

HIGH-LEVEL DIALOGUE – WORKING GROUP ON ALTERNATIVES TO INCARCERATION

Cartagena, Colombia, 20-21 October, 2014



UNODC
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Introduction

The Working Group on Alternatives to Incarceration was proposed by the Colombian government within the framework of CICAD 54, held in December 2013 in Bogotá, Colombia, and subsequently approved at CICAD 55 in Washington, DC in April, 2014.

Through this initiative, the government of Colombia, as Chair of the Inter-American Drug Abuse Control Committee, in collaboration with the CICAD Executive Secretariat in the Secretariat for Multidimensional Security at the Organization of American States (OAS), convened a group of experts who were charged with preparing a technical report on existing and possible alternatives to incarceration for drug-related offenses. These alternatives must be in accordance with international drug conventions, and take into account the patterns of drug use in each country, their regulatory frameworks, and the contents of the Hemispheric Drug Strategy and Action Plan 2011-2015. A first draft of the Technical Report on Alternatives to Incarceration for Drug-Related Offenses was presented at this dialogue and further progress was reported at CICAD 56. The final report will be presented at CICAD 57.

The High-level Dialogue, held in Cartagena, Colombia, on the 20th and 21st of October, 2014, provided space for member states to discuss a variety of alternatives from countries around the world, and the opportunities and challenges they represent for member states looking to adapt and implement such policies or programs.

This activity took place under the framework of the Working Group on Alternatives to Incarceration lead by the government of Colombia, through the Ministry of Justice, as President of the Inter-American Drug Abuse Control Commission (CICAD), Secretariat for Multidimensional Security, Organization of American States (OAS). This workshop received financial support from the government of Colombia, the Spanish Agency for International Development Cooperation (AECID), and the government of the United States of America (through the Closing the Gap initiative being implemented by CICAD). The objective of this event was to encourage a high-level dialogue between OAS Member States on alternatives to incarceration for drug-related offenses. The work of the Technical Support Group, as well as the experts invited to present different policy options, key elements, and challenges, functioned as a starting point and technical basis for discussion.

This document is intended to serve as a synthesis of the presentations and discussions held during the workshop. It is organized in the same manner as the event itself, beginning with an overview of the issue, its importance to the region, and the work of the Technical Support Group to date, followed by a

series of presentations on existing alternatives, a subsequent series of presentations on the challenges that arise and considerations that must be made when implementing alternatives to incarceration, and finally, the closing remarks.

- **Section 1: Description of the problem.** This section introduces the background of the High-level Dialogue, its relevance to the hemisphere, and the progress that has been made in this area through CICAD.
- **Section 2: Common trends in criminal legislation related to drugs, consequences of the criminalization of drug-related offenses, and existing and possible options for alternatives to incarceration.** This section presents the findings and analysis of the Technical Support Group and explains the conceptual framework and methodology that underpin the report.
- **Section 3: Public policy options with regard to alternatives to incarceration.** This section presents a wide range of policy options that provide responses other than the deprivation of liberty to those who commit drug-related offenses. A public health perspective and the protection of human rights are characteristics of all of these alternatives.
- **Section 4: Key elements and challenges of the strategies and mechanisms for implementing alternatives to incarceration and their applicability in the context of Latin America and the Caribbean.** This section provides some insight into the legal differentiation of conduct and substances with the aim of providing more specific and appropriate responses to drug-related offenses, improving the applicability of existing alternatives to incarceration, ensuring that these comprehensively respond to the distinct contexts and characteristics of target populations, as well as addressing the different phenomena the countries in the hemisphere wish to address.
- **Section 5: Closing.** This section details the closing remarks of the meeting

Each section includes a brief summary of the presentations and experiences shared during the workshop. These are followed by a summary of the questions and comments regarding the experiences discussed.

Section 1: Description of the problem

The speakers described the political context in which the initiative to promote alternatives to incarceration in the hemisphere is occurring, and affirmed the necessity of debate and exploration of this topic. The speakers pointed to the dangers of the over-use of incarceration to sanction drug-related offenses, as this can prove detrimental to human rights, pose public health risks, lead to security problems inside penitentiary facilities, and ultimately place unsustainable burdens on the criminal justice and penitentiary systems. Additionally, it was stressed that this debate concerns measures that are compatible with states' international obligations as defined in the United Nations Conventions concerning drug control.

As the host country, Colombia outlined its support for the initiative and reaffirmed its relevance. Indeed, almost a quarter of the prison population in Colombia has been incarcerated for committing a drug-related offense. Considering that 60% of the justice sector's budget goes to maintaining the

country's penitentiary system, targeting penal sanctions where they are most effective, instead of using them across the board, could significantly reduce this burden on the state, while maintaining public security. Looking towards UNGASS 2016, Colombia is seeking to provide evidence-based inputs targeting the strongest actors in the drug trade. The Technical Report on Alternatives to Incarceration is part of this effort and to constructing a hemispheric vision for this issue. Furthermore, and particular to the Colombian context, it contributes to the peace process, in which the issue of illegal drugs is taken very seriously.

After the opening remarks, the first presentation detailed the origins and development of this initiative within the framework of the OAS and how it fit into CICAD's work supporting its Hemispheric Drug Strategy. It was in the Hemispheric Drug Strategy released in 2010 where CICAD first made explicit the need to explore measures offering treatment and social reintegration as alternatives to incarceration for drug-related offenses.

During CICAD 54 in December 2013, the focus on alternatives to incarceration for drug-related offenses was widened with the Colombian Government's proposal of a Working Group on Alternatives to Incarceration to further explore existing policy options from around the world. The CICAD Executive Secretariat also formalized its work on broadening alternatives to incarceration through its Closing the Gap program, which also started in 2014. At CICAD 55 in May 2014, the Working Group on Alternatives to Incarceration was formed, and a Technical Support Group of experts from the hemisphere was established to produce a report exploring existing alternatives to incarceration and the opportunities and challenges they present to member states. It was this process that led to the High-level Dialogue in Cartagena.

Among these challenges were the divergence between abstract proportionality (as defined by the law) and concrete proportionality (how the law is applied), the concentration of incarceration among poor, young men with low levels of education, and women, the excessive use of pre-trial detention, the absence of existing monitoring and evaluation programs, and the lack of a definition of effectiveness. The presenter also referenced the "cautious circle," by which politicians want alternatives, but are wary of being "soft on crime," reducing the chances for meaningful progress in this area.

This said, the urgency of the economic and social pressures created and exacerbated by the over-use of incarceration means that responses are being seriously considered. It is a cause for optimism that there exists such a wide range of options that can be adapted to meet local needs. Moreover, the growing consensus and willingness to cooperate between different sectors and actors – judges, prosecutors, public health professionals, law enforcement, civil society, and politicians – bodes well for the creation of effective policies and programs.

Section 2: Common trends in criminal legislation related to drugs, consequences of the criminalization of drug-related offenses, and existing and possible options for alternatives

The next presentation outlined the findings and analysis of the Technical Support Group and updated the participants on the first draft of the Technical Report on Alternatives to Incarceration for Drug-Related Offenses and described its methodological and conceptual foundations.

The starting point of the study was that criminal legislation in Latin America and the Caribbean concerning drugs can be characterized by: 1) policies that are predominantly repressive, with countries predominantly using incarceration over other approaches; 2) the increasing use of criminal law, especially to deal with drug-related activities; 3) the expansion of the number of drug-related activities that are criminal offenses; and d) disproportionality, as offenses with differing degrees of seriousness are punished in the same way.

The excessive use of incarceration has created drug policies that: 1) have been ineffective in adequately addressing the problem of consumption; 2) are not required by the UN Conventions on psychoactive substances; 3) have saddled the judicial and penitentiary systems with enormous costs; 4) have created serious human rights issues due to the overcrowding of prisons and over-use of pretrial detention; 5) have tended to target the weakest links of the drug chain, who in turn tend to be members of vulnerable groups such as low-income women and youths with low levels of education.

For these reasons, a framework of alternatives to incarceration which are consistent with the UN Conventions is necessary. By making criminal law proportional and using incarceration as a last resort, it is possible to reduce prison populations and make more effective use of state resources, focusing them on proven approaches to tackling organized crime.

The Working Group clarified its use of some key terms in the report. Alternatives to incarceration are understood as political, legislative, administrative, or judicial measures intended to reduce criminal prosecution, limit incarceration in the event of prosecution, or decrease the time of actual deprivation of liberty in the event of incarceration. These alternatives were researched using secondary sources, and were chosen for being innovative, being put into operation in one or several countries, showing promise in reducing incarceration without adversely affecting public security or efforts to counter drug abuse, and having enough documentation to allow for research. Secondly, while “drug-related offenses” includes both specific infractions of drug laws and crimes committed as a result of a substance use disorder or the problematic use of psychoactive substances, the study focuses on a specific set of offenses. These are: 1) use and possession for use; 2) small-scale growing and producing, especially when peasant farmers or indigenous people are involved; 3) non-violent, small-scale transportation, distribution, and dealing; and 4) crimes committed under the influence of illicit drugs or committed to support a substance use disorder. Finally, the target population of the alternatives to incarceration was adults, as policies and programs related to minors raise many complexities which go beyond the limits of the study.

The systematization of the alternatives included 41 experiences from Europe, the Americas, Africa, and Oceania. Each was classified according to the stage when the alternative is put into effect and its principal beneficiaries. Alternatives can also be grouped by their level of implementation (national or sub-national) or the mechanisms through which such measures are adopted (policies becoming part of the legal and regulatory framework of a country, as opposed to special measures adopted for a specific period of time to deal with a narrowly defined problem).

After going through each alternative, the Working Group identified five strategic approaches underpinning the various alternatives to incarceration:

- Decriminalization. This consists of removing an activity from the sphere of criminal law, meaning the activity no longer constitutes a criminal offense. Importantly, it continues to be prohibited, and non-criminal sanctions may apply.
- Proportionality. This entails changing existing punishments in order to achieve an effective and fair correlation between the seriousness of the conduct committed and the severity of the punishment.
- Diversion from the judicial system. This means not initiating criminal proceedings against an offender and can be carried out through prosecutorial discretion or police-initiated diversion.
- Non-custodial measures. These consist of measures allowing individuals to exit the penitentiary system after being sentenced and incarcerated and before their original sentence ends.
- Differentiation. This involves changing laws and policies in order to clearly distinguish between different types of conduct, substance, and use. This includes establishing different degrees of criminal liability in the drug supply chain.

Section 3: Public policy options with regard to alternatives to incarceration

The first panel took place in the afternoon of October 20th. Six panelists presented on examples of the implementation of alternatives to incarceration for drug-related offenses in their respective countries.

Smart on Crime, Smart on Drugs

This presentation outlined the United States government's priorities with regard to drug use and initiatives to break the cycle of drug use and crime. The United States' record of reform reflects their approach to drug use as a public health issue, not just a criminal justice problem. As such, the country cannot arrest its way out of the drug problem. They aim to improve fairness and confidence in the criminal justice system, help formerly incarcerated individuals successfully reenter society, and support evidence-based alternatives to incarceration. This includes having options at every point in the justice system to move people out, depending on the circumstances of their case.

The high costs of managing a large population of justice involved individuals, coupled with the costs of high rates of recidivism, precipitated a shift in the United States government's approach to drug policy. The National Drug Control Strategy and the Department of Justice's *Smart on Crime* initiative recognize that the criminal justice system should try approaches other than incarceration for qualifying non-violent offenders and supports efforts within the criminal justice system to address the offender's criminal activity *and* underlying substance use disorder. Those who need treatment for substance use disorders should get it, whatever their involvement with the justice system. Individuals not eligible for drug court or community supervision should be provided appropriate treatment and other supportive services.

The *Smart on Crime* report, issued by Attorney General Eric Holder in August 2013, reflects the need to bring public health and public safety together to reduce drug use and its negative consequences and improve fairness in drug sentencing. Sentencing decisions should also reflect the specific circumstances of the case. One key strategy to achieving the initiative's aims is justice reinvestment – using data-driven approaches to criminal justice to help jurisdictions develop policies and practices, such as evidence-based risk and assessment tools, sentencing reform, and supervision practices that reduce recidivism rates.

Getting arrested or being incarcerated is not evidence-based treatment. Bringing public health resources and practices to bear in the justice system will contribute to real progress in dealing with the drug problem. The Obama administration supports current strategies, such as Drug Courts, swift and certain sanctions (for probation/parole), the Justice Reinvestment Initiative, the Smart on Crime Initiative, and ONDCP's ARK project, and currently provides numerous grants supporting alternatives to incarceration for non-violent offenders, such as grants from the Bureau of Justice Assistance. They are increasingly focused on interventions that help people avoid or expunge criminal records.

In addition to its focus on the federal government's response to the drug problem in the United States, the White House Office of National Drug Control Policy supports training and technical assistance to help states, counties, and cities create a full spectrum of evidence-based and appropriate alternatives. Though the United States government will continue to address drug production, trafficking, and transnational organized crime around the globe, it recognizes that new, innovative approaches to address drug crimes may be appropriate under particular circumstances. Moreover, the UN Conventions offer considerable flexibility for signatories to adapt appropriate means to fulfil their responsibilities while promoting public health and reducing the consequences related to drug use.

Rationalizing anti-drug penalties in Ecuador

This presentation outlined two contrasting strategies Ecuador has used to reduce the levels of incarceration of drug-related offenders – extraordinary political measures and reform of the legal code. The presenter described the Ecuadorian government's actions and the results of each strategy.

Ecuador's previous drug laws had a number of inconsistencies. Despite the criminalization of consumption being constitutionally prohibited, the law criminalized all types of possession. The penalties for drug-related offenses were also disproportionate, with some drug-related offenses being punished more severely than homicides. Furthermore, penalties did not distinguish between substances or the level of responsibility of the offender in the drug-trafficking chain. The enforcement of drug control laws also saw the vast majority (84%) of criminal trials for drug-related offenses make use of pre-trial detention.

In 2008, Ecuador granted pardons to low-level drug couriers, known as "mules," which allowed 2,232 incarcerated individuals to exit the prison system. This extraordinary political measure had the immediate effect of alleviating overcrowding in some prisons. However, the pardons did not precipitate changes to legislation or practice concerning drug-related offenses. In the years following the issue of the pardons, there was a significant increase in the incarcerated population of Ecuador, about a third of

which is incarcerated for drug-related offenses, meaning that rates of prison overcrowding were higher in 2014 than they were in 2008.

In contrast to the pardons, Ecuador made important changes to its drug control legislation in its *Código Orgánico Integral Penal* (approved in February 2014), including distinguishing between the levels of responsibility of different actors in the drug-trafficking chain, making a correlation between the type and quantity of a substance and the punishment, introducing more coherency between criminal law and the constitution, the range of criminal offenses considered trafficking, and modifying the lengths of sentence with a view toward making them more consistent with the gravity of the offense. For example, before the reforms, the possession of any quantity of illicit drugs was punishable by 12 to 16 years in prison, whereas now, possession of small quantities of illicit drugs can be punished by two to six months. These reforms were also applied to people already serving sentences, meaning many individuals incarcerated for drug-related offenses were able to exit the penitentiary system.

Decriminalization in Portugal

In Portugal, the problem of drug consumption was commonly perceived as an important issue to be addressed. While the total numbers of people using illicit drugs, particularly heroin, was lower than other countries in Europe, there was a high percentage of “problem users” and high rates of HIV for this population. In response, the Portuguese government created a group of experts to make public policy recommendations on how best to deal with the problem at hand. Their recommendations were based on the idea that the substances were not problematic in themselves, but rather in the way they were consumed.

The government broadly adopted the recommendations made by the expert group. Decriminalization, the removal of a conduct or activity from the sphere of criminal law, was made law in 2000 and policy changes started to take effect in 2001. It is vital to note that drug possession and consumption remain illegal in Portugal; however, certain offenses took on an administrative, not criminal, character. Furthermore, Portugal’s actions should not be classified as depenalization – a strategy which generally entails the removal of custodial sentences, while maintaining the criminal character of drug-related offenses.

Following the changes, there was not rampant increase in drug use. The key mechanisms in this new strategy were “deeming quantities” set by the government to differentiate between personal use and trafficking, and the operation of newly established Commissions for the Dissuasion of Drug Addiction. Thresholds for personal use of various substances were established based on what medical experts determined as the quantity necessary for ten days of personal use for one person. For example, the maximum amount of marijuana deemed for personal use is 25 grams, whereas the maximum amount for cocaine is two grams. If police arrest someone in possession of an amount lower than the threshold, they are referred to the other key mechanism, a Commission for the Dissuasion of Drug Addiction (CDT in Portuguese).

CDTs are comprised of three professionals, one with a legal background, appointed by the Ministry of Justice, and two with medical or social services backgrounds, appointed jointly by the Ministry of Health

and the government's coordinator for drug policy. These officials have a broad range of administrative sanctions at their disposal to address the individual's specific patterns of drug use. This discretion has proved very beneficial, as it allows for a more efficient use of government resources by connecting people with services to address their drug use or providing the necessary disincentives for individuals who may not need further treatment.

While CDTs may contribute to a more efficient allocation of government resources, the presenter did stress that this does not necessarily mean net savings for the state. CDTs require investment and social services must be adequately developed and financed if they are to be effective alternatives to the criminal justice system. In Portugal, the results of this investment appear to have been worthwhile; treatment programs have improved and more addicts are willing to use them, the percentage of drug users among newly infected HIV-positive individuals has declined, and drug-related mortality rates have decreased.

The UK Experience

This presentation outlined the diversion strategies used in the United Kingdom for drug-related offending and drug-related offenses, as well as new sentencing guidelines aimed at reducing sentences for drug mules.

The United Kingdom's current drug strategy can be summarized by the tagline: "reducing demand, restricting supply, building recovery." Since 1998, the UK has sought to divert drug users from prison and into treatment. Diversion for drug-related offending, offenses committed to support a drug habit or committed under the influence of drugs, makes treatment available at the main points of contact with the criminal justice system. Social workers in police stations and courts identify offenders with drug problems and offer treatment. Individuals undertaking voluntary drug treatment in the community while awaiting trial have the possibility of avoiding prison if a judge deems it appropriate. The rationale behind this strategy is that drug treatment has positive outcomes for health, reduces recidivism, and is generally more cost efficient than incarceration.

Diversion for drug-related offenses, i.e. specific infractions of drug control legislation, is mainly achieved through alternatives to incarceration, such as warnings or fines at the arrest and prosecution stages. Imprisonment is reserved for more serious offenses, such as the production and importation of "Class A" drugs cocaine, heroin, and ecstasy. Indeed, in 2013, only ten percent of all disposals for drug offenses in England and Wales ended in imprisonment.

Though the importation of drugs is a serious offense, the UK has established sentencing guidelines for drug mules that take mitigating or aggravating circumstances into account for individuals transporting drugs across an international border. These drug mules were judged to have undertaken minor and specific roles in drug trafficking, making long prison sentences disproportionate. The government also saw this strategy as a way to reduce the costs incurred by incarcerating low-level offenders for long periods of time. Judges use the sentencing guidelines to distinguish between three levels of responsibility: a leading role, significant role, and lesser role (these are drug mules). The weights of the drugs transported by the offender are also used to determine what range of prison time is appropriate.

for the offender. The sentencing guidelines are not mandatory minimums. Drug quantities are indicative only, and judges can and do depart from the guidelines if the circumstances of an individual case mean that the use of such discretion is appropriate. While the sentencing guidelines have provoked some debate, particularly with regard to setting threshold weights for the range of sentences, they have made sanctions for minor offenses more proportionate and generally achieved their aim of reducing punishment for minor offenders.

The Costa Rican Experience

Costa Rica currently offers alternatives to incarceration after the individual has entered the criminal justice system and after the individual has entered the penitentiary system. Though consumption is not penalized, trafficking, even in very small quantities, is heavily punished. Generally, the beneficiaries of these types of programs in Costa Rica are first-time offenders who have received sentences of three to five years.

The Costa Rican government wanted to address a problem of overcrowded prisons and decided to evaluate their previous sentencing practices. In their view, sanctions for drug-related offenses should be seen as a negative outcome, but are necessary to avoid worse outcomes. This is due to the state's responsibility to protect the rights of the community in general, as well as the offender.

With the help of the Inter-American Drug Abuse Control Commission (CICAD), Costa Rica has created drug treatment courts in two locations as a pilot program named Drug Treatment Program under Judicial Supervision. The five-phase treatment plan, which takes 20 months, offers an alternative to incarceration for individuals arrested for crimes motivated by addiction. One of the interesting elements of Costa Rica's experience, particularly in the case of the Drug Treatment Program under Judicial Supervision, is the role of the judiciary as a public policy actor. The judiciary, along with the Costa Rican Institute on Drugs (Executive Branch), the Institute on Alcoholism and Drug Dependency (Ministry of Health), and CICAD (international organization), coordinated to create the program, sharing good practices, training government officials, and ensuring human rights standards were respected.

For individuals who have already been incarcerated, Costa Rican law includes a number of available alternatives. These include traditional work release and probation programs, and a new law which allows the judges in charge of executing sentences to work from prisons. This law makes it easier for sentences to be modified and for petitions from inmates to be addressed.

One such modification is the application of Article 77 of Costa Rica's anti-drug legislation. This provides the opportunity for women who have been incarcerated for introducing drugs into prisons to serve reduced sentences if they meet certain conditions. Before the creation of this provision in 2013, the mandatory minimum sentence for this offense was eight years in prison. Now, if a woman is in a position of poverty, is head of household in a vulnerable condition, has dependents (minors, seniors, or persons with disabilities), or is in another type of vulnerable position, she may receive a reduced sentence of between three and eight years in prison. This law is useful to examine because it recognizes that women who introduce drugs into prisons may be doing so under a variety of social and economic pressures. Extended periods of incarceration might cause other types of harm to her dependents,

potentially increasing the costs of social services assumed by the state, while arresting individual, low-level traffickers does not necessarily solve the problem of smuggling drugs into prisons.

Drug Treatment Courts in the Americas

Drug Treatment Courts (DTCs) provide treatment to drug-dependent offenders under the supervision of a judge. Their implementation differs between jurisdictions and countries, but this basic idea is fundamental to all of them. Some of the expected results of implementing DTCs include reducing crime, reducing relapse into drug use, reducing the prison population, more efficient use of resources, and the social re-integration of the individual. Participants in a DTC benefit from the suspension of criminal charges or prison sentences during the time of their treatment. Upon successful completion of the treatment program, they are free to continue with their lives. In most cases, DTCs work with individuals who have committed drug-related offenses, as well as individuals who have committed other offenses motivated by addiction. The focus however, is always on drug addiction.

The Organization of American States, through CICAD, has worked extensively to support countries interested in developing the DTC model in the Western Hemisphere. Before launching the Drug Treatment Court Program for the Americas, there were only four OAS member states with DTCs in operation. Currently, 11 member states have some form of DTC in place. CICAD supports these efforts through training programs for officials, development of action plans, publication of manuals, and support for monitoring and evaluation. CICAD training brings together different actors from a variety of ministries, as well as treatment providers, and promotes inter-agency co-operation through the framework of the DTC and its steering group.

Two ATI models: HOPE probation and Back on Track

This presentation described two types of post-conviction alternatives to incarceration that rely on judicial supervision. Both of these programs rely on swift, certain, and fair justice system responses to drug-related offenses. Both programs are the product of local initiatives in the United States, but have become models for other programs in the due to their success and comprehensive design.

The Honest Opportunity Probation with Enforcement (HOPE) program was launched in Hawaii in 2004. Its target population is probationers who are at high risk for re-offending, have shown repeated non-compliance, or have drug/alcohol problems as a top criminogenic need. The goals of the programs are to reduce recidivism and probation violations. Underlying this program is the theory that the swiftness and certainty of justice responses is more important than their severity. Probationers start the program with a warning hearing, during which the judge outlines the conditions of the program and the consequences for violations.

The judge plays a crucial role in this program, emphasizing the desire of all involved to see the participant succeed, but also emphasizing that violations will be swiftly met with consequences. Each participant must call the probation office every morning to find out whether they have been randomly selected for a drug test that day. Each missed appointment or failed drug test will be brought before the judge within 72 hours and each positive drug test or missed appointment will be met with a sanction of

a short spell in jail. Drug treatment is available at any time upon the request of the participant or required if the participant continually tests positive for drugs. The key difference from other models is that this program reserves treatment for those who demonstrate a need or make a request, rather than imposing treatment without enough evidence that it will be effective. HOPE probation has been subjected to many rigorous evaluations and has demonstrated excellent results, making it a model that other jurisdictions in the United States have been eager to explore.

Whereas HOPE probation focuses on consumers, Back on Track focuses on micro-traffickers. It was launched in San Francisco in 2005 and is aimed at young adults charged with possession with intent to sell, and who display no prior convictions, and no history of violence. Its goal is to reduce recidivism among micro-traffickers. Participants are referred by prosecutors, and undertake an orientation phase of 6 weeks of assessment and educational activities, complemented by 30 hours of community service. To enroll, participants must plead guilty to charges and their sentences are deferred. For the next 12 to 18 months, the participant is expected to demonstrate concrete achievements in employment, education, child support, and a total of 220 hours of community service.

A partnership between the San Francisco Collaborative Courts and an NGO, Goodwill Industries, is critical to the success of this program. The San Francisco Collaborative Courts provide ongoing monitoring of the participant by the judge, while Goodwill Industries provides job training and other services to participants. Upon successful completion of the program, the participant's guilty plea is withdrawn, their case dismissed, and their record expunged. By allowing participants to gain skills and exit the justice system, Back on Track represents a model in restorative justice and social re-integration. It has also demonstrated excellent results in that there is only a rate of 10% recidivism among graduates, and costs are \$5,000 per participant, compared to \$10,000 to adjudicate a case and nearly \$50,000 per year to incarcerate a low-level offender.

Conceptual highlights: Day 1

- The high cost of incarceration coupled with the pressing need to use government resources effectively
- The five strategic approaches identified by the Working Group: decriminalization, proportionality, diversion from judicial system, non-custodial measures, differentiation
- The necessity of cooperation between different agencies and actors within the government and with civil society
- The benefits of appropriately applying discretion when dealing with drug-related offenses
- The importance of evidence-based solutions to the drug problem

Section 4: Key elements and challenges of the strategies and mechanisms for implementing alternatives to incarceration and their applicability in the context of Latin America and the Caribbean

This panel took place during the morning and early afternoon of October 21st. The discussion focused on key elements in the implementation of alternatives to incarceration.

Strategic and analytical approach to criminal investigation in Colombia: the Office of the Public Prosecutor's proposal to confront organized crime

From the point of view of the Colombian Office of the Public Prosecutor, the increasingly expansive and undifferentiated punishment of offenders in the drug supply chain distracts from its focus on investigating organized crime. This occurs for two reasons. Firstly, resources are concentrated on easy, lower level cases which usually concern consumers in possession of smaller quantities of drugs for personal use and micro-traffickers, who are often captured *in flagrante*. Secondly, when evaluating results, public prosecutors do not differentiate between lower and higher level cases. In other words, sentencing a consumer or a *capo* carries exactly the same weight in a performance evaluation. In practice, this means that there is an incentive to focus on lower level cases, which allow prosecutors to fulfill performance indicators with less investment. Even though more cases of prosecutions for larger-scale trafficking are reported, in reality, these are frequently easy cases.

Prosecutors do have some room to maneuver, however, and have the ability to take initiative in the face of existing trends in criminal investigations. This said, examples of this behavior were limited to personal efforts by local prosecutors in Colombia acting discretely. Then, in 2012, the Office of the Public Prosecutor instituted a new policy to modify how drug offenses were investigated, with the aim of addressing criminality in a smarter and more effective manner. Change took the form of a policy of prioritization which precipitated two principal changes. Firstly, the management of cases being investigated has changed. Prosecutors can now focus cases where they will have the most impact according to various prioritization criteria. The units within the office were encouraged to pursue strategic objectives. New units were created, including a Public Policy Unit. This promoted strategic thinking by providing feedback through continuous monitoring and evaluation, and focusing on indicators that better measured the impact of prosecutors' efforts. Secondly, the new policy of prioritization has focused on investigating offenses not as isolated cases, but as products of criminal structures. This allows prosecutors to start establishing patterns and networks from the beginning of an investigation and focus on prosecuting individuals and activity higher up the chain of command.

Some challenges remain after implementing this new policy. Firstly, there is still a lack of empirical data for local offices to adequately engage in planning exercises. Secondly, analytical capacities must be improved in order to better distinguish between which cases involve organized crime and which do not. Thirdly, there must be better co-ordination between the Office of the Public Prosecutor's objectives and those of other entities, especially the police. Finally, the objectives of the Office of the Public Prosecutor's policy must be articulated in the framework of the strategic objectives of the state as a whole with regard to criminal law.

State responses to drug users in Latin America

The response of governments in Latin America to the consumption of illicit substances continues to be principally punitive in nature and is generally managed through criminal law, rather than public health, institutions.

A study by the Collective for Drug and Law Studies (CEDD in Spanish) found a number of trends in state responses to drug consumption. Though consumption itself is not a crime in many countries in the region, those activities necessary for consumption generally are (this mainly refers to possession). Not only are the frequency and severity of punishments increasing, but punishments remain undifferentiated. Moreover, justice systems continue to measure their success in addressing the drug problem using indicators that do not sufficiently differentiate between different types of drug consumption and offending. Treatment and rehabilitation services in countries throughout Latin America continue to be mainly provided through the private sector. Despite this, even when consumers do not have substance use disorders, they can be forced by the state to enter treatment. Because states still do not have the capacity to assume responsibility for the healthcare of consumers, therapeutic communities are overcrowded and do not apply evidence-based programs. Adopting a public health approach to drug consumption can be extremely difficult if users are being removed from the criminal justice system and being placed in a public health system that lacks the capacity to address their consumption. Whether it is entirely through public institutions, a strictly regulated private system, or a combination of both, public health systems need to be able to comprehensively treat problematic consumption. Without this, countries run the risk of moving people to a public health system that includes the same problems as the criminal justice system: the deprivation of liberty, provision of ineffective treatment, and preservation of the stigmatization and marginalization of drug users.

States should be consistent in their efforts to address drug consumption. If consumption is not a criminal offense, then possession for consumption should not be a criminal offense. This makes it necessary to examine deeming quantities and make sure they are based on accurate estimations of personal use and do not automatically trigger sanctions reserved for traffickers should the specific circumstances of the case indicate otherwise. Judges should be made to prove the intent for which drugs are possessed in all cases – something that does not currently happen.

The inconsistencies mentioned above illustrate that there is not yet a clear consensus on what it means to address the problem of drug consumption through a public health approach. Some think that it involves removing all aspects of treatment from the justice system, others think that there are therapeutic alternatives within the justice system, such as drug treatment courts, that can be an important tools within a public health approach.

Drugs, Alternatives, and Human Rights in Brazil

Brazil is changing from a country where drugs are produced to a country where drugs are produced and consumed. Like the rest of Latin America, it has witnessed increases in punishments for drug-related offenses and incarceration due to disproportionate sanctions. There is insufficient investment in prevention and public services, and a serious problem of overcrowding in prisons. Though alternatives

to incarceration are provided for in current Brazilian law, the judiciary's hesitance to make use of them has meant that the population of individuals incarcerated for drug-related offenses has continued to grow.

One such measure is Law 11.343, adopted in 2006. Incarceration for offenses of possession was replaced by alternative sentences such as community service, warnings about the effects of drugs, and participation in educational programs. The law also depenalized the cultivation of small quantities of drugs and focused on prevention, allowing the judge to offer the offender voluntary treatment. While the minimum sentences for trafficking were raised from three to five years, these could be reduced if it was a first-time offense and the offender was not a gang member. Alternative sentences could also be offered to those who committed non-violent offenses. One major problem with this legislation however, was that it did not define objective criteria for distinguishing between users and traffickers. The other problem was that alternatives to incarceration were not used by the judiciary. As a result of both of these problems, the number of individuals incarcerated for drug trafficking increased 111% from 2007 to 2012, while the increase in the number of individuals incarcerated for other common crimes was less than 28%.

This example illustrates why it is important to examine resistance to implementing alternatives to incarceration, even when they are available. There is a strong conservative strain in some justice systems, and governments as a whole, which reinforces traditional, punitive approaches to the drug problem. One factor is the perception that alternatives to incarceration will require the state to expend more of its scarce resources, despite evidence that many alternatives are actually more cost-effective. Another factor is that, in some cases, there are economic interests behind using incarceration as the primary solution to the drug problem. Finally, public opinion and the media exert a good deal of pressure to maintain *mano dura* policies to combat a problem which is mainly seen as purely criminal. The presenter stressed that, while it is an important barometer of potential success or failure, public opinion is not unchangeable and should not be the last word in criminal policy. Public policy in democracies must put human rights concerns before the opinion of a majority and should be based on scientific evidence and subjected to continuous monitoring and evaluation.

Despite these difficulties, there are opportunities to advance in the implementation of alternatives to incarceration for drug-related offenses. Firstly, debate on the subject is increasingly more open and there are a wide variety of national and international platforms for discussion, such as the OAS. Secondly, states are placing more importance on having available funds to invest in social and public health services. States recognize that these funds could be made available by not prioritizing incarceration, as it can be more expensive and inefficient than other types of investment. Finally, governments can look to a variety of other countries and jurisdictions who have successfully implemented alternatives to incarceration and use their experiences as models.

The Peruvian experience

Peru continues to be an important producer of illicit drugs. There is an extensive illegal economy based on the drug trade and the country has suffered from the high rates of incarceration of individuals

convicted for drug trafficking. Criminal law establishes sanctions for various acts, but punishments do not make a distinction between substances. Though there are various alternatives to incarceration available after entering the criminal justice system and after being incarcerated, these are not available to people convicted of trafficking, or to other drug-related offenders whose sentences exceed six years. Even though Peru's anti-drug strategy proposes a more flexible approach towards producers, oriented towards incorporating them into the licit economy, there are more restrictions than opportunities for implementing alternatives to incarceration for trafficking offenses. Public opinion in Peru is one limiting factor and indicators suggest that state responses to the drug problem should be accompanied by continuous outreach programs to illustrate the implications and advantages of alternatives to incarceration.

Peru's experience suggest that the obstacles to implementing alternatives to incarceration did not include the absence of necessary legislation, but rather, concerned the tendencies that governed the application of the law. This raises two questions. Is there a problem of insufficient incentives or disincentives for government officials to make use of the possibilities available within the law to offer alternatives to incarceration? Do public defenders need more training so that they are encouraged to solicit alternatives to incarceration for their clients? This type of question should be answered to determine what can be done to promote active use alternatives to incarceration in a legal system that allows them.

Conceptual highlights: Day 2

- Simply because alternatives to incarceration for drug-related offenders are possible or available, does not mean they will be implemented or used
- Continuous monitoring and evaluation is necessary for effective policy – not only to provide constant feedback on what works and what does not, but to better communicate the implications of new policies and programs
- Strategic thinking about what the state wants to accomplish in combating crime necessitates examination of whether or not its current policies help or hinder the achievement of the state's goals

Section 5: Closing

Closing remarks emphasized the need for the participating countries to exercise political leadership on the international stage in the field of alternatives to incarceration for drug-related offenses. In this regard, the Colombian government has played a key leadership role within the CICAD framework. The importance of monitoring and evaluation of public policy was also highlighted. Exchange and outreach between governments and publics will be crucial to further ensure the success of new policies and

programs. Most importantly, it was recognized that drug consumption must be addressed through a public health approach. Finally, accompanying all of these recommendations was the acknowledgement of the difficulties in implementing alternatives to incarceration and the need for coordinated strategies that began with the involvement of a variety of actors, including prosecutors, judges, public defenders, other government officials, and members of civil society.

The Colombian government reiterated its intention to continue to encourage the investigation and analysis of alternatives to incarceration for drug-related offenses in the Americas. It supported the resolution adopted at the OAS Special General Assembly in Antigua, Guatemala. Its willingness to do so stemmed from its conviction that only by addressing the reasons people commit crimes can it adequately address criminality. The state must begin its analysis of crime by examining its origins in the community. Criminal policy should be characterized by addressing the social causes of crime and diversifying the state's responses to crime's various manifestations. However, current anti-drug efforts have not fulfilled these characteristics. Instead of using criminal law to punish consumers and cultivators (who face economic pressures hindering them from adopting alternative livelihoods), it should be used to punish those who are seriously infringing on the rights of other members of the community. Reflexive use of the criminal justice system can create the impression that the issue is being addressed, when in reality, the root of the problem remains intact and the justice system remains overburdened. The criminal justice apparatus is better applied to criminal organizations, who exploit consumers and cultivators. It should be noted that any punitive response should be proportional and differentiated according to the role the individual plays in a given criminal organization. These efforts will be insufficient however, if the underlying conditions that create criminal activity are not comprehensively addressed. Dealing with them solely through the criminal justice system has diluted the government's efforts and has not served to dismantle these organizations.

Closing remarks also mentioned the possibility of undertaking a new study on the results of alternative responses to the drug problem that included information on the results of experiments with legalization and decriminalization in the Hemisphere. The venue for this discussion would be the 56th Regular Session of CICAD.



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