

THE RISE AND DECLINE OF CANNABIS PROHIBITION

THE HISTORY OF CANNABIS IN THE UN DRUG
CONTROL SYSTEM AND OPTIONS FOR REFORM

The INCB and cannabis:
from description to condemnation



The INCB and cannabis: from description to condemnation

“Monitoring and supporting Governments’ compliance with the international drug control treaties” the International Narcotics Control Board (INCB or Board) describes itself as “the independent and quasi-judicial body for the implementation of the United Nations drug control conventions”.¹ As with other issues deemed within its purview, the Board’s view of the way different parties to the conventions choose to address cannabis use, or in the Board’s terminology, “abuse”, within their borders has fluctuated over time. Its position has, in general, hardened regarding policies deviating from strict prohibition of the non-medical and non-scientific use of the substance, a not surprising response bearing in mind increasing engagement with or consideration of more tolerant approaches by member states. This trend runs through its annual reports, periodic statements and other interventions in the policy debate, sometimes arguably beyond its mandate.

As will be described in this chapter, in recent decades three periods can be identified in relation to the way in which the Board’s views and performance on cannabis have developed. Since 1980 there was a gradual toughening of stance from an initially descriptive attitude towards a greater concern for and condemnation of countries over their tolerant cannabis policies. During the decade following the UN General Assembly Special Session (UNGASS) on drugs in 1998, this approach continued with the increase of less-punitive cannabis policies receiving extraordinary prominence within the INCB annual reports; a process that combined with the Board’s attempts to put the issue on the international agenda. Most recently, since 2009, it has played a very vocal, at times aggressive and ultimately unsuccessful role trying to counter policy shifts towards legal regulation.

The hardening of the INCB position: 1980-1998

In the early 1980s, comment within the annual reports was generally descriptive. While noting with concern the scale of the cannabis market and the growing and “widespread assumption” or “erroneous belief” that the drug was “harmless”, there was no condemnation of specific national policies. The Board urged the importance of research; the dissemination of findings across “the public at large”;² and in keeping with its close engagement with the prohibition-oriented dominant narrative during this period, commended authorities who had given “further proof of their commitment to ‘wage war on drugs’”, including in relation to cannabis seizures.³

By 1983, the INCB began to highlight concern over “disquieting signs that in the face of the magnitude of the [drug] problem determination may be giving way to



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permissiveness”. The Board notes that “Circles in certain countries apparently assume that to permit unrestricted use of some drug, regarded by them as less harmful, would permit better control of other drugs which they deem more perilous to health. To adopt such an approach would be retrogressive.” Within this context, and referring to its report for 1979, it “reaffirms that each Government is free to decide in light of the particular conditions existing in its country on the most appropriate measures for preventing the non-medical consumption of cannabis.” Nevertheless, it was quick to remind states that they “must also take into account the international implications which could result from its decisions” and that recreational use “is illegal under the 1961 Convention.”⁴

One might note that, despite significant shifts away from a prohibition-oriented approach to cannabis use within some states, the Board does not directly criticise any specific national policy, including that of the Dutch.



Rather, in 1983 the Board states that it has been “following with interest developments in the Netherlands” and after dialogue with the government “agrees that legislation is in conformity with the Single Convention.”⁵ A similarly non-confrontational and descriptive position is taken in 1989.⁶ Two years later the Board also notes in a very matter of

Mandate and functions of the INCB

The International Narcotics Control Board (INCB) is the independent and quasi-judicial monitoring body for the implementation of the United Nations international drug control conventions. It was established in 1968 in accordance with the Single Convention on Narcotic Drugs, 1961. It had predecessors under the former drug control treaties as far back as the time of the League of Nations.

Broadly speaking, INCB deals with the following:

- As regards the licit manufacture of, trade in and use of drugs, INCB endeavours, in cooperation with Governments, to ensure that adequate supplies of drugs are available for medical and scientific uses and that the diversion of drugs from licit sources to illicit channels does not occur. INCB also monitors Governments’ control over chemicals used in the illicit manufacture of drugs and assists them in preventing the diversion of those chemicals into the illicit traffic.
- As regards the illicit manufacture of, trafficking in and use of drugs, INCB identifies weaknesses in national and international control systems and contributes to correcting such situations. INCB is also responsible for assessing chemicals used in the illicit manufacture of drugs, in order to determine whether they should be placed under international control.

In the discharge of its responsibilities, INCB:

- Administers a system of estimates for narcotic drugs and a voluntary assessment system for psychotropic substances and monitors licit activities involving drugs through a statistical returns system, with a view to assisting Governments in achieving, inter alia, a balance between supply and demand.

- Monitors and promotes measures taken by Governments to prevent the diversion of substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances and assesses such substances to determine whether there is a need for changes in the scope of control of Tables I and II of the 1988 Convention.
- Analyses information provided by Governments, United Nations bodies, specialized agencies or other competent international organizations, with a view to ensuring that the provisions of the international drug control treaties are adequately carried out by Governments, and recommends remedial measures.
- Maintains a permanent dialogue with Governments to assist them in complying with their obligations under the international drug control treaties and, to that end, recommends, where appropriate, technical or financial assistance to be provided.

INCB is called upon to ask for explanations in the event of apparent violations of the treaties, to propose appropriate remedial measures to Governments that are not fully applying the provisions of the treaties or are encountering difficulties in applying them and, where necessary, to assist Governments in overcoming such difficulties. If, however, INCB notes that the measures necessary to remedy a serious situation have not been taken, it may call the matter to the attention of the parties concerned, the Commission on Narcotic Drugs and the Economic and Social Council. As a last resort, the treaties empower INCB to recommend to parties that they stop importing drugs from a defaulting country, exporting drugs to it or both. In all cases, INCB acts in close cooperation with Governments.

(source: *incb.org*)

fact manner, “The authorities of the Netherlands continue to apply the guidelines which were adopted in 1976 for the detection and prosecution of offences under the country’s Opium Act and take a relatively tolerant attitude towards small-scale dealing of cannabis conducted in cafes, while at the same time restricting trafficking in other drugs as much as possible. This policy is designed to reduce the involvement of young people with criminal elements. Abuse of cannabis is reported to have been stable since the beginning of the 1970’s.”⁷



During the mid-to-late 1980s, comment on the drug was restricted to general criticism of “permissiveness” among national authorities, their toleration of the use of “so-called ‘soft’ drugs” and how, in the view of the Board, this risked acceptance of drugs use more generally.⁸ Any interest in cannabis policy within the annual reports during this period appears to have been superseded by increasing concern for synthetic “designer drugs”, drugs and organised crime, and the link between injecting drug use and AIDS. During the late 1980s and early 1990s, however, the Board’s response to cannabis becomes part of a more general and progressively more vigorous attack on calls for drug “legalization” within various nation states. Within this context, its position on the Netherlands and other “industrialized” countries taking a tolerant approach to cannabis use begins to change.

For example, in the *Annual Report for 1992*, amidst much analysis of what at this time it defines as “well-intended” discussions around legalization and its growing concern

over more potent strains of cannabis,⁹ the Board explicitly contrasts the experiences of different nations with different relationships to the drug. Acknowledging the primacy of “the constitutional principles and basic legal concepts” of parties’ “legal systems”,¹⁰ but also stressing the limits of latitude within the treaty structures, the Board notes that it “would like to draw the attention of industrialized countries to the fact that in 1961 they initiated the introduction of the international drug control of cannabis at a period when serious cannabis abuse problems did not exist in their countries.” Foreshadowing a ‘North versus South’ narrative that was to gain considerable traction a decade later and implicitly claiming the successful implementation of article 49 of the Single Convention,¹¹ the Board goes on to point out, “Countries in which cannabis consumption was traditional implemented the provisions of the 1961 Convention.” The report continues, “If cannabis were to be legalized, the responsibility of industrialized countries would be enormous: they would be obliged to justify, at the same time, their 1961 decision to prohibit cannabis and their new decision to add cannabis to other legal substances like alcohol and tobacco.”¹²

Within this discursive framework, the Netherlands becomes the focus of increasing criticism, perhaps a trend mirroring the increasing commercialization of the coffeeshop system. However, not until 1994 and the Board’s devotion of space within the report to “Evaluation of the effectiveness of the international drug control treaties” do we see the now familiar highly critical tone. The transformation of what in the previous year been “lively debate”¹³ into condemnation might well be explained by the increasing presentation within the policy reform debate of the Netherlands’ approach as an example of a successful alternative to the prohibition of non-medical and non-scientific cannabis use. In the face of this, the Board argues that it is “questionable whether the theory of the separation of markets has ever demonstrated its practicability.” Moreover, and without supporting evidence, it continues to state, “Places where cannabis distribution is tolerated have attracted traffickers of other drugs and abusers, as well as potential abusers; thus, all types of drugs seem to be readily available at such places.”¹⁴

Such a hardening of stance can also be seen in the Supplement to the Annual Report for 1994. Here the INCB emphasizes, “In the years following the adoption of the 1961 Convention, cannabis abuse also developed in countries where traditional forms of cannabis use (ceremonial, religious, medical or social) never existed, such as countries in western Europe.” “The 1961 Convention” it contends, “does not provide adequate control measures for those situations, as such situations were not foreseen at the time of its adoption.” The Board also argues that the availability of stronger varieties of cannabis compounds “the already growing problem of non-traditional abuse”.¹⁵ Indeed, moving away from a focus on solely “non-traditional” use and examining what it regards to be

increasing THC content of different varieties of cannabis, the Board “recommends that consideration should be given to strengthening the provisions of the 1961 Convention regarding the control of cannabis” by, among other things, “extending the control to cannabis leaf”. One should note, as was explained in the first chapter, that the cannabis leaf was not included within the Schedules of the Convention, but by 1994 this omission is regarded as incongruous since leaves were now seen as often containing more “THC than cannabis resin”. As such, the Board continues “it might be necessary to consider a revision of the classification of the cannabis plant and cannabis products in the 1961 Convention, ensuring that there is a correlation with the potency of the plants and the products.”¹⁶

In addition to recommending a strengthened control regime, by the mid-1990s the Board was also responding to any perceived weakening of the system in resolute and defensive terms. For example, in its report for 1996 it commended authorities in the U.S. for their “firm stand” against referenda in November that year concerning the use of cannabis for “alleged medical purposes”, democratic processes that the Board deemed to be “indirect but evident attempts to legalize cannabis”. We see the Board’s language taking on a hostile tone with references to “well-financed, non-profit foundations sponsor institutions that are developing strategies for the legalization of drugs [sic].”¹⁷

The same year, in reference to plans in Germany to distribute cannabis through pharmacies, the report is overtly critical of the Netherlands and any claims that the “experience of the coffeeshop policy there has been ‘positive.’” The state-

ment that the toleration of coffeeshops “does not conform to the provisions of the 1961 Convention” reinforces this position. Lacking any awareness of irony, in the same paragraph it notes that the Dutch level of cannabis use is not significantly higher than in other European countries and much lower than in North America.¹⁸ This is redolent of the President of the Board’s public statements that year. When responding to a Dutch television interviewer’s statement that cannabis policies within the country were “working”, Dr Oskar Schroeder replied, “I’m not really interested if it’s working or not working. What I’m interested in is what you are doing within the lines of the international treaty. That’s what we have to check. We’re not really interested if it works or not.”¹⁹

In one of the first thematic chapters of the Board’s Annual Reports, “Preventing drug abuse in an environment of illicit drug promotion”, the report for 1997 is critical of attitudes towards cannabis across a wide range of areas, including tolerant law enforcement practices. And this was the context in which the Board described the selling of cannabis in coffeeshops as “an activity that might be described as indirect incitement.”²⁰ (See the section on coffeeshops in the next chapter) Moving beyond those sections of society seen as responsible for promoting illicit drug use, the following year’s publication presented cannabis as a key challenge for the future of the drug control system as a whole. A position no doubt influenced by the proximity of the publication’s release to the UNGASS. Under the heading the ‘Cannabis Problem’, the report for 1998 again highlights the success of outlawing and for the most part eliminating the “traditional use and abuse

Hamid Ghodse, President of the International Narcotics Control Board, launches 2011 annual report. Photo: UNODC



of cannabis”. Echoing its position from four years earlier, the Board stresses, however, “In countries where cannabis abuse has spread only in recent decades, there is a need for the 1961 Convention to be implemented more thoroughly, in particular through more effective prevention campaigns drawing attention to the dangers of cannabis abuse, thereby correcting the false image that such abuse has gained among a large segment of the youth population.”²¹ In this respect it calls for more research on the drug (including potential therapeutic properties and medicinal use),²² but also warns, “Political initiatives and public votes can be easily misused by groups promoting the legalization of all use of cannabis.”²³

other increasingly tolerant approaches within a growing number of countries. The following year, the report highlights the growing tension between such practices and strict adherence to the treaties. Moreover, as part of an unusually lengthy 22-paragraph section devoted to the ‘Control of cannabis’ the Board notes the existence of “some shifting towards a more liberal cannabis policy in several developed countries,” singling out Spain, Italy, Luxemburg and Portugal.

In these countries, the Board notes, “possession of cannabis for personal consumption is not considered a criminal offence, and acts preparatory to personal consumption,

INCB President Raymond Yans during the interview in which he accused Uruguay of having a “pirate attitude” regarding the conventions.



The INCB’s views during the ‘UNGASS Decade’: 1998-2008

As the international community entered what has been referred to as the UNGASS decade, 1998-2008,²⁴ the Board’s position on cannabis continued to harden. Indeed, having noted in the report for 1999 in hostile, yet general, terms the notion that cannabis was regarded in some states as a ‘soft’ drug and that this was sending the wrong message about its safe use,²⁵ the Board began to use the annual report to condemn specific states beyond its usual focus the Netherlands. For example, having expressly noted with concern “grey areas of business” in Switzerland and the “social acceptance” of drugs, particularly cannabis, in Australia in the report for 2000,²⁶ the Board begins responding more generally to decriminalization and

such as acquisition, transportation and possession of cannabis are not penalized. Only administrative sanctions apply to those acts.”²⁷ In a common refrain it reproaches the Netherlands for its coffeeshops, but now it also criticises legislation under consideration in Switzerland, Belgium and the United Kingdom. The Board notes that if the proposed Swiss policy were to be approved it would “amount to an unprecedented move towards legalization of the consumption, manufacture, possession, purchase and sale of cannabis for non-medical purposes” and “would not be in conformity with international drug control treaties, in particular the 1961 Convention”²⁸ Similar concerns are expressed in its report for 2002, along with recognition of ongoing discussions on “liberalizing or legalizing” cannabis in several states in the United States. On this point, the INCB expresses its appreciation that the

U.S. Federal government “continues to ensure that national laws in line with the international drug control treaties are enforced in all states.”²⁹

While, due to the different nature of what was taking place in the two countries, the U.K. largely avoided the admonishment directed towards the Swiss within the annual report itself,³⁰ it did not remain out of the line of fire. In 2003, the Board’s President, Philip Emafo, was highly critical of what by this time had become the British government’s decision to re-classify cannabis from a Class B to a Class C drug. Possession of the drug would remain illegal but, unless there were aggravating factors, it was not automatically an arrestable offence. In a letter to its Secretary Herbert Schaepe, the British Under Secretary of State for Anti-Drugs Co-ordination and Organized Crime, Bob Ainsworth, noted that the Board had used alarmist language, omitted any reference to scientific evidence on which the decision to reclassify was based and presented the decision in a misleading way to the media.³¹ During questioning on the issue by a House of Commons Select Committee, Ainsworth commented that the Home Office was

astonished at what was said in that regard. I do not know what legal basis there was for the comments that were made or what research was put into the announcement that was made... I do not know what legal advice they have taken with regard to our changes of classification on cannabis... I think UN bodies ought to base their pronouncements on evidence, fact and legal basis, and not on reaction and knee-jerk comment. It certainly seemed to me that that was exactly what they were doing. If they have some evidence that anything we have done is in any way in contravention of international Conventions, they had better let us know. I do not believe they have, and I do not believe there is any justification for the comments that they made.³²

This increasingly aggressive approach to defending its narrow interpretation of the treaties also manifested itself in the Board moving to set the political agenda and developing organizing narratives for discussion of the drug during the yearly CND sessions.³³ This was evident in March 2002 when at the CND regular session the INCB President Hamid Ghodse expanded upon the critique within the Board’s 2001 report against the European practice of “leniency” towards cannabis use and possession. Ghodse called upon “all Governments and relevant international bodies to examine the issue of cannabis control within the framework of the 1961 Convention”. He continued:

I would like to take this opportunity to remind parties to the Convention of their obligation to notify the Secretary-General, if they have information which, in their opinion, may require an amendment to any of the schedules of the Convention... For example, if there is clear evidence that a substance should no longer be

under international control or should be in a different schedule, this evidence should be made public and disseminated to all parties. In the light of the changes that are occurring in relation to cannabis control in some countries, it would seem to be an appropriate time for the Commission to consider this issue in some detail to ensure the consistent application of the provisions of the 1961 Convention across the globe.³⁴

Ghodse’s remarks are correct in that, then as now, it was CND’s role to consider the issue. Nonetheless, his comments were carefully constructed to induce prohibition-oriented states to halt and ultimately roll back the tolerant policies operating or being discussed by some parties to the conventions. Indeed, as discussed elsewhere,³⁵ the Board had some success in indicting European liberalization as a relinquishment of responsibility for cannabis consumption in the face of concerted efforts to eliminate the cultivation of cannabis by the “traditional” producer states. This “diligent producer versus the lenient consumer state” narrative did much to instigate the introduction of a resolution at the 2002 CND aiming to limit policy manoeuvre within the treaties. While ultimately unsuccessful, several delegates to the Commission attributed the impetus for the resolution to the INCB.³⁶

Another increasingly prominent narrative closely accompanied the emergence of the Board’s binary discourse regarding diligent African-Arab producer states versus lenient western, particularly European, consumer states: cannabis as the weak point within the treaty-based control



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framework. In conjunction with attention to the producer-consumer dichotomy, the Board particularly emphasised this concept in its Annual Report for 2001: “When the international drug control treaties were adopted, the international community emphasized the principle of universality, *since a breach in the international consensus by one State would endanger the implementation of the treaties by other States* [italics added].”³⁷ Framing deviation from a prohibition-oriented approach to cannabis use in such terms, the report continued, “Some Governments have justified changes of policy by stating that the consumption of cannabis is not more dangerous to health than the consumption of alcohol or tobacco and carries a lower risk than the consumption of other drugs such as heroin, cocaine or amphetamines.” It then reminded presumably those same governments of the “mechanisms and procedures” with which parties “if they have such evidence, may propose changes to the conventions” and invited “all Governments and relevant international bodies, in particular the Commission on Narcotic Drugs and WHO, to take note of and discuss the new cannabis policies in a number of countries and to agree ways to address that development within the framework of international law.”³⁸

As to be expected, this theme was also prominent within the President’s statement at the opening of the 2002 CND.³⁹ As with the comments above, both the report and Hamid Ghodse’s accompanying comments were accurate in their suggestions that member states should move to examine the scheduling of cannabis within the conventions. It was evident, nonetheless, that while paying lip service to protocol, procedures and a mandate to highlight tensions within the international system, the Board was far from enthusiastic to discuss formal changes to the parameters of regime that could allow more flexibility for its members, even if that was to be the choice of states within the Commission. Indeed, only a few paragraphs after discussing the mechanisms for rescheduling contained within Article 3 of the Single Convention, the report for 2001 exposes the Board’s position, and in so doing its proclivity for overstepping its mandate. It stated that, “Adding another drug to the same category as alcohol and tobacco would be a historical mistake...”⁴⁰

Until 2009, the reports continue to view the cannabis issue --albeit less explicitly--from this perspective. In so doing they contain many familiar themes, although with the UNGASS fast approaching, some are given increasing prominence as the years go by. With the advance of the calendar the Board increasingly devotes more attention to the issue of the medical use of cannabis. Rather than merely describe the adoption of the policy within various countries, the Board again exceeds its authority by expressing concern over the scientific basis of the practice.⁴¹ As discussed elsewhere, it is not the INCB’s role to make judgments in these terms.⁴² On this issue, the INCB appears especially anxious regarding events in the United States and uses the publication to support the federal government’s position

against the policy decisions of individual U.S. states. This is the case in the report for 2008. Concerned that an increase in medical marijuana schemes in general, and California’s in particular, would lead to an increase in “abuse” the Board “calls upon the authorities in the United States to continue its efforts to stop that practice.”⁴³ Recognition of tensions between Washington, D.C. and the states here echoes concern shown in the report for 2003 about debates within some parts of the U.S. regarding decriminalization and legalization. As was the case throughout the UNGASS decade, the Board openly expresses its support for the federal government’s opposition to any discussion of a shift away from punitive prohibition.⁴⁴

Not surprisingly, the coffeeshop system in the Netherlands remained a point of interest and criticism within a number of reports between 1998 and 2009. That said, from 2004 onwards, the Board adopted an alternative, if somewhat disingenuous approach, to the perennial topic. Indeed, picking up on some adjustments to the way Dutch authorities allowed the coffeeshops to operate, in 2004 the Board presented the refinements in approach very much as the beginnings of a policy reversal. In so doing, it welcomed the initiative and commented that it was “an important step in the right direction – towards full compliance with the international drug control conventions concerning cannabis.”⁴⁵ A similar line was also taken in the report for 2008.⁴⁶

The framing of what were in reality little more than policy refinements in terms of a Damascene conversion and disavowal of the coffeeshop system can in many ways be seen as the deliberate construction of a narrative designed to counter growing engagement with alternative policy approaches in other parts of the world. Indeed, on a number of occasions the Board expressed its concern that the implementation (or even consideration) of reduced penalties for the personal possession and use of cannabis in a number of diverse countries, including Canada and Jamaica, was creating a perception that the drug was harmless.⁴⁷ Conversely, the INCB has always been quick to commend any government deciding not to engage with policies that shift away from its preferred reading of the conventions, as was the case with Switzerland in February 2006.⁴⁸

Within the context of what was then a steady trickle of states away from the punitive approach towards the non-scientific and non-medical use of cannabis and engagement with some form of decriminalization, the INCB president, Hamid Ghodse, used the foreword to the report for 2008 to raise the Board’s concerns. This was particularly poignant in that this was the final report leading up to the High Level Segment of the CND to review progress towards the targets set by the 1998 UNGASS and as such could influence the Vienna debates in March 2009. In his opening remarks, Ghodse writes “The international community may wish to review the issue of cannabis.” This was the case, he



continued, because despite becoming more potent, being associated with increasing numbers of accident-room admissions, and being a gateway to other drugs (statements made without any corroborating evidence) “the use of cannabis is often trivialized and, in some countries, controls over the cultivation, possession and use of cannabis are less strict than for other drugs.”⁴⁹ Having set the tone beyond the usual critical comment, non-punitive cannabis policies receives extraordinary prominence within the main body of the report. Bringing together many of the concerns that had been expressed over previous years, the report notes “The Board believes that cannabis represents a challenge on several counts.” Specifically that:

- The tolerance of “recreational” use of cannabis in many countries is at odds with the position of cannabis in Schedules I and IV of the 1961 Convention;
- The relationship between the cannabis policies implemented in different countries and impact of those policies on patterns of illicit use is unclear;
- Public perceptions of the alleged “medical” uses of cannabis and its “recreational” use are overlapping and confusing;
- Developing countries that struggle to eliminate illicit cannabis cultivation are discouraged by the tolerant policies

of their wealthier neighbouring countries and, perhaps as a consequence, receive little alternative development assistance.⁵⁰

With this in mind, and highlighting the seriousness afforded the issue by the Board, one of the report’s concluding recommendations focuses on cannabis. Reiterating its concerns about some sections of society considering it a harmless, “soft drug”, and the decriminalization trends in many countries, the report states: “The Board again wishes to draw the attention of Governments to the fact that cannabis is a narcotic drug included in Schedules I and IV of the 1961 Convention and that drugs in Schedule IV are those particularly liable to abuse. The Board calls on all Governments to develop and make available programmes for the prevention of cannabis abuse and for educating the general public about the dangers of such abuse.”⁵¹

Attempting to counter the reformist tide: 2009-2013

At the High Level Segment of the 2009 CND, member states demonstrated their continuing support for the drug control treaties and signed a Political Declaration reaffirming that “the ultimate goal of both demand and supply strategies is to minimize and eventually eliminate the availability and use of illicit drugs and psychoactive substances.”⁵²

Nonetheless, since then, and often revealing a growing gap between statements and positions in Vienna and individual states' policy preferences, the INCB has faced a rising tide of cannabis policy reforms. Some of these, as we now know, were to go further than merely exploiting the flexibility within the UN drug control framework; an exercise that in itself had been increasingly vexing the INCB. Within this context, the Board's Annual Reports between 2009 and 2012 contained many familiar themes. They also, however, introduced and accentuated others, including the sale of cannabis seeds via the internet,⁵³ in response to the emerging and increasingly significant challenges to the fundamental tenets of the international structures for controlling cannabis "abuse".

Among the familiar topics of concern during this period was what the Board referred to as "medical" cannabis schemes.⁵⁴ This was particularly so with regard to those operating within U.S. states. In the report for 2009, for example, the Board noted with concern, but no evidence, that the schemes were leading to an increase in the size of the illicit market for non-medical use and were "sending the wrong message" to other countries.⁵⁵ Three years later, emphasizing California's admittedly lax approach to defining what constituted medical use, the Board's remarks were a refrain of points made in earlier reports,⁵⁶ depicting the schemes as a "major challenge to compliance by the Government of the United States with the international drug control treaties."⁵⁷

Within this context, the decriminalization of cannabis for recreational use also continued to receive substantial attention. The Board's position on this topic did change somewhat, however. Added to warnings about sending the "wrong signal" or the "wrong message to the general public", the report for 2009 attacks policy shifts, or even discussion thereof, in a number of countries,⁵⁸ particularly within U.S. states. As so often before, the precise mechanisms behind the process of sending signals and giving messages remain unexplored and problematic.⁵⁹ Nonetheless, the Board once again chose to highlight these issues, maintaining its hostile stance to what were the legitimate and legally sound policy choices of sovereign states, once again raising concern about its tendency to exceed its mandate.⁶⁰ Yet, the following year, although still critical of Dutch coffeeshops and expressing ongoing concern for medical marijuana schemes within U.S. states,⁶¹ the Board lessened its overt opposition to decriminalization trends.⁶² Moreover, it even tacitly acknowledged the legitimacy of such a legal approach. As the IDPC notes in its response to the Board's Annual Report for 2010: "Arguably the INCB has little choice in the matter. With a steady stream of nation states considering or engaging with some form of decriminalization...the Board's adoption of any other position would have made it look even more out of step with the realities of current policy trends."⁶³ It might even be argued that at this point, to borrow President Obama's phrase, the INCB had "bigger fish to fry". While appreciably softening its stance on decriminalization,



Smoking a dagga pipe the traditional way in South Africa. A bong made from a ruminant's horn.
Credit: Floris Leeuwenberg



it remained unyielding on significant and increasingly likely moves to legalize cannabis for recreational use. In this vein, it welcomed the U.S. government's opposition to Proposition 19 in California.⁶⁴ In so doing, however, the Board certainly overestimated the influence of the UN conventions on California voters. In response to the rejection of Proposition 19, the *Annual Report for 2010* claims that the "result represents a recognition of the danger of cannabis abuse and an affirmation of the international drug control conventions [emphasis added]".⁶⁵

The Board's concern regarding the application of the drug control treaties within the territory of parties to the conventions was an issue that, predominantly in response to cannabis-related policy developments within the U.S., grew in prominence from 2009. It receives substantial attention in the Annual Report for 2009⁶⁶ and two years later is the focus of a special topics section, "Application of the international drug control treaties in countries with federal structures". With the U.S. clearly in mind, the Board stresses: "The international drug control treaties must be implemented by States parties, including States with federal structures, regardless of their internal legislation, on their entire territory [emphasis added]."⁶⁷ Highlighting several operational disconnects, including once again the North-South dichotomy, within the international system, the *Annual Report for 2011* also points out that "changes in policy and legislation are taking place predominantly in developed countries". It continues, "The growing gap between declared government policy at the international level and incomplete implementation at the national level remains a matter of concern. It is disturbing that,

while many developing countries have been devoting their limited resources to eradicating cannabis plants and fighting trafficking in cannabis, certain developed countries, have at the same time, decided to tolerate the cultivation of, trade in and use of cannabis for purposes other than those provided for by the international drug control treaties."⁶⁸

As we now know, such reasoning did little to stem the reformist tide. And at the time of the drafting of the Report for 2012 (published in March 2013), events in Uruguay and the U.S. states of Washington and Colorado were the most serious challenges ever faced by the drug control system. As such, within a broader framework of "shared responsibility", Raymond Yans used his Foreword to stress, "Any such [cannabis legalization] initiatives, if implemented, would violate the international drug control conventions and could undermine the noble objectives of the entire drug control system, which are to ensure the availability of drugs for medical and scientific purposes while preventing their abuse." Building upon this position, the notion of treaty breach (if not stated explicitly) and the need for "universal implementation" of the conventions appear at various points in the report, including in the special topics section ("global drug policy debate") for Uruguay and as a specific recommendation concerning Washington and Colorado.⁶⁹ To be fair, as we have demonstrated in the main body of this report the Board is correct in viewing the policy reforms in Colorado, Washington and Uruguay (at the time not yet voted in its senate), in contravention of the 1961 Single Convention as amended by the 1972 Protocol.⁷⁰ What should be considered, however, is how the Board, particularly its president, has reacted.

At one point in relation to Uruguay, the Board stresses that "Non-compliance by any party with the provisions of the international drug control treaties could have far reaching negative consequences for the functioning of the entire drug control system."⁷¹ Yet, as IDPC has observed, "debates about what would be the best way for the global community to approach the issue of drug use are, quite simply, beyond the competence of the Board, and belong elsewhere in the UN system: at the General Assembly, the Economic and Social Council (ECOSOC), the CND."⁷² Moreover, it is far from helpful that Raymond Yans recently accused Uruguay of, among other things, having a "pirate attitude" regarding the conventions.⁷³

We find ourselves in an unfortunate state of affairs. As the UN framework for the control of cannabis begins to fail in the face of democratically selected policy choices made within sovereign states, the international community needs more than ever expert technical advice on how to carefully manage change and develop a more flexible legal structure able to accommodate a range of approaches to dealing with what has long been a widely available and used substance. A simplistic, "treaties say no" approach is no longer tenable.

Endnotes

The INCB and cannabis: from description to condemnation

- 1 See the INCB website: <http://incb.org/incb/en/about/mandate-functions.html>
- 2 See for example, INCB (1980), *Report for 1980*, para. 8; and INCB (1981), *Report for 1981*, paras. 10, 150, 152, 153, 155, 164, 165.
- 3 INCB (1982), *Report for 1982*, para. 130.
- 4 INCB (1983), *Report for 1983*, paras. 8, 10, 130.
- 5 INCB (1983), *Report for 1983*, para. 118
- 6 See for example INCB (1989), *Report for 1989*, para 109: “The drug policy of the Netherlands emphasizes the prevention of abuse and the rehabilitation of drug addicts [...] For the country as a whole, overall the abuse of cannabis’ has ‘remained stable.”
- 7 INCB (1991), *Report for 1991*, para. 171
- 8 INCB (1984), *Report for 1984*, paras. 10 & 11
- 9 INCB (1992), *Report for 1992*, paras. 12-23
- 10 In a reference to article 3 of the treaty, paragraph 15 (b) notes that “Unless to do so would be contrary to the constitutional principles and basic concepts of their legal systems, only the 1988 Convention clearly requires parties to establish as criminal offences under the law the possession, purchase or cultivation of controlled drugs for the purpose of non-medical consumption”. See: INCB (1992), *Report for 1992*.
- 11 As discussed in the main text of this publication, under the terms of article 49 the expiration of transitional reservations, including those regarding the suppression of non-medical use of cannabis, was 12 December 1989. Consequently in the Annual Report for 1989, the Board notes that in relation to suppressing the officially sanctioned non-medical use of cannabis ‘The objective of the Convention has been achieved... with the possible exception of Bangladesh.’ See: INCB (1989), *Report for 1989*, para. 48
- 12 INCB (1992), *Report for 1992*, para. 22
- 13 Indeed, in 1993 the Board referred to cannabis policy in the Netherlands in the following terms: “The dialogue between the Government of the Netherlands and the Board has led to lively discussion among the general public and at the governmental level in that country. The Board is confident that the Government of the Netherlands will take the necessary measures to limit the cultivation of cannabis and the expansion of so-called coffee-shops.’ See: INCB (1993), *Report for 1993*, para. 285
- 14 INCB (1994), *Report for 1994*, para. 213
- 15 INCB (1994), *Report for 1994*, Supplement, paras. 39 & 40
- 16 INCB (1994), *Report for 1994*, Supplement, para. 41
- 17 INCB (1997), *Report for 1996*, para. 209
- 18 INCB (1997), *Report for 1996*, paras. 321 & 359
- 19 ADLRF (1996), cited in Bewley-Taylor (2012b), pp. 237-8.
- 20 INCB (1997), *Report for 1996*, paras. 321 & 359. Under the subheading “Changing the environment that promotes drug taking” the Board was critical of the portrayal of cannabis in the media, the positive promotion of hemp products, political campaigns based on legalization or the medical use of cannabis in U.S. and tolerant law enforcement practices.
- 21 INCB (1999), *Report for 1998*, para. 35
- 22 INCB (1999), *Report for 1998*, para. 105
- 23 INCB (1999), *Report for 1998*, para. 107
- 24 It seems that the term ‘UNGASS decade’ was first officially used in E/CN.7/2008/CRP.17 (2008). Since then it has also been used to refer more generally to the period 1998-2009 because the review of the 1998 UNGASS targets did not take place until 2009. See Bewley-Taylor, (2012b), p. 2.
- 25 INCB (2000), *Report for 1999*. The Board also expressed concern for the availability for cannabis seeds, hemp shops and the internet, see: paras. 424, 455, 456, 474
- 26 INCB (2001), *Report for 2000*, paras 503 & 524
- 27 INCB (2002a), *Report for 2001*, para. 214.
- 28 INCB (2002a), *Report for 2001*, para. 225
- 29 INCB (2003), *Report for 2002*, paras 185 & 302
- 30 See INCB (2003), *Report for 2002*, para. 499. Here the board notes that the reclassification announcement could cause “confusion and widespread misunderstanding”.
- 31 Travis (2003) and Ainsworth (2003)
- 32 For the full account of the Select Committee discussion, see: HASC (2003).
- 33 Blickman (2002)
- 34 INCB (2002b)
- 35 Bewley-Taylor (2012b), pp. 200-206
- 36 Bewley-Taylor (2012b), pp. 200-206
- 37 INCB (2002a), *Report for 2001*, p. 36
- 38 *Ibid.*
- 39 INCB (2002b)
- 40 INCB (2002a), *Report for 2001*, p. 37; for further discussion, see: Bewley-Taylor (2012b), pp. 206-211.
- 41 See for example, INCB (2004), *Report for 2003*, para. 141; INCB (2005), *Report for 2004*, para. 166; and INCB (2006), *Report for 2005*, para 80.
- 42 See Bewley-Taylor (2012), p. 248
- 43 INCB (2009), *Report for*, para. 432.
- 44 INCB (2004), *Report for 2003*, para. 329
- 45 INCB (2005), *Report for 2004*, paras. 216-220
- 46 INCB (2009), *Report for 2008*, para. 182. Also see: IDPC (2009), pp. 7-8.
- 47 For Canada, see for example, INCB (2005), *Report for 2004*, para. 301, and INCB (2006), *Report for 2005*, para. 377; and for Jamaica see INCB (2005), *Report for 2004*, para. 277
- 48 INCB (2007), *Report for 2006*, para. 584
- 49 INCB (2009), *Report for 2008*, Foreword. For further discussion, see: IDPC (2009), pp. 7-8.
- 50 INCB (2009), *Report for 2008*, para 34
- 51 INCB (2009), *Report for 2008*, Recommendation 21
- 52 E/2009/28 (2009)

- 53 See INCB (2010), *Report for 2009*, para. 74 and Recommendation 29; and INCB (2011), *Report for 2011*, Special topics, 'Use of cannabis seeds for illicit purposes' (paras. 249-258) and Recommendation 27
- 54 See for example INCB (2012a), *Report for 2011*, para. 93
- 55 INCB (2010), *Report for 2009*, para. 400
- 56 See for example: INCB (2012a), *Report for 2011*, para. 429.
- 57 INCB (2013), *Report for 2012*, para. 221.
- 58 Mexico, Argentina, Brazil and Colombia
- 59 IDPC (2010), pp. 7-8.
- 60 For a full discussion see IDPC (2010), pp. 7-10.
- 61 INCB (2011), *Report for 2010*, paras. 709 & 395
- 62 IDPC (2011), p. 9.
- 63 IDPC (2011), p. 9.
- 64 INCB (2011), *Report for 2010*, para. 394.
- 65 Indeed, "The notion that many voters within the Golden State had any idea of the existence of the UN drug control conventions seems farfetched." See: IDPC (2011), p. 9.
- 66 INCB (2011), *Report for 2009*, paras. 277-285 & 400
- 67 INCB (2012a), *Report for 2011*, para 281. Also see IDPC (2012), pp. 7-8.
- 68 INCB (2012a), *Report for 2012*, para. 288
- 69 INCB (2013), *Report 2012*, paras. 81, 451, Recommendation 5
- 70 As IDPC has noted, the Board is on shakier ground where it attempts to link increase in daily cannabis "abuse" with "decreases in the perceptions of risks associated with the use of cannabis" within the "context of campaigns promoting legalization for medical purposes, as well as decriminalization of cannabis for non-medical purposes" (para. 507). See: IDPC (2013), p. 9. There are also curious incongruities in the Board's language discussing policy shifts in Uruguay. In paragraph 258, the *Report for 2012* states that, if implemented, the cannabis law "would" be contrary to the provisions of the conventions. Later, however, the report notes that, if adopted, "the law *could* be in contravention' of the conventions" [emphasis added] (para 513). This may be nothing more than an editorial oversight, but it might also suggest a difference in point of view among the drafters of the report.
- 71 INCB (2013), *Report for 2012*, para. 258
- 72 IDPC (2013), p. 15
- 73 Jelsma (2013)

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Authors

Dave Bewley-Taylor
Tom Blickman
Martin Jelsma

Copy editor

David Aronson

Design

Guido Jelsma
www.guidojelsma.nl

Photo credits

Hash Marihuana & Hemp Museum, Amsterdam/
Barcelona
Floris Leeuwenberg
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Contact

T Transnational Institute (TNI)
De Wittenstraat 25
1052 AK Amsterdam
N Netherlands
Tel: +31-(0)20-6626608
I Fax: +31-(0)20-6757176
drugs@tni.org

www.tni.org/drugs
www.undrugcontrol.info
www.druglawreform.info

Global Drug Policy Observatory (GDPO)



Research Institute for Arts and Humanities
Rooms 201-202 James Callaghan Building
Swansea University
Singleton Park, Swansea SA2 8PP
Tel: +44-(0)1792-604293
www.swansea.ac.uk/gdpo
twitter: @gdpo_swan

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The cannabis plant has been used for spiritual, medicinal and recreational purposes since the early days of civilization. In this report the Transnational Institute and the Global Drug Policy Observatory describe in detail the history of international control and how cannabis was included in the current UN drug control system. Cannabis was condemned by the 1961 Single Convention on Narcotic Drugs as a psychoactive drug with “particularly dangerous properties” and hardly any therapeutic value. Ever since, an increasing number of countries have shown discomfort with the treaty regime’s strictures through soft defections, stretching its legal flexibility to sometimes questionable limits.

Today’s political reality of regulated cannabis markets in Uruguay, Washington and Colorado operating at odds with the UN conventions puts the discussion about options for reform of the global drug control regime on the table. Now that the cracks in the Vienna consensus have reached the point of treaty breach, this discussion is no longer a reformist fantasy. Easy options, however, do not exist; they all entail procedural complications and political obstacles. A coordinated initiative by a group of like-minded countries agreeing to assess possible routes and deciding on a road map for the future seems the most likely scenario for moving forward.

There are good reasons to question the treaty-imposed prohibition model for cannabis control. Not only is the original inclusion of cannabis within the current framework the result of dubious procedures, but the understanding of the drug itself, the dynamics of illicit markets, and the unintended consequences of repressive drug control strategies has increased enormously. The prohibitive model has failed to have any sustained impact in reducing the market, while imposing heavy burdens upon criminal justice systems; producing profoundly negative social and public health impacts; and creating criminal markets supporting organised crime, violence and corruption.

After long accommodating various forms of deviance from its prohibitive ethos, like turning a blind eye to illicit cannabis markets, decriminalisation of possession for personal use, coffeeshops, cannabis social clubs and generous medical marijuana schemes, the regime has now reached a moment of truth. The current policy trend towards legal regulation of the cannabis market as a more promising model for protecting people’s health and safety has changed the drug policy landscape and the terms of the debate. The question facing the international community today is no longer whether or not there is a need to reassess and modernize the UN drug control system, but rather when and how to do it.

Transnational Institute

Since 1996, the TNI Drugs & Democracy programme has been analysing the trends in the illegal drugs market and in drug policies globally. The programme has gained a reputation worldwide as one of the leading international drug policy research institutes and a serious critical watchdog of UN drug control institutions. TNI promotes evidence-based policies guided by the principles of harm reduction and human rights for users and producers, and seeks the reform of the current out-dated UN conventions on drugs, which were inconsistent from the start and have been overtaken by new scientific insights and pragmatic policies that have proven to be more successful. For the past 18 years, the programme has maintained its focus on developments in drug policy and their implications for countries in the South. The strategic objective is to contribute to a more integrated and coherent policy – also at the UN level – where drugs are regarded as a cross-cutting issue within the broader development goals of poverty reduction, public health promotion, human rights protection, peace building and good governance.

Global Drug Policy Observatory

National and international drug policies and programmes that privilege harsh law enforcement and punishment in an effort to eliminate the cultivation, production, trade and use of controlled substances – what has become known as the ‘war on drugs’ – are coming under increased scrutiny. The Global Drug Policy Observatory aims to promote evidence and human rights based drug policy through the comprehensive and rigorous reporting, monitoring and analysis of policy developments at national and international levels. Acting as a platform from which to reach out to and engage with broad and diverse audiences, the initiative aims to help improve the sophistication and horizons of the current policy debate among the media and elite opinion formers as well as within law enforcement and policy making communities. The Observatory engages in a range of research activities that explore not only the dynamics and implications of existing and emerging policy issues, but also the processes behind policy shifts at various levels of governance.