

# **Contributions to the OHCHR for the preparation of the study mandated by resolution A/HRC/28/L.22 of the Human Rights Council on the impact of the world drug problem and the enjoyment of human rights.**

## **I. Introduction**

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This document presents the joint contribution prepared by the **Center for Legal and Social Studies (Centro de Estudios Legales y Sociales, CELS)** from Argentina, **Conectas Human Rights (Conectas Direitos Humanos)** from Brazil and **Corporación Humanas Centro Regional de Derechos Humanos y Justicia de Género** from Chile to the report mandated by the resolution A/HRC/28/L.22.

In recent years, drug policy began to be reviewed and questioned by its consequences for the observance of human rights. In March 2013, by request of 17 civil society organizations from 11 countries in America, the Inter-American Commission on Human Rights (IACHR) held a regional thematic hearing, the first on this subject at its 150 session periods. This contribution takes as its starting point the analysis report presented on that occasion.<sup>1</sup>

Latin America has tragically suffered from one of the most perverse effects of prohibitionist drug policies: drug trafficking and the violence associated with it. In recent years, the need to discuss the scope and relevance of drug policies adopted in every country in America has become even more evident.

Evidence-based research has proven the negative impact drug policies have on human rights in the region. Prohibitionist policies and ‘The War on Drugs’ have produced the escalation of violent conflicts in the region by creating an illegal market controlled by complex criminal organizations.

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<sup>1</sup> On the occasion of the aforementioned Hearing before the Inter-American Commission on Human Rights (IACHR) on the impact of drug policies on human rights in the Americas, an analysis report was prepared by the following organizations:

1. American Civil Liberties Union, United States (ACLU)
2. Association for Human Rights in Peru (APRODEH)
3. Canadian Civil Liberties Association (CCLA)
4. Center for Legal and Social Studies, Argentina (CELS)
5. Center for Research on Drugs and Human Rights, Peru (CIDDDH)
6. Committee of Relatives of the Disappeared in Honduras (COFADEH)
7. Medical College of Chile
8. Mexican Commission for the Defense and Promotion of Human Rights (CMDPDH)
9. Conectas Direitos Humanos, Brazil
10. Collective for an Integrated Drug Policy A. C., Mexico (CUPIDH)
11. Humanas Corporation, Chile
12. Center for the Study of Law, Justice and Society (DeJusticia), Colombia
13. Latin American Institute for Security and Democracy (ILSED)
14. Intercambios (Civil Association for the Study and Assistance of Drug Related Problems), Argentina
15. Myrna Mack Foundation, Guatemala
16. Washington Office on Latin America (WOLA)
17. Institute for Legal and Social Studies (IELSUR), Uruguay

These conflicts are generally located in impoverished areas and contribute to an even deeper deterioration of living conditions and the resulting stigmatization of its inhabitants.

Undoubtedly, repressive policies tend to directly infringe on thousands of people's human rights; especially those prosecuted and sent to prison, who usually face inhumane conditions such as the ones associated with prison overcrowding. Furthermore, drug policies tend to have a disproportionate impact on particularly vulnerable groups, thus recreating discrimination and infringing upon their fundamental rights.

This prohibitionist model has served to broaden social gaps, economic inequalities, political differences and international inequalities. States' *de facto* practices show that the international drugs regime has not changed in the century since its initial configuration. This is despite that, to a large extent, this rigid regime is undergoing a critical phase since its credibility and legitimacy have been seriously eroded.

Therefore, it is necessary to develop a new and better diagnosis of the problem. Mimetic answers, which have proven inefficient, are being repeated without an awareness of the real dimension of neither the phenomenon nor of the elements that have led to its evolution in the last 20 years. Provided that this is a global issue, it is essential that the sufferings already undergone in the region are not reproduced in other parts of the world, as could occur in Africa.

The drug problem is a symptom of a much deeper issue, and the eventual success in overcoming it requires us to face the difficulties and structural challenges which support and expand it. To that end, it is necessary to hold an open debate in which the human rights community bears an essential responsibility.

Throughout the last years, there have been regional debates that question the drug policy issue that have shown progress. These discussions evidence the concern from governments, organizations and academics, among others, about the negative impact that current drug policies approaches have on human rights. Among those, we can mention the "Report on the Drug Problem in the Americas," presented by the Secretary General and the Declaration of Antigua.<sup>2</sup> However, the debate opened in the OAS is still nascent and, above all, has not yet produced substantial changes in any drug policies.

This contribution to the OHCHR is intended to provide first-hand information and material evidence from organizations that have been working on the various issues that the aforementioned situation presents in Latin America.

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<sup>2</sup> The Declaration of Antigua invites countries to start a multi-level consultation process on drug policy issues in a variety of national and regional fora, taking into consideration the OAS reports' presented in the 43rd Assembly and commissions the OAS Permanent Council to call a Special Session of the General Assembly to discuss drug policies in 2014, to take place in Guatemala. The process initiated in Antigua ensures that drug policies will remain at the top of the hemispheric agenda in the near future and also provides Latin American countries with a greater opportunity to influence on the UN General Assembly in 2016 that will deal with the issue of drugs.

## II. Current drug policies in light of International Human Rights Law

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There is a heightening of tension between the international regime on drugs, which has determined and defined prevailing prohibitionist drug policies and the way in which states meet obligations derived from them, and international human rights law. In spite of that, states tend to prioritize their obligations regarding drug control, thus giving rise to policies and situations which violate human rights.<sup>3</sup>

The following is an attempt to identify those human rights which have been particularly affected by the implementation of drug policies in the region. Even though it is not meant as an exhaustive list, since there are other rights at stake, it does serve to portray the practical conflict between such policies and UN Conventions on drugs and, in particular, the American Convention on Human Rights (ACHR) and other international Covenants such as Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), Convention on the Elimination of all forms of Discrimination against Women (CEDAW), International Convention on the Elimination of All forms of Racial Discrimination (ICERD), among others. Together with the identification of the human right affected, we will describe the scenario resulting from such infringement and its connection with national drug policies.

**The right to life** established in article 4 of the ACHR, Article 3 of the UDHR, and article 6 of the ICCPR, has been systematically violated due to the outbreak of violence linked to drug trafficking. Countless people have lost their lives, including particularly women and children, as a result of confrontations between drug-related criminal organizations and state forces in countries like **Colombia, Mexico, Honduras, Peru, Argentina and Brazil**. States are accountable both for the violence and the toll it has taken. On the one hand, because drug trafficking and the power wielded by criminal groups linked with it result from prohibitionist policies adopted by states regarding the use of illegal drugs. Indeed, it is such policies which cause drugs to be a costly good to be traded at a high profit, which provides strong incentives to trafficking and violence. On the other hand, because of states' responses to those organizations has been disproportionate. Military and police actions displayed against drug trafficking affect the civil population indiscriminately, which results in a failure on the part of States to comply with their obligation to safeguard every person's right to life according to article 1.1 of the ACHR.<sup>4</sup>

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<sup>3</sup> See the report produced jointly by the Mexico City Human Rights Commission (CDHDF) and the Collective to an Integrated Policy to Drugs (CuPIHD) 'Drugs and Human Rights in Mexico City 2012-2013', where there is a detailed description of the international framework rule on drug policies and its contradictions with international human rights law, with special emphasis on the recommendations and comments issued by UN human rights treaty bodies. Available at: <http://drogasdh.cd hdf.org.mx/>

<sup>4</sup> This has been noted by the IACrHR in the Case of the Santo Domingo Massacre, in which the Colombian Air Force launched a cluster bomb and machine gunned the village of Santo Domingo in the Department of Arauca, in order to attack an airplane belonging to the FARC guerrilla which was undertaking drug-trafficking activities in that location. On this occasion, the IACrHR said that: *'The Court notes that this action by members of the Colombian Air Force entailed a failure to comply with the obligation to guarantee the rights to life and personal integrity in the terms of the American Convention of the inhabitants of Santo Domingo, who were affected by the endangerment of their rights by the mere fact of having been the object of these indiscriminate attacks, irrespective of whether anyone was killed or injured. (...)'*IACrHR. Case of the Santo Domingo Massacre v. Colombia. Judgment of November 13<sup>th</sup>, 2012. Para. 237.

**The right to personal integrity and the prohibition of torture and other cruel, inhuman or degrading treatment** under article 5 of the ACHR, article 5 of UDHR, and articles 7 and 10 of the ICCPR has been violated at least in two scenarios associated with drug policies in the region. First, by means of the participation of military forces in citizen security tasks in countries like **Mexico and Brazil**, where indiscriminate use of force and abuse of authority have led to the perpetration of torture with the purpose of obtaining confessions of illegal activities associated with drug trafficking. Second, in the rehabilitation treatments to which persons dependent on psychoactive substances are subjected to. In Latin America, due to weak state control over the way in which such treatments are administered, very often they are forced on the person, who is held and isolated against their will, denied of access to any substitute medication, and even made to engage in forced labor. Situations of this kind have been recognized by the UN Rapporteur on torture as forms of torture<sup>5</sup>.

The way in which States approach the use of illegal drugs has also been cause of violations to **the right to lead a life free of arbitrary or abusive interference established by article 11.2 of the ACHR and the right to personal liberty established by article 7 of the Convention**, in view of the criminalization of drug use. In countries such as **Argentina, Brazil, Chile and Peru**, even though there exist laws and judicial decisions which decriminalize use in small amounts, there have been reports of cases where criminal sanctions are imposed on persons who voluntarily decide to use psychoactive substances without affecting others and even when they were inside their own homes. Drug use characteristically belongs to a person's private life, therefore, the fact that it is penalized, often as severely as drug trafficking activities, constitutes an excessive intervention on the part of the state.

**The right to equality before the law and the principle of non-discrimination** enshrined in articles 1 and 24 of the ACHR, articles 1 and 2 of the UDHR, articles 2, 3 and 26 of the ICCPR, and article 1 of the ICERD, have also been violated by police detention practices for drug-related activities. Empirical evidence points out that not only have detention rates for activities associated with possession of drugs increased sharply in recent years, but also that such increase falls mainly on persons of African descent while the rate of "white persons" detention remains the same.<sup>6</sup> This means that the wide discretion margin for police action in cases related to drug carrying, which often leads to abuse of authority, responds to discriminatory profiles on the grounds of race.

**The right to be presumed innocent established in article 8.2 of the ACHR and the exceptionality of pretrial detention** derived from article 7 of the Convention, and article 11.1 of the UDHR, article 14.2 of the ICCPR, have been equally affected by excessive and arbitrary use of pretrial detention for drug-related actions. Such is the case in countries like **Bolivia, Ecuador, Mexico and Peru**, where any person linked to drug-related offenses is automatically placed in preventive detention while their legal status is addressed. In such cases, judges do not have the possibility of assessing case-related evidence, nor do prosecutors have the obligation of proving the defendant's responsibility, since it is the law itself that dictates pretrial detention for drug-related

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<sup>5</sup> United Nations, Human Rights Council (2013). Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez. February 1<sup>st</sup>. A/HRC/22/53

<sup>6</sup> On the problem of the impact of incarceration for drug-related conducts on the population of African descent in the United States, see Fellener, J. (2009). Race, Drugs, and Law Enforcement in the United States. Stanford Law & Policy Review, (20), 2. Available at: <http://www.hrw.org/news/2009/06/19/race-drugs-and-law-enforcement-united-states>

cases. Indeed, the IACHR has declared such practice to be contradictory to the Inter-American System.<sup>7</sup>

**The right to personal liberty and the prohibition of arbitrary detention enshrined in article 9 of the ICCPR and article 7.3 of the ACHR** have also been ignored by state security forces in the implementation of drug control strategies. In **México**, for example, there have been various reports of arbitrary detentions performed by military and police who are not required, within the framework of current public security strategies, to register detainees or to bring them immediately before a judge. Similar cases were reported in Bolivia in 1995 while intense campaigns of forced eradication of illegal crops were being conducted.

In the same regard, **the exceptionality of the deprivation of liberty, based on the criteria of reasonableness, necessity and proportionality which, according to the IACHR,<sup>8</sup> derive from articles 30 and 32.2 of the ACHR**, is ignored in view of the recurrent and excessive use of criminal law to punish any drug-related conduct. As will be shown below, not only has there been an unjustifiable rise in the number of drug-related conducts classified as crimes, but there has also been, in recent decades, a disproportionate rise in the prison terms with which these conducts are punished.

As a result of highly repressive and punitive policies implemented by states in the region, **the right to personal integrity and the right of every person deprived of liberty to be treated with respect for the inherent dignity of the human person, enshrined in article 5 of the ACHR**, are violated in the context of the serious prison situation facing those convicted on drug-related charges. High rates of overcrowding that exist in Latin American prisons are to a great extent the result of the large number of persons imprisoned for simple drug possession, who tend to live in complex socioeconomic conditions and be the weakest links in the drug business. Such situations particularly

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<sup>7</sup> According to the IACHR, 'Respect for the right to be presumed innocent demands equally that the State should justify and prove, in a clear and well-argued manner, considering the circumstances of each case, the existence of valid requirements for pre-trial detention. Thus, the principle of presumption of innocence is also violated whether pre-trial detention is imposed arbitrarily; or when its application is determined essentially, for example, by the type of crime, by the penalty expected to be imposed, or by the mere existence of *prima facie* evidence linking the defendant. Such cases also constitute, to a great extent, an application of anticipated penalty, previous to the conclusion of the proper proceedings, because, in effect, pre-trial detention does not differ from the deprivation of liberty derived from a sentence. When the application of pre-trial detention on the basis of criteria like the ones aforementioned derives from the rule of law, the situation becomes even more serious; since the judicial process is being 'codified' by means of the law and, therefore, a limit is being imposed on the judge's possibilities for assessing the necessity and appropriateness of such action considering the characteristics of the case in question.' (*"El respeto del derecho a la presunción de inocencia exige igualmente que el Estado fundamente y acredite, de manera clara y motivada, según cada caso concreto, la existencia de los requisitos válidos de la prisión preventiva. Por ende, también se viola el principio de presunción de inocencia cuando la prisión preventiva se impone arbitrariamente; o bien, cuando su aplicación está determinada esencialmente, por ejemplo, por el tipo de delito, la expectativa de la pena o la mera existencia de indicios razonables que vinculen al acusado. En estos casos también se está en gran medida aplicando una pena anticipada, previa a la conclusión del proceso mismo, entre otras razones porque materialmente la detención previa al juicio, en tanto privación de libertad, no difiere en nada de la que se impone como resultado de una sentencia. Cuando la aplicación de la prisión preventiva con base en criterios como los mencionados se hace obligatoria por imperio de la ley, la situación es aún más grave, porque se está 'codificando' por vía legislativa el debate judicial y por tanto, limitándose la posibilidad de los jueces de valorar su necesidad u procedencia de acuerdo con las características del caso específico."*) IACHR, Report on the Use of Pre-trial Detention in the Americas.2013, para. 137.

<sup>8</sup> IACHR, Application to the IACrTHR in the case of Walter Bulacio, January 24<sup>th</sup>, 2001, paras. 66 to 71.

affect women, taking into account that a high percentage of female prisoners are deprived of liberty for drug-related conducts.<sup>9</sup>

**The right of movement and residence protected in article 22 of the ACHR** has equally been affected by the forced displacement of the civilian population within the framework of narcotics control strategies. Such has been the case in **Colombia**, for example, where the displaced population has increased due to forced eradication and fumigation of illegal crops actions, mainly carried out by armed forces.<sup>10</sup> According to the Colombian Constitutional Court, such security operations have been carried out without any kind of anticipation or prevention against the effects of displacement on the communities involved.<sup>11</sup>

In addition, **the economic and social rights, together with the obligation to adopt measures for their progressive development, enshrined in article 2 of the ICESCR (International Covenant on Economic, Social and Cultural Rights) and in article 26 of the ACHR** have been threatened by, among other factors, forced eradication and aerial spraying of illegal crops campaigns. Such state actions are carried out in regions characterized by extreme poverty, lack of state presence and limited availability of physical infrastructure and basic services. Under the circumstances, local communities find in illegal crops their only source of income; therefore, indiscriminate state attacks, without parallel plans for alternative development, intensify their poverty and restrict even more their access to food and housing, and to education and health services, among others.

Finally, **the right to health enshrined in article 12 of the ICESCR and in article 10 of the Protocol of San Salvador** has also been violated in view of the serious healthcare situation facing drug users. In American countries, the stigmatization and criminalization of drug use hinders access to health services, since users undergo humiliating and cruel experiences in the provision of health care, which they are rightfully unwilling to take. Furthermore, access to health care for drug users is articulated with the workings of the criminal justice system, as is the case in **Uruguay** and **Argentina**, which explains why users are reluctant to access such services in order to avoid criminal sanctions.

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<sup>9</sup> Thus, for example, according to a recent report by the IACHR, ‘a high percentage of women deprived of liberty who have children under their care have been imprisoned on non-violent charges, such as retail drug dealing.’ (“*un alto porcentaje de las mujeres privadas de libertad que tienen niños a su cargo han sido detenidas por delitos no violentos, como el microtráfico de drogas.*”). IACHR. Report on the Use of Pre-trial Detention in the Americas. 2013, para. 216.

<sup>10</sup> In this regard, see the analysis by CODHES (Consultancy for Human Rights and Displacement) on the effects of Plan Colombia on forced displacement. CODHES (2003). Progress report – Plan Colombia on the Colombian Border with Ecuador: counterproductive effects and humanitarian crisis. (*Balance del Plan Colombia en la frontera de Colombia con Ecuador: contraproductos y crisis humanitaria.*) Available at: <http://www.acnur.org/t3/recursos/informacion-sobre-pais-de-origen/detalle-documento-coi/balance-del-plan-colombia-en-la-frontera-de-colombia-con-ecuador-contraproductos-y-crisis-humanitaria-2003/>

<sup>11</sup> According to the Court, ‘One of the most serious consequences of the lack of a preventive approach occurs within the framework of operations legitimately developed by the authorities, regardless of whether they are conducted by military or police forces and state security agencies against criminal conducts engaged by armed groups, or when fumigation and forced eradication of illegal crops operations are undertaken in places where the local population is forced to displace.’ (“*Una de las manifestaciones más preocupantes de la ausencia de un enfoque preventivo tiene lugar en el ámbito de las operaciones legítimamente adelantadas por las autoridades, sean estas las actuaciones de las fuerzas militares o de policía y de los organismos de seguridad del Estado cuando le hacen frente a las conductas delictivas realizadas por los grupos armados, o cuando se adelantan procesos de fumigación y erradicación de cultivos ilícitos en lugares donde habitan personas que se ven avocadas a desplazarse.*”). Corte Constitucional de Colombia. Auto 218 de 2006. M.P. Manuel José Cepeda Espinosa.

Taking into consideration all of the above, it is clear that drug policies implemented in the region in recent decades have had a negative impact on the population's human rights. The violated and threatened rights identified above are a mere sample of the negative consequences brought about by the prohibition on drugs in the countries of the Americas. Thus, a more direct involvement from the international systems of protection of human rights is necessary in view the preparation for the UNGASS 2016 to incorporate this matters of the negative impact of drug policies on human rights in the world, derived from the narcotics control regime.

### **III. Regional diagnosis:**

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In this section, we will identify some of the main points which prove the negative impact that current drug policies have on human rights in our region. The following points account for some of the predicaments brought about by such impact. We are well aware that this is an issue of global dimensions, but for the purposes of this presentation, we shall focus on the phenomena observed in our region: the Americas.

#### **1. Right to life:**

##### **Levels of violence generated in the region. Militarization of anti-drug policies and the fight against drug trafficking.**

Prohibitionist drug policies have contributed to the creation of armed organizations engaged in criminal activities. Drug trafficking is one of the main activities these organizations commit, driving violence that affects the rights of citizens. Furthermore, because violence is the main form of regulation of illegal markets, drug trafficking is necessarily accompanied by arms trafficking, territorial disputes, corruption and the undermining of democratic institutions, especially the police, the judiciary system and governmental institutions. These are the reasons why the revision of the paradigm of 'The War on Drugs' must be seen as part of an initiative to reduce violence.

Past decades have brought changes in both the production and the trafficking of illegal substances, which have also brought changes in the location of the criminal groups that control their transit. Violent situations with high impact on local communities have moved as well, shifting the conflict from one country to another.

**Colombia's** recent history is particularly marked by the violence of the great 'mafias' and their total war against the State over the drug business. During the 1980s and first half of the 90s, violence was driven by large cartels who engaged in attacks, kidnappings and murders. During this period, the

highest homicide rate in the last 50 years was attained (81 homicides per 100,000 inhabitants)<sup>12</sup> and in Medellín the proportion of homicides committed with firearms went from 40 percent in 1979 to 76 percent in 1985.<sup>13</sup>

In recent decades, actors in the armed conflict have responded to economic incentives generated by prohibitionist policies by forming an alliance with drug trafficking mafias. On the one hand, FARC guerrillas started collecting taxes for both coca leaf production and trafficking routes inside their territory. At the same time, paramilitary groups allied with drug cartels in order to consolidate a counter-insurgency strategy that would attack the coca-growing areas controlled by the guerrillas. Both guerrilla and paramilitary groups have strengthened their military capacity through the profitable drug business, thus adding a new dimension to Colombia's armed conflict and affecting its victims.<sup>14</sup> In this regard, the result of the peace process in Colombia will be of utmost importance because it will serve as a space to observe how the drug business can be dismantled once the Colombian state has enhanced its capacity to be present in a larger portion of its territory. It will also allow the most directly affected sectors of the Colombian population to influence the peace talks and legal reconstruction process.

In the last decade, the escalation of violence has focused on **Mexico**. In recent years the country has suffered tens of thousands of deaths, and harmed the safety, liberty and security of many.

The participation of the Armed Forces in public security has had a serious impact on the respect for human rights. As part of their strategy and due to their training, the Armed Forces have used lethal force indiscriminately in their operations against organized crime, which has resulted in many lives lost. The toll the war has taken has been as follows: more than 100,000 people have lost their lives, more than 25,000 people have been disappeared (according to official figures)<sup>15</sup> and torture cases have increased by 500 percent.<sup>16</sup> The Mexican Commission for the Defense and Promotion of Human Rights (CMDPDH) has documented various cases that reflect the serious consequences that the fight against drug trafficking has had in different regions in the country. In all cases, the participation of the Armed Forces has been documented in situations of enforced disappearance, arbitrary detentions, torture and extrajudicial executions. In the case of torture, systematic patterns have been identified that reflect actions taken by security forces to obtain self-incriminating

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<sup>12</sup>Sánchez Torres, Fabio José and Díaz, Ana María. 'Conflict, Violence and Criminal Activity in Colombia: a Spatial Analysis.' Economy Archives, National Planning Department, Bogotá: 2003. P.17. Available at: [https://www.dnp.gov.co/Portals/0/archivos/documentos/DEE/Archivos\\_Economia/219.PDF](https://www.dnp.gov.co/Portals/0/archivos/documentos/DEE/Archivos_Economia/219.PDF).

<sup>13</sup>Reid, Michael. 'A Region Threatened by Drug Trafficking' in García Sayán, Diego (Ed). *Coke, Cocaine and Drug Trafficking. Labyrinth in the Andes*. Andean Commission of Jurists. Bogotá: 2013. P.144.

<sup>14</sup>In its final report on the Colombian armed conflict, the Center of Historical Memory concluded, as regards drug-trafficking, that 'its unlimited corrupting power has affected politics and captured the State, but also its devastating violence has shaken the foundations of the State and found in the armed conflict an opportunity to endure and obtain political recognition under various flags.' *Centro Nacional de Memoria Histórica. "BASTA YA. Colombia: memorias de guerra y dignidad."* P. 193. Available at: <http://www.centrodememoriahistorica.gov.co/micrositios/informeGeneral/descargas.html>

<sup>15</sup>Steimberg, Nik. 'Vanished: The Disappeared of Mexico's Drug War'. Human Rights Watch. New York, 2013. Available at: <http://www.hrw.org/news/2014/01/08/vanished-disappeared-mexicos-drug-war>

<sup>16</sup>TDT Network. 'Joint Report presented by Mexican Civil Society Organizations for the Second Round of Mexico's Universal Period Review'. March 4<sup>th</sup>, 2013. Available at: <http://cmdpdh.org/wp-content/uploads/2013/07/Informe-conjunto-presentado-por-organizaciones-de-la-sociedad-civil-mexicana-para-la-segunda-ronda-del-EPU-a-M%C3%A9xico.pdf>

confessions, linking detained persons or their relatives to criminal organizations. The CMDPDH has recorded a case in which 25 police agents of Baja California State, within the framework of the 'Operation Cleanup,'<sup>17</sup> were falsely accused of being linked with organized crime and then tortured by military officers in military quarters to force confessions out of them.

Likewise, as the UN Working Group on Enforced or Involuntary Disappearances has verified, forced disappearances have been more recurrent in Mexico since the framework of the current strategy of public security started being implemented. A common pattern has been registered in all cases of enforced disappearance victims. First, victims are arbitrarily detained by members of the military or the police; their detention is not officially recorded and people are not brought before the Public Ministry. Immediately after, their relatives go to security forces and judicial officials in search of information about their whereabouts; however, officials refuse to give them any kind of information or, in spite of complaints, refuse to open respective investigations.<sup>18</sup>

The strategy to fight against organized crime has also justified the existence of different legislative bodies that operate in violation of due process. The exceptionality of organized crime and the complexity of its persecution have been used as arguments to justify extraordinary procedures; laws and legal figures have been enacted in spite of the detriment of judicial rights and guarantees, therefore creating a para-judicial system connected to organized crime. Practices such as pre-charge detention (*arraigo*) and protected witnesses have unjustifiably extended State faculties to detain a person, attempting against the sense of justice itself. Furthermore, the prevalence of military jurisdiction increases impunity in these abuses.

The use of the Armed Forces to fight organized crime has defined the terms of the fight: 1. Against an unknown 'enemy' and; 2. Without a clear strategy with limits under civilian oversight. In addition, the lack of a cause and effect analysis of such a strategy has brought an escalation of violence which, seven years after it started, seems far from reaching its end. Today, violence and insecurity rates are much higher than they were years ago and human rights violations are still increasing.

One year after the regime change in the Federal Public Administration in Mexico took place and in spite of repeated statements promising a change of strategy in security matters, the reality remains the same. To date, there is no clear strategy for the withdrawal of the Armed Forces from public security work and little has been said about the incorporation of human rights standards into security strategies. The creation of the National Gendarmerie is a cause for concern because it might result in the institutionalization of a militarized strategy for public security.

**Honduras**, one of the countries most affected by violence, is the country with the highest homicide rate among a list of 207 countries. According to data from 2011, Honduras had 92 homicides per 100,000 inhabitants.<sup>19</sup> Although it is true that these levels of violence have various causes, they are

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<sup>17</sup> The alleged operation was widely covered by the media. See articles <http://www.eluniversal.com.mx/nacion/164754.html>, <http://www.cronica.com.mx/notas/2009/417395.html>. In the international media: <http://www.elnuevodiario.com.ni/internacionales/30804>

<sup>18</sup> Human Rights Watch 'Neither Rights, nor Security: Killings, Disappearances and Torture in Mexico's 'War on Drugs'', 2011.

<sup>19</sup> United Nations Office against Drug and Crime (UNODC), in the study 'Transnational Organized Crime in Central America and the Caribbean, A Threat Assessment'

closely associated with drug trafficking dynamics and military policies. In Honduras a militarization process can be observed since 2009, which has granted the Armed Forces greater power in police functions. According to the latest Global Peace Index report, Honduras is one of the countries with the highest military and police expenditure in the world. Measured as a percentage of GDP, it reaches 17 percent. Since 2010, the Government has continually kept 4,000 soldiers on local and regional roads. Furthermore, in August 2013, the congress approved the creation of a military police corps with 1,000 men that possesses its own judges and prosecutors. In the end of 2013, the National Congress approved a constitutional reform to give the Public Order Military Police a constitutional rank.

In **Guatemala** the problem of drug trafficking is very delicate, not so much due to consumption or distribution within the country, but because Guatemala shares a 900 kilometer border with Mexico that represents a direct route into the country and subsequently into the United States. Local and Mexican trafficking structures have acquired great economic power, as well as political and operational influence in Guatemalan society. These structures have even managed to greatly infiltrate the state's institutions, therefore contributing to the acceleration of the institutional weakness of the state, which is already significantly undermined because of the actions of the economic elites during the last 30 years.

The current President's discourse about decriminalization or control processes over drug markets, especially on the cannabis market, seem to be reasonable steps to deal with the consequences in the country. Nevertheless, they contradict governmental actions regarding domestic security because reactive measures of population control have prevailed, and in some cases, repressive measures have been taken against various protesting communities.

In **Peru**, similar military decisions have been taken and they have had similar results. Currently, Peru is world's leading producer of coca, surpassing Colombia according to the latest report by the UN Office against Drug and Crime (UNODC).<sup>20</sup> By using a strategy that responds to principles associated with 'The War on Drugs,' the Peruvian state has tried to bring illegal drug trafficking to an end; nevertheless, the strategy has been a failure. Peru also shares with Colombia the dangerous juxtaposition of drug trafficking and an internal armed conflict; as a result, military actions have escalated in certain areas because of their proximity to areas controlled by the Shining Path guerrilla group, as is the case of the area of VRAEM region (Valley of the Rivers Apurímac, Ene and Mantaro).<sup>21</sup>

The VRAEM is over-militarized, with more than 40 military and police bases, 1,700 members of the armed forces. There are attempts to build an airstrip and sign a defense treaty with the U.S. military.

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<sup>20</sup> Monitoring of Coca Crop Cultivation, 2012 – UNODC. Available at: [http://www.unodc.org/documents/crop-monitoring/Peru/Peru\\_Monitoreo\\_de\\_Coca\\_2012\\_web.pdf](http://www.unodc.org/documents/crop-monitoring/Peru/Peru_Monitoreo_de_Coca_2012_web.pdf)

<sup>21</sup> The VRAEM is a strategic region located in the South of Peru among 5 Departments (Junín, Ayacucho, Cusco, Huancavelica and Apurímac). It used to comprise 11 districts (1,486,000 ha) but now comprises 32 districts (13 in the jungle and 19 on the hills). It contains gas installations, the gas pipeline, hydroelectric plants in Tayacaja and important ruins in Macchu Picchu. The process of territorial expansion from the point of view of the State (from 12,000 to 34,122 square km) has been detrimental because it stigmatizes an immense territory due to illegal drug trafficking and terrorism. The region has a population of 331,334 inhabitants (2012) composed by farmers and traders who are mostly Quechua speakers, even though they speak and understand Spanish.

Military actions, and especially the ones connected to compulsory eradication of coca crops, are an element that has resulted in increasing degrees of militarization in a territory with a long history of human rights violations of the peasant population. Furthermore, there is a tragic history of relationships between corrupt arms of government and drug trafficking in the high Peruvian jungle, with nefarious elements from the Armed Forces and the Peruvian National Police. The story is a consequence of the absolute lack of the Rule of Law in areas under police and military control. The national government's response has been the recurrent renewal of a State of Emergency, which has been renewed every three months for many years. Over time, this State of Emergency has created a growing confusion of distinct phenomena. Such is the case with the armed conflict and drug trafficking, which has been promoted by the press under the name of 'narco-terrorism'. The result has been the over-militarization of the region on the left bank of the Mantaro River, which has abroad perimeter under the State of Emergency that is used for a variety of endeavors, including: the planning of military operations; curfews; the forced retention of people; the construction of an aerodrome; foreign police and/or military presence in the police base in Palmapampa—under the pretext of the fight against terrorism—the announcement of crop eradication; integrated police and military actions and 'mega-operations,' with a great number of unjustified detentions of farm workers and leaders; as well as frequent harassment, attacks, cross-fire and accusations that affect the security of the civil population living in the area, among them, peasants, women and children.

Other countries like **Argentina**, whose geographic position prevent it from being directly exposed to the violence, have equally suffered from the tightening of security policies and an increasing militarization of state responses, actions which are justified under the fight against terrorism. For the first time, in 2013 the intervention of the Armed Forces in border patrol tasks was established in order to address the 'narco' threat. Argentine law expressly prohibits the participation of the Armed Forces in domestic security tasks, and never since the transition to democracy had it been allowed. Nevertheless, the 'narco' threat works as a discursive alibi for punitive and demagogic remedies; so at least in two Argentine provinces, organized crime infiltration into important institutional police forces has been discovered, thereby producing scandals which resulted in changes in police leadership and political oversight of security. Furthermore, political and media reactions are not based on strict diagnoses, and the solutions prescribed by them are based on biased and dangerously simplified views. 'The War on Drugs' is presented as an urgent irruption that enables, under the pretext of a State of Emergency, regressive proposals capable of combining greater police powers with an increasingly militarized agenda that includes the deployment of Armed Forces resources and debates over the enactment of the death penalty through a 'aerial shoot-down' law. The law is intended to display the same violent policies which have proven inefficient and counterproductive throughout the region and, at the same time, are intended to close the debate over central aspects of the issue. These include: 1. The key role that the police itself play in the production and circulation of violence in impoverished neighborhoods; 2. The serious difficulties that both the security forces and the justice system encounter to investigate complex crimes and; 3. The necessary review of the current drug law legislation.

The women's movement in Latin America has also expressed its concern over the impact that 'The War on Drugs' has had on women in the region. This can be seen in their report titled '*Review of the*

*Current Anti-Drug Policy: A Priority to Reduce Violence against Women in the Americas.*<sup>22</sup> The report states that, as well as in other armed conflicts, women have disproportionately suffered the impact of violence generated by illegal drug markets; that their bodies have been used as battlefields in the midst of violent confrontations; and that they have carried the main burden in the increasingly territorial militarization. The current anti-drug policies, which keep drug business illegal, also favor other illegal activities associated with drug trafficking, such as arms and human trafficking. The lack of regulation favors the perpetration of crimes against women that are committed because criminals rely on the absence—or connivance—of the State.

## 2. Right to health:

### **Criminalization of drug use:**

Criminal law has been the principal tool for drug policies in our region and it has mainly affected users.<sup>23</sup> Since the 20<sup>th</sup> century—and especially during its second half—various countries in the region have toughened criminal law with regards to different conducts connected to drugs. In many cases, the repressive set of rules was set against the conducts of substance users, who were criminalized as part of the strategy to reduce demand (“*no users means no drug trafficking*”).

In **Argentina**, for example, the regulation that criminalizes drug possession for personal use is still enforced. Studies carried out in the 90s point out that approximately 70 percent of the cases opened for breaking such law belonged to personal use infractions by people in public spaces, with small amounts of drugs—in general, marijuana or cocaine—who were not armed and were not committing any other crime. Detained persons were usually male, young, Argentinean, single, with no criminal records or previous detentions. The criminalization of drug use or possession—even in tiny amounts—is still enforced even though in 2009 the National Supreme Court decided on the Arriola case that article 14 of Law 23,737, which penalizes the possession of drugs for personal use, is unconstitutional and ordered the legislative body to adapt the law to that jurisprudence.

In **Peru**, despite the fact that the Criminal Code does not criminalize the possession of small amounts for personal use, the number of detained persons for drug use and their percentage in the total number of detained persons for drug-related crimes increased, especially during the 90s. In 1995, the number of persons detained for drug use was 6,876, and represented 55 percent of the detentions for these crimes. In 1999, the number had almost doubled to 12,228, representing 79 percent of the total number of detainees for these crimes. In 2000, when detentions for drug use decreased to 9,006, the percentage in the total number of this kind of infringements continued to rise, reaching 83 percent. Data from 2009 provided by the National Police indicates that out of 13,142 interventions; 51.19 percent (6,728) were due to personal use, and out of the 9,780 detained persons, 74.39 percent were users.

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<sup>22</sup> Communication to the Sixth Summit of the Americas. Regional Feminist Articulation for Human Rights: ELA, Latin American Team of Justice and Gender (Argentina); Humanas Corporation (Chile, Colombia, Ecuador), EQUIS: Justice for Women (Mexico) and DEMUS – Study for the Defense of Women’s Rights (Peru).

<sup>23</sup> In the next section, we will make specific a reference to the problem of sentences proportionality that was mentioned here.

It is worth mentioning that even though the law in several countries in the region does not criminalize possession for personal use, limits on what constitutes personal use are not always clear. This is why attention must be drawn to the figure of simple ‘possession,’ which in many cases results in user’s criminalization.

The approval of small drug amounts allowed for personal use has brought paradoxical effects in some countries because both the police and the criminal justice system continue to detain users, and many of them end up being accused of more serious offenses, such as drug trafficking.

Studies have shown that following drug law reform in **Brazil**, which abolished incarceration for drug users and at the same time established tougher penalties for trafficking, prisoners with charges on drug trafficking during the period 2007-2010 rose to 62 percent, while the total prison population only increased by 17 percent.<sup>24</sup> Therefore it can be observed that the discretionary power of the police increased, since they are the ones who eventually characterize the crime.

In **Chile**, the carrying of drugs for medicinal use or immediate personal consumption is not criminalized; nevertheless, the percentage of detentions for drug use in 2006 reached 14.8 percent. However, the highest percentages of detentions were for the crime of ‘carrying’ drugs (*porte*),’ which represented 57.3 percent.

Before the 2009 reform, which decriminalized possession of up to 5 grams of marijuana and .5 grams of cocaine in **Mexico**, 71 percent of the activity of the Attorney General’s Office corresponded to the investigations of the crimes of ‘possession’ and ‘use’. The high number of users detained can be explained, partly because they were caught *in flagranti* using drugs in public spaces and partly because they were detained and their belongings searched on the sole basis of police suspicions, to then be sent to appear before the Public Ministry on charges of crimes against public health in the form of ‘*narcomenudeo*,’ or retail drug dealing. According to the Survey of Illegal Drug Users in Mexico City, half the users consume drugs in the street, whether they do it anywhere (32.2 percent) or only in public spaces (17.7 percent). The process by which drug users in the street are detained, sent before the Public Prosecutor’s Office and then sentenced for ‘*narcomenudeo*’ contradicts their rights and at the same time, results in an increasing number of convicted retail dealers that does not have the desired effect on the local market of illegal substances dynamics, but rather harms the lives of thousands of users who gain criminal records for using drugs in the street. The finding that the proportion of users detained and extorted is the same brings serious consequences since it reflects how the police take advantage of the users’ vulnerability. Finally, if 2 out of every 3 drugs users have been detained and/or extorted by the police, it is no surprise that most users think that the police discriminate against them in various ways (95.1 percent)<sup>25</sup>.

Drug criminalization has negative consequences when it’s linked to the right to access to health. In the case of the criminalization of marijuana, it can prevent seriously ill people from having access to a legal medication which relieves pain and suffering in a more effective way and deals with the

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<sup>24</sup> Dzmidas Haber, Carolina and Abramovay, Pedro Viera *Velhos Problemas e Novos Desafios do Sistema Prisional Brasileiro*. Center for Prison Law Studies. E-Magazine, N°1, Year 2011.

<sup>25</sup> This and other data have been published in ‘Drugs DF: The Markets for Illegal Drugs in the City of Mexico’. Available at: <http://www.cupihd.org/portal/wp-content/uploads/2013/07/CUADERNO-6-para-internet.pdf>

symptoms of their medical condition without weakening side effects. Cannabis is prescribed for the treatment and prevention of nausea and vomiting and for the treatment of glaucoma; it is also used as a muscle relaxant and a general pain reliever. It has positive effects in the treatment of multiple sclerosis, in the fight against cancer cells, and on Alzheimer symptoms. It has also been proven that it helps to increase appetite in HIV and cancer patients.

This summary cannot overlook the situation where people grow cannabis for their own use, a phenomenon that has been developing in the region along with an important number of people who claim their right to engage in this activity. Nevertheless, several cases have been registered in America where this conduct receives the same treatment as drug trafficking, with longer or shorter detention periods.

Criminalization does not only affect drug users and home-growers by having criminal proceedings initiated against them, but it also affects their ability to exercise other economic and social rights. Beyond the uncertainty of the criminal proceeding, the fact that a person has been reached by the criminal justice system produces a social stigma in the individual's life. The situation can even distort the perspective from operators of other non-repressive instances—social or health—because of the association of drugs users with criminal law.

### **Legal reforms on the regulation of cannabis markets:**

There have been recent developments regarding the regulation of some illegal substances markets, such as cannabis. In December 2013, **Uruguay** enacted a law that legalized the production and sale of marijuana and established that it would be state regulated, making Uruguay the first country in the world to adopt such a measure. Essentially, the new law permits home growing of up to six plants of marijuana, with an annual production of up to 480 grams for personal use. The state shall control the system and home-growers must be registered in a database which shall not be made public. Apart from that, pharmacies shall be given official licenses so that they can sell cannabis solely to Uruguayan residents who have reached the legal age. The aim of the government, as President José Mujica expressed, is to wipe the black market and drug trafficking off the map and, at the same time, intervene to repair the damage that marijuana and other drugs may cause. The rule responds to a comprehensive conception of drug policies, which aims at controlling supply and reducing demand. In fact, the Uruguayan government has introduced this policy as part of a series of measures intended to reduce violence.

Nevertheless, the Uruguayan government accompanied this law with others that show a contrary trend, tightening the state's position in regards to drugs. Some reasons for these measures can be the substantial resistance that some social sectors with a strong influence on the media offered to the regulation of the cannabis market and the condemnation by international drug control bodies.<sup>26</sup> One of the laws, the Regulation of Cocaine Paste (PBC), differentiates and specifies the crimes established

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<sup>26</sup> The INCB as well as the UNODC criticized Uruguay's decision and pointed out that it represents a violation to international conventions on the matter.

by Law 14,294,<sup>27</sup> in cases whose goal is the creation of cocaine base paste. Minimum penalties are increased, reaching two or three years in prison depending on the case. The regulation on PBC intensified the approach of ‘The War on Drugs,’ ruling out release from prison for actions which, according to the legislation in force until the enactment of Law 19,007 in November 2012, had minimum imprisonment penalties. The severe stigmatization of cocaine base or crack users, is based on the common perspective of a direct relationship between the use of this substance and the commission of crimes. However, the concern focuses on the potential threat to public security, but no considerable public initiatives that would be able to look for better treatments for these users, nor harm reduction strategies, have been developed.

Another enacted law gives the judge leeway to determine whether the possession of any substance,<sup>28</sup> except cannabis,<sup>29</sup> is punishable or if it’s included under the exemption from penalty on the grounds of personal use. Finally, the criminal code established the offense of ‘abuse of alcohol or narcotics.’<sup>30</sup>

In the **United States**, four states (Washington and Colorado and then Alaska and Oregon) have advanced in the legalization of cannabis for non medical use. This decision has been accepted by the federal government, allowing the states to go forward in the definition of internal regulation frameworks. Both states pursue a paradigm of regulation and taxation of the activity, which according to local human rights organizations, will bring justice and savings to the justice system by avoiding numerous and unnecessary detentions.<sup>31</sup> Recently, several states have adopted more liberal policies on the possession of small amounts of marijuana, which has been decriminalized in almost 20 states including Alaska, California, Connecticut, Maine, Massachusetts, Nebraska, New York, Oregon, Rhode Island, Minnesota, Mississippi, Nevada, North Carolina, Ohio and Vermont.

The legal frameworks developed in Washington and Colorado have created a basis on which to continue the debate on the legalization of marijuana at a state level. There are good indicators that after the legislative elections in 2014 and 2016, there will be new votes in line with the decisions of Washington and Colorado.

The aforementioned legal changes imply a cultural shift in regards of cannabis, as well as an innovative proposal that can teach a lesson about future paths to follow. It will be of utmost importance to measure the impacts these policies have by analyzing their results with empirical evidence.

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<sup>27</sup> Law enacted on October 31<sup>st</sup>, 1974 and amendments (Law 17,016, of October 22<sup>nd</sup>, 1998)

<sup>28</sup> Law 14, 294. Case-law considerations about the ‘reasonable amount exclusively destined to personal use’ seem to be especially influenced by ethical-therapeutic considerations of a prohibitionist kind. According to the judicial discretion margin established by the law on this matter, the amounts of PBC considered at the time of classifying conducts as typical are notoriously reduced. These considerations about the restrictive enforcement by courts of the exemption from prison regarding the rights of users may be generalized to all psychoactive substances reached by the criminal drug law.

<sup>29</sup> Law 19,172

<sup>30</sup> Law 19,120 modified article 361 of the Criminal Code, establishing a penalty of 7 (seven) to 30 (thirty) days of community service for the person who ‘in a public space were in a serious state of psychic or physical alteration produced by alcohol or narcotics, and the person who by the same means provokes such state in others’.

<sup>31</sup> Colorado’s Legal Marijuana Sales Bring ‘Common Sense’ Justice and Savings. <http://www.aclu.org/criminal-law-reform/colorados-legal-marijuana-sales-bring-common-sense-justice-and-savings>

## **Social and healthcare services for drug users and drug treatments which are contrary to human rights:**

Another of the effects of criminalizing drug use is the stigmatization suffered by drug users. Stigmatization and criminalization stand as the two of the most evident barriers to access to healthcare. UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment, Juan Méndez, notes that ‘receiving medical attention is considered to be a humiliating, punitive and cruel experience.’<sup>32</sup>

The barriers to access to health care include the convenient therapeutic responses offered to drug users. First, it bears noting that the traditional responsibility and determination of drug users has served to justify forced treatments,<sup>33</sup> even though, as the medical, legal and philosophical literature on the matter agree, drug use rarely makes a person incapable of being responsible for their actions.<sup>34</sup>

In **Uruguay**, while important progress has been made regarding the regulation of the cannabis market, the Senate has recently approved the project ‘Public Health Consortium for the immediate attention for persons with critical drug use disorders’. The main objections to the legal text have to do with the actual possibility of judicial control over forced treatments (the planned procedure is based on telephone communications and technical reports sent to the judge, who eventually becomes a mere legitimizer of medical procedures), as well as the possibilities of defense and guarantees for individual liberty. At the same time, the Consortium is created by the Ministry of Interior, providing room for police abuse in health care environments.

In **Chile**, the decision has been made to prevent the use of illegal psychoactive substances mainly through the implementation of prohibitionist policies, under the premise that ‘a world free of drugs’ is possible. At the same time, they have decided to allow the indiscriminate use of alcohol and tobacco, legal drugs in the Western civilizations, without the health considerations to justify that decision. In line with similar trends in the rest of the region, in Chile, the third leading cause of death for adults is car accidents—three quarters of which occur under the influence of alcohol. In many senses, the negative consequences of drug control policies have been more serious than the damage caused by drug use itself. There has been a rise in black markets, drug trafficking and corruption; persons detained or convicted for drug use and small-scale drug dealing; criminalization of users; lack of scientific studies; growing expenses for judicial proceedings; and as if that were not enough, the figures regarding drug use have not decreased in the last 25 years. Finally, public health systems do not seem to provide adequate answers to solve drug use problems as they occur in reality.

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<sup>32</sup> Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment, Juan E. Méndez, Human Rights Council, 22<sup>nd</sup> session, February 1<sup>st</sup>, 2013. A/HRC/22/53

<sup>33</sup> IDPC, Notes for Political Advocacy. Ethics and Efficiency of Forced Treatments (In progress), 2014.

<sup>34</sup> In Argentina, the Mental Health National Law 26,657 in force since 2010 described a scenario of extension of rights for persons with problematic addictions, which must be treated as part of mental health policies in a comprehensive way, emphasizing on the individual case, regardless of the kind of addiction. Thus, it is foreseen that in some cases, the treatment under the condition of deprivation of liberty may be justified provided that certain criteria or strict guarantees are met. The law establishes that hospitalization can take place provided that less intrusive and limiting methods on the freedom of movement have been proved to fail and the person’s life or the life of others is at risk. In such case, treatment may involve hospitalization under strict judicial control to guarantee the rights of persons, while a defense lawyer shall represent the interests of the user. Drug users in contexts of poverty shall be given special care, since in those circumstances, added vulnerabilities and lacks of all kinds are used to justify a solution through confinement of situations which housing, education or health policies have not been able to solve by themselves.

With regard to treatment, it is necessary to reflect on what a treatment is or about what kind of practices make up a treatment regimen. In general, health service systems and education policies refer to drug abuse prevention and withdrawal, ignoring strategies of harm reduction, in spite of the evidence that refutes the efficiency of abstinence only programs and the damages these cause.<sup>35</sup> In the same sense, various bodies have recommended UN member states to close forced hospitalization and rehabilitation centers since they have not been proven to be effective.<sup>36</sup> In **Canada**, the government has systematically refused to do so, attempting to put an end to programs and harm reduction programs, including prison-based syringe exchange programs, supervised injection sites, and medical prescriptions of controlled substances for extremely dependent patients. A recent case before the Supreme Court declared the government's refusal to renew the legal exemption on a safe injection site to be unconstitutional.

Unfortunately, what in many countries is known as 'treatment' includes in some cases excessive prescription of psychotropic drugs and in others, the lack of substitute medication in order to relieve withdrawal symptoms: verbal abuse, military-like exercises and even beatings. Forced or low-paid labor is part of what is known as 'rehabilitation,' and the living conditions in which drug users bathe, eat and sleep in many 'treatment' institutions are far from being considered humane treatment. These abuses are far from what can be considered a health practice since they violate the fundamental rights of human dignity and can be considered cruel, inhuman and degrading treatment under the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. A person's free and informed consent are necessary because they can deter arbitrary detentions and position the user as a subject who can take part in the definition of the treatment, including the use of psychotropic drugs, and all the decisions which contribute to a genuine autonomy.<sup>37</sup>

In a similar sense, the issue of evaluation of drug treatments is one that barely figures in the local agendas for a political discussion on health and human rights. However, it is necessary to raise voice on this issue and, regarding health policies, protest for the few mechanisms implemented to monitor, regulate and, if necessary, sanction the abuses and violations to basic rights in treatment centers.

Another problem which has an impact on therapeutic responses is, without a doubt, the fragmentation of and lack of access to health systems in the region, where the overlapping of different care subsystems affects the efficiency and access to specific health policies for drug users.

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<sup>35</sup> Cfr. IDPC, Briefing Paper. Drug Consumption Rooms Evidence and Practice, June, 2012.

<sup>36</sup> Cfr. Compulsory Drug Detention and Rehabilitation Centers (Joint statement). Available at: [http://www.unaids.org/en/media/unaids/contentassets/documents/document/2012/JC2310\\_Joint%20Statement6March12FINAL\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/document/2012/JC2310_Joint%20Statement6March12FINAL_en.pdf)

<sup>37</sup> In his report to the Human Rights Council 22nd Session, the Rapporteur on Torture and other cruel, inhuman or degrading treatment, Juan Méndez, pointed out that some habitual practices without the full free and informed consent of the person concerned may constitute torture or ill-treatment. Guaranteeing free and informed consent is a fundamental feature of respecting an individual's autonomy, that is, the obligation to respect their rights and attend to their choices as regards to treatments and interventions. Free and informed consent is based on the individual's right to be recognized as a free person to make choices and on the idea of dignity of risk, that is, facing life with the risks it entails. However, generalized practices are based on the doctrine of medical necessity about the incapacity of a person to decide over their own treatment.

In **Argentina**<sup>38</sup> and **Uruguay**, the fragmentation has been replaced by an excessive use of the criminal justice system in order to gain rapid access to health care. It is evident that, when drug use is criminalized and the user must choose between prison and treatment, the health system becomes the soft side of criminalization.

It is important to note that in many countries, the limited care provided by the public health system results in the proliferation of private institutions without any kind of state regulation. In particular, we would like to draw attention to the expansion of certain treatment programs (group and residential) linked to religious communities. Even if these institutions may constitute modalities which are closer to the culture and everyday life of users, especially those living in impoverished conditions,<sup>39</sup> their lack of regulation may favor the exposure of users to mistreatment, as they lack state control or supervision.<sup>40</sup>

### **3. Arbitrary detention, torture and other forms of ill-treatment:**

#### **Drugs law and police practices of detention:**

As explained in the previous section, drug control and the detentions brought about by drug laws make up a very important part of police action in the streets. **Argentina's** drug laws, along with laws in many other countries, penalize all drug-related crimes, from drug trafficking criminal networks to possession of one marijuana cigarette for personal consumption. In Argentina, this law acts as a justification for police operations, as one out of five detentions falls under narcotics law. Related to this, two phenomena can be identified: the detention of users, which has been previously analyzed, and also, as empirical research has clearly shown, the use of the drug law to harass certain groups and exert social control.

Statistical analyses from police and judicial data suggest that a large part of the efforts in this area are focused on minor cases connected to possession for personal use, rather than on commercialization or trafficking. In many cases, these detentions will result in an increase in the imprisoned population. In the last three years, detentions carried out by the Federal Police due to infringements to the narcotics law made up 20 to 25 percent of total detentions.<sup>41</sup> Half of drug operations (49 percent) fall within police preventative actions, in which the police claim that the detention can be made on the

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<sup>38</sup> In the case of Argentina, something that calls attention is that, even though recent reforms tend to separate repression of drug trafficking policies from health policies, the latter run autonomously as regards national mental health and addiction policies. Since 2000, protest on the part of various social groups, especially those living in impoverished conditions, has grown regarding the difficulties and shortage of attention resources for drug users. It was possible for these groups to gain speedier access through a judicial order of hospitalization in order to force the health system to provide an answer. The Mental Health National Law enacted in 2010 has restricted this form of management for a health response.

<sup>39</sup> Castilla, V., Lorenzo, G. and M. Epele (2010). Care Practices and Rescue of Base Paste/Paco Users and their Relation with the Evangelic Religion. In: Social Sciences and Religion. 5<sup>th</sup> Scientific Meeting CLACSO: Religion, Sexualities and Power, Buenos Aires, November 18<sup>th</sup> and 19<sup>th</sup>, 2010.

<sup>40</sup> Galante, A., Pawlowicz, M.P., Rossi D., Corda, A., Touzé, G. Goltzman, P. (2012): 'The Arriola Decision: Debate on the Dejudicialization of Health Services for Drug Users.' In: Arias, A.; García Godoy, B.; Bazzalo, A. (comp.): *Selected Works*, 4<sup>th</sup> International Meeting 'Contributions to the Construction of the Public Sector', Buenos Aires, Faculty of Social Sciences, UBA.

<sup>41</sup> According to data from the National Management of Criminal Information Department of the National Ministry of Security. Most of these detentions take place in the City of Buenos Aires.

basis of the suspicion that the person may be committing a crime. The second largest group of detentions (38 percent) involves persons who, according to the police, are caught *in flagrante* in the act of consumption of a drug, a percentage which clearly demonstrates the systematic persecution faced by users. Next there are detentions resulting from reports or 911 calls (6 percent). Only 4 percent of drug arrests take place during searches and 2 percent from judicial orders.

In turn, the fact that an overwhelming majority of drug-related detentions take place within the framework of ‘police prevention’ (without a judicial warrant) is an indication of the wide margin of discretion given to the police to act in these interventions. In many cases, the use of drug law serves to justify prior police actions. As a result, it is an important tool for the police to keep a watch on certain sectors of society, particularly on the most vulnerable sectors: young people, migrants, informal workers, and sex workers, among others. Qualitative studies<sup>42</sup> of these groups reiterate the issue of police agents ‘planting’ drugs to justify a detention. In many cases, this detention is caused by conflict with the police over the use of public spaces and even over informal payments to the police in order to allow them to engage in their activities in the streets.

In the **United States**, the ferocity with which the state has waged ‘The War on Drugs’ between 1990 and 2010 has led to a dramatic rise in the length of prison sentences and a 53 percent rise in drug-related detentions. There has also been a 188 percent rise in the number of detainees for marijuana-related crimes.<sup>43</sup> To give an idea of the magnitude of the phenomenon, between 2001 and 2010, there were more than 8 million marijuana-related detentions, of which 88 percent were due to possession. In 2010 alone, there were 889,133 marijuana-related detentions (300,000 more detentions than all other crimes combined), or one every 37 seconds.

Additionally, judging from marijuana-related detention rates, there is evidence of a significant racial prejudice against the African-American population: 716 African-Americans are detained for every 100,000 people, while only 192 white people are detained for every 100,000 people. Even though the racial disparity regarding detentions for marijuana possession has existed for 10 years, it has risen by 32.7 percent between 2001 and 2010. In fact, while the detention rate of white people has kept constant at around 192 for every 100,000 people, the detention rate of black people has gone from 537 per 100,000 in 2001 (and 521 per 100,000 in 2002) to 716 per 100,000 in 2010. Therefore, it seems that the rise in the total rate of detention for marijuana possession results from the rise of detentions among black people. In spite of the significant disparity between detention rates among white and black people for marijuana possession, the use and non-use rates by both groups have remained more or less the same, so that differences in detention rates are not explained by a different rate of use between black and white people.

In **Chile**, a similar focus on punishing users can be observed. During the first quarter of 2012, there were 22,708 detentions for drug law violations, out of which 60.4 percent were for possession; 18.9

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<sup>42</sup> CELS, Human Rights in Argentina, 2013 Report, Chapter 2. The Security System as a Space for the Reproduction of Violence and Inequalities. P 174-180. Buenos Aires, Siglo XXI, 2013.

<sup>43</sup> ACLU, The War on Marijuana in Black and White. Billions of Dollars Wasted on Racially Biased Arrests. 2013. Available at <http://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>

percent for trafficking and 15 percent for use. This data indicates a 13.9 percent rise compared to the same quarter of the previous year.<sup>44</sup>

In **Mexico**, the situation is very similar. More than 90 percent of reports mention only one person, which suggests that detentions were more frequently carried out *in flagranti*, rather than resulting from the investigation of a crime, which implies a minimum of 2 people: seller and buyer. The Attorney General's Office in the Federal District confirms most of the detainees were caught *in flagranti*. Only 2 percent of reports involve 3 or more people, which shows a minimal impact on the fight against finding relevant links in the trafficking chain, instead focusing on easily replaceable dealers and users caught in possession of drugs. There is also an observable rise in the proportion of crimes related to possession, which federal authorities consider to be for personal use, going from 31.5 percent in 2010 to 41.6 percent in 2011 and 47.9 percent in the first months of 2012. The fact that more than 40 percent of possession-related crimes are considered to be crimes related to drug use speaks of the bias of presenting use as a crime, when it is not. Thus, a large number of the detained persons by the police are simply users treated as dealers.

In Brazil, besides the incarceration explosion, research has shown that there is a very clear profile of the targets of the drug law: young people (between 18 and 29 years old), male, black, with schooling up to elementary or primary. Moreover, this young man is generally trapped alone, unarmed, with small amounts of drugs and "flagrant" by military police - that is, without prior investigation. In a gender perspective, the situation is even worse: about 60% of the female prison population is arrested for drug-related crimes. They are mothers who leave their children without support from the State and that the vast majority of the time are taken by traffic issues related to their social vulnerability.

#### 4. Indigenous people:

##### **Forced eradication Campaigns: their impact on human rights and in particular on the Economic, Social and Cultural Rights (ESCR) of rural and displaced populations**

Forced eradication is deeply rooted in international drug control policies. Forced eradication has the appeal of appearing 'tough' and direct—aimed at eliminating the 'origin' of drugs—and has resulted in great political and bureaucratic inertia. After almost three decades it is clear that the efforts to eliminate drug production have failed.

Furthermore, there is ample evidence that eradication causes great harm to farmers and their communities, makes some of the most impoverished sectors of our society fall below the poverty line, fosters political instability and social conflict, and frequently benefits illegal armed actors.

A vast majority of the peasants who grow coca leaf and opium poppy are impoverished farmers and are engaged in small-scale production; therefore, the rapid destruction of one of their main income sources increases their poverty, intensifying rather than reducing their dependence on illegal crops.

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<sup>44</sup> Information available at:

[http://www.seguridadpublica.gov.cl/filesapp/04\\_Informe\\_DROGAS\\_1er\\_trimestre\\_2012.pdf](http://www.seguridadpublica.gov.cl/filesapp/04_Informe_DROGAS_1er_trimestre_2012.pdf)

Regions where illegal crops thrive are characterized by extreme poverty, state abandonment, limited physical infrastructure, restricted access to basic services, and occasionally, conflicts

Forced eradication does not only aggravate the peasant's economic conditions, but it also jeopardizes the targeted farmers and communities in other ways. Eradication operations often produce human rights abuses and violations. Because eradication victims live in faraway regions and have very low incomes, they have very few, if any legal resources. Therefore, forced eradication policies bring social unrest, instability and violence; its social and political impact can be devastating. In **Colombia**, for example, the expansion of coca crops into new regions has also resulted in the expansion of areas with a higher presence of armed illegal actors who increase violent acts and atrocities against local populations.

Forced eradication campaigns that were carried out in **Bolivia** produced a wide range of abuses against the local population. Research carried out by Human Rights Watch in 1995 found that arbitrary detentions, beatings against Chapare inhabitants and the excessive use of violence by the anti-drug police were a routine.<sup>45</sup> On several occasions, violent confrontations and road blocks closed off entire regions for months. Protests were the result of the government's failure to fulfill its economic assistance promises and because of human rights violations, which included extrajudicial executions, illegal detentions and torture that resulted because of forced eradication operations. In 2004, President Carlos Meza reached an agreement with Chapare coca producers. The accord allowed each coca producer to grow a small amount of coca, and the current government has continued the policy. Since then, human rights violations have almost disappeared and conflicts between coca producers and security forces are the exception, not the norm. With the election of Evo Morales to the presidency in 2005, this approach was expanded. As a first step, Bolivia amended its constitution, recognizing the ancestral right to consume coca leaves for traditional purposes. Since then, and based on the concept of "Coca yes, cocaine no," the Bolivian government has directed its actions towards reducing and regulating the cultivation of coca leaves, while increasing and modernizing measures against cocaine production and trafficking. At the heart of this policy are cooperation agreements with coca producers' federations that enabled farmers to grow, in a legal and regulated manner, a set amount of coca leaves. In addition, the government designed a series of economic programs aimed at diversifying the income sources of coca producers and it boosted investment in education, health and transport. At the same time, hundreds of projects on infrastructure, institutional strengthening and social development were implemented in the producing communities. While there are still challenges to be overcome, data shows that the current strategy has promoted a significant reduction in the violence and conflicts associated with forced eradication in the country's most vulnerable areas, such as "El Chapare".

The Program for the Eradication of Coca Crops (CORAH)<sup>46</sup> in **Peru** also shows clear signs of failure. Despite the actions CORAH has taken, in the last 25 years, drug trafficking organizations have promoted the gradual dispersal of illegal crops along the Alto Huallaga, the VRAEM and the Pichis Palcazú Central Jungle, amongst other places. In most cases, rural development actions implemented by CORAH have depended on external offers and have not reversed rural poverty in the main productive regions of the high Peruvian jungle. Forced eradication has generated a

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<sup>45</sup> Human Rights Watch, 'Human Rights Violations', July, 1995.

<sup>46</sup> In Spanish, *Proyecto Especial de Control y Reducción de Cultivos Ilegales en el Alto Huallaga*.

continuous experience of conflict and social violence, as it was aforementioned with the description of the situation of VRAEM inhabitants. In the VRAEM, problems connected to lack of information and stigmatization have prevented the Peruvian government from adopting policies in order to improve the high poverty levels of an area that has been marked by violence and its articulation with illegal economies and the presence of various armed groups. Furthermore, the Peruvian state has not established a mid or long-term strategy that respects the rule of law in order to manage areas at risk of resorting to illegal crops. External military and police viewpoints prevail (even foreign ones, such as the concept of ‘narco-terrorism’). The VRAEM region is especially vulnerable because of its special characteristic of having ‘post-conflict’ populations. Applying forced eradication in an area that has been so stricken by violence, as governmental authorities have been announcing for 2014 may be the fuel that ignites violence and social mayhem amongst the *quechua*, *mestizo* and native rural population who can still recollect the memories of the armed conflict of the 80s and 90s. This negative factor may be used to the advantage of armed and criminal groups that are interested in turning the rural population against the government and the armed forces. Considerable confusion may arise and social leaders and representatives of social organizations may become targets amidst the remnants of the armed conflict.

The only country in the Andes region that allows aerial spraying of herbicides (‘fumigation’) is **Colombia**. The aerial fumigation operations represent a threat for fragile ecologic and water systems and, at the same time, produce greater deforestation, since coca growers respond by entering further and further into the jungle in order to grow their crops. It is disturbingly common to receive reports about the fumigation of food crops, threatening even more the food safety of those who are amongst the most impoverished Colombians<sup>47</sup>.

Fumigation, as well as forced eradication, has swelled the ranks of the increasing displaced population in Colombia. According to the non-governmental agency Consultancy for Human Rights and Displacement (CODHES), one of the main causes for internal displacement is the fight over land control in order to grow crops destined for the illegal market and for the rearming of paramilitary groups.

## **5. Discrimination and the right to equality:**

### **Differential impact of the drug problem on the lives of women:**

The number of women incarcerated for drug-related crimes is of particular importance. Even though women’s imprisonment rate is still considerably lower than the male population, the percentage of women in penitentiary centers has risen substantially in recent years. According to a study recently published by the International Drug Policy Consortium (IDPC),<sup>48</sup> most of the incarcerated women

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<sup>47</sup> The establishment of a cause-effect relationship in regards to the impact of fumigation on the health of affected communities is especially difficult because of the existence of contradictory studies. However, rigorous research carried out by Camacho & Mejia concludes that exposure to the glyphosate used in aerial spraying campaigns of coca crops increases the chances of suffering skin problems and abortions. See Camacho, A. and Mejia, D. ‘Health Consequences of Aerial Spraying: Evidence in the Colombian Case’, 2013

<sup>48</sup> International Drug Policy Consortium (IDPC), ‘Women, Drug Offenses and Penitentiary Systems in Latin America’, 2013. Available at: <http://idpc.net/publications/2013/11/idpc-briefing-paper-women-drug-offenses-and-penitentiary-systems-in-latin-america>

population were arrested for drug-related crimes. Some estimates are: between 75 and 80 percent in Ecuador; 64 percent in Costa Rica; 60 percent in Brazil and between 65 and 80 percent in Argentina.

Women occupy the lowest ranks in the criminal chain. They act mainly as growers, harvesters, retail dealers, human couriers (known as '*mulas*' or '*burreras*', among other names) and drug introducers into detention centers. With a few exceptions, they work as part of the easily replaceable labor force in transnational criminal networks.

Women are more vulnerable to enter the drug business due to the high female unemployment rates and also due to the economic responsibility they have for their children. More frequently than men, women are victims of deceit and violence perpetrated by their husbands, lovers or relatives, and end up being their accomplices. The impact of drug laws on imprisoned women, their families and communities can be devastating. Women are often the only source of income for their families and therefore enter the drug business in order to feed their children. Once convicted for a drug-related crime, they will have even fewer economic opportunities when they are released from prison. Children whose parents end up behind bars are distributed among relatives and are often taken to live on the streets or forced to live in prison with their mothers. According to a research carried out in women's prisons in **Argentina**, the population of female prisoners increased by 350 percent between 1990 and 2007, and 80 percent of them had not been in contact with the criminal system before. Most are mothers and were caring for young children at the time of their detention, and 64 percent are single-parent heads of household. For women, a prison penalty implies an abrupt break of family bonds. Incarcerated women suffer from severe isolation in terms of contact with their families and relatives, since many of them do not receive any visits during their detention (44 percent) or very seldom do so (55 percent)<sup>49</sup>.

According to the IDPC briefing paper, women tend to be subjected to specific forms of violence during their contact with the criminal justice and penitentiary system. The fact that they are a minority group in all penitentiary systems in the world underlies their subsequent discrimination in the prison system. Various studies highlight the lack of penitentiary centers specifically for women; the rapes and sexual abuse perpetrated by detention center staff against women; the existence of human-trafficking networks between female and male sectors; the lack of attention for mental health problems, which tend to be more serious in women than in men in prison; the damage inflicted on the children of women in prison, those who live with them as well as those who are outside; the lower education, employment and training opportunities, among other issues.

## **6. The rights of the child:**

Keeping Mexican children away from drugs was given as a justification for the militarization of state responses; however, this paradoxically resulted in greater violations of the rights of children and adolescents.<sup>50</sup> Since late 2006, the use of lethal force has been intensified and the participation of the armed forces in security policies has increased significantly. In December 2006, then-President Felipe

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<sup>49</sup> Women in Prison. The Reaches of Punishment. Compiled by CELS, National Public Defender's Office, National Penitentiary Office. Buenos Aires, Siglo XXI. Available at:

<http://www.cels.org.ar/common/documentos/MujeresEnPrision.pdf>

<sup>50</sup> Barra, Aram and Joloy, Daniel. 'Children: The Forgotten Victims in Mexico's Drug War', at Children of the War: Perspectives on the Impact of Drug Policies on Young People. Ed. Damon Barret. Idebate Press. New York, 2011.

Calderón ordered a military offensive against drug cartels operating inside the country, which ultimately deployed tens of thousands of military officers to perform arrests, patrols, inspections and searches. At the same time, many state and municipal public security institutions had appointed active or retired military officers as directors, so in fact militaries had taken control over the country's public security.<sup>51</sup>As a result, the National Human Rights Commission's complaints against—and recommendations for—the Mexican Armed Forces have significantly increased.

Conversely, Mexico lacks a coherent and comprehensive public health strategy. There is also a lack of a strategy that focuses on risks and harm reduction related to drug use, as well as an absence in strengthening social development policies in order to provide employment opportunities to large sectors of the Mexican population.

## 7. Unintended human rights consequences of international drug control policies:

### Proportionality of sentences in drug-related cases:

The disproportionate use of criminal law in order to penalize conduct related to the use of illegal drugs poses a threat to human rights. The American Convention on Human Rights (ACHR)<sup>52</sup> establishes that restrictions on personal liberty are only allowable in exceptional circumstances and must obey minimum criteria of reasonableness, necessity and proportionality. However, as we will demonstrate, such a guarantee is infringed upon when penalizing drug-related crimes in the region.

Evidence shows that from 1950 to the present day, in six countries in the region (**Argentina, Brazil, Bolivia, Colombia, Mexico and Peru**), the number of criminal articles which penalize this kind of conduct increased ten times and the total number of illegal substance charges went from 67 to 344.<sup>53</sup>

This characteristic of Latin American laws<sup>54</sup> arises from the drive to penalize the conduct of individuals utilizing controlled psychoactive substances, regardless of the damage they cause. This explains the fact that, in contrast with other kinds of punishable crimes, the legal definition of drug-related crimes involves extensive and broad wording. In other words, criminal laws on drug-related crimes allow for all forms of participation in the crime (from attempted operations to completed operations) to be penalized as major crimes<sup>55</sup>.

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<sup>51</sup>Acosta Urquidi, Mariclaire. 'Mexico's Chronic Impunity: A Human Rights Approach'. CDHDF. Mexico, 2012. P.71. Also see: ICG. Peña Nieto's challenge: Criminal Cartels and the Rule of Law in Mexico. International Crisis Group, 2013. P.16.

<sup>52</sup> Article 7 in the Convention on Human Rights regarding the right to personal liberty.

<sup>53</sup> For example, in Argentina, while the criminal law in 1950 classified only 4 cases connected to narcotics as crimes, in 2012 the number rose to 52. The same thing occurred in Colombia, where in 1950 only 9 conducts were criminalized, while a total of 50 types of drug-related crimes were penalized in 2012. Punitive Addiction, p. 22, 24 and 57.

<sup>54</sup> The same phenomenon takes place in Central America. For example, the crime of drug trafficking in Guatemala's criminal code, article 307, is defined with 8 verbs: introduce, sell, deliver, transport, provide, withhold, keep or store.

<sup>55</sup> According to Zaffaroni, 'Apart from the unbelievable extension of punishability which this technique implies; in terms of punishability, committed actions are equal to attempts, secondary participation is equal to authorship and even preparatory actions are equal to committed ones. This is a clear characteristic of authoritarian criminal law (...), provided that, for authoritarian criminal law damage to a legally protected interest is not as important as detecting the 'enemy'.

The second factor which contributes to the disproportionate penalties for this kind of conduct is the progressive rise of criminal punishment. The terms of minimum sentences, as well as those of maximum sentences, have increased by almost 20 percent in the last 50 years. For example, in 1950, trafficking in **Colombia** was penalized with a prison term between 6 months and 5 years in prison. Currently, individuals may receive a sentence between 10.7 and 30 years in prison (without aggravating circumstances). Likewise, in **Mexico**, the minimum sentence for the crime of trafficking went from 6 months in prison in 1950 to 10 years at present. Similarly, in **Peru**, while in the 1950s the minimum punishment for drug crimes was 2 years in prison, the same crime currently has an 8-year sentence. The federal government in **Canada** established compulsory minimum sentences for certain drug-related crimes in 2010, doing away with judicial discretion that may take into account factors such as mental health, poverty, addiction, and systemic discrimination when sentencing.

As previously mentioned, judicial authorities are forced to impose considerably high penalties even for actions which do not cause effective harm on third parties. In other words, a person carrying 25 grams of marijuana in Latin America is judged on charges of drug trafficking (even when the substance is for personal use) and may be punished with minimum sentences of approximately ten years in prison.<sup>56</sup> Criminal judges are then lacking in a margin of reasonable discretion which enables them to impose penalties proportional to the damage caused by the accused.

Lastly, the absence of reasonable discretion and proportionality in criminal laws in the region becomes evident when comparing the penalties imposed on other kinds of crimes which are unquestionably more serious than those involving narcotics. In fact, if penalties are proportional to the damage caused by the prohibited conduct, it is to be expected then that more serious crimes deserve more severe punishments. However, the reality of the situation is quite different in Latin America.

In some countries in the region, an equal or stricter punishment is established for individuals who sell illegal substances to adults voluntarily deciding to consume them than for an individual who commits sexual abuse or even murder. Even as the last two previously mentioned crimes are more serious than the first, in **Bolivia** the current maximum penalty for the crime of drug trafficking (25 years in prison) is higher than those established for murder (20 years) and for sexual abuse (15 years). The tendency is similar in **Mexico**, where the maximum penalty for trafficking is 25 years in prison while it is 24 years for murder.<sup>57</sup>

Concluding from all of the above, it is clear that criminal laws in many countries in Latin America disproportionately penalize conduct related to the use of illegal drugs. These situations imply a denial of the minimum guarantees established by the American Convention on Human Rights for the proceedings of legitimate restriction of personal liberty. According to the Inter-American Commission, *'the rule of restriction on personal liberty must be carried out with the requirements of reasonableness and proportionality seen in the light of Articles 30 and 32(2) of the American Convention. Even when the rule permits the arrest of persons as a measure designed to achieve ends compatible with the American Convention, the*

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<sup>56</sup> For example, in Bolivia, Law 1,008 does not differentiate between 'narcomenudistas' and major drug-dealers, so that, without taking into account the amount of drug involved, penalties go up to 25 years.

<sup>57</sup> Likewise, in Brazil, the maximum penalty for a person charged with drug trafficking (15 years in prison) is 5 years lower than the penalty for a person charged with rape. Apart from that, in Colombia, the maximum penalty for rape is 20 years in prison, while the penalty for drug trafficking is 30 years.

*principle of proportionality requires that the greater the restriction on liberty is, the greater the responsibility of the State to justify such a restriction.*<sup>58</sup> Thus, there is no doubt that the criminal laws which penalize drug-related crimes in Latin America do not comply with the minimum guarantees established by the American Convention on Human Rights for the restriction on personal liberty of the individual who commits such a crime.

In recent years, Ecuador has undertaken a number of initiatives to rationalize the use of criminal law to punish drug offenses. The first of these was the granting of pardons to small dealers or "mules" in 2008. This measure prompted the release of more than 2,000 people and produced an initial impact that reduced the incarceration rate. But because the penal code maintained the same criteria for detention and sentencing, prisons slowly began filling up again. It was evident, then, that to tackle the problem comprehensively, it would be necessary to amend the legislation. With significant participation by civil society and non-governmental organizations, the Criminal Penal Code (COIP, according to its acronym in Spanish) was drafted. This new law is the result of a multidimensional and comprehensive vision that contemplates, among other measures, the proportionality of sanctions and the decriminalization of consumption, possession and cultivation that has no commercial purpose. With regard to drug trafficking, the legislation seeks to establish proportional punishments based on three criteria: the scale of the dealing (low, medium, high and large-scale), the accused person's degree of participation in the crime (making distinctions for intellectual authors or leaders); and the type of substance produced or commercialized. The COIP entered into force in 2014 and thanks to the work of Ecuador's Public Defender's Office, guidelines have been developed to implement the principle of lenience, allowing sentenced people to benefit from these new criteria as well.

### **Drug laws and the prison situation:**

The emphasis that has been made on drug control on criminal penalties has increased the number of persons imprisoned for drug-related crimes. The enforcement of severe laws regarding drug-related crimes has resulted in the overburdening of courts and the suffering of tens of thousands of people behind bars for petty drug-related crimes or simple drug possession. Drug laws have been especially rigorous on the most vulnerable population sectors.<sup>59</sup>

Current drug laws and their aggressive enforcement have caused rising incarceration rates, and consequently, prisons overcrowding. Even though a direct cause-effect relationship is difficult to prove, especially due to the lack of reliable information from prison authorities and other governmental sources, there is at least an easily observable correlation. Between 1992 and 2007 the incarceration rate rose averagely by over 100% in some countries in the region. Despite differences amongst some countries, incarceration for drug-related crimes show a rising trend. **Argentina's**

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<sup>58</sup>IACHR, Application before the Inter-American Court in the case of Walter Bulacio, 24 January 2001, paragraphs 66 to 71.

<sup>59</sup> Research carried out in eight Latin American countries coordinated by WOLA and TNI (Transnational Institute), 'Systems Overload: Drug Laws and Prisons in Latin America. Reform of Drug Laws in Latin America', presents the conclusions mentioned in this section. Available at: [http://www.wola.org/sites/default/files/downloadable/Drug%20Policy/2011/TNIWOLA-Systems\\_Overload-def.pdf](http://www.wola.org/sites/default/files/downloadable/Drug%20Policy/2011/TNIWOLA-Systems_Overload-def.pdf)

penitentiary service attracts attention since prisoners on drug charges were 1 percent of the prison population in 1985, and then rose to 27 percent by 2000. In **Bolivia**, 30 percent of prisoners are incarcerated for drug-related crimes.

In Brazil the number of prisoners for drug-related crimes increases year after year, and has exploded since the enactment of the current law that deals with the subject, in 2006. Since then, the number of prisoners through traffic jumped from 31,000 (11% of total) to about 130 mil (24% overall). Brazil has now the 3rd largest prison population in the world and one of the causes of the mass imprisonment is the Drug Law.

According to the Center of Violence Studies of the University of São Paulo (NEV/USP), *"the main result of this combating policy ends up being the generation of a large mass of young people with police and criminal records and the stigmas produced by prison"*<sup>60</sup>.

A high percentage of prisoners are detained for simple drug-possession (users detained with a relatively small drug amount). In most countries, the legal difference between users and drug dealers is poorly developed and misinterpreted by the police and courts. Even in countries where drug possession for personal use is not a crime, many people go to prison for simple drug possession, including cannabis.

Pre-trial detentions for drug-related crime suspects are abusive and often prolonged for years before there is a solution for the procedural situation of those in custody. In **Bolivia, Brazil, Ecuador, Mexico and Peru**, for example, pre-trial detention is compulsory in cases of drug-related crimes, regardless of whether these are minor or major offenses. Drug-related crimes are classified together with murder, rape and kidnapping as serious offenses, regardless of the level of participation. Many countries allow the detention of persons for an indefinite period of time during the investigative phase, until formal charges are presented against them. In **Peru**, police pre-trial detention for most crimes lasts 24 hours; however, it can last up to 15 days in drug-related cases. In **Mexico**, there is a period of up to 80 days during which the accused can be held in custody without having any formal charges.

In addition, persons accused or convicted for drug-related crimes are often denied access to alternative penalties that are available for persons accused of other crimes. In **Peru**, some benefits allowed by law, such as parole, are denied for people incarcerated for drugs. In **Brazil** the 2006 drug law prohibited bail release or the substitution of prison for alternative penalties until the Supreme Court declared both provisions unconstitutional.

The great majority of people that are deprived of their liberty because of drugs come from the lower ranks of the drug trafficking chain. In the case of **Colombia**, only 2 percent of the total number of prisoners incarcerated for drug-related crimes held to mid- and high-level positions. In other words, 98 percent of persons that are deprived of their liberty for this crime apparently do not have—or were not proved to have—important participation in drug trafficking networks. According to a study carried out by the Center for Research and Teaching in Economics (CIDE) in **Mexico** 75 percent of

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<sup>60</sup> Núcleo de Estudos da Violência da Universidade de São Paulo – NEV/USP (2011). “PRISÃO PROVISÓRIA E LEI DE DROGAS - Um estudo sobre os flagrantes de tráfico de drogas na cidade de São Paulo”, p.31. . Available at: <http://www.nevusp.org/downloads/down254b.pdf>

prisoners for drug-related crimes had been detained with a minimum amount of a controlled substance.

The **United States** is a country with an extremely high incarceration rate. Even though the country only represents 5 percent of the world's population, it has 25 percent of the world prison population: than one and a half million people behind bars.<sup>61</sup> In federal prisons,<sup>62</sup> prisoners for drug-related crimes account for 51 percent of the incarcerated population. Great racial disparities also exist among the U.S. prison population. If police detentions are analyzed it can be observed that African-Americans, with an incarceration rate of 3,074 per 100,000 inhabitants, and the Latino population, with a rate of 1,258 prisoners, are the focus of criminal persecution. The proportions of African-American and Latinos imprisonment contrast with the 459 white prisoners per 100,000 inhabitants.

The force of the law falls on specific parts of the population: those with little education, few resources, the unemployed or those with informal jobs. The personal histories of inmates are characterized by poverty and also have suffered family or health crises when they came across the opportunity of receiving extraordinary incomes to overcome their situations in exchange for assuming the risk of liberty deprivation.

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<sup>61</sup> What represents a rate of 500 persons per 100,000 inhabitants in 2010. Paul Guerino, Paige M. Harrison & William J. Sabol, U.S. Dep't of Just. Bureau Of Just. Available at: <http://bjs.gov/content/pub/pdf/p10.pdf>

<sup>62</sup> In 2010, there was a total of 209,771 persons in federal prisons. Idem. <http://bjs.gov/content/pub/pdf/p10.pdf>