INCB wishes to re-emphasize, that the current system, *when fully implemented*, contributes to protecting the health and

welfare of people worldwide and ensures balanced national approaches in which local socioeconomic and sociocultural conditions are considered' (emphasis added). Moreover, it is noted how the 'INCB considers that the current system is critically important in addressing the old and new challenges of the world drug problem...'⁵²

Unpacking this perspective in more detail in the main body of the Special Report, the Board explains 'One of the main challenges for States when implementing their obligations under the conventions is to determine an appropriate balance in their drug control efforts with regard to the aim of ensuring the availability of medically needed drugs while preventing their abuse and illicit production and trafficking'. Within this context, it is noted, 'Although integrated and balanced approaches have existed since the inception of the treaties, they have come to the forefront of international drug control in recent decades'. Highlighting that the international conventions deal with transborder issues, 'including international trade', it goes on to make a critical statement: 'Hence the conventions focused largely on international trade and trafficking, whereas the development and implementation of measures to prevent and treat drug abuse – while mandated by the conventions – *were left to each sovereign state to determine*, taking to consideration the local social and cultural context when designing such programmes' (emphasis added).

By framing the operation of the regime in this way, the President can claim that responsibility for ineffective efforts to achieve goals relating to reducing illegal cultivation, trafficking and non-medical use of drugs, as well as the provision of treatment and rehabilitation services, lies solely with States. This is the case, it is argued, since these aspects of the control framework 'were left to States parties to implement within their own social and cultural contexts'.⁵³ There is some truth in this position. Yet, the picture is considerably more intricate than that presented.

The normative framework: Alternative interpretations

This has much to do with the important normative role played by the regime and how it shapes the policy environment within which States operate. But not in the way it is depicted by the Board. Indeed, the topic is touched on at various points in *Celebrating 60 Years*, including in reference to how the 'normative framework for global drug control consists of a comprehensive set of conventions,

political declarations, resolutions and decisions'.⁵⁴ The Board also stresses that, while the result of an incremental process 'developed over the past 60 years and even earlier',⁵⁵ the 'basis' of the framework is the Single Convention, as amended by the 1972 Protocol.⁵⁶ Unsurprisingly, what is ignored, however, is the crucial role of the Single Convention – as the bedrock of the regime – in generating what can be regarded as a 'powerful prohibitionist expectancy in relation to how its members approach the non-medical and non-scientific use of substances scheduled or listed' within the control architecture.⁵⁷ Consequently, far from the progressive health- and rights-oriented normative regime described, states have for many years operated in, and been influenced by, an overarching framework constructed on an instrument that privileges criminalisation and punitive approaches to various elements of the illegal market.

As the Board notes, 'At the beginning of the twentieth century, in the absence of national and international norms and agreements on control, the non-medical use of narcotics and psychoactive substances was spreading in a number of countries in an alarming way'.⁵⁸ It is well documented how a growing appreciation of the truly transnational nature of what at that point was predominantly a concern around opium triggered the beginnings of multilateral drug control efforts more broadly. Yet, a strong case can be made that, far from simply 'tidying up' the drug control system and consolidating the key features of earlier treaties, the Single Convention brought about significant change to the regime.⁵⁹ While the pre-1961 foundational treaties were in essence 'restrictive commodity agreements',⁶⁰ the Single Convention was a stricter and wider-ranging multilateral instrument which, although still addressing the concerns of its predecessors, became more prohibitionist in tenor, including an increased focus on people who use drugs.⁶¹ This shift away from dealing with non-medical and non-scientific drug use, primarily via trade regulation and a 'drying up' of excess capacity, finds its most obvious expression in article 4 (c). This is significant in determining the overarching philosophy and normative character of the entire Convention and hence, as a 'cornerstone' of the international drug control system, has had substantial influence on the operation of the regime itself.

Norms, prohibitive expectancy and 'evil'

Without engaging in an extended discussion of norms within international relations, it is important to note here that they define and regulate

appropriate behaviour for actors with a given identity, assign rights and responsibilities regarding the issue in question, and are 'publicly or collectively understood as such'.⁶² Moreover, norms 'do not necessarily identify actual behavior; rather they identify notions of what appropriate behavior ought to be'.⁶³ As has been noted, 'international norms influence policy because they serve as a map for individuals or states to determine their own preferences or to understand the causal relationship between goals and alternative political strategies to achieve these goals'.⁶⁴

Reflecting the generally prescriptive nature of norms in international affairs, as a 'General Obligation', article 4 (c) of the Single Convention consequently obliges signatory nations, 'subject to the provisions' of the Convention, 'to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs' (emphasis added). A reading of the Convention reveals a legal disconnect between these obligations and any mandatory penalisation of certain forms of conduct. Although as Neil Boister points out, 'if the Convention regulated any particular form of conduct the Convention was designed to get the parties to criminalize any failure to comply with that regulation'.⁶⁵ The treaty also contains limited reference to demand-side issues and the medical treatment, care, and rehabilitation of 'drug addicts'. These were enhanced by the 1972 Protocol, which also introduces options of alternatives to penal sanctions for trafficking and possession offences committed by people who use drugs.⁶⁶

Yet, in privileging a criminal justice and prohibition-oriented approach to all aspects of the drug issue, including non-medical and non-scientific use, the Single Convention arguably redefined the normative order of the international drug control system and in so doing facilitated the application of approaches dominated by criminalisation within states. In this regard, it should not be overlooked that both the Single Convention and the 1971 Convention contain provisions for states to apply 'stricter national control measures' than those required by the instruments.⁶⁷ Parties have then over the years looked to the prohibitive spirit of the Convention to inform their domestic legal position since norms must be seen to represent acceptable 'standards and behaviour' in terms of not only rights but also obligations⁶⁸ and are used to assess the 'praiseworthy or blameworthy character of an action'.⁶⁹ Accordingly, it created a new benchmark against which the legislative actions and general attitudes of parties would henceforth be judged. This

is important since, 'Most international treaties deal with relations between nations, but the drug treaties also hold substantial implications for domestic legislation'⁷⁰ and subsequently – and somewhat unusually within international law – have a direct impact upon individuals living within those nations.

The *Commentary to the Single Convention*⁷¹ confirms that the instrument permits a high degree of flexibility⁷² for states when dealing with domestic drug use; a legal reality that underpins much of the Board's state responsibility argument. However, as pointed out by the UNODC in its 2008 *A Century of International Drug Control*, such flexibility is permitted only providing states remain committed to the general obligation laid out in article 4 (c).⁷³ Moreover, as discussed in detail elsewhere, when the article is considered more holistically with the benevolent image of the UN, the penal provisions in article 36 (provisions with which the Special Report engages), and critically for our discussion, exceptional language within the preamble, the prohibitive shift becomes starker and more impactful.⁷⁴ Indeed, it is perhaps no coincidence that, while keen to flag up the prominence of the 'health and welfare' of humankind, the Board chooses to ignore use of the term 'evil' within the preamble of the 1961 Convention. It is certainly difficult to consider its inclusion as a great cause for celebration. More specifically, here 'The Parties, Concerned with the health and welfare of mankind, Recognizing that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind, Conscious of their duty to prevent and combat this evil' agree on the need for 'coordinated and universal action'.⁷⁵ This omission is of consequence since, although non-binding, convention preambles play an important role in setting the normative context within which any treaty is both constructed and interpreted after coming into force. As a delegate involved in the conference for the adoption of the Single Convention noted in early 1961, the preamble was 'not a mere formal introduction, but rather dealt with the substance of a treaty; it was a statement of purposes and a justification of the aims of the negotiation; and because it helped to understand the intentions of the negotiators it had a juridical force for the purposes of interpretation'.⁷⁶

In his ground-breaking analysis of the inclusion and impact of the term 'evil' within the Single Convention, Rick Lines notes the rarity of its use in international law, including instruments designed to address moral crimes, such as apartheid, nuclear weapons, slavery and even genocide. Moreover, it

can be located at the heart of the relationship between ‘two related yet ultimately contradictory paradigms’ underpinning long-term international efforts to suppress drugs. ‘The first of these,’ Lines posits, ‘is that “addiction” to drugs is considered a form of “evil”, one that constitutes a threat not only to individuals but indeed to the fabric of society as a whole. As a result, States have a moral obligation to suppress’ drug cultivation, manufacture, trafficking and use. ‘The second paradigm,’ he continues, ‘is that coordinated international drug control activities, which by definition are morally defined to fight this “evil”, represent a collective humanitarian mission by the international community, rather than simply an exercise in commodity control or law enforcement.’⁷⁷ Ultimately, ‘The interplay between these paradigms creates and perpetuates an atmosphere of human rights risk, in which the global cause of drug control is framed in a manner in which abusive practices and policies are not only considered necessary, but are morally justified by the righteousness of the humanitarian end goal itself.’⁷⁸

Building on this perspective and exploring the concept of evil within international law from the perspective of political-theology, more recent legal analysis convincingly connects drugs, race and ‘the long shadow of evil’. In ‘Drug Prohibition and the End of Human Rights: Race, “Evil” and the United Nations Single Convention on Narcotic Drugs, 1961’, Kojo Koram concludes that an ‘international legal project that impacts disproportionately on racial others in order to make them civilized can be read as the underside of an international project that sought to promote and protect an idealised version of humanity.’⁷⁹ Others have argued that the international drug control system, particularly the underpinning 1961 Convention, has played a central role in upholding colonial power structures in some parts of the world.⁸⁰

Similar arguments concerning the construction of a powerful normative framework can be found within analysis coming from an international relations perspective. Some scholars have deployed a different approach but come to essentially the same conclusion.⁸¹ For example, most recently Annette Idler presents a persuasive case that ‘...the world drug problem’s primary framing as a national security issue by policy makers has greatly contributed to the international community’s failure to curb the global illicit drug trade more effectively and to the human suffering that drug policies have caused.’⁸² Drawing on earlier research, she reinforces the argument that drug policy in many parts of the world has undergone a process of securitisation. This involves

the casting of an issue of concern as an ‘existential threat’ to the state that calls for extraordinary measures beyond the routines and norms of everyday politics.⁸³ Accordingly, ‘This securitization can be traced back to the key milestones of the current interpretations’ of the international drug control regime, ‘such as political declarations and other policy documents: they portray the world drug problem as an existential threat to national security.’ ‘Likewise,’ she continues, ‘the preambles of the UN conventions present narcotic drugs as an existential threat.’ Like Lines and Koram, Idler considers use of the term evil in the preamble of the 1961 Convention to be fundamental. However, she also broadens the focus by highlighting the importance to the securitisation processes of subsequent policy documents, including the preamble of the 1988 Convention. Among other things, this refers to drugs as a threat to the fabric of society and a ‘danger of incalculable gravity’ to youth. ‘Since 1990,’ she contends, ‘every political declaration on drugs has manifested similar language.’ As a result, despite the shifting dynamics of international politics after the Cold War, including an increasing emphasis on the individual as a focus of states’ attention and the emergence of the concept of human security,⁸⁴ the international drug control regime ‘is still anchored in the mostly state centric UN conventions’. These, it is claimed, ‘lend themselves to justify a War on Drugs discourse that puts national security first.’⁸⁵ As with earlier analyses making a similar point,⁸⁶ the argument here is not that the regime demands a ‘war on drugs’ approach. Rather, and despite Board protestations to the contrary, in a more indirect fashion the international policy environment and associated normative expectancy it generates often helps facilitate and justify the implementation of punitive policies at the national level. Consequently, there is much to be said for the view that ‘While the regime does not determine specific outcomes, it channels political action and structures ongoing processes of coordination, cooperation and policy coherence.’⁸⁷

Within this context it is necessary to reappraise the Special Report’s presentation of several issues. The first of these relates to the penal provisions within the 1961 and 1971 Conventions. For example, the Board notes how ‘Over the past six decades, some State parties in various parts of the world have implemented measures associated with militarized law enforcement, disregard for human rights, overincarceration, the denial of medically appropriate treatment and inhumane or disproportionate approaches as part of the national drug control response.’ ‘Such policies,’ it continues, ‘adopted in the name of,

or under the guise of, drug policy have regrettably led to undesirable results and have had negative repercussions with respect to the stigmatization and marginalization of persons affected by drug use, or the violation of human rights.⁸⁸ These are of course valid observations and ones that the INCB could not – and should not – ignore. What is missed, however, is that such measures have not appeared out of thin air. Influenced to a degree by specific political and socio-cultural environments and ‘value-systems’,⁸⁹ they are as discussed above in many ways also a product of the normative expectations and/or securitised policy space generated by both treaties. It is to some extent fair to argue, as the Board does repeatedly, that the normative framework has been evolving since 1961 and that the contemporary regime has a far greater emphasis on health, human rights, and proportionality. Among other places, this is reflected in the outcome document from the 2016 UN General Assembly Special Session on Drugs.⁹⁰ It can also be seen in the Board’s own welcome shift in position on use of the death penalty for drug-related offences and open criticism – including in its annual reports – of states deploying extrajudicial responses to ‘drug related criminality’.⁹¹ Related in many ways to a changing view of the intersection between drug policy and human rights, a largely positive – or at least less hostile – progression in perspective can also be seen in relation to harm reduction and decriminalisation of the possession of drugs for personal use. All that said, the influence of the ‘cornerstone’ treaties upon which all subsequent soft law instruments are constructed cannot be dismissed. It is perhaps telling that the Special Report inadvertently admits that the evolution of the normative framework neatly coincides with the period during which some States parties have been implementing rights violating measures. Regarding one specific aspect of the regime, it is also worth noting how some researchers suggest that rates of incarceration for drug-related offences increased dramatically after the 1988 Convention came into force.⁹²

Similar arguments can be applied to problems surrounding availability and accessibility of narcotic drugs and psychotropic substances for medical and scientific purposes. Again, in acknowledging the regime’s poor performance, particularly regarding the availability of ‘opioids for consumption for pain management’, the INCB places responsibility squarely on the States parties. For example, it notes how, ‘Over the years, the Board has pointed out to Member States the lack of progress on this principal aim of the international drug control system.’⁹³ As the Board’s own 2019

report, *Progress in ensuring adequate access to internationally controlled substances for medical and scientific purposes*,⁹⁴ reveals, a complex range of impediments have been identified that combine to limit availability. It has, nonetheless, been highlighted how ‘The INCB has often placed the onus solely on national governments for failing to ensure access, doing so in isolation from a critique of the barriers created by the international drug control system as a whole. Thus, there has been a failure to acknowledge its role in perpetuating the imbalanced focus through an historical prioritization of law enforcement and drug control’. Apposite to this discussion, the Global Commission on Drug Policy also stresses how ‘The emphasis placed by many national governments on over-regulation stems from the very prohibitionist elements instilled in them by the Single Convention and key UN bodies.’⁹⁵ As has been discussed in previous IDPC responses to the Board’s reports and activities in and around the CND, preoccupied by illegal market control, the body has long displayed what might be seen as an overwhelming aversion to diversion.⁹⁶

Human rights

All of which inevitably leads to a discussion of the Board’s position on human rights and how they relate to a suite of three hard law conventions within which they are mentioned only once.⁹⁷ Mindful of the position taken by the Board in recent publications, it is no surprise to read that there is deemed to be a fundamentally inseparable relationship between human rights and drug policies implemented under the auspices of the regime. For instance, and echoing both the conceptualisation and language used elsewhere, the Special Report stresses that ‘The respect for human rights is a precondition for the development and implementation of effective drug policy’.⁹⁸ It is also noted how ‘The Board has reiterated that if drug control measures adopted by States violate internationally recognized human rights, they also violate the international drug control conventions’⁹⁹ and that ‘Over the years, many gross human rights violations have been committed in the name or under the guise of drug control’. ‘These human rights violations have occurred not because of the drug control conventions’, the claim is made, ‘but in spite of them.’¹⁰⁰ Similar statements can, as in previous years, also be found in the Annual Report for 2020.

The Board’s evolving position on human rights as they relate to the drug control regime has been discussed at length elsewhere and there is no need

to reprise it here.¹⁰¹ Needless to say, the manner in which the INCB works hard to frame the relationship remains debateable. For instance, it is highly problematic to claim that there is ‘no divergence between the drug control conventions themselves (as opposed to the application of some domestic counter drug measures that operate beneath them) and human rights norms and obligations’. In reality, ‘though presented as complementary’ the ‘relationship is sated with conflicts and tensions’.¹⁰²

Due to many of the reasons discussed above, by their very nature the drug control conventions must rather be seen as part of structural human rights risk. Analysis of human rights instruments reveals numerous examples of tensions and conflict between drug policy and human rights. Resolution of many of these, including those relating to indigenous rights, is arguably only likely to occur when one normative framework cedes space to the other.¹⁰³ As has been argued, the ‘drug conventions and drug control institutions have an indirect but influential relationship with human rights abuses; while they do not prescribe them, they do structure the system that employs them at the national level’.¹⁰⁴ With this in mind, it is interesting to see the Board respond – albeit briefly – to critiques of its stance on human rights. This is explicit within the Special Report’s ‘Conclusions’ section:

‘The normative drug control framework as it has developed during the past 60 years is a complex system. It is part of the larger context of the international human rights instruments because it strives to promote health and welfare of humankind. It cannot be considered – as some critics claim – simply a prohibitionist system. Rather it is a comprehensive, multisectoral, integrated and balanced system, focusing on health and welfare and grounded on respect for human rights and the principle of proportionality’.¹⁰⁵

There is no denying that, evolving as it has over six decades, the contemporary normative framework should be regarded as a ‘complex system’. Within the milieu of a range of recent soft law documents and declarations reflecting the changing perspectives of States parties to the conventions, international drug policy is increasingly considered within the CND and other UN settings in combination with human rights instruments. This is the case rhetorically if not always operationally. Consequently, and viewing international law as an ‘emergent system’, there have undoubtedly been instances over the years where the ‘productive friction’ of ‘regime interaction’ has led to ‘a more

responsive and effective international legal system than the sum of the constituent regimes’.¹⁰⁶ What have been called ‘regime complementarities’ certainly exist.¹⁰⁷ Arguments concerning the prohibitive orientation of the ‘cornerstone’ treaties, especially the 1961 Convention, seldom ‘simply’ claim that the conventions and the regime more broadly do not allow for policy approaches that soften dominant normative expectations. To claim however, as seems to be the case, that interaction between the international drug control regime and the human rights regime now exists as an example of a mutually reinforcing regime complex seems farfetched and simplistic;¹⁰⁸ although from the Board’s perspective politically understandable.

It is difficult to argue that the drug control framework should be considered neatly alongside human rights instruments simply because the preamble talks of the health and welfare of humankind, especially since elsewhere the same preamble applies the term ‘evil’. On the contrary, it provides an example of a ‘potentially conflictual regime complex whereby the intersection of the two systems can generate considerable friction and associated normative contestation amongst system actors’.¹⁰⁹ Put another way, ‘the fundamentally differing perspectives of the two systems suggest, or in some cases even require, opposing solutions to the same ‘problem’.¹¹⁰ Such friction contributes to the continuing existence of rights violating policies in many parts of the world.

Concluding comments

As exemplified by the *Celebrating 60 Years* report, recent years have witnessed concerted efforts by the Board to reframe the normative framework constructed by the Single Convention and the associated presentation of the international drug control regime as one totally in tune with human rights norms and obligations. Yet, the drug issue remains a cross-cutting policy domain often saturated with human rights abuses. Drafting decisions concerning hard law instruments made by states 50 and 60 years ago continue to exert often complex but substantive influence on state behaviour. The same can be said for the more recent 1988 Convention. Moreover, what might be regarded as path dependency generates structural inertia that pushes back against any normative shifts generated by soft law instruments. While it is reasonable to suggest we are witnessing the emergence of a regime complex comprising the intersection of the international drug policy architecture with other multinational

structures addressing a range of issues, predominantly human rights, it is misguided to present the process as automatically smooth and mutually reinforcing.

It is true that ‘productive friction’ can be a positive product of regime interaction. Further, if exploited correctly it may assist in improving regime performance. Consequently, as argued elsewhere,¹¹¹ it is increasingly necessary for the INCB to further engage with NGOs involved at the country level that are well placed to assist with systematic human rights monitoring and collaborate with UN human rights bodies in Geneva. In this area as in others, this might include the utilisation of appropriately robust civil society-generated data sets to complement the current reliance on those provided by States Parties. Reconsideration of the Board’s composition to include (formally or otherwise) a nominee from the Office of the High Commissioner on Human Rights also appears ever more pressing. Although in both these instances it should be acknowledged that with regime complexity comes fundamental questions about how elemental institutions establish overlapping and potentially rival authority claims.¹¹² Furthermore, in its role in highlighting issues of concern to governments, it is important that the Board’s Annual Reports accurately reflect a wide range of instances where tensions exist between human rights and drug policy. It should be noted, for example, that potential violations around the resumption of aerial fumigation in Colombia were once again ignored in the Annual Report for 2020.¹¹³ To be sure, dedicated engagement to human rights as they pertain to drug policy should involve explicit reference to states’ positive human rights obligations (for example in relation to harm reduction measures and the decriminalisation of drug possession for personal use). The Board’s increasing and welcome attention on direct human rights violations is vital, but insufficient.

All that said, and despite the Board’s determined endeavours to reframe the narrative, within the context of the regime’s powerful prohibitionist expectancy it remains difficult to ignore the fundamental and problematic tensions that exist between international drug control and the UN’s human rights framework. Although as discussed above, such negative frictions manifest themselves in many ways, a particularly visible point of conflict pertains to the increasingly pressing issue of regulated cannabis markets. As is to be expected, this is discussed at several points within the Annual Report for 2020. This justifiably reminds States Parties that the policy choice exceeds the legal boundaries

of the conventions.¹¹⁴ Significantly, it also features in the ‘Challenges’ section of the Special Report. Here it is presented alongside a range of other challenging issues: illegal cultivation, drug use prevention and treatment services, new psychoactive substances, proliferation of non-scheduled chemicals including designer precursors, medical cannabis use, the internet, and human rights. As the Board notes, while the system of ‘monitoring and control’ has ‘performed relatively successfully over the years’,¹¹⁵ there are ‘new challenges arising, ... which were not yet known when the 1961 Convention and the 1971 Convention were adopted’.

Crucially, it continues to point out that ‘The international community must find the response to tackle these challenges within the present normative drug control system *and/or by creating new normative tools and instruments and possible additional voluntary ways of international collaboration*’ (emphasis added).¹¹⁶ In fulfilling its role to identify for governments perceived ‘gaps and weakness in national control and treaty compliance’ and make ‘suggestions and recommendations for improvements at both the national and international levels’ the Board certainly has the ability to introduce such ideas to the discourse. It is, however, up to Member States to take up the challenge. In this instance at least, full responsibility for action lies with them to modernise the regime and bring it into line with contemporary realities.

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6. *Report of the International Narcotics Control Board for 2020*, p. iii
7. For a list of previous IDPC responses and analyses of the INCB annual reports, see: <https://idpc.net/publications/2020/12/the-international-narcotics-control-board-on-human-rights-a-critique-of-the-report-for-2019>
8. *Celebrating 60 Years*, Paras 7 and 17
9. *Celebrating 60 Years*, p. iii
10. It is worth noting that the term ‘cornerstone’ was challenged by some states during the 2016 UNGASS negotiations. As a result, compromise language referring to the human rights instruments as well as the drug control treaties was included in the preamble of the UNGASS Outcome Document: ‘We underscore that the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol, the Convention on Psychotropic Substances of 1971, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and other relevant international instruments constitute the cornerstone of the international drug control system’ (emphasis added). See: <https://www.unodc.org/documents/postungass2016/outcome/V1603301-E.pdf>. That said, references to the drug control treaties alone remain commonplace within CND discussions and member state statements
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13. Ratification defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. See: <https://ask.un.org/faq/14594>. Here adherence is understood to be the ongoing compliance with treaty obligations
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33. Bewley-Taylor, D. & Jelsma, M. (2019), ‘Drugs and crime’, in: Chesterman, S., Malone, D.M., Villalpando, S. & Ivanovic, A. (Eds), *The Oxford Handbook of United Nations Treaties* (Oxford University Press), p. 271
34. *Celebrating 60 Years*, Paras 43-49
35. *Celebrating 60 Years*, p. iii
36. *Celebrating 60 Years*, see ‘Challenges’ section Paras 104-107
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38. *Report of the International Narcotics Control Board for 2020*, p. 55

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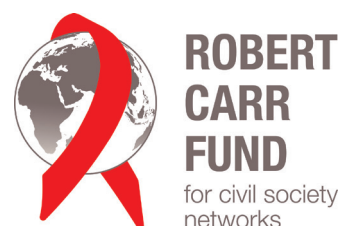
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The International Drug Policy Consortium (IDPC) is a global network of NGOs that come together to drug policies that advance social justice and human rights. IDPC's mission is to amplify and strengthen a diverse global movement to repair the harms caused by punitive drug policies, and to promote just responses.