



Pretrial Detention for Drug Offenses in Latin America

Submission by the Washington Office on Latin America to the Working Group on Arbitrary Detention

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Introduction

The Washington Office on Latin America (WOLA) prepared this submission to contribute to the study on arbitrary detention relating to drug policies, in accordance to the Human Rights Council's resolution 42/22. The submission is based on a 2019 report, *Pretrial Detention in Latin America: The Disproportionate Impact on Women Deprived of Liberty for Drug Offenses*, authored by WOLA's Senior Program Associate, Teresa Garcia Castro, and published in collaboration with the International Drug Policy Consortium (IDPC), and the Colombian NGO, Dejusticia. This submission mainly responds to questions 1, 4, 5, and 17 of the questionnaire, and it includes an overview and the most recent data on the use of pretrial detention for drug-related offenses in Latin America with a focus on women, the consequences of the use of pretrial detention, reforms and good practices in the region, recommendations, as well as a list of key resources on the issue.

The Use of Pretrial Detention for Drug-Related Offenses in Latin America

Prison populations are growing at alarming rates in Latin America and the Caribbean, mainly driven by harsh and disproportionate drug laws. Indeed, the countries of the region have the highest rates of incarceration for drug-related offenses in the world.¹ One of the leading causes of prison overcrowding is the obligatory use, or the overuse, of pretrial detention for these offenses.

For nearly half a century, the United States (U.S.) government has encouraged, cajoled and strong-armed countries to wage its “war on drugs” around the world. Nowhere has this been more evident than in Latin America. The Collective for the Study of Drugs in the Law (CEDD), of which WOLA is a member, has produced numerous reports documenting how the aggressive export of U.S. drug policies has led to the adoption of overly punitive and disproportionate drug laws across the region, with a devastating impact on the workings of national criminal justice and prison systems.² As a result, judges and prosecutors are encouraged to treat people who are drug dependent harshly, and are rewarded with promotions, while their professional careers may languish if they act otherwise. In this context, some countries have adopted laws that mandate pretrial detention for anyone accused of a drug offense, regardless of the gravity of the alleged offense or whether the alleged offense was violent or not. Even in those countries where such practices are not enshrined in law, the “drug war” mentality means that pretrial detention for drug offenses is the norm.

After Africa, the Americas have the greatest number of people incarcerated without a conviction, with an average of 36.3% of the prison population.³ In certain countries the figure is much higher.

For instance, in Bolivia, Guatemala, Honduras, Panama, Paraguay, Uruguay, and Venezuela, more than half of the prison population has not been sentenced. In addition, Paraguay (78%), Bolivia (70%), Uruguay (70%), and Haiti (67%) are among the countries with the highest proportion of pretrial detention in the world.⁴

Table 1: Pretrial Detention in Latin America

Country (Year)	Number of People in Pretrial Detention	Percentage of People in Pretrial Detention
Paraguay (2015)	9,922	77.9%
Bolivia (2018)	12,537	69.9%
Uruguay (2017)	7,726	69.7%
Haiti (2018)	5,929	66.8%
Venezuela (2017)	35,970	63.0%
Honduras (2017)	9,660	53.1%
Panama (2018)	8,584	53.0%
Guatemala (2018)	12,636	51.8%
Argentina (2016)	36,374	47.7%
Peru (2018)	35,029	39.8%
Mexico (2018)	80,442	39.4%
Brazil (2018)	244,306	35.4%
Ecuador (2018)	13,073	34.9%
Chile (2018)	14,628	33.9%
Colombia (2018)	40,070	33.6%
El Salvador (2018)	11,434	29.5%
Nicaragua (2016)	3,140	21.4%
Costa Rica (2016)	2,543	13.3%

Source: The World Prison Brief.⁵

Over the past two decades, the number of people in pretrial detention has grown by around 60% in the Americas.⁶ In the same period, the total prison population has increased by about 41% while the overall population increased by only 21.1%.⁷ A leading cause of the rise of pretrial detention rates is its mandatory use for drug offenses.⁸ Drug laws in several countries characterize all offenses related to drugs—including possession for personal use—as grave offenses for which pretrial detention is applied automatically, therefore precluding the use of alternatives to incarceration or other benefits. The Inter-American Commission on Human Rights (IACHR) has expressed concerns about treating all drug-related offenses as “serious crimes” with no distinction whatsoever, thereby ignoring the principles on which the use of pretrial detention is based, especially proportionality.⁹

In Mexico, for instance, Article 19 of the Constitution establishes that pretrial detention is mandatory and automatic for crimes that the law defines as grave crimes against health, which includes drug offenses. In other words, the judge, without analyzing the circumstances of the case, automatically imposes pretrial detention for certain offenses. Similarly, in Guatemala, the “Law against Narcoactivity” classifies all drug-related offenses as “serious,” which makes pretrial detention mandatory, including “possession for use.”¹⁰ Even in countries where pretrial detention is not obligatory, it is frequently the norm for drug-related offenses. For example, according to a recent

study conducted in Costa Rica, around 80% of persons convicted for drug-related offenses were in pretrial detention for 211 days (i.e., around seven months) on average.¹¹

In testimony before the IACHR, WOLA and other NGOs presented research showing that though not mandated by law, pretrial detention is widely used for those accused of any drug offense in Argentina, Chile, Costa Rica, Ecuador, and Uruguay. In Brazil, the Supreme Federal Court (*Supremo Tribunal Federal*) declared in 2012 that obligatory pretrial detention for those accused of a drug offense is unconstitutional, but the law itself has not been changed. Hence it is left to the discretion of the judge.¹²

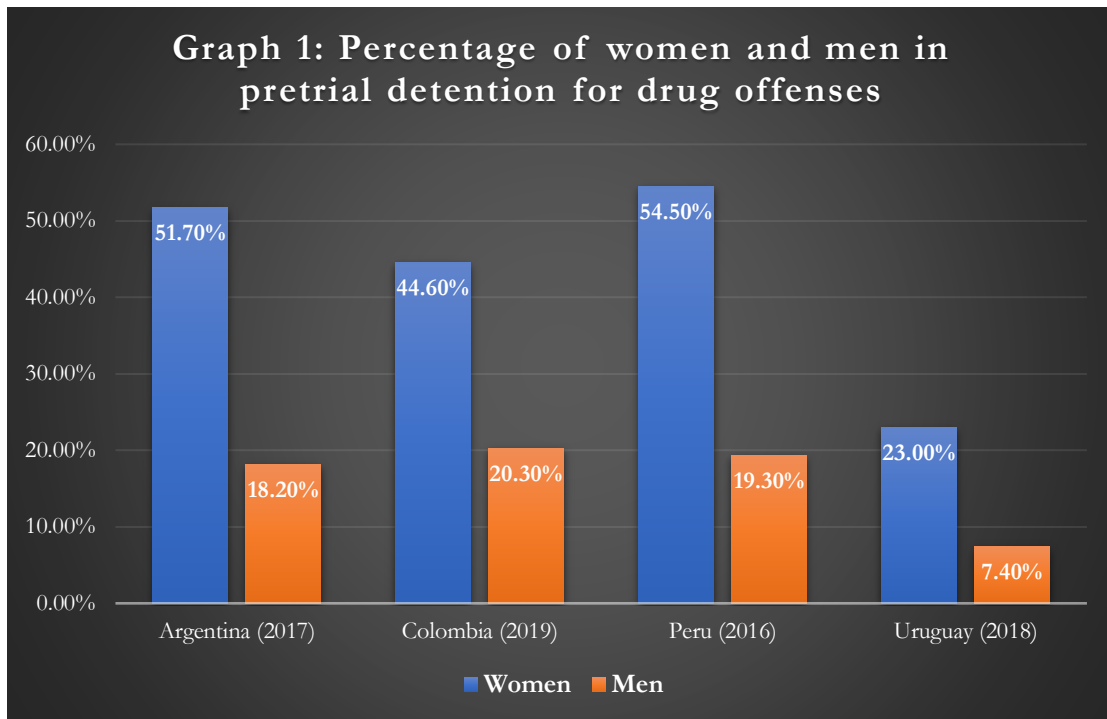
Women in pretrial detention for drug offenses

Women incarcerated for drug offenses rarely pose a threat to society. Most are arrested for low-level and non-violent offenses. Nonetheless, as noted above, harsh drug policies are driving the increase in the number of women in pretrial detention. In many Latin American countries, drug-related offenses are one of the most common among female pretrial detainees.¹³ For instance, in Peru, Ecuador, Argentina, Bolivia, and Chile around half of the women are in pretrial detention for drug offenses (54.5%, 53.0%, 51.7%, 47.7%, and 43.8%, respectively). Moreover, among the women in prison for drug-related cases, a vast portion is usually in pretrial detention. For instance, in Argentina in 2017, 70% of the women in prison for drug-related offenses were in pretrial detention.¹⁴ Table 2 shows the number and percentage of women in pretrial detention for drug offenses vis-à-vis the total female prison population in pretrial detention, where data was available, for the latest year available.

Table 2: Female Population in Pretrial Detention for Drug Offenses

Country (Year)	Number of Women in Pretrial Detention for Drug Offenses	Percentage of Women in Pretrial Detention for Drug Offenses
Peru (2016)	1,219 ¹⁵	54.5%
Ecuador (2019)	813 ¹⁶	53.0%
Argentina (2017)	1,081 ¹⁷	51.7%
Bolivia (2018)	539 ¹⁸	47.7%
Colombia (2019)	1,284 ¹⁹	44.6%
Chile (2018)	1,034 ²⁰	43.8%
Mexico²¹ (2018)	1,342 ²²	26.3%
Uruguay (2018)	119 ²³	23.0%
Costa Rica (2012)	126 ²⁴	12.5%
Nicaragua (2012)	18 ²⁵	10.5%

In certain countries, women accused of having committed drug-related offenses are much more likely to be held in pretrial detention than are men accused of drug-related offenses. For instance, in Peru, Argentina, and Uruguay the percentage of women in pretrial detention for drug-related offenses (54.5%, 51.7%, and 23.0%, respectively) is 3 times higher than that of their male counterparts (19.3%, 18.2%, and 7.4%), and in Colombia, the percentage of women (44.6%) is twice as high as for men (20.3%).²⁶



Source: Data compiled by WOLA²⁷

Consequences of pretrial detention

Pretrial detention is a leading cause of overcrowding in Latin American prisons. Inhumane prison conditions mean that defendants concentrate on surviving their time behind bars or considering plea-bargains, rather than on preparing their defense.²⁸ Access to a lawyer and information about their case is often much more limited if the defendant is detained, which affects his or her ability to prepare for trial. It is therefore not surprising that those in pretrial detention are less likely to obtain an acquittal than those who remain at liberty before their trial, as noted by the United Nations Working Group on Arbitrary Detention.²⁹

The excessive use of pretrial detention can be very costly to the state; direct costs include the operation of detention facilities, prison personnel and providing basic services, including food, health-care and gender-specific services to those incarcerated. In addition, many women and men suffer the psychological and emotional impact of being deprived of liberty without having been convicted.³⁰ The incarceration of women and men has devastating consequences not only for them, but also for their children, dependents, and the broader community. Families suffer immensely when one of their members is imprisoned.

Pretrial detention imposes serious and specific hardships and adverse consequences on women. Indeed, the Bangkok Rules have recognized the “particular risk of abuse that women face in pretrial detention.”³¹ Women suffer lack of female-only detention centers, inadequate prison infrastructure for the development of their mother-children relationships, insalubrious conditions, lack of gender-specific medical care, and subjection to various forms of violence, including sexual abuse by prison staff.³² Due to limited access to facilities and services, incarcerated women are at a higher risk of contracting HIV and other sexually transmitted infections and diseases.³³ For example, a study undertaken in Colombian prisons in 2018 shows that 48.1% of women in prison did not have access to HIV testing, only 17.7% had received psychological treatment, and merely 4.4% had received treatment for drug or alcohol dependency.³⁴

Moreover, the incarceration of women who are single heads of households is particularly harsh for those who depend upon their income and care-giving responsibilities, including their children, elderly parents or relatives, or those with disabilities under their care. In the absence of strong social protection networks, dependent persons may be exposed to situations of abandonment and further marginalization.³⁵

Testimony of Natacha Lopvet, March 2019

I am a French citizen and until recently, was in prison for 10 years in Mexico for a drug offense. Whether I am guilty or not is not the point. Before going to prison, I never had any interaction with the criminal justice system; it was only in Mexico that I got a crash course. Upon my arrival in Mexico City, I was detained in the airport jail for about 2 days, accused of transporting drugs, and from there was sent to prison.

Though the penalty I faced was 10 to 25 years in prison, I was not given an opportunity to speak to a public defender or lawyer, nor to my Embassy, until two days after my arrest. If I had had access to a decent lawyer, I would have been out in 15 days. But

I didn't learn my rights as a foreigner until I had been incarcerated for two or three years. Instead, I was in pretrial detention until being sentenced. I finally got a lawyer through contacts provided by fellow prisoners. All of this made it so much harder to defend myself. In addition, I didn't speak Spanish. The double disadvantage when you don't know the language is that you also don't know the laws or the culture of the country.

I had to learn both in prison. I was not provided with any translation when I was arrested. How can justice be served in these conditions?



Reforms and good practices

Ultimately, pretrial detention should be used only as a means of last resort, based on the presumption of innocence and the principles of necessity and proportionality. The IACHR has recommended delimiting the grounds for using pretrial detention, and increasing the threshold requirements for its use, such as prohibiting its mandatory application for particular offenses (such as drug offenses), promoting the use of alternatives to incarceration, submitting the detention to judicial review, and regularizing the procedural situation of those persons detained without any judicial order.³⁶

In recent years, some countries have made legislative, administrative and judicial reforms intended to reduce the use of pretrial detention. According to the IACHR, Argentina, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, El Salvador, Ecuador, Guatemala, Jamaica, Mexico, Panama, and Peru have taken some steps to reduce the use of pretrial detention.³⁷ Yet these measures continue to be woefully inadequate. As evident in the data presented in this report, the prolonged and excessive use of pretrial detention continues to be one of the most serious and widespread problems in the region.

Important legislative reforms that can be undertaken to reduce rates of pretrial detention include:

- Establishing procedures to expedite the processing of criminal cases;
- Imposing greater requirements for determining whether pretrial detention is necessary and justified; and
- Reducing the amount of time that a person can be held in pretrial detention.³⁸

For instance, in Colombia and Mexico, with some exceptions, the maximum duration of pretrial detention is one year.³⁹ In these cases, after being in pretrial detention for one year, the person should be released immediately while the case continues.

Regarding administrative measures, countries like Bolivia have issued pardons.⁴⁰ While Bolivia remains one of the countries with the highest percentage of pretrial detainees, from 2010 to 2018 the percentage was reduced from 77% to 69.9% of the total prison population.⁴¹ To address prison overcrowding, former President Evo Morales issued a series of pardons and amnesties which included persons held in pretrial detention. It is important to note, however, that unless such efforts are followed by reforms to reduce the flow of people entering the criminal justice system, prison beds will quickly fill back up.

Bolivia also adopted Law No. 586, “Clearing up the Backlog,” which included increasing the capacity of Criminal Investigation Courts and holding hearings in prisons.⁴² The purpose of these prison hearings is to circumvent potential difficulties with taking persons deprived of liberty to courts, such as lack of transportation, shortage of gasoline, insufficient guards, or possible risk of escaping. According to official information, between 2015 and 2017, approximately 2,047 hearings were held, concluding in non-custodial alternatives, abbreviated procedures, early release, parole, and other measures.⁴³ The reforms adopted by Bolivia reduced the caseload for the judicial system and the number of pretrial detainees. Such abbreviated processes, however, must always ensure that the due process rights of defendants are respected and not lead to unjust convictions for the sake of expediency.

Another example of a potentially positive reform can be found in Brazil where, in February 2018, the Brazilian Federal Supreme Court ruled that pregnant women and mothers with children under the age of 12 who are accused of non-violent crimes should be placed under house arrest instead of in pretrial detention.⁴⁴ This reform could benefit around 15,000 women. However, there has been poor implementation of the Supreme Court ruling by judges at the federal and state levels.⁴⁵ Moreover, the use of house arrest can be counterproductive if the conditions are so strict that women cannot work or fulfill their care-giving responsibilities.

In the case of Peru, in 2016 the Standing Criminal Chamber of the Supreme Court of Justice established various criteria for determining the exceptional nature of pretrial detention, including the obligation to state the reasons for its application. It also ruled that a determination of no community ties and the seriousness of the offense should merely be elements to consider in determining the risk of escaping and, accordingly, should not automatically result in pretrial detention.⁴⁶

Some of the remaining challenges associated with the use of pretrial detention include the establishment of mechanisms of disciplinary control to pressure or sanction judicial authorities that apply alternative measures to incarceration. Another major concern is the implementation of criminal justice policies and legal reforms that call for more incarceration as a response to insecurity, crime, and violence.⁴⁷ For instance, in February 2019, the Mexican Congress passed a bill to modify the Constitution that expanded the use of mandatory pretrial detention. This reform expands the list of crimes warranting automatic pretrial detention – including corruption, electoral crimes, fuel theft, armed robbery, weapons possession and others, and hence will further increase Mexico’s pretrial

prison population.⁴⁸ Mexico provides an example of how legislative trends and mechanisms that promote increased incarceration to address fears of insecurity and crime expand the grounds for the use of pretrial detention beyond what should be its exceptional nature.

Recommendations

The overuse of pretrial detention is one of the most serious and widespread criminal justice problems affecting Latin America. It contributes to prison overcrowding and has devastating impacts on those detained, their families, and communities. Policies to ensure the restricted and appropriate use of pretrial detention should be a priority for all governments. To reduce the use of pretrial detention to exceptional cases subject to regular review, we suggest considering the following recommendations for inclusion in the report of the Working Group on Arbitrary Detention:

- Put in place legal restrictions to limit the use of pretrial detention to exceptional cases and, whenever possible, promote non-custodial sanctions.
- Prohibit, in law and in practice, the use of pretrial detention in prisons that are overcrowded or that do not abide by internationally and nationally recognized standards.
- Remove the obligation to impose pretrial detention for any type of offense, including drug offenses, ensuring that pretrial detention decisions are not based on the offense that is alleged to have been committed, but are decided on a case-by-case basis.
- Restrict the length of time a person can be held in pretrial detention by requiring their release if their case has not appeared before the court within the allotted time (except in cases where spurious delaying actions are filed by the defence of those prosecuted in an effort to obstruct proceedings).
- Allow access to procedural benefits and opportunities for alternatives to incarceration—and ensure that a prior criminal record is not used as grounds to exclude a person from benefitting from these alternatives.
- Establish mechanisms within the criminal justice system for the collection and analysis of data and statistics on the use of pretrial detention, sentencing practices, and the impact of non-custodial measures and sanctions in order to develop and implement evidence-based policies. The data should be disaggregated by types of offenses committed and the profiles of people belonging to groups at higher risk, such as, but not limited to, people of African descent, indigenous people, foreign nationals, LGBTIQ+, older people, and people with disabilities and/or mental health and drug dependency problems.
- Employ an intersectional lens in the establishment, implementation, and monitoring of measures aimed at reducing the use of pretrial detention, including training with a gender perspective.
- Proscribe the use of pretrial detention for pregnant women or women with dependents (children, older adults, and persons with disabilities). In such cases, alternatives to incarceration should always be used. Special attention should be given to the situation of female heads of household who are the sole breadwinner for their family members so that the sanction is compatible with holding a remunerated job.

Key resources

- IACHR, *Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas* (2017), <http://www.oas.org/en/iachr/reports/pdfs/pretrialdetention.pdf>

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- WOLA, *Photo Essays: The Human Cost of Drug Policies in the Americas*, <https://womenanddrugs.wola.org/photo-essays-the-human-cost-of-drug-policies-in-the-americas/>

Endnotes

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- ⁹ IACHR, *Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas*, 27.
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- ¹¹ Ernesto Cortés, *Política Criminal y Encarcelamientos por Delitos de Drogas en Costa Rica*, (2016), 45, http://fileserv.idpc.net/library/Costa_Rica.pdf
- ¹² *Mujeres, delitos de drogas y prisión preventiva en América Latina y el Caribe, Testimonio antes de la Comisión Interamericana de Derechos Humanos de la Organización de Estados Americanos* (2016), 9-11, <https://361kuf17tye423o8ui2qfv0h-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/CIDH-Mujeres-delitos-de-drogas-y-prisi%C3%B3n-preventiva-final.pdf>
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- ²⁶ Argentina, Ministerio de Justicia y derechos Humanos, *Sistema Nacional de Estadísticas sobre Ejecución de la Pena. Año 2017*; Perú. Instituto Nacional de Estadística e Informática, *Primer Censo Nacional Penitenciario*; Uruguay, Request submitted by Junta Nacional de Drogas de la Presidencia de Uruguay to Instituto Nacional de Rehabilitación. División de Planificación Institucional; Colombia, Instituto Nacional Penitenciario y Carcelario, *Tablero de Control de Delitos, Principales delitos intramural*.
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