

4.3

Rights of indigenous groups

Key recommendations

- Governments should repair the discrepancies between the UN drug conventions and international human rights agreements, to ensure that the rights of indigenous peoples are upheld and fully protected
- Indigenous communities should be meaningfully involved in the design and implementation of any policies and regulations that affect them
- Governments should set up data collection mechanisms to review the impact of drug policies and in particular drug law enforcement strategies on indigenous groups, and review any harmful drug law, policy or practice
- The historical, cultural and traditional character and potential benefits of plants controlled at the national and international level should be recognised
- Where the use of psychoactive substances is part of people's traditional and religious practices, the right to cultivate, trade and use such plants for these purposes should be allowed and protected
- Aerial fumigation campaigns should be immediately stopped as they cause significant harm on the health of farmers and indigenous communities, and on the environment. Any crop reduction or alternative development programme should be undertaken in full collaboration and partnership with affected communities, and take specific care to protect the rights of indigenous people, including access to and use of their lands and natural resources in a way that is respectful of their culture and traditions.

Introduction

The 1989 International Labor Organization's Convention concerning Indigenous and Tribal Peoples in Independent Countries⁴⁹ 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'; or 'tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations'.

In practical terms, this means that in addition to the universal human rights recognised in international conventions (see Policy principle 2), indigenous people enjoy specific rights that protect their identity, culture, traditions, habitat, language and access to ancestral lands. These rights are enshrined in the 2007 UN Declaration on the Rights of Indigenous Peoples⁵⁰ which notably recognises indigenous peoples' right to self-determination and autonomy; to maintain, protect and develop cultural manifestations of the past, present and future, as well as their cultural heritage, traditional knowledge and manifestations of their science, technology and culture (articles 11 and 31); to maintain their traditional medicines and healing practices (article 24); to participate in decision making in matters that would affect their rights (article 18); and to the conservation and protection of the environment and the productive capacity of their lands or territories and resources (article 29).

For generations, people worldwide have used psychoactive plants such as coca, cannabis, opium, kratom (*Mitragyna speciosa*), khat (*Catha edulis*), peyote (*Lophophora williamsii*), chamico (*Datura ferox*), San Pedro (*Echinopsis pachanoi*), *Salvia Divinorum* and ayahuasca or yahé (*Banisteriopsis caapi*), among many others, for traditional, cultural and religious purposes. In the Andean region and Amazon basin,



Morning mist in a Yungas coca field outside of Coroico, Bolivia

for example, the coca leaf has a wide application in social, religious, spiritual and medical areas for indigenous people, and is also 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. In Jamaica, cannabis has played a central part in the religious ceremonies of the Rastafarian community (see Box 1). 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, to reduce pain from opioid withdrawal symptoms, and to facilitate births and surgery.⁵¹ These plants can also provide food grain, oil seed or fibre for manufacturing products.

However, and despite the significant advances in international human rights law to protect traditional and medicinal practices of indigenous populations, those involved in the cultivation and use of plants destined for the illicit drug market have been criminalised, marginalised and discriminated against by harsh drug laws and policies.

Regions where crops destined for the illicit drug market thrive are usually characterised by extreme poverty, state abandonment, limited infrastructure, restricted access to basic services, and often conflicts. Instead of addressing these underlying issues, governments have tended to focus on forced crop eradication campaigns. In the Andean region, for instance, these campaigns have caused wide-

spread damage to the health, habitat and traditions of coca-growing indigenous communities⁵² – and only serve to remove vulnerable communities' only means of subsistence in a context of market-driven crop prices, where many licit crop alternatives are not profitable enough to ensure survival, hence exacerbating their poverty.⁵³

In some countries, violent clashes have erupted between armed groups fighting for control of the drug trade and between those armed groups and drug law enforcement agencies, placing local affected communities in the crossfire. Forced eradication campaigns have exacerbated the harms caused by armed conflict, impacting particularly on indigenous groups. For instance, Plan Colombia launched in 1999 has not only had disastrous consequences on the lives, health, environment and economy of indigenous people and farmers, but has also put them in the crossfire between government forces, insurgent groups and paramilitaries fighting to control the territory. The plan did not achieve an overall reduction in cocaine production in Colombia, but has led instead to a serious humanitarian crisis, contributing heavily to the displacement of 3.6 to 5.2 million people⁵⁴ and increased levels of poverty and insecurity. Colombia's constitutional court estimated that at least 27 indigenous groups were at risk of disappearing as a result of armed conflict.⁵⁵

In locations where alternative development programmes have been implemented, no local knowledge, know-how or cultural traditions have been contemplated or considered, and indigenous groups have been excluded from these programmes. Furthermore, land grabbing processes and macroeco-

nomic 'development' projects such as monoculture, hydroelectric dams, open mining and petrol and gas exploitation in ancestral territories affect indigenous people's access to medicinal plants which are often grown within the native biodiversity of their territory⁵⁶ – jeopardising indigenous people's access to health, cultural and spiritual practices. It is essential that these programmes are developed in collaboration with affected 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 (see Chapter 4.2).

Legislative/policy issues involved

The 1961 Single Convention on Narcotic Drugs has classified three psychoactive plants – cannabis, coca and opium poppy – as subject to controls that limit their production, distribution, trade and use to medical and scientific purposes. The premise behind this policy is that it would be impossible to achieve a significant reduction in the illicit production of internationally controlled substances so long as large-scale local consumption of raw materials for these drugs continued. This led to pressure on producing countries to end traditional usage of these plants. Opium poppy, cannabis and coca were placed under the same strict levels of control as extracted and concentrated alkaloids such as heroin and cocaine, under Schedule I of the 1961 Convention – with a deadline of 15 years for the abolition of opium smoking, and 25 years for coca leaf chewing and cannabis use (article 49, para. 2).⁵⁷

The 1971 UN Convention on Psychotropic Substances does not control any plant, but does impose controls on several of the active ingredients of some plants. This is the case for mescaline, contained in peyote and the San Pedro cactus; for psilocybin and psilocin, responsible for the stimulating effect of khat; for DMT, the psychedelic compound in ayahuasca; and for THC, the psychoactive constituent of cannabis, among others.⁵⁸ This level of control creates confusion for substances such as khat, peyote or ayahuasca, since some of their psychoactive compounds are internationally controlled, but the plants themselves remain outside the remit of the conventions. As for cannabis, the plant species itself (cannabis and cannabis resin) is included in Schedule I of the 1961 Convention, but THC is scheduled in the 1971 Convention – also leading to inconsistencies for drug control.

Article 32, para. 4 of the 1971 Convention states that: 'A State on whose territory there are plants growing wild which contain psychotropic substances from among those in Schedule I and which are traditionally used by certain small, clearly determined groups in magical or religious rites, may, at the time of signature, ratification or accession, make reservations concerning these plants'⁵⁹ – thereby allowing member states to make a reservation to allow the traditional use of some plants in delimited geographic locations, during ceremonies or rituals. These provisions are important as they have been used in some countries to legitimise the use of ayahuasca, for example in Brazil, Peru, Colombia, or among the 'Ceju do Montreal' Church members in Canada,⁶⁹ as will be further discussed below.



Ayahuasca brewing

Credit: Creative Commons Paul Hessel

Box 1 The right of Rastafarians to use cannabis in Jamaica

Cannabis (known in Jamaica as ganja) is regarded as sacred by members of Jamaica's Rastafarian community. The plant was first introduced in Jamaica in the 19th century, originating from India, and quickly gained popularity as a recreative and medicinal herb. Its use spread among poor communities in the 1930s with the founding of the Rastafarian religion, a spiritual movement based on the Old Testament and Pan-Africanism.⁶⁰ Of all the herbs, cannabis occupies a special, spiritual place in the Rastafari celebrations. First and foremost is its place in the ceremonial rituals held five or six times a year, known as a nyabinghi, or 'binghi'. But for Rastafarians, the herb is part of a way of life. The plant is often smoked, but can also be drunk or eaten. Knowledge about Rastafarian culture and traditions – drawn directly from testimonies among the Rastafarian community – was collated in a report by the National Commission on Ganja published in 2001, in which the Commission recommended the decriminalisation of the plant.⁶¹ As a community, the Rastafari have been advocating for cannabis legalisation, or at the very least for a removal of its criminal status, for over half a century.

It was not until April 2015, however, that the Jamaican government adopted the Dangerous

Drug (Amendment) Act, amending Section 7(c) of para. 6. This reform constitutes a positive attempt at protecting the religious and cultural rights of the Rastafarian community. The amendment authorises cannabis sacramental use by any person aged above 18 adhering to the Rastafarian faith, or to a Rastafarian organisation. Members of the Rastafarian community can also apply for authorisation to cultivate cannabis for religious purposes as a sacrament in adherence to the Rastafarian faith. Finally, they can apply for an event to be declared exempt from cannabis prohibition rules, as long as the event is primarily organised for the purpose of the celebration of the Rastafarian faith.⁶²

The amendment is broader in scope, also decriminalising the possession of up to 2 ounces (56g) of cannabis, as well as possession for medical and therapeutic purposes as recommended or prescribed by a registered medical doctor or health practitioner. However, the Rastafarian community benefits from broader rights in terms of cultivation and use than the broader community, demonstrating a clear attempt at protecting the cultural and ancient traditions of this community.



Rastafari Rootzfest 2015 in Jamaica

Credit: Creative Commons Beverly Xuen Thomsson

Box 2 Bolivia, coca leaf chewing and the protection of indigenous culture



Credit: Ali Margeaux Pfenninger

Aymara yatiri (shaman) performing a coca leaf reading on the summit of Mt. Uchumachi near Coroico, Bolivia on the winter solstice or Aymara New Year

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 or stomach pains), and spirituality, restoring the balance between natural and spiritual realms.⁶³ For those involved in coca cultivation, this activity often constitutes their only means of subsistence.

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 agreement with coca was achieved, however, recognising the plant as a means of first necessity – this agreement lasted until the 20th century. Following World War II, the UN led a drive for 'modernisation', which identified the practice of coca chewing as being primitive and outmoded. A report of the ECOSOC Coca Leaf Inquiry Commission published in 1950, supported the assumption that coca chewing was a harmful habit, a form of 'drug addiction' and a degenerative moral agent causing malnutrition.⁶⁴ This report resulted in the scheduling of the coca leaf in the same schedule as for cocaine and heroin in the 1961 Single Convention on Narcotic Drugs (Schedule I) and a provision for the abolition of coca chewing within 25 years. Since then, the report has been criticised for being biased, scientifically flawed, culturally insensitive and even racist. A 1995 study by the World Health Organisation

(WHO) 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.'⁶⁵ This study, however, was never made public.

The international prohibition of the coca leaf demonstrates a clear misunderstanding of indigenous customs and traditions. Andean and Amazonian coca consumers often feel ignored, insulted and humiliated by the call by the international community and the UN to abolish what they consider to be a healthy ancestral tradition.

In order to repair this historical error, Bolivia made an attempt at amending the 1961 Convention to remove the obligation to ban coca leaf chewing – an initiative that was blocked by a coalition led by the USA. As a response, in June 2011, Bolivia withdrew from the 1961 Convention, announcing its intention to re-accede with a reservation to align its treaty obligations with its constitution.⁶⁶ Bolivia re-acceded the Convention on 10 January 2013, its reservation stating that: 'The Plurinational State of Bolivia reserves the right to allow in its territory: traditional coca leaf chewing; the consumption and use of the coca leaf in its natural state for cultural and medicinal purposes; its use in infusions; and also the cultivation, trade and possession of the coca leaf to the extent necessary for these licit purposes.'⁶⁷ Since then, Bolivia has developed an innovative community control approach to coca production, with a strong focus on partnership working with coca producing communities to ensure that subsistence farmers are not affected by a sudden and forced removal of their means of subsistence (see Chapter 4.2).⁶⁸

Another condition for the traditional use of internationally controlled plants was stipulated in article 14, para. 2 of the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 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’. However, this clearly contradicts the obligations included in articles 14.1 and 25 of the 1988 Convention, which state that the treaty’s 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.⁷⁰ This lack of clarity around traditional uses of these plants has enabled governments to place strict control mechanisms on cannabis, coca and opium, but also on traditional psychoactive plants that have not been classified by the UN, such as khat and kratom. In order to ensure that the rights of indigenous groups are adequately protected, there should be an explicit recognition of the traditional use of internationally controlled substances – and the UN drug control conventions should be revised to accommodate this obligation.

Implementation issues involved

Indigenous rights protected in courts

In exceptional cases, jurisprudence has recognised the rights of indigenous people to use internationally controlled plants to protect their traditional cultural and religious rights. This was the case, for instance, in Italy where a drug conviction was reversed on appeal on the grounds that the lower court had not considered the religious rights of a Rastafarian defendant to use cannabis.⁷¹ Similarly, in March 2015, the Oral Tribunal of Arica in Chile recognised the right to use the coca leaf for cultural purposes.⁷²

Legal exceptions to protect indigenous rights

Some governments have revised their drug laws and policies – often as a result of favourable court decisions – in order to include provisions within their national legal systems to allow the traditional use of certain psychoactive plants, under specific circumstances.

This is the case for example in Canada, where Section 56 of the Canadian Controlled Drugs and Substances Act stipulates 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

Box 3 Khat: The dangers of prohibition

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 – khat use remains concentrated among Eastern African migrant communities who consume khat 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.

A number of studies have demonstrated that the potential for dependence associated with khat, and the physical and mental health risks related to khat use, remain very low.⁷³ Evidence also suggests that prohibiting khat use can lead 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.⁷⁴

For instance, the recent prohibition of khat in the UK – adopted against the expert advice of the scientific community⁷⁵ (see Chapter 2.1) – is likely to generate an important illicit criminal market, and may alienate certain ethnic minorities in the country.⁷⁶ Beyond the UK itself, the ban had devastating impacts on khat producing areas in Africa, in particular in Kenya.⁷⁷

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.⁷⁸ Although this exemption is rarely applied to protect indigenous rights, an exception was made for the import and use of ayahuasca by the Ceu do Montreal followers a small group of religious leaders using ayashuasca (which they call Daime) for traditional purposes.⁷⁹

A similar rule exists in Section 1307.31 of the US Code of Federal Regulations with regards to peyote – a small, spineless cactus containing the psychoactive alkaloid mescaline (controlled under the 1971 Convention), which is used by members of the Native American Church during religious ceremonies. The rule 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’. As for Canada, this provision is limited in scope, but it effectively enables Native Americans to perpetuate their religious traditions and rituals by using peyote without fear of prosecution.

Peru, Colombia and Argentina also have domestic legal exemptions for a coca leaf market. Indeed, Peru has always maintained an internal legal coca market under the state monopoly of the National Coca Enterprise, ENACO.⁸⁰ Peru has also recognised the traditional use of ayahuasca as part of its cultural heritage.⁸¹ Colombia introduced specific exemptions for coca in indigenous territories.⁸² As for Argentina, in 1989 it introduced the following provision in Article 15 of its Criminal Law, N23.737: ‘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’.⁸³

The latest country to date to have adopted an exception to its drug law is Jamaica, with regards to the right of Rastafarians to use cannabis in their religious ceremonies (see Box 1).

Constitutional protections of indigenous rights

Bolivia is no doubt the country that has gone furthest in seeking to protect the rights of indigenous groups to produce and use coca for traditional purposes. In 2009, Bolivia adopted a new constitution, in which it recognised the traditional use of the coca leaf as a cultural heritage,⁸⁴ therefore ensuring that the right of Bolivian indigenous communities and all its citizens to chew coca is protected (see Box 2).

Regulating plants not placed under international control

As mentioned above, some plants containing psychoactive substances are not included in the UN

drug control conventions, therefore placing no obligations on governments to schedule them – but some did nonetheless. This is the case, for instance, for kratom, khat and ayahuasca. Kratom is currently prohibited under national laws in several Asian countries (including Thailand, Australia or Myanmar), while the national legal status for khat varies considerably from country to country. As for ayahuasca, there are three broad legal statuses for the plant: 1- countries in which there is a legal vacuum, and where the plant’s status might be decided by court decision and jurisprudence; 2- countries where the plant is specifically prohibited (as is the case in France); and 3- countries that allow and sometimes regulate certain uses of ayahuasca, while other uses remain outside the remit of the law (for example in Peru).⁸⁵

Key resources

- Foro Mundial de Productores de Cultivos Declarados Ilicitos (2009), *Political declaration*, http://idpc.net/sites/default/files/library/Political_Declaration_FMPCDI.EN.pdf
- 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*, <http://idpc.net/publications/2011/01/idpc-advocacy-note-bolivia-proposal-coca-leaf>
- United Nations (27 June 1989), *ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries*, <http://www.un-documents.net/c169.htm>
- United Nations (March 2008), *United Nations Declaration on the Rights of Indigenous Peoples*, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf
- United Nations Development Programme (March 2015), *Perspectives on the development dimensions of drug control policy*, http://www.unodc.org/documents/ungass2016/Contributions/UN/UNDP/UNDP_paper_for_CND_March_2015.pdf