

IRRATIONAL PUNISHMENT: Drug Laws and Incarceration in Latin America

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ABOUT CEDD

The CEDD brings together researchers –mostly lawyers– from eight Latin American countries, as well as representatives of the two institutions that organized the group: the Washington Office on Latin America (WOLA) and the Transitional Institute (TNI). The CEDD seeks to generate information on the characteristics and costs of drug policy in Latin America, whether they be social or economic. In doing so, we look to promote an informed debate regarding the efficacy of current drug policy and to recommend an alternative approach for a more just and effective policy. The investigators meet regularly to address issues regarding drugs and to generate studies on drug policy at an international and national level.

In the first report, the group elaborated an extensive study on the impact of drug laws on prison systems in eight Latin America countries. The study, by the name of “Systems Overload: Drug Laws and Prisons in Latin America”, can be found at the following link: http://www.drogasyderecho.org/publicaciones/prop_del/ss-completo.pdf

In the second study, the group focused on proportionality as it related to drug policy in each country addressed. This report shows how the punishments for drug offenses and the treatment towards drug users are disproportionate and often do more damage than good. Similarly, the studies on proportionality exhibit the many costs the current policy has, both for governments and on society.

The third CEDD study analyzed state responses to illicit substance use. The study demonstrates how even when countries intend to address the issue of consumption from a public health point of view, in practice the response often remains judicial, leading to the criminalization of consumers at a regional level.

This study addresses the use of prisons to tackle the drug phenomenon in the region. The obtained data shows not only the severe conditions of the jails in the region, but also the way in which using jails to tackle drug use and trafficking, contributes to aggravate the regional penitentiary overpopulation crisis.

The individual studies by country for each project, as well as the regional reports can be consulted on the CEDD page: <http://drogasyderecho.org>

Although Latin America has led the global debate on reforming drug policy and has promoted the need to consider alternatives to incarceration with regard to drug offenses, the use of criminal law and sentences that deprive people of their liberty has worsened in recent years. Thus, there is a significant gap between the reformist discourse of governments and their efforts to move toward less repressive responses, with a focus on public health, human rights and human development. Such efforts have been erratic with only a few exceptions. In some countries, such as Ecuador, these efforts have even been rolled back.

In the majority of countries in the region, the percentage increase in the population incarcerated for drug offenses has been much higher than that of the population imprisoned for other offenses, and the data shows that these trends continue to accelerate. In addition, in several of the countries studied, incarceration for these offenses is the main factor explaining growth in the prison population. Through country studies, the CEDD investigations show that there exists a large number of people incarcerated for low-level, non-violent drug offenses who would benefit from alternatives to incarceration, especially those who are disproportionately affected by incarceration.

The information presented in this report shows how disproportionately tough sanctions, the use of mandatory minimum sentences, the obligatory use of pretrial detention for these offenses or its overuse, and the lack of use of alternatives to incarceration, among others, contribute to the rise of people incarcerated for drug offenses. Although Latin America is one of

the most violent regions in the world, increased reliance on incarceration does not appear to adequately address this situation, given that it is mainly minor offenders, who are frequently arrested in flagrante, upon whom the weight of the criminal justice system falls. In the case of drug offenses, the CEDD studies show that drug users are often arrested, extorted and even incarcerated as small-scale or retail dealers for possessing quantities of drugs that are above what may be considered tolerated levels for personal use. This shows that the discourse on protecting the health of users exists only on paper while, in practice, drug policies continue to approach the problem of illicit drug use from a criminal law perspective.

Overcrowding, scarce resources and extreme conditions of violence plague prisons in Latin America. The lack of hygiene, of drinking water, basic essentials and sufficient space contribute to a high prevalence of contagious diseases that endanger the health of inmates, their relatives and detention center employees. The use of prisons to address the drug issue undermines health, rather than protecting it. Reducing the use (or abuse) of this criminal justice tool would help to improve prison conditions by freeing up existing resources.

Incarceration and the stigmatization associated with it affects the people who are detained for drug offenses and their families in different ways, depending on criteria such as their gender, sexual identity, ethnicity and socioeconomic situation. Prison has different and disproportionate impacts on women, for example. Although the total number of women in prison is still much lower than that of men,

the incarceration of women for drug offenses is rising at an alarming rate. Women generally occupy the lowest rungs in the drug business ladder. The vast majority of these women have low levels of education and live in conditions of poverty; many of them are single mothers. The incarceration of women who are mothers and caretakers in particular can have devastating consequences for their families. In addition, the discrimination that people from traditionally marginalized population groups suffer outside of prison is often replicated and worsened on the inside.

With regard to young people and adolescents involved in drug offenses, although they are processed in different criminal justice systems, the juvenile system tends to have similar characteristics – and problems – as the adult system. One is that neither adolescents nor young people tend to belong to the leadership ranks in drug trafficking mafias, but instead form part of the weakest and most replaceable links in the trade. However, despite this minor participation, they are among the groups that suffer the effects of the punitive impact of drug policies the most. The absence of drug use prevention strategies is combined with the government's failure to provide treatment and rehabilitation services for problematic drug use faced by those young people and adolescents who must engage in criminal conduct to obtain drugs.

This report, based on data acquired by CEDD researchers, points to the existing penitentiary crisis in Latin America and the adverse effects that current drug laws have had on national prison systems. The report also shows that

the implementation of drug policies – and its negative effects – are not applied in an equal way in society, but instead hurt certain sectors that often already face situations of social vulnerability. Faced with this reality and taking into account the findings of the individual CEDD country studies, the following public policy recommendations are put forward with the objective of achieving a more just drug policy that is respectful of fundamental rights and focused on protecting public health in societies across the Americas.

Recommendations

Legal Reforms:

- Ensure that the criminal justice response is proportional to the harm caused and reform drug laws to distinguish between low-, medium- and high-level offenses, between degrees of leadership in criminal networks, and between violent and non-violent offenses.
- Eliminate mandatory minimum sentences, avoid pretrial detention in the case of minor drug offenses, and allow access to procedural benefits and opportunities for alternatives to incarceration.
- Consider granting special amnesties (pardons) to people convicted for minor, non-violent drug offenses, as well as to first-time offenders.
- Promote the establishment of legal and regulated cannabis markets, and explore options for regulated access to other substances that have been declared illicit.

Drug Use and the Law:

- Decriminalize drug use and put a stop to all prosecution of users, including with regard to possession, cultivating and purchasing. This means removing from criminal law all of the behaviors associated with consumption.
- Use thresholds to set minimum quantities of drugs, based on user practices, below which no one can be considered to be a dealer, without allowing people who possess amounts above these thresholds to be punished for distribution and trafficking. In all cases, in order to sanction that behavior, the State must prove that the intent of the possession was to sell or distribute.
- Offer voluntary and free treatment services to people with problematic drug use, both when they commit other offenses and when they do not. This treatment should not be subject to the threat of a criminal sanction or compulsory rehabilitation. Treatment must be based on scientific evidence, have a harm reduction approach, and be carried out by doctors – not judges.

Women and Incarceration:

- Reduce significantly women's incarceration levels, whether through the application of the principle of proportionality or by adopting alternatives to incarceration. This should include addressing the inappropriate use of pretrial detention and the execution of sentences.
- Do not incarcerate pregnant women or mothers of minors convicted for non-violent drug offenses. In the case of these

women, the application of alternatives to incarceration must be considered.

- Ensure that judges have flexibility to take into account factors of vulnerability and whether the accused (male or female) has dependents, both during the criminal proceedings and when determining the sentence.

Young People and Adolescents:

- Implement comprehensive public policies aimed at young people and adolescents, and move away from the current stigmatization and criminalization of this population.
- Apply the benefits and alternative sentencing policies established for this age group in different countries.
- Comply with laws that establish juvenile justice systems for adolescents, which regulate the State response for offenses committed by people under 18, and which stipulate that the deprivation of liberty of adolescents should be an exception and that the best sanctions are those that do not entail confinement (such as supervised release or doing community service), in addition to the various resources that the laws establish to be able to resolve cases outside the court system through restorative justice. In addition, the maximum sentences for crimes committed by minors should be reduced so they do not exceed what is established in international instruments.
- Provide sufficient resources to the juvenile justice systems for adolescents, so they can operate in a specialized, fair and efficient



Matías Torres. Photographer, Communications Unit of the Chilean Gendarmerie.

manner, in accordance with what is established by the Convention on the Rights of the Child and other relevant international standards.

Alternatives to Incarceration:

- Carry out the reforms needed to implement alternatives to incarceration with strict respect for the rights of the people engaged in drug-related behavior, based on an adequate assessment of which measures would allow for optimizing the available resources in each country to reduce prison overcrowding and recidivism in the commission of offenses.
- Ensure, insofar as possible, the diversion of cases before they enter the criminal justice system, which can allow for a better use of government resources and better opportunities for the well-being and employment of people in these situations.
- Promote the reforms needed to allow those who have committed minor, non-violent drug offenses to be sent, instead of to prison, to a public support network aimed at providing services to prevent recidivism and address the socioeconomic factors that led the individual to commit the crime.

Design and Evaluation of Drug Policy:

- Guarantee and broaden participation in the design, implementation and evaluation of drug policies by civil society actors and especially by drug users, people who are incarcerated, women, the LGBTI community, indigenous, Afro-descendant and other sectors of the population who are in situations of vulnerability and have been disproportionately affected by drug policies.
- Carry out a serious assessment in each country to understand and be able to analyze the impact and effectiveness of current drug policies. This should have the aim of developing and implementing more effective, humane and just policies.
- Improve and expand systems for collecting, systematizing and evaluating criminal justice data and ensure that government officials and the public have timely access to this information. This will allow for the effective evaluation of drug policies and the impacts of those policies, and will lead to better policy making through correct diagnoses about the public policy problem that is to be addressed.

Irrational Punishment: Drug Laws and Incarceration in the Americas¹

¹ This text is a summarized version of: Chaparro, S. and Pérez Correa, C., *Sobredosis carcelaria y política de drogas en América Latina*, Dejusticia-CEDD, forthcoming 2017.

Introduction

Freedom is one of the most important rights for any human being. For that reason, the power that States have to deprive people of their freedom should be used in a proportional manner and only as a last resort. A balance must be struck between the State's duty to guarantee public safety, on the one hand, and the respect for fundamental rights, on the other. However, the “war on drugs” deployed in recent decades has distorted the constitutional and criminal justice systems, tipping the scales toward the use of punitive powers and of prisons worldwide – particularly in the Americas. As a result, prison has become the first response for resolving a series of social issues, including drug use.

The majority of Latin American governments have recognized the negative effects of drug policies that are based first and foremost on punitive responses. The report, *The Drug Problem in the Americas* by the Organization of American States (OAS, 2013), cites those promoting an approach in which “drug use is treated as a public health issue and consumption reduced through evidence-based prevention campaigns. Among other recommendations, they also encourage experimenting with legal regulation models for certain drugs.” Nevertheless, this study as well as past studies by the Research Consortium on Drugs and the Law, or CEDD (CEDD, 2014, 2012; TNI/WOLA, 2010), show that the responses of Latin American governments to the use of illicit substances continues to be predominantly punitive and repressive, addressing illicit drug consumption through criminal justice and penitentiary institutions. Moreover, the CEDD report, *In Search of Rights: Drug Users and State*

Responses in Latin America (2014), documents how that even in those countries where drug use is not a criminal offense, the criminalization of persons who use illicit drugs persists.

The report, *Addicted to Punishment* (Uprimny et al., 2012), shows that an escalation in the use of criminal law to confront the drug issue has resulted in the imposition of extremely harsh and disproportionate sentences depriving people of their liberty for all types of drug-related behavior – from cultivating to selling, and sometimes even consumption. This has aggravated the crisis in the region's penitentiary systems. Although the incarceration crisis can be explained by the excessive use of criminal law in general, this tool is abused even more in the case of drug policies. However, the overuse of incarceration has been ineffective in reducing problematic drug use and in combating organized crime, yet has resulted in enormous costs and produced adverse consequences. Moreover, this has had a disproportionate impact on specific sectors of the population, such as women, drug users, young people, Afro-descendants, small farmers and the poorest sectors of society in general.



Photo Credit: Costa Rican Ministry of Justice and Peace, Press and Communications Office

This report is a synthesis of the results of studies carried out by CEDD researchers on the relationship between drug laws and the prison systems in ten countries in the Americas – Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Peru, the United States and Uruguay. It provides an overview of the crisis that the region's penitentiary systems are undergoing, the adverse effects of the disproportionate use of that system, and the theoretical problems presented by the current criminal justice response to the drugs phenomenon. Subsequently, the report analyzes the concrete ways that drug laws result in the excessive use of criminal law and prison systems. Finally, based on the results of the research in each country, this document shows the impact of drug laws on the specific populations affected, including the prison conditions in which they live, the socioeconomic situation of people deprived of their liberty for these offenses, and as their role in the illicit drug market. In carrying out these investigations at the national level, researchers sought statistical information from penitentiary institutions and other national bodies, although it is worth noting that there was a striking lack of reliable and comprehensive data. In the majority of countries studied, the data is either not systematized or does not exist. Our work therefore highlights the need for national governments to systematically compile quality data. To overcome this obstacle, each researcher also utilized complementary sources of information, such as studies by scholars and international organizations, the analysis of judicial case files, or interviews with government officials, experts and people deprived of their liberty.

The report is organized in the following way: In the second section, the empirical evidence is laid out showing that there is an overuse of incarceration in the region, followed by an overview of the penitentiary crisis in the countries studied. The third section sets forth the conceptual and empirical reasons for asserting that the prevalent use of criminal law, and of prison in particular, has been a misguided policy. This segment shows that mass incarceration for drug offenses is one of the main causes fueling the crisis of prison systems in the Americas.

The fourth section presents data on who is being incarcerated for drug offenses in the countries studied, along with information about their alleged offenses and the substances that led to their incarceration. The specific populations incarcerated for drug offenses includes women, young people, foreigners, cultivators, poor people, as well as drug users, who continue to be unjustly prosecuted and incarcerated despite the fact that possession for personal use and drug use itself have been decriminalized in the majority of these countries.

Finally, the fifth and final section sets forth the conclusions and a series of public policy recommendations for drug policy reform.

Prison as a First Response

A great deal of scholarship (Aharonson, 2010; Urosa et al, 2009; Zaffaroni, 2006; Husak, 2008; Garland, 2001) examines the trend of maximizing the use of criminal law and prisons to tackle various social problems, including illegal drug markets – and governments in Latin America are not an exception. They have frequently relied upon criminal law as the primary response

to crime and violence in the region. In several countries in the region, such as Mexico, Costa Rica, Bolivia and Peru, restrictions have been placed on options such as probation or parole, or the cases that justify the use of pretrial detention have been expanded (Riego and Duce, 2008). In addition, there has been a clear increase in the length of prison sentences for different offenses. According to one analysis, the average number of years in prison imposed for the crimes of rape and homicide has increased in various Latin American countries between 1970 and 2012 (Uprimny et al., 2012). That study documented a rise in the average number of years established for the crime of homicide in Bolivia, Colombia and Mexico. Bolivia, for example, tripled the average prison term established for homicide, rising from 5.5 years in prison in 1970 to 12.5 in 2012.² This trend has led to a systematic increase in the number of people who are detained, which has produced a grave human rights crisis affecting people deprived of their liberty. But this increase is even more striking when drug-related offenses are involved.³

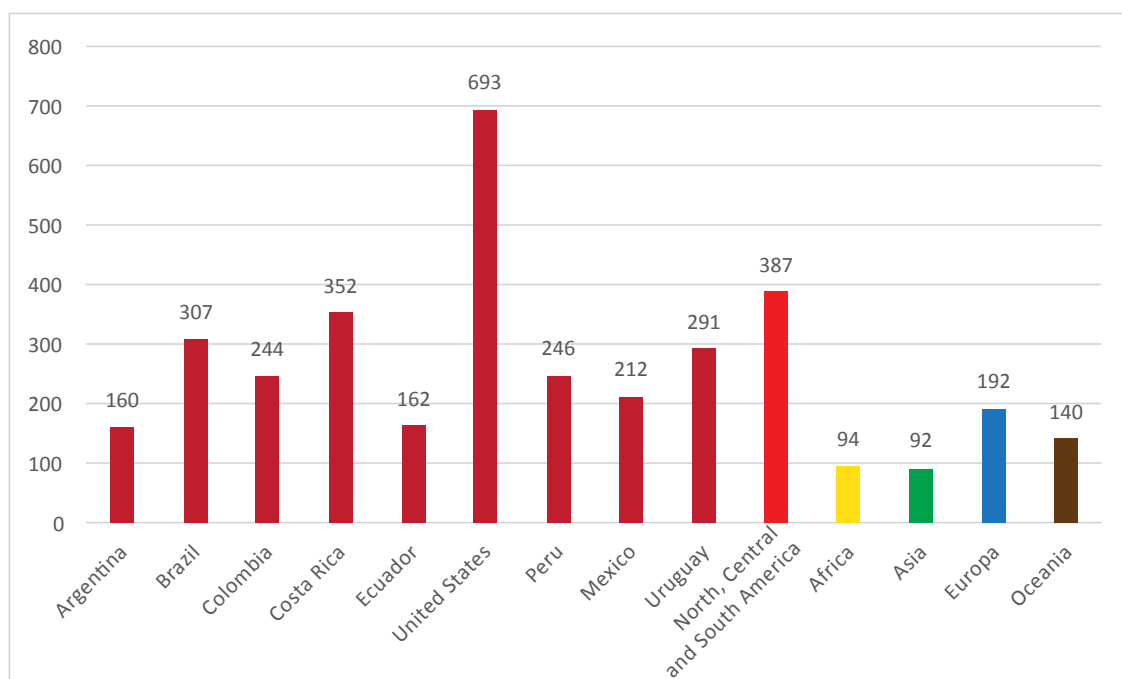
Taking into account the size of its population, the Western Hemisphere has the highest

² In the analysis of legislative changes, Colombia showed the greatest increase, passing from an average of 11 years in 1970 to 27.5 in 2012. In the case of Argentina, Ecuador and Brazil, no increase was observed. Nonetheless, in the case of rape, the average sentences established in these countries since 1970 were superior to those established in the other countries studied.

³ In their report *Addicted to Punishment*, Rodrigo Uprimny, Diana Guzmán and Jorge Parra show that there has been a clear expansion in the use of criminal law with regard to drugs. According to the cited text, since 1970, Latin America has shown an increase in the number of articles that penalize drug-related behavior in each of the relevant drug laws, or in the number of punishable behaviors or descriptive verbs included in each article (Uprimny et al., 2012, p. 20-22).

incarceration rate in the world. The following graph shows the number of people incarcerated for every 100,000 inhabitants in several Latin American countries, in comparison with other regions, according to the most recent data available in the International Center for Prison Studies' (ICPS) World Prison Brief. The majority of countries in this study, with the exception of Argentina and Ecuador, have incarceration rates that are above those of any other continent in the world, although it is also relevant to note that all the countries analyzed by CEDD have rates that are below the average in the Americas, with the exception of the United States.

Graph 1. Incarceration Rate (for every 100,000 inhabitants) in Selected Countries, in Comparison with the Rest of the World



Source: For continent rates see Coyle, Fair, Jacobson & Walmsley (2016, p.18). For country rates see ICPS, World Prison Brief, July 2016.

The Americas is not only the region with the highest rates of incarceration, but it is also where the prison population has grown the fastest in the 21st century. While the general population grew 17% in the Americas during this period, its prison population grew 41%, which is to say, 2.4 times faster. Excluding the United States, the prison population in the Americas has grown 108%, or 6.3 times faster than the general population. Although the United States has the highest incarceration rate, it has stabilized since 2008 and even declined slightly. Ecuador also had a decline of 37% between 2007 and 2009, which was the result of pardons granted to people who were convicted for transporting drugs, as well as in 2014 and 2015 due to a reform of the country's criminal code. However, the rate later rose to above previous

levels (Paladines, 2016a, p. 26-28). In the rest of the countries studied, in contrast, starting in the second half of the 1990s, the incarceration rate began a rapid ascent that continues to this day. In Brazil the incarceration rate increased by 859% since 1971, in Costa Rica by 334% since 1972, in Uruguay by 263% since 1975, in Peru by 207% since 1975, in Ecuador by 182% since 1972, in México by 175% since 1972, in Bolivia by 134% since 1987, in Colombia and Argentina by 74% and 64%, respectively, since 1972 (ICPS World Prison Brief, 2016).⁴

The Americas also has a higher level of violence than other regions in the world. The homicide rate, for example, is the highest in the world, at 16.3 for every 100,000 inhabitants. Africa

⁴ Data available through June 2016.

follows, with a rate of 12.5; Europe and Oceania, with a rate of 3; and Asia, with a rate of 2.9 (UNODC, 2014, p. 22-24). Within the region, Central America is the most violent sub-region, with countries like Honduras, which has a rate of 90.4 homicides for every 100,000 inhabitants; followed by Belize, with a rate of 44.7; El Salvador, with a rate of 41.2; and Mexico, with 21.5. The second most violent sub-region is South America, with countries like Venezuela, with a rate of 53.7 homicides for every 100,000 inhabitants; Colombia, with a rate of 30.8; and Brazil, with a rate of 25.2 (UNODC, 2014, p. 22-24).

A relevant question is whether the high incarceration rates in the region are related to this violence or are a product of the disproportionate use of criminal law and prisons as a means of social control. This text seeks to show that a significant proportion of the growth in the prison population is a result of the application of current drug laws, which place greater restrictions on granting procedural benefits, require mandatory minimum sentences and allow for the incarceration of consumers. In addition, as explored later, prison sanctions in Latin America, as in other parts of the world, tend to be aimed at populations that are already in situations of social vulnerability. Applying these sentences implies fewer social opportunities for all the family members of the person who is incarcerated. As the study *Invisible Women* (Pérez Correa, 2015, p. 9) shows, by reducing the well-being of families that were in unfavorable situations from the start, penitentiary policy creates a vicious circle in which the use of the criminal justice system is exacerbated and the probability of

substance abuse problems, violence and crime in communities increases. Thus, it is not clear whether the heightened use of prisons is a result of the violence that exists in the region or whether it also acts as a cause.

One of the recurring problems in the Americas is the use of pretrial detention. After Africa, the greatest percentage of people incarcerated without a conviction are in the Americas. In South America and in half of the countries studied here, the level of pretrial detention tops the average seen in any continent. In Argentina, Bolivia, Uruguay and Peru, there are more people incarcerated prior to trial than there are people with convictions. In Bolivia, until recently, 85 of every 100 people in prison were there without sentences, ranking it second in the world in terms of pretrial detention levels, surpassed only by Libya, where just 10% of detainees had been convicted.⁵ In all of the countries studied, with the exception of the United States, the number of people incarcerated under pretrial detention has increased. Comparing older and more recent data for each country in the 2000-2016 period, the rate of people detained prior to trial has increased 64.7% on average.

In Brazil and Peru the increase was 118% and

⁵ Recent studies suggest that the percentage of people held under pretrial detention in Bolivia may have fallen due to the policy of granting presidential pardons. Between December 2012 and the end of 2016, the government issued four presidential decrees for the exceptional granting of pardons. Pardons had benefited 4,374 people by December 2015. In June 2016, the last decree stopped being in force. The overall results show that, in effect, the percentage of people in pretrial detention has fallen from 85% in the year that the first decree was issued to 69% in 2016. However, there has not been a substantial improvement to overcrowding as more and more people are detained. Although the pardons policy has been undoubtedly effective in part, it may possibly have served to pressure the accused into declaring themselves guilty in order to benefit from the pardon (Achá, R. M., 2016).

128%, respectively, which shows that the use of pretrial detention has tended to increase.

The use of pretrial detention for drug offenses is mandatory in several countries. In Mexico, for example, the Constitution establishes that pretrial detention is mandatory for a catalogue of offenses, including those that the law defines as serious crimes against health, or that involve drugs.⁶ According to article 167 of the Federal Criminal Procedures Code, anyone accused of drug offenses must be held in pretrial detention. But even in countries where pretrial detention is not obligatory, it is applied extensively to drug-related offenses. In Costa Rica, for example, according to Cortés (2016), an analysis of a sample of judicial case files on these crimes showed that 80% of the persons convicted were incarcerated under pretrial detention for 211 days on average.



Photo Credit: Costa Rican Ministry of Justice and Peace, Press and Communications Office

⁶ Article 19, Constitution of the United Mexican States. “The judge will order mandatory pretrial detention, in the cases of organized crime, intentional homicide, rape, kidnapping, human trafficking, crimes committed by violent means such as arms and explosives, as well as grave crimes determined by the law against national security, free personal development and health.”

Prison Conditions in the Americas and Fundamental Rights

The OAS General Assembly⁷ and the Rapporteur on the Rights of Persons Deprived of Liberty have repeatedly underscored that overcrowding is the most serious problem affecting the majority of the penitentiary systems in the region, as it increases the levels of violence in prisons, creates an unhealthy sanitary and hygienic environment, and limits access to the already scarce opportunities for study and work, constituting a barrier for reentry. The use of prisons in current conditions negatively affects several fundamental rights including the right to life, to health, to dignity and to physical integrity. In addition, pretrial detention is regularly applied to drug-related cases, without any distinction made regarding the type of offense or the sanction to be imposed.

As the Inter-American Commission on Human Rights (IACHR) has stated, “Continuous violations of the right to life of persons deprived of liberty are currently one of the main problems in prisons in the region. Every year hundreds of inmates in the Americas die of different causes, particularly as a result of prison violence” (IACHR, 2011, p. 105). Between 2005 and 2010 alone, 11 countries in the Americas reported the violent deaths of 2,549 people. Of these, 1,865 occurred in Venezuelan penitentiary centers, which are considered to be the most violent in the region. According

⁷ OAS, General Assembly Resolution, AG/RES. 2510 (XXX-IX-O/09), approved June 4, 2009; OAS, General Assembly Resolution, AG/RES. 2403 (XXXVIII-O/08), approved June 13, 2008; OAS, General Assembly Resolution, AG/RES. 2283 (XXXVII-O/07), approved June 5, 2007; and OAS, General Assembly Resolution, AG/RES. 2233 (XXXVI-O/06), approved June 6, 2006.

to the United Nations Office on Drugs and Crime (UNODC), in 2012 the Americas had the highest homicide rate inside prisons, reaching 58 for every 100,000, in comparison with 2 and 3 persons for every 100,000 on average in Asia and Europe, respectively, although not all countries have provided information (UNODC, 2016). Of the countries in the Americas that have reported data, the average homicide rate in prison is three times the rate of homicide within the overall population, making this the only continent on which there are significant differences between these two rates (UNODC, 2014, p. 97). In Brazil, in states like Piauí or Marañón, the homicide rate is 16 and 22 times higher in prison than for the general population (National Penitentiary Department of Brazil, 2016, p. 53). In Mexico, in 2008, the likelihood of dying in a penitentiary center was five times greater than that of the general population. Although that probability declined in 2009, it continues to be more than double what is observed in the general population (México Evalúa, Índice de Desempeño del Sistema Penal 2010, p. 22).

In terms of health, prison environments present a high risk of contagion for numerous diseases. For example, there is a high prevalence of HIV, more than in the general population. This is due to certain practices such as the shared use of needles for drug use, tattooing with homemade and unsterilized kits, and high-risk sex and rape. Overcrowding, stress, malnutrition and drug abuse weaken the immune system, making those people who live with HIV more susceptible to contracting illnesses. Even so, programs to prevent HIV are rarely found in prisons and many incarcerated people with HIV do not have access

to antiretroviral therapy or adequate medical care (Avert, 2015). UNAIDS estimates that HIV prevalence rates are between 2 and 50 times higher in prisons than in the overall population. In the United States, the prevalence of HIV is 2.4 times greater and in Argentina it is 10 times greater (UNAIDS, 2014, p. 4). In the Brazilian state of Rio Grande del Sur, the HIV prevalence rate has reached the alarming figure of 530 of every 10,000 incarcerated persons, meaning 13 times the rate of general prevalence in the country (National Penitentiary Department of Brazil, 2016, p. 56).



Photo Credit: Costa Rican Ministry of Justice and Peace, Press and Communications Office

Comparative studies have also shown that the rate of prevalence of tuberculosis in prisons is, on average, 23 times higher than in the general population (Baussano et al., 2010). According to official data, in Brazil people who are incarcerated have a 28 times greater probability of contracting tuberculosis than the general population (National Penitentiary Department of Brazil, 2016, p. 55). According to studies compiled by the UNODC, in Uruguay in 2008, the prevalence rates of HIV and Hepatitis B among the prison population were 5.5 and 8.5, respectively. In Mexico, in 2012, they were 6.7%, 4.4% and Hepatitis C was 10%, much higher

than the rates seen in the general population.⁸ Finally, there is a high rate of prevalence of psychiatric disorders – bipolarity, depression, schizophrenia and psychotic disorders, among others – in detention centers that are not properly addressed (Steadman et al., 2009, p. 761-765).



Photo Credit: Costa Rican Ministry of Justice and Peace, Press and Communications Office

Those who visit or work in penitentiaries are also exposed to the health risks posed by prison. For example, in 2010 it was found that prisons were the point of contagion for 8.3% of tuberculosis cases in high-income countries and for 6.3% of cases in low-income countries (Baussano et al., 2010, p. 60). The risk of illness is such that a 1% increase in the incarcerated population could produce a 0.34% increase in the rate of prevalence of tuberculosis in the general population (Steadman et al., 2009, p. 761-765).

Incarceration also results in other adverse effects for people in prison, their families and their communities. For the people in prison, it has negative consequences for their self-esteem, their social relationships and their possibilities of obtaining decent employment and adequate earnings, both while they are incarcerated and upon release. A study by Adolfo Sachsidá and

⁸ Regularly updated databases on transmissible diseases in prison can be found at <https://data.unodc.org/#state:0>

Jorge de Mendonça showed that in the province of Brasília, Brazil, former prisoners earned wages that were as much as 39% below that of other employed persons (Sachsidá and Mendonça, 2007, p. 505). For families, incarceration can lead to greater economic vulnerability and stigmatization, the breaking up of a family unit, and/or pressure for some members to get involved in criminal activities. Women in particular are impacted by these costs, as they are the people who primarily visit and provide for their family members in prison (Pérez Correa, 2015). Children can also be seriously impacted; a growing body of scholarship shows how they can face adverse effects and worse results in education and other areas when their parents are incarcerated (Saavedra, et al., 2014; Robertson, 2012; Rosenberg, 2009; Tomkin, 2009). In addition to the economic costs, the concentration of incarceration among people from certain populations or communities can increase stigmatization and provoke greater violence against them on the part of institutions or other members of society. Furthermore, incarceration can aggravate existing inequalities in society, and thereby worsen social mobility, cohesion and trust in institutions⁹

Disinterest on the part of some governments in keeping prison systems in line with human rights standards has caused a systematic crisis resulting in the violation of the human rights of those who are incarcerated, which is reflected in high levels of overcrowding and precarious prison conditions that are incompatible with human dignity. This approach creates enormous

⁹ For an analysis of the studies that quantify and document these and other effects of incarceration in the United States, see the work of the National Research Council (2014, p. 157-319).

opportunity costs in the use of resources and erodes the legitimacy of the judicial system. However, the effects in terms of reducing crime are questionable, or even counterproductive, when applied to minor offenses and, in any case, are inferior to what other alternatives to tackling criminal phenomena can offer.

The following section shows that the prevalent and extensive use of criminal law to respond to the phenomenon of illicit drugs is one of the main causes of the crisis of mass incarceration suffered by countries across the region.

Incarceration for Drug Offenses

The Shortcomings of Drug Policy in the Criminal Justice Process

The countries of the Americas have prioritized the criminal justice response over other more just and reasonable responses to the drug issue. CEDD's study on proportionality (Pérez Correa et al., 2012) documents the disproportionate use of criminal law and a continual increase in prison sentences to address the drug issue. This indiscriminate use of criminal law has distorted (or often simply violated) the general principles of criminal law. These distortions exist throughout the different phases of criminalization regarding drugs – from the definition of criminal offenses to the determination of sentences.

During the phase of *“primary criminalization,”* at the time of the legislative definition of crimes and punishments, States must respect a series of *“due process guarantees,”* such as those

mandated by human rights instruments and each country's constitutional norms. These guarantees include limits for establishing punishments based on the principles of legality, detriment, proportionality, guilt, purpose and reasonableness. In the phase of *“secondary criminalization,”* during the course of the investigation into criminal responsibility (which also includes police officers), the State's actions must adhere to a series of “procedural guarantees” that define the requirements that the investigation and criminal justice process must meet to be considered legitimate and compatible with fundamental rights. Finally, there are a series of constitutional principles and rights that must be respected in the *“tertiary criminalization”* phase, which refers to sentence execution (Advisory Commission on Criminal Policy, 2012, p. 17).

Primary Criminalization: The Establishment of Penalties

In the phase of primary criminalization, the establishment of criminal offenses to sanction certain drug-related behavior may not be compatible with some criminal law principles (Uprimny, et al., 2013, p. 21). One of these principles is that of detriment, or material “wrongfulness.” According to this principle, only those behaviors that effectively violate or endanger fundamental legal interests can be criminalized and criminally sanctioned, as long as people's rights and liberties or essential conditions of the social order are protected. This means that, in a democratic State that respects pluralism and free personal development, behaviors are not punishable if they can be dangerous to the person carrying them out

or are considered immoral by some sector of society, but do not represent, in themselves, a behavior that is harmful to others. This certainly does not mean that the State should not intervene to protect people's health, but rather that it should not use criminal law to do so.

Classifying behaviors related to illicit drugs as crimes ostensibly seeks to protect public health. Although this is an important legal interest, in general drug-related behavior does not tend to produce direct and concrete harm to the general public health. If anything, there may be harm done to the health of the person who has voluntarily decided to consume these substances. But, as has been recognized in numerous countries, drug use is an activity that a person can opt to engage in freely, on the basis of fundamental rights such as individual autonomy and free personal development, which means that it should in no way be subject to criminal sanctions (Pérez Correa, et al., 2016). Only with regard to a handful of drug-related criminal offenses could the existence of a concrete and direct harm be identified, such as in supplying minors, since the distribution of drugs to children and adolescents could indeed hinder their free personal development (Uprimny, et al., 2012, p. 14). The vast majority of sanctioned behaviors – such as cultivation, production, distribution and sale – create instead an abstract and indirect risk of possibly harming public health, which does not justify the use of criminal law and incarceration (and the other rights that are indirectly affected).



Photo Credit: Mauro Tomasini

Proportionality is another of the principles affected in the phase of primary criminalization.¹⁰ Since the 1960s, the evolution of drug laws in the region has been characterized by three trends (CICAD-OAS, 2015, p. 13). The first is the prevalent use of criminal justice tools to confront involvement in different drug-related activities to the detriment of public health strategies, including programs for prevention or treatment, and social policies, such as the creation of protective environments and employment opportunities in high-risk areas. The second is expanding what is considered to be criminal conduct through an increase in the number of articles and verbs used to define a criminal offense (*verbos rectores*) –or punishable conducts– and the length of mandatory minimum and maximum sentences (Uprimny, et al., 2012, p. 18-36). Finally, in numerous countries in the Americas this criminalization is characterized by disproportionate punishments,

¹⁰ The principle of proportionality has its basis in the principle of legality and is related to the prohibition of cruel, inhuman or degrading treatment or punishment as a guarantee for the protection of human dignity, as well as in several constitutional texts in the countries studied. "It is cruel and inhuman to punish a person with a penalty that is not reasonably proportionate to the seriousness of his or her action" (Uprimny, et al., 2012, p. 5). This principle can be separated in two: a) similar offenses should be punished with similar severity; and b) there should be a just relationship between the punishment or sanction imposed and the harm that is sought to be avoided (Pérez Correa, C., 2013).

by imposing similar severe sanctions on very dissimilar behaviors, without making the necessary distinctions between the gravity of the different behaviors and the circumstances of the affected populations. (CICAD-OAS, 2015, p. 13). In some countries, for example, drug trafficking has been sanctioned with stiffer sentences than homicide and rape (Uprimny, et al., 2012).

The imposition of sentences that deprive people of liberty to sanction all sorts of drug-related behavior is disproportionate in two other senses: in the utilitarian sense and in the constitutional sense (Uprimny, et al., 2013). In the utilitarian sense, the costs that this approach has produced are not compensated by the scarce benefits reaped. The CEDD study (2014, p. 157-158) showed that most drug policy resources in the region are aimed at reducing any kind of drug use, without appropriately focusing on cases of problematic use. Far from reducing drug use, this has led to the stigmatization of users and the violation of their fundamental rights. In the constitutional sense, meanwhile, this is a measure that limits fundamental rights but does not appear to be an adequate, necessary and proportionate instrument for guaranteeing the enjoyment of other fundamental rights or of values essential for coexistence in democracy.

Secondary Criminalization: Punishment in the Judicial Phase

In the majority of countries studied, the system for defining criminal responsibility and the specific length of the sentence for drug offenses are characterized by inflexibility, severity, and grouping diverse behaviors under one criminal offense. These systems often have special

regimes that limit guarantees for drug-related crimes and are marked by the indiscriminate use of pretrial detention and the treatment of those caught in flagrante, who may be coerced into admitting guilt. These rules, or the way in which they are applied by judicial officials, end up putting more pressure on prison systems.



Matías Torres. Photographer, Communications Unit of the Chilean Gendarmerie.

In all of the countries studied there are mandatory minimum sentences for drug offenses depending on factors such as: the substance in question; the amount involved; the motives and aims of the behavior; the number of persons involved; the circumstances of the manner, time and place of the incident; the personal circumstances of the person involved; the level of participation of the accused; their acceptance of guilt; and their criminal history. In some countries the establishment of mandatory minimum sentences prevents people convicted for drug offenses from being able to receive benefits in the sentence execution phase. In Peru, for example, and in Ecuador since the adoption of the Organic Comprehensive Criminal Code, several of these factors are taken into account, thereby ensuring more appropriate and fair sentencing policies (Mangelinckx, 2013). However, in other countries the criteria for determining sentences are very restricted, such as in the case of Bolivia, Mexico and Colombia. In several countries, a person who is not a first

time offender automatically receives a higher sentence and cannot benefit from alternatives to incarceration. However, recidivism is a questionable reason for increased prison terms or exclusion from alternative sanctions given the crisis in the region's prison systems and the failure to provide effective support for those re-entering society.

In looking at the severity of sanctions, some specific regulations allow for the imposition of even more severe penalties to sanction drug offenses. In Brazil, for example, despite the adoption of a new criminal justice policy based on the Constitution of 1988, the category of so-called "heinous crimes" remains, in which drug trafficking is included, initially in article 5, subsection XLIII of the Constitution and later as defined in Law No. 8.072/90.¹¹ For such offenses, certain benefits such as amnesties or pardons are prohibited, as well as the time periods for eligibility for early release (although these rules were declared unconstitutional by the Supreme Court) (Boiteux, et al., 2016).

In **Colombia**, according to article 301 of the Criminal Code, those who are captured in flagrante can only receive one fourth of the sentence reduction received by those who agree to a plea bargain, which is to say, a maximum reduction of 12.5% of the sentence rather than the 50% contemplated in article 351 of the Code. This puts people charged with drug offenses at a particular disadvantage, since 94.9% of police arrests for possession, production or trafficking of drugs are in flagrante, while for all other criminal offenses such arrests represent 83.4%. This implies a disadvantage for people

¹¹ For a more detailed analysis of the legal definition of heinous crimes in Brazil, consult the text of Boiteux (2006).

arrested for these behaviors since, even if they plead guilty, they cannot benefit from greater sentence reductions and will receive a harsher sentence (Uprimny, et al., 2016a).

In terms of procedural guarantees, Alejandro Madrazo and Antonio Barreto have argued that the "war on drugs" has justified the diminishment and gradual weakening of basic constitutional values, including due process guarantees, in several countries in the region (Barreto & Madrazo, 2015). Among these constitutional costs of the war on drugs is the introduction in the 1980s and 1990s in Colombia of exceptional judicial regimes for dealing with drug trafficking cartels. An example is the Statute for the Defense of Justice, which created "faceless justice," a system that allowed for the existence of secret judges and witnesses, among other problematic aspects.¹² Subsequent evaluations highlighted the grave costs that the use of these courts represented in terms of due process guarantees, even as they failed to achieve greater effectiveness in addressing organized crime (National Center for Historical Memory, 2013, p. 217). Another example of such constitutional costs is the introduction of an exceptional regime for combating organized crime in Mexico. Not even two years after having declared a "war on drugs," former Mexican President Felipe Calderón established

¹² "In addition to faceless justice, the Statute for the Defense of Justice promulgated by the then-president, César Gaviria, included procedural innovations set into motion by the public order courts and amounted to an evident backward step in terms of investigative independence. This statute granted broad powers of judicial police to the security forces, while it reduced the capacity of the Judicial Police's Technical Force to act independently. While the former could carry out preliminary investigations at will, the latter could only do so if instructed by a public order judge" (National Center for Historical Memory, 2013, p. 217).

a special criminal regime – with reduced rights and amplified police powers and discretion that are prohibited in the ordinary regime – to confront “organized crime.” Within this special regime, the concept of arraigo was established under which people can be detained, and held incommunicado and without formal charges, for up to 80 days if this is considered to be necessary for the investigation of “organized crime.”¹³ The use of arraigo, however, has not been exceptional and in nearly half of the cases was used for reasons beyond its constitutional purpose (Pérez Correa & Azaola, 2012).

In **Argentina**, the president recently declared, via Decree 228 of 2016, a public security emergency throughout the country for the period of one year, with the possibility of extension.¹⁴ The measure is aimed at tackling the “situation of collective danger” created by “complex crime and organized crime.” The list of crimes includes drug trafficking, production and manufacturing. Among the measures set forth in the decree is the approval of the “Rules of Aerospace Protection,” which authorize the Armed Forces to “identify, warn, intimidate and make use of force (as a last resort)” against planes in Argentine air space that are “capable of ‘perturbing, endangering or causing harm’ in the national territory.” These regulations for shooting down planes have a

¹³ In addition to arraigo, the elements that make up this parallel regime are: i) the possibility of police retention time being doubled (4 days) versus the ordinary criminal regime, before having to go before a judge (article 16); (ii) being held incommunicado in prison (with the exception of communication with a defense attorney) (article 18); (iii) the serving out of sentences in “special” detention centers, separated from the general population (article 18); (iv) authorization to establish unspecified measures for “special” surveillance (article 18) and (v) no right to know who is making the accusations (article 20) (Barreto & Madrazo, 2015, p. 155-156).

¹⁴ Available at: <https://www.boletinoficial.gob.ar/pdf/linkQR/S2R5emtDRm0rejgrdTVReh2ZkU0dz09>

long history in Latin America, where they have been adopted by presidential decree, or even in confidential Security Council proceedings, such as in Colombia in 1993 (Tokatlían, 2004). Numerous voices have opposed the adoption of this measure in Argentina, pointing out that it is unconstitutional because it amounts to a “covert summary death sentence,” and because past experience shows that it is not effective for “dismantling the complex illegal drug market, or its interaction with state institutions involved in illegal networks” (Hauser, 2016).

In **Peru**, the National Constitution (article 2.24.f) states that in cases of drug trafficking, detentions in police stations are permitted for up to 15 days, in comparison to a maximum of 24 hours for other offenses (Mangelinckx, 2016).

Tertiary Criminalization: Drug Offenses and Mandatory Incarceration

In the sentence execution phase, people charged with or convicted of drug offenses are often denied access to alternatives to incarceration, which are made available to those accused of other kinds of crimes. In Brazil, as mentioned previously, because drug offenses are tagged as “heinous crimes,” people must serve out greater percentages of their minimum prison sentence before they can request the transition to more favorable regimes (Boiteux, et al., 2016).

According to the original drafting of Brazil’s Drug Law, applying alternative sanctions (in lieu of deprivation of liberty) is prohibited for the crime of drug trafficking, for two reasons: i) the minimum sentence stipulated for this kind of offense is 5 years in prison and substitution with

alternative sanctions would only be possible, as a general rule, for sentences of up to 4 years (according to article 44 of the criminal code); and ii) in the case of “privileged trafficking”¹⁵ – addressed in article 33, which carries a penalty of up to 1 year and 8 months of confinement – such alternatives are expressly prohibited. In 2012, the Supreme Federal Court (taking up Habeas Corpus 97.256) considered that prohibition to be unconstitutional, arguing that it violated the principle of the individualization of punishment. However, the judicial branch does not always follow the Supreme Court’s criteria. According to a recent study, alternative penalties were applied in just 12.2% of all the verdicts analyzed, while 46.8% of convictions resulted in a prison sentence (Instituto de Pesquisa Econômica Aplicada, 2015).

In Peru as well, some benefits that the law contemplates for convicted persons in the sentence execution phase – such as probation or parole – are denied to people sanctioned for drug-related offenses. And even in Uruguay, the country with the least punitive legislation of all those studied, the limited application of alternative measures ensures that many minor drug offenders remain incarcerated (TNI/WOLA, 2010, p. 6).

In Colombia, criminal legislation allows for people who commit minor offenses to benefit from alternatives to incarceration. After being convicted, such individuals can benefit from alternatives to incarceration, a suspended

¹⁵ Article 33 regarding “privileged trafficking” allows for sentence reductions from one-third to two-thirds of the normal sentence of five to 15 years for those who are first time offenders, have no connections to organized crime and are not “dedicated to criminal activities” as a way of life.

sentence, probation or parole. However, recent reforms such as Law 1709 of 2014 have restricted the application of some of these benefits in the case of certain drug offenses. Among these behaviors, there are two possibilities for applying benefits to those who have been convicted for possession under subparagraph 2 of article 376 of the Criminal Code.¹⁶ For the rest of the offenses, there is no room whatsoever for these substitutes.¹⁷ A convicted person in these circumstances can only access the benefits of articles 64 and 38G. In practice, this means that a person convicted of drug trafficking, possession or manufacturing for less than 1,000 grams of marijuana, 200 grams of hashish and 100 grams of cocaine must serve a defined period of prison time to be able to access benefits such as alternatives to incarceration, probation or parole. In the case of being convicted under the second subparagraph of article 376, he or she must be incarcerated for at least 32 months in order to be able to apply for such benefits (Uprimny, et

¹⁶ In this subparagraph the thresholds for narcotics possession are defined, along with their respective sanctions, in the following way: “If the quantity of drugs does not exceed one thousand (1,000) grams of marijuana, two hundred (200) grams of hashish, one hundred (100) grams of cocaine or a cocaine-based narcotic substance, or twenty (20) grams of derivatives of poppy, two hundred (200) grams of methaqualone or synthetic drugs, the penalty will be from four (4) to six (6) years in prison and a fine of two (2) to one hundred (100) legal monthly minimum wages.” Colombian Criminal Code, article 376.

¹⁷ It is worth mentioning that these restrictions are not applicable when the person convicted is above 65 years of age, or is a woman who is expecting to give birth within two months’ time or has given birth to an infant within the last six months. This is true as well when the person charged or accused is in a grave state due to illness, as attested to by official doctors, or is the head of household and has a child who is a minor or is permanently disabled, as long as that child has been under her care. In the mother’s absence, the father who fills in will have the same benefit, in which case it is necessary to ask judicial officials about the application of this rule.

al., 2016). An analysis of judicial case files at the Ministry of Justice and Law, however, shows that there are more cases in which judges deny these benefits than in which they grant them. The combination of restrictive laws and judicial interpretations causes the length and conditions of sentence execution to be disproportionate, which makes the criminal justice system very unfair in its response to drug-related offenses.

Incarceration for Drugs: One of the Main Causes of the Prison Crisis

The use of criminal law over other responses to the issue of drugs has proven to be a very costly policy that has little effect, or is even counterproductive, in terms of reducing drug abuse, protecting public or individual health, reducing the size of illegal markets, or contributing to security. As demonstrated in the following section, although the incarcerated population has grown at alarming rates in the Americas, above those of the rest of the world, the growth in the number of people incarcerated for drug offenses has been even more accelerated in the majority of countries studied.

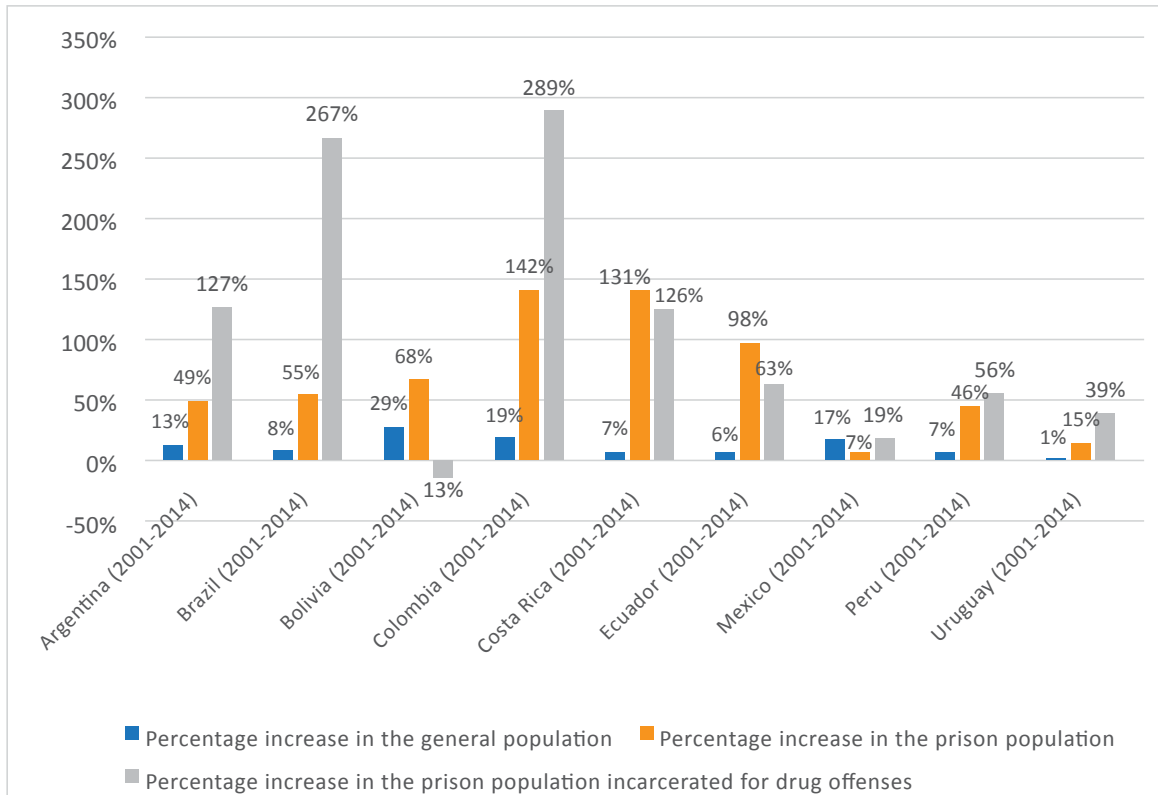
Graph 2 shows the comparison between the growth of the general population, of the prison population and of people detained for drug offenses in the Latin American countries studied. The left axis shows the percentage variation of the general population, the prison population and those imprisoned for drug offenses in nine Latin American countries in recent years.

In all of the countries with the exception of Bolivia, the population incarcerated for drug offenses increased more rapidly than the overall

population, at between eight and 33 times a greater pace. Bolivia is the only country in which the population for drug offenses declined, probably because some people convicted for drug offenses benefited from pardons.¹⁸ In six of the nine countries, the population for drug offenses grew more rapidly than the general prison population. In Brazil, while the prison population rose 55%, the number of people incarcerated for drug offenses surged by 267%, a pace that was five times faster. In Colombia, the prison population grew 141%, but the population incarcerated for drug offenses rose 289%.

¹⁸ As mentioned before, the Bolivian government issued four presidential decrees starting in December 2012 for the exceptional granting of pardons that benefited 4,374 people through December 2015.

Graph 2. Percentage Increase in General Population, Prison Population and Prison Population for Drug Offenses in Nine Latin American Countries

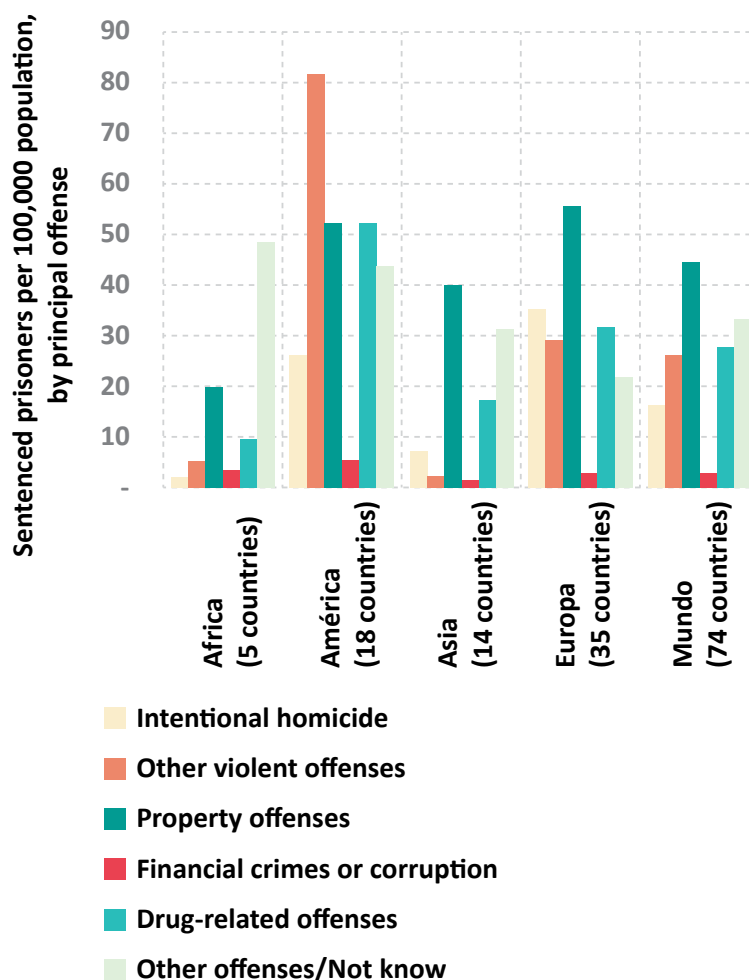


Source: Prepared by CEDD based on World Bank data. (The years depend on the country, see graph and data at <http://datos.bancomundial.org/>).

From this data, however, the punitive pressure put on the citizens of the Americas (in comparison with other parts of the world) due to current drug laws is not obvious. To illustrate these pressures, the following graph presents a comparison between the average incarceration rates for different offenses in various regions of the world, according to reports presented by governments to the UNODC. The Americas have the highest rate of people incarcerated on drug

offenses. Around 51 people for every 100,000 inhabitants are incarcerated for these offenses, in comparison to 28 for every 100,000 in the world. In the Americas, drug offenses are on average the third biggest cause of incarceration, behind violent crimes, and are at nearly the same level as property crimes. As explained above, drug offenses do not have a direct victim but instead seek to protect public health as a social good.

Graph 3. Incarceration Rates on Different Continents by Type of Crime



Source: UNODC (2016, p. 102)

In the countries analyzed, the incarceration rate for drug offenses ranges from between 17 for every 100,000 inhabitants in Argentina to 103 for every 100,000 in Costa Rica. With the exception of Argentina, Mexico and Bolivia, the incarceration rate for drugs in these countries is higher than the average seen in any of the world's continents besides the Americas (World Bank, 2016).¹⁹

¹⁹ See <http://data.worldbank.org>. The years for each country vary. For Argentina, Bolivia, Brazil, Ecuador: 2014; Colombia: 2015; Costa Rica: 2011; Mexico, Peru and Uruguay: 2013.

The following table shows the most recent data available for the ten countries studied on the total prison population and the population incarcerated for drug offenses. It also shows the participation of this latter category as a percentage of the total prison population between the first and last year specified for each country. In six of the ten countries studied, those incarcerated for drug offenses represented a greater proportion of the overall number of prisoners in the last year of reporting versus the first year. Of the more than 2.7 million

people incarcerated in these countries, 572,000 were detained for drug offenses. This means that drug offenses account for one in every five incarcerated persons in these countries, with a slight upward trend. The participation of persons

incarcerated for drug offenses ranges from 10% to 28% of the prison population, which means that drug crimes are between the second- and fourth-biggest causes of incarceration in the countries listed below.

Table 1. Population of All Prisoners, of Those Incarcerated for Drug Offenses and the Percentage of Those Incarcerated for Drug Offenses Versus the Total Prison Population in the Ten Countries Studied

	Prison Population (last year reported)	Incarcerated for drugs (last year reported)	Drug offenses (last year reported, %)		Drug offenses (first year reported, %)
Argentina (2002-2014)	69,060	7,435	10.77%	>	7.07%
Brazil (2006-2014)	622,202	174,216	28.00%	>	11.83%
Bolivia (2000-2015)	13,672	2,592	18.96%	<	36.78%
Colombia (2000-2015)	120,444	24,374	20.24%	>	12.57%
Costa Rica (2006-2011)	17,971	4,745	26.40%	<	27.06%
Ecuador (2010-2014)	26,591	6,467	24.00%	<	29.54%
Mexico (2002-2013)	257,017	26,098	10.00%	>	9.13%
Peru (2008-2013)	68,858	16,526	24.00%	>	22.46%
Uruguay (2009-2013)	9,771	1,265	13.00%	>	10.71%
United States (2006-2013)*	1,576,950	308,400 ²⁰	19.31%	<	22.92%
Total	2,782,536	572,118	20.6%	>	19.1%

Source: Prepared by CEDD based on official data.

*The total prison population in the United States only includes federal and state prisons, but not local ones (Carson, 2015, p. 2).

²⁰ Schaffer (2016, p. 7).

The use of prison to address drug-related issues must be evaluated in terms of its objectives. If the proposed objectives are not being met, then the State response and the tool used must be rethought. It is important to recall that the use of criminal law and of incarceration in relation to the drug issue got a decisive push when the international drug conventions were incorporated into the criminal codes of Latin American countries. Paradoxically, the punitive focus that drug laws have adopted has led many to forget the fundamental objective of these conventions, which is “the protection of health and the well-being of humanity.”²¹ However, the prevalence of drug dependency, problematic drug use and overdose deaths have not declined in any of the countries analyzed, or at a global level, as a result of the greater levels of incarceration.²² On the contrary, the establishment of criminal sanctions has become a source of discrimination and greater risks for drug users (CEDD, 2014; OHCHR, 2015). These risks are explained by the reluctance of users to seek out sanitary conditions in the preparation and use of injectable and other drugs for fear of being arrested, stigmatized, incarcerated or subjected to treatment against their will. In addition, the criminalization of different behaviors forces users to buy drugs in illegal markets, exposing them to health and security risks. Furthermore, classifying as a crime the dissemination of information about drug use, and in particular information on safety practices related to drug use and harm reduction, is not compatible with the right to health, as it hinders

²¹ Preamble to the 1961 Single Convention on Narcotic Drugs, and ratified by later instruments.

²² Regarding state responses to drug use in countries of the region, see *In Search of Rights: Drug Users and State Responses in Latin America* (CEDD, 2015).

individuals’ ability to make informed decisions about their health, and it goes against what is set forth in the International Guidelines on HIV/AIDS and Human Rights (UNAIDS, 2011).

Far from protecting health, prison is very harmful, as risky conditions are present both for people deprived of their liberty as well as for their dependent family members. In addition, within prisons there is a high prevalence of illicit drug use, which means that incarceration, far from preventing use, actually boosts it. The UNODC estimates that one in every three people uses drugs at least once during their incarceration (UNODC, 2015, p. 2). This means that, in comparison with the average rates of drug use for the general population, the prevalence of illicit drug use in prisons is about four to five times greater.

The criminal prosecution and incarceration of people who have committed drug offenses is also extremely expensive. In Argentina, the budget in 2014 for incarcerating people for drug offenses in the country’s five main penitentiary services – where 90% of the population incarcerated for these offenses are concentrated – was approximately US\$190.2 million per year (Corda, 2016). In Colombia, between 2000 and 2014 an estimated US\$1.184 billion was spent on incarceration for drug offenses (Uprimny, et al., 2016). Studies carried out in the United States and the United Kingdom suggest that these resources would be better used if they were spent on alternatives to incarceration, including community programs, residential treatment or electronic monitoring, all of which are cost effective and reduce recidivism rates (National Research Council, 2001; Matrix Knowledge Group, 2007; WSIPP, 2015).

Incarceration in Numbers

Who is Incarcerated for Drug Offenses?

Incarceration for drug offenses has especially affected certain populations. Throughout the region socioeconomic and power-related inequalities continue to exist in the criminal justice process (CEDD, 2012, p. 167-200). With regards to the drug trade, the actors who are in positions of greater vulnerability and have less power are the ones who are primarily punished and sometimes with greater severity, as compared to those higher up in the trade, (CEDD, 2012). First, there are certain facilitating or inhibiting factors that make some territories and populations more vulnerable (Thoumi, 2015). Second, States have selectively used their punitive authority to sanction drug offenses: They have been tough on the weakest and weak on the toughest (Garzón, 2015).

Who are the people incarcerated for drug offenses? For what crimes and substances are they prosecuted? This section presents an overview of the population incarcerated for drug offenses, their profiles and crimes; data about criminalization; and the incarceration of users. The second part focuses on the situation of some specific populations: women, young people, foreigners and other vulnerable populations.

The information presented in this section comes from the country reports prepared by CEDD researchers as part of the investigation, People Deprived of Their Liberty for Drug Offenses. The individual reports can be consulted at <http://www.drogasyderecho.org/>.

Poverty and Opportunities in Illegality: Prosecution and Incarceration of the Weakest

Although there is little or difficult access to information on the characteristics of the population incarcerated for drug offenses in the countries studied, some traits shared among the people arrested and incarcerated can be identified. The majority are people with little education, in situations of poverty or with low-paying jobs. A significant number of them were arrested in flagrante and were first-time offenders. In terms of drug trafficking organizations, as shown in this section, the people who end up incarcerated constitute the weakest links in the chain of illicit drug trafficking or are often users equated with small-scale dealers. In general, these are people who carry out low-level but high-risk activities in the organizations, are not those who profit the most from drug-related activities, and are easily replaced in the tasks they do.



Photo Credit: Costa Rican Ministry of Justice and Peace, Press and Communications Office

In **Argentina**, according to data from the National System on Sentence Execution Statistics (Sistema Nacional de Estadísticas sobre Ejecución de la Pena, SNEEP) of the national Ministry of Justice and Human Rights, the majority of

people deprived of their liberty in 2013 had not finished high school (85%) and a considerable percentage had not finished elementary school either (31%). Eighty-two percent did not have a full-time job and 44% had no profession or trade. Sixty percent received sentences of 3 to 9 years in prison, and 69% of them had committed a criminal offense for the first time (Corda, 2016). In 2014, according to a survey by the Federal Penitentiary Service (Servicio Penitenciario Federal, SPF) and that of Buenos Aires province, incarcerated persons made up a rather homogenous population: “They are mainly young people, with low levels of education and the majority of them come from broken families (...) 71% of those convicted were working before they were arrested. However, those jobs were generally of low economic and occupational quality.” The report adds: “We have not detected a significant number of detainees who had important positions in organized crime. Very few of them led a robbery or drug trafficking operation or were accused of committing million-dollar crimes. Instead, there are many offenders who form part of the last link on the chain and are the most easily replaced by others when detained” (Bergman, et al., 2014, p. 7).

In **Brazil**, as in other countries of the region, the general profile of the prison population is mainly young people (up to 24 years of age), Afro-descendant, poor and with limited opportunities. The offense of drug trafficking is the most common crime committed. Of the population deprived of liberty, in 2014 only 75% had completed their elementary education. While 32% of the country’s general population has finished high school, only 9.5% of the prison

population has done so (National Penitentiary Department of Brazil, 2016, p. 46). The general profile of those detained for drug trafficking follows the selective structural logic of the social control of poverty. The police know where to look for the people they want to apprehend: in poor communities on the periphery and in the favelas (Boiteux, et al., 2016).

In **Colombia**, as of May 2016, according to data from the National Penitentiary and Prison Institute (Instituto Nacional Penitenciario y Carcelario, INPEC), 79.3% of people deprived of their liberty had not finished their high school education and 42% had only an elementary school education. Poverty levels in the case of families whose head of household had a maximum of primary or secondary education in 2013 were around 41.9% and 27.1%, respectively (DANE, 2013, p. 14), which suggests that many of these people come from poor families. In a sample of people convicted for drug trafficking, possession or manufacturing between 2010 and 2014, the Ministry of Justice and Law determined that 19.4% were unemployed and the great majority worked at informal, low-paying jobs. Only 4.41% were engaged in professional tasks or were studying (Ministry of Justice and Law, forthcoming 2017).



Photo Credit: Mauro Tomasini

With regard to the role of these people in criminal networks, in 2014, 78.9% of the people incarcerated for drug offenses were first time offenders and only 3.9% were repeat offenders for two or more times. At least 78% were imprisoned for committing solely a drug offense; i.e. no other criminal offenses were committed. No more than 12% had also committed violent crimes, with or without firearms. While it is logical to assume that people with important roles in criminal organizations should also have been convicted of or charged with conspiracy to commit a crime, only 6.51% of people incarcerated for drug offenses in the last five years met that criteria (Uprimny, et al., 2016). The criminal prosecution of offenses such as cultivating coca or small-scale trafficking, perpetrated primarily by those at the beginning of the drug trafficking chain, is much more efficient than that of asset laundering, where the “big fish” tend to be (García Villegas, et al., 2013, p. 36-40). In 2014, 94.9% of police arrests for drug offenses were in flagrante. The poorest provinces, particularly in the south of the country, had a greater proportion of arrests for behaviors such as financing or engaging in coca cultivation or trafficking in precursors used for producing drugs, while in the provinces of the coffee-growing zone and Antioquia, arrests for drug trafficking were higher (Uprimny, et al., 2016).

In **Costa Rica**, a sample of 2,012 case files on drug convictions from 2014, analyzed by CEDD researchers (Cortes, 2016), shows that the most common level of education completed by people incarcerated for drug offenses is elementary school studies (33%), followed by incomplete elementary school studies (27.3%)

and incomplete high school studies (21%). Only 6.8% of people finished high school and 4% completed university studies, while 1.7% do not know how to read or write. The main occupations vary by sex: 53% of the women are housewives and 17% are vendors, while 18% of men are vendors, followed by unemployed workers and construction workers (12% each). Other occupations registered in the case files for women are that of stylist, cook, domestic worker and nurse, all with very low percentages. Among men there are jobs as a porter, farm worker, driver, mechanic, truck driver, car washer and security guard, among others. Previous drug use is mentioned in only 43% of the cases; however, in 15% of cases this was not recorded in the case file.

In **Mexico**, the data also shows that the incarcerated population is quite homogeneous, made up primarily of young men from economically and socially disadvantaged sectors. The First Survey of the Detained Population in Federal Social Rehabilitation Centers (Pérez Correa & Azaola, 2012, p. 7) indicates that the inmates sentenced in the federal penitentiary system are mainly young men and women (the majority between 31 and 40 years old), with children (78.8% of men and 88.4% of women) and with acute social disadvantages. The majority come from situations of violence in their homes or communities and have little education: 53.7% of the male inmates and 60% of the women did not finish high school, and 56.6% of the men and 45.3% of the women said they did not continue studying because they had to work. In Mexico City and the nearby suburbs in the state of Mexico, the data also shows the same profile: those incarcerated are mostly young and male,

with schooling levels that are slightly below the average in these areas (Bergman, et al., 2014, p. 10-11). The data from that survey showed that one in every four incarcerated individuals said they had left their homes before turning 15, and the most common reason they gave for doing so was intra-family violence.

Offenses and Substances Associated with People Deprived of Their Liberty

As noted previously, the majority of people incarcerated for drug offenses in Latin America occupy the lowest rungs of the illicit drug trafficking ladder and tend to perform low-level tasks. In general, these are not individuals who become rich from drug-related activities, but rather they are easily replaced. In addition, because of the way in which drug possession is regulated, they are often users who possess substances without the intention of selling drugs or who are prepared to sell small amounts of drugs, also known as micro-traffickers or small-scale dealers.

In **Brazil**, a research study done by the University of São Paulo (Jesus, et al., 2011) analyzed 667 cases of in flagrante arrests between November 2010 and January 2011 in the city of São Paulo. In 62.13% of these cases, less than 100 grams of a substance was found on the person. Marijuana was the most common substance (57.61%), and in 61% of the cases fewer than 30 packets were found. (A packet contains the amount used for one dose.) With regard to cocaine, less than 100 grams of the substance were seized in 70% of the cases. In 56% of cases, between one and 30 packets of cocaine base (pasta base) were

found. Among these cases, 30.66% of people claimed to be drug users, 20.8% denied owning the drug, 12.04% denied trafficking, 6.21% said they survived from drug trafficking, and 1.46% said they were transporting drugs. All of these cases were criminally sanctioned as trafficking. According to Boiteux and Wiecko (2009), the convictions for trafficking between 2006 and 2008 in Rio de Janeiro and Brasilia confirm that marijuana and cocaine were the most common substances seized in the two cities, and in low quantities. In Brasilia, 68.7% of the cases involved less than 100 grams of marijuana and, with regard to cocaine, the majority of convictions (28.8%) involved between 100 grams and 1 kilo. In Rio de Janeiro, in 50% of cases the quantity of marijuana presented was less than 104 grams. The number of cases that involved small amounts of drugs is striking: 35.1% of those convicted for cocaine had in their possession up to 10 grams, while 9% had up to 10 grams of marijuana. This suggests that they could be drug users arrested by the police as traffickers (Boiteux & Wiecko, 2009).

In **Costa Rica**, the main causes for sentence execution among the offenses defined in the Psychotropic Substances Law (Ley de Psicotrópicos) were the “sale of drugs,” with 58.4% of the total, followed by “drug trafficking/transporting,” at 12.6%. In all of the cases, 61.9% of detainees were given prison terms of between five and seven years, which coincides with the sanctions in the plea bargain agreements that the Prosecutor’s Office tends to offer. This indicates that in the majority of cases with convictions, there is enough evidence for the accused to declare themselves guilty in order to receive shorter sentences, but only by

waiving the opportunity to testify in a formal trial (Cortés, 2016). Likewise, fewer than half of the cases submitted to the Criminal Prosecutor's Office for Adults (Fiscalía Penal de Adultos) for violation of the Psychotropic Substances Law between 2003 and 2013 ended with the criminal courts handing down sentences that deprived people of their liberty (Cortés, 2016).



Photo Credit: Costa Rican Ministry of Justice and Peace, Press and Communications Office

The majority of people incarcerated in that country between 2006 and 2011 were accused of four different criminal behaviors: selling (33%), transporting (20.2%), violating the Psychotropic Substances Law (21.7%), and possessing (17.8%). The variable that increased the most was "selling," which tripled in that same period. The analysis of the sample of criminal case files shows that nearly 70% of the cases reviewed involved a plea bargain agreement, with prison sentences of 5 years and 4 months (35.5%), 6 years (16.5%) and 7 years (6.7%). One fourth of inmates faced prison terms of 8 years (24.3%) and just 5% were given longer sentences than that. Despite this, nearly 80% were held in pretrial detention, for an average of 211 days. Retail sales represented 68.8% of all the cases of incarceration for drug offenses analyzed in this sample of case files. This offense represents nearly 80% of the crimes for which men are

incarcerated, compared to 60% for women. One characteristic of all these cases is that undercover agents or informants carried out controlled operations. Only in 3.9% of the cases was it indicated that the person incarcerated was a leader or boss of an organization selling drugs, and of these more than half of the people were sentenced to less than 8 years in prison, which is similar to the sanctions for those at the lowest rungs of the drug trafficking ladder (Cortés, 2016).

Among the cases of people convicted for retail sales, according to the analysis of the sample of criminal case files, cannabis was the most common drug, although crack was the most common among women. In the cases where it was possible to obtain information about the weight of the substances involved, in 60% of cases less than 10 grams were confiscated and in 80% of cases less than 50 grams of a given substance were seized (Cortés, 2016).

In **Colombia**, according to figures from the Antinarcotics Police, 93% of the people arrested (which does not always involve referrals to the prosecutor's office) for drug offenses in 2013 had less than 250 grams of marijuana, cocaine, cocaine base (known in that country as basuco) in their possession (Ministry of Justice and Law, 2016). According to an analysis of a sample of judicial case files that ended in conviction between 2011 and 2014 for drug trafficking, possession or manufacturing, 72.94% of the cases involved just one illegal drug, and only 22.5% of the cases involved people who possessed two or more illicit substances at the time of arrest. Among those who were in possession of one substance, cocaine was the most prevalent

drug, in 47.22% of cases, followed by marijuana in 44.18%. The remainder was distributed among cases in which the substance was a precursor used for processing heroin or cocaine. In terms of the amounts involved in the offense, for cocaine most cases involved less than 20 grams (which represent 20.75% of all the cases in which one illegal substance was involved and 43% of those in which only cocaine was involved). In the case of marijuana, prosecution was concentrated in cases involving less than 200 grams (which represent 23% of the cases of just one substance and 52% of all those related to marijuana) (Ministry of Justice and Law, forthcoming 2017).

In **Mexico**, according to the First Survey in Federal Penitentiary Centers (CIDE), carried out in 2012, 62% of the people with convictions incarcerated in those centers had been sentenced for drug offenses. Of these, 58.7% had been convicted of a marijuana-related offense and 38.5% for the crime of possession. The survey's data shows that 10.2% of the detained population in federal centers was sentenced just for behavior related to consuming or possessing marijuana (Pérez Correa & Romero, 2016). This means that in 2011 there were 1,509 inmates convicted of consuming or possessing marijuana. In Mexico's states, cannabis also appears as the main substance targeted for prosecution. In the 11 states that provided information for the CEDD research study in Mexico, 62.24% of reported arrests were for marijuana, followed by cocaine (22.63%) and methamphetamines (13.24%) (Pérez Correa & Romero, 2016).

In **Peru**, (49.9%) of people incarcerated for drug offenses as of March 2014 were convicted

of illicit drug trafficking, primarily people who transported small quantities of drugs (Mangelinckx, 2016). This category is followed by those who were convicted of aggravated forms of illicit trafficking (28.9% of the total), promotion or facilitation of trafficking (12.8%) and micro-commercialization (8.2%). Of particular concern, among those convicted of trafficking, 3.9% of inmates were above 60 years of age. In terms of education levels, only 8.2% of those detained for drugs had pursued studies beyond the high school level. According to research by criminal justice experts and the Episcopal Commission for Social Action (Comisión Episcopal de Acción Social), "upon studying the educational levels and professions of the fathers and mothers, it is clear that, essentially, it is poor workers, who are in turn the children of workers with few qualifications and little education, who continue to go to prison." These studies indicate that the great majority of incarcerated people come from broken or large families that have lived on the street (Episcopal Commission for Social Action, 2015, p. 13).



Photo Credit: Costa Rican Ministry of Justice and Peace, Press and Communications Office

In **Uruguay**, the percentage of repeat offenders within the total population deprived of liberty is high (59.6% in 2012) and has been rising. Out of every 10 people charged with drug trafficking

offenses in 2014, two were unemployed or received a pension at the time they were charged, six carried out tasks in precarious employment situations, such as day workers or prostitutes, and only two were students or private or public employees (Bardazano & Salamano, 2016).

Drug Users: Criminalization and Incarceration

Despite the fact that internationally, and particularly in Latin America, there is increasing support for the idea that drug use – and the actions required to carry it out – should not be treated as a criminal justice matter but rather a health issue, users continue to be prosecuted and criminally sanctioned. According to the data that governments report to the UNODC, the number of police arrests for behaviors associated with illicit drug use is more than those for trafficking. Although in the case of users the conviction rate is lower than for trafficking-related offenses, drug users continue to be convicted and incarcerated (Metaal & Loi, 2016). In fact, the UNODC estimates that nearly one fourth of the people in prison worldwide for drug offenses are there for actions related to illicit drug use, not production, trafficking or commercialization (UNODC, 2016, p. 102).

In light of the political declarations signed by OAS member states indicating that drug use should be treated using a public health approach and not repressive measures, one would expect to see movement in that direction in the countries included in this investigation.²³ However, as mentioned previously, the responses of States

in the Americas to the consumption of illicit substances continue to be primarily punitive and repressive (CEDD, 2014). This occurs because while drug use is not criminalized, possession and other necessary activities related to people exercising their right to use drugs are penalized – although in different ways in each country. The following table shows the regulation of drug use and possession in the nine Latin American countries studied.

on June 6, 2013, and the report *The Drug Problem in the Americas* (OAS, 2013), which represents a shift in the position of the region's governments. Subsequently, additional declarations have ratified the will to reform: The UNASUR's Regional Vision for UNGASS 2016; the CELAC's Quito Declaration, which was the result of the Second Ministerial Meeting on the World Drug Problem; and the Brasilia Declaration on Points of Agreement among MERCOSUR Member States and Associate Members Regarding UNGASS 2016. To consult these and other declarations, see: <http://idpc.net/alerts/2015/09/the-zero-draft-for-the-2016-ungass-contributions-from-member-states-and-regional-bodies>

²³ See the Declaration of Antigua, Guatemala, adopted

Table 2. Regulation of Drug Consumption and Possession in the Latin American Countries Studied

Country	Consumption	Possession	Regulation (synthesis)
Argentina	No	Yes	Simple possession and possession with intent to sell are classified as criminal offenses. Article 14 of Law 23.737 defines possession for personal use as a crime. However, the Supreme Court declared that the second paragraph of article 14 was unconstitutional whenever the drug use “is carried out in conditions that do not result in a specific hazard or harm to the rights or goods of third parties.” (See Argentine Supreme Court of Justice, Arriola ruling -A. 891. XLIV-).
Bolivia	No	Yes	Possession for personal use is a crime, according to article 49 of Law 1008, and is punishable with forced treatment. However, in practice this rule is not applied. If a medical examination determines that the arrested person is carrying more than what would be needed for his or her immediate personal use, then that person is prosecuted for drug trafficking.
Brazil	No	Yes	Possession for personal use and simple possession are considered crimes. Article 28 of Law 11.343/06 states that the judge must determine if the substance is for personal use, taking into account, among other things, the nature of the substance, the amount involved and the person’s criminal record. The sanctions for possession for personal use do not include the deprivation of liberty (article 33 of Law 11.343/06).
Colombia	No	Yes	Drug consumption is constitutionally prohibited, but the Supreme Court has ruled that possession for personal consumption should not be penalized even if it surpasses the established dose for personal use. (See Constitutional Court of Colombia, Sentence C-221). However, simple possession is classified as a crime. ²⁴
Costa Rica	No	No	Neither possession for personal use nor simple possession is a crime. Possession is only a crime if it is determined that the person’s intent is to “distribute, trade, supply, manufacture, develop, refine, transform, extract, prepare, cultivate, produce, transport, store or sell the drugs, substances or products referred to in this Law, or to cultivate the plants from which such substances or products are obtained” (article 58 of Law 8204). The possession of seeds “with the capacity to germinate or of other natural products to produce the referenced drugs” is classified and sanctioned as a crime (article 58 of Law 8204).
Ecuador	No	Yes	Simple possession and possession for personal use are classified as crimes, but possession for personal use is not sanctioned (article 220 of the Organic Comprehensive Criminal Code). Simple possession is determined above certain threshold amounts. ²⁵
Mexico	No	Yes	Possession for personal use is a crime but it is not prosecuted as long as the amounts do not exceed the maximum thresholds established by the General Health Law (Ley General de Salud, article 479), it does not occur in places such as schools or prisons, and it involves one of the substances covered by the law. Simple possession is a criminal offense. ²⁶
Peru	No	Yes	Possession for personal use is not criminally sanctioned as long as it is below the established thresholds permitted and the person is not in possession of two or more substances. Above those thresholds, it is punishable.
Uruguay	No	Yes	Possession for personal use is not a criminal offense. The judge, according to the principle of the “rational analysis of the evidence” decides when a substance is for personal use. In the case of cannabis, up to 40 grams or 6 psychoactive plants is considered to be for personal use (article 7, Law 19.172). Simple possession is a crime unless the person has legal authorization under article 5 of Law 19.172.

Source: Pérez Correa, et al., 2015.

In terms of the law, possession tends to be broken down into a) possession for the purpose of distribution (which can be sold or given away) and b) possession that does not have these aims. A distinction is then made in this latter category between drugs that are presumably possessed for strictly personal use (known as possession for consumption) and possession that is not tolerated, even when it is not required that it be aimed at distribution. This last type of possession is known as simple possession (Pérez Correa, et al., 2015).

Drug-related behavior can be regulated in three possible ways: a) classified as a criminal offense and sanctioned; b) classified as a criminal offense but is not sanctioned; and c) neither classified as a crime nor penalized. Trafficking, trading, cultivating and distributing are classified as a criminal offense and are sanctioned: they are crimes and they are punished. Drug use, in contrast, often falls into the third of these three categories: It is not a crime, nor is it sanctioned. Different types of possession, however, tend to oscillate between the first and second forms of regulation, depending on the country. So,

while no country classifies the behavior of consuming illicit substances as a crime, in all countries studied except Costa Rica, possession is classified as a crime, under one of the previously mentioned modalities (Pérez Correa, et al., 2015).

By classifying possession as a criminal offense, drug users are kept within the criminal justice sphere since all users, in order to consume, must first possess the substance. And, even on the supposition that possession for personal use is not criminally sanctioned, it is the police, prosecutors and criminal judges – in other words, agents of the criminal justice system – who determine the intended purpose of the possession. Users are arrested and are frequently required to appear before a prosecutor solely in order to define their status as users. In the Latin American context, this process implies a significant amount of risk due to corruption, abuse of discretionary powers and excessive use of force.

²⁴ In Sentence C-491 from 2012, the Constitutional Court declared inapplicable the article in the Criminal Code that criminalized possession, on the understanding that it does not include the criminalization of possessing or preserving a dose exclusively destined for personal use of a narcotic or psychotropic substance or synthetic drug, even when it slightly exceeds the permitted personal dose. Article 376, Trafficking, manufacturing or possession of narcotics: “Any person who, without the proper legal authorization, introduces into the country, even in transit, or takes out of it, transports, carries, stores, preserves, develops, sells, offers, acquires, finances or supplies in any capacity whatsoever the narcotic or psychotropic substances or synthetic drugs that are contemplated in tables one, two, three and four of the United Nations Convention on Psychotropic Substances, will face prison terms of between one hundred and twenty eight (128) to three hundred and sixty (360) months and a

fine of one thousand three hundred and thirty four (1,334) to fifty thousand (50,000) current legal monthly minimum salaries.”

²⁵ Resolution 001 CONSEP-CD-2013 establishes the thresholds for the maximum admissible amounts of narcotic and psychotropic substances that may be possessed for personal use. Second Supplement R.O. No. 19, 20 June 2013.

²⁶ Article 477 of the General Health Law establishes that simple possession is when someone possesses one of the “narcotics listed in the table in a quantity below what would result from multiplying what is set forth in that table by one thousand” and “when due to the circumstances this possession cannot be considered to be aimed at commercializing or supplying them, even free of charge.” This behavior is punishable by between “ten months and three years in prison and up to eighty days of fines.”

Mechanisms such as the definition of thresholds to distinguish between possession for personal use and possession for other purposes have not been enough to avert this risk.²⁷ CEDD data shows that in the countries studied, drug users continue to be arrested and processed in the legal system. And when all the administrative and judicial controls set up to distinguish between those who possess drugs for consumption and those who possess drugs for distribution fail, drug users can be unjustly convicted and incarcerated for being equated with small-scale dealers.

In Argentina, according to CEDD's most recent research (Corda, 2016), in 2014 the Attorney's Office for Narco-criminality (Procuraduría de Narcocriminalidad, PROCUNAR) of the National Attorney General's Office presented a report in which it stated that in 2012, 9,414 judicial cases for the offense of possession of narcotics for personal use were recorded by federal prosecutors around the country (38.2% of the total), representing the single biggest cause for initiating cases (PROCUNAR, 2012). Over and above that are the cases for the same offense found in the prosecutor's offices of Buenos Aires province, where local criminal justice agencies intervene. In 2008, there were 7,484

cases for possession for personal use initiated by the Buenos Aires provincial prosecutors (PROCUNAR, 2014b). "Taking into account that these cases continued to grow as of that year, it is possible to infer that in 2012 there were more than fifteen thousand cases related to possession for personal use; which allows us to think about an equal or greater number of users affected by the criminal justice system throughout the country" (Corda, 2016). In fact, the cases initiated for this reason represent more than half of the total in jurisdictions such as Córdoba (60%), Mendoza (52%) and Resistencia (51%) (PROCUNAR, 2012). Although there is not enough information to determine how these cases ended, there have been cases where users and those who grow cannabis for personal use are convicted (Revista THC, 2011, 2012 & 2013).



Photo Credit: César Acuña. Maximum security prison in Latacunga, Ecuador.

²⁷ It is common for possession to be tolerated within a scheme of maximum threshold amounts for substances, whereby governments predefine a determined quantity of some illicit substances and below that amount it is presumed that possession is for personal use. In the Americas these thresholds tend to be very low and, frequently, the amounts do not correspond with users' consumption and supply practices. In some cases, such as in Mexico, if people have more than these amounts it is considered to be proven, without any other evidence, that there was intent to sell and/or trade in the substances. This violates constitutional principles stating that drug users should not be criminalized as well as the presumption of

innocence. In other cases, such as in Colombia, additional elements are required to convict a person when the permitted thresholds are exceeded, such as for example establishing the intentionality to sell or distribute. However, even in this scenario, the user remains within the sphere of criminal justice institutions, with this being an issue for police and prosecutors and not for health institutions, as the discourse would indicate. Taking into account that the thresholds can act as a double-edged sword, CEDD has recommended using them only as floors, below which no one can be considered to be a dealer, and not as ceilings above which people are presumed to be retail vendors or micro-traffickers (Pérez Correa, et al., 2015).

15 Grams of Marijuana, More than Five Months in Prison

One highly publicized case in the province of Santiago del Estero in Argentina shows that users often end up in prison. Various media reported on the situation of a 22-year-old man who was found in mid-2013 with 15 grams of marijuana on him and was detained for more than five months. A year later it was established that he had possessed the substance for personal use. The case was part of a documentary called “The Machine for Making Scapegoats” (“La máquina de hacer perejiles”) that was published in 2014 and is available in Spanish on YouTube.

From various sources it is possible to reconstruct this young man’s story. It began in early 2013, when he was arrested with 12 grams of cannabis, which resulted in a police officer, with whom he had argued before, opening up a criminal investigation. Instead of giving him a citation, justice sector officials began to investigate him for drug trafficking.

The result of that investigation led to a raid on June 19, 2013 on the family newspaper stand where the young man was working; 15 more grams of marijuana were confiscated from him during the raid. According to the young man, at the time of the raid one of the police officers that participated had accompanied the person who sold him the cannabis the night before. Despite the meager amount of cannabis, the young man was detained based on the supposed evidence that indicated that he was dealing. He was detained until November 26, 2013, and on June 10, 2014 it was determined that this was a case of possession for personal use.

Although he did not return to prison, the criminal process still did not end. As a consequence of that judicial case, he had to finish his studies, do community service and rehabilitation – requirements that are imposed as alternatives to incarceration.

With regard to the imposition of rehabilitation, this person sustained that it was “foolish...I am not sick because I consume marijuana.” However, he had no choice as the alternative was a continuation of the judicial process and going back to prison.

Source: Corda, 2016

In **Brazil**, one of the hypotheses regarding the rise in the quantity of people deprived of their liberty based on the 2006 drug law is that a significant number of young users are being convicted as traffickers for possessing small amounts of drugs. This seems to be the case in Rio de Janeiro, Brasília (Boiteux & Wiecko, 2009), and in São Paulo (Jesus, et al., 2011).

In **Bolivia**, there is no set quantity, or threshold, of illegal drugs that is considered to be for immediate personal use; rather, this amount must be determined via a medical examination. Between 2010 and 2012, 3,525 people were apprehended by the Special Force to Fight Drug Trafficking (Fuerza Especial de Lucha contra el Narcotráfico) for possessing a controlled substance. In the course of 2016, 8% of the

1,753 cases for controlled substance offenses were for possession for personal use, and 19% for supplying drugs.

In **Colombia**, the Supreme Court has developed the doctrine of the “supply dose”(la doctrina de la dosis de aprovisionamiento), or the amount of a drug that is legally considered to be for personal consumption. According to the doctrine, if people are apprehended with a quantity that is slightly above the permitted personal dose, they should not be penalized as long as they do not aim to distribute the substance but rather have it for their own use.²⁸ In another recent decision the Supreme Court went further, establishing that “the amount of narcotics that one has with him (or her) is not the only element that defines wrongfulness, but instead is just one more element that the judges will have to assess in order to determine the legality of the purpose of the possession,” a precedent that is of mandatory compliance for judicial officials.²⁹ Considering that many cases reach a verdict, it is not surprising that, as previous research has shown (CEDD, 2014), a good number of the 80,000 people that the police arrest annually (this annual arrest figure translates into 221 per day and 9 per hour) are users (Uprimny, et al., 2016). Moreover, according to a sample of case files on drug offense convictions between 2011 and 2014, 30.71% of the convictions were exclusively for possession, which is to say simple possession of drugs, without any evidence that the

substances had any other purpose besides use. In some of these cases people were convicted for possessing amounts that were below or just slightly above the permitted personal dose (Ministry of Justice and Law, forthcoming 2017).



Photo Credit: Costa Rican Ministry of Justice and Peace, Press and Communications Office

In **Ecuador**, although article 364 of the Constitution states that drug use or consumption is not a crime and its criminalization is prohibited, in practice mere possession for personal use has been penalized, according to the repealed article 62 of Law 108 and article 220 of the Organic Comprehensive Criminal Code, in force today. Data shows that 88.8% of people sent to the criminal justice system by police agencies are apprehended for acts of possession. Between 2007 and 2014, the Public Defender’s Office disaggregated, among the people it defended, the following figures on detainees for drug-related offenses: 232 for the offense of commercialization or processing, 515 for the offense of illicit trafficking; and 15,532 for the offense of possession. In other words, about 2,220 people needing a public defender were detained on average per year for drug possession (Paladines, 2016a, p. 22).

The entering into force of the new Organic Comprehensive Criminal Code (COIP), on August

²⁸ Supreme Court of Justice. Chamber of criminal appeals. Verdict from November 18, 2008. Process No. 29183. Public Ministry. José Leonidas Bustos Martínez.

²⁹ Supreme Court of Justice. Chamber of criminal appeals. Case file No. 42617. Public Ministry. Gustavo Enrique Malo Fernández.

10, 2014, allowed for sentences to be reduced over the course of one year and established clearer criteria for trafficking cases on a low, medium, high and large scale. In March 2015, Ecuador's prison population reached 24,391 people deprived of liberty (Paladines, 2016b, p. 27), of whom 4,156 were convicted for drug-related offenses, without including those who had pending cases. Of these, 3,447 were men and 709 were women. In the case of women, more than 466 women were released under the principle of favorability, which allows for more benign subsequent laws to be applied retroactively, reducing the female population incarcerated for drugs by 66%.

However, a year after the COIP came into effect, the Ecuadorean government reversed course and toughened penalties again for cases of low- and medium-scale trafficking, also known as "micro-trafficking." The flow of people who benefited from the sentences reduced by the COIP – including with their release – matched the number of people who were now entering the system as a result of those changes. Thus, by mid-2015 Ecuador had 8,597 people incarcerated for drugs (El Telégrafo, June 29, 2015), or close to 30% of all people deprived of their liberty at that time.³⁰

In the **United States**, criminal law has been used to reduce both drug supply and demand, and so the incarceration rate for drug possession

grew to be nearly the same as that of trafficking (Caulkins & Chandler, 2006). In 2014, 83% of all arrests for drug-related crimes were for drug possession. In addition, 2014 was the first year since 2009 in which the number of arrests for cannabis rose, reaching 619,809 cases. Due to the system for determining sentences, many of the most draconian convictions for possession take place at the state level.

In **Mexico**, according to the national Attorney General's Office (Procuraduría General de la República, PGR), between 2006 and 2014, 453,069 people were arrested for drug offenses in the federal system. Of this total, 175,993 were arrested for possession (in its diverse modalities) and 156,189 for drug use (despite the fact that consumption is not a crime).³¹ This means that 73.3% of people detained on a federal level for drug offenses were detained for either possession or consumption.

For the research on people deprived of their liberty in Mexico, various information requests were made to state governments about people deprived of liberty for drug offenses. Although not all the states in the country provided the information,³² of the responses received, 73,992 people had been arrested for drug offenses in the 18 states that gave information for the 2012-2014 period. In addition, although the majority of states only reported drug offenses in general without specifying the crimes, ten states did

³⁰ The total number of people deprived of liberty by mid-2015 was 27,657, a figure obtained on the "Contacto Directo" program of the Ecuavisa channel on July 1, 2015. The exact figure of the total number of people deprived of liberty should be triangulated with interviews with public officials and other press publications, since there are no freely accessible periodic and public reports for the citizenry provided by the government.

³¹ Information request via Infomex, PGR, folio 0001700072215.

³² Of Mexico's 32 states, only 18 gave information regarding specific drug offenses: Baja California, Campeche, Chiapas, Chihuahua, Coahuila, Distrito Federal, Durango, Guerrero, Hidalgo, Jalisco, Nuevo León, Oaxaca, Puebla, Quintana Roo, Sinaloa, San Luis Potosí, Tlaxcala and Zacatecas.

provide a breakdown. Of the 13,049 detained there, 6,172 (47%) were arrested for simple possession and 1,432 (11%) for possession for personal use. In other words, 58% of the drug detentions in those states between 2012 and 2014 were for the offenses of possession for personal use or simple possession. Moreover, the majority of arrests were for cannabis (Pérez Correa & Romero, 2016).



Photo Credit: Libertas Program. San Sebastian men's prison in Cochabamba, Bolivia. Christmas party in 2016 for children visiting their incarcerated fathers.

In **Peru**, the Criminal Code does not penalize the possession of small amounts of drugs for personal use (article 299). However, the Peruvian National Police often illegally arrest drug users. Between 2000 and 2013, police arrested 43,515 people for consumption or possession, which represented 55.5% of all drug-related arrests.³³ Some of these cases

³³ The institution justifies these arrests in the following way: "it is inferred that these actions are framed within and backed by current laws and rules; in addition to the Existing Manuals and Guidelines for Operational Procedures (...) the

reach the Specialized Prosecutor's Offices (Fiscalías Especializadas): Between 2009 and 2013, 588 cases for drug use or possession came before the judiciary, representing 5.4% of drug-related cases (Mangelinckx, 2016). Among incarcerated people, the high percentage of people deprived of liberty for micro-trafficking, combined with the existence of some cases of users being imprisoned for this offense, have led some people to suggest that numerous people incarcerated on this basis could be users (Mangelinckx, 2016).

In **Uruguay**, the research carried out on the jurisprudence of criminal appellate courts regarding the interpretation of the exemption from punishment for possession for personal use shows that restrictive criteria has been used that tends toward the criminalization of small quantities (Bardazano, 2012). The limited jurisprudence that has emerged since the 2013 reform indicates that the judicial discourse has not incorporated the change. A similar dynamic is seen with regard to cultivation for personal use. An example of this is a verdict that sentenced a woman for the offense of producing prohibited narcotic substances (29 cannabis plants) to 23 months in prison, including the pretrial detention she suffered, for having exceeded the six plants permitted by

police official carries out an operational police procedure to intervene with the citizen who possesses drugs, with the aim of identifying that person, establishing what type of drugs he or she possesses and whether the amount is punishable or not. This brings with it the need to carry out tests on the substance and weigh it and in some cases to request a toxicological exam, chemical analysis, police records and requisitions, etc.; which are not done in the place of intervention and will subsequently allow for the representative of the Public Prosecutor's Office to establish whether an offense was committed or not" (National Police of Peru, 2015).

law.³⁴ Between 2011 and 2014, in contrast to what occurred with prosecutions for trafficking, which fell 55%, those related to possession and use grew 17%. During this period, a total of 6,161 people were charged with possession, which represents 58% of prosecutions for drug-related offenses. One in every four people prosecuted were convicted. Of those convicted for possession/use, 44% were for possession of marijuana, followed by cocaine (33%) and cocaine base, also known in Uruguay as paco (21%). For every ten such people, six are men and four are women (Bardazano & Salamano, 2016).

The exception to what has been described is Costa Rica, where there are no thresholds set for personal use. Rather, there is a discretionary model based on evidence and the extenuating factors related to the commission of a crime. Normally, the Attorney General's Office (Fiscalía General de la República) dismisses cases of drug use, discouraging police from arresting people who are users (Cortés, 2013). In fact, the police do not arrest users; instead, if they find someone using drugs in public spaces, they

³⁴ The Court indicated that the case should be examined taking into account Law 19.172, which exempts some growers from responsibility, since it is a subsequent law that is more beneficial to the accused. However, it established that the person accused could not avail herself of this exemption from responsibility: "Under neither the previous regime nor the current one does a person who has a 'nursery' with 29 marijuana plants, artificial lighting, canopies to hide them and protect them, have any explanation or justification to be exempted from criminal blame. It is not even possible to consider this cultivation as necessary for her consumption since it exceeds the six marijuana plants referred to in the Law." Notwithstanding the foregoing, "with regard to the penalty imposed on the accused, it will be reduced to the legal minimum, which is twenty months in prison, given the nature of the imputed offense, changing circumstances, and the agent's dangerousness and personality" (TAP 4, Sentence 140/2014, July 17, 2014).

search the person and seize the substance, but they do not tend to make arrests. This follows guidelines on institutional practices to avoid criminalizing users (Pérez Correa, et al., 2015, p. 7-8). However, in an analysis of a sample of criminal case files for drug offenses in Costa Rica, 49% of the people convicted for retail sales were also drug users. The drug that is most widely consumed among this population is cannabis, followed by crack, cocaine and alcohol. This shows that a significant number of these people sell the same drug that they use to keep themselves supplied, as well as to earn an income (Cortés, 2016). An example is those known as "Robots," who are usually young people addicted to crack and who receive a certain amount of it as payment for their sales. The "Robots" are the group that is most subject to the violence generated by the illicit market and the State (Cortés, 2015).

Specific Populations

Women

Although the majority of people incarcerated for drugs are men, incarceration has a differentiated and disproportionate impact on women (WOLA, IDPC, Dejusticia & CIM, 2016). Prison aggravates the position of economic and family-related vulnerability that women face in society. As they usually take on the role of caring for dependents (children, older adults or persons with disabilities), prison puts greater pressure on women and can have a more serious impact on the people with whom they were living. In many cases, the incarceration of these women leads to a rupture in family ties and greater exposure by their dependents to situations of

risk and vulnerability.³⁵ This is compounded by the disproportionate burdens that they bear for getting involved in an illegal activity, as they often face greater consequences for their criminal acts, both in the judicial system (police, defenders, prosecutors and judges) as well as in society (within communities, the family, the workplace, etc.). In several countries, the offense of transporting drugs – which women are frequently convicted of – is punished more severely than other drug crimes. This means that, even when their participation is limited to transporting a small amount of illicit substances from point A to point B, they are sentenced to many years in prison. Finally, there are gender impacts inside prison, as the framework for penitentiary systems is designed for men. Upon regaining freedom, women often suffer since it is very difficult to find a decent job, which often ends up perpetuating the vicious circle of poverty, involvement in drug markets and incarceration.



Photo Credit: César Acuña. Ecuadorian prison.

³⁵ “The children and adolescents who have their fathers or mothers incarcerated can face similar situations of vulnerability; however, there is significant scholarship that highlights some specific aspects when it is the mother who is imprisoned. The work published by Claudia Stella (2009) focused on the children of female prisoners on the understanding that there is a historical conditioning by which women have always been responsible for caring for the children. Analyzing data from prison censuses shows that when the father is incarcerated, the majority of children continue to be cared for by their mothers; however, when the mother is incarcerated, just 10% of children are cared for by their fathers” (Saavedra, Lappado, Bango & Mello, 2014, p. 34).

Women also have to assume responsibilities when their relatives are incarcerated, which turns criminal sanctions into a punishment not only of individuals but also of families, and in particular, of the mothers, daughters and wives of inmates (Pérez Correa, 2015). In light of the shortcomings of prison systems, these women provide for both male and female inmates, visiting them several times a week and linking them to the outside world. In addition to assuming the costs of their legal defense, in corrupt prison systems they need resources to pay bribes so that their relatives can access basic goods such as water, food and medication. In addition, the stigma produced by the incarceration of a relative has a negative impact on their family and social relationships. Some women with relatives in prison even report having had to quit their jobs and having suffered health problems (Pérez Correa, 2015). These realities are very different when the women themselves are incarcerated, because they commonly receive fewer visits than male inmates. Far from getting understanding and support, they are subjected to greater pressure and reproach for all the responsibilities that they can no longer assume or that they must continue to carry out by searching for solutions inside prison.

The female prison population in the Americas has grown at a faster rate than that of men. But within the female prison population, the rate of those incarcerated for drug offenses has grown at an even quicker pace in a majority of countries. In Argentina and Bolivia, for example, the female population deprived of liberty for drug crimes has grown faster percentage-wise than the male population imprisoned for

these same offenses. Drug offenses are, in all the countries studied except Mexico, the main cause of female incarceration. While people incarcerated for drugs represent between 8 and 30% of the overall prison population, women deprived of their liberty for drugs represent between 24% and 80% of the incarcerated female population. In Brazil, Costa Rica, Peru and Argentina (at the federal level) women

imprisoned for drug offenses represent more than 60% of the female prison population, while at a global level, according to UNODC estimates, just 12% of women in prison are there for drug offenses (UNODC Bolivia, 2016). This means that in these Latin American countries, the rate of women incarcerated for drug offenses is between five and six times greater than the global average.

Table 3. Indicators on Female Incarceration for Drug Offenses in the Nine Latin American Countries Studied

	Number of persons incarcerated for drugs (men and women)	% incarcerated for drugs in relation to the total	% Increase in the population incarcerated for drugs	Number of women incarcerated for drug offenses	% Women incarcerated for drugs in relation to all female detainees	% Increase in the female population incarcerated for drugs ³⁶
ARG ³⁷	6,979 (2013)	10.88%	113.35% (2002/2013)	513 ³⁸ (dec/2012)	65% ³⁹ (dec/2012)	271% (1989/2008)
BOL ⁴⁰	3,939 (2013)	27.32%	- 17% (2000/2013)	827 ⁴¹	48% ⁴²	114.38% (2003/2013)
BRA ⁴³	146,276 (june/2013)	25.94% (june/2013)	344.87% (2005/2013)	16,489 (june/2013)	60.63% (june/2013)	290% (2005/2013)
COL ⁴⁴	23,141 (2014)	21% (2014)	289.2% (2000/2015)	3,830 (2014)	45% (2014)	211% (2000/2014)
CR ⁴⁵	4,645 (dec/2011)	26.4% (dec/2011)	225.52% (2006/2011)	944 (dec/2011)	75.46% (dec/2011)	189.18% (2006/2011)
ECU ⁴⁶	4,156 (2015)	17% (2015)	-	709	43%	-
MEX ⁴⁷	26,098 (2013)	10% (2013)	19% (2011/2013)	Federal (2014) 1,547 Local (2013) 528	44.8% (aug/2014) 14.2% (may/2013)	NA 2.3% (2011/2013)
PER ⁴⁸	19,329 (july/2014)	27% (july/2014)	50% (2008/2014)	2,679 (july/2014)	60.6% (july/2014)	35% (2008/2014)
URU ⁴⁹	1,265 (2013)	12.9% (2013)	-	205	24% (2013)	-

Source: Boiteux (2015, p. 3)

³⁶ The increase is calculated based on the absolute number of incarcerated women.

³⁷ SNEEP, Annual report by the Republic of Argentina. This data refers to federal prisons.

³⁸ <https://www.oas.org/en/cim/docs/WomenDrugsAmericas-EN.pdf>, calculation made based on data from p. 29-30.

³⁹ Ibid.

⁴⁰ National Institute of Statistics (Instituto Nacional de

Estadística, INE)

⁴¹ <https://www.oas.org/en/cim/docs/WomenDrugsAmericas-EN.pdf>.

⁴² Ibid.

⁴³ National Penitentiary Department (Departamento Penitenciário Nacional, DEPEN), Brazil.

⁴⁴ National Penitentiary and Prison Institute (Instituto Nacional Penitenciario y Carcelario, INPEC). December 2014.

The women incarcerated for drug offenses are frequently arrested for carrying out low-level but high-risk tasks, such as:

- Human couriers for international or domestic trafficking or to smuggle drugs into prisons.
- Small-scale dealers, growers or processors.
- Domestic support work, like cooking or cleaning, for organized criminal groups.
- Workers with other kinds of low-level duties such as the storage of illicit substances, the communication of information, or serving as intermediaries.

Drug users who carry small amounts of illicit substances, despite the fact that in the majority of the region's countries drug use itself is not penalized (WOLA, IDPC, Dejusticia & CIM, 2016).

Many of these women grow up in environments that favor involvement in illicit activities, and they do not have the means or the social capital to obtain alternative sources of income. Taking advantage of this situation, trafficking networks have opted to increasingly substitute those people who are arrested carrying out low-

level activities with women who are in needy situations, which has led to the concept of a feminization of drug offenses that is directly related to the feminization and criminalization of poverty (Caicedo, 2015). The 2016 study by WOLA, IDPC, Dejusticia & CIM affirms that many of the women involved in drug offenses acknowledge having gotten involved of their own will, aware of the risks they were running. However, with relative frequency, there is also coercion to get involved by strangers, partners or relatives. The report also points to the fact that some of these women were deceived; they did not know what they were doing or did not understand the risks they were taking. Some even say they received threats from members of criminal organizations aimed at forcing them to carry out the behavior for which they were arrested. These factors, however, do not tend to be taken into account when judges hand down sentences, which are often excessively long and disproportionate (WOLA, IDPC, Dejusticia & CIM, 2016, p. 8-13).

In addition, in several countries, women belonging to indigenous communities and ethnic minorities have a greater likelihood of being arrested, charged and convicted for drug

⁴⁵ Calculation made based on data from the Violence Observatory of the Ministry of Justice and Peace (Observatorio de la Violencia del Ministerio de Justicia y Paz) <http://sisvi.mj.go.cr/SISVI/>.

⁴⁶ Ministry of Justice of Ecuador.

⁴⁷ According to data from the National Census of Government, Public Safety and State Penitentiary Systems (Censo Nacional de Gobierno, Seguridad Pública y Sistemas Penitenciarios Estatales), as of December 2014: 252,000 people were deprived of their liberty for offenses under state jurisdiction (239,667 men – 95.1% of the total – and 12,233 women, or 4.8%), of whom 11,488 (4.5%) were there for small-scale drug dealing (10,614 men – 92.3% – and 874 women, or 7.6%). In the federal sphere, 35,679 people were deprived of their liberty (33,000 men – 92.4%

– and 2,679 women, or 7.5%), of whom 13,794 (38.6%) were there for drug offenses (12,581 men – 91.2% – and 1,213 women, or 8.7%). This means that 25,282 people were incarcerated for drug offenses (8.7% of the total). Of these 2,087 were women (8.2% of the total). However, women incarcerated for drugs represented 13.9% of all female prisoners (although in federal jurisdiction they represented 45% of the total and in the state/lower-court jurisdiction, 7%). Available at: http://www.inegi.org.mx/lib/olap/consulta/general_ver4/MDXQueryDatos.asp?c=.

⁴⁸ National Penitentiary Institute (Instituto Nacional Penitenciario, INPE), Statistical Report (July 2014).

⁴⁹ Legislative Branch, Parliamentary Commissioner's Reports on the Practices and Evaluation of the National Penitentiary System.

offenses. For example, in the United States, African-American women are seven times more likely to be incarcerated than white women (Kensy, et al., 2012). For these and other reasons, the war on drugs has also been called a war on women (Chesney-Lind, 2003). As occurs with men, the discrimination that they face in society is replicated and exacerbated in prison.

In **Argentina**, when Law 23.737 came into force, the female population incarcerated for drug offenses grew at a much faster pace than that of men, both in the federal system and in Buenos Aires province. In the period from 1989 to 2008, the female population incarcerated for drugs in the federal system increased by 271%, while that of men grew 112%. Nine out of every ten female foreigners incarcerated for drug offenses in federal prisons were detained for acting as “human couriers”; among that group, 96% were first time offenders and nearly all of them were the lowest link in the drug trafficking chain (Centro de Estudios Legales y Sociales, 2011). Between 2005 and 2012, the number of women incarcerated in Buenos Aires province for drug offenses nearly doubled, rising from 600 to 1,179. With the implementation of the “de-federalization” of criminal prosecution of drug offenses in 2013, the percentage of women incarcerated for these crimes grew rapidly between 2012 and 2013 in several other provinces, such as Córdoba (29%) and Salta (78%) (Corda, 2016). A survey done among women in prison for drug offenses in various parts of the country showed that 78% were mothers, and 58.5% did not live with a partner before being detained. Of the women surveyed, 80.5% said they were the main breadwinners in their households (National Prison Ombudsman’s

Office, 2014, p. 321-328). In addition, several studies have documented human rights violations against incarcerated women and the increase in their close relatives’ conditions of vulnerability (Centro de Estudios Legales y Sociales 2011; Committee against Torture of the Provincial Commission for Memory, 2013, p. 183).



Photo Credit: César Acuña. Maximum security prison in Latacunga, Ecuador.

In **Brazil**, women incarcerated for drug offenses do not occupy high-ranking positions in the illicit market. Around 55% of incarcerated women are Afro-descendant, 57% are not married and 50% are under 29 years of age. When they are incarcerated, in addition to often being abandoned by their friends and co-workers, they are taken away from their children, the vast majority of whom end up being raised by grandparents or aunts (when they are not put up for adoption). Pregnant women in prison have had to endure situations like being handcuffed during their deliveries, or giving birth in a police van or in prison (when transportation does not arrive on time). The profile of pregnant women in prison shows that 78% are between 18 and 22 years old, 77% are Afro-descendent women, 75.6% have not completed elementary school, and 9.8% said they did not know how to read or write. Half of them had precarious jobs (85%

without any official paperwork) and the majority was responsible for financially supporting the household. Seventy percent were first time offenders. Of those convicted, 44.4% were given prison terms of between five and nine years and in 33.3% of cases they were sentenced to under four years (Boiteux, et al., 2016).

In **Bolivia**, a report by Fundación Construir based on a sample of incarcerated women reveals that, with regard to their marriage status, 50% of the women lived with a partner, but their partners distanced themselves due to the incarceration. Only 36.8% had finished high school and 38% of the women came from dysfunctional homes or were abandoned by their relatives. The majority of them were poor women who sought to support their families while incarcerated. But in prison, women face discriminatory treatment and only have a jail cell if they can pay for it (Fundación Construir, 2014).

In **Colombia**, the female prison population multiplied fivefold from 1991 to 2015, while the male population nearly tripled. Almost five out of every ten women in prison is there for drug offenses. Among that group, only one of them is there for having committed a violent offense or for belonging to a criminal organization. Out of all the women incarcerated for drug offenses between 2010 and 2014, 93% had children, while in the case of men, 76% had children. Single mothers represented the largest group of women incarcerated for drug offenses between 2011 and 2014 (43 out of every 100), while for men the largest group was characterized by having a live-in partner (41 out of every 100). In 52.8% of cases the women incarcerated for these offenses were divorced, separated, single

or widowed and therefore did not have a spouse or partner who could help care for their children. In contrast, for men, this occurred in 27.2% of cases. There are implicit biases in the criminal prosecution of women for drug offenses that tend to worsen over time: Although they were only involved in about 10% of the cases that reached the criminal justice system for drug offenses between 2008 and 2015, during the same period, women represented between 14% and 22% of the convictions handed down for these crimes. Between 2000 and 2014, the Colombian government spent 400 billion pesos, or US\$140 million, to keep these women in prison (Uprimny, et al., 2016).

In **Costa Rica**, drug offenses are the main cause of female incarceration. According to 2011 data from the Information System on Violence (Sistema de Información en Violencia, SISVI) of the Violence Observatory of the Ministry of Justice and Peace, female drug offenders represented 75.5% of all women deprived of their liberty. But according to more recent information, also reported by the Ministry of Justice and Peace, women incarcerated for drug offenses in 2014 represented 53.8% of the female incarcerated population residing in a prison facility. This relative decline may have to do with the comparison between regimes (institutional, semi-institutional, and others) but also the progressive incorporation of a gender approach into criminal and penitentiary policy related to drug offenses (Cortés, 2016). In 2012, the Public Defender's Office did a study that showed that 65% of incarcerated women were convicted under the Psychotropic Substances Law, and 23.5% of them had been convicted for smuggling drugs into prison centers. In addition,

50% had three or more children to care for (Costa Rican Public Defender's Office, 2012). As a result of this study and of the advocacy work done by the Public Defender's Office and social organizations, in 2013, Law 9162 was passed that advances proportionality in sentencing policy and a gender perspective. The reform added article 77bis to the Psychotropic Substances Law, which reduced prison sentences from 8 to 20 years to between 3 and 8 years for women convicted of trying to smuggle drugs into a prison and who met at least one of the criteria of socioeconomic vulnerability.⁵⁰ After the reform was passed and with the support of the Court for the Execution of Sentences (Juzgado de Ejecución de las Penas), more than 150 women convicted for this offense were released from prison, benefited by the possibility of receiving alternative sanctions in application of the principle of the most favorable law (Cortés, 2016).

However, despite the progress, the women in that country continue to be convicted for other drug offenses in greater proportions to their average participation in other crimes. In 2011, 83.6% of women in prison were there for drug offenses not related to smuggling drugs into prison centers. Among the women in prison for other drug-related offenses, 46% were more than 40 years old, while the percentage of incarcerated men of the same age group represented 39% of the total. In other words, older women tend to be incarcerated more, whereas for men, it is the youngest among them

⁵⁰ These criteria are that the woman: a) is in a situation of poverty; b) is the head of household in conditions of vulnerability; c) is responsible for minors, older adults or people with any kind of disability; and/or d) is an older adult in conditions of vulnerability.

who end up in prison (Cortés, 2016). The analysis of a sample of case files ending in convictions in seven of the country's provinces, most of them after 2008, ratifies these conclusions. As noted previously, those convicted for drug offenses were in precarious and low-earning jobs or unemployed (Cortés, 2016). This poses the need to consider alternatives to incarceration for other drug offenses, in addition to the smuggling of drugs into prisons, since these other behaviors also involve women (and men) in vulnerable situations whose incarceration contributes little, if anything, to dismantling drug trafficking organizations.

In **Mexico**, according to the First Survey of the Detained Population in Federal Social Rehabilitation Centers (Pérez Correa & Azaola, 2012), 88% of incarcerated women have children, in comparison to 78% of men. With regard to the age at which they gave birth, 65% of women said they had had their first child between the ages of 15 and 19. In contrast, among the male population, the age at which they had their first child was concentrated in the range of 17 to 23. Furthermore, the survey showed that women in prison have a lower average educational level than men. In addition, "women in prison in general, and women incarcerated for drug offenses in particular, tend to share the following characteristics: They are poor, come from marginalized homes and communities and have low education levels and no criminal records. Before performing duties related to illicit drugs, the majority worked in numerous informal activities, such as housecleaning, washing and ironing clothes, preparing food, street vending at stoplights, etc. And some have a life history marked by violence, including sexual violence" (Giacomello & Blas, 2016, p. 2).

In **Peru**, six out of every ten women in prison have committed drug offenses. The participation of Peruvian women in the drug industry has increased, leading to a greater number of women being charged and incarcerated for drug-related offenses. Low levels of education, poverty and social exclusion are the predominant factors that contribute to this phenomenon. These women tend to have minor roles within the commercialization chain, often acting as couriers or intermediaries for the purchase and sale of illicit drugs. Between 2008 and 2013, trafficking went from representing 34% to 49% of all police arrests of women for drug offenses, followed by use (27%) and small-scale dealing (24%). Among women incarcerated for drugs, 46% were incarcerated for the offense of illicit trafficking and just 27% for aggravated forms of this crime. In Peru, more women in prison are accused of drug offenses than are convicted. In 2008, this first group represented 72% of the total, a percentage that fell to 54% in 2013 but which continues to be excessively high (Mangelinckx, 2016).

In **Uruguay**, women have greater participation in drug markets that are associated with more marginal contexts. While they represent one-fifth and one-third of people convicted for cocaine and marijuana trafficking, respectively, in the case of trafficking pasta base, or cocaine base, four out of every ten people convicted are women. This is particularly worrisome given that, since 2015, the executive branch has implemented a police strategy targeting the points of sale for pasta base, ostensibly to improve security. This means that the priority is going after small-scale dealing and retail sales in the most precarious market for illegal drugs,

where the cheapest substance is sold and where women's participation is greatest (Bardazano & Salamano, 2016).

Women with Children in Prison

The issue of incarcerated women who are pregnant or have children deserves special mention, although only a few countries have information available on this population. Given the devastating effects that children may suffer upon being separated from their mothers and the fact that in many instances children depend exclusively on their mothers, governments must seek out policies that fully protect women's rights and their children's rights. In the case of crimes that are neither violent nor serious, the Bangkok Rules encourage governments to impose "non-custodial sentences for pregnant women and women with dependent children."⁵¹ In addition, in its report on the use of pretrial detention in the Americas, the IACHR states that "in accordance with children's best interests, the competent judicial authorities should apply the criteria of necessity, proportionality, and reasonableness more strictly when they consider ordering the pretrial detention of people who are responsible for children. In such cases, the use of precautionary measures other than pretrial detention should be favored. For example, the Commission has observed that a high percentage of the women deprived of freedom who are responsible for children were arrested for nonviolent crimes, such as small-scale drug dealing" (IACHR, 2013, p. 86).

⁵¹ United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules). Rule No. 64.

In **Argentina**, in 2009, via Provincial Law 13.943, article 159 of Buenos Aires province's Code of Criminal Procedure was modified to incorporate the possibility of allowing pregnant women or women with children under five years old to avoid prison during criminal justice proceedings. That same year, National Law 26.472 changed the Criminal Code and the Law for Executing Deprivations of Liberty Sentences (Ley de Ejecución de la Pena Privativa de Libertad), permitting house arrest for pregnant women, women with children under five and those responsible for persons with disabilities. According to data from SNEEP, a significant number of children are still living in Argentina's prisons. Although the number of women living with their children while incarcerated was about 200 some years ago, since 2009 it has fluctuated around 150, without a clear downward trend. In 2013, there were 165 women in this situation (Corda, 2016, p. 30).



Photo Credit: César Acuña. Ecuadorian prison.

Although alternatives to incarceration have been granted, in many cases they continue to be denied. In the 2014 annual report on prisons issued by Argentina's National Prison Ombudsman's Office (Procuración Penitenciaria de la Nación), there is a section dedicated to this issue that states: "the discrimination underlying the arguments put forward by the judiciary upon denying requests for house arrest continues

to be worrisome.⁵² The social condition of the women requesting this frequently constitutes the central rationale for denying access to this benefit. In this way, women are immersed, once again, in a dangerous marginal area when the judicial branch denies them full exercise of motherhood by virtue of their socioeconomic origin" (National Prison Ombudsman's Office, 2014, p. 334-335). Also troubling, in 2014 the press reported on the detention conditions of mothers with their children in the prisons of Buenos Aires province and told of a 21 day-old infant who died in confinement. Afterwards, the mothers published a letter in which they asked for the health unit to have an ambulance in good condition for the exclusive purpose of health services and to be driven by health personnel (Cosecha Roja, 2014).

In **Colombia**, pregnant women face multiple barriers to accessing adequate health services in prison (Guzmán, 2009) and occasionally suffer the stigma imposed by judicial officials or prison staff, who characterize them as "bad mothers" (Mejía, 2014). For women with their children in prison, nurseries have been created within the compounds; however, the nurseries have been less successful than expected since mothers have very limited access to them and are not allowed to be actively involved in the child-rearing process. When the children turn three years old, they must be sent to a relative or to an external institution that can care for them (UNIFEM, 2006, p. 44). The Advisory

⁵² It is important to note that the strict use of house arrest is not enough, since women who benefit from alternatives to incarceration should have special permission to work outside of the home, because if they cannot tend to their children's needs, this benefit can have a similar impact to prison, or can lead to a repeat offense.

Commission on Criminal Policy (Comisión Asesora de Política Criminal) (2012, p. 163) and social organizations have made an urgent call for a gender perspective to be incorporated into this and other aspects of criminal justice and penitentiary policy (Uprimny, et al., 2016).

In **Peru**, women incarcerated with their children represent 5.2% of the female prison population. As of April 2013, there were 209 mothers with a total of 212 children under three years of age in prison. According to article 8 of the Regulations of the Code of Prison Enforcement (Reglamento del Código de Ejecución Penal), the protection of pregnant inmates – and those in labor – and the children who live in prisons requires that medical attention in public health centers, adequate environments for children in the prison, as well as programmed outings for the children are available. Article 12 stipulates that women deprived of their liberty have a right to have their children with them in prison until they turn three years old, at which point they will be handed over to the appropriate person, in accordance with the rules governing this matter, or failing this, the appropriate legal mechanism will be used to place them with a family or in another institution, according to what is set forth in the Code of Children and Adolescents (Código de los Niños y Adolescentes) (Mangelinckx, 2016).

In **Uruguay**, a recent discussion took place regarding the transfer of detainees with young children from El Molino (a small facility devoted exclusively to housing mothers with their children, which has capacity for 30 inmates and where 27 children were housed as of December 2015) to a women's prison. The National Human

Rights Institution (Institución Nacional de Derechos Humanos) expressed concern about how harmful this measure would be for the women and their children, while also pointing to the need to find alternatives to incarceration for women with young children, instead of continuing to make more space for that purpose in inadequate establishments (Bardazano & Salamano, 2016).

Other countries also contemplate special places in prisons for women to be with their children. Given that in these facilities neither the mothers nor their children are in suitable conditions, it would be preferable to opt for alternatives to incarceration that provide socioeconomic support when necessary. In the case of those women who have committed non-violent drug offenses, however, it is difficult to even justify the use of criminal law. Taking into account the high costs of incarceration, governments should incorporate and promote the adoption of mechanisms that allow such women to keep custody of their children, under conditions in which the rights of both parties are protected.⁵³

⁵³ Two experiences that serve as reference points are: 1) In Argentina, the Association of Relatives of Detainees in Federal Prisons (Asociación de Familiares de Detenidos en Cárceles Federales, ACIFAD) has the objective of protecting the social rights of the children of incarcerated persons. This organization successfully defended the need for the government to provide the Universal Child Allowance (Asignación universal por hijo) to families whose main economic provider is incarcerated. This allowance is a monthly stipend given to children who are Argentine citizens and whose parents do not work in the formal economy; and 2) In the United States, in the state of New York, JusticeHome is a program promoted by the Women's Prison Association (WPA) as a gender-specific alternative to incarceration, for women committed to making a change in their lives. Through the program, the women are selected to live in their homes, with their children, and to participate in different treatment, educational and employment programs, instead of being incarcerated in the traditional way (WOLA, IDPC, Dejusticia & CIM, 2016, p. 37).

In the case of pregnant women and those who are responsible for dependents, incarceration should be the last resort or should be avoided altogether (WOLA, IDPC, Dejusticia & CIM, 2016).

Young People and Adolescents

Prohibitionist policies have led to the prosecution and incarceration of thousands of adolescents and young people from across the Americas,⁵⁴ cutting short their life projects and impeding their studies. In addition, the same conditions of risk described in the first section exist in juvenile detention centers. These young people see their health undermined and they are exposed to situations of violence and the use of illicit substances. Two traits that characterize the situation of these adolescents and young people are: 1) the existence of a negative and discriminatory social perceptions of young people that stigmatizes them, as they are considered to be prone towards crime and violence, which in turn means that the repressive burden of drug policies often affects this population; and 2) their marginal or low-level participation in drug trafficking networks (Achá, 2015, p. 3).

In **Colombia**, 31.9% of people apprehended for trafficking, possession or manufacturing are between the ages of 18 and 25, and 25.8% of them are between 26 and 34. According to the data obtained by CEDD, 40.71% of people incarcerated in Colombian prisons for drug offenses are between 18 and 29 years old. In **Bolivia**, using as an example the Palmasola

prison in the province of Santa Cruz, which is the most heavily populated prison in the country, drug offenses are the third-biggest cause of incarceration among people aged 16 to 21. In Brazil, despite the fact that the population between 18 and 34 years of age represents 27% of the overall population, within the prison system they represent 74% (National Penitentiary Department of Brazil, 2016). In Costa Rica, according to data from 2011, 10.44% of inmates incarcerated under Law 8.204 were between 18 and 24, while 18.07% were between 25 and 29. In Mexico, at the federal level, 65.2% of people sentenced for drug offenses in 2012 were young people between 18 and 34. In Peru, 82.5% of the prison population for drug offenses is between 20 and 49. In Uruguay, the greatest proportion of people charged for trafficking offenses are between the ages of 25 and 34 and the second-largest age group is from 35 to 40. For drug possession offenses, it is from 18 to 24 (Achá, 2015, p. 4).

With regard to adolescents, according to the Regional Juvenile Justice Observatory (Observatorio Regional de Justicia Penal Juvenil), those deprived of their liberty for drug offenses are made up of the lowest-level participants in the drug trade, including transporting drugs and people who get involved in small-scale dealing, a high percentage of whom are users who sell drugs to sustain their own consumption. The recruitment of young people into the drug trade is a growing trend in various countries (Sistema Subregional de Información e Investigación sobre Drogas, 2010). The situation is aggravated by governments' failure to duly implement criminal justice for adolescents, which in

⁵⁴ In Latin America, adolescents are classified as people between 12 and 17 years old. Young people are understood as being between 18 and 35 (Achá, 2015).

principle should primarily serve educational purposes. However, governments across the region have failed to do so, negatively impacting the life trajectories of adolescents who are in conflict with the law.⁵⁵

In **Mexico**, drug-related behavior is the primary cause of detention for adolescents, whereas in Colombia it is the second and in Brazil the third (Achá, 2015). In Peru, the number of adolescents arrested for drugs between 2008 and 2012 rose by 73%. During this period a total of 3,155 adolescents were arrested for these behaviors, 52% of them for drug use or possession (Mangelinckx, 2016). The relationship between drug use and criminal activity in the case of adolescents is linked to the lack of family or emotional ties, the lack of opportunities and other deprivations that a segment of the adolescent population suffers; however, the responses continue to be based on repression.

In **Ecuador**, for example, according to the Regional Juvenile Justice Observatory's citing of the Council on Childhood and Adolescence (Consejo de la Niñez y la Adolescencia), 80% of

minors detained for criminal behavior have no family, in some cases because their parents have immigrated to other countries and in others because they abandoned them or died (Achá, 2015).



Photo Credit: César Acuña. Ecuadorian prison.

According to the Regional Juvenile Justice Observatory, in **Colombia**, 25.4% of male adolescents and 30.1% of female adolescents deprived of their liberty meet the criteria for substance abuse; in addition, in Costa Rica, in 2012 at least 80% of the population deprived of liberty in the Zurquí Juvenile Education Center (Centro de Formación Juvenil Zurquí) had drug use problems. Treatment and rehabilitation for those who abuse drugs also have serious shortcomings (Sistema Subregional de Información e Investigación sobre Drogas, 2010).

Foreigners

Among the foreigners deprived of liberty in the countries studied, available information shows that they are most frequently incarcerated for drug-related offenses. In addition to difficulties stemming from the language barrier that some of them face, foreign nationals also encounter problems in maintaining contact with their family and in receiving visits. Many of them do not receive even one visit during their

⁵⁵ For example, in Colombia, recent evaluations of the System for Adolescent Criminal Responsibility (Sistema de Responsabilidad Penal para Adolescentes, SRPA) indicate that in its implementation "the logic of sanctioning an offender prevails over that of a judicial process" that would allow young people to assume responsibility for his or her actions and provide "an adequate environment to repair the harm caused to his/her life project, that of his/her victims and the affected community" (Rubio, 2013). In addition, "social policy barely penetrates the walls of the SRPA: there are only a handful of courses offered by the National Learning Service, for example. There are almost no treatment programs to tend to addiction or the psychiatric problems associated with it. Flexible models that guarantee the right to a quality, pertinent education are nonexistent" (ibid). In these conditions the deprivation of liberty serves no pedagogical purpose at all.

time in prison. Furthermore, they can face a lack of support from their country consulates, ignorance of the law, and difficulty in accessing an effective criminal defense and benefits because they do not have a set address or previous work experience in the country where they are incarcerated. In the countries where repatriation to their places of origin is allowed, the process tends to be slow and cumbersome.

In **Argentina**, according to the website of the Federal Penitentiary Service (SPF), as of February 2015, 1,131 people from other countries were detained for drug offenses, which represented 52.33% of people from other countries in that prison system. In all, there were 2,161 people from other countries detained, which represented 20.3% of the total federal prison population. The same source also ratified that this population of foreign nationals suffers pretrial detention more frequently than Argentine citizens: 70.66% (1,527 people) had been charged while just 29.34% (634) had been convicted. In addition, within the foreign population held in the SPF, women represented a greater percentage compared with the overall population. Women made up 12.63% (273) of the foreign nationals that were detained there, nearly doubling the 6.9% of women in the general prison population. Also, based on SPF information, one can see that the percentage of women from other countries detained for drug offenses is higher than in any other population. While the percentage is 48.83% (922 people) among foreign men, it is much higher among women: 76.56% of the women from other countries in Argentina's federal prisons are there in relation to drug offenses, meaning 209 women as of February 2015 (Corda, 2016).⁵⁶

In **Brazil**, a total of 2,625 people from other countries were deprived of their liberty as of 2014. The majority of these people came from countries in the Americas (53%) and Africa (29%), with the most common nationalities represented in Brazil's incarcerated foreign population being those from Nigeria (330) and Paraguay (315), followed by Bolivia (312), Peru (244) and Colombia (198). The most recent data released regarding the foreign prison population by gender, also from 2014, indicates that of the 2,778 inmates from other countries, 2,182 were men and 596 were women. A research study carried out in São Paulo emphasizes the situation of extreme vulnerability faced by foreign detainees (Instituto Terra, Trabalho e Cidadania, 2011). Although there is no official data regarding the offenses that detained foreigners have been accused of in Brazil, studies indicate that drug trafficking is the main one, which is a shared reality in numerous Latin American countries. Similarly, the Federal Public Defender's Office recently revealed that more than 90% of the incarcerated foreign nationals aided by this body were serving time for the offense of drug trafficking (Boiteux, et al., 2016).

In **Peru**, as of December 2013, the foreign prison population represented 3% of the total prison population. Around 90% of these people had been detained for illicit drug trafficking for transporting drugs (human couriers). They were from more than 70 countries, with the greatest percentages from Colombia (17.6%), Spain (17.1%), Mexico (10%), Bolivia (5%), Portugal (4.6%), Ecuador (4.4%) and the Netherlands (3.3%). In general, couriers are far removed from

⁵⁶ The information was taken from the SPF's website: <http://www.spf.gob.ar/www/index>

the circle of people, who may or may not form part of a criminal organization, who lured them in or otherwise employed them. Their task is limited to instrumentally moving the drugs, with no interest in knowing on whose behalf they do

so. The prison term for a human courier in Peru is usually six years long. However, if the amount of drugs exceeds 10 kilos, the sentence can be up to 15 years due to aggravating circumstances (Mangelinckx, 2016).

Tania's Tragic Fate

In late October 2009, 21-year-old Tania Rodríguez Abrante and her sister Melody, 18, both of Spanish nationality, traveled to Peru with the intention of finding work. A few weeks later both were arrested in the Jorge Chávez airport as they attempted to transport a kilo of cocaine stuck to their bodies. Tania and Melody were sentenced to six years in prison and were later detained in the women's penitentiary establishment known as Virgen de Fátima (in Lima). According to the National Penitentiary Institute (Instituto Nacional Penitenciario, INPE), Tania did not adjust to the prison's regime (in fact, she was suffering a deep depression) and, on those grounds, she was transferred in February 2011 to the Annex, a maximum security women's prison, along with women incarcerated for terrorism-related offenses.

This transfer to the Annex and her separation from her sister only worsened her mental health. There she met Thais Isazi, another young woman from Spain detained in October 2009 when she was 19. Thais was also suffering from depression and anxiety. On October 13, 2012, Thais committed suicide in her cell, which further aggravated Tania's depressive state. That same month, Tania tried to commit suicide for the first time. On January 7, 2014, Tania returned to her prison wing and hung herself with her own scarf.

Tania was 25 years old and had already served four years of her six-year sentence. She had tried to commit suicide two other times.

Source: Mangelinckx, 2016

Latin Americans incarcerated for drug offenses in other countries is a largely invisible problem that needs to be addressed. In Colombia, for example, it is estimated that around 14,200 Colombians are detained in different prisons around the world, 128 of them sentenced to life in prison and 15 to the death penalty in those countries. According to El Tiempo newspaper: "The drug trafficking networks have identified Asian countries as a destination for cocaine,

and to get it there they use so-called 'mules' or 'human couriers.' Official reports say that each month three people are caught with drugs in China, and the majority are from the coffee-growing region and the Valley [of Colombia]" (El Tiempo, 2015). Many of these people say they were used as "bait" by the traffickers to distract attention and ensure that other people would arrive at their final destinations with the drugs.

Other Populations

The CEDD research studies in each country shined a spotlight on other populations deprived of their liberty for drugs and which suffer situations of vulnerability and discrimination in prison systems.

Within the population of people incarcerated for drug offenses, the situation of transgender individuals also deserves analysis. Although there are not many transgender inmates, they face similar or worse situations of vulnerability, compounded by the discrimination that still persists and which is aggravated by prison conditions. In Argentina, according to information from the SPF's website, 25 people were categorized as being transgender as of February 2015. The gender and sexual diversity team from the National Prison Ombudsman's Office stated that in one of the SPF's prison establishments, there were seven transgender people, and six of them were there for drug law offenses. In 2012, the Argentine Congress passed the Gender Identity Law (Ley de Identidad de Género, No. 26.743), which marked progress in recognizing different groups' rights. Despite this progress, some media continue to reinforce the stereotype of the "narco-transvestite." News stories show that in the majority of these cases, that category is attributed to transgender women who were working as sex workers and were found selling small amounts of drugs (Corda, 2016). According to the National Prison Ombudsman's Office (2016, 10), of the 27 transgender women detained in federal prisons, 19, or 70%, are there for drug offenses.

In producer countries – such as **Peru, Bolivia, Mexico and Colombia** – the rural population (indigenous people, Afro-descendants and peasant farmers) have traditionally been criminalized for getting involved in the cultivation of coca, marijuana and poppy plants as a way to survive. In Colombia, the greatest percentage of inmates for the offense of financing and cultivating these plants is found in the provinces of Antioquia, Norte de Santander and Chocó (traditional farming communities), while the greatest number of detentions for these offenses occur in the provinces of southern Colombia (Uprimny, et al., 2016). This criminal prosecution, along with strategies such as aerial spraying, have laid siege on these populations and created mistrust toward the State, which could be avoided with other types of approaches focused on comprehensive rural development aimed at reducing the vulnerabilities faced by this population (Indepaz, 2015; Mansfield, 2016).

Although the Latin American region has led the global debate on reforming drug policy and has promoted the need to consider alternatives to incarceration with regard to drug offenses, the use of criminal law and sanctions that deprive people of their liberty has worsened in recent years. Thus, there is a significant gap between the reformist discourse of governments and their efforts to move toward less repressive responses, with a focus on public health, human rights and human development. Such efforts have been erratic with only a few exceptions. In some countries, such as Ecuador, these efforts have even been rolled back.

In the majority of countries in the region, the percentage increase in the population incarcerated for drug offenses has been much higher than that of the population imprisoned for other offenses, and the data shows that these trends continue to accelerate. In addition, in several of the countries studied, incarceration for these offenses is the main factor explaining growth in the prison population.

Incarceration rates in Latin America are above the global average. The information presented in this report details key factors that explain this situation: disproportionately tough sanctions, the use of mandatory minimum sentences, the obligatory use of pretrial detention for these offenses or its overuse, and the lack of use of alternatives to incarceration, among others. Although Latin America is one of the most violent regions in the world, increased reliance on incarceration does not appear to adequately address this situation, given that the weight of the criminal justice system mainly falls on minor offenders who are frequently arrested in

flagrante. In the case of drug offenses, the CEDD studies show that drug users are often arrested, extorted and even incarcerated as small-scale or retail dealers for possessing quantities of drugs that are above what may be considered tolerated levels for personal use. This shows that the discourse on protecting the health of users exists only on paper while, in practice, drug policies continue to approach the problem of illicit drug use from a criminal law perspective.

The excessive penalization of drug-related offenses has not had a significant impact on reducing the production, trafficking or use of the drugs deemed illicit. On the contrary, the people who are sent to prison tend to be minor players in the drug trade, easily replaced and associated with subsistence economies or other conditions of vulnerability. Nor has it contributed to improving public or individual health. Overcrowding, scarce resources and extreme conditions of violence plague prisons in Latin America. The lack of hygiene, of drinking water, basic essentials and sufficient space contribute to a high prevalence of contagious diseases that endanger the health of inmates, their relatives and detention center employees. The use of prisons to address the drug issue undermines health, rather than protecting it. Reducing the use (or abuse) of this criminal justice tool would help to improve prison conditions by freeing up existing resources.

Incarceration and the stigmatization associated with it affects the people who are detained for drug offenses and their families in different ways, depending on criteria such as their gender, sexual identity, ethnicity and socioeconomic situation. Prison has different

and disproportionate impacts on women, for example. Although the total number of women in prison is still much lower than that of men, the incarceration of women for drug offenses is rising at an alarming rate. They generally occupy the lowest rungs in the drug business ladder. The vast majority of these women have low levels of education and live in conditions of poverty; many of them are single mothers. The incarceration of women who are mothers and caretakers in particular can have devastating consequences for their families. In addition, the discrimination that people from traditionally marginalized population groups suffer outside of prison is often replicated and worsened on the inside.

Foreign women, who are often incarcerated for acting as human couriers that transport drugs for another person or for a criminal network, face a particularly grave situation given difficulties with language differences, with maintaining contact with their families, and accessing an effective criminal defense. In the countries that allow repatriation to their places of origin, the process tends to be slow and cumbersome.

Young people and adolescents involved in drug use and trafficking are processed in a different criminal justice system, yet these systems tend to have similar characteristics – and problems – as the adult system. One problem is that neither adolescents nor young people tend to belong to the leadership ranks in drug trafficking mafias, but instead form part of the weakest and most replaceable links in the trade. However, despite their small scale participation, they are among the groups that most suffer the effects of the punitive impact of drug policies. The absence of

drug use prevention strategies is combined with the government's failure to provide treatment and rehabilitation services for problematic drug use faced by those young people and adolescents who must engage in criminal conduct to obtain drugs.

In conclusion, in all of the countries studied, the CEDD research shows that a large number of people incarcerated for minor and non-violent drug offenses should not be deprived of their liberty. Prison should be used as a measure of last resort; however, it is now the main tool for controlling drugs in the Americas.

The use of criminal law and prison in the framework of drug policy must be optimized and reduced. The substitution of the criminal justice response with a broader approach focused on human development and public health is absolutely necessary for allowing governments to move toward more humane and effective responses to drug-related behavior. More specifically, the effective decriminalization of the use of illicit substances is indispensable. This not only implies guaranteeing access to drugs that are deemed illegal today in order to reduce the harms that may be caused by problematic drug use or current policies, but also the decriminalization of possession for personal use. Given the harmful effects provoked by the use of criminal law and prisons, the effective decriminalization of use and users is the most ethical option. In addition, it would help resolve the crisis of overcrowding and associated problems faced by prison systems in the Americas.

This report, based on data acquired by CEDD researchers, points to the existing penitentiary crisis in Latin America and the adverse effects that current drug laws have had on national prison systems. The report also shows that the implementation of drug policies – and their negative effects – are not applied in an equal way in society, but instead hurt certain sectors that often already face situations of social vulnerability. Faced with this reality and taking into account the findings of the individual CEDD country studies, the following public policy recommendations are put forward with the objective of achieving more just drug policies that are respectful of fundamental rights and focus on protecting public health in societies across the Americas.



Matías Torres. Photographer, Communications Unit of the Chilean Gendarmerie.

Recommendations

Legal Reforms:

- Ensure that the criminal justice response is proportional to the harm caused; reform drug laws to distinguish between low-, medium- and high-level offenses, between degrees of leadership in criminal networks, and between violent and non-violent offenses.
- Eliminate mandatory minimum sentences, avoid pretrial detention in the case of minor drug offenses, and allow access to procedural benefits and opportunities for alternatives to incarceration.
- Consider granting special amnesties (pardons) to people convicted for minor, non-violent drug offenses, as well as to first-time offenders.
- Promote the establishment of legal and regulated cannabis markets, and explore options for regulated access to other substances that have been declared illicit.

Drug Use and the Law:

- Decriminalize drug use and put a stop to all prosecution of users, including with regard to possession, cultivation and purchasing. This means removing from criminal law all of the behaviors associated with consumption.
- Use thresholds to set minimum quantities of drugs, based on user practices, below which no one can be considered to be a dealer, while also not allowing people who possess amounts above these thresholds to be automatically punished for distribution and trafficking. In all cases, in order to sanction that behavior, the State must prove that the intent of the possession was to sell or distribute.
- Offer voluntary and free treatment services to people with problematic drug use, both when they commit other offenses and when they do not. This treatment should not be subject to the threat of a criminal sanction or compulsory rehabilitation. Treatment

must be based on scientific evidence, have a harm reduction approach, and be carried out by doctors – not judges.

Women and Incarceration:

- Reduce significantly women's incarceration levels, whether through the application of the principle of proportionality or by adopting alternatives to incarceration. This should include addressing the inappropriate use of pretrial detention and the execution of sentences.
- Do not incarcerate pregnant women or mothers of minors convicted for non-violent drug offenses. In the case of these women, the application of alternatives to incarceration must be considered.
- Ensure that judges have flexibility to take into account factors of vulnerability and whether the accused (male or female) has dependents, both during the criminal proceedings and when determining the sentence.

Young People and Adolescents:

- Implement comprehensive public policies aimed at young people and adolescents, and move away from the current stigmatization and criminalization of this population.
- Apply the benefits and alternative sentencing policies established for this age group in different countries.
- Comply with laws that establish juvenile justice systems for adolescents, which regulate the State response for offenses

committed by people under 18, and which stipulate that the deprivation of liberty of adolescents should be an exception and that the best sanctions are those that do not entail confinement (such as supervised release or doing community service), in addition to the various resources that the laws establish to be able to resolve cases outside the court system through restorative justice. In addition, the maximum sentences for crimes committed by minors should be reduced so they do not exceed what is established in international instruments.

- Provide sufficient resources to the juvenile justice systems for adolescents, so they can operate in a specialized, fair and efficient manner, in accordance with what is established by the Convention on the Rights of the Child and other relevant international standards.

Alternatives to Incarceration:

- Carry out the reforms needed to implement alternatives to incarceration with strict respect for the rights of the people engaged in drug-related behavior, based on an adequate assessment of which measures would allow for optimizing the available resources in each country to reduce prison overcrowding and recidivism in the commission of offenses.
- Ensure, insofar as possible, the diversion of cases before they enter the criminal justice system, which can allow for a better use of government resources and better opportunities for the well-being and employment of people in these situations.

- Promote the reforms needed to allow those who have committed minor, non-violent drug offenses to be sent, instead of to prison, to a public support network aimed at providing services to prevent recidivism and address the socioeconomic factors that led the individual to commit the crime.

Design and Evaluation of Drug Policy:

- Guarantee and broaden participation in the design, implementation and evaluation of drug policies by civil society actors and especially by drug users, people who are incarcerated, women, the LGBTI community, indigenous, Afro-descendant and other sectors of the population who are in situations of vulnerability and have been disproportionately affected by drug policies.
- Carry out a serious assessment in each country to understand and be able to analyze the impact and effectiveness of current drug policies. This should have the aim of developing and implementing more effective, humane and just policies.
- Improve and expand systems for collecting, systematizing and evaluating criminal justice data and ensure that government officials and the public have timely access to this information. This will allow for the effective evaluation of drug policies and the impacts of those policies, and will lead to better policy making through correct diagnoses about the public policy problem that is to be addressed.

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About CEDD

The Research Consortium on Drugs and the Law (Colectivo de Estudios Drogas y Derecho, CEDD) brings together researchers —most of them lawyers— from nine Latin American countries: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Peru and Uruguay. Launched as an initiative of WOLA and TNI, CEDD's main objective is to analyze the impact of criminal law and legal practice related to drugs, seeking to provide information on the characteristics and social and economic costs of drug policies in Latin America and thereby foster an informed debate about the effectiveness of current policies and recommend alternative approaches that are fairer and more effective.

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