

Advocacy Note

A Call to the new Secretary of the International Narcotics Control Board: Ongoing Challenges

On February 1 2010, Jonathan Lucas was appointed as the new Secretary of the International Narcotics Control Board (INCB or Board) and chief of the INCB Secretariat. He starts with this new challenge the week after this year's CND session taking place from 8-12 March. The Secretariat plays an important role in assisting the Board in the exercise of its treaty related functions and operates as an "administrative entity" of the UN Office on Drugs and Crime (UNODC) in Vienna. According to the Board, although linked to the UNODC, the Secretariat reports solely to the INCB on matters of substance. It should be noted, however, that such an arrangement inevitably creates close ties between the Secretariat and the Executive Director of the UNODC. Mr Lucas succeeds Mr Koli Kouame who retired from the organization on 31 January having served as Secretary and chief for nearly six years.

With a Master's degree in Political Science and a PhD in International Law/Economics, Mr Lucas is no stranger to the field of international drug control. He began his professional career in 1982 as a consultant with the International Labour Organization. Later, however, Mr Lucas served as Legal and First Officer for the policy-making organs of the United Nations International Drug Control Programme and as Senior Programme Management Officer in the Office of the Executive Director/Director General, of the then Office on Drug Control and Crime Prevention/United Nations Office at Vienna. From 1998 to 2004, he was Secretary of both the Commission on Narcotic Drugs (CND or Commission) and the Commission on Crime Prevention and Criminal Justice. Since then, Mr Lucas has been the Special Representative of the UNODC to the Republic of South Africa.

The IDPC offers its congratulations to Mr Lucas for his appointment to this prestigious and, as we approach the first CND session to follow the High Level Segment (HLS) of the Commission last year, increasingly pivotal post. 12-months ago, member states met to evaluate the targets set at the 1998 UN General Assembly Special Session on Drugs (UNGASS). While intended to produce a unitary position on the direction of international drug control for the next decade or so, the HLS and resultant Political Declaration revealed a clear divide in state's attitudes towards domestic drug control. On one side of the divide stand a growing number of nations that are choosing to adopt pragmatic evidence-based harm reduction policies, while on the other side stand countries continuing to put faith in a zero-tolerance approach that has failed to produce any significant and sustained result over the past decade. This mounting lack of consensus puts the INCB, and its Secretariat, in an increasingly important position within the UN drug control framework. As the watchdog of the drug control treaties, it is essential that the Board deals respectfully and sensitively with the deepening variance in interpretation of the treaties by their owners; the member states themselves. Moreover, in moving to help with the resolution of growing systemic tension, it seems as if the Board needs to adopt a Janus-like stance; looking both forwards and backwards. In order to redress some of the "Mission Creep" displayed in recent years and discussed in previous IDPC briefs, the INCB would do well to look back to its mandate as laid out in the conventions. Simultaneously, however, in order to remain relevant and in line with other similar treaty bodies, it must also look forward and redefine its customary practice in a manner more appropriate to a modern organization operating within an increasingly diverse and complex international environment.

With this in mind, the IDPC has identified key areas of concern that it would like to bring to the attention of the incoming Secretary. These include: the lack of objectivity on the INCB's part regarding alternative

drug policy choices from member states and its refusal to encourage open and constructive debate on drug policy between the Board, member states, relevant UN bodies, civil society and NGOs; the need for a balanced approach in the INCB's work on drug policy; the need for a more diverse range of expertise in INCB membership; the lack of transparency for the Board's operations; the need for increased engagement with civil society to ensure the fulfilment of the Board's functions; and the need for a more pro-active attitude to monitor the functioning of the Board within its mandate, and to encourage a process of modernisation of its role in line with established UN practices. While interconnected, these concerns can be organised under the following headings.

The INCB must operate according to a spirit of dialogue

The INCB should revive the spirit of dialogue that was intended to be the key characteristic of its mandate. Indeed, Article 9 of the Single Convention on Narcotic Drugs refers to "All measures taken by the Board" (Emphasis added) taking place in terms of "co-operation with Governments" and via mechanisms for "continuing dialogue." The only exception to this spirit of cooperation relates to specific conditions laid out in the 1961 and 1971 Conventions. Article 14 of the Single Convention notably refers to circumstances where "the Board has objective reasons to believe that the aims of this Convention are being seriously endangered by reason of the failure of any party, country or territory to carry out the provisions of the Convention" (Emphasis added). Within this context, the general mandate established for the Board under the Single Convention, especially after the 1972 Protocol, is quite broad. In fact, the Board "may raise with any Government...any question related to the aims of the Single Convention." But, this broad mandate is restricted to suggesting consultations and asking for explanations. The aim is dialogue with governments, who are, even then, not legally bound to engage in such consultations. As the 1976 Commentary on the Protocol Amending the Single Convention points out, the INCB is not allowed to give advice to any government unless that government requests the Board to do so, let alone cast judgement or recommend governments to change their policy. Such conduct is outside its remit, unless and until the Board has objective reasons – which it needs to substantiate – to argue that certain countries are undermining the aims of the conventions in such a serious way that it may affect other parties to the treaty. In such cases the Board needs to invoke explicitly Article 14 of the 1961 Convention or the similar Article 19 of the 1971 Convention for which special rules apply. Those rules include that any Party shall be invited to be represented at a meeting of the Board at which a question of direct interest to it is considered under these articles and that the report includes an account of the explanations given by governments. Also, if a decision reached by the Board under these articles is not unanimous, the views of the minority shall be stated.

Recent years, however, have seen the Board, in its Annual Reports and periodic statements as well as in comments by its members and former Secretaries, often without consultation openly criticize the policy choices of states that deviate from its own specific (and highly selective) interpretations of the conventions, yet by any measure do not come under the provisions of Article 14 of the Single Convention. Furthermore, while it is true that Article 15 of the Single Convention does not impose restrictions on the Board concerning the kind of observations and recommendations that its reports may obtain, Annual Reports must still be formulated in accordance with Article 9. Consequently, rather than adopting such a blinkered and bellicose position, it would be more constructive if advice were provided in full understanding of the complexity of drug policy making today, in respect of other international commitments countries have made, respectful of constitutional principles and basic concepts of national law, and based on a spirit of cooperation rather than by a narrow view of the letter of international law. A return to a spirit of dialogue requires a process of serious self-reflection of the Board members about the role Member States, via the treaties, have asked them to play and a willingness to engage in a real exchange of views and open debate about differences of opinion. To this end, while remaining an important element of the UN's drug control apparatus, the Board's Annual Report also needs to be more balanced and include substantiation for the positions it contains. Specifically, comments and differences in opinions expressed in writing, during country missions, or at the CND debate about the Annual

Report, could be included in the final version of the Report. Similarly, generalized observations should be accompanied by accurate confirmation of statements as well as references to relevant scientific and legal documents and those produced by the UN itself.

The INCB needs to avoid “Mission Creep”

Closely related to this first key challenge is the need for the Board to be more cautious in not overstepping its mandate. Of relevance here is the prudence expressed in the Commentary on the protocol amending the Single Convention, for instance, notes, “the Board may in particular not recommend remedial measures to an individual government without its agreement.” The mandate establishes the Board’s role to be one of assistance to Member States and not to condemn them except in extreme cases of grave violations that undermine the very existence of the treaties, and even then only after a process of consultation. In addition, the INCB has no official remit to reprimand a state for not cooperating with what the Board deems to be the terms of the 1988 Convention. In fact, apart from its particular function to recommend precursors under article 12, no mandate is given to the INCB to monitor the implementation of the Convention. Indeed, as the Commentary to that treaty makes clear, the Board’s mandate is “more restricted than those of parallel articles in the 1961 and 1971 Conventions. Not only are the Board’s powers thereunder limited to matters within its competence as defined by the Convention (rather than extending the provisions of the 1988 Conventions as a whole) but also [...] the Board does not retain the right under article 22 itself that it has under the other conventions to call the attention of the parties, the Council and the Commission to the matter.”

This has not always been the case. There are a growing number of issues that the Board considers within its competence to make judgements without being requested to do so and without engaging in consultation first. A key instance of such “mission creep” can be seen in the INCB’s response to the adoption of the harm reduction approach by a growing number of parties to the conventions – a point highlighted at the High Level Segment of the 2009 CND. UN member states have twice unanimously endorsed their commitment to provide people at risk of HIV with harm reduction services. Other UN agencies, such as the WHO, the United Nations Development Programme, UNAIDS and more recently and tentatively, the UNODC, have chosen to engage with and support harm reduction principles. Further, a 2002 report by the Legal Affairs Section of the then United Nations International Drug Control Programme concluded that most harm reduction interventions, including “Needle and Syringe exchange,” “substitution and maintenance treatment” and “drug injection rooms” did not contravene the conventions. Yet, the Board remains largely hostile to the harm reduction approach. Rather than acting as a watchdog of the treaties, describing the global situation and bringing attention to emerging challenges and dilemmas, the Board often seems to play a role of guardian of a particular and often opaque interpretation of many of the treaty’s provisions. This has resulted in the INCB issuing statements in its public discourse – such as the Annual Report – and in private communications with states parties that are at odds with the evidence base and legal scholarship on harm reduction. In attempting to influence the internal policies of governments that are working within their own interpretations of the treaties without prior consultation and agreement, the Board is perilously close to overstepping its mandate. A similar dynamic can also be seen with regard to tolerant cannabis policies and the “decriminalization” for drugs for personal use within some member states; an issue criticized once again in this year’s Annual Report. This stance is especially problematic bearing in mind both the Board’s lack of mandate in relation to the 1988 Convention and the flexibility permitted in Article 3 regarding the criminalization of the possession, purchase or cultivation for personal consumption relative to the “constitutional principles and basic concepts” of national legal systems.

Another concern regarding ‘mission creep’ relates to the scheduling of controlled substances. The Board’s mandate for advising on scheduling is restricted to the precursor chemicals listed in the Tables of the 1988 Convention, a task for which the INCB convenes an Advisory Expert Group. The Board, therefore, should refrain from interfering in the scheduling procedures for the 1961 and 1971 treaties.

This is a task specifically delegated to the WHO; an important treaty body that the INCB has increasingly marginalized in recent years. Representatives of the INCB are invited to attend meetings of the WHO Expert Committee on Drug Dependence to hear its opinion on substances under review. Voicing its own recommendations to the CND about the scheduling of narcotic and psychotropic substances is, however, out of the Board's remit. Moreover, such a practice is confusing, especially when these unwarranted opinions contradict the expert advice of the WHO; witness, for example, recent INCB interventions in relation to ketamine, Dronabinol and khat.

Board Membership – There needs to be improvements in Scope and Protocol

Mindful of cross cutting and complex nature of contemporary drug policy, the Board should include members with expertise on a wider range of drug related issues, particularly on the intersection of drug policy and HIV/AIDS prevention, and the intersection of drug policy and human rights. Both domains are of increasing importance, particularly in light of the engagement by increasing numbers of parties to the conventions with various harm reduction modalities. Although recent years have seen the Board's proficiency on international relations increase, it is also noteworthy that even after the recent elections to it, the thirteen-member body still lacks expertise on international law. This is largely a product of the electoral process with Board membership being subject to the political interests of member states rather than an objective concern for appropriate diversity. It is, nonetheless, a significant lacuna within the context of the increasing tension between the interpretative stance on the treaties held by the Board and those adopted by some parties to the conventions. The Board does not appear to reflect the diversity of views on drug policy that exists with the broader fabric of contemporary society and there is little understanding of the Board's isolation – if not outright contempt for its positions – in the broader international academic community. Furthermore, the conduct of the Board's membership is itself governed by the conventions. The Single Convention states, "Members of the Board...during their term in office...shall not hold any position or engage in any activity which would be liable to impair the impartiality in the exercise of their functions" (Emphasis added.) The past behaviour of some members, along with a lack of comment by the Board, makes it difficult to argue that the INCB is a truly independent arbiter of debates around, for example, harm reduction.

The operations of the Board must become more transparent

The Board must lose its status as one of the least transparent and most secretive of UN bodies. It meets in secret, and while agendas can now be found on the INCB's website, no minutes of its meetings are published and nor are the analyses by which it arrives at its positions on policy issues. Furthermore, the thousands of communications and letters with Parties sent each year are confidential. Although WHO and UNODC staff do attend sessions of INCB meetings, for the most part they do so only as observers with the WHO representative restricted to specific agenda items. The Board's country visits are also conducted under a cloud of secrecy. Recent years have seen the Board post brief reports on missions to member states on its website. It does not, however, publicize them in advance, offer criteria for how countries are selected for visits, which member of the Board goes where, or hold public forums while on these visits. Although the countries visited by the INCB undoubtedly value the chance to discuss their drug policies in confidence, the secrecy surrounding the planning of country visits and the lack of mechanisms for input from health professionals or non-governmental experts surely impedes the effectiveness of the Board's visits. Such secrecy insulates the Board from healthy dialogue about its focus and priorities.

The Board justifies this secrecy by reference to its 'independent' nature and the rules of confidentiality legally established under the treaties. Yet, the only mention of confidentiality relates specifically to actions the Board initiates under article 14 of the Single Convention, article 19 of the 1971 Convention and article 12 of the 1988 Convention, and those rules are meant to protect the countries concerned

rather than the Board. The fact that the INCB has applied these rules to the entirety of its conduct is a purely procedural issue and is not related to its mandate as laid out in the conventions. In reality, the Board's private meetings are relics from the days of the Permanent Central Opium Board, the INCB's predecessor body dating to the League of Nations. This does not, however, justify the Board's secrecy in the 21st century and its decision not to modernise in accordance with current UN standards. Moreover, that Article 11 of the Single Convention permits the Board to develop its own rules of procedure also means that these rules are non-binding and legitimately open to change. Full country mission reports and correspondence with Member States could be made publicly available unless the country involved has requested confidentiality.

As it is, however, current practice means that the Board is completely lacking in any accountability of procedure. This shroud does little for the image of the body and further undermines confidence in the INCB's ability to carry out its mandate in a balanced and sophisticated manner, reflecting both the realities of the contemporary global drug situation and the plurality of views that exist on how best to deal with it.

The INCB should increase engagement with Civil Society

Civil society engagement with UN policy making is specifically mentioned in the Charter of the UN as well as in the more recent ECOSOC Resolution 1996/31. In the field of drug policy, civil society was able to contribute to the deliberations at the 2009 High Level Segment, through the valuable work of the Vienna NGO Committee. Increasingly throughout the extended family of UN bodies, civil society organizations and NGOs are seen as a valuable resource, providing additional forms of information and advice and a link to affected communities. Given the UN's heavy reliance on data supplied by governmental actors and agencies, the role of civil society to provide checks and balances against official sources is clearly important. Civil society is also often best placed to convey information and perspectives from the field, something that the, sometimes remote, UN monitoring and policy bodies are ill-equipped to do. Such a role is of particular significance in the case of a body like the INCB, which is wholly reliant on information supplied by member states. It is at least arguable that, without the different modes of information derived from non-governmental stakeholders, it is impossible for the INCB to gain the insight, understanding and richness of perspective required to fulfil its mandate. This may help explain contradictions sometimes found within the Annual Report.

In the past, the President of the Board said that the body's mandate is to communicate with governments, not civil society. However, the conventions do specifically mention the Board's ability to use non-governmental sources of information, albeit in rather restricted circumstances. As such, non-engagement is the choice of the INCB, not the result of mandate or legal barrier. Nothing in the conventions preclude engagement with civil society since it is open to the Board itself to develop its own working methods and rules of procedure in relation to the mechanisms established to fulfil its mandate. In contrast, other similarly constituted UN bodies, notably the human rights treaty bodies, have chosen to engage extensively with civil society. As such they are more in line with the views of the former UN Secretary General, Kofi Annan, when he observed "Partnership with civil society is not an option; it is a necessity." The Board should consequently develop specific mechanisms for receiving information from and consulting with relevant civil society organizations throughout the Board's work, including country visits.

The Board must overcome its "Selective Reticence" on key issues

Alongside the recent colonization by the INCB of areas outside its remit as defined by the conventions and their commentaries, there is, on the other side of the coin, a coyness and timidity about certain elements of its role. While engaging in "Mission Creep" in some areas, the Board sometimes refrains

from intervention where circumstances, and its duties under its mandate, would warrant a robust response. The IDPC remains concerned by this practice in relation to a number of areas. First, in line with its generally negative position on harm reduction, the Board has demonstrated only lukewarm support for opiate substitution therapies (OST), such as those employing methadone and buprenorphine. It rarely mentions such well researched interventions within its Annual Reports and has neglected to call to account those countries that fail to make available treatments to their citizens. On the rare occasions where OST is mentioned, the Board often only notes its concern about potential diversion of methadone and buprenorphine to the illicit market. Second, the Board has also demonstrated some leadership in its commitment to expanding the provision of opiate medications for pain relief. Nonetheless, problems remain in regard to its conceptualization of need or demand for these medicines. The INCB's persistent and largely inflexible privileging of concerns over diversion, as well as its more restrictive ethos, renders virtually unachievable the already difficult balance between its restrictive mandate and its duty to ensure that therapeutic need is met. Third, while technically independent of the UN, the Board's status as a treaty body that is funded through, reports to, and is elected by various parts of the organization, means that it must fulfil its mandate in line with broader UN goals and principles; including those relating to human rights. The issue of human rights is of course central to the ideals and operation of the UN. Consequently, as the body responsible for monitoring the implementation of the UN drug control conventions, the INCB should not choose to ignore instances where parties to those conventions seemingly contravene other UN instruments, principally the UN Charter, in the name of drug control. Put simply, the drug control conventions should not operate in a legal vacuum. While this is the case, there are many examples where the Board has privileged enforcement approaches above concerns for human rights and chosen not to comment upon various points of tension between human rights and the policies of some parties to the conventions. Thus, while his predecessor noted in 2007 that the INCB was not set up to deal with human rights, it is our hope that Mr Lucas' background in international law will ensure that the Board is made aware that it cannot remain detached from the issue.

Mindful of both his extensive experience within the UN and his appreciation for the intricacies of the international legal system, IDPC hopes that the new Secretary will work towards the twin goals of refocusing the Board's activities to those within its mandate and, within this framework, encourage it to modernize its practices. Failure to do so risks making the Board an irrelevant and anachronistic body during a period of flux and a time when parties to the conventions are most in need of independent and objective expertise. To this end, the IDPC urges Mr Lucas to:

- Encourage the Board to work in a spirit of dialogue and consultation with all member states and UN bodies such as the WHO.
- Encourage the Board to ensure its Annual Report is balanced and substantiated, including reference to the responsibilities of parties in relation to issues including drug treatment and human rights.
- Encourage the Board to strike a more appropriate balance in its approach to regulation of drugs for pain relief.
- Remind the Board of its mandate relative to making judgements on the drug policy choices of member states that are not in unison with its own narrow interpretations of the conventions and relative to the scheduling of substances for international control.
- Encourage the Board to take a leading role in stimulating debate and movement towards resolving disagreements between member states. For instance, where legal ambiguities and disagreement persist on the place of the coca leaf in the conventions, tolerant policies on cannabis use and, particularly, harm reduction practices - including controlled heroin prescription and drug consumption rooms.
- Stress to member states the importance of diversity in expertise of Board membership.

- Ensure that Board members are fully aware of the conditions of membership.
- Encourage increased transparency of the Board's operations.
- Encourage the Board to engage with civil society to assist in the fulfilment of its functions.
- Encourage Member States to take a more pro-active attitude to monitor the functioning of the Board within its mandate, and to encourage a process of modernization of its role in line with established UN practices.