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Origin and consequences of the war on drugs. from the united states to Andean countries

Origem e conseqüências da guerra contra às drogas dos Estados Unidos aos países andinos

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Abstract

This paper aims to study the War on Drugs and its consequences in the Andean countries (Colombia, Peru and Bolivia). It analyses the way in which the United States internationalization of a criminal political discourse, resulted on a punitivist ideology separated from human rights when responding to the drug problem in these countries. The study begins with an incursion into the legal, political and social aspects of the origin of the discourse of the War on Drugs in the United States and the Andean countries. It continues with the presentation of the results and the current state of the political response to coca cultivation in each of these countries. The work closes with an exposition of the most visible consequences of the war on drugs in the Andean countries, characterized by the increase in prison overcrowding, the selective criminal prosecution of marginalized groups and mass incarceration. Regarding the methodology, it uses the inductive rationale through the bibliographic search. Consequently, it characterizes the punitivisim discourse against drugs and the ideologies that support it as a response lacking rationality within the framework of a Social and Democratic Rule of Law, whose implementation in drug-producing countries has caused structural damage to the legitimacy of the democratic systems of these countries, especially with regard to the respect for fundamental rights. This paper offers a study on the War on Drugs and its consequences in the Andean countries (Colombia, Peru and Bolivia). In particular, the way in which the United States internationalized a criminal political discourse that resulted in the establishment of an exceptional criminal prosecution system without a minimum standard when it comes to the constitutional guarantee of due process. In a second moment, this study approaches the different strategies assumed by these countries once the United States abandoned direct military intervention in policies. The paper ends analysing the visible consequences of this process, characterized by the increase in prison overcrowding, the selective criminal prosecution of marginalized groups and mass incarceration are exposed.

Keywords: War on Drugs. Criminal Policy. Mass Imprisonment.

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Resumo

Este trabalho tem como objetivo estudar a Guerra às Drogas e suas consequências nos países andinos (Colômbia, Peru e Bolívia). Analisa a forma como os Estados Unidos internacionalizaram um discurso político criminoso que teve como resultado nesses países a consagração de uma ideologia punitivista separada dos direitos humanos em resposta ao problema das drogas. O estudo começa com uma incursão pelos aspectos jurídicos, políticos e sociais da origem do discurso da guerra às drogas nos Estados Unidos e nos países andinos. Continua com a apresentação dos resultados e o estado atual da resposta política ao cultivo da coca em cada um desses países. A obra se encerra com uma exposição das consequências mais visíveis da guerra às drogas nos países andinos: consequências visíveis caracterizadas pelo aumento da superlotação carcerária, o processo criminal seletivo de grupos marginalizados e o encarceramento em massa. Quanto à metodologia, utiliza o raciocínio indutivo por meio da pesquisa bibliográfica. Conseqüentemente, caracteriza o discurso punitivista contra as drogas e as ideologias que o sustentam como uma resposta carente de racionalidade no marco de um Estado de Direito social e democrático, cuja implementação nos países produtores de drogas causou danos estruturais à legitimidade do democrático. sistemas desses países, especialmente no que diz respeito ao respeito pelos direitos fundamentais.

Palavras-chave: Guerra contra as drogas. Política criminal. Encarceramento em massa.

1 Introduction

The recent history of Latin America is linked, without a doubt, to the problems of legitimacy of its democratic institutions, corruption, drug trafficking, poverty, economic, racial and cultural segregation, among other problems that are structural in our region. In this history of endemic difficulties, the problem of drug trafficking, especially in countries that produce coca leaves, has played a leading role for more than fifty years. The strength of the economic ties between the Andean countries and the United States intensified at the beginning of the last century, especially through the requirement of raw materials and food products originated in the cultivation of fruits and vegetables¹, which constituted until the middle of the previous century, the main income of Colombia, Peru and Bolivia.

The dismantling of the Welfare State in the United States produced an increase in unemployment, the loss of social rights, and an increase in inequality in the population, especially in post-industrial cities. With this, the consumption of drugs and illicit substances increased, in a neoliberal market logic that made possible the development of organized crime and the growth of demand for raw materials associated with the production of coca leaf in the Andean countries. At the same time that the inequality produced by the implementation of neoliberal public policies in the United States grew, the demand for new illicit narcotic substances increased.

At the end of the sixties of the last century, poverty and marginalization in large cities in the United States, in addition to the demands of the new model of neoliberal society, limited assistance to minorities produced an increase in racism, social violence². the exclusion of needy sectors, in addition, from crime. In this context, all political parties assumed that the answer to these problems laid in the promises of increased

¹ What produces the inability of domestic economies to respond to international variables with the consequent endemic inflation. See: KENNETH, Jameson. "Latin American Structuralism: A Methodological Perspective", *Working Paper* 43, July (1985). Available in: https://kellogg.nd.edu/sites/default/files/old_files/documents/043_0

LOVE, Joseph. "The Rise and Decline of Economic Structuralism in Latin America: New Dimensions", *Latin American Research Review* Vol. 40, No. 3 (2005), pp. 100-125.

² WACQUANT, Loïc J. D. "The Rise of Advanced Marginality: Notes on Its Nature and Implications", *Acta Sociologica*, Vol. 39, No. 2 (1996), pp. 121-139

penalties, the creation of new crimes and the improvement of the criminal justice system. However, in the face of the drug problem, all the answers seemed insufficient.

For this reason, the idea arose that in the case of drugs, a war was necessary not only at the national but at the international level, and that it should lead to the origin of the problem: the cultivation of the coca leaf and the production of cocaine in the Andean countries which, by the end of the seventies of the last century, had changed their traditional crops for the cultivation of drugs, at the same time that the peasants, dedicated to the production of fruits and vegetables, had organized themselves into associations and groups due to the economic advantage that meant the profits from the cultivation of coca leaves³. These groups would later give rise to the drug cartels.

The research problem is to identify the risks that the war on drugs discourse, punitivism and its main consequences, produce for the social and democratic State of Law, by creating a penal system outside of fundamental rights. This research is justified from a theoretical point of view, by the absence of studies on the consequences that the implementation for more than fifty years of this type of criminal discourse has had in the Andean countries, and explains its more visible consequences: prison overcrowding, mass incarceration, and targeted prosecution of the criminal prosecution system. What accounts, finally, of structural injuries to fundamental rights such as human dignity and due process, as minimum guarantees of the rule of law⁴.

The study is divided into three stages. Firstly, the origin of the discourse against drugs in the United States and the way in which the “war” was implemented in the Andean countries. Secondly, the particularities of each of these countries are explained and the way in which, in general terms, they have approached the problem of the cultivation and production of cocaine, with different results, since declaring “the end of the war of drugs”,

has meant the nationalization of it. Finally, the consequences of the war and the nationalization of the fight against illicit drug trafficking in the Andean countries are explained, as has been said, prison overcrowding, mass incarceration and the selective prosecution of the penal system. Regarding the methodology, the deductive, historical and materialistic logical basis was used, through bibliographic research and documentary archives, with the aim of submitting its results for discussion under an approach of critical analysis of the discourse, characteristic of post-modern criminology, and the principles of criminal policy as rules for the rationality of criminal law.

2 The failure of the war on drugs as a criminal policy: a background

The origin of the declaration of war can be firmly traced to Richard Nixon’s speech in 1971, when he announced to the press and the United States Congress the need to restore, in line with his presidential election campaign since 1968, the so-called law and order policy⁵, declaring that drugs were a “modern curse on American youth”, that actions were to be taken against drug producers and marketers “wherever they may be”, strengthening the borders against the “pestilence” of narcotics. As a result, during Nixon’s Administration, in 1973, the DEA (*Drug Enforcement Administration*) was established. Even though more emphasis was placed on consumption prevention, the ground was laid for the subsequent development of an interventionist policy in Latin America, especially in drug - producing countries⁶.

³ See: THOUMI, Francisco. *Illegal Drugs, Economy, and Society in the Andes*. Johns Hopkins University Press, 2004, pp. 30-150.

⁴ ALEXANDER, Michelle. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. The New Press, 2012.

⁵ It is a phenomenon where political parties, both left and right, liberal and conservative, try to depart from traditional politics and show in the media that they have chosen a “new policy” close to the people, away from the traditional form and internal ideological pressures, PRATT, John. *Penal Populism*, Routledge, London, 2007, p. 10.

⁶ DEL OLMO, Rosa. *La Cara Oculta de la Droga*, Ed. Temis, Bogotá, 1988, pp. 50 et seq. On the construction of the cultural ste-

As Alexander points out, this process was a result of a reconstruction of the so-called “law and order” policy, established in the late 1950s, as a rhetorical response of the politicians of the South of the United States to the civil rights movement, and in particular to Afro-American minorities. In this scheme, everything that involved defending civil rights was perceived as a reward for lawbreakers, meaning mass social agitators.

Gerald Ford and Jimmy Carter’s governments are important as they promoted legal changes aimed at reinforcing the idea that, as far as drug trafficking was concerned, judges should apply what were called *prison sentences with a minimum of effective or obligatory compliance* at a time when crime had already been stereotyped by the media as the consequence of structural class and racial factors, characterising criminality as a street issue, associated with drug trafficking, committed by criminal gangs of African-American origin, which committed all kinds of minor crimes⁷.

During Ronald Regan’s time, what had so far been a straightforward declaration of war materialised into a series of public policies that steadily hiked the number of criminal prosecutions beyond US borders, thus creating a sort of “mass hysteria” associated with drugs, with the support of the Congress and law enforcement agencies and, certainly, with the complicity of media in creating the stereotyped trafficker by turning criminal prosecution into a spectacle⁸. Over the course of time, this was hitched to a highly moral discourse whereby drugs were blamed for the loss of family values, moral traditions and religion. At the same time the president himself blamed drugs, without any empirical evidence, via the media, for being responsible for robberies, thefts, and every crime against property understood as the consequence of addiction⁹.

At the end of the day, it is a rhetoric that revolves around two kinds of questions: on one hand, there are all those in favour of intensify the “war”, attributing every crime, in particular, thefts and street robberies, but also state corruption or any risk of its occurrence, as well as murder and organised crime, to drugs and everything connected to them. And, on the other hand, those who act within the logic of progressive legalization or decriminalization, affirming, that even more serious than the problem of drugs is their “criminalization” and the solutions to the so-called drug problem¹⁰. Thus, in the United States criminal populism

reotype of deviance by the media, ATHEIDE, David L. “Deviance and the Mass Media”, *The Handbook of Deviance*, John Wiley & Sons, Inc., New Jersey, 2015, pp. 298-310.

⁷ This figure of the enemy-trafficker-black, has a wide acceptance in the American imaginary, the result of multiple factors in the construction of reality. In 1915, *The Birth of a Nation*, directed by D. W. Griffith, was released, one of the most important films of its time. In the film, which had a large box office in its time, a stereotype of a cruel black, rapist and drunk is fostered, in contrast to the virtues of whites. The sensation of reality that cinema, television and the internet have been creating can make something that has little to do with reality seem obvious. For example, the usual idea of the black trafficker responds more to a prejudice fed by the media than to true data. Indeed, various studies conclude that the rates of consumption and sale of illegal drugs among blacks and whites are practically the same. Regarding young people, the probabilities of young whites to be involved in the sale of illegal drugs are higher than that of blacks. ALEXANDER, *The New Jim Crow*, pp. 158-159. However, the general opinion of the people is that drugs are sold by blacks. A 1995 survey that invited the interviewee to close their eyes and visualize a drug user and then describe him / her resulted in 95% of people imagining a black user. WATSON, Betty, DIONNE Jones and ROBERTSTONE-SUNDERS, Pat. “Drug Use and African Americans: Myth Versus Reality”, *Journal of Alcohol and Drugs Abuse*, 40:19, 1995. p. 19.

⁸ For ALEXANDER, *The New Jim Crow*, p. 86, from the beginning the war on drugs had little to do with public concern with narcotics and more to do with public concern with the issue of race”. For this author, mass incarceration is a system of racial control that is not incompatible with current sensitivities due to its invisibility. The premise formulated by Giuseppe Tomasi de Lampedusa helps us to understand American racial segregation: that everything changes, so that everything remains the same. First it was slavery, then the era of segregation and today it is the penal regime that surreptitiously maintains the racial caste system in North American society. Just because racism isn’t explicit doesn’t mean it doesn’t exist. The arguments and rationalizations of racial discrimination and exclusion have mutated, but the results have been practically the same.

⁹ Ronald Reagan’s disposition towards the drug problem manifested itself since he took office. Since 1981, the presidential political discourse has been directed decisively to “identify” the strategic components at the national and international level in relation to drug trafficking, accusing that the drug problem was the cause of the expansion of criminality in U.S. GALEN, Ted. *Bad Neighbor Policy. Washington’s Futile War of Drugs in Latin America*, Palgrave-Macmillan, New York, 2003, p. 19.

¹⁰ DUKE, Steven; GROSS, Albert. *America’s Longest War. Rethinking Our Tragic Crusade Against Drugs*, E-reads, 1999, pp. 2 et seq. The “war” required internally the sustained increase of resources at the state and federal level, especially in the period of installation, therefore, since the Reagan government the prison budget was increased from 1.5 million dollars in 1981 to 17 million in 1999. GARLAND, David. *Mass Imprisonment. Social Causes and Consequences*, Sage Publications, London, 2001, pp. 5-6. As for the increase in

has been on the public agenda since the presidential campaign of Richard Nixon as a political decision that involved all political parties without distinction, where social welfare was harnessed to a war against crime and, in particular, against drugs¹¹.

Establishing these historical milestones is important as it lays down the foundations for a new criminal policy, related to drugs, that puts the idea of security above fundamental rights. Therefore, new laws were progressively enacted, whose application was reinforced by jurisprudential criteria that have led to a progressive limiting of individual freedoms.

At the same time, on an international level, the criminal policy of the War on Drugs translated into a progressive intervention in Latin-American governments, to the point where it has been denounced¹² the existence of a general objective, aimed at the eradication of coca leaf crops. This paved the way for the formation of paramilitary anti-drug forces, which went hand in hand with a foreign policy that even went as far as to bribe Latin American governments or force them to accept the impositions of the DEA under the threat of stiff economic sanctions¹³.

The imposition and influence of the criminal policy of the War on Drugs abroad is especially reflected in the expansion in Latin America of criteria laid down in the so-called *Anti-Drug Abuse Act of 1986*. This expresses the idea of drugs posing a threat to national security, drugs being a part of organised crime, and the need to avoid the economic benefits associated with drug trafficking, the criminalization of drug possession, punishment of consumption in public, criminal prosecution authorising the use of undercover agents, secrecy during investigation, interception of communications, as well as other measures limiting fundamental rights which, from once being the exception, became the norm for investigation.

3 The “new threat” issue in the international context

In the late 1980s, to avoid cocaine entering the United States, the country began a new phase in the War on Drugs, aimed at the destruction and eradication of the “enemy” at its roots. Therefore, at the end of George H.W. Bush’s government a policy of intervention in Latin-America was drawn up, whose main feature was to wipe out coca’s crops and fight cartels in their country of origin. With these aim in mind, the so-called militarization of the fight against drug trafficking was promoted. The origin of this new phase was marked by two events: first, the invasion of Panama, which was justified by the drug trafficking activities carried out by President Noriega (which would give rise to the concept of a narco-state) and the second, the decision to permanently install an aircraft carrier in Colombian territorial waters, in order to intercept cocaine shipments by the Medellin and Cali cartels to the United States¹⁴.

spending on government agencies, according to Alexander between 1980 and 1984, the funds for the anti-drug section of the FBI increased by 8 to 95 million dollars. The spending of the Department of Defense increased from 33 million dollars in 1981 to 1,042 million in 1991. For its part, the DEA (Drug Enforcement Administration) in the same period went from spending 86 million to 1,026 million dollars. By contrast, the budget for drug education, prevention, and treatment fell sharply from \$ 274 million in 1981 to \$ 3-14 million in the 1990s. ALEXANDER, *The New Jim Crow*, p. 5.

¹¹ In the United States, the so-called “war on crime” has been present in all presidential political campaigns since 1968 and in those that did not focus excessively on criminal political issues (1976, 1992 and 2000) the political programs of the candidates on the subject crime rates offered similar punitive increases. SIMON, Jonathan. “Fear and Loathing in Late Modernity: Reflections on the Cultural Sources of Mass Imprisonment in the United States”, *Mass Imprisonment. Social Causes and Consequences*, Sage Publications, London, 2001, p. 44.

¹² GALEN. *Bad Neighbor Policy*, pp. 40-45.

¹³ BUSTOS RAMÍREZ, Juan. *Coca-Cocaína. Política Criminal de la Droga*. Ed. Jurídica Cono Sur, Santiago, 1995, pp. 109-120.

¹⁴ President Bush would offer economic and military support to any government in Latin America that requires it, the first manifestation of which would be the 65 million dollars it would offer to Colombia in the so-called “Andean initiative” with the aim of collaborating militarily in the eradication of the cartel Medellin after the assassination of presidential candidate Luis Carlos Galán in 1989. GALEN. *Bad Neighbor Policy*, pp. 33-36.

The influence of the United States in Latin American legislations progressively became more evident, in particular following Bolivia embracing and adapting the aforementioned *Drugs Acts*, through the Coca and Controlled Substances Regime Act of 19 July 1988, known as Law No. 1008¹⁵. During this same period, the Convention of the United Nations against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 was created, concentrating on concern for the drugs' impact on the population's physical health, as well as giving drugs economic meaning, as it focused on the deprivation of the economic benefits of illicit drug trafficking.

In fact, the Convention favours a criminal strategy as a response to the drug trafficking issue and it does so from a maximal criminal law perspective, meaning that it assigns to States the duty of creating a more efficient, operative and flexible legislation that can be used to eradicate illicit trafficking, claiming in the preamble that drug trafficking is an activity that generates economic profit, "corrupts the structures of public administration, lawful commercial and financial activities and society at all levels" (as stated in the Preamble to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988)¹⁶. In other words, the Convention marked a turning point in criminal drug policy, from the moment it offered "a powerful excuse to give absolute preference to the War on Drugs"¹⁷ legitimising the undermining of criminal law's principles in modern, constitutional and democratic States governed by the rule of law¹⁸.

The Convention consolidates the "new threat" as the expression of a collective imagination and of the moral paternalism typical of North American criminal populism. First of all, because the image of apparent drug traffic impunity is adopted, with the consequent claim of it leaving to public insecurity associated with the need for a harsher punitive response far removed from the doctrines linked to the ideal of rehabilitation (special positive prevention). Secondly, because the above rests on the assumption *ad conditionalis* of a series of unproven binomials: i) that the consumption of drugs leads irremediably to irreversible dependence on a progressive scale which is proportional in intensity to the dangerousness of the drugs; ii) that all drug consumers belong or potentially should belong, given the inherent risk of these substances, to a subculture far removed from the morals of "normal" people, where addicts do not participate in productive life¹⁹.

The moral paternalism, inherent in the penal policy adopted since Ronald Reagan's government is based on the naturalistic misconception of "good" with what could actually be "the good", the latter meaning a specific type of citizen respectful of the laws and the traditional moral values of the United States' middle class²⁰.

In this way, the United Nations considered the "drug problem" as a matter linked to the effectiveness of persecution and repression, based on the moral paternalism and legal guidelines imposed by Washington, which meant the internationalization of the basic postulates of what until then had only been an internal war and the imposition of a hegemonic regime. All this is made explicit from the moment the UN once and for all highlights drugs as a public health problem demanding a penal response, whereby the focus should be on the loss of the individual autonomy of the consume. In doing just so it makes a distinction between licit and illicit drugs, broadens the margins of the latter administratively, associates them with the idea of crimi-

¹⁵ On the evolution of the criminal drugs policy in Bolivia, STIPPEL, Jörg; SERRANO, Juan. "La nacionalización de la lucha contra el narcotráfico en Bolivia", *Política Criminal*, n° 15, 2018, pp. 273 y ss.

¹⁶ The text is available on the website: https://www.unodc.org/pdf/convention_1988_es.pdf [26.11.2020]

¹⁷ LAURENZO COPELLO, Patricia. "Drogas y Estado de Derecho. Algunas reflexiones sobre los costes de la política represiva", *Jueces para la Democracia*, N° 24, 1994, p. 11.

¹⁸ On the way in which the United Nations discourse was adopted in Spain and in Europe in general, discrediting the decriminalization experience of some countries such as the Netherlands, it can be seen: DÍEZ RIPOLLÉS, José Luis. "Principios inspiradores de una nueva política sobre drogas", *Nuevo Foro Penal*, n° 42, 1988, pp. 464-465.

¹⁹ BARATTA, Alessandro. "Introducción a la criminología de la droga", *Nuevo Foro Penal*, n° 41, 1988, pp. 329 ss. ZILIO, Jacson. "La criminalización de las drogas como política criminal de la exclusión", *Pensamiento Penal*, 2014, pp. 4 ss.

²⁰ ELIAS, Norbert. "The Civilizing Process and Punishment", *The Oxford Online Handbook of Criminology and Criminal Justice Publisher*: Oxford University Press Editors: Michael Tonry, 2015, pp. 43 ss.

nal organizations or groups of drug traffickers that affect or may affect the institutions of different States, their democratic stability and the market, to the extent that they take advantage or benefit from corruption in order to launder the profits obtained from illicit trafficking²¹.

The 1988 Convention implied the gradual adoption by its member states of the US criminal policy embodied at the time in the *Anti-Drug Abuse Act of 1986*²². Therefore, as stipulated in Article 3 of the Convention, it proposed to criminalise behaviour constituting mere preparatory acts as separate offences, in particular in relation to the so-called offence of trafficking in precursors or chemical precursors necessary for the processing or production of drugs, with few requirements for proof of the subjective aspect of the offence. That criteria extended to the criminalization of unlawful association for drug trafficking as a crime of its own, to which is added the criminalization of proposition and conspiracy to commit crimes against public health, the mere membership of a criminal group and the criminalization of drug possession when possession or carrying for personal consumption is not justified. Among the Andean countries that straight away adopted the regulations contained in the *Drugs Act* is Colombia, which, under Law 30 of 1986, criminalised the mere consumption of drugs. Due to the problems of constitutionality that this implies in relation to the exercise of individual freedom and the rational limits to criminal law within a democratic rule of law, this rule was declared unconstitutional by Supreme Court ruling C-211 of 1994²³.

The legitimization of the United States' speech on the international level would find a favourable response from international bodies (in particular the UN), which supported the discourse of the need for a regulatory unification and strategic collaboration in the area of national and international security public policies for the "fight" against drug trafficking. Therefore, the criminal legislation regime contained in the *Anti-Drug Abuse Act of 1986* and in the *Anti-Drug Abuse Act of 1988* was consolidated in the 1990s, to the extent that most of the Andean countries' legislations incorporated the general guidelines set forth in said legislation into their internal regulations²⁴.

From this moment, legal reforms aimed at creating an exceptional criminal law were introduced in the U.S. as a national security strategy that needed the legitimacy of the judicial system; that is to say, it required criminal populism to be activated by ensuring the flexibility of the interpretations, which would lead to the expansion of the irrational exercise of punitive power. In other words, despite the fact that the United States officially declared the end of the War on Drugs in 2009²⁵, meaning at an international level the progressive

²¹ DÍEZ RIPOLLÉS, José Luis. "Principios", pp. 472 ss. DÍEZ RIPOLLÉS, José Luis. "El control penal del abuso de drogas: una valoración político-criminal", *Revista de Derecho*, n° 18, 2005, pp. 203 ss.

²² UPRIMNY, Yepes and DE RODRIGO; Guzmán. *La adicción punitiva: la desproporción de leyes de drogas en América Latina* Ediciones Antropos, Bogotá, 2012, pp. 5-8, 51-54, pp. 19 ss.

²³ Even some Latin American States such as Colombia rightly assumed the regulations contained in the Drugs Act penalizing in the so-called Law No. 30 of 1986 the mere consumption of drugs with all the constitutionality problems that this implies in relation to the exercise of individual freedom and the rational limits to criminal law within a democratic state of law. Although, later, said norm was declared unconstitutional by the judgment of the Supreme Court C-211 of 1994. With references, ZULUAGA, Diana. "Tendencias actuales de los sistemas penales: consideraciones en torno a la criminalización de conductas relacionadas al consumo de drogas", *Jurídicas*, n° 1, 2008, p. 169.

²⁴ These three Andean countries produced 98% of the cocaine consumed in the world, for this reason and in exercise of the aforementioned "Andean initiative", a meeting took place in Cartagena de Indias at the beginning of 1990, which was baptized as "The Summit Against Drugs", where the United States met with the aforementioned Andean countries with the specific purpose of raising awareness among Latin American governments about the serious threat that cocaine posed to "the well-being, economy and national security of the United States". *Diario El País*, 15.02.1990, website: https://elpais.com/diario/1990/02/15/internacional/635036403_850215.html [26.11.2020]. At this meeting, the four countries committed to creating a comprehensive multilateral strategy against drug trafficking. On the one hand, the Andean countries were obliged to persevere in the pursuit of the diversion of precursors, avoiding their diversion in order to discourage cocaine production and, on the other hand, the United States would make an economic commitment to grant military assistance and develop alternatives. profitable for peasant coca leaf growers. Statistics show how in Peru, Bolivia and Colombia the cultivation of the coca leaf became 98% of agricultural production in 1998 and the number of hectares of cultivated Amazon rainforest tripled, BOVILLE, Belén. *The Cocaine War in Context: Drugs and Politics*, Algora Publishing, New York, 2004, p. 69.

²⁵ MARTÍNEZ VALENZUELA, César. "The 'War on Drugs', and the 'New Strategy' identity constructions of the United States U.S. drug user and Mexico", *Mexican Law Review* n° 2, 2013.

abandonment of military interventions in the Andean countries and, at the same time, replacing its internal criminal policy with a new strategy linked to youth prevention and education with a view to reducing consumption statistics, the ravages of the fight against drug trafficking are still there, and indeed some maintain that the war is not over, rather it has been recreated using a new discursive strategy that claims to address the apparent need for greater citizen security, while carefully ensuring to be in tune with the political sensibilities of each historical moment²⁶.

Thus, until the 1992 presidential elections, the Democratic Party did not have a clear stance on drugs and criminality. Finally, it understood the electoral gain of criminal populism, and gave in to the Republican Party's demands for greater criminalization. This war rhetoric was intended to show how every government, George Bush's as much as Bill Clinton's, firmly stood on the side of society depicted as a victim of the scourge of drugs, how it was concerned about public security and rising crime, and, especially, combatting drug production in the Andean countries. The result of this War on Drugs was not exactly a decrease in crime, rather an unprecedented increase in the prison population (mainly male, young, poor and black). With prisons more crowded than ever, the popularity of those who had been the driving force behind these measures increased²⁷.

During Bill Clinton's Democratic Administration, the media slogan of "getting violent criminals off the streets" spread²⁸, leading to the approval of the *Violent Crime Control and Law Enforcement Act* of 1994, which amended § 924 (e) of Chapter 18 of the *United States Code*, enshrining life imprisonment after committing the third crime, without any distinction as to proportionality or reference to the possibility of prescription. The amendment was reduced to the slogan: "three strikes and you are out"²⁹. This law contains changes to the above cited *Anti-Drug Abuse Act* of 1988 grouped under the name *Truth in Sentencing*, with the aim of ensuring a mandatory sentence for drug possession and trafficking offences by harshening the minimum prison term comprised in the drug law, called *mandatory minimums*³⁰. Specifically, at least 85% of the judgment had to be effectively served, which led to a steep rise in the number of drug convictions in federal prisons and the costs associated with imprisonment. Therefore, by mid-2016, 49.1% of the prisoners convicted in this type of penal establishment were for drugs and 72.3% were there convicted of a crime requiring a mandatory minimum stay in prison. At the same time, while in 1986 imprisonment costs in federal prisons stood at US\$ 550,014 million, in 2016 they were at US\$ 6,751 billion³¹.

At the end of 2015, Bill Clinton renounced the *three strikes law*, indicating together with president Barack Obama that this norm had been a big mistake within the framework of the War on Drugs, as it especially caused the disproportionate rise of incarceration rates, to which research adds the use of the judicial system as a means of perpetrating racial segregation of the African American and Latino population³². Furthermore, in 2015, the Supreme Court declared that judges should not have to view the *three strikes and you are out* rule as being constitutionally mandatory. Although deriving from an exceptional situation, where the Court had to judge a white supremacist, this sentence states that the of application of custodial sentences violates the guarantee of criminal legality in its manifestation of the right to a due process of law, from the moment that a law with such characteristics restricts "the right to personal liberty", because this criminal law is "so vague that it does not give ordinary people a fair warning about the conduct that warrants a penalty" and sets a standard so low - in terms of legal requirements for its application - that it "ends up being imposed

²⁶ SCHERLEN, Renee. "The Never-Ending Drug War: Obstacles to Drug War Policy Termination", *Political Science and Politics*, vol. 45 n° 1, 2012.

²⁷ ROBINSON, Paul. *Principios distributivos del Derecho penal*, traducción and introduction by Manuel Cancio and Iñigo Ortiz de Urbina, Marcial Pons, Madrid-Barcelona-Buenos Aires, 2012.

²⁸ CLINTON, Bill. "Remarks by the President at One Strike Symposium", White House, Office of the Press Secretary, Washington, 1996.

²⁹ Department of Justice, 2020. Available in the web site: <https://www.justice.gov/criminal/ndds> [12.12.2020].

³⁰ WHITLEY, Joe. "Three Strikes and you're out: More Harm than Good", *Federal Sentencing Reporter*, N° 2, 1994.

³¹ DOYLE, Charles. "Mandatory Minimum Sentencing of Federal Drug Offenses", *Congressional Research Service*, 2018.

³² ALEXANDER, *The New Jim Crow*.

arbitrarily by criminal judges”³³.

4 Application of an interventionist criminal policy in the andean countries

In current times, there are evident studies that claim the lack of effective prevention and the failure of the old criminal policy originated in the United States under the slogan: “War on Drugs”. This is due to the fact that a total ban on the production and commercialization of drugs, a disproportionate punitive response and the absence of treatment measures for users, have proven to be ineffective as the consumption figures of narcotics, especially among the American middle class, has continued to progressively increase since the 1990s, an issue that has led to an economic crisis in the American health system.

Previous criminal policy has been characterized by a legitimizing discourse of national security ideology³⁴, a penal populism promoted by every political party³⁵ the definition of an “internal” enemy with a high content of racism³⁶, identified by the political class as African American and Latino communities that sold illegal drugs to honest white citizens³⁷. This is in contrast with the “external” enemy represented by the drug traffickers of South American countries and their corrupt governments, which together with tolerating the indiscriminate cultivation of drugs, benefited from the profit of the exports of cocaine into the United States, thus legitimizing the birth of failed-states or narco-states whose goal is the legitimation and the indiscriminate proliferation of institutionalized violence against indigenous and underprivileged populations³⁸.

During the last four decades of the past century, the United States exported to Latin America and, in particular, to the Andean countries (Colombia, Peru and Bolivia), a criminal policy devoid of guarantees of a rule of law. This took the form of a series of criminal regulations designed to strengthen the prosecution of coca crops, under emergency measures typical of a situation of constitutional exception where guarantees of due process are rendered more flexible, restricting the possibilities of defense and legitimizing illegal evidence with little effect on the presumption of innocence during criminal proceedings. While in the United States, laws passed contrasting the previous War on Drugs policies cause, in reality, mass imprisonment of Afro-Americans and Latino communities, in Latin America, they provoked a progressive increase of prison population, particularly in the Andean countries where the selectivity of the system would be reflected in the incarceration of marginalized sectors of the population, and, especially, of women who operate as drug carriers or mules.

A new criminal policy focusing on the prevention of drug trafficking and the rehabilitation of law-breaking consumers, requires strategies aimed at overcoming militarization³⁹ by allocating greater public resources to improve the living conditions of historically segregated and discriminated communities⁴⁰ in the Andean countries. Moreover, concrete measures must be added, aimed at eradicating the most visible consequence of the old criminal policy against drugs: mass imprisonment⁴¹. Therefore, it is necessary to address

³³ Johnson v. United States (2015), n° 13-7120, 26 de junio de 2015. Available in the web site: https://www.supremecourt.gov/opinions/14pdf/13-7120_p86b.pdf. [12.10.2018].

³⁴ BUSTOS RAMÍREZ, Juan. *Coca*.

³⁵ PRATT, John. *Penal Populism*, Routledge, London, 2007.

³⁶ WATSON, Betty, DIONNE Jones and ROBERSTONE-SUNDERS, Pat. “Drug Use and African Americans: Myth Versus Reality”, *Journal of Alcohol and Drug Abuse*, 40:19, 1995.

³⁷ DEL OLMO, Rosa. *La Cara Oculta de la Droga*, Ed. Temis, Bogotá, 1998.

³⁸ ATHEIDE, David L. “Deviance and the Mass Media”.

³⁹ WACQUANT, Loïc. *Simbiosi mortale, Neoliberalismo e politica penale*, Ombre Corte, Verona, 2002.

⁴⁰ MACCOUN, Robert; REUTER, Peter. *Drug War Heresies: Learning from Other Vices*, Times, and Places, Cambridge University Press, Nueva York, 2001, p. 65.

⁴¹ GARLAND, David. *Mass Imprisonment. Social Causes and Consequences*.

the origin and subsequent materialization of the U.S. criminal policy in the period known as the “war on drugs”, its implementation in the Andean countries and its more visible consequences, while analyzing the need for a new criminal policy respectful of Human Rights.

Then, armed with the strength of these arguments, the so-called “Andean Initiative” was launched, in the form of a strategic plan promoted at the end of the George W. Bush’s Administration in 1990, whose purpose was to limit and control the cultivation of coca leaves on the slopes of the Andes, in exchange for economic benefits and military support for the three main producing states: Bolivia, Peru and Colombia. In these countries the traditional agricultural cultivation had been progressively abandoned since the 1970s, to the extent that the peasant farmers, who until then had grown bananas and other agricultural products, decided to burn and clear the forest in order to replace traditional agriculture with coca leaf cultivation⁴².

The ‘90s, would mark for Colombia the use of a criminal law of exception, whereby military justice would judge drug trafficking crimes, opening the door for massive conformities or abbreviated trials, to the limitation of the exercise of *habeas corpus*, the establishment of pre-trial detention as a general rule in criminal proceedings, the consecration of a leniency system for whistle-blowers, the confiscation by the State of all goods acquired in connection with drug trafficking, direct extradition at the request of the United States, plus other measures involving a gradual limitation of fundamental rights in criminal proceedings, at the time perceived in Colombia as a limitation to the needs pertaining to an emergency criminal law, as was made clear in the recommendations adopted at the International Conference on Judicial Protection, held in Washington in early 1989, which stated that the constitutional guarantee of the presumption of innocence, the principle of contradiction of evidence and even the constitutional guarantee of the legality of crimes and penalties, constituted in the case of Colombia “practical difficulties” for the effective prosecution of drug trafficking⁴³.

In this country, coca growing changed from being non-existent in the 1970s to occupying more than 160,000 hectares at the end of the 1990s, spreading throughout the Colombian Amazon rainforest⁴⁴. The situation remains unchanged due to the failure of a criminal policy aimed at converting peasants into other types of workers, obviously with the assistance of North American funds, despite the undeniable fact that no crop in the Andes is more profitable for the peasants than coca, added to which there was historical political instability leading to guerrilla and paramilitary groups-controlled areas in the country. At present, as far as international organizations were able to estimate⁴⁵ coca cultivation exceeds 171,000 illegal hectares⁴⁶.

In Peru’s case the coca leaf has been traditionally grown in the altiplano area adjacent to the Amazon rainforest, in particular in Cuzco⁴⁷. Since the ‘80s, coca leaf farming has been controlled by the State, which

⁴² Available in the web site: https://elpais.com/diario/1992/02/26/internacional/699058806_850215.html [12.12.2020].

⁴³ BUSTOS, *Coca*, p. 121.

⁴⁴ By 1998 the cultivation of the coca leaf had spread throughout the Colombian Amazon jungle. In this regard, with references, BOVILLE, *The Cocaine War in Context*, p. 22.

⁴⁵ The areas where coca crops are currently found were colonized after the period known as “La Violencia”, which began on April 9, 1948 with the assassination of the head of the liberal party Jorge Gaitán and which unleashed a true undeclared civil war with conservative sectors. In this context, the peasants organized themselves into armed groups and took refuge in non-colonized areas of the Amazons that later became bastions of the Colombian communist party that would later lend its support for the birth, in the sixties of the last century, of armed groups such as the Revolutionary Armed Forces of Colombia (FARC). Thus, while the guerrillas protected peasant crops, landowners supported by conservative sectors armed themselves with paramilitaries who favored the transformation of agriculture and traditional crops into extensive coca leaf plantations. CARTAGENA, Catalina. “Los Estudios de la Violencia en Colombia antes de la Violentología”, *Diálogos*, vol. N 17, n° 1, 2016, pp. 69 ff.

⁴⁶ UNODC (United Nations Office on Drugs and Crime), Colombia. Monitoring of Territories affected by illicit crops 2017, Bogotá (2018), p. 8. The report is available on the website: https://reliefweb.int/sites/reliefweb.int/files/resources/Informe_de_Monitoreo_de_Territorios_Afectados_por_Cultivos_Illicitos_2017_FINAL.pdf [visited on 11/26/2020].

⁴⁷ The company is called Enaco SA. It was established in 1982. It is currently a private law corporation financed with public funds. According to official data, as of 2011 it produces 2,650 metric tons of coca leaf. Although the company is integrated with the participation of peasant coca leaf producers, they would not be enough. Especially because there are extensive areas of Alto Huallaga, San Martín, the Apurímac valley and Aguaytía that are not controlled. At the same time, there has been an ostensible demographic

initiated a process of nationalization and control of production, including the exploitation and commercialization of the coca leaf and its derivatives through the company Enaco SA, constituted in 1982, a private law corporation financed with public funds⁴⁸. The economic adjustments resulting from economic liberalization in Peru during the 1990s also favoured the absence of state control over the production and commercialization of drugs, as proposals for a new microeconomy for peasants became unviable with a net area of coca crops estimated at 43,900 hectares declared⁴⁹.

In Bolivia, uncontrolled cultivation has been concentrated since the 1960s in the tropical area of the Chapare, more specifically in Cochabamba, where the extension of illegal hectares experienced a controlled growth until the 1990s, exceeding 50,000 hectares with 350,000 people employed directly or indirectly in the coca business⁵⁰. However, as the area under cultivation expanded, the public policies promoted with funds from Washington aimed at the labour reconversion of the indigenous peasantry failed miserably. All this, despite the active participation of local authorities even promoting infrastructure improvement works and projects. In the Bolivian Amazon, the War on Drugs meant tolerating a United States military intervention that concentrated on eradicating the plantations through the unchecked burning of thousands of hectares without any distinction being made between crops and virgin forest⁵¹. This plainly provoked strong social discontent among the peasants working in coca cultivation (the coca growers)⁵², who decided to politically organise themselves, demanding the expulsion of the DEA and the U.S. military.

Under the slogan “march for life, coca and national sovereignty”, Evo Morales, himself a peasant, organised in 1994 a political movement which included indigenous communities, which had up to until then been completely marginalised and excluded from political and government representation. In the 2015 presidential elections, Morales obtained an absolute majority with the support of the coca growers organised in the political party *Movimiento al Socialismo-Instrumento Político por la Soberanía de los Pueblos* (MAS-IPSP). With the arrival of Morales as president, the DEA and the U.S. military were expelled in 2008; the protection of the “original and ancestral coca leaf as cultural heritage” and the crops were constitutionally preserved in the 2009 constitutional reform, pursuant to Article 384 of the 2009 Constitution of the Plurinational State of Bolivia⁵³.

Since 2011 Bolivia has no foreign supervision of its hectares of coca leaf that have been cultivated and declared to international agencies, estimated to cover 12,000 hectares in 2016⁵⁴. In 2017, Act No. 1008 of 1988, which was imposed by the United States and merely adapted the Anti-Drug Abuse Act of 1986, was

growth in these areas since the eighties and traditional crops have also gradually disappeared, being replaced almost entirely by the coca leaf. The economic adjustments originated in the economic liberalization in Peru during the 1990s also favored the absence of state control over the production and commercialization of the drug to the extent that the proposals of a new microeconomy for the peasants became unviable. BOVILLE, *The Cocaine War in Context*, pp. 70-71.

⁴⁸ Available in the web site: <https://www.bnamericas.com/es/perfil-empresa/fondo-nacional-de-financiamiento-de-la-actividad-empresarial-del-estado-fofonafe> [12.12.2020].

⁴⁹ UNODC (United Nations Office on Drugs and Crime), Peru. Monitoring of Territories affected by illicit crops 2016, San Isidro (2017), p. 8. The report is available on the website: https://www.unodc.org/documents/cropmonitoring/Peru/Peru_Monitoreo_de_coca_2016_web.pdf [visited on 11/26/2020].

⁵⁰ Production in 1996 exceeded 50,000 hectares with 350,000 people employed directly or indirectly in the coca business. At this time, the military intervention of the United States could not eradicate the production of cocaine despite all the controls that prevented the passage of chemical precursors from Argentina and Chile. The peasants found in urine and other organic waste a way to produce essential chemicals themselves to transform the coca leaf into cocaine. In this regard, BOVILLE, *The Cocaine War in Context*, pp. 73-74.

⁵¹ BUSTOS, *Coca*, pp. 45 ff.

⁵² STIPPEL, Jörg; SERRANO, Juan. “La nacionalización de la lucha contra el narcotráfico en Bolivia”.

⁵³ Article 384 of the 2009 Constitution of the Plurinational State of Bolivia states the following: “The State protects original and ancestral coca as cultural heritage, a renewable natural resource of Bolivian biodiversity, and as a factor of social cohesion; in its natural state it is not narcotic. The revaluation, production, commercialization and industrialization will be governed by law”. The constitutional text is available on the website: https://www.oas.org/dil/esp/Constitucion_Bolivia.pdf [visited on 11/26/2020]

⁵⁴ UNODC (United Nations Office on Drugs and Crime), Plurinational State of Bolivia. Coca Crop Monitoring 2016, (2017), p. 5. The report is available on the website: https://www.unodc.org/documents/cropmonitoring/Bolivia/2016_Bolivia_Informe_Monitoreo_Coca.pdf [visited on 11/26/2020].

revoked through the enactment of Act No. 906 of 8 March 2017⁵⁵. At the same time, in the same year Law No. 913 of 16 March was enacted, entitled: “Law on the Fight against Illicit Trafficking in Controlled Substances”, of which Article 6 declares the nationalization of the “fight against illicit drug trafficking”, as a “management model that recovers sovereignty and dignity in the fight against drug trafficking, without foreign interference”, establishing “social participation, regionalization, respect for human rights and mother earth”⁵⁶.

These three Andean countries would adopt, through the direct intervention of the United States, special laws related to drug trafficking before the model contained in the 1988 Vienna Convention was shared with the rest of the western world⁵⁷. These laws contained provisions literally translated from the aforementioned *Anti-Drug Abuse Act* of 1986 which - with the exception of the case of Bolivia - remain in force in their inspiring principles. Even the successive reforms (in the case of Peru and Colombia) have consecrated, since the end of the last century and, in particular, since the first decade of the present, an even more intense neopunitivist hypertrophy, characterised in the substantive plan by the progressive increase of punishable actions or guiding verbs in the penal codes, which in some paradigmatic cases within the continent reach nearly four hundred criminalised conducts⁵⁸. This phenomenon implies the materialization at present of a legislative activity that resorts to a maximum substantive criminal law and of *prima ratio*, which abuses the criminal legality to produce an injury to the constitutional guarantees with the purpose that no conduct remains unpunished. The mentioned situation has been denounced since the early 1990s as an expression of an expansive, erratic, inexpressive legislation of criminal political coherence or rationality⁵⁹.

5 Results: mass imprisonment and selective prison overcrowding in andean countries

At a prison level, the outcome of this criminal policy of the War on Drugs in the United States has been the mass imprisonment of people, understood as a manifestation of a fight against crime that seeks to prevent crimes associated with drug trafficking by imposing disproportionate penalties, without the right of substitution of sentences or without the possibility of opting for regimes of alternative compliance at liberty⁶⁰. Mass imprisonment means that prison ceases to be a place of individual incarceration and becomes a site that systematically locks up a group of the population which, in the case of the United States, is composed of young male Afro-Americans living in urban centres. For those groups, prison becomes a normal place, a “predictable part of the experience” and not a rare and infrequent fact⁶¹.

Although its origin is often discussed, at least there is some agreement that this phenomenon is the result of the combination of two factors: first, it is the consequence of various cultural changes in U.S. policy that led to crime becoming a political problem and, second, it is the result of the so called “War on Drugs”, which blurred the guarantees of offenders liable to arrest and at the same time contributed to the creation of a

⁵⁵ Through the enactment of Law No. 906, of March 8, 2017, called the General Coca Law, available on the website: <http://senado.gob.bo/sites/default/files/LEY%20906-2017.PDF> [accessed 11.26.2020].

⁵⁶ The current law can be consulted on the website: <http://www.dgsc.gob.bo/normativa/leyes/Ley913.pdf> [visited on 11.26.2020].

⁵⁷ UPRIMY, Rodrigo, GUZMAN, Diana and PARRA, Jorge. *La adicción punitiva: la desproporción de leyes de drogas en América Latina* Ediciones Antropos, Bogotá, 2012.

⁵⁸ ZAFFARONI, Eugenio Raúl. “La legislación antidroga latinoamericana: sus componentes de Derecho Penal Autoritario”, en MORALES VITERI, Juan Pablo; PALADINES, Jorge Vicente (editores), *Entre el control social y los derechos humanos-Los retos de la política y la legislación de drogas*. Homenaje a Juan Bustos Ramírez, Ministerio de Justicia y Derechos Humanos, Quito, 2009.

⁵⁹ ESCOBAR, Juan. “La realidad social del ‘narcotráfico’ en Colombia: Discursos y políticas criminales. Perspectiva socio-jurídica”, *Nuevo Foro Penal*, n° 47, 1990.

⁶⁰ ALEXANDER, *The New Jim Crow*.

⁶¹ GARLAND, David, *La cultura del control: crimen y orden social en la sociedad contemporánea*, traducción Máximo Sozzo, Gedisa, Barcelona, 2005.

specific category of criminal⁶². All in all, analysing such a complicated matter as mass imprisonment appears to be a complex affair, since separating the factors and causes that generate it, although it has a pedagogical utility, is not very precise given social reality is always presented as a tangled whole and it is not always easy to understand the various relationships between different phenomena. For the same reason, and without being exempt from the same criticism, it is possibly more suitable to talk about mediate and immediate causes⁶³. Immediate causes are to be found directly in the juridical sentences that send to prison and in the criminal legislation that encourages mass imprisonment, for example, in laws that each time enforce tougher sanctions, in those that make it impossible or difficult to obtain forms of freedom before the end of the sentence, etc. Among those norms, a key role in mass imprisonment is played by procedural laws which enable criminal justice to be way faster by allowing for expedited prison sentences⁶⁴.

Mediate causes, on the other hand, refer to a more general context that makes the existence of the most punitive laws possible. Example of mediate cause are the electoral gain provided by punitivism, the dismantling of the social state, the weakening of the ideal of rehabilitation and its compensation by a system that is difficult to substantiate and is the outcome of improvisations on the fringes of science. It is precisely these mediate causes that first allow and approve, and then demand and applaud imprisonment. Garland understands that “the current field of crime control is the result of political choices and administrative decisions, but these choices and decisions are rooted in a new structure of social relations and are coloured by a new pattern of cultural sensitivities”⁶⁵.

In Andean countries, on the other hand, mass imprisonment is focused on marginalised sectors of the population, specifically on micro- traffickers of drugs or consumers who sell in order to survive, who must bear overcrowded and unhealthy prison conditions. Although racial discrimination such as that in the United States cannot be ruled out *a priori*, it is certain that the increase in the number of the population subject to deprivation of liberty (with and without conviction), serves, as it does in the country of the North, to contribute towards a system of perpetuating discrimination and control of the lower classes in the cities and the countryside, contributing at the same time to a system of selection typical of a neoliberal economy⁶⁶ which intends to impose its hegemony in the way in which crime is considered not only in the Andean countries but throughout Latin America⁶⁷. In this respect, mass imprisonment, within the context of the Andean countries’ context, can also be seen as “the difference between the number of people that enter prison and the number – consistently lower- leaving it”⁶⁸.

This being said, the ideology of a national security ends up favouring, in unequal and self-proclaimed neoliberal societies, a moral indifference manifested by the banality of evil⁶⁹ that represents the confinement of the poor and marginalised⁷⁰; it is an institutionalised inequality of entire groups of the population that are considered inferior and, as such, their freedom and dignity can be sacrificed in favour of the idea of neutralising every danger linked to criminality⁷¹. This generates a social and culture division purporting that

⁶² SIMON, Jonathan. “Fear and Loathing in Late Modernity: Reflections on the Cultural Sources of Mass Imprisonment in the United States”, *Mass Imprisonment. Social Causes and Consequences*, Sage Publications, London, 2001.

⁶³ CUNEO, Silvio. *Cárceles y pobreza. Distorsiones del populismo penal*, Uqbar, Santiago de Chile, 2018.

⁶⁴ CUNEO, Silvio. *El Encarcelamiento Masivo*, Didot, Buenos Aires, 2017.

⁶⁵ GARLAND, *La cultura del control*, p. 40.

⁶⁶ MATTHEWS, Roger. *Pagando tiempo. Una introducción a la sociología del encarcelamiento*, Ediciones Bellaterra, Barcelona, 2003.

⁶⁷ In the sense of weakening the welfare state in favor of highly formalized state social control that involves disciplining the working classes through criminal law as a priority public policy of the neoliberal state. WACQUANT, Loïc. *Punishing the Poor. The Neoliberal Government of Social Insecurity*, Duke University Press, Durham, 2009, pp. 76 ff. Also, CHRISTIE, Nils. *La Industria del Control del Delito ¿La nueva forma del Holocausto?*, Ed. Del Puerto, Buenos Aires, 1993. pp. 87 ff.

⁶⁸ CUNEO, *El encarcelamiento*, p. 115 ff.

⁶⁹ To the extent that we understand that this phenomenon is a “normal” consequence of the system of rules of today’s society. ARENDT, Hannah. *Eichmann en Jerusalén. Un estudio sobre la banalidad del mal*, Lumen, Barcelona, 2013. pp. 10 ff.

⁷⁰ CUNEO, Silvio. *El Encarcelamiento Masivo*.

⁷¹ FERRAJOLI, Luigi. “Criminología, crímenes globales y Derecho Penal: El debate epistemológico en la Criminología Contemporánea”, *Revista Crítica Penal y Poder*, n° 4, 2013, p. 3 ff.

on one side there stands *us*, meaning we, who identify with the innocent victim and decent people, and, on the other, *them*, the immoral criminals, dangerous abusers, unworthy of being the beneficiaries of rights. Our security depends on their control⁷².

At this point it is important to emphasise that in reality the increase in imprisonment numbers and in the mass imprisonment of a specific group of people, whether due to racial segregation as in the United States or to social segregation as in Latin American countries, is not a phenomenon that matches the increase of criminality rates, but is the result of a criminal policy decision of the neoliberal states⁷³, where the idea of citizen's security has been encouraged, expressed in a series of punitive laws that implied a diminishing of fundamental rights and an endorsing of a criminal policy of "law and order", promoted by punitive populism, vindictive demagogy and the aforementioned banality with which the media deal with the problem of criminality⁷⁴.

In this regard, data show that, faced with the same levels or rates of crime, some states, generally, those with a weaker social state are those opting to use imprisonment as the sole and main response to crime, thus channelling their public policies and fiscal spending⁷⁵ to the extent that "prison functions, in public debate, as a symbol that effectively demonstrates the political concern for crime". The result of this type of criminal policy is the imprisonment in the United States of more than 2.14 million people, which translates into a ratio of 693 prisoners per 100,000 inhabitants, where 46.1% corresponds to crimes of drug trafficking or possession and only 0.3% corresponds to banking or stock market crimes⁷⁶.

In Andean cocaine producing countries, imprisonment figures are similar. In Colombia, the total number of inmates are as high as 123,156 people, with a ratio of 239 prisoners per 100,000 inhabitants⁷⁷. In Peru, the number of those incarcerated stands at 90,934, with a ratio of 215 prisoners per 100,000 inhabitants⁷⁸. Bolivia, according to the latest statistics released in 2016, has 16,038 people behind bars, with a ratio of 142 prisoners per 100,000 inhabitants⁷⁹.

Although not strictly pertinent to this article, it is important to mention that the Latin American country with the highest level of imprisonment is El Salvador, with a ratio that peaked at 617 people per 100.000 habitants, with a total of 38,939 people deprived of their liberty. Other countries where most inmates have been jailed on drug trafficking charges is Mexico, which also has high incarceration figures, although well below those of Colombia and Peru, with 177 people imprisoned per 100,000 inhabitants, with a prison population of over 203,364⁸⁰. In each of these Latin American countries, mass imprisonment is linked to prison overcrowding, implying the constant and systematic violation of a broad range of basic rights, without considering those inherent to the punishment itself. Therefore, detentions centres seriously fail to meet the requirements for rehabilitation or social reintegration programmes.

6 Conclusions

The increase in prison population is directly attributable to a criminal policy on drug trafficking characterised by an over-inflating of the "drug problem", resulting in a uncontrolled punitivism leading to legis-

⁷² GARLAND, *La cultura del control*, p. 50.

⁷³ CHRISTIE, Nils. *La Industria del Control del Delito*.

⁷⁴ BRANDARIZ GARCÍA, José Ángel. *El Gobierno de la Penalidad. La Complejidad de la política Criminal Contemporánea*, Dykinson, Madrid, 2014.

⁷⁵ TONRY, Michael. "Has the Prison a Future?", *The Future of Imprisonment*, Oxford University Press, Oxford, 2004, 30 ff.

⁷⁶ World Prison Brief (WPB): <http://www.prisonstudies.org/country/united-states-america> [26.11.2020].

⁷⁷ World Prison Brief (WPB): <http://www.prisonstudies.org/country/colombia> [26.11.2020].

⁷⁸ World Prison Brief (WPB): <http://www.prisonstudies.org/country/peru> [26.11.2020].

⁷⁹ <https://www.prisonstudies.org/country/bolivia>

⁸⁰ World Prison Brief (WPB): <http://www.prisonstudies.org/country/mexico> [26.11.2020].

lative changes materialising in special laws aimed at fighting drug trafficking as an internal issue, defined as such by national security discourses, whose guidelines, in terms of creating a criminal law of exception with substantial limitation of constitutional guarantees, are still in force today.

In the 1980s, the United States by taking the decision to internationalise the War on Drugs, has assumed a leading role in legitimising the need to neutralise drug trafficking from its origin, intervening politically, legislatively, and economically in the Andean countries, the principal producers of coca leaf. Hence, Bolivia, Peru and Colombia accepted the general principles of the *Anti-Drugs Acts* (1986 and 1988), in their domestic legal system, enacting special laws that reproduced the policies of limitation of rights and constitutional guarantees that operated within the United States. This meant the imposition of a criminal policy and the hegemonic materialization of public security policies and their acceptance in the legal systems of various States, to the extent that these guidelines found recognition in the United Nations and were embodied in the 1988 Vienna Convention.

Given the impossibility of stamping coca leaves' agriculture, despite all economic efforts, the United States decided to abandon its intervention in Latin America, reinforcing its punitive system in the internal order. Such decision implied new reforms that increased the minimum time spent in prison for all crimes of drug possession and trafficking, especially with the enactment of the "three strikes..." law, which was also legitimised by the Supreme Court itself since it argued - with some exceptions - that such a special regime for serving sentences does not violate the principle of proportionality nor does it imply a violation of the principle of legality of sentences.

The upshot in the Andean countries that implemented the policies and legislative principles promoted at a time by the United States, has been the mass imprisonment of marginalized sectors of society. In particular, of women carrying minimal quantities of drugs. The above has prompted claims such as that the War on Drugs is a war against women⁸¹ and against the poor from the subcultures of Latin America's cities, who devoid of any opportunity to emerge from their poverty, join the networks of the large drug cartels. Consequently, in Latin America, especially in the Andean countries, prison has ceased to be a tool to control the male population that commits crimes, becoming a form of control and domination of the most disadvantaged classes, especially, women who commit crimes associated with drug trafficking and minority ethnic groups⁸².

The main reason why women commit trafficking-related crimes more than others is related to a historical role they have had to fulfill. Women, who are often mothers, can hardly disengage from their motherhood, and drug trafficking activities can be perpetrated from home. Thus, a woman fulfilling her role as a mother and housewife, who engages in activities linked to drug trafficking, can generate income without looking for work and neglect the home and the care of her children⁸³. The incarceration of mothers often means or implies their son or daughter's imprisonment or separation from them.

To conclude this paper, we will pose two questions:

What would have happened if drugs, especially cocaine, were produced in the northern hemisphere and consumed by developing countries in the southern hemisphere?

Finally, since female imprisonment is growing faster than male incarceration, considering that most women in prison are serving sentences for drug trafficking offenses and that more than 80% of female

⁸¹ CHESNEY-LIND, M. "Imprisoning Women: The Unintended Victims of Mass Imprisonment", e M. Chesney-Lind, & M. Mauer, *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, New Press, New York, 2003.

⁸² RIVERA, Iñaki. *La cuestión carcelaria. Historia, Epistemología, Derecho y Política penitenciaria*. Volumen I; con prólogo de Roberto Bergalli y Massimo Pavarini, 2ª ed., Editores del Puerto, Buenos Aires, 2009.

⁸³ In the same vein: ANTONY GARCIA, C. "Reflexiones sobre los procesos de criminalidad y criminalización de las mujeres de América Latina implicadas en delitos relacionados con drogas". A. Facio, & L. Fries, *Género y Derecho* (pp. 511-516), LOM / La Morada, Santiago, 2002.

prisoners are mothers, a legitimate question arises. Its answer may help us understand much more complex and more profound issues beyond this paper's scope: Where do the children of women prisoners end up?

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