

# **Rights of Indigenous Peoples and the International Drug Control Regime: The Case of Traditional Coca Leaf Chewing**

Sven Pfeiffer<sup>\*</sup>

## Table of Contents

A. Introduction.....	288
B. Coca Leaf Chewing Under the International Drug Control Regime....	289
C. The Right of Indigenous Peoples to Practice Their Customs and Traditions Under International Law .....	292
D. Coca Leaf Chewing and Rights of Indigenous Peoples Under Domestic Law in the Andean Region .....	296
E. The Case of Bolivia .....	297
F. Resolving the Normative Conflict .....	308
I. The Relationship Between the Prohibition on Coca Leaf Chewing and the Rights of Indigenous Peoples to Their Customs and Traditions .....	308
1. Relevant Rules of the International Drug Control Regime .....	309
2. Relevant Rules of International Human Rights Law.....	313
II. Underlying Reasons for Tension Between Indigenous Peoples' Rights and the International Drug Control Regime .....	318
G. Conclusion.....	323

<sup>\*</sup> LL.M. (International Law), University of Bristol, UK; Associate Expert, United Nations Office on Drugs and Crime (UNODC), Vienna, Austria. The article is written in the author's personal capacity.

## Abstract<sup>1</sup>

This article discusses whether there is a normative conflict between the rights of indigenous peoples and the international drug control regime. Treaty obligations to abolish coca leaf chewing might clash with the indigenous peoples' right to practice their customs and traditions in States of the Andean region where indigenous peoples have practiced coca leaf chewing for centuries. Taking into account the manner with which States have addressed this issue, the article focuses on the case of Bolivia and its recent attempt to amend the 1961 *Single Convention on Narcotic Drugs*. It is argued that the normative conflict can be resolved or at least avoided by applying the methods of treaty interpretation, though only at the expense of indigenous rights. Options to change the international drug control regime to ensure indigenous rights are not only limited by the common interest in preserving its integrity, but also by the negative impact this could have on treaty relations.

## A. Introduction

Concerns for the rights of indigenous peoples recently led the Plurinational State of Bolivia<sup>2</sup> to propose an amendment to and later withdraw from the 1961 *Single Convention on Narcotic Drugs* (1961 Convention), which begs the question of whether there is a normative conflict between the international drug control regime and indigenous rights. This article considers the human rights of indigenous peoples under international law in a situation where coca leaf chewing is part of their customs and traditions and at the same time prohibited under the international drug control regime. It discusses a conflict that seems to exist between relevant rules of the two bodies of law at the conceptual level and offers an interpretation of how it can be resolved. Its focus is the case of Bolivia, the only country that has sought to address this normative conflict by taking action under both domestic and international law.

The arguments presented here are built on the conviction that international law is a system in which rules do not exist in a vacuum but must be seen in relation to each other. Sections B and C of the article outline those provisions under the international drug control regime and international human rights law that appear to be in conflict with each other with regards to the rights of

<sup>1</sup> All views expressed in this article are those of the author and do not necessarily represent the views of, and should not be attributed to, UNODC or the United Nations in general.

<sup>2</sup> Hereinafter: Bolivia.

indigenous peoples. The following sections D and E consider how the issue of coca leaf chewing as a custom or tradition of indigenous peoples has been addressed by States of the Andean region,<sup>3</sup> in particular Bolivia, given their international drug control obligations. Section F discusses how the normative conflict can be resolved by applying the methods of treaty interpretation. It examines the conflicting values and interests that inform the rules in question, and concludes that a solution within existing international law would not be favorable to human rights. Efforts to ensure indigenous rights, on the other hand, would require changes to the international drug control regime, which are not easily achievable and may have far reaching consequences.

With its limited focus on a normative conflict, this article will not address human rights issues resulting from the implementation of the international drug control regime. Such issues have been exhaustively addressed elsewhere and relate to the questions whether domestic enforcement measures meet human rights standards or whether international drug control policy makers give sufficient attention to human rights.<sup>4</sup>

## B. Coca Leaf Chewing Under the International Drug Control Regime

The international drug control regime has been treaty-based since its inception in the early 20th century.<sup>5</sup> Today, there are three main international drug control conventions,<sup>6</sup> which oblige States parties to exercise control over narcotic drugs and psychotropic substances while ensuring their availability for medical and scientific purposes, and to combat their illicit trafficking. Substances subject to international control are listed in schedules annexed to the conventions, which can be modified according to the procedures foreseen by the

<sup>3</sup> Argentina, Bolivia, Chile, Colombia, Ecuador, Peru, and Venezuela.

<sup>4</sup> See, e.g., D. Barrett *et al.*, 'Recalibrating the Regime: The Need for a Human Rights-Based Approach to International Drug Policy' (1 March 2008), available at <http://www.hrw.org/legacy/pub/2008/hivaids/beckley0308.pdf> (last visited 15 June 2013).

<sup>5</sup> T. Pietschmann, 'A Century of International Drug Control', 54 *Bulletin on Narcotics* (2007) 1 & 2, 1, 1.

<sup>6</sup> *Single Convention on Narcotic Drugs*, 30 May 1961, 976 UNTS 105 [1961 Convention]; *Convention on Psychotropic Substances*, 21 February 1971, 1019 UNTS 175; *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, 1582 UNTS 95 [1988 Convention].

conventions. However, specific treaty provisions apply to the coca leaf, cannabis and opium,<sup>7</sup> which can only be modified by amending the conventions.

The *1961 Convention* as amended by the *1972 Protocol Amending the Single Convention on Narcotic Drugs*<sup>8</sup> defines coca leaf as “the leaf of the coca bush except a leaf from which all ecgonine, cocaine and any other ecgonine alkaloids have been removed” and places it in Schedule I,<sup>9</sup> together with other drugs like cocaine, heroin, and morphia. The drugs in Schedule I are subject to the measures of control listed in Article 2 (1) of the Convention, which aim at limiting “exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs”.<sup>10</sup> Among other measures, States parties to the *1961 Convention* are required to provide statistical data on the production and consumption of drugs,<sup>11</sup> limit their manufacture and importation,<sup>12</sup> enforce a license system for their trade and distribution,<sup>13</sup> and prohibit the possession of drugs.<sup>14</sup> In addition, coca leaves are subject to the specific system of controls in Article 26, which requires States parties to establish a national authority responsible to limit and supervise the production of coca leaves for licit medical and scientific purposes and to uproot all coca bushes which grow wild. Article 27 further allows States parties to use coca leaves for the preparation of a flavoring agent, which shall not contain any alkaloids (such as cocaine), and to permit the production, import, export, trade in and possession of such leaves to the extent necessary for such use.

The *1961 Convention*, in Article 49, allowed States parties to reserve the right to temporarily permit coca leaf chewing by providing as follows:

<sup>7</sup> Additional measures of control for opium are established by Art. 19 (1) (f) and Arts 21 *bis*, 23 & 24 of the *1961 Convention*; for the coca leaf by Arts 26 and 27 and for cannabis by Art. 28 of the *1961 Convention*. The opium poppy, the coca bush, the cannabis plant, poppy straw, and cannabis leaves are subject to the control measures prescribed in Art. 19 (1) (e), Art. 20 (1) (g), Article 21 *bis* and in Arts 22 to 24; 22, 26 and 27; 22 and 28; 25; and 28, respectively.

<sup>8</sup> *Protocol Amending the Single Convention on Narcotic Drugs, 1961, 25 March 1972, 976 UNTS 3 [1972 Protocol]*.

<sup>9</sup> *1961 Convention*, Art. 1 (f), *supra* note 6, 107.

<sup>10</sup> *Ibid.*, Art. 4 (c), 111.

<sup>11</sup> *Ibid.*, Arts 19 & 20, 117-118.

<sup>12</sup> *Ibid.*, Art. 21, 118-119.

<sup>13</sup> *Ibid.*, Art. 30, 123-124.

<sup>14</sup> *Ibid.*, Art. 33, 126.

“1. A Party may at the time of signature, ratification or accession reserve the right to permit temporarily in any one of its territories:

[...]

c) Coca leaf chewing;

[...]

e) The production and manufacture of and trade in the drugs referred to under a) to d) for the purposes mentioned therein.

2. The reservations under paragraph 1 shall be subject to the following restrictions:

a) The activities mentioned in paragraph 1 may be authorized only to the extent that they were traditional in the territories in respect of which the reservation is made, and were there permitted on 1 January 1961.

[...]

e) Coca leaf chewing must be abolished within twenty-five years from the coming into force of this Convention.”<sup>15</sup>

The *1961 Convention* entered into force on 13 December 1964, and, in line with the transitional period of 25 years foreseen in Article 49 (2) (e), coca leaf chewing had to be prohibited by 12 December 1989.<sup>16</sup> Article 49 was not changed by the *1972 Protocol*.

Article 49 of the *1961 Convention* was also not affected by the provisions of the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* of 1988 (1988 Convention), although the relationship between the provisions of both conventions has been the subject of some controversy concerning the obligation to abolish coca leaf chewing under the *1961 Convention*. In its Article 14 (2), the *1988 Convention* established that the measures adopted by States parties to prevent illicit cultivation and to eradicate plants containing narcotic or psychotropic substances “shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use”.<sup>17</sup> Despite the clear date established by the *1961 Convention* for the abolition of coca leaf chewing and related production, the provision contained in Article 14 (2) was taken by some States of the Andean

<sup>15</sup> *1961 Convention*, Art. 49, *supra* note 6, 132-133.

<sup>16</sup> UN, *Commentary on the Single Convention on Narcotic Drugs, 1961* (1973), 470, para. 5 [UN Commentary].

<sup>17</sup> *1988 Convention*, Art. 14 (2), *supra* note 6, 194.

region to justify the production of coca for traditional consumption and the legality of traditional consumption in their domestic legal order.<sup>18</sup> However, Article 14 (1) of the *1988 Convention* makes it clear that “[a]ny 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 [...] substances under the provisions of the 1961 Convention”.<sup>19</sup> The relationship between the relevant provisions of both conventions shall be further analyzed in section F of this article, when the relationship between the prohibition on coca leaf chewing and the rights of indigenous peoples to their customs and traditions is explored.

### C. The Right of Indigenous Peoples to Practice Their Customs and Traditions Under International Law

One of the key objectives of the international legal regime of the rights of indigenous peoples is the preservation of their cultural integrity, including the right to maintain and develop their cultural identity, customs and traditions, and their traditional ways of life.<sup>20</sup> Certain principles of this legal regime have been said to be part of an emerging customary international law.<sup>21</sup> According to the International Law Association (ILA), this includes the right of indigenous peoples “to recognition and preservation of their cultural identity” and the obligation of States to “recognize and ensure respect for the laws, traditions and customs of indigenous peoples”.<sup>22</sup>

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) is the most comprehensive instrument in this regard and was adopted by the General Assembly in 2007.<sup>23</sup> Article 11 of the Declaration sets out the right of indigenous peoples to practice and revitalize their cultural traditions and customs. Under Article 12, indigenous peoples also have the right to manifest,

<sup>18</sup> Pietschmann, *supra* note 5, 103.

<sup>19</sup> *1988 Convention*, Art. 14 (1), *supra* note 6, 194.

<sup>20</sup> S. J. Anaya, *Indigenous Peoples in International Law*, 2nd ed. (2004), 131 [Anaya, *Indigenous Peoples in International Law*].

<sup>21</sup> *Ibid.*, 61; S. Wiessner, ‘Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis’, 12 *Harvard Human Rights Journal* (1999), 57, 127.

<sup>22</sup> C. J. Iorns Magallanes, ‘ILA Interim Report on a Commentary on the Declaration of the the Rights of Indigenous Peoples’, *Victoria University of Wellington Legal Research Paper No. 50* (2012), 51 [Iorns Magallanes, *ILA Interim Report*].

<sup>23</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, GA Res. 61/295 annex, UN Doc A/RES/61/295, 1 [UNDRIP].

practice or develop their spiritual traditions, customs and ceremonies. Their right to traditional medicines and health practices is enshrined in Article 24, including the conservation of their vital medicinal plants. Article 31 affirms the right of indigenous peoples to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions. These terms are further defined in specific treaties concluded under the auspices of UNESCO. For instance, “‘cultural expressions’ are those expressions that result from the creativity of individuals, groups and societies, and that have cultural content”.<sup>24</sup> ‘Cultural heritage’ includes “‘intangible cultural heritage’”, which in turn includes “‘social practices, rituals and festive events’”, as well as “‘knowledge and practices concerning nature and the universe’”.<sup>25</sup>

While not legally binding, UNDRIP reflects the opinion of the United Nations Member States that indigenous peoples have a set of specific rights and that measures should be taken to protect and fulfill such rights. More importantly, the provisions of UNDRIP related to the preservation of the cultural integrity of indigenous peoples have not caused much controversy during the discussions on the final draft, as opposed to issues like indigenous land rights or the territorial and political integrity of States.<sup>26</sup> For example, all States of the Andean region voted in favor, except for Colombia, which abstained because it considered those aspects of the Declaration relating to the use of the land and territories of indigenous peoples to be in direct contradiction with its domestic legal system.<sup>27</sup> In 2009, Colombia expressed its unilateral support for the Declaration, its spirit, and its fundamental principles.<sup>28</sup> Moreover, all four Member States that voted against the Declaration have now endorsed it.<sup>29</sup>

<sup>24</sup> *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 20 October 2005, Art. 4 (3), United Nations Juridical Yearbook (2005), 361, 364-365.

<sup>25</sup> *Convention for the Safeguarding of the Intangible Cultural Heritage*, 17 October 2003, Art. 2, 2368 UNTS 3, 36-37.

<sup>26</sup> Cf. UN, *General Assembly Official Records* (UNGAOR) 61st Session (107th plenary meeting), UN Doc A/61/PV.107, 13 September 2007; UNGAOR 61st Session (108th plenary meeting), UN Doc A/61/PV.108, 13 September 2007; UNGAOR 61st Session (109th plenary meeting), UN Doc A/61/PV.109, 17 September 2007.

<sup>27</sup> See UNGAOR 61st Session (107th plenary meeting), *supra* note 26, 17-18.

<sup>28</sup> Statement by the Colombian Vice Minister for Multilateral Affairs, Adriana Mejía Hernández, at the occasion of the Durban Review Conference (21 April 2009), available at <http://www.mij.gov.co/econtent/library/documents/DocNewsNo3345DocumentNo1611.PDF> (last visited 15 June 2013).

<sup>29</sup> Australia, Canada, New Zealand, and the United States of America. See S. Wiessner, ‘The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges’, 22 *European Journal of International Law* (2011) 1, 121, 129.

The right of indigenous peoples to practice their cultural traditions and customs is also enshrined in *Convention No. 169* of the International Labour Organization (ILO),<sup>30</sup> which entered into force in 1991 and has been ratified by the States of the Andean region. States parties to *ILO Convention No. 169* are required to protect “the social, cultural, religious and spiritual values and practices”, as well as “the integrity of the practices of indigenous peoples”.<sup>31</sup> Moreover, the States parties have the responsibility for developing co-ordinated and systematic action to promote the full realization of the social, economic, and cultural rights of indigenous peoples with respect for their social and cultural identity, their customs and traditions.<sup>32</sup>

In line with the *ILO Constitution* (Articles 19 and 22), States parties to *ILO Convention No. 169* are required to report regularly on its implementation. Nevertheless, the observations that have been made by the ILO Committee of Experts on the Application of Conventions and Recommendations so far provide little guidance on the interpretation of the provisions relevant to the right of indigenous peoples to practice their cultural traditions and customs.<sup>33</sup>

Other provisions relevant to the protection of the cultural integrity of indigenous peoples can be found in international human rights treaties. These provisions have been interpreted by the respective treaty bodies, whose views can be summarized as follows: Indigenous peoples may constitute a minority and may benefit from the protection of Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR) concerning the right of minorities to enjoy their own culture.<sup>34</sup> The right to take part in cultural life, enshrined in Article 15 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) also embodies the protection of the ways of life and the cultural identity of indigenous peoples.<sup>35</sup> The *Convention on the Elimination of Racial Discrimination* also requires that States parties fight discrimination against indigenous people,

<sup>30</sup> ILO, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 ILM 1382 [ILO Convention No. 169].

<sup>31</sup> *Ibid.*, Art. 5, 1385.

<sup>32</sup> *Ibid.*, Art. 2 (b), 1385.

<sup>33</sup> The annual reports of the Committee of Experts on the Application of Conventions and Recommendations are available at <http://www.ilo.org/public/libdoc/ilo/P/09661> (last visited 15 June 2013).

<sup>34</sup> Human Rights Committee (HRC), *General Comment No. 23*, UN Doc CCPR/C/21/Rev.1/Add.5, 26 April 1994, 1, para. 1; HRC, *Kitok v. Sweden*, Communication No. 197/1985, UN Doc CCPR/C/33/D/197/1985, 10 August 1988.

<sup>35</sup> Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 21*, UN Doc E/C.12/GC/21, 21 December 2009, 8-9, para. 32.



including by recognizing and respecting their distinct culture and way of life and by ensuring that indigenous communities can exercise their rights to practice and revitalize their cultural customs and traditions.<sup>36</sup> Similar considerations apply to the right of indigenous children to enjoy their own culture, which is explicitly affirmed in Article 30 of the *Convention on the Rights of the Child*.<sup>37</sup>

This overview of relevant international human rights instruments shows that the right of indigenous peoples to practice their customs and traditions is firmly established in international law. As mentioned in the introduction, coca leaf chewing is part of the customs and traditions of several indigenous peoples in some States of the Andean region, where cultivation and use of the coca leaf has been concentrated for millennia.<sup>38</sup> In these cultural traditions, the use of coca leaf has important medicinal, social, and spiritual functions.<sup>39</sup> The importance of coca leaf chewing in the customs and traditions of the Aymara and Quetchua peoples in Bolivia and Peru has been documented by the UN Commission of Enquiry on the Coca Leaf.<sup>40</sup> Many of the States of the Andean region have established constitutional provisions aimed at protecting the rights of indigenous peoples, including in some cases their right to practice their customs and traditions. Nevertheless, as parties to the *1961 Convention*, these States are bound by the obligation to abolish coca leaf chewing. The question thus is: how can these States fulfill their human rights obligations towards their indigenous peoples while at the same time honoring their drug control obligations? A look at domestic laws and policies will reveal different approaches in addressing this issue.

<sup>36</sup> Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation XXIII*, UN Doc HRI/GEN/1/Rev.6, 27 May 2008, 285, 285, para. 1.

<sup>37</sup> Committee on the Rights of the Child, *General Comment No. 11*, UN Doc CRC/C/GC/11, 12 February 2009, 4-5, paras 16-22.

<sup>38</sup> Observatoire Géopolitique des Drogues (ed.), *Atlas Mondial des Drogues* (1996), 30.

<sup>39</sup> See, e.g., C. J. Allen, 'Coca and Cultural Identity in Andean Communities', in D. Pacini & C. Franquemont, *Coca and Cocaine: Effects on People and Policy in Latin America*, 35; R. T. Martin, 'The Role of Coca in the History, Religion, and Medicine of South American Indians', 24 *Economic Botany* (1970) 4, 422; M. Terán & A. Sandagorda, 'Aspectos Socioculturales del Consumo de la Coca', in F. R. Jeri (ed.), *Cocaína 1980* (1980), 282; F. Cabieses, 'Aspectos Etnológicos de la Coca y la Cocaína', in Jeri, *supra* note 39, 179.

<sup>40</sup> Economic and Social Council (ECOSOC), *Report of the Commission of Enquiry on the Coca Leaf* (May 1950), available at <http://druglawreform.info/images/stories/documents/coca-inquiry-1950e.pdf> (last visited 15 June 2013), 9-12 [ECOSOC, Report of the Commission of Enquiry on the Coca Leaf].

## D. Coca Leaf Chewing and Rights of Indigenous Peoples Under Domestic Law in the Andean Region

In Bolivia, “the rights of indigenous peoples to their cultural identity, spirituality, practices and customs” are protected under the Constitution.<sup>41</sup> Similarly, the constitution of Ecuador recognizes the collective right of indigenous peoples to maintain, develop, and strengthen their traditions and cultural heritage.<sup>42</sup> In Peru, the State is obliged to respect the cultural identity of indigenous communities.<sup>43</sup> The Constitution of Venezuela not only recognizes the right of indigenous peoples to maintain and develop their cultural identity but also obliges the State to foster the diffusion of the manifestations of their culture.<sup>44</sup> In Argentina, the constitution includes a reference to the ethnic and cultural “pre-existence” of indigenous peoples and the need to guarantee their identity.<sup>45</sup> In Chile, the right of indigenous peoples to maintain and develop their cultural manifestations is protected by law.<sup>46</sup> In Colombia, although not explicitly foreseen in the Constitution, the rights of indigenous peoples to cultural integrity and to traditional practices have been reaffirmed in the jurisprudence of the Constitutional Court.<sup>47</sup>

Despite the existence of legislative and constitutional provisions aimed at protecting the right of indigenous peoples to practice their customs and traditions, most States appear to have addressed the issue of traditional coca leaf chewing predominantly, if not exclusively, on the basis of their drug control obligations. In Chile, for example, the national drug strategy 2009-2018 does not address traditional uses of coca leaf by indigenous peoples, but refers to the need for initiatives to reduce the consumption of drugs by such communities.<sup>48</sup> The law penalizes the possession or cultivation of narcotic drugs,<sup>49</sup> including

<sup>41</sup> *Constitution of Bolivia* (2009), Art. 30 (II) (2).

<sup>42</sup> *Constitution of Ecuador* (2008), Art. 57.

<sup>43</sup> *Constitution of Peru* (1993), Art. 89.

<sup>44</sup> *Constitution of Venezuela* (1999), Art. 121.

<sup>45</sup> *Constitution of Argentina* (1994), Art. 75 (17).

<sup>46</sup> *Law No. 19253* (28 September 1993), Art. 7.

<sup>47</sup> See F. Semper, ‘Los Derechos de los Pueblos Indígenas de Colombia en la Jurisprudencia de la Corte Constitucional’, in Konrad Adenauer Stiftung (ed.), *Anuario de Derecho Constitucional Latinoamericano*, Vol. II (2006), 761.

<sup>48</sup> Chile, Ministry of the Interior, ‘Estrategia Nacional Sobre Drogas 2009-2018’ (2009), available at [http://www.cicad.oas.org/Fortalecimiento\\_Institucional/eng/National%20Plans/Chile%202009-2018.pdf](http://www.cicad.oas.org/Fortalecimiento_Institucional/eng/National%20Plans/Chile%202009-2018.pdf) (last visited 15 June 2013), 21.

<sup>49</sup> *Law No. 20000* (2 February 2005), Arts 4 & 8.

coca leaf, which is also the case in Colombia<sup>50</sup> and in Ecuador.<sup>51</sup> The drug legislation of Peru refers to coca leaf chewing as a grave social problem and aims at the progressive eradication of all coca cultivation in the country.<sup>52</sup> Its *National Drug Strategy 2012-2016* does not address coca leaf chewing, but focuses on the strategic objective to foster alternative development in order to reduce the illicit cultivation of the coca leaf.<sup>53</sup> Initiatives taken by local governments to legalize traditional uses of coca leaf by indigenous peoples have been successfully suppressed by the national government.<sup>54</sup> However, traditional coca leaf chewing still continues in Peru.<sup>55</sup>

Few countries have taken a different stance. In Argentina, the law excludes coca leaf chewing (or its use as herbal infusion) from punishable conduct, independently of whether it is part of the traditional use by indigenous peoples or not.<sup>56</sup> So far, only Bolivia has put in place legislation and policies that aim explicitly at the preservation of coca leaf chewing. It is helpful to consider the case of Bolivia more in depth, in order to better understand the situation of a State bound both by the obligation to abolish coca leaf chewing and by the obligations relating to the right of indigenous peoples to practice their customs and traditions.

## E. The Case of Bolivia

The population of Bolivia is composed to a large extent of different indigenous groups. In the last census in 2001, more than 60 per cent of the population over 15 years of age identified themselves as indigenous, mainly as either Aymara or Quechua.<sup>57</sup> The economic and social situation of Bolivia is

<sup>50</sup> *Law No. 30* (31 January 1986), Art. 32.

<sup>51</sup> *Law No. 108* (17 September 1990), Arts 59 & 64.

<sup>52</sup> *Decree Law No. 22095* (21 February 1978).

<sup>53</sup> Peru, Council of Ministers, 'Estrategia Nacional De Lucha Contra Las Drogas 2012-2016' (February 2012), available at [http://www.cicad.oas.org/fortalecimiento\\_institucional/planesnacionales/ENLCD-2012-2016.pdf](http://www.cicad.oas.org/fortalecimiento_institucional/planesnacionales/ENLCD-2012-2016.pdf) (last visited 15 June 2013), 45.

<sup>54</sup> International Narcotics Control Board [INCB], *Report of the International Narcotics Control Board for 2008*, UN Doc E/INCB/2008/1, 19 February 2009, 75, para. 496 [INCB, Report for 2008]; INCB, *Report of the International Narcotics Control Board for 2005*, UN Doc E/INCB/2005/1, 1 March 2006, 63, para. 414.

<sup>55</sup> INCB, *Report of the International Narcotics Control Board for 2010*, UN Doc E/INCB/2010/1, 2 March 2011, 16, para. 90 [INCB, Report for 2010].

<sup>56</sup> *Law No. 23737* (10 October 1989), Art. 15.

<sup>57</sup> National Institute for Statistics, 'Autoidentificación con Pueblos Originarios o Indígenas de la Población de 15 Años o Más de Edad Segun Sexo, Area Geografica y Grupo de

characterized by high poverty rates. In 2007, 60 per cent of the population lived below the national poverty line and the gross national income *per capita ratio* has remained below the regional average for the last decade.<sup>58</sup> The political situation of the country has been influenced by clashes between the interests of indigenous groups and regional economic elites on issues such as the redistribution of revenue, the privatization of natural resources, and the operation of foreign companies in indigenous territories. In this situation, a political crisis erupted in 2003, leading to violent clashes between law enforcement authorities and protesters who rose up against the appropriation of the country's natural gas resources to international companies. The mass protests were spearheaded by a coalition of movements of peasants and miners led by Evo Morales, a trade union leader and member of the Aymara indigenous people, who was eventually elected president in 2005 and is said to be firmly committed to the interests of the coca farmers.<sup>59</sup> Under the new president, a number of reforms have been implemented, including the nationalization of oil and gas resources and a referendum on regional autonomy. The process of constitutional reform was revived in 2006 with the election of a constitutional assembly, but the different interests prevailing in the country led to political turmoil and violence in 2008, before a new constitution was approved in a referendum on 25 January 2009.<sup>60</sup>

As mentioned above, coca leaf chewing is practiced for traditional and customary reasons by the Aymara and Quechua peoples in Bolivia. However, it is also practiced by larger segments of the population for other purposes, including as a relief for altitude sickness,<sup>61</sup> which is reflected in relevant provisions of the domestic legal regime. The new Constitution of 2009 emphasizes that coca in its natural state is not considered to be a drug and characterizes coca as cultural heritage, a renewable natural resource, and a factor of social cohesion.<sup>62</sup>

Edad', available at [http://www.ine.gob.bo/indice/visualizador.aspx?ah=PC2\\_0113.HTM](http://www.ine.gob.bo/indice/visualizador.aspx?ah=PC2_0113.HTM) (last visited 15 June 2013).

<sup>58</sup> World Bank, 'World Development Indicators: Bolivia', available at [http://data.worldbank.org/country/bolivia#cp\\_wdi](http://data.worldbank.org/country/bolivia#cp_wdi) (last visited 15 June 2013).

<sup>59</sup> See generally the contributions in A. J. Pearce (ed.), *Evo Morales and the Movimiento Al Socialismo in Bolivia: The First Term in Context, 2005-2009* (2011).

<sup>60</sup> A more detailed account of the recent history of Bolivia and its indigenous peoples is contained in the annual reports of the International Working Group on Indigenous Affairs, available at <http://www.iwgia.org/publications/series/annual-reports> (last visited 15 June 2013).

<sup>61</sup> A. Lorenzo & J. Rodriguez, 'La Hoja de Coca en Bolivia: Un Dilema de la Convención de Viena o la Defensa del Akulliku?', 1 *Revista Andina de Estudios Políticos* (2011) 7, 3, 5.

<sup>62</sup> *Constitution of Bolivia* (2009), Art. 384.

Detailed rules on the control of coca and other substances are contained in *Law 1008* of 19 July 1988. It distinguishes the coca leaf in its natural state from the processed coca leaf from which the alkaloid cocaine has been extracted through a chemical process and prohibits the use of such processed coca leaf. Under this law, coca leaf production as such is regarded as a legitimate agricultural and cultural activity. Social and cultural practices in their traditional forms, such as chewing, medicinal, and ritual uses of coca leaf are considered as legal consumption and use. Other forms of legal use, not susceptible to cause drug dependence or addiction, as well as legitimate industrial uses are subject to regulatory control. The law also delimits geographical areas in which coca cultivation is allowed, while prohibiting such cultivation in the rest of the country.

Bolivia is bound by the international legal framework concerning the rights of indigenous peoples, including their right to practice their customs and traditions. Bolivia ratified *ILO Convention No. 169* on 11 December 1991.<sup>63</sup> It also voted in favor of the adoption of UNDRIP,<sup>64</sup> which has been conferred the status of national law.<sup>65</sup> Bolivia is also a party to the ICCPR, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the ICESCR, and the *Convention on the Rights of the Child*.<sup>66</sup> Human rights treaties ratified by Bolivia prevail in the internal legal order, pursuant to Article 13 (IV) of its Constitution, which also establishes that the rights and obligations set out in the Constitution must be interpreted in conformity with such treaties.

Bolivia is also bound by the international drug control regime. Having acceded to the *1961 Convention* on 23 September 1976,<sup>67</sup> Bolivia was required to abolish coca leaf chewing as of that date, since it did not make a reservation under Article 49 in order to avail itself of the transitional period for phasing out this practice. However, Bolivia made a reservation to Article 3 (2) of the *1988 Convention*, insofar as it required the country to establish as a criminal offence the use, consumption, possession, purchase or cultivation of the coca leaf for personal consumption. The reservation stated that the Bolivian legal system recognized the traditional licit use of the coca leaf, which was widely used

<sup>63</sup> See ILO, 'Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)', available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312314](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314) (last visited 15 June 2013).

<sup>64</sup> See UNGAOR 61st Session (108th plenary meeting), *supra* note 26, 19.

<sup>65</sup> *Law No. 3879* (26 June 2008).

<sup>66</sup> See UN, 'Multilateral Treaties Deposited with the Secretary-General', available at <http://treaties.un.org/Pages/ParticipationStatus.aspx> (last visited 15 June 2013).

<sup>67</sup> *Ibid.*

and consumed in Bolivia, including for traditional medicinal purposes. While Bolivia did not consider coca leaf as a narcotic drug that produced significant psychological or physical changes, it reiterated its commitment to international drug control:

“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.”<sup>68</sup>

However, as pointed out by the International Narcotics Control Board (INCB), the independent expert body set up by the *1961 Convention*, this reservation does not absolve Bolivia from fulfilling its obligations under the convention,<sup>69</sup> including the prohibition on coca leaf chewing.

Before 2005, the drug policy of Bolivia did not explicitly address the lack of implementation of Article 49 of the *1961 Convention*, which requires that coca leaf chewing must be abolished. As noted by the INCB, this provision continued “not to be applied since the production of coca leaf for chewing continued to be considered licit under national law”,<sup>70</sup> in line with *Law 1008* of 1988. Under the presidency of Mr. Morales, Bolivia changed its drug policy, first outlined in the *National Drug Control Strategy 2007-2010*.<sup>71</sup> On the national level, the new policy aimed at revaluing the coca leaf, while establishing an effective control over its production and preventing its deviation for illicit uses. On the international level, it envisaged a study to be carried out with the support of the World Health Organization (WHO) with a view to opening a discussion on the revision of the provisions of the *1961 Convention* concerning the coca leaf. Bolivia informed the WHO of its desire to study and validate the use of coca leaf as a traditional medicine and its contributions to public health,<sup>72</sup>

<sup>68</sup> *1988 Convention*, *supra* note 6, 395.

<sup>69</sup> INCB, *Report of the International Narcotics Control Board for 2011*, UN Doc E/INCB/2011/1, 28 February 2012, 37, para. 274 [INCB, Report for 2011].

<sup>70</sup> INCB, *Report of the International Narcotics Control Board for 2001*, UN Doc E/INCB/2001/1, January 2002, 57, para. 368.

<sup>71</sup> Bolivia, National Council Against Illicit Drug Trafficking ‘Estrategia de Lucha Contra el Narcotráfico y Revalorización de la Hoja de Coca 2007-2010’ (2007), available at <http://www.rree.gob.bo/webmre/publicaciones//d134.pdf> (last visited 15 June 2013).

<sup>72</sup> INCB, *Report for 2011*, *supra* note 69, 36-37, para. 273.

and the WHO Executive Board decided to defer further discussions on this matter until the results of such a study became available.<sup>73</sup>

In practice, the national drug policy shifted its focus from the eradication of illicit coca crops, to the promotion of the legal coca market, including by increasing the area of licit coca crop cultivation and the implementation of alternative development projects in cooperation with coca farmers.<sup>74</sup> However, the new policy has come under criticism for creating incentives to increase coca production beyond the limits established by law and thus contributing to drug trafficking.<sup>75</sup> The INCB repeatedly expressed concern about the effects of the new policy,<sup>76</sup> stating that Bolivia was in contravention of its obligations under the international drug control conventions. It recommended, *inter alia*, that the government shall “formulate and implement education programmes aimed at eliminating coca leaf chewing, as well as other non-medical uses of coca leaf”.<sup>77</sup>

Bolivia brought the issue to the international fora in 2009. At this first stage, its aim was to change the applicable rules of the international drug control regime. On 12 March 2009, President Morales notified the UN Secretary General (in his capacity as depositary of the *1961 Convention*), that Bolivia proposed to amend the *1961 Convention* by deleting the provisions on coca leaf chewing (i.e. Article 49, paragraphs 1 (c) and 2 (e)). The notification stressed that coca leaf chewing was “one of the sociocultural practices and rituals of the Andean indigenous peoples [...] closely linked to [their] history and cultural identity” and that the prohibition on coca leaf chewing based on the provisions in question violated the human rights of indigenous peoples, enshrined in Article 31 UNDRIP, *ILO Convention No. 169* and other instruments.<sup>78</sup> It also contained the argument that coca leaf chewing was not harmful to human health

<sup>73</sup> WHO Executive Board, *Summary Records*, EB119/2006–EB120/2007/REC/2, 22-29 January 2007 (120th session), 53, 233.

<sup>74</sup> Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development: Mission to Bolivia*, UN Doc A/HRC/11/11, 18 February 2009, 15, para. 58.

<sup>75</sup> Lorenzo & Rodriguez, *supra* note 61, 18.

<sup>76</sup> INCB, *Report for 2010*, *supra* note 55, 23-24, paras 141-144; *Report of the International Narcotics Control Board for 2009*, UN Doc E/INCB/2009/1, 24 February 2010, 76-77, para. 467; INCB, *Report for 2008*, *supra* note 54, 76, para. 505; INCB, *Report of the International Narcotics Control Board for 2007*, UN Doc E/INCB/2007/1, 5 March 2008, 73-74, para. 476 [INCB, *Report for 2007*].

<sup>77</sup> INCB, *Report for 2007*, *supra* note 76, 74, para 480.

<sup>78</sup> See *Letter Dated 12 March 2009 From the President of Bolivia Addressed to the Secretary-General*, UN Doc E/2009/78 enclosure, 15 May 2009, 4, 4.

and that the objective of the *1961 Convention* was not to prohibit practices that do not harm human health, thus implying that the proposed amendment was justified and would not defeat the object and purpose of the *1961 Convention*. The notification further referred to the report of the Commission of Enquiry on the Coca Leaf as the “basis” for the relevant provisions of the *1961 Conventions* and stated that the Report was “loaded with sociocultural prejudices”.<sup>79</sup> The Bolivian proposal received some media attention when Morales reiterated these arguments and even chewed on a coca leaf at the high-level segment of the fifty-second session of the Commission on Narcotic Drugs.<sup>80</sup>

The amendment procedure established in Article 47 (1) (b) of the *1961 Convention* was initiated by ECOSOC *Decision 2009/250*, pursuant to which the States parties to the convention were requested to indicate, within the following 18 months, whether they accept the proposed amendment and were asked to submit any comments on the proposal. Until the end of February 2011, 25 States parties submitted their responses.<sup>81</sup> Three Latin American States expressed their support<sup>82</sup> and two referred to the text of declarations made by Heads of State and Government in support of the proposed amendment at summits of the Union of South American Nations<sup>83</sup> and of the Bolivarian Alliance for the Peoples of Our America, signed by nine Heads of States.<sup>84</sup> Taken together, a total of 18 Latin American and Caribbean States supported the proposal. By contrast, a total of 21 States from different regions rejected the proposal,

<sup>79</sup> *Ibid.*, 5.

<sup>80</sup> Without mention of author, ‘Coca Leaves are not Cocaine, Evo Morales Insists’, *The Telegraph* (12 March 2009), available at <http://www.telegraph.co.uk/news/worldnews/southamerica/bolivia/4976322/Coca-leaves-are-not-cocaine-Evo-Morales-insists.html> (last visited 15 June 2013).

<sup>81</sup> Bulgaria, Canada, Colombia, Costa Rica, Denmark, Former Yugoslav Republic of Macedonia, France, Ecuador, Egypt, Estonia, Germany, Italy, Japan, Latvia, Malaysia, Mexico, Russian Federation, Singapore, Slovakia, Sweden, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, and Venezuela (Bolivarian Republic of).

<sup>82</sup> *Note Verbale Dated 27 January 2011 From the Permanent Mission of Costa Rica*, UN Doc E/2011/68 annex, 4 February 2011, 2; *Note Verbale Dated 31 January 2011 From the Permanent Mission of Uruguay*, UN Doc E/2011/65 annex, 1 February 2011, 2; *Note Verbale Dated 31 January 2011 From the Permanent Mission of Ecuador*, UN Doc E/2011/64 annex, 1 February 2011, 2.

<sup>83</sup> *Note Verbale Dated 31 January 2011 From the Permanent Mission of Ecuador*, UN Doc E/2011/81, 9 February 2011, 2.

<sup>84</sup> *Letter Dated 28 January 2011 From the Permanent Representative of the Bolivarian Republic of Venezuela*, UN Doc A/65/714-E/2011/70, 3 February 2011.



although three States withdrew their objections,<sup>85</sup> following diplomatic efforts by Bolivia to persuade other governments of its arguments. Most of the States that finally rejected the proposal stated that the proposed amendment had to be considered in light of the principles and objectives of the *1961 Convention*, and highlighted the obligation of parties to limit the trade and use of narcotic drugs, including the coca leaf, exclusively to medical and scientific purposes, and the need for coordinated and universal action against the abuse of narcotic drugs,<sup>86</sup> referred to in the Preamble of the *1961 Convention*. Several States cited political considerations as reasons for their rejection of the proposed amendment,<sup>87</sup> including the risk of creating a precedent that could be used to undermine the universality of the international drug control regime. A number of objecting States, however, explicitly acknowledged the importance of protecting the cultural identity and traditional customs of indigenous peoples<sup>88</sup> and some were open to further dialogue in this regard.<sup>89</sup>

By January 2011, it had become obvious that changes to the international drug control regime were unlikely to occur in the near future. At this second stage, Bolivia adjusted its strategy and focused on changing its own legal obligations concerning the rules requiring the abolition of coca leaf chewing. Bolivia denounced the *1961 Convention* and submitted an instrument of accession, containing a reservation to allow

<sup>85</sup> *Letter Dated 26 January From the Ministry of Foreign Affairs of Colombia*, UN Doc E/2011/59 enclosure, 31 January 2011, 3; *Note Verbale Dated 17 January 2011 From the Permanent Mission of the Former Yugoslav Republic of Macedonia*, UN Doc E/2011/12 annex, 18 January 2011, 2; *Note Verbale Dated 28 January 2010 From the Permanent Mission of Egypt*, UN Doc E/2010/7 annex, 3 February 2010, 2.

<sup>86</sup> See the following *Notes by the Secretary General on the Proposal of Amendments by the Plurinational State of Bolivia*: UN Docs E/2011/47, 19 January 2011, 1; E/2011/49, 21 January 2011, 1; E/2011/51, 26 January 2011, 1; E/2011/54, 31 January 2011, 1; E/2011/57, 31 January 2011, 1; and E/2011/61, 1 February 2011, 1.

<sup>87</sup> See the following *Notes by the Secretary General on the Proposal of Amendments by the Plurinational State of Bolivia*: UN Docs E/2011/48, 21 January 2011, 1; E/2011/53, 28 January 2011, 1; E/2011/55, 31 January 2011, 1; E/2011/56, 31 January 2011, 1; and E/2011/58, 31 January 2011, 1.

<sup>88</sup> See the following *Notes by the Secretary General on the Proposal of Amendments by the Plurinational State of Bolivia*: UN Docs E/2011/53 (*supra* note 87); E/2011/56 (*supra* note 87), E/2011/58 (*supra* note 87); and E/2011/60, 1 February 2011, 1.

<sup>89</sup> See the following *Notes by the Secretary General on the Proposal of Amendments by the Plurinational State of Bolivia*: UN Docs E/2011/53 (*supra* note 87), E/2011/55 (*supra* note 87), E/2011/56 (*supra* note 87) and E/2011/58 (*supra* note 87).

“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.”<sup>90</sup>

In the reservation, Bolivia also stressed its commitment to international drug control, as it had already done in its reservation to the *1988 Convention*:

“Bolivia will continue to take all necessary legal measures to control the illicit cultivation of coca in order to prevent its abuse and the illicit production of the narcotic drugs which may be extracted from the leaf.”<sup>91</sup>

At the national level, this was affirmed in *Law 147* of 29 June 2011, which provides that Bolivia will fully comply, within the framework of its constitution, with the provisions of the *1961 Convention* until its re-accession takes effect.

While the denunciation took effect on 1 January 2012, pursuant to Article 46 (2) of the *1961 Convention*, the reservation was subject to a special approval procedure. In accordance with Article 50 (3) of the *1961 Convention*, reservations are deemed to be permitted, unless one third of the States parties object to it within one year. By the end of this period, only 15 of the then 183 States parties had objected to the reservation made by Bolivia.<sup>92</sup> The objection of 61 States parties would have been necessary to disallow the reservation.

Most objecting States welcomed the commitment of Bolivia to control coca production or recognized the efforts made to reduce its production and trade. Some of them acknowledged the reasons cited by Bolivia for its reservation,<sup>93</sup> although only a few explicitly referred to the human rights of indigenous

<sup>90</sup> UN Secretary General [UNSG], *Depository Notification*, UN Doc C.N.829.2011.TREATIES-28, 10 January 2012, 5.

<sup>91</sup> *Ibid.*

<sup>92</sup> Canada, Finland, France, Germany, Ireland, Israel, Italy, Japan, Mexico, Netherlands, Portugal, Russian Federation, Sweden, United Kingdom, and United States of America. See UNSG, *Depository Notification*, UN Doc C.N.94.2013.TREATIES-VI.18, 22 January 2013, 1.

<sup>93</sup> See UNSG, *Depository Notification*, UN Doc C.N.719.2012.TREATIES-VI.18, 19 December 2012 [Objection by United Kingdom]; UNSG, *Depository Notification*, UN Doc C.N.732.2012.TREATIES-VI.18, 21 December 2012 [Objection by Sweden]; UNSG, *Depository Notification*, UN Doc C.N.84.2013.TREATIES-VI.18, 15 January 2013 [Objection by Japan]; UNSG, *Depository Notification*, UN Doc C.N.93.2013.TREATIES-VI.18, 16 January 2013 [Objection by Portugal].

peoples.<sup>94</sup> Several objecting States were concerned that the reservation would lead to a greater production and supply of coca, greater availability of cocaine, and increased drug trafficking and related criminal activities, as well as a weaker international response to these challenges.<sup>95</sup> Such drug law enforcement or political concerns were, however, not the most frequently cited reasons for objection. Most objecting States were concerned about the legal implications of the reservation for the international drug control regime and for the international law of treaties more generally. The view that the reservation was at odds with the international law of treaties was also advanced by an additional State party, which felt it necessary to comment, while not filing a formal objection against the reservation.<sup>96</sup>

With regard to the international drug control regime, objecting States expressed concern that the reservation would undermine this legal framework and the integrity of the *1961 Convention*. As a result, controls over narcotic drugs could be weakened, including if other States parties used this precedent to establish more liberal drug control regimes within their territory.<sup>97</sup> Similar concerns were also expressed by the INCB, which considered that denunciation and re-accession with reservations was contrary to the object and purpose of the *1961 Convention*, since it could lead other States to adopt the same approach and could ultimately undermine the integrity of the international drug control

<sup>94</sup> See UNSG, *Depositary Notification*, UN Doc C.N.750.2012.TREATIES-VI.18, 2 January 2013 [Objection by Italy]; UNSG, *Depositary Notification*, UN Doc C.N.19.2013.TREATIES-VI.18, 8 January 2013 [Objection by France]; UNSG, *Depositary Notification*, UN Doc C.N.85.2013.TREATIES-VI.18, 15 January 2013 [Objection by Mexico].

<sup>95</sup> See UNSG, *Depositary Notification*, UN Doc C.N.361.2012.TREATIES-VI.18, 10 July 2012 [Objection by United States of America]; *Objection by United Kingdom*, *supra* note 93; *Objection by Sweden*, *supra* note 93; UNSG, *Depositary Notification*, UN Doc C.N.751.2012.TREATIES-VI.18, 4 January 2013 [Objection by Canada]; *Objection by France*, *supra* note 94; UNSG, *Depositary Notification*, UN Doc C.N.88.2013.TREATIES-VI.18, 15 January 2013 [Objection by Russian Federation]; UNSG, *Depositary Notification*, UN Doc C.N.89.2013.TREATIES-VI.18, 15 January 2013 [Objection by Israel]; UNSG, *Depositary Notification*, UN Doc C.N.101.2013.TREATIES-VI.18, 18 January 2013 [Objection by Ireland].

<sup>96</sup> See UNSG, *Depositary Notification*, UN Doc C.N.91.2013.TREATIES-VI.18, 22 January 2013 [Communication by Romania].

<sup>97</sup> See *Objection by United Kingdom*, *supra* note 93; *Objection by Sweden*, *supra* note 93; *Objection by Italy*, *supra* note 94; *Objection by France*, *supra* note 94; *Objection by Mexico*, *supra* note 94; *Objection by Russian Federation*, *supra* note 95; *Objection by Ireland*, *supra* note 95; UNSG, *Depositary Notification*, UN Doc C.N.102.2013.TREATIES-VI.18, 22 January 2013 [Objection by Netherlands].

system.<sup>98</sup> In its reply to the INCB,<sup>99</sup> the Bolivian government defended the legality of its actions and reaffirmed its commitment to the remaining drug control obligations under the *1961 Convention*.

Concerning the law of treaties, most objecting States stated that the procedure under Article 50 (3) of the *1961 Convention* could not be used the way Bolivia had done, albeit on different grounds. While some made reference to basic principles like “*pacta sunt servanda*”,<sup>100</sup> legal certainty<sup>101</sup> or good faith,<sup>102</sup> others asserted the existence of customary rules of international law prohibiting States from “misusing” the procedure by denouncing a treaty and re-acceding to it, in order to make it subject to a new reservation.<sup>103</sup> Others stated that this was contrary to the rules of the international law of treaties that prohibit the formulation of reservations after ratification.<sup>104</sup> Again others adopted a “*lex specialis*” argument, which implies that reservations on the subject of coca leaf chewing are exclusively possible under the special rule of Article 49 of the *1961 Convention* and only until the end of the transitional period contained therein.<sup>105</sup>

Despite these arguments, it appears that a large majority of States silently accepted the reservation of Bolivia and the procedure followed in this regard. In fact, the UN Secretary General confirmed that the reservation was deemed to be permitted in accordance with Article 50 (3) of the *1961 Convention* and that the accession of Bolivia, with the reservation, was effected on 11 January 2013.<sup>106</sup> Since none of the objecting States opposed the entry into force of the *1961 Convention* between themselves and Bolivia, the provisions to which the reservation relates will not apply as between those States and Bolivia to the extent of the reservation and the objecting States need not assume towards

<sup>98</sup> INCB, *Report for 2011*, *supra* note 69, 37, para. 279.

<sup>99</sup> Letter from the Minister of Foreign Affairs of Bolivia to the Secretary of the INCB (24 February 2012), available at [http://www.rree.gob.bo/webmre/principal.aspx?pagina=np09.htm&ruta=notasprensa/2012/2012\\_febrero/](http://www.rree.gob.bo/webmre/principal.aspx?pagina=np09.htm&ruta=notasprensa/2012/2012_febrero/) (last visited 15 June 2013).

<sup>100</sup> See *Communication by Romania*, *supra* note 96.

<sup>101</sup> See *Objection by France*, *supra* note 94.

<sup>102</sup> See *Objection by Italy*, *supra* note 94.

<sup>103</sup> See *Objection by Sweden*, *supra* note 93; UNSG, *Depositary Notification*, UN Doc C.N.95.2013.TREATIES-VI.18, 16 January 2013 [Objection by Finland].

<sup>104</sup> See *Objection by Ireland*, *supra* note 95; *Objection by Netherlands*, *supra* note 97; *Communication by Romania*, *supra* note 96.

<sup>105</sup> See *Objection by Russian Federation*, *supra* note 95; *Objection by Portugal*, *supra* note 93.

<sup>106</sup> See UNSG, *Depositary Notification*, UN Doc C.N.94.2013.TREATIES-VI.18, *supra* note 92.

Bolivia any legal obligation which is affected by the reservation.<sup>107</sup> However, this also means that Bolivia does not need to assume these obligations towards them, thus having successfully removed its legal obligation to prohibit and abolish coca leaf chewing under the *1961 Convention*, despite the objections.

Three important considerations have emerged during the consideration of the case of Bolivia. First, the government made a political choice to give priority to the human rights of indigenous peoples over its international drug control obligations. The existence of a normative conflict between the two legal regimes only partially explains this choice, because coca leaf chewing is a broader social phenomenon and is therefore not limited to the customary and traditional uses by indigenous peoples in Bolivia.

The second consideration relates to the type of measures taken to address the apparent normative conflict. Bolivia initially attempted to change relevant rules of the international drug control regime and, when this proved unviable, subsequently changed its own legal obligations concerning these rules. In terms of the legal relations between the States parties to the *1961 Convention*, it moved from a measure aiming at a high degree of legal change to a measure aiming at a lower degree of legal change. In line with its policy choice, the government seems to have discarded from the outset the question of whether legal change was necessary at all. It did not explore whether the rules in question could have been interpreted in a way so as to avoid conflict between them. This possibility will be considered in the next section.

The third consideration concerns the results of the measures taken by Bolivia. The effects of the procedure followed to make a reservation to the *1961 Convention* are not limited to international human rights law and the international drug control regime. The procedure of denunciation and re-accession with ratification has been followed by a number of States with regard to different types of international treaties.<sup>108</sup> As highlighted by the objecting States, a number of legal issues arise, concerning the international law of treaties, the full examination of which is beyond the scope of this article. The question that will be examined is whether such far reaching consequences could have been avoided by interpreting the rules in question in such a way as to resolve the apparent normative conflict.

<sup>107</sup> See *Vienna Convention on the Law of Treaties*, 22 May 1969, Art. 21 (3), 1155 UNTS 331, 337 [VLCT]; and *1961 Convention*, Art. 50 (3), *supra* note 6, 134.

<sup>108</sup> See Y. Tyagi, 'The Denunciation of Human Rights Treaties', 79 *British Yearbook of International Law* (2008), 86, 173-177.

## F. Resolving the Normative Conflict

The present section will determine the scope of the apparent normative conflict and explores underlying reasons for the tensions between indigenous peoples' rights and the international drug control regime. Following the guidance provided by the ILC concerning the fragmentation of international law,<sup>109</sup> it will first explore the question of whether the relevant rules are in conflict or in a "relationship of interpretation", i.e. whether they can be interpreted to produce their effect in a way that is not mutually exclusive. Secondly, the preparatory works of relevant instruments will be considered to reveal the conflicting values and interests that are at the origin of the tension between the two bodies of law.

### I. The Relationship Between the Prohibition on Coca Leaf Chewing and the Rights of Indigenous Peoples to Their Customs and Traditions

According to the ILC, the determination of the relationship between the rules in question must be guided by the rules of treaty interpretation. The ILC identified a generally recognized principle of harmonization in international law, according to which different rules dealing with the same issue "should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations".<sup>110</sup> This approach was recently confirmed by the European Court of Human Rights, which held that wherever apparently contradictory instruments are simultaneously applicable they should be construed "in such a way as to coordinate their effects and avoid any opposition between them" and that "diverging commitments must therefore be harmonized as far as possible so that they produce effects that are fully in accordance with existing law".<sup>111</sup> The relevant rules will first be examined from the perspective of the international drug control regime and then from the perspective of international human rights law.

<sup>109</sup> ILC, *Report of the International Law Commission on the Work of its Fifty-Eighth Session* (2006), UN Doc A/61/10, 400-423, paras 233-251 [ILC Conclusions]; ILC, *Report of the Study Group of the International Law Commission on the Fragmentation of International Law*, UN Doc A/CN.4/L.682, 13 April 2006 [ILC Study].

<sup>110</sup> *ILC Conclusions*, *supra* note 109, 408, para. 251 (4).

<sup>111</sup> *Nada v. Switzerland*, ECHR App. No. 10593/08, 46, Judgment of 12 September 2012, para. 170.

## 1. Relevant Rules of the International Drug Control Regime

In the context of the international drug control regime, it is necessary to return to the consideration of the relationship between the relevant provisions of the *1961 Convention* and the *1988 Convention*. The drug control regime established in the *1961 Convention* is complemented by the *1988 Convention*. The latter aims at the promotion of international cooperation in order to address illicit drug trafficking more effectively, including by requiring States parties to criminalize and establish jurisdiction over relevant offences and by enabling them to make use of detailed provisions on extradition and mutual legal assistance in investigations, prosecutions, and judicial proceedings.

The *1988 Convention* was adopted only shortly before the end of the transitional period for possible reservations concerning the prohibition on coca leaf chewing provided for by the *1961 Convention*. This is why Article 14 (2) of the *1988 Convention* would appear to provide a possible exception to the prohibition on coca leaf chewing by requiring States parties to respect fundamental human rights and take due account of traditional licit uses when taking measures to eradicate and to prevent cultivation of coca bush and other relevant plants.

To the extent that there is an overlap or conflict between these provisions, it could be argued that the latter one should prevail in virtue of the *lex posterior* principle, especially as both conventions form part of the same regime.<sup>112</sup> However, in reality the degree to which both provisions overlap or conflict with each other is minimal. Article 14 (2) of the *1988 Convention* does not affect the prohibition on coca leaf chewing as such, as its scope is limited to drug supply reduction measures and does not include other demand reduction measures that would be necessary to enforce this prohibition. In addition, as mentioned above, Article 14 (1) of the *1988 Convention* prohibits States parties from taking supply reduction measures that would be less stringent than the provisions applicable under the *1961 Convention*. This includes such measures as are necessary to enforce the prohibition on coca leaf chewing under Article 49 of the *1961 Convention*. Article 14 (1) of the *1988 Convention* can be classified as a conflict clause that expressly maintains the earlier treaty,<sup>113</sup> which is evidence of the intention of the parties to avoid conflict between the provisions of the *1988 Convention* and the *1961 Convention*.

<sup>112</sup> See *ILC Conclusions*, *supra* note 109, 417, para. 251 (26).

<sup>113</sup> See *ILC Study*, *supra* note 109, 136, para. 268 (6).

Taken as a whole, Article 14 of the *1988 Convention* thus does not derogate or provide any exceptions to the prohibition on coca leaf chewing. States parties to both conventions remain bound by their obligation to abolish coca leaf chewing, but are required to respect human rights when reducing the supply of coca leaf in order to do so. This might include human rights impact assessments in which due account can be taken of traditional uses. It should go without saying that States must respect their international human rights obligations while implementing other international obligations. It must be asked, however, if there is a way in which States can eradicate coca bush and, at the same time, respect the right of indigenous peoples to their customs and traditions in a situation where such peoples cultivate coca bush precisely for traditional coca leaf chewing. The response to this question will depend on the scope of that right, which is further explored below.

Now that the relationship between Article 14 of the *1988 Convention* and Article 49 of the *1961 Convention* has been clarified, its terms must be interpreted in order to better understand the prohibition of coca leaf chewing and to determine whether there is any leeway for its harmonization with the rights of indigenous peoples. The terms of Article 49 are very specific in requiring that States parties do not allow coca leaf chewing unless they make a reservation at the time of signature, ratification or accession. States parties who allowed it had to abolish coca leaf chewing within a transitional period that expired in 1989. Article 49 (2) (a) further restricted the possibility of allowing coca leaf chewing to the extent that it was “traditional in the territories in respect of which the reservation is made”. The fact that States parties who have not made the reservation must prohibit coca leaf chewing is also evident from the context of Article 49. It contains the only exception to the applicable measures of control, which limit the production, manufacture, export, import, distribution of, trade in, use, and possession of coca leaf.<sup>114</sup> As mentioned in the official commentary on the *1961 Convention*, “[i]t was one of the most important achievements of the Single Convention that it ended the exceptions permitted in earlier treaties”.<sup>115</sup> In line with the general obligation contained in Article 4 (c), the provisions on measures of control oblige States parties to limit coca leaf and other narcotic drugs exclusively to medical and scientific purposes. This is also a key element of the object and purpose of the *1961 Convention*,<sup>116</sup> which was mentioned by most Member States in their comments on the Bolivian amendment proposal.

<sup>114</sup> See *supra* notes 10-14 and accompanying text.

<sup>115</sup> UN Commentary, *supra* note 16, 110, para 9.

<sup>116</sup> *Ibid.*



Despite the general prohibition on coca leaf chewing, it might be tempting to argue that, since the term “medical purposes” is not strictly defined, its meaning should be interpreted to include coca leaf chewing when considered as a form of traditional indigenous medicine. According to the official commentary, the meaning of this term may depend on the circumstances and the development of medical science, also taking into account “legitimate systems of indigenous medicine”.<sup>117</sup> In this regard, a possible future pronouncement of the WHO on the use of coca leaf as a traditional medicine and its contributions to public health could be of relevance. However, the explicit reference in Article 49 (2) (a), labeling coca leaf chewing as “traditional”, as well as the very existence of Article 49, show that coca leaf chewing is currently outside the scope of the medical and scientific purposes contemplated in the Convention. More importantly, no country has ever questioned this. In fact, when the issue was discussed at the conference for the adoption of the *1961 Convention*, only the use of opium and cannabis in indigenous medicine were mentioned.<sup>118</sup> Even Bolivia has made it clear that coca leaf chewing is a broader sociocultural practice and that an amendment was necessary to allow it, despite the country’s view that the *1961 Convention* does not prohibit practices that are not harmful to human health.

Having interpreted the prohibition on coca leaf chewing under the *1961 Convention* in its context and in light of the object and purpose of the Convention, it may also be necessary to take into account other relevant rules of international law that are applicable in the relations between the parties, pursuant to Article 31 (3) (c) VCLT.<sup>119</sup> This Article is generally considered as an expression of the objective of “systemic integration”, which governs treaty interpretation and reflects the fact that treaties are created by and operate within the international legal system.<sup>120</sup> In other words, the meaning of a treaty rule must be interpreted against the background of other relevant rules of international law.

There is a considerable degree of uncertainty concerning the proper application of this article, as became evident in the divergence of views expressed

<sup>117</sup> *Ibid.*, 111, para. 12.

<sup>118</sup> See UN, *Conference for the Adoption of a Single Convention on Narcotic Drugs*, Official Records, Vol. 1, UN Doc E/CONF.34/24 [UN, Conference for the Adoption of a Single Convention on Narcotic Drugs].

<sup>119</sup> See VCLT, Art. 31 (3) (c), *supra* note 107, 340.

<sup>120</sup> *ILC Conclusions*, *supra* note 109, 413, para. 251 (17); *ILC Study*, *supra* note 109, 208, para. 413 (with further references). See also P. Merkouris, ‘Article 31(3) (c) of the VLCT and the Principle of Systemic Integration’ (2010), available at <https://qmro.qm.ac.uk/jspui/bitstream/123456789/477/1/MERKOURISArticle%2031%283%29%28c%292010.pdf> (last visited 15 June 2013).

both in and on the ICJ judgment on the *Oil Platforms* case.<sup>121</sup> However, it appears indisputable that Article 31 (3) (c) allows the consideration of treaty-based rules, in addition to general principles of law and customary international law, in order to arrive at a consistent meaning of the treaty rule under interpretation.<sup>122</sup> While different approaches can be followed to determine which are the relevant rules for the purposes of Article 31 (3) (c), it has been argued that this is ultimately an assessment of the proximity between such rules and the provision under interpretation, including with respect to their terminology, their subject matter, their signatory parties, and their distance in time.<sup>123</sup>

A more difficult question is whether Article 31 (3) (c) allows the interpreter to take into account relevant rules that are in force at present or only those applicable at the time of the conclusion of the treaty under interpretation. It seems that this problem of inter-temporality, famously outlined by Judge Huber in the *Palmas* arbitration,<sup>124</sup> can only be resolved on a case-by-case basis, by establishing the intention of the parties in this regard,<sup>125</sup> starting by considering whether the treaty itself allows for future developments of international law to be taken into account.<sup>126</sup>

Although the prohibition on coca leaf chewing does not appear to be an open or evolving concept, it shall be assumed for the sake of argument that it is possible to take into account relevant rules that came into being after the conclusion of the *1961 Convention*. In this case, Article 14 of the *1988 Convention* would be most relevant for the interpretation of Article 49 of the *1961 Convention*, as several aspects of the proximity criterion are fulfilled. Both provisions contain similar terminology as to “traditional” uses, while both conventions deal with the subject matter of drug control and share a large number of States parties. Given the combined effect of both paragraphs of Article 14 of the *1988 Convention* and its relationship with the *1961 Convention*, outlined

<sup>121</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, 161. For an overview of relevant views, see P. Sands & J. Commission, ‘Treaty, Custom and Time: Interpretation/Application?’, in M. Fitzmaurice, O. Elias & P. Merkouris (eds), *The Issues of Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (2010), 39.

<sup>122</sup> See *ILC Study*, *supra* note 109, 237, para. 470; R. K. Gardiner, *Treaty Interpretation* (2008), 263.

<sup>123</sup> See Merkouris, *supra* note 120, 36-78.

<sup>124</sup> *Island of Palmas Case (Netherlands, USA)*, 4 April 1928, 2 Reports of International Arbitral Awards 829, 845.

<sup>125</sup> See Merkouris, *supra* note 120, 120.

<sup>126</sup> See *ILC Study*, *supra* note 109, 242, para. 478.

above, these rules, albeit relevant, do not shed a different light on the meaning of the prohibition on coca leaf chewing. What Article 14 does clarify is that human rights and traditional uses cannot be ignored by States when enforcing this prohibition.

It may also be argued that the right of indigenous peoples to their customs and traditions is itself a relevant rule of international law that must be taken into account when interpreting Article 49. In this view, the emergence of the rights of indigenous peoples is a significant evolution of the international legal system, which may have an impact on the meaning to be given to the provisions under discussion. Although less relevant in terms of subject matter, the fact that most of the States parties to the treaties enshrining these rights are also parties to the *1961 Convention* could be taken to justify this approach. However, the specific nature of the provisions of Article 49 leaves little scope for their interpretation or development. It is difficult to imagine how States parties could apply the rule obliging them to abolish coca leaf chewing in a way that would not lead to a restriction on the rights of those indigenous peoples, whose customs and traditions involve coca leaf chewing.

## 2. Relevant Rules of International Human Rights Law

The relationship between the rules in question must also be addressed from the perspective of international human rights law. Given the rigidity of the rules on drug control, it is necessary to consider whether the rules on the rights of indigenous peoples are more flexible in allowing for harmonization and systemic integration.

At first sight, coca leaf chewing by indigenous peoples seems to be an activity within the protected rights of indigenous peoples. The terms “custom” and “tradition” mentioned in Article 2 (b) of *ILO Convention No. 169* and in Articles 11 and 12 of UNDRIP are not further defined by these instruments. According to the dictionary definition, a custom is “a traditional and widely accepted way of behaving or doing something that is specific to a particular society, place, or time”, while a tradition is “a long-established custom or belief that has been passed on from one generation to another”.<sup>127</sup> The terms thus express similar and partially overlapping concepts, which will include coca leaf chewing if it is long established, widely accepted, or specific to an indigenous people. Another relevant term is ‘cultural expressions’ of indigenous peoples, referred to in Article 31 of UNDRIP, which was explicitly cited by Bolivia in

<sup>127</sup> A. Stevenson (ed.), *Oxford Dictionary of English*, 3rd ed. (2010), 430, 1884.

support of its amendment proposal. As mentioned above, it may relate to social practices, rituals, and practices concerning nature, arguably including those involving coca leaf chewing.

However, an interpretation of the right of indigenous peoples to their customs and traditions must also take into account relevant rules of international law, pursuant to Article 31 (3) (c) VCLT, as outlined in the previous section. The principle of systemic integration may be more easily applied here, since the provisions on the right of indigenous peoples to their customs and traditions are less specific and appear open to interpretation. As stressed by the ILC with reference to the jurisprudence of the ICJ, States entering into treaty obligations cannot be presumed to act inconsistently with generally recognized principles of international law.<sup>128</sup> Arguably, one of the most important of these principles is the obligation of States to honor their commitments under the treaties they are parties to (*pacta sunt servanda*), codified in Article 26 VCLT. States that ratify or accede to *ILO Convention No. 169* thus cannot be deemed to deviate from their obligations under the *1961 Convention*, including the prohibition on coca leaf chewing. If this presumption cannot be rebutted, the obligation to respect the rights of indigenous peoples to their customs and traditions under *ILO Convention No. 169* must be interpreted without prejudice to the prohibition on coca leaf chewing under the *1961 Convention*. Arguably, this applies, *a fortiori*, to any customary rules in this regard, as well as the commitments accepted by States under the UNDRIP. As a matter of law, this would mean that the provisions protecting the customs and traditions of indigenous peoples do not extend to coca leaf chewing, even if it is part of their customs and traditions as a matter of fact. This presumption needs to be considered in the context of the relevant provisions and in light of the object and purpose of the instruments protecting indigenous rights.

A central feature of the instruments enshrining the rights of indigenous peoples is the primary role accorded to the interests, views, and aspirations of indigenous peoples. *ILO Convention No. 169* aims at empowering indigenous peoples and at ensuring that they can maintain and develop their cultural identity, customs, traditions, and institutions, in accordance with their own aspirations.<sup>129</sup> The importance of respect for and the development of the institutions, cultures, and traditions of indigenous peoples in accordance with their aspirations and needs is reaffirmed in the preamble of UNDRIP. Key

<sup>128</sup> *ILC Conclusions*, *supra* note 109, 414, para. 251 (19) (b).

<sup>129</sup> B. Feiring, *Indigenous & Tribal People's Rights in Practice: A Guide to ILO Convention No. 169* (2009), 36.

objectives are indigenous peoples' consent to and involvement in the policies and measures that affect them. This is evident from several provisions of *ILO Convention No. 169*. Article 1 (c) establishes self-identification as indigenous as a fundamental criterion for the application of the provisions of the convention. The cooperation and participation of indigenous peoples is required in several articles throughout the Convention.<sup>130</sup> Article 6 establishes a general principle of consultation, reaffirmed in Article 19 UNDRIP, pursuant to which the peoples affected by legislative or administrative measures must be consulted through their own representative institutions. The requirement of consultations and cooperation with the peoples concerned is also an integral part of several provisions of UNDRIP.<sup>131</sup>

Based on these considerations, it is submitted here that any presumptive restriction of the concept of customs and traditions would be at odds with the object and purpose of *ILO Convention No. 169* and other relevant instruments. If the views of indigenous peoples and the principle of consultation are to be taken seriously, States will need to defer to the views of the indigenous peoples concerning their customs and traditions. Therefore, indigenous peoples who identify coca leaf chewing as part of their customs and traditions should, in principle, be entitled to the protection of their rights in this regard. This does not mean that States cannot restrict the rights of indigenous peoples. In fact, these rights are not absolute and may be subject to limitations. What it means is that restrictions of these rights cannot be presumed but must follow the appropriate procedures, in consultation with the indigenous peoples concerned and taking their interests and views into account.

*ILO Convention No. 169* does not prevent States parties from applying national laws and regulations on drug control to indigenous peoples. However, its Article 8 (1) requires governments to accord due regard to the customs or customary laws of these peoples when doing so. Article 8 (2) states that the right of indigenous peoples to retain their own customs is contingent on whether such customs are compatible with fundamental rights defined by the national legal system and with internationally recognized human rights. It also requires that procedures shall be established to resolve conflicts, which may arise in this context. Both provisions must be read together with the general principle of consultation set out in Article 6 of *ILO Convention No. 169*, which requires that consultations are to be carried out through appropriate procedures, in particular

<sup>130</sup> *Convention No. 169*, Arts 2 (1), 5 (c), 7, 15, 20 (1), 22, 23 (1), 25 (2), 27 (1), 29 & 33 (2), *supra* note 30, 1385-1391.

<sup>131</sup> *Ibid.*, Arts 15, 17, 30, 32, 36 & 38, 1387-1388, 1391-1392.

through indigenous peoples' representative institutions, with the objective of achieving agreement or consent to the proposed measures. Comments made by States during the preparatory works of *ILO Convention No. 169* confirm that the purpose of the restriction foreseen in Article 8 (2) is to address situations in which customary practices of indigenous peoples result in discrimination against women, slavery or other human rights violations.<sup>132</sup>

The international human rights treaties are the yardsticks against which restrictions to the customary practices of indigenous peoples will be measured. Moreover, some of these treaties contain specific obligations that may affect the right of indigenous peoples to practice their cultural traditions and customs. For instance, under Article 2 (f) of the *Convention on the Elimination of All Forms of Discrimination Against Women*, States parties agreed "to take all appropriate measures [...] to modify or abolish existing [...] customs and practices which constitute discrimination against women".<sup>133</sup> Under Article 33 of the *Convention on the Rights of the Child*, States parties are obliged to "take all appropriate measures [...] to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties".<sup>134</sup> The result of this provision is an obligation to protect indigenous children from coca leaf chewing, taking into account the relevant provisions of the *1961 Convention*.

Restrictions to the rights of indigenous peoples are also envisaged in the UNDRIP. Under Article 34, indigenous peoples have the right to promote, develop, and maintain their distinctive customs, spirituality, traditions, etc. "in accordance with international human rights standards".<sup>135</sup> Moreover, Article 46 also allows limitations that are imposed for other purposes, as long as they are determined by law and in accordance with human rights obligations. It also sets out a balancing test that incorporates elements developed in the jurisprudence of the Human Rights Committee. In accordance with that provision, any limitation shall be

"non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of

<sup>132</sup> ILO, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, International Labour Conference (75th Session), Report VI (1) (1987), 38 [ILO, *Partial Revision of the Indigenous and Tribal Populations Convention*, Report VI (1)].

<sup>133</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December, Art. 2 (f), 18 December 1979, 1249 UNTS 13, 16.

<sup>134</sup> *Convention on the Rights of the Child*, 20 November 1989, Art. 33, 1577 UNTS 3, 55.

<sup>135</sup> UNDRIP, Art. 34, *supra* note 23, 9.

others and for meeting the just and most compelling requirements of a democratic society”.<sup>136</sup>

The rights guaranteed to indigenous peoples in the context of Article 27 ICCPR are also not without limits. According to the jurisprudence of the Human Rights Committee, a balancing test must be applied to assess whether there is a reasonable and objective justification for the interference by a State party and whether the interference is necessary, reasonable, and proportionate.<sup>137</sup> In particular, this jurisprudence considers whether the interference with the way of life of the people concerned is so substantial that it denied or failed to protect their right to enjoy their own culture. In this regard, it is of special importance whether the people affected have been consulted during the proceedings.<sup>138</sup>

The mentioned provisions make it clear that States may lawfully restrict the right of indigenous peoples to their customs and traditions. This can be done in order to safeguard human rights standards, but also for other purposes, such as drug control. In either case, a balancing test will have to be applied to assess whether the interference by a State with the right of indigenous peoples is justifiable. So far, the situation is not dissimilar from restrictions of other human rights, such as limitations to the freedom of peaceful assembly in the interests of national security or public safety.<sup>139</sup> The distinctive feature of restrictions to the rights of indigenous peoples is the importance of consulting them in this regard, including by using their institutions and taking into account their customary laws. According to some commentators, any assessment of indigenous peoples’ cultural practices should allow the peoples concerned a certain margin of appreciation and an opportunity to use their own decision-making processes in interpreting and applying human rights standards.<sup>140</sup> This would mean that States intending to enforce their international obligation to abolish coca leaf

<sup>136</sup> *Ibid.*, Art. 46 (2), 11.

<sup>137</sup> *Lovelace v. Canada*, Communication No. R.6/24, UN Doc A/36/40, 166, 30 July 1981, *Kitok v. Sweden*, *supra* note 34; *Länsman et al. v. Finland*, Communication No. 511/1992, UN Doc CCPR/C/52/D/511/1992, 26 October 1994; *Länsman III v. Finland*, Communication No. 1023/2001, UN Doc A/60/40 (Vol. II), 17 March 2008, 90.

<sup>138</sup> See *Länsman et al. v. Finland*, *supra* note 137, 11, para. 9.6.

<sup>139</sup> See *International Covenant on Civil and Political Rights*, 16 December 1966, Art. 21, 999 UNTS 171, 178.

<sup>140</sup> See A. Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (2007), 109; and Iorns Magallanes, ‘ILA Interim Report’, *supra* note 22, 18; both with reference to S. J. Anaya, ‘International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State’, 21 *Arizona Journal of International and Comparative Law* (2004) 1, 13, 26.

chewing will at least need to consult the indigenous peoples affected as early as possible, making use of their institutions and customary laws in order to achieve consent on the envisaged measures and to possibly implement these measures.

Having considered the problem both from a drug control and a human rights perspective, it would thus seem inevitable to conclude that the rules in question are indeed in a relationship of interpretation. States who are obliged to implement the prohibition on coca leaf chewing can restrict the right of indigenous peoples to their customs and traditions, but should follow the appropriate procedures to do so in consultation with the peoples concerned, in line with the object and purpose of the relevant instruments. Although this outcome appears legally sound, it is not very favorable to the rights of indigenous peoples, because the balance to be drawn will be tilted in favor of the abolition of coca leaf chewing. The question remains whether a consultation procedure will allow States to give enough weight to culture as an essential element of the identity of the indigenous peoples concerned.<sup>141</sup>

## II. Underlying Reasons for Tension Between Indigenous Peoples' Rights and the International Drug Control Regime

Even though the conclusion reached is that the rules containing the prohibition on coca leaf chewing and those enshrining the right of indigenous peoples to their customs and traditions are in a relationship of interpretation, a degree of tension between these rules clearly remains. In order to better understand the values and interests at the heart of this underlying tension, it is helpful to consider the preparatory work of the relevant provisions under the *1961 Convention* and *ILO Convention No. 169*. Both instruments are based on certain sets of value judgments concerning indigenous peoples. The values and attitudes of the international community towards indigenous peoples have changed considerably during the past decades.

The need to limit the production of coca leaf had been discussed in various fora under the auspices of the League of Nations. It was also one of the first issues to be considered by the competent bodies of the United Nations, which decided to establish a Commission of Enquiry on the Coca Leaf.<sup>142</sup> From September to December 1949, the Commission conducted a fact finding mission in Peru and Bolivia to investigate the effects of chewing the coca leaf and the possibilities

<sup>141</sup> Iorns Magallanes, 'ILA Interim Report', *supra* note 22, 19.

<sup>142</sup> See UN Division of Narcotic Drugs, 'Commission of Enquiry on the Coca Leaf', 1 *Bulletin on Narcotics* (1949) 1, 20.



of limiting its production and controlling its distribution.<sup>143</sup> With regard to coca leaf chewers in Peru and Bolivia, the Commission found that almost all of them were “Indian”, i.e. members of the indigenous peoples of the Quechua and Aymara.<sup>144</sup> It highlighted the sacred character of the coca leaf and its important role in the customs and rituals of these peoples, especially those relating to holidays, deaths, agriculture, illnesses and magical practices.<sup>145</sup> However, the Commission dismissed the supernatural beliefs associated with these customs and practices as “superstitions”.<sup>146</sup> It considered the factors encouraging coca leaf chewing as a result of the poor living conditions and the lack of education of the indigenous communities concerned. Although deeply rooted in certain regions and groups, the Commission expressed the view that these factors could be eradicated by improving the living conditions and providing education,<sup>147</sup> and concluded that coca leaf chewing produced harmful effects, including malnutrition, undesirable changes of an intellectual and moral character, and reduced economic activity.<sup>148</sup> It recommended a gradual suppression of coca leaf chewing, including by improving the living conditions of the populations concerned and eradicating the production, distribution, and chewing of coca leaf.<sup>149</sup>

The views expressed by the Commission of Enquiry formed the basic understanding among States with regard to the question of the coca leaf, which was addressed at the intergovernmental level in the period leading to the adoption of the *1961 Convention*. The matter was considered within ECOSOC and its Commission on Narcotic Drugs, as well as by the Expert Committee on Drugs Liable to Produce Addiction of the WHO. The health experts agreed that coca leaf chewing was harmful to the individual and to society and should be considered as a form of addiction.<sup>150</sup> The policy-making bodies encouraged countries to progressively abolish its eradication, including by implementing

<sup>143</sup> See ECOSOC, ‘Report of the Commission of Enquiry on the Coca Leaf’, *supra* note 40, 102.

<sup>144</sup> *Ibid.*, 9.

<sup>145</sup> *Ibid.*, 53-54.

<sup>146</sup> *Ibid.*, 10.

<sup>147</sup> *Ibid.*, 54.

<sup>148</sup> *Ibid.*, 93.

<sup>149</sup> *Ibid.*, 94-98.

<sup>150</sup> WHO, ‘Third Report of the Expert Committee on Drugs Liable to Produce Addiction’, *Technical Report Series No. 57* (1952), 10.

educational programmes to highlight the harmful effects.<sup>151</sup> As a response, States like Argentina, Bolivia, Colombia, and Peru adopted a policy of progressive abolition of coca leaf chewing.<sup>152</sup>

During the negotiations at the United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs in 1961, there was a consensus among delegations that coca leaf chewing was harmful and that its gradual abolishment was necessary. While different opinions were expressed as to the length of the transitional period, no delegation questioned the purpose of the relevant provisions in the draft text. The representatives of Bolivia and Peru argued that more time was required to abolish traditional coca leaf chewing by their indigenous peoples, while emphasizing their ongoing efforts in this regard.<sup>153</sup>

The policies of progressive abolition were further developed at the regional level. An Inter-American Consultative Group on Narcotics Control met at Rio de Janeiro from 27 November to 7 December 1961, followed by two meetings of the Inter-American Consultative Group on Coca Leaf Problems, which agreed that coca leaf chewing was harmful and should be abolished. It considered that the incidence of this habit could be radically reduced by improving the “difficult economic, social and harsh climatic conditions under which the highland Indians lived”.<sup>154</sup>

These developments show how strongly the provisions requiring the abolition of coca leaf chewing reflect the value judgments and attitudes towards indigenous peoples that were prevalent within the international community in the 1950s and early 1960s. The economic, social, and cultural conditions of indigenous peoples were considered under-developed and destined to disappear with “modernization”. It was believed that governments had a “duty to integrate

<sup>151</sup> See *Commission on Narcotic Drugs Res. 1 (VII)*, May 1952; *ECOSOC Res. 1952/436(XIV) E*, 28 May 1952; *ECOSOC Res. 1954/548*, UN Doc E/RES/1954/548(XVIII)E, 12 July 1954.

<sup>152</sup> See *ECOSOC Res. 1954/548(XVIII)E*, *supra* note 151.

<sup>153</sup> UN, *Conference for the Adoption of a Single Convention on Narcotic Drugs*, *supra* note 118, 57.

<sup>154</sup> *Report of the Consultative Group on Coca Leaf Problems*, Part III, para. 27, reprinted in C. Avalos Jibaja, ‘Consultative Group on Coca Leaf Problems’, 16 *Bulletin on Narcotics* (1964) 3, 25, 31.

the highland Indians in the economic and social life of their nations”<sup>155</sup> and that there was the need for “a fight against superstition and mistaken beliefs”.<sup>156</sup>

The same attitude also informed the negotiations and the provisions of the *ILO Convention Concerning Indigenous and Tribal Populations* of 1957 (ILO Convention No. 107).<sup>157</sup> *ILO Convention No. 107* reflected the same paternalistic and integrationist approach, based on the assumption that indigenous groups were culturally inferior and that they needed to be integrated into society in order to help them reach a higher stage of social, economic, and cultural development.<sup>158</sup> This was evident in the provisions of *ILO Convention No. 107*, which established that the progressive integration of indigenous peoples was the main aim of government action,<sup>159</sup> and that “the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong”.<sup>160</sup>

A more detailed debate emerged in the 1970s, when indigenous peoples were increasingly organized and visible at the international level, in order to challenge this paternalistic approach.<sup>161</sup> At the ILO, this led to a review of *ILO Convention No. 107* during 1988 and 1989 and, ultimately, the adoption and entry into force of *ILO Convention No. 169*. During the preparatory works of *ILO Convention No. 169*, governments agreed that the views concerning indigenous peoples had changed considerably and that the integrationist approach and the assumption of cultural inferiority needed to be removed from the Convention.<sup>162</sup> Instead of aiming at the integration of indigenous culture, the new rules enshrined in *ILO Convention No. 169* and UNDRIP aim at achieving the recognition of, and respect for, the ethnic and cultural diversity of indigenous peoples. This new attitude is also reflected in other instruments. For

<sup>155</sup> *Ibid.*, 32.

<sup>156</sup> M. Granier-Doyeux, ‘Some Sociological Aspects of the Problem of Cocaism’, 14 *Bulletin on Narcotics* (1962) 4, 1, 16.

<sup>157</sup> ILO, *Partial Revision of the Indigenous and Tribal Populations Convention*, Report VI (1) (1987), *supra* note 132, 18-19 & 27-29.

<sup>158</sup> See Xanthaki, *supra* note 140, 52-55.

<sup>159</sup> ILO, *Convention Concerning the Protection and Integration of Indigenous and Other Tribal Peoples and Semi-Tribal Populations in Independent Countries*, 26 June 1957, Arts 1 (2), 2, 4, 5, 7 (2), 17 (3), 22 (1) & 24, 328 UNTS 247, 251, 252, 254, 260, 262.

<sup>160</sup> *Ibid.*, Art. 3 (1), 252.

<sup>161</sup> See Anaya, *Indigenous Peoples in International Law*, *supra* note 20, 56.

<sup>162</sup> ILO, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, International Labour Conference (75th Session), Report VI (2) (1988), 3-9. See also ILO, *Provisional Record No. 32*, International Labour Conference (75th Session) (1988); ILO, *Provisional Record No. 25*, International Labour Conference (76th Session) (1989).

instance, Article 1 of the UNESCO *Universal Declaration on Cultural Diversity* states that “cultural diversity is as necessary for humankind as biodiversity is for nature”.<sup>163</sup>

The international drug control regime has not undergone the same fundamental changes. An attempt to open its provisions to the respect of traditional uses of coca leaf by indigenous peoples was made during the preparatory works of the *1988 Convention*. Bolivia and other States proposed the inclusion of a reference to traditional licit uses into the draft article on measures against the illicit cultivation of coca bush and other plants. Many States initially opposed this proposal on the grounds that traditions were often subject to change.<sup>164</sup> Their main concern was to avoid introducing any sweeping exceptions or loopholes that might hinder the effective eradication of drug crops or increase their illicit cultivation.<sup>165</sup> The final compromise was reached by introducing the aforementioned sentence in Article 14 (1) to the effect that any measures taken under the Convention shall not be less stringent than the provisions applicable under the other international drug control treaties.<sup>166</sup> As a result, the reference to traditional licit uses in the *1988 Convention* did not affect the prohibition on coca leaf chewing under the *1961 Convention*. As outlined in section E, there was no support from States outside Latin America for Bolivia’s recent proposal to amend the *1961 Convention* to remove this prohibition.

These developments illustrate the conflicting values and interests that exist within the international community. On the one hand, the value judgments and attitudes of States towards indigenous peoples have moved towards respect for the culture and identity of indigenous peoples. This has led to the development and changes of relevant rules of international human rights law. On the other hand, most States have been reluctant to permit changes to the rules of the international drug control regime. Maintaining the integrity and effectiveness of this body of law seems to be their primary concern, even if they share the attitude of respect for the culture and identity of indigenous peoples. This ambivalence may be considered as the main source of the tension between the prohibition

<sup>163</sup> UNESCO, *Universal Declaration on Cultural Diversity*, 2 November 2001, Art. 1, 41 ILM 57, 58.

<sup>164</sup> *UN Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Official Records, Vol. 1, UN Doc E/CONF.82/16, 26.

<sup>165</sup> *UN Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Official Records, Vol. 2, UN Doc E/CONF.82/16/Add.1, 297-298.

<sup>166</sup> *Ibid.*, 300-305; UN, *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1988), 300.

on coca leaf chewing and the right of indigenous peoples to their customs and traditions.

## G. Conclusion

The present article has examined whether a conflict exists between the rules of international law prohibiting coca leaf chewing and those enshrining the right of indigenous peoples to their customs and traditions. In practice, governments of countries where coca leaf chewing is practiced by indigenous peoples do not seem to have considered the issue as a normative conflict. So far, only Bolivia has asserted that a normative conflict exists and has called international attention to the issue by attempting to change relevant rules and its obligations under the international drug control regime. Its choice was a political one and must be seen in light of its broader policy of legalizing and promoting traditional uses of coca leaf, which is not limited to safeguarding the rights of indigenous peoples.

The case of Bolivia has shown that resolving the normative conflict in favor of the rights of indigenous peoples requires changes to existing international law. Such changes are not easily achievable and may have negative impacts on treaty relations. Bolivia only succeeded in removing its own obligation to abolish coca leaf chewing, instead of changing relevant rules of the *1961 Convention* for all States parties. In denouncing the *1961 Convention* and re-acceding to it with a reservation, Bolivia not only affected the integrity of the convention, but also added to existing precedents regarding this procedure with potentially significant consequences. It might appear attractive for other States parties pursuing a new drug policy to use the same procedure in order to avoid international responsibility for decisions to legalize cannabis or other narcotic drugs within their territory. In a case like this, unless one third of the States parties to the *1961 Convention* were to object, all States parties would have to accept the consequence that the provisions excluded by the reservation would not apply as between them and the reserving State. The appeal of using this is not limited to the international drug control regime and may also be used to modify obligations under international treaties on other subject matters.

At the conceptual level, a legal analysis has led to the conclusion that a normative conflict can be resolved or avoided, without changing existing international law, by applying the rules of treaty interpretation and the principle of harmonization. However, the rules in question can be harmonized only by restricting the right of indigenous peoples to their customs and traditions. In this regard, it would be of crucial importance that States consult the indigenous

peoples affected and enable them to use their institutions and decision-making procedures, in order to abolish coca leaf chewing in the least intrusive and most acceptable way possible. Having said this, it is conceivable that there may be borderline cases in which an indigenous people considers coca leaf chewing to be so central to its culture and identity that even the use of appropriate consultations and institutions in abolishing coca leaf chewing would defeat the purpose of preserving its culture and identity.

An examination of the drafting history of relevant provisions has revealed the conflicting values and interests of the international community as the origin of the tension between the rules in question. Whether or not coca leaf chewing is still considered as harmful for human health, its prohibition may be seen as a codification of an outdated attitude towards indigenous peoples that is no longer supported by any State. On the one hand, this begs the question of whether the rule to abolish coca leaf chewing has lost its legitimacy and whether the principle of harmonization should be applied in this case. Restricting the rights of indigenous peoples in order to enable the application of such a rule may seem unfair, especially in borderline cases where the very purpose of these rights is at stake. On the other hand, the prohibition on coca leaf chewing remains a binding obligation of States parties to the *1961 Convention*, despite the attempt of Bolivia to change relevant rules. The main argument in favor of the prohibition is that allowing coca leaf chewing would lead to a greater production and supply of coca, greater availability of cocaine, and increased drug trafficking and related criminal activities. Accordingly, a restriction of the rights of indigenous peoples would be warranted in order to safeguard the health and security of people worldwide.

To conclude, the normative conflict can be addressed either within the existing international legal framework or by changing international legal obligations. Both options have adverse consequences. A coherent solution within existing international law would not be favorable to the rights of indigenous peoples. On the other hand, attempts to amend the international drug control regime are unlikely to succeed in the current political climate. While the procedure of denunciation and re-accession of a treaty with reservation has proven successful for the purposes of Bolivia, a more widespread use of this procedure risks affecting the integrity of multilateral treaties and the stability of treaty relations.