Technical report on
ALTERNATIVES TO INCARCERATION FOR DRUG-RELATED OFFENSES

Prepared by the Technical Secretariat Working Group on Alternatives to Incarceration

Closing THE GAP

MINJUSTICIA

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PAZ EQUIDAD EDUCACIÓN

This document builds on the inputs of the Working Group on Alternatives to Incarceration, was conducted under the coordination of the Government of Colombia as Technical Secretariat, with the assistance and support of the Executive Secretariat of the Inter-American Drug Abuse Control Commission (CICAD), it provides a selection of alternatives to incarceration that have been initiated around the world. This document is for reference and therefore not binding. The contents of this publication do not necessarily reflect the position of the OAS, nor Member States of the OAS.

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TECHNICAL REPORT ON
ALTERNATIVES TO INCARCERATION FOR DRUG-RELATED OFFENSES

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Prologue

Convinced that responses to the drug problem should be comprehensive, centering on public health and human rights perspectives, the Government of Colombia, with the support of the Inter-American Drug Abuse Control Commission (CICAD), is committed to encouraging the debate on alternatives which allow for a focus on the individual, moving beyond approaches solely based on repression.

The Report on the Drug Problem in the Americas, undertaken by the Organization of American States (OAS), confirms that the use of a punitive approach in response to consumption has meant that the populations most vulnerable to problematic use have been discouraged from access to timely information, public health services, and treatment and prevention programs in general.

Furthermore, academic studies and reports from civil society organizations have indicated that indiscriminate repression, including applying severe sanctions for consumption and possession of small quantities, has especially affected the lowest levels of the drug trafficking chain. This situation has aggravated the problem of prison overcrowding that a number of countries in the region are facing. In this context, drug policy has come into conflict with the respect for human rights. The situation of women and their increasing participation in drug-related crimes is especially worrying.

Given this reality, it is necessary to understand crime as a social phenomenon and not a fact of nature. For this reason, the State's reaction to crime must start with the analysis of its origins within the community, since only by determining the reasons which bring some members to engage in criminal activity, can it be addressed adequately. The reflexive use of criminal law – frequently manifested in the proliferation of new crimes, increases in sentences, and the indiscriminate incarceration of a large number of offenders – can create fleeting sensations of relief in a society. However, the use of criminal law as the State's only reaction not only leaves the origin of the problem intact, but also places large burdens on the resources of the justice system, and more importantly, in the eyes of a community that could see its actions as inefficient, increases the perception that its repeated intervention no does help to address the problems it seeks to solve.

With regard to the fight against drugs, the last four decades show that policies have been developed on the assumption that activities related to all illicit substances should be controlled in the same way, with the understanding that all of the links in the drug trafficking chain merit the same treatment. This perception is mistaken and requires reconsideration in order to allow for differential approaches and responses by the State, not only for different types of drugs, but also for the different types of people who are part of the problem.

It is necessary to highlight that criminal law is understood as the gravest response of the State to criminal behavior, and as such should be the last resort when attempting to solve social problems. Moreover, the use of criminal law should be strictly limited to those cases in which an individual abandons the sphere of personal liberty to infringe on the rights of others.

The problem of small cultivators is less simple, but because of its complexity, deserves thorough examination before deciding if criminal law is the only possible method of combating illicit cultivation,

and if this is true, if it is appropriate in all cases. Repression itself is insufficient if the State does not offer small cultivators viable alternatives to improve their living conditions, in such a way that they have the option to choose, under conditions of equality, between bringing their activities into the parameters of the law or continuing to operate outside it. Because of this, Colombia's efforts in the last few years have not exclusively focused on eradication. Rather, they have been complemented by social interventions in affected regions.

At the other extreme of the drug trafficking chain, large criminal organizations take advantage of the needs of drug consumers and small farmers to amass fortunes through the large-scale production and distribution of illicit drugs. Over the course of recent years, their desire for easy money, and the power they can derive from it, has led to a great escalation of violence in countries such as Colombia, where the people murdered in feuds between criminal groups dedicated to drug trafficking can be counted in the thousands. There is no doubt that criminal law is indispensable in the face of these actions. While severely sanctioning those who commit these crimes is perfectly valid, this reaction by the State is insufficient if it also does not effectively and comprehensively combat the drug trafficking carried out by criminal organizations, as this is the real cause of the problem.

From a criminal policy perspective, those countries affected by the drug problem must recognize that the strategy of attacking all tiers of the drug trafficking chain through isolated and exclusive application of criminal law has diluted the human and material resources of the justice system, and has not succeeded in definitively dealing with these criminal organizations.

In light of this, and committing to continue and deepen the regional debate on drug policy, the Colombian government, as Chair of CICAD, proposed the creation of a Working Group aimed at identifying alternatives to incarceration in the framework of the Fifty-Fourth Regular Session of the Commission. This was held in December, 2013, in Bogota. This initiative was endorsed and approved by the Commission in May, 2014.

The Working Group had as its central objective the identification and analysis of different alternatives to incarceration using available evidence and drawing from the perspectives of strengthening public health and emphasizing human rights. Three elements of this objective, as we understand them, guided the development of this report.

First, "evidence" implies the analysis and exchange of experiences under a rigorous approach allowing us to identify what has worked and what needs improvement. Second, "public health" is a fundamental component that emphasizes prevention, the non-stigmatization of drug users, and the recognition of their rights. Third, "human rights" implies humanizing drug policy by making its main objective the protection of the individual in an environment of opportunities and social inclusion.

It is important to highlight that countries in the region have progressively been promoting alternative solutions to a purely punitive approach, especially for consumption and possession for personal consumption, understanding that the use of drugs is a subject that must be addressed from a public health perspective, and that the limited resources of the State must be used in an efficient manner.

These alternatives include decriminalization of drug consumption, suspension of criminal consumption sanctions, and the adoption of administrative sanctions, as well as the diversion of cases to treatment and educational services, among others.

This report should serve to help those countries deeply committed to the fight against the drug problem to examine, in an open and informed manner, the wide and varied spectrum of alternatives at their disposal to combat, not only all levels of the drug trafficking chain, but also offenses related both directly and indirectly to drugs.

It is a pleasure for the Ministry of Justice and Law, for the Working Group and for the Inter-American Drug Abuse Control Commission, to offer countries, policy-makers, and the wider public, a document containing a spectrum of alternatives to incarceration in order to contribute to the enrichment of understanding of one of the most serious aspects of the drug problem.

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TECHNICAL REPORT ON ALTERNATIVES TO INCARCERATION FOR DRUG-RELATED OFFENSES

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Background

The Member States of the Organization of American States (OAS) adopted the 2010 Hemispheric Drug Strategy[1] and the 2011-2015 Plan of Action,[2] agreeing to explore the means of offering treatment, rehabilitation, and recovery support services to drug-dependent offenders as an alternative to imprisonment, and in some cases, criminal prosecution.[3]

In this same vein, the report entitled "The Drug Problem in the Americas," was prepared by the OAS in response to the mandate of the Heads of State meeting at the Sixth Summit of the Americas in Cartagena, Colombia, in April 2012. This report identified several drug-related challenges that call for public policy responses from the Member States. Among the challenges highlighted in this report were the growing prison population incarcerated for drug-related offenses and consequent conditions of overcrowding, the lack of access to treatment, difficulties in accessing social services for dependent drug users, as well as the vulnerability and risks to which particular groups of society, such as young people, women, and the economically disadvantaged, are exposed.

Likewise, in the Declaration of Antigua, Guatemala, "For a Comprehensive Policy against the World Drug Problem in the Americas," adopted on June 6, 2013, OAS Foreign Ministers, "encourage Member States, in accordance with their domestic law, to continue strengthening measures and policies, including a gender perspective, as appropriate, to reduce overcrowding in prisons, while promoting greater access to justice for all, and establishing penalties that are reasonable and proportionate to the severity of the crime, and supporting alternatives to incarceration …."[4] At the subsequent OAS Special General Assembly, also held in Guatemala in September 2014, this need was re-emphasized with the following mandate, "Promote, where appropriate and in accordance with domestic laws, alternatives to incarceration, taking into account, *inter alia*, a gender perspective, the severity of the crime, and the appropriate sentencing, with the view to deterring crime, achieving the rehabilitation and reintegration into society of incarcerated persons in order to ensure the well-being of individuals and communities, and reducing overcrowding in prisons, with full respect for human rights."[5]

To address these challenges, the government of Colombia, as chair of the Inter-American Drug Abuse Control Commission (CICAD), proposed the creation of a Working Group on Alternatives to Incarceration for Drug-Related Offenses at the 54th Regular Session of CICAD, held in December 2013

[1] Adopted by the Inter-American Drug Abuse Control Commission (CICAD) at its 47th Regular Session, May 2010.
[2] Adopted by the General Assembly of the Organization of American States at its 41st Regular Session in San Salvador, El Salvador, 2011.
[3] Inter-American Drug Abuse Control Commission (CICAD). *Hemispheric Drug Strategy*, 2010. Article 22. Available at: http://www.cicad.oas.org/apps/Document.aspx?Id=953
[4] Declaration of Antigua Guatemala. *For a Comprehensive Policy against the World Drug Problem in the Americas*. Antigua Guatemala, 6 June 2013. AG/DEC. 73 (XLIII-O/13) corr. 1. Available at: http://scm.oas.org/doc_public/ENGLISH/HIST_13/AG06222E04.doc
[5] *Reflections and Guidelines to Formulate and Follow up on Comprehensive Policies to address the World Drug Problem in the Americas*. Guatemala City, 19 September 2014. AG/RES. 2866 (XLVI-O/14) rev. 1. Available at: http://www.oas.org/consejo/GENERAL%20ASSEMBLY/46SGA.asp#inf

in Bogota, Colombia.[6] At the 55th Regular Session of CICAD, which took place in Washington, D.C. in April 2014, the Commission approved the creation of this Working Group and gave it the mandate of establishing a working group on alternatives to incarceration "within the framework of the Inter-American Drug Abuse Control Commission (CICAD), and instruct[ed] the Group to prepare a technical report on existing alternatives to incarceration for drug-related offenses in accordance with the three international drug control conventions, taking into account national legislative frameworks and the contents of the Hemispheric Drug Strategy and Plan of Action 2011 – 2015, and instruct[ed] it to present its progress at CICAD 56 and its final report at CICAD 57".[7]

The Working Group is made up of experts appointed by the Member States and is supported by a Technical Support Group (TSG). The Government of Colombia was in charge of coordinating the group and the Colombian Ministry of Justice and Law acted as the Technical Secretariat and, for this purpose, was supported by a "Legal Technical Leader." The first meeting of the Working Group and the TSG took place in the city of Antigua, Guatemala, from June 16 to 20, 2014, and was attended by representatives of fifteen countries from the hemisphere.[8] Representatives shared experiences regarding alternatives to incarceration and other justice system responses with a public health and human rights approach. A second High-Level Dialogue was held in Cartagena on October 20 and 21, 2014, and a first draft of the Technical Report that the Working Group would submit at the 56th session of CICAD in Guatemala (November 2014) was introduced. On this occasion, representatives of fifteen countries from the hemisphere[9] had the opportunity to discuss this draft, and gain further insight into this subject matter so that the report could reflect the wide variety of perspectives and experiences.

As a result of these meetings, and in compliance with its mandate, the Technical Support Group, under the coordination of the Ministry of Justice and Law and with the support of the Executive Secretariat of CICAD, hereby presents the ***Technical Report on Alternatives to Incarceration for Drug-Related Offenses***. The main objective of the Technical Report is to examine alternatives to incarceration that have been used in different countries of the world for drug-related offenses. It is intended to offer Member States a wide range of options to move forward in the design and implementation of policies that provide promising alternatives and respect human rights.

The first and second parts of the Technical Report explain the rationale behind the project, laying out the situation leading to the initiative and the justification for designing and implementing alternatives to incarceration for drug-related offenses. The third part outlines the methodological approaches and principles guiding the TSG's work. The fourth part proposes a system of categorization based on the stage in judicial proceedings at which an individual may be offered an alternative to incarceration, as well as a few specific examples. The fifth part presents five broad strategies that were found to

[6] Inter-American Drug Abuse Control Commission (CICAD). *Fifty-Fourth Regular Session – Final Report.* 2013. Available at: http://www.cicad.oas.org/apps/Document.aspx?Id=2528

[7] Inter-American Drug Abuse Control Commission (CICAD). *Hemispheric Plan of Action, 2011-2015.* 2010 Available at: http://www.cicad.oas.org/Main/Template.asp?File=/main/aboutcicad/basicdocuments/plan-action_eng.asp

[8] Argentina, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Trinidad & Tobago, Uruguay, and the United States

[9] Argentina, Bolivia, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Jamaica, Mexico, Panama, Paraguay, Peru, Trinidad & Tobago, and the United States.

underlie, either singularly or in combination, the case studies examined, while recognizing practical considerations based on the contexts of OAS Member States.

In accordance with the agreement at the 56th Regular Session of CICAD, the Government of Colombia, in its capacity as Technical Secretary of the Working Group and on the occasion of CICAD 57, presents this Technical Report, which has been based on the contributions of the Technical Support Group. This document, written by a group of subject matter experts from the hemisphere, with the support and collaboration of the Executive Secretariat CICAD provides a comprehensive overview of alternatives to incarceration that have been initiated around the world.

I. Introduction: drug-related incarceration

The modern international drug control framework is governed by three United Nations Conventions, from 1961, 1971, and 1988. In the 1961 Convention, Article 36 (1), and in the 1971 Convention, Article 22, provide that drug possession and distribution be a punishable offense, with serious offenses liable to adequate punishment such as imprisonment. This focus on deterrence and punishment was strengthened by Article 3(2) of the UN Convention against Illicit Traffic 1988 which (with safeguard clauses) specifically asks Parties to establish possession for personal consumption as a criminal offense. Articles 39, 23, and 24, of the 1961, 1971 and 1988 Conventions respectively, permit countries to adopt more strict or severe measures if they are desirable or necessary to protect public health and welfare, or prevent or suppress illicit traffic. In this way, no part of the conventions requires that non-serious drug offenses be punished with incarceration or any particular penalty.

The way these obligations have been interpreted through national drug laws follows at least three common threads. Firstly, policies in many Member States have heavily emphasized punitive responses by favoring the use of incarceration in response to the drug problem, with less emphasis on other tools, such as prevention strategies and alternative sanctions or penalties that limit the use of incarceration. Secondly, the establishment of criminal penalties for drug-related offenses has tended to be expansive, increasing the number of codified acts and the associated sanctions over time. Thirdly, the utilization of criminal penalties has manifested in a one-size-fits-all approach in many Member States, encompassing a wide variety of conducts with varying consequences, which may nonetheless be punished with the same effective sentence. These trends have occurred against a backdrop of public opinion and political discourse that often demand immediate solutions to a complex and dynamic problem.

The rise in the population incarcerated for drug-related offenses is positively associated with the gradual increase in the number of prohibited activities and the lengthening of prison terms for drug crimes. It is also the result of large numbers of low-level drug-related offenders entering the criminal justice system in many countries. This phenomenon has taken place in the context of a general increase in the prison populations in many Member States.[10] There also may well be considerable use

[10] Metaal, Pien, and Coletta Youngers. *Systems Overload - Drug Laws and Prisons in Latin America*. Amsterdam: Transnational Institute / Washington Office on Latin America, 2011.

of pretrial detention when minor drug offenses are involved. According to the Inter-American Commission on Human Rights, more than 40% of the jail population – without distinguishing between offenses – is in custody awaiting a final disposition in their proceedings, with percentages varying from 30% to 85%[11] within the hemisphere.

The situation of incarceration in the Hemisphere has been summarized in the UNODC report "International Statistics on Crime and Justice," published in 2010, which uses 2007 data to highlight the proportion of the prison population in pretrial detention/remand, and the prison occupancy rates, in different regions. For 11 countries in the Americas, the proportion of the prison population in pretrial detention was greater than 50%, and in ten countries, the prison occupancy rate exceeded 150% (more recent figures are available on the website of the International Centre for Prison Studies).

In some countries, drug-related offenses account for the first or second cause of incarceration among women, and between the second and fourth cause among men. Even though most individuals serving drug-related sentences are men, a growing number of women in conditions of vulnerability are getting involved in this business and are incarcerated as a consequence.[12] Over the last ten years, the rate of incarceration of women in the Americas has increased faster than anywhere else in the world.[13]

Close examination of the composition of the prison population incarcerated for drug offenses reveals that in most countries these offenders, which are arrested, convicted, and incarcerated in large numbers, represent the lowest levels in the drug supply chain.[14] These offenders are much greater in number than high-level drug kingpins, and much easier to arrest and prosecute, but their incarceration makes a minimal contribution to the disruption of the activities of drug trafficking organizations. These individuals, which have been subject to significant criminal penalties in some countries, were generally caught in possession of personal use quantities of drugs, in low-level distribution, or were badly-paid drug couriers who have no significant role in the trafficking organization (commonly known as "drug mules").[15] They, like other low level offenders, tend to live in conditions of social vulnerability.

This trend in drug-related offenses is based on the need to suppress a set of behaviors that are harmful to public health and the risk to public safety posed by drug trafficking. In practice, the effectiveness of these measures has been questioned, as they primarily involves actors who are

[11] Inter-American Commission on Human Rights (IACHR). *Report on the use of pre-trial detention in the Americas,* Rapporteurship on the Rights of Persons Deprived of Liberty, 2013. Available at: http://www.oas.org/en /iachr/pdl/reports/pdfs/Report-PD-2013-en.pdf

[12] Anitua, Gabriel and Valeria Picco. 2012 .Género, drogas y sistema penal: Estrategias de defensa en casos de mujeres "mulas - In *Violencia de Género: Estrategias de litigio para la defensa de los derechos de las mujeres*. Buenos Aires: Defensoría General de la Nación.

[13] Walmsley, Roy. "World Female Imprisonment List (second Edition)." International Centre for Prison Studies. August 3, 2012. Available at: http://www.prisonstudies.org/sites/prisonstudies. org/files/resources /downloads/wfil_2nd_edition.pdf

[14] Metaal, Pien, and Coletta Youngers. *Systems Overload - Drug Laws and Prisons in Latin America*. Amsterdam: Transnational Institute / Washington Office on Latin America, 2011.

[15] This report recognizes that the term "drug mule" can have pejorative connotations and welcomes suggestions for alternative terms which accurately describe this unique group of offenders. For the definition of drug mules used in this report, see European Monitoring Centre for Drugs and Drug Addiction. 2012. *A definition of 'drug mules' for use in a European context.* Lisbon: European Monitoring Centre for Drugs and Drug Addiction. Available at: http://www.emcdda.europa.eu/publications/thematic-papers/drug-mules

readily replaceable in the illicit economy of drug trafficking. Additionally, the large-scale use of incarceration is not always the most efficient use of law enforcement resources.[16]

Dependent drug use can also place individuals in conditions of vulnerability. Furthermore, dependent drug use is chronic in nature and, consequently, treatment in prison may be necessary. According to the Bureau of Justice Statistics, in the United States, approximately 70% of the individuals imprisoned in state prisons have regularly used drugs prior to incarceration, a much higher rate than in the general public. [17]

According to the National Institute on Drug Abuse (NIDA), not providing treatment for drug-dependent persons within the judicial system contributes to the unbroken cycle of drug abuse and crime. Among the negative effects of inadequate treatment of drug abuse are the commission of new crimes; increased, additional expenditures for prisons, courts and the criminal justice system in general; hospital emergency room visits; as well as child abuse and neglect, loss of child custody, and social security costs.[18]

Finally, these trends must be examined within the context of promoting public security in OAS Member States. According a Latinobarómetro report on public opinion in Latin American countries, at least 80% of respondents perceived that crime had risen in the past year, for every year from 1995 to 2011.[19] These perceptions reflect the high levels of insecurity experienced by some Member States. In the decade from 2000 to 2010, the average homicide rate in Latin America rose by 12%. From 2005 to 2010, the number of robberies also increased in most countries.[20] These trends in public perception and actual insecurity may be driving forces behind public policy, as governments look for solutions to these problems.

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[16] La Vigne, Nancy and Julie Samuels. 2012. *The Growth & Increasing Cost of the Federal Prison System: Drivers and Potential Solutions.* The Urban Institute. Available at: http://www.urban.org/research/publication/growth-increasing-cost-federal-prison-system-drivers-and-potential-solutions/view/full_report. See also Subramanian, Ram and Rebecca Tublitz. 2012. *Realigning Justice Resources: A Review of Population and Spending Shifts in Prison and Community Corrections.* Vera Institute of Justice. Available at: http://www.vera.org/sites/default/files/resources/downloads/Realigning_Justice_full_report.pdf

[17] Mumola, Christopher, and Jennifer Karberg. 2007 *Drug Use and Dependence, State and Federal Prisoners, 2004*. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. Available at: http://www.bjs.gov/content/pub/pdf/dudsfp04.pdf

[18] National Institute on Drug Abuse. *Principles of Drug Abuse Treatment for Criminal Justice Populations - A Research-Based Guide.*. Bethesda, MD: National Institutes of Health, National Institute on Drug Abuse. NIH publication No. 11-5316. 2012. Available at: http://www.drugabuse.gov/publications/principles-drug-abuse-treatment-criminal-justice-populations. See also Art 17(1) of the American Convention on Human rights (1969): "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state."

[19] Lagos, Marta and Lucía Dammert. 2012. *La Seguridad Ciudadana: El problema principal de América Latina*. Lima: Corporación Latinobarómetro. Available at: http://www.latinobarometro.org/documentos/LATBD_La_seguridad_ciudadana.pdf

[20] United Nations Development Programme. *Regional Human Development Report 2013-2014*, *Citizen Security with a Human Face: Evidence and proposals for Latin America*. UNDP: New York, 12 Nov. 2013. Available at: http://www.latinamerica.undp.org/content/dam/rblac/docs/Research%20and%20Publications/IDH/Regional_Human_Development_Report_2013-14.pdf

II. The needs for alternatives to incarceration

Incarceration as a primary response to low-level drug-related offenses is now under examination. Countries are debating and implementing measures to address the problems associated with drugs more efficiently and effectively. Indeed, OAS Member States have declared that it is essential that the hemisphere searches for solutions to the world drug problem "with a comprehensive, strengthened, balanced, and multidisciplinary approach with full respect for human rights and fundamental freedoms that fully incorporates public health, education, and social inclusion, together with preventive actions to address transnational organized crime, and the strengthening of democratic institutions, as well as promotion of local and national development."[21]

This report suggests that this can only happen if Member States look for alternatives to incarceration for minor, non-violent offenders, using incarceration as a primary response for violent crime, high-level drug trafficking, and other serious security threats.

The effectiveness of large-scale incarceration can be questioned as it often involves actors who are readily replaceable in the illicit economy of drug trafficking. This notion should in no way be construed as advocating the elimination or reduction of appropriately targeted law enforcement efforts. However, in some cases, the resources of law enforcement and the judiciary could be utilized more efficiently to focus on combating violent, high-level drug-related crimes, while allowing alternatives to incarceration for lower-level drug-related offenders which may in turn reduce recividism. As this report outlines, there are a variety of alternative services, sanctions, and monitoring methods that can serve as less onerous, more cost-effective methods of addressing low-level drug offenses, while ensuring that drug use and related crimes are reduced.

It is important to emphasise that reducing these rates and levels of incarceration remains in line with Member States' obligations under the UN Conventions. Firstly, as noted above, the conventions provide for the establishment of possession for personal use as a criminal offense – but they do not oblige incarceration, or even punishment, for that crime. In the 1961 Convention, Article 38 instructs Parties to "give special attention to the provision of facilities for the medical treatment, care, and rehabilitation of drug addicts." Moreover, ever since the 1972 Protocol to the 1961 Convention (and echoed in the 1971 UN Convention on Psychotropic Substances), the new Art 36.1(b) states:

> ***"…when abusers of drugs have committed such offences, the Parties may provide … either as an alternative to conviction or punishment or in addition … that such abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration…"***

Furthermore, while the 1988 Convention requests countries to establish personal possession as a criminal offense, it simultaneously widens the scope of application of rehabilitative alternatives or additions to conviction or punishment (in Art 3.4 (b, c, and d)), such that:

[21] Declaration of Antigua Guatemala. *For a Comprehensive Policy against the World Drug Problem in the Americas*. Antigua Guatemala, 6 June 2013. AG/DEC. 73 (XLIII-O/13) corr. 1. Available at: http://scm.oas.org/doc_public/ENGLISH/HIST_13/AG06222E04.doc

"…in appropriate [supply offenses] of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare."

Alternatives to incarceration can also contribute to increasing the efficiency and the effectiveness of the judicial system.[22] A number of studies have yielded evidence that these measures are more cost-effective than sending individuals to prison, especially when there is not access to treatment. For example, a study conducted by the Justice Policy Institute has provided evidence to suggest that therapeutic programs operating outside of prisons yield up to USD $8.87 for every dollar invested, while drug treatment in prison yields a return on investment of USD $1.91 to $2.69 for every dollar invested.[23] Studies conducted in England and Wales yielded evidence that alternatives including both residential treatment and supervised release can be more effective at reducing recidivism in the target population, and that they are more cost-effective than incarceration. They also found that, in those cases where incarceration was necessary, treatment or other behavioral interventions during imprisonment were more effective than imprisonment alone. [24]

Though crime is a key contributing factor to the high levels of insecurity experienced by some Member States, the solution to increasing public security may not be as simple as increasing incarceration. Firstly, there is not a consistent relationship between crime rates and incarceration rates.[25] There are many other factors that contribute to rising or falling crime rates, and the relationship can change from national, to regional, to local levels when looking at the same period of time.[26] Some studies have even provided evidence that, in certain situations and communities, the effects of being incarcerated for more than a year can lead to increased likelihood of recidivism.[27] With regard to minor, non-violent drug offenders, a number of studies have illustrated that increasing rates of incarceration provide diminishing returns in terms of crime reduction, while at the same time increasing costs.[28] For these reasons, it is worthwhile to examine how efficiently incarceration for drug-related offenders contributes to increasing public security, and if other measures can be equally, or even more, efficient in achieving the same end.

With this knowledge, some Member States have been revisiting and revising existing laws and sentencing practices. In the United States, this has occurred in the context of significant concerns

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[22] Office of National Drug Control Policy. 2011. *Alternatives to Incarceratioon : A Smart Approach to Breaking the Cycel of Drug Use and Crime, Criminal Justice.* Executive Office of the President. Available at: https://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/alternatives_to_incarceration_policy_brief_8-12-11.pdf

[23] McVay, Doug. 2004. "Treatment or Incarceration: National and State Findings on the Efficacy and Cost Savings of Drug Treatment Versus Imprisonment." Justice Policy Institute. Available at: http://www.justicepolicy.org/research/2023.

[24] Matrix Knowledge Group. 2007. *The economic case for and against prison.* Matrix Knowledge Group. Available at: http://www.optimitymatrix.com/wp-content/uploads/2014/01/Matrix-prison-report-2007.pdf

[25] King, Ryan S., Mauer, Marc, and Young, Malcom C.. 2005. *Incarceration and Crime: A Complex Relationship*. The Sentencing Project. Available at: http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf

[26] Stemen, Don. 2007. *Reconsidering Incarceration: New Directions for Reducing Crime*. Vera Institute of Justice. Available at: http://vera.org/sites/default/files/resources/downloads/veraincarc_vFW2.pdf

[27] Bench and Allen, 2003; Chen and Shapiro, 2004; Gaes and Camp, 2009; Cullen, Jonson, and Nagin, 2011; Clear, Frost, et al, 2014

[28] Stemen, Don. 2007. *Reconsidering Incarceration: New Directions for Reducing Crime*. Vera Institute of Justice. Available at: http://vera.org/sites/default/files/resources/downloads/veraincarc_vFW2.pdf

over the costs of incarceration, as well as the growing body of international research showing other alternatives can be more effective responses to drug-related offenses than long terms of incarceration, producing a gradual shift in drug policy at the state level.[29] More than 30 U.S. states are leading the way with sentencing reform efforts that include reducing incarceration. To date, these specific changes are too new to have produced substantial results and it is not yet possible to make a clear causal link, although in most of those affected states, crime rates actually fell.[30] The promising impact of these reforms is also being recognized at the federal level, and the U.S. Department of Justice has put forward numerous initiatives that could significantly reduce the number of federal prisoners. For example, the Fair Sentencing Act,[31] the Smart on Crime Initiative,[32] and the "Drugs Minus Two Amendment"[33] all promote alternatives to incarceration.[34]

As such, the search for alternatives to incarceration which respect the obligations of international law can contribute to achieving at least five core objectives for Member States:

i) To more efficiently address public health problems associated with illicit drug use and provide a more humane and effective response to minor drug-related crimes.
ii) To reduce the negative impacts of incarceration on low-level offenders, while helping to reduce prison overcrowding and the human rights violations that can stem from it.
iii) To make the punishment fit the crime, maintaining the idea of proportionality and employing criminal punishment as the last resort for minor offenders,
iv) To ensure public safety and citizen security by prioritizing use of public resources in the fight against organized crime.
v) To ensure that the above objectives are achieved with the minimum expense necessary to maximize the desired results.

Recognizing that drug use is a matter requiring a public health approach and that states' limited resources should be targeted primarily towards combating violence and organized crime, some Member States have been promoting alternatives to incarceration, for minor offenders, particularly with regard to criminal penalties related to possession for personal consumption. This report is a contribution to this timely and necessary debate.

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[29] Subramanian, Ram, and Moreno, Rebeka. 2014. *Drug War Détente? A Review of State-level Drug Law Reform, 2009-2013*. Available at: http://www.vera.org/sites/default/files/resources/downloads/state-drug-law-reform-review-2009-2013.pdf

[30] *Uniform Crime Reporting Statistics.* Federal Bureau of Investigation, 2013. Web. http://www.ucrdatatool.gov/Search/Crime/State/StatebyState.cfm

[31] United States Department of Justice "Memorandum for all federal prosecutors: the Fair Sentencing Act of 2010", August 2010. Available at: http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fair-sentencing-act-memo.pdf

[32] United States Department of Justice. "Smart on Crime: Reforming the Criminal Justice System for the 21st Century" August 2013. Available at: http://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf

[33] United States Sentencing Commission. 2014. *Frequently Asked Questions: Retroactive Application of the 2014 Drug Guidelines Amendment.* Available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/materials-on-2014-drug-guidelines-amendment/20140724_FAQ.pdf

[34] Additionally, various reform bills have been introduced in the U.S. Congress, with bipartisan support. Policy responses, such as "justice reinvestment," have offered approaches that shift away from previous "tough-on-crime" policies. Instead, they favor the deliberate and data-driven application of resources to solutions that will generate the greatest return to communities and taxpayers in terms of cost savings, public safety, long-term health and personal stability for justice-involved populations, and overall community improvement

III. Narrowing the search: key criteria and fundamental principles

The concepts and methodology employed in this report build on earlier studies on alternatives to incarceration, especially the United Nations Office on Drugs and Crime (UNODC) report on promising principles and practices on alternatives to incarceration,[35] supplemented by a review of the academic literature. This required a general definition of alternatives to incarceration in the context of drugs, the scope and boundaries of the research, and the methodology for documenting promising experiences.

For this report, alternatives to incarceration are defined as:

> ***Any measure (whether legal reforms, strategies, programs or policies) intended to:***
> ***i) reduce criminal prosecution,***
> ***ii) limit the use of incarceration as a punishment, or***
> ***iii) decrease the time of actual deprivation of liberty in the event of incarceration, for individuals who have committed drug-related offenses.***

Starting from the premise that most of those incarcerated in the hemisphere are users, people transporting small quantities, or those with little role in a criminal organization, and that alternatives to incarceration are a viable way to reduce recidivism for these types of offenders, this report focuses on lesser offenses, such as: i) use and possession for use, when such behavior is criminalized, whether by recreational users or addicts; ii) small-scale growing and producing, especially in the case of peasant farmers or indigenous people, or for personal use or cultural purposes; and iii) non-violent, small-scale distributors and "drug mules." The report also takes into account iv) individuals who have committed other minor crimes under the influence of illicit drugs, or to support their addiction. Nevertheless, it is recommended for Member States to reflect on the need to implement alternatives to incarceration for a wide variety of drug-related offenses.

This report only documents alternatives designed for adults. This should not negate the importance of these measures for children and adolescents. Member States should certainly consider developing alternative measures to deprivation of liberty for this population as well.[36] Available evidence in some countries suggests that involvement of children and adolescents in drug-related offenses (such as acting as distributors and couriers, among other roles), is on the rise and, in some instances, associated drug use does not seem to have triggered a clear public health response.[37] This limitation to the scope of the report was established for purely operational reasons; juvenile justice poses

[35] United Nations Office on Drugs and Crime. Criminal Justice Handbook Series. *Handbook of basic principles and promising practices on Alternatives to Imprisonment*. UNODC: New York , 2007. Available at: http://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf

[36] American Convention on Human Rights (1969) Art. 5(5) provides: "Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors."

[37] United Nations Office on Drugs and Crime, *La Relacion Droga y Delito en Adolescentes Infractores de la Ley.* Sistema Subregional de Informacion e Investigacion Sobre Drogas en Argentina, Bolivia, Chile, Colombia, Ecuador, Peru y Uruguay – SISUID: 2010. Available at: http://www.bvcedro.org.pe/bitstream/123456789/218/1/DEVIDA-SISUID.pdf

specific and complex issues which could not be adequately addressed in this report within the time available.

For practical purposes, the alternatives to incarceration for drug-related offenses examined for this report were i) operational, ii) documented, and iii) from a broad range of countries and contexts. Those included can provide Member States with a broad range of alternative options to incarceration which could be tailored to their particular context.

Following these definitions, the selection of the alternatives to incarceration documented in this Report was based on five fundamental principles:

- **Compatibility of alternatives to incarceration with international drug control standards**

International drug control conventions allow Member States to use alternatives to incarceration for minor drug offenses, which may include minor supply offenses, but do not obligate mandatory prison sentences for minor or serious offenses[38]. Nevertheless, they permit countries to adopt more strict or severe measures if they are desirable or necessary to protect public health and welfare or prevent or suppress illicit traffic. The laws of Member States show sharp differences in this regard. In some countries, there are mandatory minimum sentences for drug-related offenses, while in others, sentences for this type of offense are left to the discretion of the judge. All of the alternatives to incarceration compiled in this report are compatible with the international drug conventions.

- **Public Health Approach**

The preamble of the 1961 United Nations Single Convention on Narcotic Drugs starts "*The Parties, Concerned* with the health and welfare of mankind…" Article 38 of that Convention then establishes that "the Parties shall give special attention to take all practicable measures for the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved and shall co-coordinate their efforts to these ends." This has been interpreted by a number of bodies as a commitment to health-focused and social interventions. Under this interpretation, this type of approach may include, among other elements, opting for non-punitive and non-enforcement focused policies regarding drug use, or even some related conduct, and designing and implementing such policies based on the principle of the right to health.[39] As stated in the chapter "Drugs and Public Health," from the report "The Drug Problem in the Americas,"[40] the public health approach seeks to ensure that the harms associated with drug control interventions do not outweigh the harms of the substances themselves. Either within this

[38] See Article 3 of *Charter of the Organization of American States.* Bogota, 30 April 1948. Available at: http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.pdf. See also United Nations Office on Drugs and Crime. Criminal Justice Handbook Series. *Handbook of basic principles and promising practices on Alternatives to Imprisonment*. UNODC: New York , 2007.

[39] United Nations Office on Drugs and Crime, *From coercion to cohesion. Treating drug dependence through health care, not punishment, Discussion paper.* UNODC: New York, 2010.

[40] Organization of American States. 2013. *The Drug Problem in the Americas*. Washington D.C.: The Organization of American States. Available at: http://www.cicad.oas.org/Main/Template.asp?File=/drogas/elinforme/default_eng.asp

rehabilitative approach towards drug use, or based on other interpretations, the alternatives to incarceration featured in this report are based primarily on a public health approach.

- **Human Rights Approach**

Adopting a human rights approach involves humanizing drug policy by protecting the rights of the individual in a setting that provides access to opportunities and social inclusion as a primary objective. As emphasized in the resolution adopted at the 44th OAS General Assembly, "Promotion and protection of human rights in the search for new and effective approaches to global drug problem solutions in the Americas,"[41] drug policies must be implemented with full respect for national and international law, including due process, and respect for human rights, which include Member States' obligations with regard to civil, political, economic, social, and cultural rights. The alternatives to incarceration featured in this report promote human rights.

- **Proportional Approach**

This approach incorporates consideration of the different harms to the individual or to society posed by the different substances, the amount of drugs linked to the offender and the behavior and role of the offender in the drug market, on a case by case basis. In particular, a more detailed consideration of the role and characteristics of the offender – such as gender, age, socio-economic status, national origin, lack of guidance as a youth, and physical and mental disabilities – can help authorities recognize and more effectively respond to certain such vulnerabilities, or aggravating circumstances (such as recidivist or violent behavior). The proportional approach should be taken into account at all stages of the judicial system.[42] It may also recognize some criminal justice supervision during treatment or social reintegration programs that may result in the imposition of minor sanctions of short duration to encourage compliance.

- **Evidence-Based Approach**

Drug policies should be evidence-based so that they are most suitable to the particular context involved; become increasingly efficient and effective in reducing drug use, production, trafficking, and related crime; and respect human rights. This approach requires a thorough analysis of what policies have been successful, what needs improvement, and the manner in which to improve it. A number of alternatives to incarceration have been developed in different countries, and can provide a wide range of options for study. A fundamental aspect of evidence-based approaches is the creation of monitoring and evaluation mechanisms that allow Member States to build a basis for evidence when this is lacking.

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[41] *Reflections and Guidelines to Formulate and Follow up on Comprehensive Policies to address the World Drug Problem in the Americas*. Guatemala City, 19 September 2014. AG/RES. 2866 (XLVI-O/14) rev. 1. Available at: http://www.oas.org/consejo/GENERAL%20ASSEMBLY/46SGA.asp#inf

[42] See American Declaration on the Rights and Duties of Man, 1948, Art. II; American Convention on Human Rights 1969, Art. 1 and Art. 8(2). See also United States Sentencing Commission. 2014 *U.S. Sentencing Guidelines Manual, Original Introduction to the Guidelines Manual, Ch1, Pt. A, 1.b) Departures*. Available at: http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf.

Alternatives to incarceration for drug-related offenders raise important questions about what kind of supervision or care is necessary to reduce recidivism amongst offenders and the resources necessary for a given initiative to prove effective. In some situations, it may be appropriate to invest in a targeted surge of resources, with the aim of reducing long-term costs, while in others, it may be appropriate to move resources being used for one intervention to another that responds to the same issue with a different approach. Whatever the priorities of a given government, an evidence-based approach can contribute to more effective and efficient decision-making.

IV. Inventory of alternatives to incarceration: evidence of a promising way forward

The report profiles the variety of alternatives and shows that the Member States employ a broad range of policy options to provide tailored responses limiting the use of incarceration for those who commit drug-related offenses.[43] The document is not intended to rank alternatives from best to worst; instead, it operates under the assumption that the best approach for Member States may be to develop several alternatives, adapted to meet their particular context and the variety of crimes that they must confront. In this way, the report seeks to highlight opportunities offered by these experiences, acknowledging some of the difficulties in their implementation.

This report should be viewed as a first step to guide future efforts, which by no means excludes any other existing experiences on the subject. It is also important to recognize that this report is not intended to serve as an evaluation of the alternatives identified herein. On the contrary, this report is only intended to describe a variety of initiatives, each interesting in its own right, and to put forward some fundamental characteristics on which they are based.

Alternatives to incarceration can be grouped into three broad categories according to the stage in judicial proceedings at which they occur. Accordingly, this report refers to:

i) Measures taken prior to the opening of a criminal proceeding, and aimed at limiting entry into the criminal justice system;

ii) Measures applied during criminal proceedings, and aimed at either preventing the criminal case from resulting in incarceration, or making the incarceration proportional to the offense; and

iii) Measures for prison populations, aimed at providing for early release of convicted and imprisoned individuals along with social integration strategies.

This is similar to the typology used in the UNODC report on alternatives to imprisonment. While UNODC introduces four types of measures – i) measures which limit the scope of the criminal justice system; ii) pre-trial and pre-sentence measures; iii) alternative sentence measures; and iv) measures

[43] Article 5(6) of the American Convention on Human Rights (1969) states in Article 5 (Right to Humane Treatment) that: "Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners."

involving early release.[44] This report joins the second and third types for reasons of simplification. In the interest of brevity, this report simply outlines the main characteristics of some alternatives applied at each stage, together with some challenges and opportunities. Note that distinctions are not always clear, and the same alternative may be applicable at more than one stage, for example diversion measures may be applicable from law enforcement intervention until judicial sentencing.

In addition to being classified by stage in the judicial proceedings, alternatives to incarceration can also be classified by the **target population** and the **levels of implementation** of the alternatives. Classifying by target population can account for different types of offenders, such as, but not limited to women, youth, or indigenous populations, or it can differentiate between the four types of drug-related offenses mentioned earlier in this report. Considering the target population allows different alternatives to be viewed according to whether they aim to address the needs of particular groups of people, and may be especially beneficial for choosing effective alternatives for groups in conditions of social vulnerability. Classifying by levels of implementation illustrates how alternatives may require different levels of institutional involvement and coordination, from a pilot project in a single courtroom to a new parliamentary law and accompanying regulations. This is important for those Member States considering the resources and time involved in making changes, and whether changes are only required in a few key locations to rapidly solve a specific problem, or whether they should be nationwide. Member States are invited to consider also these aspects of alternatives as the different models are outlined. While this report does not provide in-depth analyses, the alternatives have been organized according to these typologies on CICAD's website for Member States' consideration.

A broad variety of alternatives were identified that have been adopted over the past years in the countries around the world, and have shown promise in reducing incarceration; are compatible with international drug conventions; are respectful of human rights; and have a proportional approach that may have a positive impact on populations in situations of vulnerability. The basic information relating to these experiences can be found on CICAD's website. These experiences are as varied as the countries and jurisdictions in which they operate. Some were started as long ago as the 1980s, some as recently as 2015. Some are managed at a national level, some at the level of provinces, states, regions or departments, some by criminal justice entities, some by national health ministries, and some by independent non-profit organizations. Some include participation of state agencies, while others do not. Annual budgets range from zero (all volunteer) to those in the millions of dollars, and the numbers of participants range from dozens to more than 10,000. Some are limited to one phase of justice involvement, such as police forces or problem-solving courts, while others are available to be accessed at various stages of the criminal justice system, from arrest through to appearance before a judge. Likewise, the types of alternatives analyzed, from drug education to substance use treatment to mental health services to homeless services and job training, vary from program to program and country to country. Some utilize independent case management while others rely on probation or other supervisory mechanisms to ensure compliance and access to services.

[44] United Nations Office on Drugs and Crime. Criminal Justice Handbook Series. *Handbook of basic principles and promising practices on Alternatives to Imprisonment*. UNODC: New York , 2007. Available at: http://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf

One challenge common to many of these options is how to define the limits of their application, such as distinguishing between possession for personal use and possession with intent to distribute when an alternative is only permitted for the former. A common tool to address this problem is threshold quantities. Though this may appear to be a simple solution to a difficult question, establishing threshold quantities provokes many challenging questions. Countries must decide: i) what the purpose of the threshold is, ii) whether it will be binding or indicative, iii) who sets thresholds and if and how they can be changed, and finally iv) how quantities are determined.[45] For example, thresholds can be used for diversion programs or sentencing guidelines, they can be coupled with judicial discretion or mandatory, they can be set by governmental decree or police procedure, and they can be determined by net weight or quantity of active ingredient. While threshold quantities can be a useful tool, when set without a firm grounding in the reality of local patterns of use or applied too rigidly, they can have potentially damaging consequences. Importantly, the use of threshold quantities and judicial or prosecutorial discretion are not mutually exclusive. In fact, they can be effectively combined to ensure that offenders are not taking advantage of the system, while allowing judges to excercise their discretion (if appropriate) in the cases of individuals possessing quantities above a given threshold but still for personal use.

No matter how successful alternatives may be in one country, a detailed analysis and, most likely, a number of adjustments, will be required for these alternatives to be successful in another country. Because context plays such a central role in the way rules and institutions actually function, significant differences among countries can mean that a particularly successful alternative in one country may not necessarily be successful in another.

a. Alternatives limiting entry into the criminal justice system

This category of alternatives enables a number of individuals to stay out of the criminal justice system. These alternatives are usually associated with three fundamental strategies: i) decriminalization of certain conduct,[46] which basically involves removing that conduct from criminal law and, therefore, removing the possibility of incarceration as a punishment; ii) depenalisation of certain conduct, which allows closure of a minor criminal case without issuing a penalty; and iii) law enforcement diversion mechanisms, in response to criminal conduct that could eventually be sanctioned with incarceration, but is diverted towards rehabilitative measures instead. It is important to note that decriminalization does not imply the same policy everywhere it is implemented.[47]

One recent example of decriminalization in the Hemisphere is that of Jamaica. Before the amendment of the Dangerous Drugs Act of 2015, a person found possessing or using a small amount of cannabis could, in theory, face several years of incarceration. The amendment decriminalizes public

[45] Harris, Genevieve. 2011. *TNI-EMCDDA Expert Seminar on Threshold Quantities.* Transnational Institute and European Monitoring Centre for Drugs and Drug Addiction. Available at: http://www.tni.org/sites/www.tni.org/files/download/thresholds-expert-seminar.pdf
[46] See glossary for the definitions used in this report
[47] For a more detailed look at this phenomenon, see Table 1 in *Studies: Legal and Regulatory Alternatives.* Organization of American States. 2013. *The Drug Problem in the Americas*. Washington D.C.: The Organization of American States. Available at: http://www.cicad.oas.org/Main/Template.asp?File=/drogas/elinforme/default_eng.asp

consumption and possession of up to two ounces of cannabis, yet maintains the prohibition of such acts, imposing a monetary fine that carries no criminal record.

Another example of decriminalization is in Spain. Even since 1992, possession of drugs for personal use has been considered a "serious infraction of public safety," according to the Constitutional Law on Public Safety, which is an administrative, rather than criminal, offense. Article 25(1) of that law defines this as "possession, while not for the purpose of trafficking, provided no criminal offense is involved." Judicial precedents set the maximum quantity for this as that considered as for five days of consumption, which have then been calculated in gram limits by the National Institute of Toxicology. The offense is punished with a monetary fine, though other penalties such as suspension of the driving license are also possible. Directly accompanying this definition of the offense, Article 25(2) establishes the possibility of diversion, stating that "The penalties may be suspended if the offender submits to a treatment program" in accordance with the procedure regulated in a separate legal instrument.

A well established example of depenalisation is in Germany. While the police must report every case of drug possession to the public prosecutor, section 31a of the drug law allows the public prosecutor to refrain from prosecution if four conditions are met: if the quantity is insignificant, if it is for personal use, if there is no public interest in prosecution, and if the offender's guilt is minor. While the law does not refer to any particular drug, in practice this is used only for cannabis offenses. The “insignificant quantity” has been interpreted in various ways in the different states within Germany, but there are efforts to bring it to a consistent amount.

The third strategy – diversion – also offers a number of options. It may involve referral to an administrative monitoring system, treatment, or other non-punitive measures, such as educational measures. In all of these instances, the first key point is that the person is not referred to the judicial system and, therefore, does not end up being criminally punished, thus helping to relieve pressure on the system. The second key point is that rehabilitative rather than purely punitive measures have been shown to be more successful in reducing recidivism, thus reducing reoffending and re-incarceration in the longer term. Programs of this type include tiered sanctioning mechanisms, access to treatment, education, housing, and employment, as well as tracking and monitoring systems and ongoing drug testing.

One diversion program which has been featured in recent literature is Law Enforcement Assisted Diversion (LEAD), which originated in Seattle, Washington in October 2011. It is an independent program, targeted at persons arrested for minor drug offenses and prostitution. The arresting police officer has the power to decide whether or not to divert the person into the program. This entails referring the person to a case manager in charge of deciding the type of monitoring arrangement the person will be subjected to and usually includes a program tailored to the individual needs of the person. Other examples of diversion can be found in Australia, England, and the United States.

Diversion programs may occur as early as street-level law enforcement intervention, as discussed here, or as late as court involvement.[48]

In countries where illicit crops are grown, there are practices for diverting small-scale growers from prosecution – commonly referred to as alternative development programs. These offer growers the opportunity to avoid prosecution by directing them towards alternative development practices and alternative livelihoods. Though, these vary by country and by implementation in the level of eradication required before benefiting, and in the characteristics of the target population, they have the common aim of the social reintegration of their target populations. Additionally, it is important to consider other types of alternatives for cultivators, such as plea bargaining.

A combination of the decriminalization and diversion approaches can be found in Portugal. Possession of substances in amounts consistent with established quantities for personal use is decriminalized, as it continues to be prohibited, but an administrative, rather than criminal, measure is used to respond to the offense. This administrative response is coordinated through a body called a "Dissuasion Commission." A multi-disciplinary team assesses the individual and can refer them to voluntary health or social services if they are a problematic or dependent user, or may impose different types of punishments, such as admonishments or warnings, community service, suspension of driver's licenses and fines, depending on the particular circumstances of the case and the type of drug use involved.[49] In Box No. 1, this experience is described in greater detail.

| Box No. 1 |

DISSUASION COMMISSIONS IN PORTUGAL

In 2000, a new law was approved in Portugal that decriminalizes possession of all drugs. Even though possession continues to be illicit conduct, an administrative response is provided for offenders, instead of sanctioning them with a criminal measure.

The mechanism to implement the administrative measures is called a Dissuasion Commission. There are 18 such Commissions, one for each province of the country, and they are part of the Ministry of Health. Each is made up of three members selected by the Ministries of Health and Justice. Usually, the members include one legal expert, one health professional, and one social worker. The Commissions are also supported by psychologists and sociologists.

When a person is found in possession of a psychoactive substance below an amount consistent with ten days of personal use, the drugs are seized and the person is summoned to appear before a Commission. When the amount of drugs exceeds this threshold, the conduct falls under the criminal sphere; however, it must be noted that quantity is not the only element taken into account to determine the difference between personal

[48] In the U.S. now more than ever, and often with strong public support, legislators, prosecutors, judges, court administrators, corrections, and probation officials, and the jurisdictions they serve are responding with community-based diversion alternatives, often incorporating substance use and mental health service or program components.

[49] European Monitoring Centre for Drugs and Drug Addiction. 2011. *Drug Policy Profiles: Portugal*. 2011. European Monitoring Centre for Drugs and Drug Addiction. Available at: http://www.emcdda.europa.eu/publications/drug-policy-profiles/portugal.

use and trafficking.

At the appearance, the user discusses their drug use history with the members of the Commission in order to identify whether occasional or problematic use is involved, and to offer a response tailored to the individual's needs. The first appearance usually entails suspension of the judicial proceedings and no sanction is issued. The Commission provides guidance about treatment options, but admission into a treatment program is always voluntary. The Commission can impose administrative measures, such as suspension of one's driving license, a ban on presence in certain locations, and community service and fines, among others. By law, no fine can be imposed on a drug-dependent person, because in so doing, it could compel them to commit a crime to procure the money to pay it.

In 2009, some 68% of the cases heard by the Dissuasion Commissions were non-dependent users to whom no sanction was applied. In 15% of the cases, it was agreed that the person would go to treatment. Around 14% received an administrative measure; 4%, a fine; and 10%, a non-pecuniary sanction. Some 76% of the cases were for possession of cannabis, 11% for heroin, 6% for cocaine and 6% for a combination of drugs.

Diversion requires investments in social services and follow-up mechanisms to reduce the likelihood of recidivism and/or continued drug use. Examples of this include the collaboration found in the Portuguese Dissuasion Commissions or the role of the case manager in Seattle's LEAD program. For many existing diversion programs, there are no apparent overarching standards for collecting or publishing data for the purposes of evaluating different types of programs against common sets of performance measures such as cost savings or reduced recidivism.[50]

Another challenge presented by decriminalization and diversion may be the need for the public and policymakers to modify their legal systems, often by enacting legislation and/or issuing executive orders.

All three strategies may save resources of imprisoning individuals by keeping them out of the criminal justice system, saving the costs associated with prosecution and incarceration, and reducing prison overcrowding. They also reduce the long-term harm to individuals associated with having a criminal record. In addition, to the extent individuals who have dependents, such as women who are mothers, are saved from imprisonment, they are able to continue caring for their dependents, thereby saving society the additional costs of finding other means of care.

In the context of Latin America and the Caribbean, discussions with police and prosecutors revealed two major reasons for the apparent skepticism about implementing police and pre-trial diversion.[51] On the one hand, there is apprehension that, in some places, such programs could be undermined by corrupt practices, and the determination to divert an offender may not be made based on

[50]Center for Health and Justice. 2013. *No Entry: A National Survey of Criminal Justice Diversion Programs and Initiatives*. Treatment Alternatives for Safe Communities. Available at: http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diversion%20Report_web.pdf

[51] Inter-American Drug Abuse Control Commission (CICAD). *High Level Workshop – Working Group on Alternatives to Incarceration*. 17-19 June, 2014. Antigua Guatemala. Available at: http://www.cicad.oas.org/apps/Document.aspx?Id=2963

appropriate criteria. On the other hand, from a legal standpoint, such programs could be tantamount to granting the police the legal authority to bring criminal actions and, in some Member States, this would be inconsistent with the way their judicial systems work. In any case, these alternatives suggest that the police can play an important role and, therefore, Member States could make legislative and/or policy changes in order to reduce the risks that may be associated with this type of intervention. Some mechanisms to safeguard against police corruption include better transparency in the decisions, professionalization and better compensation for police, and requiring annual disclosures of compensation and assets. Making diversion programs transparent and creating effective partnerships among law enforcement, health care and other social services, as well as civil society, is not easy, but can allow governments to benefit from this type of program.

b. Alternatives to incarceration through the criminal justice system

These alternatives take place during the course of a criminal proceeding, which might vary from country to country, but generally would include the phases of prosecution and trial, including conviction and sentencing. These can include prosecutor-led diversion, or diversion to specialty courts, or modifying the laws that specify the sentences to be given. In Latin America and the Caribbean, there have been several initiatives that could be regarded as alternatives used during this stage of proceedings.

Once an offender has entered the criminal justice system and is awaiting trial, the question of pre-trial detention arises. Pre-trial detention of large numbers of drug-related offenders can strain the resources in justice systems, particularly those of the prison system. While pre-trial detention might be appropriate for serious offenders who present a high flight risk, there are less restrictive means by which to ensure the presence of a defendant before a court. Alternatives to pre-trial detention include: bonds (personal recognizance and financial bonds), pre-trial services supervision, third party custody and supervision, assignment to treatment or monitoring based on the nature of alleged crime, location monitoring, curfew, home detention (permitting absences for work or school), home incarceration (24 hour lockdown except for medical or court appointments),[52] or halfway houses. Some of these technologies and mechanisms can also be used to ensure that offenders comply with the conditions of early release or probation. Pre-trial detention should be used sparingly, as it is not advanced punishment, but rather a precautionary measure that should only be applied in exceptional circumstances.

In this stage, Drug Treatment Courts (DTCs) warrant examination, as they are the only example that is being actively explored or implemented in almost half of the OAS Member States, as well as other countries in and outside the hemisphere.[53] The Drug Treatment Court model is further described in Box No. 2.

[52] For more information on home confinement and electronic monitoring, see Office of Juvenile Justice and Delinquency Prevention. 2013. *Home Confinement and Electronic Monitoring*. Available at: http://www.ojjdp.gov/mpg/litreviews/Home_Confinement_EM.pdf

[53] As of 2015, this model has been implemented in Argentina, Barbados, Bermuda, Canada, the Cayman Islands, Chile, Costa Rica, United States, Dominican Republic, Jamaica, Mexico, Panama, and Trinidad and Tobago. Outside of the Americas, it can be found in

| Box No. 2 |

Drug Treatment Courts

The Drug Treatment Court (DTC) model for drug-dependent offenders involves diverting drug-dependent offenders from prison and jail into treatment and rehabilitation, through a process directed by a judge. By increasing direct supervision of offenders, coordinating public resources, and expediting case processing, DTCs can help promote the rehabilitation and social reintegration of the individual, and contribute to a reduction in recidivism among drug-dependent offenders. DTCs do this by addressing the causes of crime in addition, and aiming to break the cycle of criminal behavior, alcohol and drug dependence, and imprisonment.

DTCs were created as an alternative to incarceration, combining treatment with intensive judicial oversight of the treatment process. Judicial oversight typically involves ongoing status hearings before a DTC judge, individualized interaction between the judge and participant (drug-dependent offender), interim sanctions and incentives to motivate compliance, drug testing, community supervision, legal incentives for graduating, and, in some cases, incarceration for unsuccessful termination. The intended beneficiaries of the DTC model are drug-dependent defendants who would otherwise be handled in the regular criminal justice system and, in some cases, would face imprisonment for criminal offenses.

DTC programs can serve as an alternative to the regular criminal justice procedure in many ways, including but not limited to: i) conditional suspension of the proceeding, or ii) supervised release when the person is in custody or is already serving a sentence. In both instances, a substance-dependent individual, who has committed a certain type of crime, agrees voluntarily to receive comprehensive rehabilitation treatment under strict judicial supervision. The judge supervises the offender's progress in the treatment program with the assistance of the defense attorney, prosecutor, social workers (case officers), treatment providers, and probation officers. Typically, a participant will spend from twelve to eighteen months in treatment under the judge's supervision, and must report to the court every week or so at the beginning of the treatment, and submit to random drug testing. Both those working in the treatment process and the participants themselves report their progress to the judge. At the end of the term (graduation), the participant leaves the DTC and, when the proceeding was conditionally suspended, the case is usually dismissed without prejudice (or the equivalent thereof in the particular jurisdiction), and consequently, the person's criminal record is expunged for this offense. When this model is used during the phase of sentence execution, if the person successfully completes the program, he or she is released.

The model has been adapted to meet different countries' realities. The legal eligibility criteria, the drug cases being considered, the way screening and referral process are applied, and the target population, among other aspects, may vary greatly from country to country.[54] Panama, for instance, employs a combined inquisitive and accusatory criminal justice system. Mexico is transitioning to a full accusatory system while this model is being piloted. In Mexico, the model has spread to different states but in very different ways from one to another. In Costa Rica, the model has been incorporated into a broader restorative justice

countries such as Australia, Belgium, Ireland, New Zealand, Norway, and the United Kingdom (England and Scotland). Colombia, Peru, and Belize are currently engaged in the exploration phase of this model.

[54] For a more in-depth look at the diversity of drug treatment courts, see Cooper, Caroline S., McG Chisman, Anna and Lomba, Antonio. 2013. *Drug treatment courts: an international response for drug-dependent offenders.* Washington, D.C. Organization of American States. Available at: http://www.cicad.oas.org/fortalecimiento_institucional/dtca/publications/DTC_FINAL_PUBLICATION.pdf.

program. In the Dominican Republic, trial judges, as well as special judges for the Execution of Sentences, have become involved. Some courts accept domestic violence cases, while others focus on property crimes.

If the goal of a DTC program is to lower recidivism rates, relapse into drug use, and/or prison overcrowding, then including low-risk offenders such as those accused of simple possession may not be helpful, and in some cases may even be harmful.[55] The DTC model promoted by the OAS, and supported in a MADCE study as the most efficient,[56] stresses the importance of including offenders whose crime was motivated by addiction, but not drug possession alone. However, expansion of the model to higher risk profiles takes time, and needs to be balanced with the state's capacities to respond to the requirements of these profiles.

Several studies show that the model, when properly implemented, can be effective at reducing the recidivism rate and the crime rate, which is generally measured by a decrease in arrests for new crimes and technical offenses.[57] Some surveys suggest that the drug relapse rate of participants in DTCs ranges from 8% to 26%, lower than the rate for other judicial response systems. Other studies indicate that the best drug treatment courts reduced the rate of reoffending by 45% compared with other methods.[58] However, as with any new idea, the model has been rightfully subject to study, debate, and scrutiny. Other studies present different results with regard to the success of the model.[59] This is probably the most studied model among all of the alternatives presented, as there are multiple studies being carried out presenting different practices. Further research on high-risk, high-need profiles for DTCs has documented that in comparison with those courts admitting only possession cases, "Drug Courts yielded nearly twice the cost savings when they served addicted individuals charged with felony theft and property crimes."[60]

The bulk of the current evidence comes from the United States, Australia, and Canada.[61] However, there is a large effort in many Member States, supported by the OAS, to implement monitoring and evaluation systems,[62] in order for countries to be able to generate their own evidence to assess the performance of their programs.

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[55] Lowenkamp, Christopher T. and Edward J. Latessa. 2004. "Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders" in Topics in Community Corrections. Washington, D.C.: The National Institute of Corrections. Available at: http://www.uc.edu/content/dam/uc/ccjr/docs/articles/ticc04_final_complete.pdf

[56] Rossman, Shelli B., John Roman, Janine M. Zweig, Michael Rempel, and Christine Lindquist. 2011. The Multi-Site Adult Drug Court Evaluation. Washington, D.C.: The Urban Institute.

[57] In addition to the bibliographic references at the end of this Report, visit: http://www.nij.gov/topics/courts/drug-courts/Pages/welcome.aspx

[58] National Association of Drug Court Professionals. "Drug Courts Work." National Association of Drug Court Professionals. http://www.nadcp.org/learn/facts-and-figures.

[59] For example, see Sevigny, E., Pollack, H. and Reuter, P. (2013), "Can Drug Courts Help to Reduce Prison and Jail Populations?" *The Annals of the American Academy of Political and Social Science*, May 2013 vol. 647 no. 1 190-212 and and Mitchell, Wilson, Eggers, and MacKenzie (2012) "Assessing the effectiveness of drug courts on recidivism: A meta-analytic review of traditional and non-traditional drug courts". Journal of Criminal Justice 40 (2012) 60–71.

[60] Carey, Shannon M., Juliette R. Mackin, and Michael W. Finigan. 2012. "What Works? The Ten Key Components of Drug Court: Research-Based Best Practices." *Drug Court Review* 8: 1: 6-42

[61] For example, see Rossman, Shelli B., John Roman, Janine M. Zweig, Michael Rempel, and Christine Lindquist. 2011. The Multi-Site Adult Drug Court Evaluation. Washington, D.C.: The Urban Institute. And also see Koetzle Shaffer, Deborah, 2011. "Looking Inside the 'Black Box' of Drug Courts: A Meta-Analytic Review." Justice Quarterly 28: 3: 493-521.

[62] For example, Rempel, Michael, Raine, Valerie, and Lomba, Antonio, 2014. *Estudio Diagnóstico Del Modelo De Tribunal De Tratamiento De Adicciones De Guadalupe, Nuevo Leon, Mexico.* Washington D.C.: Organization of American States. See also Marlowe, Douglas B. In press. *Manual for Scientific Monitoring and Evaluation of Drug Treatment Courts in the Americas*. Washington D.C.: Organization of American States.

A different example of a specialist court is the community court model implemented in the United States, Canada and United Kingdom. The purpose of these courts is to bring judges closer to the community and allow the community to actively participate in doing justice. The Red Hook Community Justice Center, in Brooklyn, New York, a branch of the New York state court system, is one example of how such courts deal with drug-related crimes. An eligible person can have their case disposed of if they agree to perform community or social service, which can include treatment for drug-dependent participants. Those who are referred to treatment are subject to ongoing monitoring, which includes drug testing, judicial supervision and incentives and sanctions (a carrot and stick approach) for compliance with the program.

Other examples at the sentencing stage include is called Right Living House (RLH), which has been operating in Bermuda since 2010. This allows persons who have committed crimes and have a drug use disorder to receive residential treatment and community care after sentencing. Another is the wide use of Community Service Orders in the countries of the Caribbean, whereby the judge may, at his or her discretion, send the convicted person into treatment or to perform community service at the time of sentencing.

One example of a program which is notable for its focus on small-scale, non-violent distributors, rather than problematic users is Back on Track, launched in 2005 by the San Francisco District Attorney's Office. See Box. No. 3 for more details.

| Box No. 3 |

Back on Track

The "Back on Track" initiative is primarily aimed at offenders aged 18-30 with no prior convictions, charged with micro-trafficking not involving violence. The program is notable for its focus on dealers rather than problematic users of drugs.

Program participants are referred by the prosecutor's office, plead guilty to the offense, and are supervised by a designated judge. Working with local NGOs, Back on Track is a 12-18 month program that, under ongoing judicial monitoring, offers job training and other programming, while requiring participants to complete community service. Upon successful completion, the case is dismissed and the participant's record is sealed. If a participant fails to meet program requirements, a judge can immediately impose jail or prison.

According to the San Francisco District Attorney's Office, which continues to operate Back on Track after nearly a decade, the program has reduced recidivism amongst graduates to less than 10 percent. However, Back on Track has not been subject to an independent evaluation. The most notable replication of the program has been in Philadelphia, where the local prosecutor's office has established a program called The Choice is Yours (TCY). TCY serves a similarly youthful population although it allows for the inclusion of more serious offenses than Back on Track. This program was recently the subject of a thorough process evaluation, and the office reports that an independent impact evaluation will soon get underway.

In conjunction with the above-cited measures, which seek alternative forms of court processing and sentencing to avoid incarceration, certain countries have opted for reforms aimed at modifying sentence ranges for drug crimes, often reduing sentences for minor offenses, while sometimes increasing sentences for more serious offenses. This can lead to a decrease in incarceration rates as the average prison term is brought down. One interesting example is found in England and Wales, where guidelines were established to ensure more proportional sentences. For this purpose, several criteria were defined in order to allow judges to impose sentences which are commensurate with the degree of responsibility and the specific profile of the conduct. This is an example of how legal measures that allow for differentiation among substances, quantities, types of conduct, and levels of liability can contribute to making punishments more proportional and, consequently, make offenders spend less time deprived of liberty. This system is further explained in Box No. 4.

| Box No. 4 |

Sentencing Guidelines for Drug Crimes in England and Wales

In early 2012, the Sentencing Council for England and Wales – created in 2010 – issued sentencing guidelines for drug crimes. The guidelines provide an example of a measure that seeks to set more consistent and proportional sentencing criteria.

The guidelines do not amend the law on the subject matter – the Misuse of Drugs Act – but instead provide guidance to judges with regard to sentencing ranges and criteria to be taken into account in setting punishments. Accordingly, they establish seven degrees of offenses: introduction or extraction of controlled drugs into or from the country, supply or offer of supply, possession for the purpose of supplying it to another person, production, growing cannabis plants, allowing the use of facilities, and possession of controlled substances. A specific offense range is laid out for each crime, which stipulates the maximum and minimum sentence that can be given.

In order to establish the punishment, the following factors are taken into account: type of crime, type and quantity of the substance, and the role of the offender (leading, significant or minor role). Additionally, aggravating and mitigating circumstances were established

One of the groups that has greatly benefited from these guidelines are women used as drug mules by international drug trafficking groups. Under the guidelines, the length of the average sentence in this circumstance has been reduced by almost half.

An evaluation conducted by the Sentencing Council shows how, overall, in the first ten months from the time the guidelines were enacted, 100% of the sentences were in line with the suggested ranges. It must be clarified that in most of the cases, the punishments given are community service, as only around 9% of the persons charged with a drug crime are sentenced to deprivation of liberty. In the case of personal possession, emphasis has been placed, since 1998, on diversion or referral programs, and rarely is a prison term imposed. In general, these cases are settled with a verbal admonishment or fines.

Another example of changes to sentences is the amendment to Article 77 of Costa Rica's Law 8204 on Narcotic Drugs, Psychotropic Substances, Drugs of Unauthorized Use, Connected Activities, Asset Laundering, and Financing Terrorism. The amendment reduced the sentencing range available for defined offenses. It is important to note that this change was applied to some women already in prison, meaning that it was applied both at the sentencing stage for future offenders but also, in these cases, as an alternative for prison populations. Details are given in Box 5.

| Box No. 5. |

Amendment to Article 77 of Law 8204 for Women in Costa Rica

This is an innovative legal reform which was instituted in Costa Rica to enable sentence reductions and access to other penal benefits for women in conditions of vulnerability who are tried for bringing drugs into a prison. [63]

It is the first amendment to Law 9161, the Psychotropics Law, and it involved changing Article 77, in order to reduce the punishment set forth for the conduct described therein (making the prison term from 3 to 8 years instead of from 8 to 20 years). The amendment also enabled women who are standing trial and are living in conditions of poverty, are heads of household living in conditions of vulnerability, or have custody of minor children, older adults or persons with some form of disability, to be granted the benefit of home arrest, supervised release, residence in a halfway house, or electronic monitoring.

This reform incorporates a gender perspective and provides a specific response to a criminological phenomenon that had been affecting the country, and to which the only possible response was the deprivation of liberty for at least 8 years, with judges unable to take into account the particular situation of each woman.

The measure is being implemented and has yielded very promising results. As it has also been applied to women already sentenced, it has allowed for the release of 132 women who were incarcerated but were clearly living in conditions of vulnerability. In Costa Rica, it is anticipated that an inter-institutional network will be built to make it possible to provide the women with comprehensive socioeconomic care in response to risk factors that led them to the criminal activity.

Alternatives through the criminal justice system offer a number of potential benefits. The short-term costs of changing sentencing practices are lower than creating new programs and infrastructure. Moreover, governments can make use of their existing legal frameworks, but apply them in different ways to certain types of drug-related offenders. It should be noted that in some cases, such as Drug Treatment Courts and Community Courts, offering an alternative sentence does require at least some investment in infrastructure and human resources. In terms of proportionality, these types of initiatives can also allow judges and prosecutors to better reflect mitigating and aggravating circumstances in their sentencing by offering a wide array of sentencing options. One example would be the possibility of differentiating between accused individuals who organize and finance serious drug-related offenses and those in conditions of vulnerability employed as mules.

[63] *Law on narcotics, psychotropics substances, drug use, unauthorized related activities, money laundering and terrorist financing*. San Jose, 3 September 2011. Available at: http://www.cicad.oas.org/fortalecimiento_institucional/legislations/PDF/CR/ley_8204.pdf.

Changes in sentencing do raise the issue of judicial transparency. It is important that the decisions of judges and the requests of prosecutors and defenders be transparent in order to reduce the likelihood of misapplying alternatives to incarceration at this stage. Another challenge with regard to these alternatives is the importance of strong collaboration between courts and other sectors (health and other social services, as well as law enforcement) in order to correctly assess the needs of an offender and the appropriateness of a given sentence or program.

c. Post-sentencing alternatives

Post-sentencing alternatives refer to mechanisms that work to substitute or reduce incarceration for drug-related offenses and are applied after an offender has already been sentenced. Examples of this include probation or early release programs, as well as pardons or clemency.

The HOPE (Hawaii's Opportunity Probation with Enforcement) model was launched in 2004, in order to reduce recidivism and probation violations. The program hinges on the swiftness and certainty of consequences for non-compliance with specific court mandated conditions. Participants are informed of the rules, and those who violate the terms of their probation are immediately arrested and jailed for short periods of time. Participants must submit to random drug tests and are sanctioned if they test negative or fail to take the test. Probationers are sentenced to drug treatment only if they continue to test positive for drug use or if they request a treatment referral.

| Box No. 6 |

HOPE Probation

The Hawaii Opportunity Probation with Enforcement (HOPE) model was launched in Hawaii in 2004. Its goals are to reduce recidivism and probation violations among probationers at high risk of drug use, missed appointments or new criminal behavior. The model relies on the idea that *swiftness* and *certainty* of responses are more important than *severity* in improving outcomes.

The HOPE program starts with a warning hearing, where a judge clearly explains the conditions of probation to be complied with, as well as the consequences for noncompliance. In particular, the judge emphasizes that each violation will lead to a short, but immediate, stay in jail. Each probationer is told to call a phone number every morning to find out whether they are to be tested for drug use, and that if they miss their appointment or fail their drug test they will be arrested and brought before the judge. Every positive drug test and every missed probation appointment is met with a brief, immediately applied sanction. If probationers continue to test positive for drugs, or they request treatment at any time, they will be provided drug treatment.

The original HOPE program was the subject of an independent evaluation, which found that, compared to probationers in a control group, after one year the HOPE probationers were 55% less likely to be arrested for a new crime; 72% less likely to use drugs; 61% less likely to skip appointments with their supervisory officer; and 53% less likely to have their probation revoked. As a result, HOPE probationers served or were sentenced to 48% fewer jail days, on average, than the control group. To determine

whether these results could be replicated in other settings, the U.S. Department of Justice has funded a field experiment in four different states with a rigorous evaluation to determine the impact of HOPE in reducing probationer re-offending and identify the likely challenges and costs a jurisdiction should expect when implementing the program. Results are expected in 2015. Separately, programs similar to HOPE have been implemented in more than 20 U.S. states; several of these are undergoing evaluation for their effectiveness.

Another example is conditional sentencing in Argentina, whereby a person accused of a first-time minor, non-violent offense can receive a suspended sentence. This way, the accused avoids a prison sentence, but must still comply with the terms of the suspended sentence. If the offender commits another crime within a specified time period, the suspended sentence is revoked and the individual is remanded into custody to serve the original sentence plus the sentence for the second offense.

Clemency is also an option. In 2008, the Ecuadorean government pardoned more than 2,000 individuals convicted of drug trafficking. In order to benefit from this policy the individuals had to fulfill three requirements: i) having been sentenced, ii) the quantity of drugs trafficked was less than or equal to two kilograms and iii) the individual must have fulfilled 10% of the sentence and at least one year of imprisonment. Once a pardon request was received by the competent authorities they must respond to the request within 30 days. It is important to note that 30% of those who benefited from this policy were women, and that 95% of those eligible for a pardon were freed. However, in the longer term, this required a different solution, as described in Box 7.

| Box No. 7 |

Seeking proportionality in Ecuador: from pardons to criminal code reform

On July 4, 2008, the Constituent Assembly issued a pardon for prisoners convicted of trafficking who were considered to be drug mules. As a result of this measure, more than 2,200 incarcerated individuals were released from prisons. Nonetheless, while there was a significant but temporary drop in total incarcerations, which fell from 18,675 persons in 2007 to 10,881 persons in 2009, subsequently, there was a major rise in incarcerations from 2010 to 2014, when they doubled from 13,436 to 26,591. The one-time pardon did not stem the influx of people into the penal system; the released inmates were stigmatized by the police as criminalsand demonized by the media; there was political-institutional opposition to the measure and the number of persons incarcerated for drug crimes resumed an upward trend.[64] Indeed, by 2012, 34% of all incarcerated individuals were imprisoned for committing a drug-related crime.

The pardons' lack of lasting impact, the failure of the law to differentiate between conducts, and the

[64] Paladines, Jorge. "La racionalización de la penalidad anti-drogas en Ecuador." Lecture, Diálogo de Alto Nivel sobre Alternativas al Encarcelamiento from CICAD and the Colombian Ministry of Justice and Law, Cartagena, October 22, 2014. Available at: http://www.cicad.oas.org/apps/Document.aspx?Id=2973

disproportionality of its punishments paved the way for the enactment of the Comprehensive Organic Criminal Code (COIP, for its Spanish acronym), in 2014. This legislative process was characterized by evidence-based discussion, spearheaded by civil society and academia, and supported multiple government institutions.

The COIP repealed much of the Law on Narcotic and Psychotropic Substances (Law 108) in order to: 1) bring criminal legislation in line with Article 364, prohibiting any form of criminalization of users of both legal and illegal drugs; and 2) redefine the description of the elements of the offenses and the punishments. The COIP introduced distinctions based on three types of criteria. The first is the degree of involvement in a crime. This means differentiating between the *instrumentos* (tools of the crime) or *partícipes* (accessories to the crime) in the production or supply chain of illegal drug trafficking as opposed to the principal perpetrators of drug trafficking activity. In the new law, punishments were reduced for *instrumentos* and *partícipes*, and raised even higher for the principal perpetrators. The new law also differentiates between production of chemical precursors and substances. Finally, the law provides four classifications of trafficking, establishing the proportionality of the sentence in accordance with the quantity and type of substance being trafficked.

This more proportional treatment for drug offenses has led to the option of applying the principle of *favorabilia sunt amplianda adiosa restrigenda* (penal laws which are favorable to the accused are given retroactive effect), applying it to those who have been convicted or were being tried under the old law. The potential beneficiaries, either through the office of the public defender or through retained counsel, can file a motion for application of this principle. The Office of the Public Defender has been particularly active in this area, and has also developed support mechanisms for persons who are released in order to facilitate their integration into society. As of October 10, 2014, as a result of the efforts of the Office of the Public Defender, 1,063 inmates have been released for drug crimes under the benefit of application of this principle.

One of the advantages of suspended sentences or reducing average sentences is that many of such initiatives can be accommodated within the existing legal framworks of Member States. Furthermore, these programs can allow offenders the opportunity to reintegrate into society, while also monitoring the individual to ensure compliance with the terms of his release. The challenge is then to adapt and apply these programs to drug-related offenders, if they were originally excluded. Pardons and clemency, on the other hand, can contribute to short-term reduction in prison overcrowding, but without effective monitoring and reintegration schemes, the government cannot guarantee low rates of recidivism.

V. Conclusions

Following the requirements of the UN Conventions on international drug control, Member States have established a range of penalties related to illegal possession, sale, and drug trafficking. However, given the scale of the problem, and reacting to public demand, the offenses have been penalized often with long prison sentences, not always in proportion to the scale of the exact offense committed and its threat to public health or security. Many countries in the hemisphere are now facing major prison overcrowding problems, leading to associated state expenditure and increased risks of human rights violations. Member States are looking for alternatives and, for these reasons,

the government of Colombia, as chair of the Inter-American Drug Abuse Control Commission, proposed the creation of a Working Group on Alternatives to Incarceration for Drug-Related Offenses.

The Working Group examined the needs for alternatives to incarceration in the hemisphere, and considered that they could contribute to achieving five core objectives:

i) To more effectively address public health problems associated with illicit drug use and provide a more humane and effective response to drug-related crimes.
ii) To reduce the negative impacts of incarceration, while helping to reduce prison overcrowding and the human rights violations stemming from it.
iii) To make the punishment fit the crime, maintaining the idea of proportionality and employing criminal punishment as the last resort for minor offenders,
iv) To ensure public safety and citizen security by prioritizing use of public resources in the fight against organized crime.
v) To ensure that the above objectives are achieved with the minimum expense necessary to maximize the desired results.

With these core objectives in mind, the Working Group compiled an inventory of alternatives that have been adopted over the past years in the countries around the world.

This inventory shows that there are many alternatives to incarceration in place which Member States can use as points of reference to reduce the incarceration highlighted in the first section of this Report. There are promising experiences of alternatives to incarceration, which respect international obligations in the field of drugs and human rights, and which can not only have a significant impact on reducing the prison population, but also may be more effective responses to address the problems of drug abuse and public safety, in the short, medium and long term.

This report yielded a menu of options, which each Member State may tailor to its own context, given that each State is facing different issues on the ground. Chosen according to the above objectives, these measures have certain common threads running through them. They may view drug use as a matter of public health, or involve community interventions and alternative forms of justice. They take into account available empirical evidence to identify mechanisms that better ensure compliance with intended objectives. They may reduce criminal penalties for minor, non-violent offenders, which can sharply limit use of significant prison sentences except for relatively rare or unusual instances applied on a case by case basis. But there is no across-the-board formula that works everywhere. Member States should take stock of the variety of alternatives to incarceration and consider thosealternatives that meet the different needs of the criminal justice and health systems within each State, in coordination with public policy.

Nevertheless, starting from the above objectives and examining the measures subsequently identified, certain basic strategic approaches can be identified which could be useful to Member States in addressing this subject matter. Each Member State can, of course, accept, reject, or modify each strategy as it sees fit, and in this way they can be used singularly or in combination to design

customized practical alternatives that are appropriate to the national social, political, and cultural context.

- Decriminalization or depenalization

The elimination or non-application of criminal sanctions before entry into the criminal justice system is primarily used as an alternative for non-problematic drug users, usually for a first offense without aggravating circumstances. Repeat or more serious offenders may be processed through the criminal justice system and be subject to other non-custodial or custodial sanctions. This measure is also in line with international drug control law. For decriminalization, personal possession remains an offense, but no longer at the criminal level, which is punished by the state as an alternative to a criminal conviction, perhaps with a pecuniary sanctions or suspension of a license. For depenalization, personal possession remains a crime, but the criminal punishment is not applied using the discretion of police or prosecutors in cases that meet certain criteria. By keeping these offenders out of the criminal justice system, it is decongested of drug users who may not experience major health or social problems related to their illicit behavior, and who do not commit crime to support their drug use. In this way, the criminal justice system may concentrate resources on the more serious offenders.

- Diversion from the judicial system

A drug-related offender may be diverted from the judicial system towards public health and social assistance systems, affording them opportunities to rejoin and become a productive member of their community. The United Nations conventions establish that treatment, rehabilitation, social reintegration, and other types of care may be considered alternatives to punishment; and persons who use drugs and have committed drug-related crimes can be encouraged to enter treatment as an alternative to punishment. This can occur at various stages in the process, from law enforcement led diversion and referral, through prosecutor led diversion and referral, or diversion to a specialty court. At one end, these mechanisms may spare the offender of any criminal proceedings; at the other end, the offender may receive a suspended sentence pending the completion of certain requirements. These measures are primarily for offenders who start to experience difficulties as a result of use, but there are some examples of low-level distributers being diverted to programs that assist their social reintegration.

Decriminalization, depenalization, and diversion measures should be adopted in combination with the creation or strengthening of appropriate administrative bodies responsible for the diagnosis of the options of minor punishment or referral to public health and social assistance systems. Treatment (and rehabilitation as part of treatment) should be offered as an alternative to incarceration, but indicated only when use is dependent or problematic. It is essential for a health specialist to conduct a clinical assessment in order to identify persons who are problematic users, and thus avoid referral to

treatment as an alternative to imprisonment for persons who are occasional users, serious traffickers, or members of a criminal organization. The criminal justice system was made precisely for these latter types of individuals.

- Non-custodial sanctions

The strategy of imposing non-custodial measures recognizes the need for conviction and punishment in certain cases, but it minimizes the number of offenders serving time in prison for minor drug offenses, thus contributing to the relief of overcrowding, and in turn the potential human rights violations that often stem from such overcrowding. It takes effect at the sentencing or post-sentencing stage. It can take on a variety of forms, such as probation, community service, suspended or reduced sentences, general pardons, specific pardons, and even referral to treatment.

Even though legislation in most Member States allows for this type of measure, as well as other procedural benefits, drug-related crimes are frequently excluded from these options. It would be worthwhile, however, to consider allowing for individuals who are the lowest levels in the drug supply or trafficking chain to benefit from these types of measures, thereby contributing to the social reintegration of this type of offender. In particular, these may be considered for populations in conditions of vulnerability, where incarceration would have the unintended consequence of depriving children of parents or households of the main earner, which may exacerbate other social problems.

- Proportionality

The legal principle of proportionality in sentencing means that the punishment for a particular crime should reflect the degree of harm caused to society. This principle necessitates the creation of categories of offenses, of substances, and of offenders, and the assignment of a range of sentencing options applicable to each category. Some Member States are recognizing that their sentencing structures and policing practices do not sufficiently differentiate between such different types of offenses as use, minor supply, and major trafficking, and that reliance on incarceration for most offenses is problematic. Depriving an individual of liberty, especially for an extended period of time, imposes great costs on the individual, their families and communities, and society in general. By enhancing proportionality in criminal sentencing, Member States can ensure that these costs are only assumed when absolutely necessary. Resources saved by not incarcerating the large number of comparatively minor offenders, but imposing other punishments if appropriate, can in turn be re-invested in investigation and prosecution of the higher levels of organized crime, strengthening citizen security.

Threshold levels can play a key role in the definition of categories of offenses and sanctions, as long as they are set at realistic levels. Levels may be defined with higher or lower degrees of

precision (number of grams, or simply “small quantity”); whatever levels are chosen, the actors in the justice system should be flexible, addressing each case individually and remembering the intention behind the levels set.

- **Monitoring and evaluation**

It is important for alternatives to be adopted as part of a broad public policy approach that incorporates all of the elements required to ensure proper implementation, such as institutional backing, adequate funding, training, assessment of implementation, and proper oversight. There is still a debate as to the manner in which to measure the impacts of the alternative measures for drug-related offenses mentioned in this report. There is, however, agreement that the establishment of clear indicators to measure the results is essential to demonstrate the success or failure of any particular alternative or to identify aspects that could be improved. Professionals in the social services and public health sectors, as well as those tasked with prison management and the administration of justice, should agree on increased data collection and a set of common benchmarks that provide for both the support and accountability combined with the threat of sanction through the police power in the event of recidivism. As an example, there must be commonly agreed mechanisms to measure whether a beneficiary of a program is succeeding. These may include measuring drug-taking habits by drug testing, measuring recidivism rates, or even by measuring levels of employment (full-time, part-time, or community work). There must also be a shared understanding of what constitutes social integration so that it too can be evaluated objectively. Different alternatives may require a different set of measurement tools to ensure that the alternative regimes provide the social outcomes and public policy objectives intended.

In considering policy adaptation or transfer, it is important to recognize the importance of context, especially with regard to the current institutional capacity, how institutions function, cultural differences, public opinion concerning alternatives to incarceration, restrictions in legal codes and budgets, and the specific profile of the targeted criminal behavior. One alternative that works well in a particular context risks failing in another if essential elements are missing.

Due to the enormous variety and complexity of the initiatives examined and the existence of many more besides, this report cannot provide comprehensive answers to all the issues related to the investigation and implementation of alternatives to incarceration for drug-related offenders. It is therefore relevant to highlight some areas that could lead to fruitful investigations in the future. These include additional ways to classify initiatives and how certain institution building and policy coordination efforts could contribute to the success of any initiative. Discussions with Member States at CICAD Regular Sessions and high-level meetings, as well as through written comments from Member States, helped to shed light on certain institution building and policy coordination efforts

which would create more favorable conditions for the implementation of alternatives to incarceration. Though by no means a comprehensive list, three potential areas of action include:

i) Strengthening public defenders' offices, since many times disadvantaged persons have ended up in prison primarily because they could not afford adequate defense in the proceedings;
ii) Making outreach efforts to engage government institutions, communities, and civil society organizations an integral part of any new initiative, as the expertise, local knowledge, and buy-in of these groups is vital for truly effective public policy; and
iii) Promoting transparency and accountability in the judicial system in order to reduce the likelihood of abuse or misapplication of alternatives to incarceration resulting in threats to public safety and the rule of law.

Practical investigations of how to approach these issues with regard to alternatives to incarceration for drug-related offenses would be invaluable tools in the investigation and implementation of these types of initiatives.

Large-scale use of drug-related incarceration has posed problems for Member States due to the resulting social and institutional costs. Governments have therefore increasingly begun to investigate and implement alternatives to incarceration which enable them address the drug problem in new ways, while maintaining public safety, the rule of law, and their international human rights and drug control obligations. The inventory of initiatives examined in this report is a testament to this trend and illustrates the variety of these initiatives and the creativity with which they are being applied and adapted. By classifying the initiatives, and proposing some underlying strategies and principles for their investigation and implementation, this report seeks to contribute to Member States' efforts to examine the relevance of alternatives to incarceration to their own contexts. Most importantly, this report aims to illustrate how alternatives to incarceration for drug-related offenses can contribute to stronger, healthy communities with less crime and fewer victims.

Glossary

These terms definitions are intended for this particular Technical Report and should not be considered "authoritative definitions", but instead "preferred usage." It is understood that there will always be disagreement concerning some of these definitions.

Decriminalization: removal of a conduct or activity from the sphere of criminal law, meaning that the act no longer constitutes a criminal offense. It remains prohibited, but non-criminal sanctions may be applied, such as a fine, suspension of a driving license, or just a warning, often without the establishment of a formal police record. With regard to drugs, it is usually used to refer to acts relating to drug demand, such as acquisition, possession, and consumption.

Depenalization: reduction of the possibility of punishment for an offense. The act remains prohibited, under criminal or non-criminal law, but the action taken in response to this offense does not necessarily lead to punishment. A common example occurs when the case may be considered "of minor importance" or there is "no public interest" in prosecution, and so it is simply closed. With regard to drugs, it is usually used to refer to acts relating to drug demand, such as acquisition, possession and consumption.

Diversion: refers to programs that afford an opportunity to address an individual's behavior without resulting in a conviction on an individual's record.

Drug mule: A drug courier who is paid, coerced or tricked into transporting drugs across an international border but who has no further commercial interest in the drugs. According to this definition, the main difference between drug mules and other couriers centers on the level of organization and commercial interest in the transportation of the drug, with those who are paid a fee, wage, or salary (including the reduction of debts) to transport drugs referred to as "drug mules" and those who derive benefit from the sale (or use) of the drugs upon arrival at their destination referred to as "self-employed" drug couriers.

Drug-related offenses: refers to: i) use and possession for use, when such behavior is criminalized, as well as problematic use in instances of drug-dependent offenders; ii) small-scale growing and producing, especially in the case of peasant farmers or indigenous people or for personal use; and iii) non-violent, small-scale transporters, traffickers and distributers, such as the couriers know as "mules" or what in some countries is known as 'narcomenudeo' – retail or small-scale drug dealing . The report also takes into account iv) persons who have committed other minor crimes under the influence of illicit drugs, or to support their addiction.

***Minor drug-related offenses*:** can include any drug-related offense that does not involve one of the offenses mentioned in Article 3(5) or when there are extenuating circumstances (e.g., an indigent woman with a family who becomes a mule involving significant quantities of cocaine or heroin).

Problem drug use: There is no standard definition of problem drug use. The definition differs from country to country and may include people who engage in the high-risk consumption of drugs, for example, people who inject drugs, people who use drugs on a daily basis and/or people diagnosed

with drug use disorders or as drug-dependent based on clinical criteria contained in the International Classification of Diseases (10th revision) of the World Health Organization and the Diagnostic and Statistical Manual of Mental Disorders (4th ed.) of the American Psychiatric Association, or any similar criteria or definition that may be used.

***Serious drug-related offenses*:** Should consider taking into account those offenses mentioned in Art. 3(5) of the United Nations Convention against the Trafficking in Narcotic and Psychotropic Substances. They include: a) the involvement in the offense of an organized criminal group to which the offender belongs; b) the involvement of the offender in other international organized criminal activities; c) the involvement of the offender in other illegal activities facilitated by commission of the offense; d) the use of violence or arms by the offender; e) the fact that the offender holds a public office and that the offense is connected with the office in question; f) the victimization or use of minors; g) the fact that the offense is committed in a penal institution or in an educational institution or social service facility or in their immediate vicinity or in other places to which school children and students resort for educational, sports and social activities; h) prior conviction, particularly for similar offenses, whether foreign or domestic, to the extent permitted under the domestic law of a Party.

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