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General Comment on the impacts of drug policies on economic, social and cultural rights: Public Consultation – Annotated Outline

Dear Distinguished Members of the Committee on Economic, Social and Cultural Rights,

In response to your call for comments on the draft annotated outline of a General Comment on the impacts of drug policies on economic, social and cultural rights (“Outline”), we have the honor to submit a few remarks for your perusal.

We are a group of researchers from various academic disciplines in Germany that examines ethical, legal, and social aspects of the so-called psychedelic renaissance, the return of psychedelic substances to medicine. You can find more about our research group at www.psychodelsi.org. For the sake of transparency, we note that our research is funded by a grant from the German Federal Ministry of Education and Research, but we are independent researchers without conflicts of interest. Psychedelic substances such as LSD, psilocybin, DMT or MDMA are currently categorized in schedule I of the Convention on Psychotropic Substances of 1971 (“Convention”). Ongoing research strongly suggests their medical utility so that the need for rescheduling some of them may soon arise (market authorization of drugs containing MDMA is expected to be granted by the FDA this year).

With respect to the draft text of the Outline, we wish to extend our appreciation for the commendable efforts of the Committee in engaging with this complex, conflict-laden, and unsettled topic in such a broad scope, its commitment to emphasize the necessity of a human rights approach to international drug control and to advance the global search for novel ways forward.

In substance, we would like to draw the attention of the Committee to two aspects which may merit your consideration and elaboration in the General Comment. The first concerns one of the issues of particular interest identified in the Outline, namely ways to transcend the patient vs. criminal dichotomy by acknowledging rights to use and refuse drugs. The second concerns *de facto* obstacles to research with psychotropic substances which may run counter to a right to research and, by extension, the right to health.

I. Freedom of thought and substances altering thought

The Outline correctly observes a glaring gap in the established rights framework with respect to basic questions about the voluntary use and involuntary administration of drugs. They concern no less than the general legal relation between the person and the State with respect to mind altering interventions. Clarifying this basic relation lays the foundation for examinations of more specific, yet interrelated and interdependent economic, social, and cultural rights. The Outline refers to the right to bodily autonomy and freedom from treatment. Although they are not explicitly enshrined in the core international documents, both can be derived from rights to privacy, integrity or security of the person (e.g., Articles 9, 17 International Covenant on Civil and Political Rights, ICCPR); the Convention on the Rights of Persons with Disabilities (CRPD) and several regional documents such as Article 5(1) American Convention on Human Rights (ACHR) and Article 3(1) European Charter for Fundamental Rights and Freedoms (ECFR) specify them as rights to physical and *mental* integrity. With respect to psychotropic substances that by definition affect the mind, the latter may be more appropriate and worth explicitly mentioning given the underdeveloped state of the right.¹ More generally, nuanced assessments of psychotropic substances are possible only when the mental effects are fully taken into consideration; analyses at the physiological level alone might fall short of capturing the complexity of their effects (this view does not presuppose mind-brain dualism).²

¹ Cf. Bublitz, The nascent right to psychological integrity and mental self-determination. In: v. Arnould/v. Decken/Susi, The Cambridge handbook of new human rights: Recognition, novelty, rhetoric. 2020, 387.

² This is one of the reasons for the explicit inclusion of “mental harm” in Article IIb of the Genocide Convention to avert negative effects on people through narcotic drugs; UN Doc. E/AC.25/SR.28 (remarks by the delegate of China).

In addition to this rather terminological refinement, another even more important and currently underexamined right may apply to both using and refusing drugs: freedom of thought (Articles 18 Universal Declaration of Human Rights, ICCPR). Its scope and meaning are not settled, hardly any jurisprudence addresses it at the international or regional level. It may be the only core right without any application. However, this neglect may do injustice to the significance of the guarantee. Standing in a long tradition in the western history of ideas, drafters of the Universal Declaration envisioned the right to provide protection against overwhelming powers and pressures on the person and to secure an inner freedom against overreaching governmental powers. With symbolic importance, freedom of thought was placed first in Article 18 and considered as the general guarantee from which the more specific freedoms of conscience and religion derive.³ The importance of the freedom is also expressed in it being one of the few absolute and non-derogable rights under the ICCPR.⁴ Its disregard in practice fails to live up to the importance that drafters and States accorded to the right.⁵

For the present topic, the relevance of freedom of thought is twofold: First, we suggest that freedom of thought protects against forced treatments that alter how or what people think. Many forced psychiatric treatments may do so. However, this suggestion does not imply that forced treatments should be categorically prohibited. The special situation of coercive medical treatment of non-competent patients is a special case that has not been duly appreciated during the drafting of the UDHR the ICCPR. Still, the idea of freedom of thought should be acknowledged and accommodated in decisions about forced treatment and may sometimes speak against them.⁶ This interpretation of freedom of thought as a right against forced interventions into thought is supported in the literature.⁷

Secondly, the right may apply to the voluntary use of psychotropic substances insofar as they afford or enable *free thinking*. This is the case when they help to overcome compulsive or delusional thought (as some psychiatric medications) but also when they enable modes of thinking that are free from other psychological constraints. This may well be one of the peculiar effects of classic psychedelics. They apparently open rigid modes and restrictive structures of thought, allow thinking outside the box, and may even provide access to non-conscious psychological

³ For the genesis of the right see Bublitz, The origins of freedom of thought in the Universal Declaration and the Covenant on Civil and Political Rights. In: O'Callaghan/Shiner, The Cambridge handbook of freedom of thought (forthcoming).

⁴ Article 4(2) ICCPR.

⁵ Cf. the report of the Special Rapporteur on Freedom of Belief or Religion, Ahmed Shaheed, on freedom of thought 2021, UN Doc. A/76/380.

⁶ For a longer argument to this end Bublitz, Freedom of Thought as an International Human Right, in Blitz/Bublitz, The Law and Ethics of Freedom of Thought Vol I. Palgrave 2021, 49.

⁷ Nowak, CCPR Commentary, 2nd ed. 2005, Article 18, p. 413 ("refrain from interfering ... whether this be through indoctrination, "brainwashing", influencing of the ... mind with psychoactive drugs").

material. A neurobiological explanation for these effects is a relaxation of the “top-down” control of higher brain structures, which allows to leave the usual frame of perceiving the world and oneself.⁸ Herein lies their therapeutic potential, and these altered modes of thought may be beneficial for many other purposes, from gaining insights and a better understanding of oneself to overcoming inner blockades and adopting new perspectives. A majority of participants who used psilocybin in a recent study retrospectively declared it as one of the five “most personally meaningful” experiences of their lives.⁹ Of course, should these experiences be mere hallucinations without epistemic merit or become so free of constraints that they turn delusional, they do not deserve any special legal treatment. If they, however, allow modes of thought which are aptly understood as free thinking and provide genuine insights – which we suppose they at least sometimes do –, they should fall under the remit of freedom of thought, provided there are no other means to attain sufficiently similar cognitive effects.

This suggestion does not entail that governmental restrictions are illegitimate, an absolute understanding of the freedom would lead *ad absurdum*. This is, again, a specific constellation that drafters of the international documents may not have had in mind, and nothing here shall suggest the contrary. However, we hold the proposed interpretation to be persuasive once one renders the abstract freedom applicable to concrete contexts. As a consequence, we submit that freedom of thought creates a *pro tanto* right to use psychotropic substances which substantively alter thought in an epistemically advantageous way. Although this right might be limited for a number of reasons, it clarifies the basic legal relation between the person and the State with respect to some aspects of her mind, laying the groundwork for further analyses of inter-related and interdependent economic social, and cultural rights.

II. Right to research and schedule I substances

The Convention recognizes the scientific use of scheduled substances and its preamble declares to not unduly restrict their availability for such purposes. While reiterated in many statements from various actors, including the Commission on Narcotic Drugs and the International Narcotics Control Board, this aspiration has not always been met in practice.¹⁰ At least de facto, the drug conventions and the measures States implemented in compliance, and sometimes over-

⁸ Carhart-Harris, REBUS and the anarchic brain: toward a unified model of the brain action of psychedelics. *Pharmacological Reviews* 2019, 316.

⁹ Griffiths et al., Mystical-type experiences occasioned by psilocybin mediate the attribution of personal meaning and spiritual significance 14 months later. *Journal of Psychopharmacology* 2008, 621.

¹⁰ See the INCB supplement to its annual report 2022, No patient left behind. UN Doc. E/INCB/2022/1/Supp.1.

compliance, have significantly hampered research. The demands, obligations, and hurdles for researchers and institutions concerning safety and security, import permissions, transports, and further aspects seem often out of proportion and are sometimes impossible to meet, especially without the financial backing of large pharmaceutical companies.¹¹ The restrictions take an air of absurdity when one considers the fact that many psychotropic substances are readily available on black markets in most urban areas. The problem of diversion of these substances from research facilities or licensed production facilities to illegal markets, which these strict rules seek to counteract, seems largely non-existent. The damage to research, by contrast, is enormous. This problem is aggravated when substances are placed under international control without sufficient prior research into their potential benefits. This adversely affects the right to science or research (Articles 27 UDHR, 5 ICESCR) as a standalone guarantee and a necessary precursor for developing novel medical treatments, which affects the right to health (Article 12.1 ICESCR).

The case of MDMA might illustrate this concern. Following a controversial scheduling in the United States, it was listed in schedule I of the Convention in 1986. At that time, it was in therapeutic use by psychologists and psychiatrists who unsuccessfully appealed its restriction; MDMA was hastily scheduled without proper research into its potential medical utility.¹² Some therapists continued to work illegally with the substance due to its peculiar therapeutic effects; a few of them faced legal consequences, including criminal penalties. Punishing therapists for successful psychotherapeutic work runs counter to several human rights and distorts the spirit of the Convention.¹³ It took almost forty years and dedicated efforts by private persons and philanthropists for the potential of the substance to be officially appreciated. In retrospect, this appears as an unnecessary complication that hampered research, and obstructed therapy, for decades. This may exemplify the costs of prohibition to research and health, and the need for more adequate trade-offs between public health, security, and access to substances. It may well be the case that MDMA is not the sole therapeutic substance that could not be scientifically explored because of a control system that might be overly restrictive, punitive, and lacking the elasticity that scientific and social experiments may require. A self-critical reflection of these effects of the drug conventions and concrete steps to alleviate the situation for further potentially valuable substances are necessary.

¹¹ Nutt et al., Effects of Schedule I drug laws on neuroscience research and treatment innovation. *Nature Reviews Neuroscience* 2013, 577.

¹² For the history of the scheduling see Passie, *The history of MDMA*. Oxford University Press, 2023.

¹³ Sessa/Meckel Fischer. Underground MDMA-, LSD- and 2-CB-assisted individual and group psychotherapy in Zurich: Outcomes, implications and commentary. *Drug Science, Policy and Law* 2015, 2050324515578080.

We hope that these remarks may prove beneficial to your endeavors. Should you seek additional information or further clarification, it would be our privilege to address them.

With highest consideration,

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