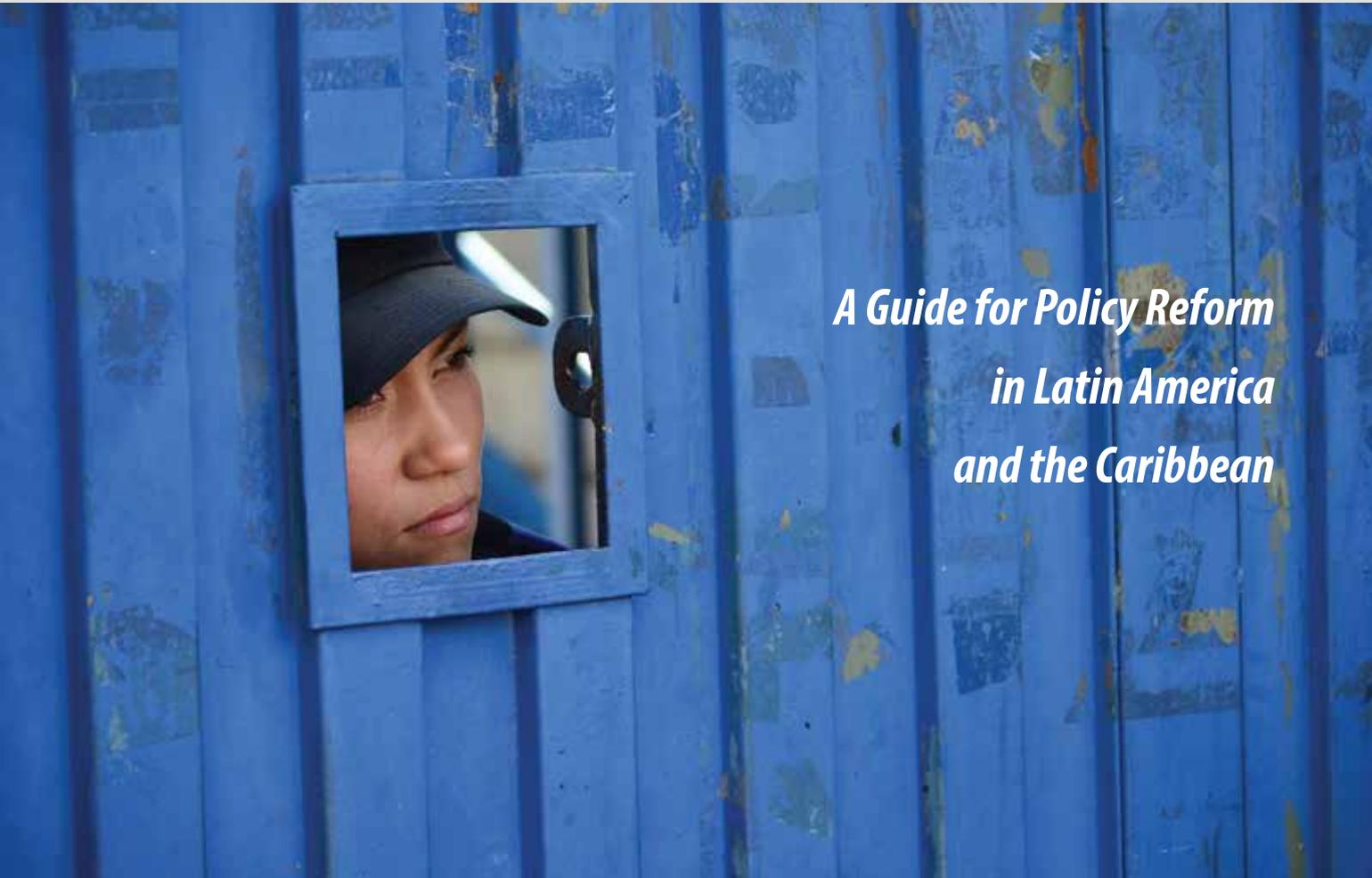


Women, Drug Policies, and Incarceration



*A Guide for Policy Reform
in Latin America
and the Caribbean*



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A Guide for Policy Reform in Latin America and the Caribbean

Table of Contents

Executive Summary	3
PART I	
The Situation of Incarcerated Women	5
Overview of the Guide	5
Audience	6
Contributors.....	6
Three Reference Documents	6
Women and the Drug Trade	8
PART II	
Proposed Recommendations	13
I. More Inclusive Drug Policies.....	15

II. Drug Policy Reforms.....	17
1. Decriminalizing Drug Use.....	17
2. Proportionality in Sentencing	18
3. Pardons, Amnesties, Commutation of Sentences, and Retroactive Reductions of Sentences.....	20
4. Human Couriers and Foreign Women	21
5. Pretrial Detention.....	22
III. Alternatives to Incarceration	24
1. General Recommendations	25
2. Problematic Drug Use and Committing Offenses Related to Use	26
3. Small-Scale Drug Dealing and Human Couriers.....	27
IV. Cultivation and Drug Processing.....	29
V. Social Inclusion Programs.....	31
1. A Holistic Approach	31
2. Social Integration Approach for Women Incarcerated for Drug Offenses	32
VI. Pregnant Women and Women with Dependents.....	35
VII. Data Collection and Analysis	38
1. Transparency in the Gathering and Availability of Data	38
2. New Approaches to Measuring Success.....	40
Conclusion.....	42
The Working Group on Women, Drug Policies, and Incarceration.....	43
Notes.....	45
About the Coordinating Organizations.....	47
Acknowledgments	48



Executive Summary

The use of prison as a response to drugs has had a disproportionately negative impact on women. In Argentina, Brazil, and Costa Rica, more than 60 percent of the female prison population is incarcerated for drug-related offenses. Many of them have low levels of education, live in poverty, and are the primary caregivers of dependent persons—children, young people, the elderly, and the disabled.

Even though they bear the brunt of punitive policies, these women rarely pose a threat to society. Most are arrested for low-level yet high-risk tasks (small-scale drug dealing or transporting drugs); they become involved as a result of poverty, or at times due to coercion by a partner or relative. Their incarceration contributes little if anything to dismantling illegal drug markets or improving public security. To the contrary, prison tends to worsen the situation, further limiting their chances of finding decent and legal employment when released from prison, thus perpetuating a vicious cycle of poverty, involvement in drug markets, and incarceration.

The incarceration of women—caregivers in particular—can have devastating consequences for their families and communities. In the absence of strong social protection networks, their dependents are exposed to situations of abandonment and marginality. Indeed, women’s incarceration may, paradoxically, increase the likelihood of persons in their care consuming drugs or becoming involved in illegal trafficking networks. This, in turn, increases the demand on governments to provide social services, an area that is often neglected.

It is time to acknowledge that current drug policies have resulted in the excessive criminalization and incarceration of women. These policies must be reviewed in order to reduce the female prison population. Drug policies should be developed based on the fundamental legal principle that incarceration should only be used as a last resort. Fundamental drug law reforms are needed throughout the region, so that low-level offenses committed by women or men can be addressed by alternatives to incarceration and by ensuring that the penalties are proportional to the offenses committed.

In addition, special attention should be given to the gender perspective in developing, implementing, and evaluating legislative and drug policy reforms. Criminal justice systems should be capable of taking extenuating circumstances into account, for example in the case of women who have dependents in their care, or pregnant women. In no case should women accused or convicted of non-violent drug crimes go to jail; instead alternatives to incarceration should be implemented. Indeed, alternatives to incarceration are less costly and less harmful responses, and more effective for addressing drug-related offenses.

This guide is a tool for those interested in developing and implementing more humane and effective drug policies.

This guide for policymakers offers a road map of policy reforms based on a human rights and public health framework and from a gender perspective. It includes a set of guiding principles relevant for countries across the region and offers an array of concrete public policy recommendations covering seven specific categories: more inclusive drug policies; drug policy reforms; alternatives to incarceration; cultivation and

drug processing; social inclusion programs; women who are pregnant or have dependents; and data collection and analysis. This guide is a tool for those interested in developing and implementing more humane and effective drug policies.

The Situation of Incarcerated Women

Overview of the Guide

The main objective of this guide for policymakers is to reduce the female prison population in the region. It is based on the premise that current drug control policies have led to excessive criminalization and incarceration of women, and that such policies need to be reconsidered from their very foundations.

The guide makes recommendations regarding women incarcerated for drug offenses in Latin America and the Caribbean. It does not encompass those issues affecting the general prison population, though it does refer to pregnant women and mothers, since the vast majority of women in prison for drug offenses are single mothers. The recommendations do not refer to females who are minors, but only to adult women; nor do they address issues related to prison conditions, which are exacerbated by overcrowding and overpopulation of the prisons.ⁱ

This guide begins by acknowledging that:

- Most women who are in prison have experienced discrimination or violence before being incarcerated.
- To understand and address the situation of women, consideration must be given to those who are dependent on them, their “dependents,” which may include not only their children, but also other minors and older members of the family and the community.
- Prison has devastating consequences for women, their families, and their communities, in particular when they are mothers or have dependents under their care. These consequences occur during their imprisonment and after they are released.

i This situation continues to worsen due to the incarceration of women for drug offenses. Extensive recommendations on this issue can be found in the UN Bangkok Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders.

- In criminal trials or in sentencing, special consideration must also be given to the rights of persons dependent on women. This issue is more urgent today, as data confirms that increasing numbers of women are being incarcerated in the Americas, especially for drug-related offenses.

Audience

This guide seeks to provide a road map for decision-makers and those with political responsibility who are concerned about the disproportionate impact of drug laws and drug policies on women and who are therefore interested in designing and implementing policies that take the gender dimensions of the issue into account. However, these recommendations do not constitute a “one size fits all” approach; rather, they are useful as a menu of options from which to choose, to be adapted to the particular realities of each country in order to promote more effective and humane drug policies.

While this guide was written to address the issue of women, drug policies, and incarceration, it is hoped that it will prove useful for developing and implementing policies that have a positive impact on the lives of all persons deprived of liberty for drug offenses, both women and men.

Contributors

The guide was prepared by a working group of experts in the areas of gender, human rights, and drug policy who work in government, academia, and civil society organizations in Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, the United States, Puerto Rico, Mexico, the United Kingdom, and Uruguay. The working group met on two occasions, the first in San José, Costa Rica, in February 2015, at the beginning of the process of developing the policy guidelines, and the second time in Bogotá, Colombia, in September 2015. In both countries, representatives of the working group visited a women’s prison and interviewed women inmates.



Three Reference Documents

The Bangkok Rules emphasize the need to ensure respect for the dignity of women in prison and to avoid any source of physical or sexual violence. The issue of discrimination against women is addressed in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (known as the Belém do Pará Convention) is a regional instrument that defines violence against women, and establishes that women have the right to live a life free from violence and that violence against women constitutes a violation of human rights and fundamental freedoms. The guide considers these three official documents, recognized internationally, as a point of reference given that they are key tools offering guidelines on how to put an end to violence and discrimination against women.



See also

The Bangkok Rules:

https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf

Convention on the Elimination of All Forms of Discrimination against Women:

<http://www.un.org/womenwatch/daw/cedaw/text/sconvention.htm>

Convention of Belém do Pará:

<http://www.oas.org/juridico/english/treaties/a-61.html>

Women and the Drug Trade

Women in the Americas are being incarcerated for drug-related offenses in alarming numbers, with the highest incarceration rates anywhere, along with Asia.¹ While the number of men incarcerated is greater, incarceration of women is growing at a faster pace. According to the Institute for Criminal Policy Research, the population of women prisoners in Latin America climbed 51.6 percent between 2000 and 2015, compared to 20 percent for men. In Argentina, Brazil, Costa Rica, and Peru, more than 60 percent of women prisoners are behind bars for drug-related offenses.² As the table on the following page shows, the population of women incarcerated for drug offenses climbed 271 percent in Argentina between 1989 and 2008; and 290 percent in Brazil between 2005 and 2013. The driving forces behind these exorbitant rates of incarceration are the adoption of extremely punitive drug laws and the imposition of disproportionate penalties.

Both the offenses committed by women to obtain drugs for their own consumption and their involvement in offenses related to the production, distribution, supply, and sale of drugs often have to do with social exclusion, poverty, and gender-related violence. Most have little or no schooling, live in poverty, and are responsible for providing care for dependents, whether children, young people, elderly, or persons with disabilities.³ For example, in Colombia, 76 percent of women in prison have not been able to complete their secondary school education.⁴

In addition, the vast majority of women incarcerated for drug offenses in Latin America are single mothers. In Costa Rica, for example, in 2012 more than 95 percent of women incarcerated for bringing drugs into prison were single mothers and the sole caregivers of their children.⁵ Hence, it is not surprising that many become involved in the drug trade as a way to support their children, nor is it surprising that while they are incarcerated they suffer because they are not able to care for them. The children in turn suffer from being separated from their mothers.⁶

Women who go to prison for drug offenses offer very diverse explanations as to what led them to be incarcerated, and what they have to say should be taken seriously and explored further. Although there are women who report having become involved by their own choice and say they were aware of the risks associated with the drug business, in many cases the women have been coerced by a partner or family member—a situation which is facilitated by emotional bonds fraught with gender stereotypes and unequal power relations between men and women. Some women in prison say they were deceived and did not know what they were doing, while others say they were not fully aware of all the risks they were taking. Some simply say they believed their partner when that person would tell them “everything’s going to be OK.”⁷

Country	Number of Women Incarcerated for Drug Crimes	Percentage of Women Incarcerated for Drug Crimes
Argentina	790	65 %
	Federal Prison Statistics, 2013	December 2012
Brazil	16,489	60.63 %
	June 2013	June 2013
Colombia	3,830	45 %
	2014	2014
Costa Rica	944	75.46 %
	December 2011	December 2011
Chile	1,889	57.2 %
	Based on the population in April 2015	Based on the population in April 2015
Ecuador	709	43 %
	2015	2015
Mexico	Federal 528 Local 1,547	44.8 % 14.2 %
	2014/2013	August 2014/May 2013
Peru	2,679	60.6 %
	2014	2014
Uruguay	126	29.5 %
	2014	2014

Country Source

- Argentina Sistema Nacional de Estadísticas sobre Ejecución de la Pena (SNEEP)
- Brazil Departamento Penitenciario Nacional (DEPEN)
- Colombia Instituto Nacional Penitenciario y Carcelario (INPEC)
- Costa Rica Observatorio de la Violencia de Justicia y Paz
- Chile Report by Corporación Humanas Chile
- Ecuador Ministerio de Justicia del Ecuador
- Mexico Secretaría de Gobernación and Consejo Nacional de Población, Population Projection
- Peru Instituto Nacional Penitenciario
- Uruguay Observatorio Uruguayo de Drogas

Statistics compiled by the Research Consortium on Drugs and the Law (CEDD)

“
Most women involved
in the drug business in
the region are at the
lowest levels in the chain
of organized crime.”

Women incarcerated for drug offenses rarely pose a real threat to society; most are arrested for performing low-level, high-risk tasks. Nonetheless they are locked up in pretrial detention or with excessive prison terms.⁸ Once they have served their sentences and are released, their criminal records make it harder to find a decent and legal job, which can perpetuate the vicious cycle of social exclusion and incarceration.

Women accused of drug offenses often grow up in settings propitious for involvement in illicit activities, and they do not have the resources or social capital to create alternatives. In many cases they have been victims of violence, sexual abuse, commercial sexual exploitation, etc. at some point in time and possibly repeatedly, for which they did not receive timely care from the government. Once women are incarcerated, the patterns of violence to which they are subjected also extend to their experiences in prison.

Some groups of women have an even greater propensity to be subjected to discrimination in the enforcement of drug laws: indigenous women, Afrodescendant women, and gay, lesbian, bisexual, trans and intersex persons (LGBTI), among others. Studies show that in some countries, such as Canada and the United States, indigenous women and ethnic minorities are more likely to be arrested, prosecuted, and convicted. For example, in the United States, African-American women are seven times more likely to go to prison than Caucasian women.⁹ In Brazil, nearly 55 percent of the women incarcerated are Afrodescendant.¹⁰ The negative impact of drug laws on indigenous and rural women who are economically dependent on producing marijuana, coca, and poppy crops should also be taken into account. Eliminating their main source of cash income through forced eradication campaigns, or by imprisoning them, pushes them further into poverty, leads to internal displacement, and sets in motion a series of human rights violations against them, reinforcing their prior situation of vulnerability and discrimination.¹¹

According to the available studies, most women involved in the drug business in the region are at the lowest levels in the chain of organized crime, either as small-scale dealers or “human couriers,” (transporters of drugs).¹² They are minor actors in drug trafficking and are easily replaced; that is, their arrest has no impact on reducing drug trafficking or improving citizen security, tackling violence, or reducing the corruption generated by the illegal business.

Latin America has been particularly hard hit by the consequences of a punitive and repressive approach. The available evidence shows the failure of this approach.

Current policies have not succeeded in reducing the size of the drug market, while human rights violations have proliferated.¹³ Violence, health problems, and social exclusion have all been exacerbated, and problematic drug use has increased; organized crime networks have expanded their reach and power; and State institutions are facing a serious crisis, in particular criminal justice systems.¹⁴





PART II

Proposed Recommendations

There is an urgent need to review punitive policies so that low-level, non-violent offenses committed by women or men are not penalized with prison time. The punishment needs to be proportional to the gravity of the offense committed. The criminal justice system should take extenuating factors into account such as women who care for minor children or older members of their family or community, and pregnant women. At the same time, alternatives to incarceration should be implemented, as these have proven to be less costly, less harmful, and more effective as a response to drug-related offenses.¹⁵

The main objective of this guide—to reduce the population of women in prison in the region—is a response to the finding that current drug control policies have led to the excessive criminalization and incarceration of women, the enormous human costs of different kinds caused by punitive policies and their disproportionate impact on women and their families, and hence the need for the policies to be thoroughly re-examined. Accordingly, the task of developing new policies, interventions, and programs cannot be delayed any longer.

This part of the guide offers policymakers two kinds of resources for adopting, implementing and reviewing reforms regarding the incarceration of women for drug-related offenses.

The first is a summary of basic guidelines that are applicable across the region and constitute “Guiding Principles for Policies and Action” (see box); and second, an array of recommendations grouped around seven specific categories or issues:

- More Inclusive Drug Policies
- Drug Policy Reforms
- Alternatives to Incarceration
- Cultivation and Drug Processing
- Social Inclusion Programs
- Women who are Pregnant or Have Dependents
- Data Collection and Analysis

Guiding Principles for Policies and Action

Certain conditions must necessarily be considered in any decision or action related to drug-related offenses, in particular in the case of women offenders. They are the “guiding principles” upon which all policies related to drug offenses and women must be based. For the actors on the ground they are fundamental references.

Drug policies should be integral, have a gender perspective, and be based on a public health and harm reduction approach, with strict observance of States’ obligations in the areas of human rights and social inclusion. They should also be based on scientific evidence. The guiding principles are as follows:

- The legal principle that *incarceration* should be used only *as a last resort* is fundamental in designing drug policies.
- *Gender mainstreaming* needs to be incorporated when developing, implementing, and evaluating reforms to drug laws and policies. Criminal law is constructed from an androcentric perspective, and the prison system has been designed by and for men. Accordingly, the offenses, penalties, and ways in which persons that break the law can make retribution to society all need to be reviewed from a gender perspective.
- In order to minimize their collateral consequences, *drug policies should take into account the differential and incremental impact of their application on women and their families.*
- Drug laws and drug policies must *take into account the conditions of greater vulnerability* of indigenous women, Afrodescendant women, the LGBTI community and pregnant women, and nursing mothers, as well as women living in poverty and affected by social exclusion.
- Women, especially those incarcerated or formerly incarcerated, should be given *a fundamental role in designing, implementing, and evaluating drug policies.*
- *Adopting a public health approach* to guide drug policies guarantees that responses of social inclusion and protection of health will prevail over those punitive in nature.
- Drug policies should have a *human development focus*. Economic development programs should be implemented in rural areas where crops for illicit markets are cultivated and in marginalized urban areas where drug markets are found. These programs should be planned and carried out in collaboration with the most affected communities, and always with an approach informed by concerns of gender, human rights, and social inclusion.



I. More Inclusive Drug Policies

Given the consequences affecting women in particular, it is important to encourage and ensure their participation in the debate on reforming current drug policies and designing new ones. Women face violations of their rights in patriarchal societies, where effective gender equality is lacking and their rights are not broadly ensured. Constructing a more humane, inclusive, and sensible drug policy that is respectful of human rights requires more participation of women as key actors, and not just as victims of the policy.

The direct voices of women who are or have been incarcerated, and those of their family members and partners, must be heard. Under the right conditions, this can have a very positive impact on criminal justice reform. Additionally, the specific inclusion of groups who have also been excluded from the debate, but who often bear the brunt of unjust drug policies, is also fundamental. These include Afrodescendants, indigenous peoples, the LGBTI community, foreign women incarcerated for drug offenses, and other groups impacted, marginalized, and underrepresented in this debate.

Typically, drug control programs lack transparency and effective supervision, with little or no debate or evaluation from the public or even within legislatures. The police

and military forces play a dominant role in such programs, ensuring that the national security perspective prevails over all others, such as public health and human rights. Yet the vast majority of persons incarcerated for drug offenses come from the poorest sectors of society, which is precisely where the insecurity generated by the violence associated with drug trafficking is concentrated. Addressing the drug issue comprehensively, then, effectively goes hand in hand—or should go hand in hand—with addressing the issue of poverty and inequality in our societies. Accordingly, the recommendations are to:

- Encourage and ensure women’s participation in the discussions and in the design of drug policies, especially those women who have been negatively impacted by current policies. They should include women drug users; women who are or have been incarcerated; mothers, wives or partners of persons who are incarcerated; and members of communities that have been impacted.
- Request the government agencies responsible for social inclusion, human development, and human rights and national and regional civil society organizations to participate in the revamping, implementation, and monitoring of drug policies from a gender perspective.
- Involve agencies such as the offices of the human rights ombudsperson and other national human rights institutions or mechanisms for promoting the protection of human rights, and women’s commissions to review and make recommendations on drug laws and their enforcement in the case of women.
- Implement strategies for raising community awareness of the need to promote drug policy reforms with a gender perspective.
- Recognize that persons from certain sectors of the population—Afrodescendants, indigenous peoples, other ethnic minorities, and the LGBTI community—are disproportionately impacted by the current drug policies, and ensure that representatives of these groups participate in the debate and in developing these policies.
- Promote gender parity in forums or other debates and meetings on drug policy financed by local or national governments and international bodies.



II. Drug Policy Reforms

Five aspects are focused on under this heading: decriminalizing drug use; proportionality in sentencing; pardons, amnesties, commutations, and retroactive reduction of sentences; human couriers and foreign women; and pretrial detention.

1. Decriminalizing Drug Use

Despite the regional debate on the need to address drug use as a public health issue—and not as a criminal justice matter—criminalization of drug users persists. A study by the The Research Consortium on Drugs and the Law (*Colectivo de Estudios Drogas y Derecho*, CEDD) shows that even in countries in which possession for personal use is not a crime users may be subject to disproportionate searches by the police and taken into custody. In addition, the stigmatization of drug users is a constant violation of their fundamental rights.¹⁶ Women are even more stigmatized for using drugs, as society condemns them for subverting traditional gender roles by neglecting their caregiving and domestic responsibilities. For these reasons, governments should:

- Decriminalize the use, possession, and cultivation of drugs for personal use; criminal prosecution should not be used in these cases.
- Put more government resources into health services, including programs for treating drug dependency and harm reduction services, based on scientific evidence and with a gender perspective. At the same time, it is important to

distinguish between recreational or occasional use and problematic use. The first—which describes the vast majority of drug users—does not justify any government intervention. Nonetheless, in all cases the government has a responsibility to provide and ensure access to health services, even when drug use is occasional, if the person is in need of such services and voluntarily asks for them.

- With respect to when to consider someone an offender, CEDD recommends using thresholds that set minimum amounts, below which it can never be assumed that a person is a seller or dealer, and above which it also cannot be assumed that the person be punished for distribution and trafficking, as it is the responsibility of the State to prove the intent to sell or distribute. CEDD clarifies that in addition: “Thresholds must also be based on users’ practices and not set arbitrarily, always ensuring that users are protected.”¹⁷ Moreover, these thresholds should be used within a system of judicial interpretation that takes into account the totality of the circumstances of the offense (if it is an offense) and of the offender.¹⁸

Innovative Approaches. One successful example of addressing drug use as a public health issue is Portugal, which in 2000 decriminalized all drug use and developed a solid array of health and harm reduction services, and social services, with very good results. Drug use has not increased, as some had feared, and substantial improvements have been documented in the health of drug users. Access to evidence-based treatment programs has expanded, and there has been a significant decrease in deaths due to overdoses.

2. Proportionality in Sentencing

Throughout the region, those who commit drug crimes—including women who commit non-violent, low-level offenses—face exceptionally harsh sentences. Such sentences are facilitated by the failure, in the laws of some countries, to distinguish among the various levels of participation in drug trafficking; rather, all conduct is subject to the same stiff penalties. In many countries the penalties for drug offenses are disproportionate compared to other offenses, and are even greater than penalties for rape and homicide or femicide. The prosecution of drug offenses, as compared to other offenses, may result in swifter sentencing with even less of a chance to mount an adequate defense.¹⁹

In view of these circumstances, action is needed to ensure that incarceration is actually a last resort and that penalties are proportional to the type of offense, to the harm actually caused by the offender, to his or her role in the drug trade, and to the level of

danger to the community, taking into account a series of extenuating factors. The following recommendations are along those lines:

- Ensure proportionality in sentencing, distinguishing in the laws: (i) low-level, mid-level, and high-level drug offenses; (ii) one's rank in the criminal network; and (iii) violent and non-violent offenses.
- Eliminate mandatory minimum sentences.
- Ensure that judicial officers and prison systems of the respective countries incorporate a gender perspective in the management of cases in which women are investigated, prosecuted, and sentenced and, at the same time, ensure that legal frameworks allow for the possibility to reduce sentences and promote alternatives to incarceration. To that end, several factors should be considered, including: poverty and social exclusion, motherhood and caregiver status in relation to other dependent persons, status as head of household, illiteracy, level of education, lack of job training, immigration status, and gender-based violence, or physical or mental disabilities that may have contributed to the involvement in criminal conduct.
- Take into account "Racial Impact Statements" in adopting new drug laws, as currently occurs in several states of the United States. These are an important tool for legislators to be used in evaluating the possible disproportionate impact of proposed legislation on minority communities. Policymakers should modify legislative proposals that could exacerbate existing racial inequalities.
- Strengthen public defender systems by developing specialized units for defense in cases involving drug-related offenses and special standards and strategies for women prosecuted for such offenses. Ensure that those systems are efficient and empower the actual defense of female users or offenders. When handling the cases of women in the criminal justice system, the above-noted factors should be taken into account so that they can continue to be used to reduce penalties and to promote alternatives to incarceration, and while serving prison terms.

Innovative Approaches. In August 2014, Ecuador implemented an Integral Organic Criminal Code (*Código Orgánico Integral Penal, COIP*) that notably reduced sentences for low-level drug offenses. As the new code could be applied retroactively, in the first year in which it was implemented more than 2,700 persons were released from Ecuador’s prisons. Many others received lighter sentences. The percentage of women behind bars for drug offenses fell from 80 percent to 43 percent. This is a clear example of how a legislative reform can have a positive impact. However, in October 2015, the National Assembly stiffened the penalties once again, without offering a solid justification in terms of criminal justice policy. Therefore, it is likely that the rate of women incarcerated for drug offenses will soon climb.²⁰

Innovative Approaches. Costa Rica offers a good example of legislation that incorporates a gender perspective and proportional measures in the criminal prosecution of drug-related offenses. In July 2013 Costa Rica promulgated Law 9161, which incorporated a gender perspective in the modification of Article 77 of Law 8204 so as to reduce the penalties for bringing drugs into prisons. Thanks to the reform, more than 150 women who had been sentenced under the previous law were released from prison. In addition, now women for whom bringing drugs into prison is their first offense, and who are affected by some of the conditions of vulnerability noted in the law, can be eligible for alternatives to incarceration, making it possible for them to participate in social insertion programs aimed at preventing recidivism.

3. Pardons, Amnesties, Commutation of Sentences, and Retroactive Reductions of Sentences

Pardons and amnesties are measures that can impact several groups among the prison population. Yet such short-term measures, if not accompanied or followed by sweeping and far-reaching reforms in drug laws, will not achieve a sustained reduction in the number of people in prison. Retroactive application of less severe penalties furthers respect for human rights and harmonization in the enforcement of the law, and at the same time can have beneficial impacts for the prisons and the criminal justice system. Nonetheless, drug offenses are defined as “serious offenses” (*“delitos graves”*) in several countries of the region, which leads to automatic pretrial detention without the possibility of alternatives to incarceration or other benefits. Accordingly, the following measures are recommended:

- Implement pardons or amnesties—or the equivalent depending on the respective criminal justice systems—for pregnant women and nursing mothers, and those with children or other dependents.
- Reinforce application of the principle of the most favorable law. In other words, when it is possible to apply more or less restrictive laws, the judge should opt for the most benign.

- Do not use a prior criminal record as grounds to exclude a person from benefiting from these measures.
- Do not exclude those convicted of drug offenses from the possibility of benefiting from pardons, amnesties, or commutation or retroactive reduction of sentences.

Innovative Approaches. In 2008, Ecuador granted a pardon to some prisoners accused of drug offenses. They accounted for 40 percent of the overall prison population and 75 percent of women prisoners. The requirements for receiving a pardon were: not having a previous criminal record, having been accused of an offense involving less than two kilos of drugs and having served one year or 10 percent of the sentence. More than 2,000 individuals received pardons. Nonetheless, overcrowding in the prisons continued to grow until the implementation of the new Integral Organic Criminal Code in 2014.ⁱⁱ

4. Human Couriers and Foreign Women

The common factor among women who work as “human couriers” or “mules,”ⁱⁱⁱ especially those who transport cocaine, is that they have no prior criminal record and many are foreign-born women. Most of the “mules” arrested have quantities of one to two kilos, hidden in their luggage or often carried in their own bodies, after ingesting capsules full of the drug or inserting “eggs” filled with the drug inside their vagina. If the capsules rupture the person can die of an overdose. These women are used by organized criminal groups, which are the ones who really profit from these illicit activities. Some of these women are compelled to stay in the trafficking network because their families are under the surveillance of the organization. They themselves are told they will be killed if they are arrested and then leak information, if they try to leave the organization, or if they do not deliver the merchandise to the indicated destination.²¹

According to a 2011 study, in Argentina nine of every ten foreign women in prison for drug offenses at the federal level were there for serving as human couriers; 96 percent were first-time offenders.²² In addition to the characteristics common to all women in prison, foreign women face particular challenges. As they do not live in the country where they are detained, in many cases their family, social, and institutional ties are all

ii As has been noted, in view of the recent changes in the Ecuadorian National Assembly, in which sentences were increased once again, the problem of overcrowding will likely recur.

iii The term “mula” or “mule” can have pejorative connotations. Like “mulas,” the term “human couriers” (“*correos humanos*”) implies that the persons so described are carrying drugs for another person or for a criminal network.

interrupted, and they also face difficulties dealing with unfamiliar criminal justice proceedings. The following are therefore recommended:

- Facilitate the transfer of foreign women, who give their consent, so that they can serve their sentences in their home country (taking advantage of bilateral cooperation agreements that allow for international transfers). Policies could also be adopted to replace the criminal procedure, for example, by seizure of the drug and immediate repatriation at the moment of arrest.
- Ensure access to benefits in the enforcement of the sentence and to the right to non-discrimination on grounds of nationality, to obtain prison benefits such as sentence reductions, temporary releases, and parole.
- Develop social and economic support networks for foreign women who were employed as human couriers and ensure they have access to interpreters in the legal process.
- Carry out investigations to determine in which cases women have been forced to carry drugs, and activate mechanisms that guarantee the physical security of the families of women who have been used as human couriers.

Innovative Approaches. There are several examples of alternative policies for foreign women who end up serving as human couriers. In Spain, when the sentence is less than six years, it can be replaced by expulsion from Spanish territory. In Argentina, the law allows for the expulsion of non-resident foreign women once they have served half of their sentence.

5. Pretrial Detention

The excessive use of pretrial detention is one of the main factors in prison overcrowding in the region. In many Latin American countries, pretrial detention is mandatory for any drug offense, no matter if it is at a high or low level, or whether it was violent or non-violent. Therefore, many spend a disproportionate amount of time in prison before having a trial or a verdict being issued. The following recommendations are made with a view to resolving the situations caused by pretrial detention:

- Eliminate from national legislation the obligation to hold those accused of drug-related offenses in pretrial detention. Such provisions violate the principle that incarceration should be used a measure of last resort and the principle of the presumption of innocence, and is a disproportionate measure.

- Require prosecutors and prosecutorial authorities, as a condition for seeking pretrial detention, to show before the competent court that detention is a measure of last resort.
- Do not use pretrial detention for pregnant women or women with dependents (children, older adults, and persons with disabilities). In such cases, house arrest or supervised release should be used, such that the fundamental rights of the offender and her family are not violated. Special attention should be given to the situation of women heads of household who are the sole breadwinner for their family members, so that the sanction is compatible with holding a remunerated job.
- As regards the use of bail and other types of pecuniary sanctions that represent an alternative to pretrial detention, a range of alternatives to the payment of a sum of money should be offered in order to uphold the principles of equality and non-discrimination, and thus prevent imprisonment as a sanction for living in poverty.

Innovative Approaches. Countries such as Brazil, Colombia, Ecuador, Mexico, Paraguay, Uruguay, and Venezuela establish restrictions in their national legislations for applying pretrial detention in cases involving pregnant women (with different rules depending on the number of months of pregnancy) and nursing mothers, who are to serve pretrial measures at home.

Innovative Approaches. In July 2015, New York City officials announced a plan, slated to be implemented in 2016, that will authorize judges in matters involving low-level offenses to impose options such as signing a daily logbook, receiving drug treatment, and even exchanging text messages, as alternatives to paying a bail. The aim of the plan is to eliminate pretrial detention, allowing people who cannot meet a bail payment to continue working and living with their families, and to reduce the number of prisoners at the Rikers Island prison complex, known for its overcrowding.



III. Alternatives to Incarceration

Several different alternatives to incarceration are already being implemented, in and beyond the region, which include:

- Decriminalization, or removing a given conduct or a certain activity from the sphere of criminal law, though it may or may not continue to be prohibited and sanctioned by other means; and depenalization, or eliminating incarceration as a sanction, even though the conduct continues to be a criminal offense.
- Diversion, in which the case exits the criminal justice system before a sentence is imposed, or programs to divert the matter in question for non-judicial treatment before it makes its way into the court system.
- Release from prison, which is when the sentence has already been imposed, and the prison sentence is eliminated, reduced, or replaced; it may take the form of specific pardons, diversion to treatment, or reduced sentences.

Choosing among these possibilities should be guided by the criteria of proportionality; economy in the use of resources, which may imply a preference for pre-procedural measures over those that are applied during the criminal process or after the conviction; and consistency with the criminal justice policy of each country, under the principle of limiting the use of criminal law and penalties entailing incarceration—mindful of the key principle of incarceration only being used as a last resort.

In addition, in the case of women, and in view of the arguments that appear in different parts of this guide, the following criteria, among others, should also be taken into account: socioeconomic vulnerability, responsibility for the care of dependents, participation in the weakest links of the trafficking organizations, absence of aggravating circumstances such as violence in committing the offense, drug dependency, infringement upon the rights of third persons in their care, quantities of drugs involved, and additional vulnerabilities based on age, ethnicity, or origin.

1. General Recommendations

- Alternatives to incarceration should be aimed at providing more humane and effective responses to drug-related offenses that reduce the negative impacts and consequences of imprisonment, while limiting the use of criminal law, strengthening its emphasis on guarantees and making it more compatible with the idea of criminal punishment as a last resort. The use of criminal law and prison must be minimized, focusing instead on reinforcing women's eligibility for alternative penalties that avoid the impacts of female incarceration. Moreover, the aim of the penalties should be promoting re-socialization and building meaningful lives in keeping with the aspirations of the women in question.
- Remove all legislative and practical obstacles that keep those who commit drug offenses from benefiting from alternatives to incarceration or from being granted a suspended sentence, probation, or parole. As has been indicated, in many contexts, characterizing drug violations as "grave" or "serious" offenses means that all those who are accused of such offenses have pretrial detention automatically imposed on them or they cannot benefit from alternatives to incarceration. All provisions and practical obstacles impeding women in prison for drug-related offenses from being able to receive such benefits should be eliminated.
- Guarantee every woman who is a first-time offender of a minor drug-related offense entry to programs outside the criminal justice system that make it possible to prevent any new offense from being committed through an integral approach and the support of a multisectoral network. In any event, recidivism should not be counted against the person if the system does not perform the functions of rehabilitation and social insertion. Accordingly, recidivism should not be used in drug laws as a rationale for excluding a person from diversion programs or other alternatives to incarceration, or to aggravate the penalties he or she faces.

On Recidivism

The concept of recidivism is thought of as “the material act of one who is guilty of once again engaging in the criminal act.”²³ It may be generic (the new offense is of a different sort from that for which he or she was convicted) or specific (repetition of crimes of the same sort). Some Latin American countries, unfortunately, have provided in their legislation for specific recidivism to be grounds for an enhanced sentence; and some have adopted provisions under which recidivism is grounds for blocking parole or excluding a person from diversion programs.

This is the case, for example, in Ecuador, Costa Rica, and Uruguay. The practice constitutes a violation of basic principles of the law incorporated in international treaties and constitutions that should be removed from the books to ensure that criminal law is compatible with respect for human dignity and the principle of the minimum involvement of the criminal justice system.

2. Problematic Drug Use and Committing Offenses Related to Use

These are persons who may be facing charges for offenses linked to problematic drug use or small-scale dealing associated with their own dependence on controlled substances. As noted above, drug use (or possession for personal use) should never be criminalized. The following recommendations are put forth in relation to these offenders:

- Consider suspending the criminal proceeding for offenses associated with problematic drug use, offering instead an opportunity for treatment through diversion as an alternative before or during the criminal process.
- Adopt models of restorative justice, promoting a case-by-case management model, exploring with the user the factors that led to committing offenses associated with drug dependency. This should be done through inter-institutional cooperation and the support of a multidisciplinary team with an integral approach to psychosocial health.
- Ensure that these programs are implemented with an approach marked by non-punitive cooperation, aimed at the rehabilitation of the person, using innovative measures adapted to processes such as voluntary conciliation and mediation in the criminal justice context. In no case should joining a treatment program be mandatory, as available evidence shows that compulsory treatment programs are ineffective and counter-productive, and the United Nations has

condemned mandatory rehabilitation of drug users as a seriously concerning alternative to incarceration.²⁴

Innovative Approaches. The U.S. model of drug courts has been adopted, or is being considered, by several Latin American and Caribbean countries. The objective is to send the person to a treatment program and also to reduce the rate of incarceration of persons who have committed minor offenses associated with drug use. This mechanism depends very much on the context in which it is implemented and has been subjected to many criticisms.²⁵ As alternatives, some programs divert dependent users to health or treatment services that take into account some of the concerns regarding drug courts. These include the “dissuasion committees” in Portugal, administrative committees that review, on a case-by-case basis, all persons arrested for drug use; the Law Enforcement Assisted Diversion (LEAD) program in Seattle, United States; and the Drug Treatment under Judicial Supervision Program (*Programa de Tratamiento de Drogas Bajo Supervisión Judicial, PTDJ*), in Costa Rica.

3. Small-Scale Drug Dealing and Human Couriers

Most women in prison in Latin America are incarcerated for working as human couriers to transport drugs or as small-scale drug dealers. They are women at the lowest levels of the illicit market and their incarceration has no significant impact in terms of reducing the size of that market as they are easy to replace by other persons in the same social conditions; however, it does have devastating consequences on their lives and the lives of their dependents, perpetuating a vicious cycle of poverty, marginality, desperation, and recidivism. For this reason promoting alternatives to criminal proceedings and incarceration is especially important for this group in particular. The following recommendations are made in view of these considerations:

- Reform criminal justice procedures to be able to apply prosecutorial discretion in cases of women who are small-scale dealers and who live in vulnerable conditions in order to refrain from beginning a criminal proceeding, or to end it if it has already begun. Clear and well-structured criteria need to be established to carry out this measure to avoid its arbitrary use and the abuse of prosecutorial discretion.
- Explore models that establish a multidisciplinary administrative agency to evaluate women arrested on drug-related charges and that can discern and identify those who should be prosecuted by the criminal justice system and those who could be diverted to community or social services. Such actions should always be geared to avoiding a recurrence of criminal conduct.

- Explore implementing processes of conciliation or mediation for small-scale dealing offenses. These procedures are used when there is a willingness on the part of both parties to end a dispute. For crimes of small-scale dealing, one of the parties involved is the State, given its responsibility to develop and implement drug policies. In such circumstances, the State could evaluate the situation of these women on a case-by-case basis so as to offer alternatives to criminal trial and incarceration.
- These measures should be accompanied by the development of a social and community support network that includes education, work, housing, health services, and other programs so as to address the socioeconomic factors that led women to become involved in drug markets in the first place.
- In cases in which women are being prosecuted in a criminal trial, conditional suspension of the sentence should be considered for women who are first-time offenders so as to identify their needs, their conditions of vulnerability, and the obstacles they face that have not been addressed by the government. When it is determined that they should be incarcerated, progressive systems can be considered as an option bearing in mind the principle according to which a penalty should be proportional to the offense. These may include social rehabilitation regimes; closed and semi-institutional programs; parole and probation, in particular for mothers and pregnant women; and proceedings for early release.

Innovative Approaches. In Puerto Rico, the Rules of Criminal Procedure recognize prosecutorial discretion in several stages, among them to determine whether an incident should even set the criminal justice system in motion by the filing of a complaint. A case can also be closed for just cause even if there has already been a judicial determination of probable cause to indict. Indeed, the prosecutorial authority may move for dismissal after filing an indictment, which could be granted with or without prejudice to the possibility of beginning a new proceeding, at the discretion of the judiciary.



Godofredo Reinicke

IV. Cultivation and Drug Processing

Growing or producing raw materials for processing controlled substances is generally part of the survival strategy of whole families—indeed of the economy and subsistence of entire communities—especially in rural areas of producer countries. In the family those activities are distributed based on age, skills, and gender. Women are involved at the lowest level of the chain, planting, harvesting, transferring seeds and inputs for production, providing domestic services and taking charge of preparing food, and transporting small amounts of the product, among others.

Given their economic vulnerability, those who carry out these tasks most often do so with the aim of resolving their families' socioeconomic needs. Often they are female-headed households that belong to ethnic minority and *campesina* communities and are victims of rural poverty, violence, or coercion. These *campesina* and indigenous women suffer the worst consequences of the lack of access to property rights, low incomes from rural activities, or unpaid work. They live in areas with little if any educational opportunity, lack access to health care and other basic services, and are poorly situated to be economically competitive.

“

These *campesina* and indigenous women suffer the worst consequences of the lack of access to property rights, low incomes from rural activities, or unpaid work.

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Therefore, the specific conditions of economic vulnerability of women involved in growing, producing, and processing raw materials, such as cocaine paste, must be taken into account, in particular in indigenous, Afrodescendant, and rural communities. In addition to being a misguided measure, the criminal prosecution and incarceration of persons with such a profile represents a squandering of resources for security forces, judiciaries, and prison systems. Investing energy in punishing women who participate in production in the contexts of their own economies, or rural subsistence economies, exacerbates their vulnerability and sows distrust among the communities. The following recommendations are made bearing in mind these considerations:

- Decriminalize cultivation of crops that may be diverted to illegal markets. In the place of criminal sanctions, government agencies should provide assistance to establish and support options for a substantial improvement in their situation, working with the local communities to gradually reduce their economic dependence on the income generated by such crops.
- Give visibility to the causes and motivations for engaging in unlawful conduct, as well as the vulnerabilities that these women face, in order to illustrate the need to implement alternatives to incarceration.
- Undertake the reforms needed to design and implement alternatives to incarceration, or to suspend any criminal proceedings, to avoid furthering the socioeconomic vulnerability of these women and their families.
- Implement a new vision of integral rural development, informed by a gender perspective, which takes into account the situation of *campesina* and indigenous women in the areas where crops are grown or processed.²⁶ This could include promoting the cultivation of coca leaf for lawful, ancestral, medicinal, or industrial use by women-led farming collectives.



V. Social Inclusion Programs

1. A Holistic Approach

The asymmetry and inequality of power relations between men and women, and the gender violence and poverty that affect women who end up incarcerated for drug offenses, are issues that require a holistic response. Instead of merely warning women about the criminal consequences of drug trafficking through educational campaigns, it is important to undertake initiatives that address issues that result in women's involvement in drug-related offenses. This includes the construction of gender roles, stereotypes of femininity and masculinity, and violence against women.

A holistic approach should give women economic independence, contributing to their empowerment and autonomy in making decisions that affect their lives. It should also guarantee that women not see the drug trade as the only option for economic survival. The following recommendations are therefore made:

- Implement specific programs to provide alternatives to women who, because of their situation of vulnerability and the context in which they live, can easily be drawn into organized crime or end up working in small illicit businesses managed by their families. These programs should include informational content—on forms of recruitment and the legal consequences—and offer viable life options so that women are not trapped in the cycle of social exclusion and marginality in areas where organized crime is present.

- Guarantee that government agencies—secretariats, ministries, institutes, etc.—responsible for designing and implementing programs with and for women affected by social exclusion are knowledgeable about drug policies and recognize how they are tied to gender relations. In addition, the agencies responsible for designing and implementing drug use prevention programs—and crime prevention—should understand the relationship between gender violence, drug trafficking, and the use of psychoactive substances.
- Earmark the funds from assets seized from persons convicted of drug trafficking offenses to finance programs aimed at preventing the involvement of women in trafficking networks, in particular in situations where there is a high risk of recruitment into such activities. Part of the seized assets should be channeled to civil society organizations operating in high-risk areas to finance social projects such as schools, small and medium sized enterprises, community activities, etc.

Innovative Approaches. In Uruguay seized assets are channeled towards financing and implementing policies for prevention, treatment, and social integration. Under the umbrella of social integration are educational reinsertion; labor insertion in coordination with private companies, government agencies, and civil society; and an array of projects in the areas of sports, art, culture, and job training, among others.

2. Social Integration Approach for Women Incarcerated for Drug Offenses

For people deprived of their liberty, the prison system produces loss and rupture in every sphere of life. Incarceration prevents women from making their own decisions, does not prepare those incarcerated for returning to their families and communities, and does not provide the training or support needed for getting a job in dignified conditions so as to be able to resume the role of caregivers. Prison training programs generally reinforce women's traditional gender roles, so if they do find work upon leaving prison, it is often in jobs with low social recognition and insufficient economic remuneration. In addition, the stigma against women involved in drug offenses makes it more difficult for them to get a decent job and avoid returning to criminal activity. This discrimination, plus having a criminal record, become the main obstacles to employment, which in turn worsens the conditions of risk and vulnerability.

The concept of social integration makes reference to three specific conditions: (i) education and training programs for women in prison; (ii) transition between life in

prison and life post-incarceration; and (iii) labor reinsertion with a criminal record. The following recommendations address these three components:

(i) Education and training programs for women in prison:

- Design integral and interagency public policies that take into account the factors that have led women to become involved in drug offenses; that are in line with their skills and abilities, their time behind bars, and the requirements of the job market; and are not based on gender stereotypes.
- Offer programs that incorporate incentives for studying, job training, or work in prison. These activities should make it possible to reduce the duration of incarceration and contribute to effectively finding a job that, as noted above, does not reinforce traditional gender stereotypes.
- Ensure that State institutions offer an adequate response to the persons who need it by promoting networks for inter-institutional referral, with clear protocols and with specific follow-up; in other words, a “specialized” route so that those who need assistance get expedited attention.

(ii) Transition from life in prison to life post-incarceration:

- Gradually de-institutionalize women by offering restricted leave in order to help them adjust to life upon release from prison. In cases where there is a legal requirement that one have a job to be granted restricted leave, unremunerated work should be considered to satisfy the requirement.
- Ensure that women have the opportunity to speak regularly with their family members, receive medical and therapeutic attention, educational support, and socio-educational care, and are able to participate in voluntary or paid work programs outside the prison walls so they can practice building a routine to ease their transition into everyday life once they regain their freedom.
- Promote homes, temporary centers, or halfway houses for such women and their children once they get out of prison.

(iii) Labor reinsertion with a criminal record:

- Promote networks for inter-institutional referral with the collaboration of the business and private sectors that facilitate the restoration of rights and social insertion for women who have been in prison.
- Reduce the barriers to social re-integration, limiting restrictions on hiring people with criminal records by private employers and the government:

- Asking job applicants to disclose their criminal record should only be allowed if a prior conviction would have a direct impact on their ability to meet the requirements of the job. These questions may only be asked in the final part of the selection process.
- If a person is rejected on the grounds of their criminal record, a clear explanation should be given as to why that record affects their ability to carry out the tasks of the job. The applicant should have the opportunity to appeal to an independent party, such as the Office of the Human Rights Ombudsperson or a government oversight body.
- A competent entity should evaluate the current policies and common practices for determining whether the guidelines about criminal records have a differential effect among different ethnic groups and genders.

Recommendations related to criminal records can be difficult to implement. At least one government agency should have the responsibility and infrastructure to process complaints and audit compliance. The possibility of filing legal action based on a violation of the decree can also be an effective means of compelling compliance.

Innovative Approaches. In Costa Rica, with the leadership of the Public Defender's Office and the National Institute of Women, a network for inter-institutional referral was established with the participation of public institutions for women in the criminal justice system (both women serving non-custodial sentences and women in prison), so as to address their needs and the needs of their family members and dependents, both during incarceration and at the moment of release.

Innovative Approaches. Another example is the "Ban the Box" strategy in the United States, where activists have made gains facilitating the transition from prison to freedom. In the last 15 years, more than 100 jurisdictions—cities, counties, and states—in the United States have changed their laws to limit questions about criminal background as part of the process of interviewing job applicants. These initiatives have used the slogans "Ban the Box," which refers to the box asking about past convictions in job application forms, and "Fair Chance."



VI. Pregnant Women and Women with Dependents

Many of the women in prison for drug-related offenses became involved in small-scale dealing and other low-level drug transactions for reasons of economic subsistence, which is to say, to facilitate the care of their dependents. Current drug policies and laws criminalize these women and aggravate their family situation, making their dependents more vulnerable. The impact of this can have long-term consequences.

“When a woman is incarcerated family ties become fragile and may even be broken for good. The situation is different for men, who, despite all the difficulties, have an easier time supporting themselves and have the support of female figures (mothers and partners), who ensure contact with the children.”

Raquel Souza, *Invisibles ¿hasta cuándo?*²⁷

For a child, the separation from one’s mother or father behind bars can have a devastating impact. In many cases the mother is the only adult person on whom the child depends, and separation from her may result in situations of extreme poverty, institutionalization, or life on the street. In 2010, Brazilian psychologist Claudia Stella analyzed international prison censuses and concluded that when a father is in prison, most children continue to be cared for by their mothers; however, when it is the mother who is

incarcerated, only 10 percent remain in the care of their fathers. A similar situation was observed in the prison census for São Paulo, which found that the custody of most of the children of an incarcerated father is assumed by his wife or partner (86.9 percent), whereas only 19.5 percent of the children of women prisoners remain in the care of their male spouses or partners.²⁸ This disparity shows how equally strict penalties for women and men end up punishing children disproportionately. Thus, special consideration must be given to mothers deprived of their liberty, while also recognizing the negative impact of incarcerating fathers.

It must be understood that prisons are not the only way to impose a criminal sanction; mechanisms need to be incorporated that make possible third party custody and supervision, location monitoring, or other forms of monitoring and control. In particular, in the cases of pregnant women and women with dependents, incarceration should be the last resort, or should even be completely avoided (see the section on alternatives to incarceration).

For women who are mothers and pregnant women who are detained or convicted with a criminal sanction—and to ensure the best interest of the child—it is important to refer to the UN Bangkok Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders. In addition to the Bangkok Rules, the following measures are recommended:

- Implement alternatives to incarceration as outlined in the previous section on that topic. In no case should pregnant women or mothers of minor children who have been detained or convicted of non-violent drug offenses go to prison. While recognizing that this recommendation could in some cases create perverse incentives to have children, the impact of the incarceration of this group of women is so counterproductive for society that it is justified.
- Ensure that women are held in penitentiary centers near their homes so that family members can visit them.
- Provide funds for family members of incarcerated women to cover their transportation expenses to visit the prison and ensure that they do not lose contact with their family members and that family bonds are maintained.
- Avoid any discrimination against and criminalization of mothers and pregnant women who use drugs. In particular, avoid: mandatory confinement, loss of custody of one's children, criminalizing women for interrupting pregnancy, negatively impacting their sexual and reproductive health, and compulsory treatment for drug use.

In the event that these women are incarcerated, in relation to their children we recommend:²⁹

- Give the detained and convicted mothers appropriate time to organize the custody and care of their children before they are incarcerated.
- Ensure that children and adolescents have a regular means of contact with their incarcerated mother, for example through phone calls.
- Establish appropriate policies for family visits to the prison, ensuring that children not have to go through long lines at the points of entry; that the security checks are appropriate; that suitable child-friendly spaces are designated for the visits; and that they can have sufficient time, physical contact, and a reasonable level of privacy when visiting their incarcerated mothers.
- Appoint a government minister tasked with safeguarding the interests of the children of incarcerated parents.³⁰

Innovative Approaches. JusticeHome is a program sponsored by the Women’s Prison Association in the United States as a specific alternative to incarceration for women committed to making changes in their lives. Through the program women are selected to live at home with their children and participate in treatment, education, and employment programs, instead of being incarcerated in a traditional manner. The women are eligible if they have a sentence of at least six months in the New York prison system and are convicted of a felony.

Innovative Approaches. The Association of Family Members of People Detained in Federal Prisons (*Asociación de Familiares de Detenidos en Cárceles Federales*, ACIFAD) is a new civil society organization in Argentina that is making progress in the struggle to protect the social rights of children of incarcerated parents. They successfully defended the need for the government to pay a “universal allowance per child” to families whose breadwinner is deprived of liberty. This allocation is a monthly stipend given to children who are Argentine citizens, and whose mothers and fathers do not work in the formal economy. ACIFAD brings together various organizations and engages in advocacy with public agencies in charge of funding the program, ensuring that families receive support during and after incarceration.



VII. Data Collection and Analysis

1. Transparency in the Gathering and Availability of Data

One of the most significant obstacles to designing effective policies that are consistent with a gender perspective and a human rights-based approach is the lack of information and knowledge of women's participation in activities related to illicit drugs and their situation once they are imprisoned.

Three additional restrictions impede the collection, reliability of, and access to public data in the case of women incarcerated for drug-related offenses in Latin America:

1. The first restriction is the closed nature of prison life and the lack of understanding of the dynamics of daily life for those behind bars. Information systems on prisons are generally incomplete, unreliable, fragmentary, and, in many countries, not all the jurisdictions are unified, which impedes being able to provide analysis at the national level. The difficulty is all the greater when attempting to compile data covering the whole region.
2. The second is the lack of a gender perspective in prison data, which is found throughout the region; information systems do not include a gender perspective. Information is needed, for example, on the number of pregnant women and children in women's prisons, and the associated health services available to women, just to cite two examples.

3. Third, in some countries drug laws do not distinguish between different types of offenses, or the differentiations in the offenses allegedly committed are not included in the records; rather, they are simply recorded as drug-related crimes. Nor is there any differentiation in the scale of the offense committed: small-scale dealing is in the same category—“drug trafficking”—as the large-scale transport of drugs. The fact that these very different situations are recorded in crime and prison statistics under a single category stands in the way of an accurate description of the population behind bars for drug offenses, and makes an analysis of the operation of the criminal justice system difficult.

Producing data is important in and of itself to increase knowledge and provide valuable information based on what governments are actually doing; in addition, public policies should be designed and developed based on statistical data and qualitative studies that identify structural problems in the system as well as any opportunities for change. For this reason, when a social problem is identified—such as the profound social impacts of a growing female prison population for drug-related offenses—generating information to describe and analyze the issue is a fundamental part of the process of finding timely and adequate solutions. Accordingly, and in order to substantially close the knowledge gap on women and drug policy, we recommend the following:

- Prioritize the compilation of detailed information on the situation of women in prison in region. This information should be generated by national governments and it should be accessible to all types of users—both professionals who work on the issue and the general population—to promote transparency.
- Compile sufficient and necessary information about the characteristics of arrests and sentences for drug-related offenses. This should include annual statistical information—broken down by sex—on the situation of the prison population, specifying characteristics such as level of education, age, health, conditions of confinement, ethnic or racial identity, sexual orientation and gender identity, the specific offenses for which they are behind bars, their dependents, their situation in the prison, and rates of overcrowding in women’s prisons, so that society at large can be made aware of the situation facing women in the prison system.
- Compile and make available to the general public up-to-date information at the national level on plans for intervention, training, work opportunities, and reinsertion for women in prison, with adequate monitoring of results, which will make it possible to better adapt them and to secure the budgetary resources needed to implement them.

- Break down information on different drug-related conducts such as production, distribution, supply, sale, and consumption, and identify the roles women play in each of them, so as to be able to make differentiated analyses.
- Develop objective, reliable, and comparable information on the prevalence of the use of psychoactive substances and associated risks for women in prison. This information is essential for planning and continuously improving health services from a gender and human rights perspective.
- Produce statistics available to the public, disaggregated by sex, on the number of people who apply each year to benefit from alternatives to incarceration, including their profiles. Include in this data the number of people (disaggregated by sex) whose applications were successful and the number of applications denied, specifying the reasons for the denials.
- The following indicators (without being exhaustive) are among those that should be compiled at a minimum:³¹
 - Number of people in prison.
 - Female prison population.
 - Population accused of drug offenses, disaggregated by sex.
 - Legal situation of those who are incarcerated.
 - Type of offense and sentences.
 - Number of prisons.
 - Number of children who live with their mothers (or fathers) in prison.
 - Number of children of incarcerated women who live outside prison.
 - Number of people in prison who receive visitors and frequency of the visits.
 - Distance between the prisons and the homes of those detained.
 - Health indicators.
 - Data on problematic use of psychoactive substances and access to treatment and harm reduction services in prison.

2. New Approaches to Measuring Success

Together with the information that needs to be generated, the available data should be used to develop new indicators that shed light on the problem and make it possible to appreciate both the different aspects of the issue of the incarceration of women for drug offenses and the impact of government responses, so as to lead to new strategies for intervention. Most of the indicators used in this field at present are process indicators, not results indicators. What is generally measured is the number of police arrests, the quantity

of drugs seized, and the number of those behind bars. Yet this says nothing about the size of the markets for the production, sale, and use of drugs. Nor does it reveal anything about the health and well-being of the populations affected, including the women who live in the areas where prohibited substances are grown and trafficked.

In some cases, this can be achieved by requiring public authorities to crosscheck existing information, which is often not shared between different bureaucratic agencies that produce information. One example is the combination of data on arrests with data on the quantity of substances seized or the form of transport. The qualitative studies show the prevalence of the crime of transporting drugs—in particular ingesting cocaine capsules—among women prisoners in the region. It also shows the frequent association of the involvement of women in drug trafficking with situations of human trafficking, and the juxtaposition of criminal networks. Nonetheless, this dramatic reality is hidden today in the production of official information.

In other words, in addition to producing new information, it is necessary to introduce a new perspective for analyzing existing data that sheds light on this specific problem and makes it possible to design and implement adequate responses. Therefore, adequate criteria must be developed to gauge the success of drug policies, mindful that their objective should be the well-being of the individual, the women, and their families. These could include access to adequate housing, decent and meaningful employment, health services, etc.



Conclusion

Once the enormous human and other costs caused by punitive drug policies and their disproportionate impact on women and their families is acknowledged, the development of new policies, interventions, and programs with the objective of eliminating or at least mitigating these negative consequences takes on new urgency. This guide offers a road map of public policy reforms with a human rights and gender focus to achieve that objective. In addition, a list of resources has been developed to accompany this guide that include:

- A report on alternatives to incarceration with a gender perspective.
- A compilation of some existing innovative approaches related to the issues addressed in the guide.
- A more detailed proposal on data collection and analysis.
- A series of photo essays of women deprived of liberty for drug offenses.
- A list of useful bibliographic references.
- To access these additional resources click on the following link:
<http://bit.ly/1ToUiFc>

The Working Group on Women, Drug Policies, and Incarceration



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NOTES

- 1 Walmsley, Roy, *World Female Imprisonment List*, Institute for Criminal Policy Research at Birbeck, University of London, October 2015, pp. 2, 13.
- 2 For more information, see Boiteux, Luciana, *The Incarceration of Women for Drug Offenses*, CEDD, November 2015, at http://www.drogasyderecho.org/publicaciones/pub-priv/luciana_i.pdf
- 3 Pieris, Nischa, *Women and Drugs in the Americas: A Policy Working Paper*, CIM/OAS, 2014, p. 2, at <http://www.oas.org/en/cim/docs/WomenDrugsAmericas-EN.pdf>
- 4 Instituto Nacional Penitenciario y Carcelario, *Estadísticas a diciembre de 2014*, at http://www.inpec.gov.co/portal/page/portal/INPEC_CONTENTIDO/NOTICIAS%20Y%20NORMATIVIDAD/ESTADISTICAS/12.%20ESTADISTICO%20DICIEMBRE%202014.xls
- 5 Defensoría Pública de Costa Rica, *Estudio de la Defensa Pública de Costa Rica sobre el perfil de la población femenina privada de libertad por introducir drogas a los centros penales*, April 2012, p. 4.
- 6 Saavedra, Enrique, Paula Lappado, Matilde Bango and Federico Melo, *Invisibles: ¿hasta cuándo?*, Church World Service and Gurisos Unidos, 2014, at http://www.cwslac.org/es/docs/Invisibles_hasta_cuando.pdf
- 7 Giacomello, Corina, *Género, drogas y prisión*, Mexico City, Tirant lo Blanch, 2013.
- 8 For more information, see Metaal, Pien and Youngers, Coletta, *Systems Overload: Drug Laws and Prisons in Latin America*, WOLA and TNI, 2010, at http://www.wola.org/sites/default/files/downloadable/Drug%20Policy/2011/TNIWOLA-Systems_Overload-def.pdf
- 9 Kensy, Julia, Camile Stengel, Marie Nougier and Ruth Birgin, *Drug policy and women: Addressing the negative consequences of harmful drug control*, International Drug Policy Consortium, no date, p. 11.
- 10 Boiteux, *op. cit.*, p. 2.
- 11 Instituto de Estudios para el Desarrollo y la Paz (Indepaz), *Vicios penales: cultivadores de coca, amapola y marihuana, en la hora de su despenalización*, Observatorio Colombiano de Cultivadores y cultivos declarados ilícitos, July 2015, at <http://www.indepaz.org.co/wp-content/uploads/2015/08/Vicios-Penales-ANEXOS-ultima-version-30-julio.pdf>
- 12 See examples in Giacomello, Corina, *Women, drug offenses and penitentiary systems in Latin America*, International Drug Policy Consortium, 2013, at https://www.unodc.org/documents/congress//background-information/NGO/IDPC/IDPC-Briefing-Paper_Women-in-Latin-America_ENGLISH.pdf. See also Giacomello, Corina, *Género, drogas y prisión*, *op. cit.*
- 13 For more information, see *The Impact of Drug Policy on Human Rights: The Experience in the Americas*, CELS, 2015, at http://www.wola.org/publications/the_impact_of_drug_policy_on_human_rights
- 14 For more information, see *The drug problem in the Americas*, OAS, 2013, at http://www.oas.org/documents/eng/press/Introduction_and_Analytical_Report.pdf; Youngers, Coletta, *The drug policy reform agenda in the Americas (Version 2)*, International Drug Policy Consortium, August 2013, pp. 2-3, at https://dl.dropboxusercontent.com/u/64663568/library/IDPC-briefing-paper_Drug-policy-agenda-in-Americas_V2_SPANISH.pdf
- 15 Technical Secretariat of the Working Group on Alternatives to Incarceration, *Technical report on Alternatives to Incarceration for Drug-related Offenses*, Inter-American Drug Abuse Control Commission (CICAD) of the Organization of American States, 2015, at http://www.cicad.oas.org/fortalecimiento_institucional/dtca/publications/InformeSobreAlternativasEncarcelamiento_SPA.pdf
- 16 In Search of Rights: Drug Users and Government Responses in Latin America, Colectivo de Estudios Drogas y Derecho (CEDD), July 2014, pp. 159-160 and 163.

- 17 *Ibid.*, p. 163.
- 18 Harris, Genevieve, *Conviction by numbers: Threshold quantities for drug policy*, International Drug Policy Consortium and the Transnational Institute, 2012, at <http://idpc.net/es/publications/2012/03/condenados-por-los-numeros-cantidades-umbral>
- 19 For more information, see *Addicted to punishment: The disproportionality of drug laws in Latin America*, Colectivo de Estudios Drogas y Derecho (CEDD), 2013, at [http://www.drogasyderecho.org/publicaciones/pub-col/proportionality-colombia-\(addicted-punishment\).pdf](http://www.drogasyderecho.org/publicaciones/pub-col/proportionality-colombia-(addicted-punishment).pdf)
- 20 Paladines, Jorge, *Nuevas penas para delitos de drogas en Ecuador*, WOLA, October 14, 2015, at http://www.wola.org/es/comentario/nuevas_penas_para_delitos_de_drogas_en_ecuador
- 21 Fleetwood, Jennifer, *Drug Mules: Women in the International Cocaine Trade*, London, Palgrave Macmillan, June 2014.
- 22 *Mujeres en prisión: los alcances del castigo*, 2011, Centro de Estudios Legales y Sociales, Ministry of Defense, Office of the Federal Prison Ombudsperson, <http://www.cels.org.ar/common/documentos/mujeresenprision.pdf>
- 23 Donna, Edgardo A. and María José Iuvaro, *Reincidencia y culpabilidad*, Buenos Aires, Astrea, 1984.
- 24 Joint UN Statement Closure of Compulsory Drug Detention and Rehabilitation Centers, at <http://idpc.net/es/alerts/2012/03/joint-un-statement-closure-of-compulsory-drug-detention-and-rehabilitation-centers>
- 25 For more information, see Guzmán, Diana Esther, *Drug courts: Scope and challenges of an alternative to incarceration*, May 2012, at <http://www.drogasyderecho.org/publicaciones/pub-col/drug-courts.pdf>.
- 26 For more information, see *Agricultural Censuses and Gender Considerations - Concept and Methodology*, United Nations Food and Agriculture Organization (FAO), at <http://www.fao.org/docrep/003/X2919E/X2919E00.HTM>; *Gender and Rural Development*, GIZ, at https://www.giz.de/expertise/downloads/1_Gender_and_Rural_Development.pdf.
- 27 Cited in *Invisibles, ¿hasta cuándo?: una primera aproximación a la vida y derechos de niños, niñas y adolescentes con referentes adultos encarcelados en América Latina y el Caribe*, Church World Service and Gurises Unidos, July 2014, p. 34, at http://www.cwslac.org/es/docs/Invisibles_hasta_cuando.pdf
- 28 *Ibid.*, p. 34.
- 29 These recommendations are included in *idem*.
- 30 Gunes, Kalkan, and Smith, Nicola, *Just Visiting: Experiences of children visiting prisons*, Barnardo's, September 2014, at <http://www.barnardos.org.uk/just-visiting.pdf>
- 31 Giacomello, Corina, *Women, drug offenses and penitentiary systems in Latin America*, *op. cit.*

About the Coordinating Organizations

WOLA is a leading research and advocacy organization advancing human rights in the Americas. We envision a future where public policies protect human rights and recognize human dignity, and where justice overcomes violence. WOLA tackles problems that transcend borders and demand cross-border solutions. We create strategic partnerships with courageous people making social change—advocacy organizations, academics, religious and business leaders, artists, and government officials. Together, we advocate for more just societies in the Americas.

The International Drug Policy Consortium (IDPC) is a global network of NGOs that promotes objective and open debate on the effectiveness, direction and content of drug policies at national and international level, and supports evidence-based policies that are effective in reducing drug-related harms. IDPC members have a wide range of experience and expertise in the analysis of drug problems and policies, and contribute to national and international policy debates. IDPC offers specialist advice through the dissemination of written materials, presentations at conferences, meetings with key policymakers and study tours. IDPC also provides capacity building and advocacy training for civil society organizations.

Dejusticia is a Colombian human rights organization, with more than ten years of experience, that produces expert knowledge around themes such as environmental justice, ethnic rights, drug policies, judicial systems in Latin America, and gender equality, among others, for public opinion and policy advocacy. Its objective is to strengthen the ties between academia and civil society in defense of the social democratic state and the law. For Dejusticia the law is a powerful tool for social transformation; therefore one of its cornerstones is to investigate the various ways in which people exercise the right to create a democratic culture respectful of institutions and human rights.

The Inter-American Commission of Women (CIM) of the Organization of American States (OAS) is the main hemispheric policy forum for the promotion of women's rights and gender equality. Created in 1928 - in recognition of the importance of women's inclusion to democratic strengthening and human development in the Americas – CIM was the first inter-governmental organization established to promote women's human rights and gender equality.

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The use of prison as a response to drugs has had a disproportionate negative impact on women. In Argentina, Brazil, and Costa Rica, more than 60 percent of the female prison population is incarcerated for drug-related offenses. Many of them have low levels of education, live in poverty, and are the primary caregivers of dependent persons—children, young people, the elderly, and the disabled. This guide proposes public policy reforms to reduce the number of women incarcerated in the region.