
CALL FOR INPUT: SPECIAL PROCEDURES CURRENT ISSUES AND GOOD PRACTICES IN PRISON MANAGEMENT

THEMATIC REPORT OF THE SPECIAL RAPPORTEUR ON TORTURE

CONTRIBUTION BY
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INTRODUCTION

This contribution was prepared within the framework of the *IMPACTUM* research project (Assessing the Impact of Urgent Measures in Protecting At-Risk Detainees in Latin America)¹ and the Programme for Studies on Human Rights in Context² of Ghent University (Belgium).³ *IMPACTUM* is funded by the European Research Council (ERC) and aims to examine the impact of precautionary and provisional measures adopted by regional and international human rights bodies in favour of persons deprived of liberty in six Latin American countries: Colombia, Ecuador, El Salvador, Guatemala, Nicaragua, and Peru. The Programme for Studies of Human Rights in Context is a research programme of the Faculty of Law and Criminology of Ghent University which conducts studies on the promotion, advancement and respect of human rights, democracy and the rule of law. Ghent University is an open, pluralistic, and socially engaged university. Founded in 1816, it offers more than 200 programmes, conducting research in a wide range of disciplines.

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² The Programme for Studies on Human Rights in Context [website](#).

³ Ghent University [website](#).

In this contribution, we outline what we believe are two major challenges to securing efficient prison management in most Latin American countries: prison overcrowding and pretrial detention. We discuss each challenge as they relate specifically to the Americas, describing the current situation in several Latin American countries with reference to the relevant data. In the case of overcrowding, we make specific reference to the COVID-19 pandemic and the ways in which it exposed the dangers brought by prison overcrowding to prisoners' right to health. After providing a contextual understanding of each challenge, we outline relevant human rights standards on both issues, citing various international human rights treaties, declarations and resolutions as well as jurisprudence from the United Nations (UN) and regional human rights systems, with a special focus on the Inter-American System but also alluding to African and European standards. Bearing in mind these standards, we give concrete recommendations for national legislative, executive and judicial bodies to reduce overcrowding and limit reliance on pretrial detention. Before our concluding remarks, we present cases of good practice in reducing prison overcrowding implemented in Colombia and other Latin American countries. We believe this may serve as a useful model for other countries attempting to reduce prison overcrowding and pretrial detentions.

OVERCROWDING AND PRETRIAL DETENTION: MAJOR CHALLENGES

The challenges in the management of Latin American prisons are manifold and are brought on or exacerbated by underlying issues in the region's penitentiary systems.⁴ IMPACTUM and Human Rights in Context have identified two fundamental issues hindering the better management of prisons: overcrowding (lack of adequate physical space)⁵ and the excessive reliance of pretrial detention.⁶ These factors adversely affect the securing of fundamental rights of persons deprived of liberty by creating structural conditions antithetical to that of a right's compliant environment.⁷

I. OVERCROWDING

Context

According to the United Nations Office on Drugs and Crime (UNODC) prison overcrowding is generally defined in relation to the official capacity or occupancy rates of prisons.⁸ In other words,

⁴ Other common issues in Latin American prisons include deficient infrastructure, violence, poor human rights conditions, prison informality, lack of funding and corruption see for example, Paul Hathazy and Markus-Michel Muller, 'The crisis of detention and the politics of denial in Latin America' 98(903) *International Review of the Red Cross* 889-916; [Raquel Ballestin, 'Why Mega-Prisons Holding Tens of Thousands Won't Make a Difference?' \(InSight Crime, 25 November 2022\)](#)

⁵ According to UNODC Handbook on strategies to reduce overcrowding in prisons, overcrowding is generally defined with reference to the occupancy rate and the official capacity of prisons. Using this simple formula, overcrowding refers to the situation where the number of prisoners exceeds the official prison capacity. The rate of overcrowding is defined as that part of the occupancy rate above 100 per cent, UNODC, CRIMINAL JUSTICE HANDBOOK SERIES 2010, p. 8, [E-book](#).

⁶ According to the IACHR pretrial or preventive detention is understood as the whole period of deprivation of liberty of a suspected offender ordered by a judicial authority and prior to a final judgment, see IACHR, 2013, report on the use of pretrial detention in the Americas, p. 13, <https://www.oas.org/en/iachr/pdl/reports/pdfs/Report-PD-2013-en.pdf>. IMPACTUM chose these two issues from our own research and experience into the problems linked to the proper functioning of prison systems. These choices are supported by the findings of the United Nations Office of the High Commissioner for Human Rights, the ICRC and the IACHR see, [United Nations Office of the High Commissioner for Human Rights, 'Immediate action needed to address conditions of detention in Latin America'](#), [The International Committee for the Red Cross, 'The crisis of detention and politics of denial in Latin America'](#) and the [Inter-American Commission on Human Rights, 'Measures to reduce pretrial detention.'](#)

⁷ [Inter-American Commission on Human Rights, 'Measures to Reduce Pretrial Detention'](#) paras 2 and 109.

⁸ [United Nations Office on Drugs and Crime, 'Handbook on strategies to reduce overcrowding in prison' \(2013\)](#) page 8.

overcrowding in prisons occurs where the number of prisoners exceeds the official prison capacity.⁹ Rates of imprisonment cannot always indicate the level of prison overcrowding in a country. However, the UN has found that ‘the majority of countries [with] a high rate of imprisonment’ also suffer from overcrowding.¹⁰

Across Latin America, prison populations remain extremely high, with rates of overcrowding far exceeding the official maximum occupancy levels of national prison institutions. For example, at present (2023) Guatemala has a rate of prison overcrowding of 293.2%.¹¹ Guatemala’s 21 institutions hold over 23,582 people despite having an official capacity of 8,539.¹² 46,9% of these detainees are held in pretrial detention.¹³ This marks a big increase from previous years, when the rate of overcrowding – while still unacceptable – was almost 150 times lower than what it is today.¹⁴ Similarly, in Colombia the current rate of overcrowding is around 125% and over 102,192 persons are in institutions that have a combined official capacity of 81,726.¹⁵ Peru’s prison population has been steadily increasing over the last 20 years with rates of overcrowding growing in tandem. In 2000, the rate of prison occupancy (?) in Peru was at 107% of its official capacity.¹⁶ This year, the rate of overcrowding was reported to be 225.1%, with the Peruvian prison population totalling 92,351 and the official capacity of all prison systems combined reaching 41,019.¹⁷

Worrying practices have been observed in several Latin American countries. Instead of reducing overcrowding, Latin American States are increasingly incarcerating people by applying tough-on-

⁹ *ibid.*

¹⁰ *ibid* page 9.

¹¹ [World Prison Brief, Guatemala \(2023\)](#)

¹² *ibid.*

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ [World Prison Brief, Colombia \(2023\)](#)

¹⁶ [World Prison Brief, Peru \(2023\)](#)

¹⁷ *ibid.*

crime policies and exceptional legislative measures.¹⁸ For example, the state of emergency in El Salvador, effective since March 2022, has caused the arrest and detention of over 70,000 persons.¹⁹ This situation makes El Salvador the country with the highest incarceration rate in the world (1086 per 100,000 inhabitants).

In 2023, the government of El Salvador finished the construction of a new prison with a capacity of 40,000 for the confinement of detainees labelled as terrorists.²⁰ This construction should have lowered the number of occupants in each facility but, instead, prisons remain overcrowded and their population exceeds their capacity by almost 3 times.²¹ The current president of El Salvador, Nayib Bukele, advocates for tough-on-crime policies and speaks against persons deprived of liberty on Twitter/X. On July 10, 2023, he tweeted:

Wouldn't it be obvious that if we had the highest murder rate in the world, it was precisely because we had a lot of criminals on the streets that were supposed to be in

¹⁸ While El Salvador is arguably the most notable example of rapidly rising incarceration rates, numerous dissenting voices in Nicaragua have been arbitrarily detained with the Ortega government increasingly shutting point civil society groups or attempting to curb the freedom of journalists by adopting repressive laws and cancelling the legal registration of hundreds of nongovernmental organizations and universities see, [Juan Pappier, 'Putting a Spotlight on Nicaragua's Brutal Repression: Independent International Investigation Needed to Ensure Accountability' \(Human Rights Watch, 7 March 2022\)](#). One example of this law is the cybercrime bill which aims to criminalise the spread of 'fake news' see, [Ley Especial de Cibercrimitos \(28 September 2020\)](#). Another example is Ecuador where, in recent elections, tough on crime policies dominated much of the campaign with candidates supporting these crimes becoming increasingly popular following the murder of presidential election candidate Fernando Villavicencio see, [DW, 'Ecuador: la 'mano dura' domina fin de campana electoral \(15 August 2023\)](#). In preparation for the Guatemalan elections, many candidates are imitating Bukele's tough on crime policies, opting for similar strategies see, [Associated Press, 'Guatemala: Politicians Bet on Bukele's Heavy-Handed Tactics to Win Elections' \(6 June 2023\)](#).

¹⁹ [DW, 'El Salvador supera 68.000 arrestos bajo régimen de excepción \(5 May 2023\)](#)

²⁰ The judiciary also refers to gangs as terrorists see, [Constitutional Chamber, Supreme Court of El Salvador, 224/2015, page 3](#).

²¹ [World Prison Brief, El Salvador \(2023\)](#).

*jail in the first place? It seems like basic logic has completely abandoned western civilization.*²²

Across Latin America, overcrowding continues to be one of the biggest barriers to safe and effective prison management because prisoners lack privacy, the prison staff faces increasing pressures and the infrastructures (including basic sanitary amenities) are affected.²³

In conditions of overcrowding, it is extremely difficult to create effective reintegration activities and offer tailored programmes to meet the needs of the prison population. According to the International Committee of the Red Cross (ICRC) and the United Nations Office on Drugs and Crime (UNODC), the lack of adequate space in prison ‘is only one of the numerous problems that are experienced as a consequence of overcrowding in prisons.’²⁴ Overcrowding is also detrimental to the quality of nutrition, sanitation, prisoner activities and programmes, health services and the care for vulnerable groups.²⁵ Moreover, overcrowding affects the ‘physical and mental well-being of all prisoners, generates prisoner tension and violence, exacerbates existing mental and physical health problems’ resulting in ‘immense management challenges.’²⁶

²² Nayib Bukele (@nayibbukele), ‘we had a lot of criminals on the streets that were supposed to be in jail in the first place’ X, 10 July 2023 <(9) [Nayib Bukele on X: "Wouldn't it be obvious that if we had the highest murder rate in the world, it was precisely because we had a lot of criminals on the streets that were supposed to be in jail in the first place? 🤔 It seems like basic logic has completely abandoned western civilization." / X \(twitter.com\)](#)> accessed 29 October 2023.

²³ For instance, The Inter-American Court of Human Rights (IACtHR) has established that ‘overcrowding is, in itself, a violation of personal integrity [and] in addition, it hinders the normal execution of essential functions in prisons see, *Pacheco Teruel et al. v. Honduras*, Merits, Reparations and Costs, IACtHR, (27 April 2012) para 67; *Tibi v Ecuador*, Preliminary Objections, Merits, Reparations and Costs, IACtHR, (7 September 2004) para 150; *Fleury et al. v Haiti*, Merits and Reparations, IACtHR, para 85.

²⁴ [United Nations Office on Drugs and Crime, ‘Handbook on strategies to reduce overcrowding in prison’ \(2013\)](#)

²⁵ *ibid.*

²⁶ *ibid.*

COVID-19: Exposing the Dangers of Prison Overcrowding

Coronavirus disease 2019 (COVID-19) is a contagious fast spreading virus which caused what the World Health Organisation (WHO) declared a ‘global pandemic’ in March 2020.²⁷ The symptoms of the virus range from a cough and headache to fever, muscle aches, nausea, vomiting and diarrhea.²⁸ The virus is spread through ‘respiratory droplets transmitted in small particles when a person who is infected breathes, coughs, talks or sneezes.’²⁹ In other words, it is normally spread when people are in close contact with each other. The WHO recommends that the best way to prevent the spread of the virus is to stay ‘at least 1 meter apart from others, wearing a properly fitted mask and washing your hands or using an alcohol-based rub frequently.’³⁰

The COVID-19 pandemic exposed many of the prisons’ weaknesses to health risks, of which a great deal are caused by extreme overcrowding.³¹ Prisons often operate as epicentres for infectious diseases, and to an even higher extent in cases of overcrowding.³² The cramped and restrictive spatial settings coupled with prison health systems already under stress make persons deprived of liberty more vulnerable to pandemics and their dire effects. It is practically ‘impossible for

prisons in the [Latin American] region to ensure the isolation of infected people’ due to the high rates of prison overcrowding, many of which are above the world average.³³

The Latin American Society of Criminology’s (SOCLA) and Centro de Estudios Latinoamericanos sobre Inseguridad y Violencia (CELIV) 2020 study on ‘The Effects of the Coronavirus on Latin

²⁷ [Yale Medicine, ‘COVID-19.’](#)

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ [World Health Organisation, ‘Coronavirus disease \(COVID-19\).’](#)

³¹ Jörg Pont and others, ‘Covid-19 Lessons for Health and Human Rights in Prison’ in Clara Burbano Herrera and Yves Haeck (eds) *Human Rights Behind Bars: Tracing Vulnerability in Prison Populations Across Continents from a Multidisciplinary Perspective* (Springer International Publishing 2022).

³² Catherine Heard, ‘Assessing the global impact of the Covid-19 pandemic on prison populations’ (2020) 15(7-8) *Victims & Offenders*, 848-861.

³³ [Marcelo Bergman, Covid-19 and Prisons in Latin America \(2 September 2020\)](#)

American prisons' examined 27 penitentiary systems across 18 Latin American countries³⁴ and found that only 30% of the facilities reported having sufficient capacity to test suspected COVID cases.³⁵ Three out of every four prisons in the study reported high levels of overcrowding, which strain already struggling health care facilities.³⁶ Indeed, overcrowding becomes even more harmful to the health and safety of prisoners during pandemics, when the limited health facilities and inadequate conditions produce uncertainty, fear and mistrust between prisoners. In overcrowded prisons with grossly inadequate and precarious living conditions, the 'fear of contagion' is high and panic even more likely than outside.³⁷ This risk of panic was exemplified by the widespread riots in Latin American prisons during the pandemic.

The aforementioned 2020 study on 'The Effects of the Coronavirus in Latin American prisons' observed an average of 6 riots per penitentiary system with roughly 14 deaths per riot during the Covid period. In total, there were deaths in 46% of the riots held in prison as a reaction to COVID-19 measures.³⁸ The potential and actual dangers posed by overcrowded prison conditions come to the forefront during pandemics. Overcrowding often produces situations that make the provision of dignified conditions to persons deprived of liberty impossible, limits the possibility for the realisation of human rights in places of detention, and hampers efforts to improve the daily life and health of detained persons.³⁹ Overcrowding, by making people live in tight spaces with little to no privacy and with diminished resources, also increases the likelihood of violence.⁴⁰

³⁴ The countries covered by the study were: Argentina, Belice, Bolivia, Brasil, Colombia, Costa Rica, Chile, Ecuador, Guatemala, Honduras, México, Nicaragua, Panamá, Paraguay, Perú, The Dominican Republic, Uruguay and Venezuela.

³⁵ [Sociedad de Criminología Latinoamericana y Centro de Estudios Latinoamericanos sobre Inseguridad y Violencia, 'Los efectos del coronavirus en las cárceles de Latinoamérica' \(Junio 2020\).](#)

³⁶ *ibid.*

³⁷ Bergman (n 33).

³⁸ *ibid.*

³⁹ See for example, Comisión Interamericana de Derechos Humanos, 'Personas Privadas de Libertad en Ecuador' OEA/Ser.L/V/II (21 February 2022) para 114.

⁴⁰ Jörg Pont and others (n 31).

Human Rights Bodies' Positionality and Recommendations on Prison Overcrowding

Given the effects on prisoners' rights to life, integrity and health, overcrowding has been the object of significant interest to international and regional human rights systems both in relation to their human rights instruments and to the bodies' jurisprudence.

The 1955 UN 'Standard Minimum Rules for the Treatment of Prisoners' (The Nelson Mandela Rules) mention 'temporary overcrowding' and note that overcrowding is an exceptional situation deviating from the norm.⁴¹ More concretely, rule 13 of the Nelson Mandela Rules, states that 'all accommodation provided for the use of prisoners [...] shall meet all requirements of health, due regard being paid to [...] minimum floor space, lighting, heating and ventilation'. Rule 42 thereof reemphasises that 'general living conditions addressed in these rules, including those related to light, ventilation, temperature, sanitation, nutrition [...] personal hygiene, health care and adequate personal space, shall apply to all prisoners without exception.'⁴²

With respect to prison overcrowding, the United Nations High Commissioner for Human Rights has found that

*'the overuse of detention overstretches the often-scarce prison resources, puts detention staff in extremely difficult and? even dangerous conditions, and has serious implications on the human rights of persons deprived of their liberty. Moreover, overincarceration also constitutes one of the major underlying causes of overcrowding, which results in conditions that can amount to ill-treatment or even torture.'*⁴³

The UN Working Groups on Arbitrary Detention have found that

⁴¹ The United Nations, Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) rule 12(1).

⁴² *ibid*, rule 42

⁴³ [UNGA 'Human rights implications of overincarceration and overcrowding, Report of the United Nations High Commissioner for Human Rights' \(10 August 2015\) UN Doc A/HRC/30/19](#), para 66.

overcrowding ‘inevitably’ leads to ‘serious violations, such as denial of or insufficient access to medical care, nutrition, sanitation, security and rehabilitation services.’⁴⁴

Both the IACHR and Inter-American Court of Human Rights (IACtHR or Court) have discussed the issue of overcrowding on several occasions. The IACtHR has established that ‘overcrowding is, in itself, a violation of personal integrity [and] in addition,⁴⁵ it hinders the normal execution of essential functions in prisons.’⁴⁶ The Court has also stated that overcrowding is a cause of instability and conflict.⁴⁷ The Commission has found that overcrowding ‘creates an environment in which health and hygiene conditions are deplorable’ and produces ‘serious problems in the management of medical services.’⁴⁸ In its 2020 resolution on pandemics and human rights in the Americas, the IACHR urged States to address overcrowding in prisons, which would involve ‘reassessing cases of preventive detention’ with the aim to ensure adequate measures to stop the spread of COVID-

⁴⁴ UN Working Group on Arbitrary Detention, Mission to Morocco, A/HRC/27/48/Add.5, 4 August 2014, para 49. See also, the Working Group visit to El Salvador where it found that the overcrowding resulted in the conditions of detention amounting to inhuman and degrading treatment especially with regard to ‘the situation of women detainees in police jails is particularly worrying since they have practically no access to personal hygiene items’ UN Working Group on Arbitrary Detention, Mission to El Salvador, A/HRC/22/44/Add.2, paras 95-108.

⁴⁵ And also humane treatment see, IACtHR, Case of *Tibi v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004. Series C No. 114, para 150. In this case, the Court concluded that keeping a detainee in overcrowded conditions, lacking natural light and ventilation, without a bed to rest on or adequate hygiene conditions, in isolation and incommunicado or with undue restrictions to the system of visits, constitutes a violation of that person’s right to humane treatment. See also, Case of *Cantoral Benavides*, supra note 139, paras. 85 al 89; and Case of *Loayza Tamayo*. September 17, 1997 Judgment, para. 58; IACtHR, Case of *Hernández v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 22, 2019.

⁴⁶ See for example, *Pacheco Teruel et al. v. Honduras*, Merits, Reparations and Costs, Inter-American Court of Human Rights, Series C No. 24 (27 April 2012) para 67; *Tibi v Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No. 114 (7 September 2004) para 150; *Fleury et al. v Haiti*, Merits and Reparations, Inter-American Court of Human Rights, Series C No. 236, para 85.

⁴⁷ IACtHR, Matter of Certain Penitentiary Centers of Venezuela. Central Occidental Region (Uribana Prison) regarding Venezuela. Provisional Measures. Order of the IACtHR, 13 February 2013, para. 8.

⁴⁸ [Report of the Inter-American Commission on Human Rights on the Situation of Persons Deprived of Liberty in Honduras, 18 March 2015, Doc. OEA/Ser.L/V/II.147](#), para 66.

19.⁴⁹ In the *Penitentiary Complex of Curado v. Brazil*⁵⁰ and the *Instituto Penal Plácido de Sá Carvalho v. Brazil*, the IACtHR⁵¹ issued provisional measures ordering Brazil to reduce overcrowding.⁵² In this resolution, the IACtHR recognised overcrowding as a much broader phenomena that occurs beyond Brazil and also affects ‘other States in the Americas and Europe.’⁵³ Indeed, the Court is acutely aware that overcrowding is one of the primary ‘structural problems in [...] prisons in the Americas.’⁵⁴

The African Commission on Human and People’s Rights Special Rapporteur on Prisons and Conditions of Detention in Africa stated that prison overcrowding ‘is by itself a human rights violation and occasions further human rights violations.’⁵⁵ During the COVID-19 pandemic, the African Commission urged States to ‘release convicted prisoners and [...] those who have been rehabilitated and pose limited risk to society’ along with ‘the elderly, pregnant women and those with children; those with underlying health conditions, prisoners of conscience, human rights defenders and undocumented migrant detainees, in order to reduce overcrowding in prisons and curb the spread of the Corona virus.’⁵⁶ Similarly, in several cases, the European Court of Human Rights (ECtHR) considered overcrowding in prison to be so severe as to ‘justify of itself a finding of a violation of Article 3 (prohibition of torture or inhuman or degrading treatment or

⁴⁹ IACHR, ‘Pandemic and Human Rights in the Americas in the Americas’ Resolution 1/2020 (adopted by the IACHR on April 10, 2020) para 45.

⁵⁰ IACtHR, *Penitentiary Complex of Curado v. Brazil*, Order of Provisional Measure, Order of 22 November 2018, paras. 80-81.

⁵¹ IACtHR, *Instituto Penal Plácido de Sá Carvalho v. Brazil*, Order of Provisional Measures, 22 November 2018, para 17.

⁵² *ibid* para 28.

⁵³ Burbano Herrera, C., Haeck, Y., & Cuppini, A. (2022). Transformative Provisional Measures and Prisons in the Americas: Protecting the Invisibles in Clara Burbano Herrera and Yves Haeck (eds) *Human Rights Behind Bars: Tracing Vulnerability in Prison Populations Across Continents from a Multidisciplinary Perspective* (Springer 2022) page 157.

⁵⁴ *ibid*.

⁵⁵ Since the pandemic, it has been widely acknowledged that future pandemics are inevitable particularly due to ‘spillover infections’ from animals to people. See for example, [Professor Maire Connolly, coordinator of the EU-funded PANDEM-2 project, Q&A: Future pandemics are inevitable, but we can reduce the risk’ \(European Commission, 16 December 2021\)](#). See also, [Priya Joi, ‘5 reasons why pandemics like COVID-19 are becoming more likely \(Gavi, 10 June 2020\)](#).

⁵⁶ [African Commission on Human and Peoples’ Rights, Resolution on Prison and Conditions of Detention in Africa’ ACHPR/Res.466 \(LXVII\) 2020](#).

punishment).⁵⁷ In the 2015 *Varga* case, the ECtHR concluded that the national authorities should promptly provide an effective remedy to redress ‘Convention violations originating in prison overcrowding.’⁵⁸ It is now unequivocally accepted that overcrowding itself violates several fundamental human rights as well as severely hinders the securing of other rights of persons deprived of liberty.

Recommendations related to Prison Overcrowding

The Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas of the IACHR⁵⁹ suggest different measures against overcrowding. According to Principle XVII, ‘the occupation of a place of detention over its maximum capacity shall be prohibited by law’ and in such cases where ‘overcrowding results in human rights violations, it shall be considered cruel, inhuman or degrading treatment or punishment.’ Once overcrowding is present, States have the duty to enact laws to ‘establish remedies intended to immediately address any situation of overcrowding’ and ‘adopt measures to prevent the repetition of such situations.’ The IACHR also considers that there should be public, accessible and periodically updated data on ratio of occupation of each place of detention, and that detainees, NGOs, and experts should be allowed to challenge the data.

⁵⁷ See for example, *Melnik v Ukraine* no. 72286/01 (ECtHR, 28 March 2006) paras 102-103; *Dmitriy Sazonov v Russia* no. 30268/03 (ECtHR, 1 March 2012) paras 31-32 *Niewiecki v Greece* no 11677/11 (ECtHR, 4 December 2012) paras 49-51.

⁵⁸ para 110.

⁵⁹ IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas of the Inter-American Commission of Human Rights, (Approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008) principle XVII. [OAS :: IACHR :: Principles and Best Practices on the Protection of Persons Deprived of Liberty](#)

Bearing this in mind *IMPACTUM* and Human Rights in Context recommend the following:

To the Legislative

- To prohibit prison overcrowding by law.⁶⁰
- To review and update penal policies and legislation to ensure proportionate sentencing.⁶¹
- To reform criminal policies from a prevention-, human rights- and gender-sensitive perspective, and use prison and pretrial detention only as last resorts.
- To ensure that all detainees are provided with legal assistance and have access to legal aid.
- To establish and ensure the proper functioning of independent oversight and complaints mechanism.⁶²
- To develop and implement alternatives to custodial measures including during pretrial and post-conviction, and strengthening restorative justice mechanisms should be prioritised.⁶³
- To assess the economic and social costs of criminal policies that recognise criminal behavior, increase penalties, suppress benefits, and to measure the impact (of what?) on overcrowding and the prison and jail capacity. The legislative powers should welcome advice from independent experts, institutions or consultants.⁶⁴
- To communicate to society and promote public debate on the costs of the prison system and its influence on taxation and public spending.

To the Executive (Prison Authorities)

- To develop strategies to plan and forecast prison population growth to ensure adequate staff, facilities, and resources for all prison population. Strategies should be developed with

⁶⁰ *ibid.*

⁶¹ [UNGA 'Human rights implications of overincarceration and overcrowding, Report of the United Nations High Commissioner for Human Rights' \(10 August 2015\) UN Doc A/HRC/30/19](#), para 58 and 67. See also Colombian Constitutional Court, T-Judgment 762 of 2015, order 11.

⁶² Report of the UN High Commissioner for Human Rights *ibid* para 63.

⁶³ *ibid* para 67.

⁶⁴ See Constitutional Court of Colombia, Judgment T-762 of 2015, orders 10 and 11.

due consideration to the high probability of future pandemics, which are demonstrably harder to handle in prison than outside.⁶⁵

- To publish accessible and periodically updated data on the ratio of occupancy of each place of detention, and ensure detainees, NGOs, and experts the possibility to challenge the data.⁶⁶
- To report and publicise the number of detainees in prisons, jails, and temporary places of detention such as police stations and other systems of detention.⁶⁷
- To determine a prison's capacity by measuring not only its physical space (m2) but also the adequacy of its infrastructure, housing, services, budget, and staff with the objective of detainees' reintegration.
- To improve the access to healthcare for all groups, with an increased attention for those groups (children, women, LGBTQI+, elderly, persons with disabilities) for which imprisonment leads to exacerbated vulnerabilities.
- To provide effective rehabilitation services to help decrease reoffending rates.
- To implement digital and judicial information services in prison.
- To ensure that detention times imposed by law are strictly adhered to and never exceeded, and to release individuals immediately upon completion of their sentence.
- To provide legal aid to all persons deprived of liberty and ensure that they are informed in a timely manner of the requisites of early and conditional releases.
- To train prison authorities and all staff members to meet the particular challenges brought by pandemics, which includes handling emotions and uncertainty.

⁶⁵ See section 'Covid-19: Exposing the Dangers of Prison Overcrowding'

⁶⁶ Above note, principles and best practices IACHR.

⁶⁷ This recommendation builds on the wide concept of deprivation of liberty provided by article 4.2 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, Degrading treatment or Punishment (OPCAT), adopted the 18th of December 2002 by the the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199 and that entered into force the 22nd of June, 2003. See also Burbano Herrera, C., Haeck, Y., Parra, G., Murphy, K., Vercammen, C., Negro, L., & Hansen, A. (2023). *Contribution on The Draft Of General Comment of The Subcommittee on Prevention of Torture (Spt), Article 4 of The Optional Protocol to The Convention Against Torture (Opcat)*. Geneva: United Nations.

- To pre-empt and work proactively to develop protocols and strategies to prevent panics and harm caused to persons deprived of liberty in the context of pandemics. Protocols should be developed, as much as possible, with a view to maintaining a sense of normality and routine for persons deprived of liberty. In cases where in-person family visits prove difficult, prison authorities should facilitate remote contact visits.
- To ensure the existence and proper functioning of independent oversight and complaints mechanisms.
- To disseminate and raise public awareness on interim measures, and other decisions on urgent measures issued by human rights bodies to protect persons deprived of liberty.⁶⁸

To the Judiciary

- To recognise prison overcrowding and precarious detention conditions as cruel, inhuman and degrading treatment or punishment and adopt measures to prevent it as well abstaining from sending accused or convicted persons to overcrowded spaces.
- To ensure reparations to detainees who endure prison overcrowding and precarious conditions of detentions, and to provide accessible complaint mechanisms.
- To apply alternatives to detention wherever possible, particularly in instances where the person would be sent to an ‘overcrowded or unsuitable custodial setting.’⁶⁹
- To grant alternatives to detention, pardons or early release for detainees according to criteria such as:
 - Circumstances under which the offence was committed such as marginalization or poverty.

⁶⁸ See, [Nijmegen Principles and Guidelines on Interim Measures for the Protection of Human Rights](#).

⁶⁹ UN Working Group on Arbitrary Detention, Mission to Argentina, A/HRC/39/45/Add.1, 19 July 2019, para 82(b).

- Negative impacts of detention on the care provided by the accused to children, persons with disabilities and the elderly.⁷⁰
- Calculation of conviction or pretrial time considering factors such as overcrowding, lack of or inadequacy of services, and precarious conditions of detention.
- Higher vulnerability of detainees such as: children, the elderly, persons with mental and physical disabilities, pregnant women, mothers, caregivers, persons with serious health conditions, or those having served a significant part of their sentence.⁷¹

To the Special Rapporteur on Torture

- To systematise, digitalise and publicise information linked to decisions made (by whom?) concerning persons deprived of liberty, including interim measures decisions taken by UN human rights bodies, in order to provide these resources to the civil society, potential victims and others.
- To encourage international adjudicators to publish interim and other urgent measures whether they have been granted or rejected.
- To encourage international adjudicators to facilitate access to information about the use of interim measures to protect at-risk persons deprived of liberty and provide reasons for ordering or rejecting them, which would provide guidance to (potential) parties.

⁷⁰ See Burbano Herrera, C., Haeck, Y., Parra, G., Murphy, K., Vercammen, C., Negro, L., & Hansen, A. (2023), El Contenido y El Alcance Del Derecho al Cuidado y su Interrelación con otros Derechos Humanos, *Contribución En El Marco De La Solicitud De Opinión Consultiva por parte De La República De Argentina Ante La Corte Interamericana De Derechos Humanos*, CIDH, 27 October 2023.

⁷¹ Burbano Herrera, C., (2022). Concluding Remarks: Examination and Suggestions from a Multidisciplinary Perspective, in Clara Burbano Herrera and Yves Haeck (eds) *Human Rights Behind Bars: Tracing Vulnerability in Prison Populations Across Continents from a Multidisciplinary Perspective* (Springer 2022) page 351-355.

- To encourage prison authorities to operate on the basis of maximum transparency in the context of future pandemics. To transmit information consistently and frequently to persons deprived of liberty is imperative with regard to future pandemics.

II. PRETRIAL DETENTION

Context

According to the IACHR, pretrial or preventive detention is the whole period of deprivation of liberty of a suspected offender ordered by a judicial authority and prior to a final judgment.⁷² According to the Institute for Crime & Justice Policy Research (ICPR), the over-use, abuse and prolongment of pretrial detention is caused by three elements.⁷³

- 1) Socio-economic inequality affects not only people's ability to pay bail and find adequate legal representation but it also affects people's likelihood of being arrested and being held before trial.
- 2) The wider criminal justice system's shortcomings include over-use of pretrial imprisonment, insufficient alternatives to custody, and a lack of adequate legal aid. For example, insufficient resources for police, prosecution, court services and infrastructure cause massive backlogs in case investigation and prosecution.
- 3) The judicial culture and practice can be one of the reasons why pretrial has been overused for years.⁷⁴

⁷² [IACHR, report on the use of pretrial detention in the Americas \(2013\)](#), page 13.

⁷³ "Ten-Country Prisons Project | World Prison Brief"

https://www.prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf.

⁷⁴ According to ICPR, judges tend to be too quick to dismiss claims regarding insufficient evidence or ways to minimise risk without detaining a suspect. On top of that they are deemed to be often easily swayed by fear of negative publicity from the media and social media; and they are reluctant to provide specific, fact-based justifications for decisions to remand a suspect in custody, *ibid*.

Worldwide pretrial prison populations have increased significantly since 2000.⁷⁵ The use of pretrial detention is common in Latin America (36%).⁷⁶ This number even reaches 60% in Peru, Paraguay and Guatemala, and 80% in Bolivia. This structural problem has been highlighted by the COVID-19 pandemic which urged states to implement urgent measures to avoid or limit prison overcrowding.⁷⁷

Some countries increasingly rely on the use of pretrial detention and some governments have extended the maximum custody length. For instance, in 2021, members of the Nicaraguan National Assembly approved Law No. 1060, amending Nicaragua's Code of Criminal Procedure and allowing suspects to be detained for 15 to 90 days in order to 'supplement information or gather sufficient evidence to support and file charges against the detainee.'⁷⁸ In El Salvador, UN experts have expressed grave concern about the 'prolonged state of emergency, together with legislation allowing for [...] broader prosecution and faster determination of guilt and sentencing' which have contributed to the 'excessive use of pretrial detention' and seriously undermined due process guarantees.⁷⁹ The experts also warned that El Salvador's approach 'threaten[s] to criminalize people who happen to live in the most impoverished areas and who have themselves been targeted by gangs in the past'; this issue is thus connected to the first and second pillars of the ICPR's breakdown of pretrial detention.⁸⁰ In March of this year, the Peruvian Supreme Court extended

⁷⁵ *ibid.*

⁷⁶ [Prison Insider, 'Amérique latine: détention provisoire et accès à la justice'](#) (11 June 2021)

⁷⁷ *ibid.*

⁷⁸ El Presidente de la Republica de Nicaragua, La Asamblea Nacional de la Republica de Nicaragua, La Asamblea Nacional de la Republica de Nicaragua, '[Ley de reforma y adición a la ley N°.406 código procesal penal de la república de Nicaragua' Ley N°. 1060, aprobada el 02 de Febrero de 2021, Publicada en La Gaceta, Diario Oficial N°. 25 de 05 Febrero de 2021](#). See also, Library of Congress, 'Nicaragua: Amendment to Code of Criminal Procedure Extends Pretrial Preventive Detention Period' (*Library of Congress*, 11 March 2021) [Nicaragua: Amendment to Code of Criminal Procedure Extends Pretrial Preventive Detention Period | Library of Congress \(loc.gov\)](#)

⁷⁹ United Nations Office of the High Commissioner for Human Rights, 'El Salvador: Extended state of emergency undermines right to fair trial, UN experts say' (United Nations, 22 May 2023) <[El Salvador: Extended state of emergency undermines right to fair trial, UN experts say | OHCHR](#)> accessed 6 November 2023.

⁸⁰ *ibid.*

former president Pedro Castillo's pretrial detention period to 3 years while initially jailed for 7 days; this exemplifies the third pillar, the overuse of pretrial detention.⁸¹

⁸¹ See, France 24, 'Judge extends Peru's ex-president Pedro Castillo's pre-trial detention' (*France 24*, 10 March 2023) <[Judge extends Peru's ex-president Pedro Castillo's pre-trial detention \(france24.com\)](https://www.france24.com/en/americas/20230310-judge-extends-peru-ex-president-pedro-castillo-pre-trial-detention)> accessed 6 November 2023. Colombian President Gustavo Petro asked the Inter-American Commission on Human Rights to intervene but was told that the Commission 'respects the 'democratic response' of Peruvian institutions' see, Lucas Reynoso, 'Human rights commission rejects Colombian president's attempt to save Peru's Pedro Castillo' (*El País*, 10 December 2022) <[Human rights commission rejects Colombian president's attempt to save Peru's Pedro Castillo | International | EL PAÍS English \(elpais.com\)](https://www.elpais.com/international/2022/12/10/human-rights-commission-rejects-colombian-president-attempt-to-save-peru-pedro-castillo)> accessed 6 November 2023.

Human Rights Bodies' Positionality and Recommendations on Pretrial Detention

Article 9 of the Universal Declaration of Human Rights provides that 'no one shall be subjected to arbitrary arrest, detention or exile'.⁸² Article 14 of the International Covenant on Civil and Political Rights (ICCPR) establishes that 'everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law' and that everyone shall be 'tried without undue delay'.⁸³ Principle 11(1) of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that 'a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority'.⁸⁴ Rule 6.1 of the Tokyo Rules (UN Standard Minimum Rules for Non-custodial Measures) state that 'pretrial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim'.⁸⁵ Rule 6.2 of that same document holds that 'alternatives to pretrial detention shall be employed at as early a stage as possible'.⁸⁶

In her report on human rights in the administration of justice, United Nations High Commissioner for Human Rights, Michelle Bachelet, recommended that States should 'adop[t] measures to address overcrowding by reducing recourse to incarceration, including by resorting to pretrial detention as a last resort'.⁸⁷ In the eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment it was noted that the

⁸² Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 9.

⁸³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 14(2) and 14(3)(c).

⁸⁴ Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (adopted 9 December 1988 UNGA Res 43/173) principle 11(1).

⁸⁵ United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) (adopted 14 December 1990 UNGA Res 45/110) rule 6.1.

⁸⁶ *ibid*, rule 6.2.

⁸⁷ UNGA, 'Human rights in the administration of justice, Report of the United Nations High Commissioner for Human Rights' (21 August 2019) UN Doc A/HRC/42/20, para 65(a).

excessive use and length of pretrial detention is a major cause of overcrowding.⁸⁸ Moreover, the Committee recognised the interaction between poverty, discrimination and pretrial detention and the fact that ‘the poorest and most marginalised individuals or groups in society are most likely to come into contact with the criminal justice system and therefore to be held in pretrial detention’.⁸⁹ As such, the Committee acknowledged the need to impose ‘non-discriminatory’ and ‘accessible’ ‘alternatives to criminal prosecution’ to divert people ‘away from detention under the criminal justice system’.⁹⁰

The IACHR’s Report aimed at reducing the use of pretrial detention in the Americas noted that ‘the non-exceptional use of pretrial detention is one of the most serious and widespread problems faced by the member States of the OAS when it comes to respecting and ensuring the rights of persons deprived of liberty’.⁹¹ The Commission observed that the prevalence of the use of pretrial detention is caused by *inter alia* ‘criminal justice policies that propose more incarceration as a solution to citizen security problem,’ ‘preponderance of tough policies in the discourse of the high-level authorities to put an end to citizen insecurity through custodial measures, and in the consequent pressure from the media and public opinion in this regard’, ‘inadequate public defense’ and ‘lack of inter-institutional coordination among actors in the system for the administration of justice.’⁹² As such, the Commission promotes the ‘rational use of incarceration’ recommending that States ‘adopt the judicial, legislative, administrative, and other measures required to correct the excessive use of pretrial attention, guaranteeing that this measure is exceptional and limited by the principles of legality, presumption of innocence, necessity, and proportionality.’⁹³

⁸⁸ [Eight annual report of the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment \(26 March 2015\) UN Doc CAT/C/54/2.](#)

⁸⁹ *ibid.*

⁹⁰ *ibid.*

⁹¹ [The Inter-American Commission on Human Rights, Measures to Reduce Pretrial Detention](#), 3 July 2017, OEA/Ser.L/V/II.163, para 20.

⁹² *ibid.*, para 225.

⁹³ *ibid.*, Conclusions and Recommendations part A (1)

Additionally, the IACtHR has ordered certain States such as Mexico and El Salvador to reform pretrial detention in their criminal procedural statutes. The Court urged El Salvador to derogate the prohibition on non-custodial alternatives against a fixed list of crimes⁹⁴ and ordered Mexico to reform its constitutional and legal provisions on mandatory pretrial detention.⁹⁵ According to the Court, pretrial detention should be justified by preventions of procedural risks such as flight and obstruction of justice and not only on the basis of the crime's gravity.⁹⁶ In other words, States can impose pretrial detention to a specific set of crimes, which are predetermined in their legislation, that are legal under Article 7(2) of the Inter-American Convention of Human Rights (ACHR).⁹⁷ However, the detention may nevertheless be arbitrary under ACHR Article 7(3) if there is no proportionality or the accused poses no procedural risks.⁹⁸

The African Commission's Guidelines on the Conditions of Arrest, Police Custody and Pretrial Detention in Africa (Luanda Guidelines) which act as an 'authoritative interpretation of the African Charter'⁹⁹ speaks at length about pretrial detention and contains provisions about the justifications of pretrial detention, the conditions of pretrial detention and the procedures for remedies in cases of arbitrary detention.¹⁰⁰ The guidelines maintain that pretrial detention is 'a measure of last resort and should only be used where necessary and where no other alternatives are available.'¹⁰¹ The African Commission developed a participant manual for law enforcement to accompany the

⁹⁴ IACtHR., Case of Manuela et al. v. El Salvador. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 2, 2021, paras. 104, 107, 288, 289.

⁹⁵ IACtHR., Case of Manuela et al. v. El Salvador. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 2, 2021, paras. 168, 171, 301.

⁹⁶ *ibid.*

⁹⁷ IACtHR., Case of López Álvarez v. Honduras. Merits, Reparations and Costs. Judgment of February 1, 2006, paras. 65-69, 99.

⁹⁸ *ibid.*

⁹⁹ [African Commission on Human and Peoples' Rights, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa \(Luanda Guidelines\) Toolkit \(2017\).](#)

¹⁰⁰ [African Commission on Human and Peoples' Rights, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa \(2014\).](#)

¹⁰¹ *ibid.*, article 10(b).

guidelines.¹⁰² The Manual stipulates that the guidelines ‘encourage cases of minor crime to be diverted away from the criminal justice system’ and promotes the use of ‘recognised and effective alternatives that respect international law and standards.’ Moreover, the African Commission stresses that another reason for the ‘diversion of minor matters’ away from pretrial detention is ‘the lack of appropriate infrastructure for proper facilities to ensure safe custody of all suspects, the lack of budget and the inability to provide for the essential needs of detainees during custody.’¹⁰³

The ECtHR takes a similar stance on the exceptional use of pretrial detention, ruling that two conditions must be satisfied to justify pretrial detention. Firstly, there must be an established public interest ground, and secondly, it must be shown that alternative measures cannot provide adequate protection against the case’s relevant risk.¹⁰⁴ The European Court demands that the authorities justify their use of pretrial detention on specific facts of each individual case rather than by ‘general and abstract’ arguments.¹⁰⁵ Similarly, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which operates under the Council of Europe, has held that pretrial detention should be ‘imposed for the shortest time possible and should be based on a case-by-case evaluation’ taking into account ‘the risks of committing a new crime, of absconding, or of tampering with evidence or witnesses.’¹⁰⁶

¹⁰² The Manual, which was designed in consultation with States and their stakeholders, is to be used ‘to assess current law enforcement training curriculum on the use of arrest and custody, and to be incorporated or adapted where necessary by State Parties to the African Charter. The approach taken to the Training Manual has its foundation in behavioral change and emphasizes the skills and knowledge required by law enforcement officials to make decisions and take action that respects human rights, the rule of law and the safety and security of all people.’ See, Toolkit (n 97). See also, [African Commission on Human and Peoples’ Rights, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa \(2014\)](#) preamble ‘Recognising that police custody and remand facilities in many African countries lack appropriate infrastructure and budget and provisions for providing for the essential needs of detainees in custody’ and article 1(c).

¹⁰³ *ibid*, page 22.

¹⁰⁴ *Buzadji v the Republic of Moldova* no. 23755/07 (ECtHR, 5 July 2016), paras 87 and 90-91.

¹⁰⁵ *Smirnova v Russia*, no. 46133/99, 48183/99 (ECtHR, 24 July 2003), para 63.

¹⁰⁶ [The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment \(CPT\) Extract from the 26th General Report of the CPT](#), para 53.

Bearing this in mind IMPACTUM and Human Rights in Context recommend the following:

To the Legislative

- To remove automatic or mandatory pretrial detention from generic lists of crimes.
- To legislate for pretrial detention to be used only in last resort and applied on a case-by-case basis where it can be shown to be necessary to prevent procedural risks.¹⁰⁷
- To provide effective rehabilitation services to help reducing reoffending rates.

To the Executive (Prison Authorities)

- To ensure that detainees under pretrial detention are immediately released as soon as the legal detention time expires.

To the Judiciary

- To ensure that pretrial detention does not exceed a reasonable duration.
- To review pretrial detention periodically and to apply non-custodial measures when procedural risks such as flight or obstruction to justice could be managed with less restrictive means.

To the Special Rapporteur

- To encourage the systematisation, organisation and publication of the decisions of UN human rights Committees, including decisions on interim measures for persons deprived of liberty.¹⁰⁸

¹⁰⁷ Burbano Herrera, C., (2022). Concluding Remarks: Examination and Suggestions from a Multidisciplinary Perspective, in Clara Burbano Herrera and Yves Haeck (eds) *Human Rights Behind Bars: Tracing Vulnerability in Prison Populations Across Continents from a Multidisciplinary Perspective* (Springer 2022) page 351-355.

¹⁰⁸ [See, Nijmegen Principles and Guidelines on Interim Measures for the Protection of Human Rights.](#)

GOOD PRACTICES RELATED TO PRISON OVERCROWDING: COLOMBIA AND OTHER LATIN-AMERICAN COUNTRIES

In this section we will discuss how Colombia and other Latin American countries have positively addressed prison overcrowding.

I. COLOMBIA

IMPACTUM chose to discuss how prison overcrowding was handled by Colombia because of the special attention given by the Constitutional Court of Colombia to the humanitarian prison crisis and its approach to solving it by engaging with the legislative, executive and other judiciary authorities.¹⁰⁹ This perspective could provide useful recommendations to other Latin American States dealing with critical overcrowding beyond suggestions to build more prisons.

Context

Since 1998, the Constitutional Court of Colombia has called jail and prison overcrowding an ‘unconstitutional state of affairs.’¹¹⁰ In the late 90s, prison overcrowding in Colombia was around 145%.¹¹¹ In that context the Court emphasised that prison overcrowding would not be solved by building more prisons and jails but by adopting policies that require the commitment of the judiciary, legislative, public defence, and other administrative authorities. The Court also pointed out the need to reform punitive and populist criminal policies by adopting a preventive, reintegrative and human rights protection approach, by conducting empirical and costs assessments

¹⁰⁹ According to the article 241 of the Colombian Political Constitution, the Constitutional Court is a tribunal in charge of keeping the integrity and supremacy of the constitution. In this sense, it reviews legislation automatically or upon civil litigation and determines if it should be reaffirmed or expelled from legal order. Congress of Colombia, Political Constitution of Colombia, http://secretariasenado.gov.co/senado/basedoc/constitucion_politica_1991.html.

¹¹⁰ Colombian Constitutional Court, Judgement T-153, 1998; Judgement T-388, 2013; Judgment T-762, 2015.

¹¹¹ *ibid*, Judgment T-153/1998, para. 10.

and by speeding processes to grant early and conditional releases and other legal benefits.¹¹² The Court also ordered that prisons and jails should not admit new detainees unless the number of new admissions was equal or inferior to the number of detainees released over the same period.¹¹³

Despite these judgments, in 2023 prison overcrowding reached 125%¹¹⁴ and spread to temporary detention centres.¹¹⁵ The situation was concerning due to inadequate services for detainees, including inadequate design and capacity of police stations and other places of transition holding detainees for short periods of time. The Court noted that overcrowding is aggravated by a lack of construction and adaptation of new spaces in accordance with minimum standards of living and dignity¹¹⁶ and insufficient resources to finance the criminal and prison policies.¹¹⁷ On the basis of these concerns, the Court ordered the transfer of all convicted detainees from police detention centres to prison system and demanded the improvement and expansion of space, the increase of budget allocation, monitoring and legal aid to detainees both in prison and police detention systems.¹¹⁸

Although the issue of prison overcrowding has not yet been solved, the problem may be mitigated by recent measures adopted by the Colombian authorities. These measures may also inspire other countries on the continent with critical rates of overcrowding. Here are those measures.

Colombian Judicial and Legislative initiatives to Address Prison Overcrowding

Releasing detainees in times of epidemics, pandemics or health emergencies of international concern

¹¹² Colombian Constitutional Court, T-762, 2015, paras. 50-68.

¹¹³ *ibid*, para 74.

¹¹⁴ [World Prison Brief, Colombia \(2023\)](#)

¹¹⁵ Colombian Constitutional Court, Judgement SU-122, 2022., ICRC, 2023, Overcrowding in temporary detention centres getting worse, <https://www.icrc.org/en/document/colombia-overcrowding-temporary-detention-centres-getting-worse-2023>^[66]

¹¹⁶ *ibid*, paras 77-82.

¹¹⁷ *ibid*, paras 83-85.

¹¹⁸ *ibid*, section on orders III.

In 2020, during the COVID-19 pandemic, the Colombian government approved Decree 546/2020 which substituted pretrial detention and prison with home arrest for a maximum period of 6 months for those at higher risk of contagion of Covid-19.¹¹⁹ The legislation covered elderly persons above 60 years of age, nursing mothers or mothers living with children below the age of 3, persons with chronic illnesses, physical disabilities, persons convicted for crimes committed by negligence (culpa), persons with convictions below 5 years of prison, and persons who have completed 40% or more of their conviction.¹²⁰

Despite the limited time scope of this norm, it led to a decrease in prison population from 154% to 120%.¹²¹ Additionally, this measure proved that the judiciary and prison authorities could release detainees and pay due consideration to the fact that overcrowding increases risks to health, life and integrity not only of detainees but also of prison officials and the wider community.

Providing economic reparations on behalf of detainees in conditions of overcrowding and precarity

In 2020, the Colombian Council of State¹²² ordered economic reparations to women who were detained in a prison with 504% of overpopulation.¹²³ The tribunal ruled that overcrowding was inhumane, cruel, and degrading and ordered compensations measured according to the time spent in prison and the percentage of overcrowding.¹²⁴ The Court considered that the policies and other

¹¹⁹ Ministry of Justice and Law, Decree 546-2020, article 3.

¹²⁰ *ibid*, article 2.

¹²¹ [Infobae, 'Hacinamiento en cárceles del país bajo un 16,7%: MinJusticia \(24 August 2021\).](#)

¹²² Article 237 of Colombian Political Constitution provides is the highest tribunal of the administrative contentious jurisdiction. in this regard, it deals with lawsuits against state institutions and reparations when there is damage caused by public officials. Congress of Colombia, Political Constitution of Colombia, http://secretariassenado.gov.co/senado/basedoc/constitucion_politica_1991.html^[cōā]

¹²³ Colombia Council of State, 2020, Sala de lo Contencioso Administrativo Sección Tercera Subsección B Magistrado ponente: Alberto Montaña Plata Bogotá D.C., 20 de noviembre de 2020 Radicación: 1800123330002013002160, paras. 28, 29.

¹²⁴ *ibid*, paras. 42, 100-106.

measures of prevention implemented by prison system to reduce overcrowding did not preclude the right of detainees to get an economic compensation when their rights were violated.¹²⁵

This decision is positive because it condemned the government's failure to prevent and reduce prison overcrowding and recognised the humanity and dignity of detainees. It was also a step forward in recognising both that there is no justification for harm, cruel, inhumane and degrading treatment of anyone, even those with a criminal background, and that the families of detainees who suffered deterioration, incapacitation, death or illness due to prison conditions are entitled to reparations by the State.

Granting alternatives to prison and pretrial detention: community or public work

In 2023, Colombian Congress passed Law 2292, which substitutes prison convictions of breadwinner women with community work or work for public institutions.¹²⁶ The law stipulates that judicial authorities should both consider relevant to the commission of a crime the women's conditions of marginalisation and the pressure associated with duties to provide for the needs of a family and grant substitutions for convictions.¹²⁷ Furthermore, the legislation substitutes pretrial detention with home arrests for women and men caregivers.¹²⁸

This Law complies with recommendation of the Constitutional Court to create and implement a broad system of alternatives to prison conviction and pretrial detention¹²⁹ and also recognises that the rapid growth of women deprived of liberty population at a higher rate than men is a regional problem.¹³⁰ This Law could also help reduce the high number of women under pretrial detention for drug related crime by taking into consideration the possibility of marginalisation and lack of

¹²⁵ *ibid*, paras. 89-94.

¹²⁶ Congress of the Republic of Colombia, Law 2292 of 2023, article 1.

¹²⁷ *ibid*, article 3.

¹²⁸ *ibid*, article 17.

¹²⁹ Colombian Constitutional Court, Judgment, T-762 of 2015. Order 8.

¹³⁰ [IACHR, 2023, Report on Women Deprived of Liberty in the Americas](#), para 40.

opportunities of a group of people that often occupies low positions in a criminal organisations' hierarchy or is exploited or coerced.¹³¹

Although it is too soon to measure the impacts of Law 2292 and neither the number of beneficiaries nor the Law's success in reducing overcrowding is known, this measure is a significant step forward because it promotes alternatives to detention and strives to mitigate and prevent negative impacts on caregiving activities.

II. OTHER LATIN AMERICAN COUNTRIES: EARLY RELEASE AND ALTERNATIVES TO DETENTION DURING COVID-19

In recognition of the dangers to health caused by prison overcrowding and the exacerbation thereof in times of pandemics, several human rights bodies called for the (temporary) release of detainees during the height of COVID-19.¹³² Most of the calls emphasised the need to consider release for those facing risks such as pregnant women, elderly persons and those suffering from chronic diseases. Some Latin American States paid heed to the advice, like the Colombian governmental measures cited earlier, adopting alternative measures to detention such as home arrests, pardons and amnesties during the COVID-19 pandemic.¹³³ In April of 2020 the Peruvian Government issued the Executive Decree (No.004-2020 JUS) allowing for commutations of sentences and pardons by presidential decree for humanitarian and other reasons.¹³⁴ Those who could request

¹³¹ *ibid*, para 42.

¹³² See for example, [UN High Commissioner for Human Rights Michelle Bachelet, 'UN rights chief urges quick action by governments to prevent devastating impact of COVID-19 in places of detention' \(UN, 25 March 2020\); Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Advice of the Subcommittee on Prevention of Torture to State Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic \(adopted on 25th March 2020\).](#)

¹³³ For an overview of the different measures adopted by various Latin American States see, María Luisa Romeno; Luisa Stalman and Azul Hidalgo Solá, 'The Covid-19 Pandemic and Prison Policy in Latin America' (The Dialogue, April 2021) pages 14-19. See also Burbano Herrera, Haeck, Y; Cuppini, A, (n 53) pages 151-153.

¹³⁴ *ibid*. See also, [Decreto Supremo que establece supuestos especiales para la evaluación y propuesta de recomendación de Gracias Presidenciales, y determina su procedimiento, en el marco de la emergencia sanitaria por COVID-19, N°004-2020-JUS.](#)

such a pardon included mothers who reside in jail with their children, pregnant women, people over 60 years of age, those whose sentence would have been finished in the upcoming 6 months, and those with a sentence of less than 4 years.¹³⁵ In Chile, the national prison services released figures indicating that roughly 1,860 people (over 5% of Chile's total prison population) were released via the General Communicative Pardon Act.¹³⁶ As Burbano Herrera, Haeck and Cuppini expressed; 'It seems that the pandemic was the catalyst for authorities to finally begin to implement the measures that had already been proposed by international human rights bodies, constitutional courts, and experts for some time.'¹³⁷ While these measures did not greatly improve the *de facto* prison situation in the region,¹³⁸ an analysis from a broader perspective shows that the 'indirect impact' of these measures is high.¹³⁹ They emphasised; 'The measures adopted have shown that, in practice, it is possible to reduce prison population and implement alternative measures beyond prison. The measures taken have shown that with political will it is possible to attack one of the most serious problems of the prison system, such as prison overcrowding. These measures could define prison and criminal policy in Latin America in the future. The challenge is to learn from this experience and to press for these measures to be taken more consistently.'¹⁴⁰

¹³⁵ *ibid*, article 3.

¹³⁶ *ibid*.

¹³⁷ See Burbano Herrera, C; Haeck Y; Cuppini, A (n 53)

¹³⁸ For example, studies carried out by various organisations, such as The Dialogue, maintain that releases in response to Covid-19 probably represent less than 5% of the incarcerated population in Latin America seem (n 133) footnote 56 page 15.

¹³⁹ As a preliminary point, it is crucial to conceptually and empirically understand 'impact'. Impact is related to the effects of the decisions on the beneficiaries (direct impact) and on society at large (indirect or symbolic impact). Actions undertaken by states related to direct impact might involve, for example, the construction of a new prison, the hiring of more prison staff or the transfer of sick detainees to a specialised hospital. An assessment of the impact of such actions would need to consider whether there has been a decline in the rate of overcrowding in the prison, a decrease of the rate of violence between the detainees or a change in the extent of the recovery of ill prisoners receiving adequate medical treatment. Assessing the impact of measures poses considerable methodological challenges. Any assessment of impact is also made difficult for example because of the often irregular behaviour of states. See Burbano Herrera C and Haeck Y 'the impact of precautionary measures on persons deprived of liberty in the Americas' in Par Engström (ed) *The Inter-American Human Rights System: impact beyond compliance* (Palgrave Macmillan 2019) page 89-113.

¹⁴⁰ (n 137) page 153.

CONCLUSIONS

IMPACTUM and HUMAN RIGHTS IN CONTEXT Research Teams value the Special Rapporteur's work towards better prison management in the fight against torture and other cruel, inhuman or degrading treatment or punishment and appreciates the opportunity given to academia, civil society and national and international institutions to share our input on this crucial issue.

In this contribution we have described the context, the international and regional standards and our recommendations to reduce prison overcrowding and the overuse of pretrial detention, overcrowding and the overuse of pretrial detention have been identified as two major hurdles to effective prison management in Latin America. Tackling these issues will require long-term changes at all levels and branches of government and the State's close cooperation with prison authorities. We encourage all solutions adopted to go to the root causes of problems in an effort to prevent recurrence of these problems. We also respectfully encourage the Special Rapporteur to further assist the work of civil society by supporting the systematisation, organisation and publication of the UN treaty bodies' case law, including their orders for interim measures. IMPACTUM and HUMAN RIGHTS IN CONTEXT Research teams are at the service of the Special Rapporteur and most willing to help by providing more information on the situation of persons deprived of liberty in Latin America.