

4.4 Protecting the rights of indigenous people

In this section

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Many aspects of drug policy, including the blanket prohibition of the traditional cultivation and use of certain plants, violate indigenous peoples' rights that are enshrined in United Nations conventions.

Why is protection of the rights of indigenous people important?

For generations, people worldwide have used psychoactive plants such as coca, cannabis, opium poppy, kratom, khat, peyote and ayahuasca for traditional, cultural and religious purposes. In Latin America, for example, the coca leaf has long had a wide application in social, religious and medical areas for indigenous people, and is now used by the general population. Similarly in India, cannabis and opium have been bound to faith and mysticism in Hindu and Islamic traditions for centuries, and are enshrined in countless cultural practices. Other plants, such as khat in Eastern Africa and kratom in South East Asia, have also been used for traditional and social purposes for centuries. Some of these substances have also been employed medicinally, especially for the treatment of rheumatism, migraine, malaria, cholera and other gastrointestinal complaints, and to facilitate surgery.¹ They can also provide food grain, oil seed or fibre for manufacturing products.

The UN drug conventions have classified some of these plants (i.e. cannabis, the coca leaf and opium) as harmful and subject to controls that limit their production, distribution, trade and use to medical and scientific purposes. The premise behind this policy was that it was considered difficult to achieve effective reduction of the production of controlled drugs to amounts required for medical and scientific purposes as long as large-scale local consumption of raw materials for these drugs continued in the main producing countries. This led to pressure on producing countries to end traditional uses of the plants used as raw materials for controlled drugs. Opium, cannabis and the coca leaf were therefore placed under the same strict levels of control as extracted and concentrated alkaloids such as morphine and cocaine (Schedule I of the 1961 Convention).²

The value of traditional use of controlled plants was recognised in the 1988 Convention, which provides that drug policies should 'respect fundamental human rights' and 'take due account of traditional licit uses, where there is historical evidence of such use' (article 14, para.2). However, the 1988 Convention (articles 14.1 and 25) also states that its provisions should not derogate from any obligations under the previous drug control treaties, including the 1961 obligation to abolish any traditional uses of coca, opium and cannabis (article 49).³ In legal terms, therefore, the significance of the 1988 recognition of 'traditional licit uses' is questionable and, in practice, most governments have disregarded this provision

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and have placed strict control mechanisms on cannabis, the coca leaf and opium, but also on traditional psychoactive plants that have not been classified by the UN, such as khat and kratom.

International law and the rights of indigenous people

The 1989 Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries⁴ defines indigenous people as those who, 'on account of their descent from the populations which inhabited the country at the time of conquest, colonisation, or the establishment of present state boundaries and who, irrespective of their legal status, retain some, or all, of their own social, economic, cultural and political institutions'.

In addition to the universal human rights recognised in international conventions (see [Section 1.2: Ensuring compliance with fundamental rights and freedoms](#)), indigenous people enjoy certain specific rights that protect their identity and defend their right to maintain their own culture, traditions, habitat, language and access to ancestral lands.

UN bodies such as the United Nations Economic and Social Council and the Human Rights Council, have made significant progress in promoting, protecting and consolidating indigenous peoples' rights and freedoms. Several declarations and conventions, signed and ratified by a large number of governments, now endorse these achievements.

The 2007 United Nations Declaration on the Rights of Indigenous Peoples⁵ notably recognises indigenous peoples' right to:

- self-determination and autonomy
- maintain, protect and develop cultural manifestations of the past, present and future (article 11)
- maintain their traditional medicines and healing practices (article 24)
- maintain, control, protect and develop their cultural heritage, traditional knowledge and manifestations of their science, technology and culture (article 31).

The declaration is not binding under international law, but represents an important advance in the recognition of indigenous rights and provides governments with a comprehensive code of good practice.

National levels of control for traditional plants

National governments have applied varying levels of control for traditional plants. These controls have been associated with a number of consequences for the rights of indigenous people.

Full prohibition of traditional plants' cultivation and use

Some governments have sought to prohibit the cultivation, trafficking, distribution and use of traditional plants, both for plants that have been scheduled at the international level, and also for other mild plant stimulants. These policies have often focused on crop eradication on the supply side and/or on the criminalisation of people who use these plants on the demand side.

For instance, although the UN drug conventions do not compel signatory states to control kratom production, trafficking, distribution and use, Australia, Malaysia, Burma/Myanmar and Thailand (see [Box 1](#)) have decided to ban kratom, despite little evidence that the use of this plant impacts negatively on the health of users. Kratom can also have beneficial medicinal properties for the digestive system and in reducing pain from opioid withdrawal symptoms.⁶

Box 1. Kratom prohibition in Thailand

Kratom has been used for medicinal and traditional purposes in Thailand for centuries, in particular in the southern part of the country. The plant was scheduled in 1943 under the Kratom Act, and was then included in the Thai Narcotics Act in 1979. Over the past 10 years, the application of kratom laws and policies has become increasingly rigid, leading to widespread arrests of kratom users and eradication campaigns to destroy kratom trees. This policy has had a limited effect on levels of kratom use and has led to a number of negative consequences for the right of communities to use kratom as an integral part of southern Thai culture.⁷

In the Andean region, while Bolivia and Peru have protected a domestic legal coca market, crop-eradication campaigns have caused widespread damage to the health, habitat and traditions of coca-growing indigenous communities. In countries where violent clashes take place between armed groups fighting for control of the drug trade, or where conflicts have erupted between coca farmers and law-enforcement agencies, forced eradication has militarised coca-producing areas, placing the local rural population (and especially indigenous communities) in the middle of the battlefield.

Plan Colombia, for instance, a counterinsurgency and counter-narcotics strategy that launched a massive crop-eradication campaign initiated in 1999, has not only had disastrous consequences on the lives and economy of indigenous people and farmers, but has also put them in the crossfire between government forces, insurgent groups and paramilitary gangs fighting to control the territory. The plan did not lead to an overall reduction in cocaine production in Colombia, but has led instead to a serious humanitarian crisis, leading to the displacement of 3.6 to 5.2 million people⁸ and resulting in increased levels of poverty and insecurity.

In instances when alternative development programmes were implemented, these did not always incorporate local knowledge, know-how and cultural traditions, leading to further alienation of the indigenous populations. It is necessary that these programmes are developed in collaboration with local populations after a careful assessment of the local cultivation possibilities and market access, and with full respect for the rights and traditions of indigenous people (for more information, see [Section 4.3: Promoting alternative livelihoods](#)).

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On the consumption side, the coca leaf has been used for thousands of years in the Andean region for traditional and religious purposes. The international prohibition introduced by the 1961 Convention demonstrates a clear misunderstanding of indigenous customs and traditions. Andean and Amazonian coca consumers often feel ignored, insulted and humiliated by the international community and the UN call to abolish what they consider to be a healthy ancestral tradition. Allegations that chewing coca was a form of drug addiction causing malnutrition in indigenous people and that it was a degenerative moral agent helped justify its classification as a controlled substance. Since then, scientific research has convincingly proved otherwise, including a 1995 WHO study that concluded that the 'use of coca leaves appears to have no negative health effects and has positive therapeutic, sacred and social functions for indigenous Andean populations'.⁹ [Box 4](#) illustrates how the Bolivian government has remedied the issue raised by the international ban on coca leaf chewing.

Special legal and constitutional provisions to protect the rights of indigenous people

Some governments have developed provisions within their national legal system to allow for the traditional use of certain psychoactive plants under special circumstances. This is the case, for example, in Canada, with Section 56 exemption of the Canadian Controlled Drugs and Substances Act (see [Box 2](#)), and in the USA for peyote use among indigenous communities (see [Box 3](#)).

Box 2. The case of Santo Daime in Canada¹⁰

Section 56 of the Canadian Controlled Drugs and Substances Act provides that: 'The Minister may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of the Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest'.¹¹

In practice, this exemption is rarely exercised. It has usually been granted for medical and scientific purposes, for instance to some physicians to prescribe methadone as part of OST, to conduct specific research trials for a supervised injection site in Vancouver, and for heroin prescription in Vancouver and Montreal. In 2001, for the first time, Section 56 was used with the aim of protecting the right to use a controlled substance for traditional and cultural purposes (i.e. using the 'public interest' provision).

In 1996, Jessica Williams Rochester returned to Canada after a visit to Brazil and established Ceu do Montreal, based on the Santo Daime religion. From the time of its founding until 2000, Ceu do Montreal leaders imported Daime sacrament (i.e. ayahuasca¹²) into Canada with Brazilian agricultural export documents and practised their religion according to church doctrines. In 2000, the Canadian customs intercepted a shipment of Daime and sent it for chemical analysis. Ceu do Montreal was informed that possession of Daime constituted an offence under the Canadian criminal code, but was advised to apply for a legal exemption for their Daime sacrament under Section 56 of the Canadian Controlled Drugs and Substances Act, which it did in 2001. In this particular case, the government concluded that 'in principle', the case could benefit from an exemption under Section 56, pending receipt of documentation from the government of Brazil allowing legal export of Daime.¹³

Although this policy is limited in scope, as an exemption only applies to a particular group of individuals for a specific substance, this example remains useful as it provides for a possibility to protect the right to use a plant for cultural and traditional purposes.

Box 3. Peyote use among indigenous communities in the USA

Peyote is a small, spineless cactus containing psychoactive alkaloids. In the USA, the religious use of peyote is allowed for members of the Native American Church, a pan-tribal religion derived from the practices of native Americans who inhabited what is now southern Texas and northern Mexico.

This exception is inscribed in Title 21, Section 1307.31 of the US Code of Federal Regulations, which states that: 'The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church'.

These provisions effectively enable Native Americans to perpetuate their religious traditions and rituals by using peyote without fear of prosecution.

Bolivia is no doubt the country that has gone furthest in this domain, by recognising the traditional use of the coca leaf as a cultural heritage within its constitution,¹⁴ and therefore ensuring that the rights of Bolivian indigenous communities to chew the coca leaf be protected. While Peru, Colombia and Argentina also have domestic legal exemptions for coca leaf consumption,¹⁵ Bolivia is the first country to acknowledge that such exemptions and practices represent breaches of drug control treaty obligations.

In doing so, Bolivia decided to denounce the 1961 Convention to re-accede to it with a reservation on the coca leaf to ensure that its national laws and practices are in line with its international obligations (see [Box 4](#)).

Box 4. Bolivia, coca leaf chewing and the protection of indigenous culture

Coca has been sacred to the indigenous peoples of the Andean region for thousands of years. In Bolivia, the Quechua and Aymara peoples make up the majority of the rural population, and use of the coca leaf is widespread among them. The practice is associated with social and cultural solidarity, economic activity and work, medicinal factors (such as adding nutrients to the diet and providing protection against altitude sickness), and spirituality, restoring the balance between natural and spiritual realms. As in Britain, where people might invite friends around for a cup of tea, or for a coffee in the USA, Bolivia's indigenous people will say, 'Come around for a chew' (*aculli*).¹⁶ This gives some indication of how thoroughly embedded traditional practices of coca consumption are in Bolivia.

The first Western attempts at prohibiting coca came with colonisation in the 16th century, when the Catholic church became aware of the plant's role in native religious ritual. An informal accommodation with coca was achieved, however, which lasted until the 20th century and its disastrous 'war on drugs'. Following the Second World War, the UN led a drive for 'modernisation', which identified the practice of coca chewing with the primitive and outmoded. The 1950 report of the UN Economic and Social Council (ECOSOC) Coca Leaf Inquiry Commission, led by a US representative, supported the assumption that the use of coca was harmful, and resulted in the scheduling of the coca leaf along with cocaine and heroin in the 1961 Convention and its provision that coca chewing had to be abolished within 25 years.¹⁷ Though the 1950 report has often been criticised for being biased, scientifically flawed, culturally insensitive and even racist, it remains the prime UN reference document on the coca issue.

These historical factors are becoming increasingly understood as the main shapers of the present international drug control regime and were accused of 'drug control imperialism' by the Global Commission on Drug Policy.¹⁸ The fact that the UN drug control regime still fails to recognise the rights of Andean indigenous communities to chew the coca leaf today stands symbol to the embarrassing inability of the regime to stay in touch and in line with developments in the UN system, and more broadly with international human rights.

As a result, in June 2011, Bolivia withdrew from the 1961 Single Convention, announcing its intention to re-accede with a reservation allowing coca leaf chewing in the country.¹⁹ Some of the reasons for Bolivia's move, in addition to those already stated above, are that:

- coca is regarded by the Constitution of the Plurinational State of Bolivia as a cultural patrimony. The international drug control treaties make repeated allowance for the fundamental constitutional principles of member states to be respected
- coca is central to the cultural life & sense of identity of the indigenous peoples of Bolivia
- coca is at the core of the forms of sociability developed within their culture
- coca has important medicinal and therapeutic uses
- coca has highly significant spiritual associations and functions
- coca is at the heart of a subsistence economy, and many attempts to substitute alternative crops have failed in the Andean region.

Bolivia's withdrawal from the 1961 Convention, submitted in June 2011, came into effect on 1 January 2012. A few days before that, on 29 December 2011, in a letter to the UN Secretary-General, Bolivia presented the reservation it requires to reconcile its various national and international legal obligations before becoming a full treaty member again. Bolivia expresses that it reserves the right to allow traditional coca leaf chewing in its territory, but also the consumption and use of the coca leaf in its natural state in general, as well as the cultivation, trade and possession of the coca leaf to the extent necessary for these licit purposes. At the same time, the reservation clarifies that Bolivia will continue to take all necessary measures to control the cultivation of coca in order to prevent the illicit production of cocaine. In the letter, Bolivia also made clear that its effective re-accession to the 1961 Convention was subject to the authorisation of this reservation. The treaty procedure establishes that all members have one year to express any objections and that the reservation will be accepted unless one-third or more of the states object to it during that period. In this case, 'the 12-month period for objections will expire on 10 January 2013'.²⁰

Legal regulation of traditional plants

As explained before, some mild plant stimulants have not been included in the UN classification system, leaving governments responsible for deciding on their status. This is the case, for example, for kratom and khat. As observed earlier, kratom was prohibited under national laws in several Asian countries, while the national legal status of khat varies considerably from country to country.

Khat has been used for hundreds, if not thousands, of years, in the highlands of Eastern Africa and Southern Arabia. Traditionally, khat has been chewed communally, after work or on social occasions, in public spaces or dedicated rooms in private houses. Global khat markets have been driven by demand from diaspora populations settling in Europe, particularly from Somalia. So far, there has been little cross-over from migrants to the mainstream European population. A number of studies have demonstrated that the potential for dependence associated with khat, and the physical and mental health risks of khat use, remain very low.²¹ Evidence suggests that prohibiting khat use has led to a number of negative consequences, including expanding the isolation and vulnerability of immigrant populations, and impacting negatively on livelihoods and economic development in producer countries.²² In countries where khat is legally regulated, none of these unintended consequences have occurred (see [Box 5](#)). Khat use remains concentrated among Eastern African migrant communities who consume khat safely in commercial establishments, and communal centres where social and community bonds remain strong. This enables consumers to control the quality of the khat they use and to perpetuate cultural and social traditions among their community.

Box 5. Khat regulation in the UK

In the UK, khat chewing remains legal. There has been substantial research on the social harms associated with khat. In 2005 the Advisory Commission for the Misuse of Drugs advised against regulating khat under the Misuse of Drugs Act 1971, concluding instead that educational and awareness campaigns should be implemented.²³

Khat retails in the UK at £3 to £6 per bundle.²⁴ VAT is now imposed on khat imports, raising £2.9 million in 2010 when around 3,002 tonnes of khat entered the UK, a large increase since the late 1990s.²⁵ The fresh product is mainly imported from Kenya and Ethiopia for the consumption of mainly East African and Yemeni communities in the UK.

In the UK, khat is mainly consumed in commercial establishments, which act as local communal

centres where food and drinks are served. These establishments are subject to local health and safety laws, ensuring that there is no nuisance for local residents.²⁶ Studies of khat use in the UK imply that it is of cultural importance among diaspora communities, enabling them to maintain their identity. Immigrant communities often gather to chew khat and discuss politics in their country of origin, as well as giving advice on problems they experience and on job opportunities.²⁷

There is little evidence to connect khat chewing, crime and public disorder in the UK. In fact, khat is seen as preventing people from offending, as it strengthens social bonds and relaxes users.²⁸ Some members of diaspora communities have, however, raised some concerns associated with khat chewing, such as income diversion, family breakdown and unemployment. It should be noted that these social harms would be highly exacerbated if khat were to be controlled as an illicit drug.

Recommendations

- 1) International obligations, particularly those arising from human rights legal instruments that are at the heart of international law, need to be fully respected at the national level.
- 2) Governments should address the discrepancies between the UN drug conventions and international human rights agreements, to ensure that the rights of indigenous peoples are upheld.
- 3) The historical, cultural and traditional character and potential benefits of plants controlled at the national and international level should be recognised. At the national level, new laws and regulations are needed to provide for the controlled cultivation of these plants for traditional use.
- 4) The participation of indigenous communities should be promoted in the design and implementation of policies and regulations that affect them.

Key resources

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Endnotes

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- 2 Bewley-Taylor, D. & Jelsma, M. (2011), *TNI Series on legislative reform of drug policies Nr. 12 – Fifty years of the 1961 Single Convention on Narcotic Drugs: a reinterpretation* (Amsterdam: Transnational Institute), <http://www.idpc.net/sites/default/files/library/fifty-years-of-1961-single-convention.pdf>
- 3 Jelsma, M. (2011), *TNI Series on legislative reform of drug policies Nr. 11 – Lifting the ban on coca chewing, Bolivia's proposal to amend the 1961 Single Convention* (Amsterdam: Transnational Institute), <http://www.idpc.net/sites/default/files/library/lifting-the-ban-on-coca.pdf>
- 4 The Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries was adopted in 1989 by the International Labour Organisation, <http://www.un-documents.net/c169.htm>
- 5 The declaration reached universal endorsement after the Obama administration announced its support for it in December 2010. Four countries, the USA, Canada, Australia and New Zealand initially voted against the declaration in 2007, but all four have since revised their position, the USA being the last one to drop its objections.
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- 8 Although the government estimates that 3.6 million people were displaced as a result of Plan Colombia, the independent Observatory on Human Rights and Displacement (CODHES) estimated the figure to be as high as 5.2 million people.
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- 11 Department of Justice Canada (2007), *Controlled Drugs and Substance Act*, <http://laws-lois.justice.gc.ca/eng/acts/C-38.8/>

- 12 Ayahuasca – an infusion or decoction prepared from two different plants, the *Banisteriopsis* spp. vine and leaves or shrubs from the *Psychotria* genus containing dimethyltryptamine – has traditionally been used for divinatory and healing purposes by indigenous communities of the Amazon. Canada's 1996 Controlled Drugs and Substances Act prohibits three alkaloids found in the ayahuasca brew (*N,N*-dimethyltryptamine, harmalol and harmaline).
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- 14 Article 384: '*El Estado protege a la coca originaria y ancestral como patrimonio cultural, recurso natural renovable de la biodiversidad de Bolivia, y como factor de cohesión social; en su estado natural no es estupefaciente. La revalorización, producción, comercialización e industrialización se regirá mediante la ley.*' (The State protects coca in its original and ancestral form as a cultural patrimony, a renewable biodiversity resource in Bolivia, and a social cohesion factor; in its natural state, it is not considered as a psychoactive substance. Its revalorisation, production, commercialisation and industrialisation will be governed by the law.)
- 15 Peru has always maintained an internal legal coca market under State monopoly control of the National Coca Enterprise, ENACO; Colombia introduced specific exemptions for coca use of its indigenous peoples; and in 1989 Argentina introduced in its Criminal Law, N 23.737, Art. 15: 'The possession and consumption of the coca leaf in its natural state, destined for the practice of "coqueo" or chewing, or its use as an infusion, will not be considered as possession or consumption of narcotics'. See: International Drug Policy Consortium (2011), *IDPC Advocacy note – Correcting a historical error: IDPC calls on countries to abstain from submitting objections to the Bolivian proposal to remove the ban on the chewing of the coca leaf* (London: International Drug Policy Consortium), http://idpc.net/sites/default/files/library/IDPC%20Advocacy%20note%20-%20Support%20Bolivia%20Proposal%20on%20coca%20leaf_0.pdf
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