

Submission to the UN Committee on the Elimination of Racial Discrimination

The right to health and the criminalisation of ancestral plants

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Submitting organisations & contacts:

**International Centre for
Ethnobotanical Education,
Research and Service**

The International Center for Ethnobotanical Education, Research, and Service (ICEERS) is a non-profit organization dedicated to transforming society's relationship with psychoactive plants. We do this by engaging with some of the fundamental issues resulting from the globalization of ayahuasca, iboga, and other ethnobotanicals.

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**International Drug Policy
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The International Drug Policy Consortium (IDPC) is a global network of over 190 NGOs that come together to promote person-centred and rights-affirming drug policies.

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Introduction

1. The International Centre for Ethnobotanical Education, Research and Service (ICEERS) and the International Drug Policy Consortium (IDPC) welcome the opportunity to provide comments on the first draft of the General Recommendation on racial discrimination in the enjoyment of the right to health.
2. International human rights standards recognise the right of Indigenous peoples to their traditional medicines and health practices, and its centrality in the context of the right to health. However, international and national drug control laws, policies and practices, often rooted in prejudiced and discriminatory assumptions, have sought to ban the cultivation, possession, and use of plants with psychoactive effects that are essential to Indigenous medicine and health. As a result, in certain jurisdictions people who grow, use, heal or travel with ancestral plants are still criminalised, and traditional medicine is endangered.
3. We welcome the draft General Recommendation's recognition that '*The lack of recognition or arbitrary prohibition of traditional healers, traditional medicines and pharmacopoeia specific to certain ethnic groups make members of these groups vulnerable to diseases whose response is found in their tribal cultures*' (para. 12.c), and that '*Criminalization of traditional medicine and practices, without any consultation and consideration of integration, exposes persons protected under the Convention to unreasonable dilemmas between their right to life and bodily autonomy and their right to security of person and protection by the State against violence or bodily harm*' (paragraph 19).
4. In this submission, we encourage the Committee to further recognise that under article 5 ICERD States have the obligation to respect, protect, and take active measures to preserve Indigenous peoples' right to their traditional medicines and health practices, and to amend or repeal laws, policies and practices that criminalise people who cultivate, possess, use, or travel with their ancestral plants.

Traditional medicine as a central element of the right to health

5. In recent years, a clear international human rights standard has emerged with regards to States' obligation to respect, protect, and take active measures to preserve the traditional health knowledge systems and practices of Indigenous peoples, including their medicines. The UN Committee on Economic, Social and Cultural Rights has found that everyone's right to the enjoyment of the highest standard of physical and mental health includes State's obligations to protect 'the vital medicinal plants, animals and minerals necessary to the full enjoyment of health of Indigenous peoples'.¹ Similarly, Article 24 of the UN Declaration on the Rights of Indigenous Peoples states that 'Indigenous peoples have the right to their traditional medicines and to maintain their health practices'. In her recent report on racism and the right to health,² the UN Special Rapporteur on the right to health Dr Tlaleng Mofokeng has found that the 'suppression, undermining and marginalization of traditional and indigenous knowledge systems and medicine has wide-ranging health impacts', and has reminded States that 'Acceptable health requires an urgent focus on ensuring an end to the demonization and belittling of indigenous and traditional health'. In country visits, the special mandate on the rights of Indigenous peoples has found

¹ E/C.12/2000/4, para. 27.

² A/77/197

that ‘traditional Indigenous systems of medicine are not sufficiently recognised’,³ and has called on States to protect Indigenous ‘pharmacopoeia’.⁴

6. Similar developments have taken place in the international health and drug policy spheres. In May 2023, the World Health Assembly adopted a landmark resolution on the health of Indigenous Peoples⁵ that calls for integrating traditional practices and knowledge systems in a wide range of health policies. UN General Assembly resolution 77/238 on the world drug situation (December 2022), as well as UN Human Rights Council resolution 52/24 on the human rights implications of drug policy (April 2023), contain similar commitments. The International Guidelines on Human Rights and Drug Policy, which are endorsed by OHCHR, WHO, UNDP, and UNAIDS, indicate that Indigenous peoples have ‘the right to use and cultivate plants and plant-based substances that have psychoactive effects, where these are part of their cultural, spiritual, or religious practices’.⁶

International and national prohibition of traditional medicines and practices in the name of drug control

7. Despite the clear international human rights standard requiring the protection of Indigenous traditional medicines and health practices, international and national drug control frameworks often prohibit the use of plants and plant-based substances that are integral to Indigenous tradition.

Prohibition of traditional medicines under the international drug control conventions

8. The international drug control regime is governed by the 1961 Single Convention on Drugs, the 1971 Convention on Psychotropic Substances, and the 1988 Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, which are almost universally ratified. The 1961 and 1971 conventions lay down a list of plants and substances with psychoactive effects that are under international control, and the 1988 convention establishes an obligation to criminalise their cultivation, supply, and possession. Whilst psychoactive substances used in the Western tradition for cultural and recreational purposes, such as alcohol and tobacco, escaped control, plants and plant-based substances used in Indigenous medicine were subject to international prohibition.
9. The prohibition of coca leaf chewing - still in force - is maybe one of the clearest examples of the international drug conventions proscribing a traditional indigenous health practice. The coca plant is a mild stimulant that has been used for centuries by Indigenous Peoples in the Andean region for cultural and religious purposes, as well as for their mental health, in addition to being used to produce cocaine for the illegal drug market mainly localised in the Global North. The 1961 Single Convention on Narcotic Drugs included the coca plants amongst the most dangerous substances in its Schedule I⁷ and committed all Member States to phase out the ancestral Andean practice of coca leaf chewing in 25 years. The rationale for including the coca leaf in the 1961 Single Convention is mainly rooted in a report by the ECOSOC Commission of Inquiry on the Coca Leaf from May 1950⁸, which has been sharply criticised for

³ <https://uhri.ohchr.org/en/document/fa2d548d-a2a3-4c4f-b56a-71ee76fb8da7>

⁴ <https://uhri.ohchr.org/en/document/597b6193-e081-4cd6-96e5-098e3ac937ca>

⁵ https://apps.who.int/gb/ebwha/pdf_files/WHA76/A76_ACONF1-en.pdf

⁶ <https://www.humanrights-drugpolicy.org/>

⁷ More information on the coca leaf can be found here: <https://www.tni.org/en/publication/coca-leaf-myths-and-reality>

⁸ Available here: <https://www.tni.org/en/publication/report-of-the-commission-of-enquiry-on-the-coca-leaf>

the makeup of its researchers, its arbitrariness, poor methodology, lack of precision and racist connotations about the 'Andean Indian', and disregard for the value of traditional practices.

10. In spite of this prohibition, the coca leaf has continued to be chewed and brewed by millions of people in the Andes region. The UN Permanent Forum on Indigenous issues has recognised 'the cultural significance and medical importance of the coca leaf in the Andean and other indigenous regions of South America', and that 'coca leaf chewing is specifically banned by the United Nations Single Convention on Narcotic Drugs'. The Permanent Forum recommends that those portions of the Convention regarding coca leaf chewing that are inconsistent with the rights of indigenous peoples to maintain their traditional health and cultural practices, as recognized in articles 11, 24 and 31 of the Declaration, be amended and/or repealed'.⁹ In line with this recommendation, Bolivia has recently announced¹⁰ that it will trigger a process to remove the coca leaf from the international drug conventions. .
11. Besides the coca leaf, the active ingredients of preparations or plants traditionally used by Indigenous Peoples in the Americas, such as ayahuasca, peyote or the San Pedro cactus, are subject to control under the 1971 Convention. The plants that contain those active ingredients were exempted from international control, so its provisions only apply to the isolated chemical compounds and to preparations made by mixing those with other ingredients -and as such has been interpreted by the International Narcotic Control Board (INCB) in its 2010 and 2012 Annual Reports¹¹. Additionally, the 1971 Convention offers the option of a special reservation for Indigenous uses, which countries like Canada, Mexico, Peru and the USA have adopted.¹² However, certain countries have moved to ban possessing or travelling with these substances, or have created legal limbos in which people may end up being criminalised, as we shall see below.¹³

Prohibition and criminalisation of traditional medicines under national practice

12. In recent years, we have witnessed how Indigenous people have been criminalised for the importation or possession of their ancestral plants in different countries. In most jurisdictions, these traditional plants are not subject to control but they do not have a defined legal status either. For this reason, they are often placed within the framework of drug control and are legally equated with their psychoactive components. This is an error that the INCB itself has clarified in its annual reports, interpreting that "although some active ingredients with stimulant or hallucinogenic effects contained in certain plants are controlled under the 1971 Convention, there are currently no plants controlled under that Convention or under the 1988 Convention"¹⁴.
13. For example, during the year 2022 alone, four indigenous people were arrested in Mexico for travelling with ayahuasca into the country. So far, three of them remain in prison under the figure of mandatory

⁹ See recommendations from the 8th session of the PF> <https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/health/recs-health.html>

¹⁰ <https://www.reuters.com/world/americas/colombia-bolivia-ask-un-remove-coca-leaf-narcotics-list-2023-02-22/>

¹¹ INCB Annual Reports for 2010 and 2012.

¹² For more detailed information, see: Sanchez, C. & Bouso, J.C. (December 2015), *Ayahuasca: From the Amazon to the Global Village, Drug policy briefing 43* (International Center for Ethnobotanical Education Research & Service & Transnational Institute), https://www.tni.org/files/publication-downloads/dpb_43_eng_web_19122015.pdf. For more details on the legal arguments and relevant quotes from the Commentary and INCB, as well as the legal opinion used in the USA in favour of ayahuasca use by Indigenous Peoples, see:

https://www.iceers.org/Documents/ICEERS_site/Reports/UDV/Hoasca_1971_Convention-Legal_Brief.pdf

¹³ For the case of ayahuasca, see: <https://www.iceers.org/adf/country-by-country-legal-status-map/>,

¹⁴ INCB Annual Report 2010, p. 52.

pre-trial detention, which, although contrary to international human rights standards¹⁵, is applicable to crimes against health in the context of the 'war on drugs'. Legal operators tend to prioritise drug legislation over human rights legislation. As a result, indigenous spiritual practices, which are an indispensable part of indigenous health systems, are also often criminalised, with no margin even for personal use. This means that States have not been complying with the 2007 United Nations Declaration on the Rights of Indigenous Peoples (Art. 24 and 31), nor have they followed the recommendations of the International Guidelines on Human Rights and Drug Policy (point 4.3).

People who travel with their ancestral plants

14. One of the work pillars of ICEERS (one of the submitting organisations) is supporting the legal defence of people who face legal problems in relation to plants used for traditional purposes, including coca leaf. For example, since 2015 in Spain ICEERS has participated in the defence of 11 cases related to this plant¹⁶. We have also supported the defence of cases in other countries such as France, Denmark, Mexico (4 cases), Peru (for export), Finland or Portugal, among others. In 2023, for example, we assisted in the defence of a Bolivian citizen who was sentenced to 4 years in prison and a fine of 40,000 euros for travelling with 4.8 kilograms of coca leaf that was meant to be used for traditional purposes such as chewing and brewing; she was finally condemned to 6 months in prison and a fine of 425 euros (although the sentence has been appealed). Another example the case of a British citizen arrested and prosecuted in Bali (Indonesia), whose trial was held recently (with dubious procedural guarantees) and who was sentenced to 5 years and 4 months in prison for possession of 20 grams of coca leaf.
15. People who are criminalised for travelling with their ancestral plants respond to a clear profile. They are migrants from Colombia, Bolivia or Peru, who reside in the countries where they are detained. They are usually arrested upon returning from a visit to their family, as they bring with them coca leaf for chewing or drinking in infusion in the traditional way (also in the form of mambe). They tend to have few resources and little knowledge of the criminal justice system, including their procedural rights. Many times they do not know that the traditional use of coca leaf is not allowed in the countries where they live. We have also identified several due process irregularities, for example in relation to the toxicological analysis of the plants, which we have pointed out through different reports¹⁷.
16. Another set of examples can be found in the number of recent cases in which traditional or Indigenous healers who have travelled with ayahuasca have been criminalised. In 2022 alone, we documented 10 cases of persons deprived of liberty in Mexico for transporting ayahuasca, four of them Indigenous people (as of 2023, 8 out of the 10 remain under criminal proceedings, whilst two are released on bail and we obtained two favourable sentences). At least two more people were arrested in Mexico in 2022 for possessing coca leaf, including a pregnant women from Peru. In addition to that, similar cases have been presented in Spain, the Netherlands and Portugal for ayahuasca or other plants with medicinal or ancestral uses. These cases require the support of lawyers to demonstrate before court the legal and pharmacological difference between the plants and their psychoactive compounds, which often involves long and difficult processes that have severe impacts on the health, welfare and economy of traditional healers. A relevant aspect is that most of these events have occurred in international airports with direct

¹⁵ <https://www.ohchr.org/en/press-releases/2022/09/mexico-should-overturn-mandatory-pre-trial-detention-un-experts>

¹⁶ See for example <https://www.opensocietyfoundations.org/voices/small-case-spain-big-victory-smarter-drug-policy/es> ; <https://www.iceers.org/es/hoja-de-coca-amazonia-andina-tribunales-europeos/>

¹⁷ <https://www.iceers.org/es/tribunales-usos-tradicionales-hoja-coca/>

flights from countries such as Brazil, Peru and Colombia, where indigenous people travel with their traditional medicines.

17. The criminalization of these plants not only generates a profound impact on the individual lives of the people who are subject to criminal processes for travelling with their ancestral medicines, but also on their broader communities. Within their traditional communities, these plants allow the collectivity to enjoy health (understood in a broad sense), prevent social conflicts, create spaces for intercommunity dialogue, and integrate a fundamental aspect of the exercise of their collective conscience that supports their identity and cosmovision. This puts the very existence of entire cultures at risk.

Conclusion: feedback on the first draft of the General Recommendation

18. **A clear and explicit recognition by this General Recommendation that States have the obligation to actively preserve traditional medicines and practices, including by amending laws, policies and practices that criminalise ancestral plants and their traditional use, will be an impactful and valuable contribution to the ongoing judicial and political efforts to reform drug frameworks that disregard and undermine Indigenous knowledge systems.**
19. In view of the foregoing, we respectfully suggest amending paragraphs 12(c) and 19 of the draft General Recommendation. The following draft language is presented for consideration:

Para. 12(c). *'(...) The history of medicine, and its role in supporting theories of racial superiority and in justifying slavery and colonialism, shaped and sustained hierarchies in the creation of health systems, stereotyping and perpetuating bias against traditional medicine and the role of culturally sensitive personnel and practices, including midwifery care. [INSERT → The international drug conventions, as well as certain national drug laws, policies and practices, have sought to eradicate ancestral plants and plant-based substances with psychoactive effects such as the coca leaf that are integral to traditional medicine and practices, thus undermining Indigenous peoples' right to health]. The lack of recognition or arbitrary prohibition of traditional healers, traditional medicines and pharmacopoeia specific to certain ethnic groups make members of these groups vulnerable to diseases whose response is found in their tribal cultures. (...).'*

Para. 19. *'(...) Criminalization of traditional medicine and practices, without any consultation and consideration of integration, exposes persons protected under the Convention to unreasonable dilemmas between their right to life and bodily autonomy and their right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution (Article 5 (b)). [INSERT → This is also applicable to international and national drug laws, policies and practices that prohibit or criminalise the cultivation, possession or use of plants with psychoactive effects that are integral to traditional medicine, including for people who migrate or travel with their ancestral plants]. In both cases, their right to health is compromised.'*

20. We also respectfully suggest the inclusion of the following recommendation to section IV.(A), concerning recommendations on legislative and policy related matters, which in the first draft do not adequately reflect the findings of the General Recommendation with regards to traditional medicines and practices.

'INSERT → States must take active steps to respect, protect, and preserve Indigenous peoples right to their traditional medicines and to maintain their health practices. This should include amending or repealing the international and national laws, policies and practices that seek to suppress the cultivation, possession and use of plants and plant-based substances that are integral to Indigenous traditional medicines and practices, including for people who migrate or travel with their ancestral plants'.