

Backgrounder: Bolivia's concurrent drug control and other international legal commitments

Damon Barrett, International Centre on Human Rights and Drug Policy, 1 July 2011

'No rule, treaty or custom, no matter how special its subject matter ...applies in a vacuum'
International Law Commission¹

Bolivia's denunciation of the 1961 Single Convention on Narcotic Drugs is not just about one treaty. It is about finding an appropriate balance between multiple concurrent and conflicting international legal obligations. When international treaties ratified by or acceded to by Bolivia and relevant jurisprudence are taken into account, it is clear that Bolivia would find itself in breach of multiple international agreements were it to fully implement the 1961 Single Convention as written. A reservation on the 1961 Single Convention is the most reasonable and proportionate way to address this conflict.

This is particularly so in relation to indigenous peoples and free prior and informed consent relating on issues that affect them. The manner in which Bolivia translates international obligations under the 1961 Single Convention on Narcotic Drugs into national legislation, programmes and policies must be consistent with its obligations to respect indigenous peoples rights that flow from its obligations under contemporary international, constitutional and (indigenous) customary law. The proposed reservation provides the means through which these obligations can be harmonised. Without it the Convention would constitute a unilateral imposition of a ban on the coca leaf on indigenous peoples, and a failure to fulfill the obligations to hold good faith consultations in order to obtain their consent and to ensure their cultural and physical survival.

A second question relates to whether the reservation is compatible with other concurrent international legal obligations, in this case under the law of treaties and children's rights. An analysis of these agreements set against Bolivia's proposal reveals no apparent conflict.

This backgrounder is divided into two sections.

I. Considers drawing a balance between the Single Convention of 1961 and

- Universal Declaration of Human Rights 1948
- International Covenant on Civil and Political Rights 1966
- International Covenant on Economic Social and Cultural Rights 1966
- International Convention on the Elimination of Racial Discrimination 1965
- UN Declaration on the Rights of Indigenous People 2007
- ILO Convention 169 - Indigenous and Tribal Peoples Convention 1989
- UNESCO Convention for the Safeguarding of Intangible Cultural Heritage 2003
- UN Convention on the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988
- Convention on Biological Diversity 1992

II. Considers the compatibility of the proposed reservation with

1. Report of the Study Group of the International Law Commission, finalized by Martti Koskeniemi, Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, (A/CN.4/L.682), 13 April 2006, para. 120

- Vienna Convention on the Law of Treaties 1969
- Convention on the Rights of the Child 1989
- ILO Convention 182 on the Worst Forms of Child Labour 1999

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I.

Universal Declaration of Human Rights (UDHR) 1948²

(Article 27) *Everyone has the right freely to participate in the cultural life of the community*

International Covenant on Civil and Political Rights (ICCPR, 1966)³ was acceded to by Bolivia in 1982. Article 27 requires that *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

Article 27, as it relates to indigenous peoples, may be read alongside, *inter alia*, article 1 common to the ICCPR and ICESCR:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development

Article 27 of the ICCPR is understood as an individual and collective right. Jurisprudence of the UN Human Rights Committee on the article as it relates to indigenous peoples rights has shown that:

1. The regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 of the Covenant⁴
2. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27⁵
3. When considering the above question, consultation with indigenous communities and the viability of the indigenous economy are key.

The ban on both coca chewing as a cultural practice and cultivation as an economic activity rooted in cultural heritage was implemented with the adoption of the 1961 Single Convention without consultation with indigenous communities. Since then '[i]t has become a generally accepted principle in international law that indigenous peoples should be consulted as to any decision affecting them'.⁶

2. G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) <http://www1.umn.edu/humanrts/instree/b1udhr.htm>

3. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976 <http://www2.ohchr.org/english/law/cescr.htm>

4. Kitok v Sweden Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988) <http://www1.umn.edu/humanrts/undocs/197-1985.html>

5. Jouni E. Länsmäen et al. v. Finland, Communication No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 (1996) <http://www1.umn.edu/humanrts/undocs/html/VWS67158.htm>

6. 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Land and Resources' *Arizona Journal of International and Comparative Law*, 1 (2005 (22)) 7.

Free Prior and Informed Consent of indigenous peoples in relation to issues that affect them is supported by the UN Human Rights Committee,⁷ the UN Committee on Economic Social and Cultural Rights⁸ and the UN Committee on the Elimination of Racial Discrimination.⁹ It has also been upheld at the Colombian Constitutional Court,¹⁰ and the Inter-American Court of Human Rights.¹¹

On FPIC see also, the Convention on the Elimination of All Forms of Racial Discrimination, UN Declaration on the Rights of Indigenous Peoples, ILO Convention 169, and the Convention on Biological Diversity below. Bolivia also acceded to the **International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)**¹² in 1982. Article 15(1)(a) of the ICESCR requires that *The States Parties to the present Covenant recognize the right of everyone...To take part in cultural life*

In General Comment No. 15, adopted in 2009, the UN Committee on Economic Social and Cultural Rights developed the normative content of article 15(1)(a). The Committee found, *inter alia*, that:

- The right to take part in cultural life is also interdependent on other rights enshrined in the Covenant, including the right of all peoples to self-determination (art. 1)
- The right to take part in cultural life can be characterised as a freedom. In order for this right to be ensured, it requires from the State party both abstention (i.e., non-interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods).
- The Committee considers that culture, for the purpose of implementing article 15 (1) (a), encompasses, *inter alia*, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions...
- Laws, policies, strategies, programmes and measures adopted by the State party for the enjoyment of cultural rights should be formulated and implemented in such a way as to be acceptable to the individuals and communities involved. In this regard, consultations should be held with the individuals and communities concerned in order to ensure that the measures to protect cultural diversity are acceptable to them;
- States parties must take measures to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.

Bolivia ratified the **International Convention on the Elimination of All forms of Racial Discrimination (CERD, 1965)**¹³ in 1970. In 1997 the UN Committee on the Elimination of Racial Discrimination adopted a General Comment applying the Convention to indigenous peoples.¹⁴ It found that States parties must:

7. Poma Poma v Peru Communication No. 1457/2006 (CCPR/C/95/D/1457/2006, 2009) para 7.6

8. Concluding Observations: Ecuador (E/C.12/1/Add.100, 2004) para 12

9. General Comment No. 23, 1997 para 4(d)

10. Sentencia SU.383/03 <http://www.corteconstitucional.gov.co/relatoria/2003/SU383-03.htm>

11. Saramaka People v. Suriname. Inter-American Court for Human Rights (ser.C). No. 172 (28 November 2007)

12. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976 <http://www2.ohchr.org/english/law/cescr.htm>

13. 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969

14. General Comment No. 23, 1997

- Recognise and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation¹⁵
- Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics¹⁶
- Ensure that indigenous communities can exercise their rights to practise and revitalise their cultural traditions and customs and to preserve and to practise their languages¹⁷
- Recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources¹⁸

In support of the arguments made in relation to the treaties above:

The **UN Declaration on the Rights of Indigenous Peoples (2007)** is now universally adopted. Bolivia has incorporated the Declaration in its entirety directly into its legislative framework and has recognised the rights of indigenous peoples to self-determination in its 2009 Constitution (Article 2). The Declaration recognises the right to free prior and informed consent¹⁹ and participation in decision making²⁰ as well as the right of indigenous peoples to 'practise and revitalize their cultural traditions and customs'²¹ 'to the use and control of their ceremonial objects'²² 'to their traditional medicines'²³ 'to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'²⁴ and 'to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora'.²⁵

The **UN Permanent Forum on Indigenous Issues (UN PFII)** supported the call for the removal of traditional uses of coca from the scope of international drug control.²⁶ According to the UN PFII in 2009, 'those portions of the [1961] 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'.²⁷

15. Ibid para 4(a)

16. Ibid para 4(c)

17. Ibid para 4(e)

18. Ibid para 5

19. Articles 11, 19, 32

20. Articles 18(1)

21. Article 11(1)

22. Article 12(1)

23. Article 24(1)

24. Article 26(1)

25. Article 31(1)

26. 'The Permanent Forum welcomes the decision 2009/250 of the Economic and Social Council on a proposed amendment to the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol, related to the traditional use of the coca leaf. The Forum recommends that Member States support this initiative, taking into account articles 11, 24 and 31 of the United Nations Declaration on the Rights of Indigenous Peoples'. Report of the Ninth Session of the UN Permanent Forum on Indigenous Issues 19-30 April 2010, (UN Doc No E/2010/43-E/C.19/2010/15), para 35.

27. 'The Permanent Forum recognizes the cultural significance and medical importance of the coca leaf in the Andean and other indigenous regions of South America. It also notes that coca leaf chewing is specifically banned by the United Nations Single Convention on Narcotic Drugs (1961). 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', Report of the Eighth Session of the UN Permanent Forum on Indigenous Issues 18-29 May 2009, (UN Doc No E/2009/43 - E/C.19/2009/14), para 89.

ILO Convention 169 - Indigenous and Tribal Peoples Convention (1989) was ratified by Bolivia in 1991. It requires that 'Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned' (Article 4). It clarifies that these should 'not be contrary to the freely-expressed wishes of the peoples concerned' and instead must be 'appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention' (Article 30).

Bolivia ratified the **UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (2003)** in 2006. The UNESCO convention notes that indigenous communities '*play an important role in the production, safeguarding, maintenance and re-creation of intangible cultural heritage, thus helping to enrich cultural diversity and human creativity*'. As has been argued by Bolivia, traditional uses of the coca leaf are part of the country's intangible culture.

The UN convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) was ratified by Bolivia in 1990 with a reservation on article 3(2) as to traditional uses of coca.

Article 14(2) of the 1988 explicitly requires that eradication measures respect 'traditional licit uses' and fundamental human rights. As with the ICCPR and ICESCR, which are directly related to this provision, Bolivia must reconcile this obligation with its obligations under the 1961 Convention.

However, the 1988 treaty (art 14(1)) states that '*Any measures taken pursuant to this Convention by Parties shall not be less stringent than the provisions applicable to the eradication of illicit cultivation of plants containing narcotic and psychotropic substances and to the elimination of illicit demand for narcotic drugs and psychotropic substances under the provisions of the 1961 Convention*'

But there is a conflict between these two provisions if the measures under the 1961 Single Convention interfere with human rights obligations and traditional licit uses – as is the case in Bolivia. This is reflected in Bolivia's reservation to the 1988 convention which will serve as the model for that entered on the 1961 treaty.²⁸

The Convention on Biological Diversity (1992)²⁹ was ratified by Bolivia in 1994. One of the aims of the CBD is the conservation of biological diversity (article 1). Clearly, eradication of coca may have an impact on this. Article 8j of the CBD reads:

28. The Republic of Bolivia places on record its express reservation to article 3, paragraph 2, and declares the inapplicability to Bolivia of those provisions of that paragraph which could be interpreted as establishing as a criminal offence the use, consumption, possession, purchase or cultivation of the coca leaf for personal consumption.

For Bolivia such an interpretation of that paragraph is contrary to principles of its Constitution and basic concepts of its legal system which embody respect for the culture, legitimate practices, values and attributes of the nationalities making up Bolivia's population. Bolivia's legal system recognizes the ancestral nature of the licit use of the coca leaf which, for much of Bolivia's population, dates back over centuries. In formulating this reservation, Bolivia considers that:

- The coca leaf is not, in and of itself, a narcotic drug or psychotropic substance;
- The use and consumption of the coca leaf do not cause psychological or physical changes greater than those resulting from the consumption of other plants and products which are in free and universal use;
- The coca leaf is widely used for medicinal purposes in the practice of traditional medicine, the validity of which is upheld by WHO and confirmed by scientific findings;
- The coca leaf can be used for industrial purposes;
- The coca leaf is widely used and consumed in Bolivia, with the result that, if such an interpretation of the above-mentioned paragraph was accepted, a large part of Bolivia's population could be considered criminals and punished as such, such an interpretation is therefore inapplicable;
- It must be placed on record that the coca leaf is transformed into cocaine paste, sulphate and hydrochlorate when it is subjected to chemical processes which involve the use of precursors, equipment and materials which are neither manufactured in or originate in Bolivia.

At the same time, the Republic of Bolivia will continue to take all necessary legal measures to control the illicit cultivation of coca for the production of narcotic drugs, as well as the illicit consumption, use and purchase of narcotic drugs and psychotropic substances.

29. United Nations, *Treaty Series*, vol. 1760, p. 79

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices

This been interpreted as requiring the free prior and informed consent of indigenous peoples³⁰

In addition, under article 6 (General Measures for Conservation and Sustainable Use) each Contracting Party shall, in accordance with its particular conditions and capabilities:

- (a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned; and*
- (b) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.*

Included within such cross sectoral plans are Bolivia's supply reduction policies, which require integration with the State's biodiversity obligations. A reservation to the 1961 Single Convention to permit traditional uses of coca is an appropriate balance with obligations under the CBD.

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II.

Is the reservation consistent with the Vienna Convention on the Law of Treaties (VCLT)?³¹ In particular, is the reservation contrary to the 'object and purpose' of the treaty contrary to article 19 of the VCLT?

Two main points assist in answering this question:

1. An original transitional reservation was permitted to allow for a 25 year grace period for coca chewing. In this context the official UN commentary to the 1961 Single Convention expressly envisages a reservation freeing the State of these time limits which may be entered under the same procedure proposed in the present case.³²
2. Bolivia intends to re-accede to the treaty in order to fulfil its obligations to reduce supply and demand of illicit substances, including illicit supply of coca.

As such it cannot be reasonably argued that to consider a reservation on traditional uses of coca leaf without a time limit could be deemed contrary to the object and purpose of the treaty.

The reservation will not affect the other States parties to the 1961 Single Convention *inter se* (article 21.2). As such this will affect only Bolivia's obligations *vis a vis* other States parties making it, in reality, of less relevance to other States parties than the initial proposal to remove the requirement to abolish coca chewing from the text of the treaty itself.

30. See CBD Akwe Kon Guidelines www.cbd.int/doc/publications/akwe-brochure-en.pdf and the 2011 Nagoya Protocol to the CBD <http://www.cbd.int/abs/nagoya-protocol/signatories/> to which Bolivia is a signatory.

31. 1155 U.N.T.S. 331, 8 I.L.M. 679, *entered into force* Jan. 27, 1980. Note: Bolivia has signed but not ratified the VCLT. But many of its provisions are considered customary international law. http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

32. Commentary to the Single Convention on Narcotic Drugs, page 476, para 3.

The UN Convention on the Rights of the Child (CRC) was ratified by Bolivia in 1990.³³ Article 30 of the CRC is similar to article 27 of the ICCPR, guaranteeing the right to the minority or indigenous child ‘*in community with other members of his or her group, to enjoy his or her own culture*’

Article 33, however, requires that ‘*States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances*’

Article 24(3) meanwhile requires that ‘*shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children*’

The question is whether allowing traditional uses of coca is compatible with the CRC.

To comply with the CRC, Bolivia must continue to take appropriate measures, in the best interests of the child (article 3), to protect children from the illicit use of narcotic drugs and psychotropic substances. The word illicit is key. If traditional uses are no longer illicit in Bolivia, nor with relation to Bolivia’s obligations under the ‘relevant international treaties’ then article 33 does not apply to them.

In addition, given the discussions above, the complete ban on traditional uses of coca cannot be seen as an ‘appropriate measure’ for the purposes of article 33 due to the disproportionate impact on the cultural and indigenous rights of Andean communities. Moreover, the total ban on coca has a deleterious effect on family income for traditional growers and farming communities which impacts on a range of child rights, from the right to an adequate standard of living (article 27), to the right to education (article 28 - with school enrolment being affected when family income drops)

In relation to article 24(3) the coca leaf itself has been shown to not be harmful, and to have medicinal uses. It must not be confused or conflated with cocaine use. Coca chewing or drinking coca tea cannot be considered a traditional practice prejudicial to the health of children without such prejudicial effects having been documented.

Bolivia must continue to take appropriate measures, and in the best interests of the child, to prevent the use of children in the illicit production and trafficking in all illicit substances. Where children are involved in licit production of coca, Bolivia must apply child labour standards (minimum age, maximum hours, safe conditions etc). Such work must not be hazardous or interfere with the child's education, or be harmful to the child's health or physical, mental, spiritual, moral or social development. (article 32)

ILO Convention 182 on the Worst forms of Child Labour (1999) was ratified by Bolivia in 2003. It would continue to apply to coca production after the reservation even if the work is no longer ‘illicit’ for the purposes of article 3(c).

The work must not by its nature or the circumstances in which it is carried out be likely to harm the health, safety or morals of children (article 3(d)).

With sincere thanks to Cathal Doyle, University of Middlesex

33. G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990. <http://www2.ohchr.org/english/law/crc.htm>