

I.8

The Use of Transformative Provisional Measures by the Inter-American Court of Human Rights

Toward a Tangible Impact

By Clara Burbano-Herrera¹ and Yves Haeck

1. Introduction

In 2017, the Inter-American Court of Human Rights (Inter-American Court, or IACtHR) ordered provisional measures to protect the life and integrity of all persons deprived of liberty at the Criminal Institute of Plácido de Sá Carvalho (the Institute), 3,820 detainees in total.² The detention facility faced serious challenges, including high levels of violence, lack of access to health services and medicine, spread of contagious infections, and deaths. Overpopulation at the Institute had reached an approximate density of 200 percent.³ Only one doctor attended to the medical needs of the 3,820 prisoners, and most other aspects of life at the Institute were controlled by the prisoners themselves. In its provisional measures, the Inter-American Court ordered Brazil to reduce overcrowding, assess the overall situation, and create a plan for the structural reform of the Institute.⁴ In 2018, despite the provisional measures, the general situation at the Institute did not improve.

¹ This work was supported by the Research Fund Ghent University and the European Union. Views and opinions expressed are however of those of the authors only and do not necessarily reflect those of the European Union or the European Research Council. Neither the European Union nor the granting authority can be held responsible for them

² *Criminal Institute of Plácido de Sá Carvalho v. Brazil* [2017] IACtHR; see also precautionary measures adopted by the Inter-American Commission on Human Rights (Inter-American Commission, or IACHR) *Criminal Institute of Plácido de Sa Carvalho v. Brazil* [2016] IACHR. Precautionary measures had also been granted by the Inter-American Commission in 2016.

³ International standards, such as those advanced by the Council of Europe, have established that a population density exceeding 120 percent means a prison is dangerously overcrowded. See *Criminal Institute of Plácido de Sá Carvalho v. Brazil* [2018] IACtHR, para. 78.

⁴ *Criminal Institute of Plácido de Sá Carvalho v. Brazil* [2017] IACtHR, paras. 28, 70, and Resolutive, para. 3.

The situation at the Institute is far from an isolated case. On several occasions, the Inter-American Court has ordered provisional measures to protect persons deprived of liberty from degrading conditions in Brazilian prisons.⁵ Since terrible prison conditions is a tragedy common not only in Brazil but also in other Latin American countries, this chapter aims to study the impact of *transformative provisional measures* granted by the IACtHR to address contexts of detention.⁶ We suggest that the term *transformative provisional measures* refer to those provisional measures adopted by the Inter-American Court that address structural problems endangering many individuals (see section 4).

We will devote special attention to the transformative provisional measures adopted in the case of the Institute in November 2018 because, in this case, the IACtHR departed from its usual method of addressing detention cases. The provisional measures in this case are so revolutionary that they may eventually be considered a benchmark for studies of protective measures in international human rights law, at least in the context of prisons if not more generally. Furthermore, the unique qualities of this order of provisional measures could generate a debate about the legitimacy of the IACtHR's interventions in public policy as well as about its role and limitations. It is not yet clear whether the provisional measures ordered were appropriate to prevent human rights violations and protect detainees' human rights, as stipulated in Article 63(2) of the American Convention on Human Rights (American Convention, or ACHR), or whether the State will comply with these measures.⁷

This chapter is divided into six sections. The second section gives a general overview of the human rights standards developed by the IACtHR with respect to persons deprived of their liberty in Latin America. The third section introduces the concept of transformative provisional measures. The fourth

⁵ See, e.g., *Matter of the Penitentiary Complex of Pedrinhas v. Brazil* [2019] IACtHR; *Matter of the Penitentiary Complex of Curado v. Brazil* [2018] IACtHR; *Matter of the Socio-Educational Internment Facility v. Brazil* [2017] IACtHR; *Socio-Educational Internment Facility of the Penitentiary Complex of Curado v. Brazil* [2017] IACtHR; *Matter of the Socio-Educational Internment Facility v. Brazil* [2015] IACtHR; *Matter of Urso Branco Prison v. Brazil* [2011] IACtHR; *Matter of the persons imprisoned in the "Dr Sebastião Martins Silveira" Penitentiary in Araraquara, São Paulo v. Brazil* [2008] IACtHR; *Matter of children deprived of liberty in the "Complexo do Tatuapé" of Fundação CASA v. Brazil* [2008] IACtHR; *Matter of the persons imprisoned in the "Dr Sebastião Martins Silveira" Penitentiary in Araraquara, São Paulo v. Brazil* [2008] IACtHR.

⁶ See, e.g., *Criminal Institute of Plácido de Sá Carvalho v. Brazil* [2018] IACtHR; *Certain Penitentiary Centers of Venezuela, Penitenciaria Center of the Central Occidental Region (Uribana Prison) v. Venezuela* [2013] IACtHR and Order [2015]; *Capital Detention Center El Rodeo I and II v. Venezuela* [2011] IACtHR; *Convicted and tried inmates committed to the Penitentiary of Mendoza and its offices v. Argentina* [2004] IACHR; *108 inmates in the Maximum Security Prison at Kilometer 14 v. Colombia* [2004] IACHR; *Political prisoners in buildings 1 and 2 of the National Model Prison in Bogotá v. Colombia* [2000] IACHR; *Minors in the San Pedro de Sula Prison v. Honduras* [1996] IACHR.

⁷ See Clara Burbano Herrera, Yves Haeck, and Alessandra Cuppini, "Transformative Provisional Measures and Prisons in the Americas: Protect the Invisible," in Clara Burbano Herrera and Yves Haeck (eds), *Human Rights Behind Bars. Ius Gentium: Comparative Perspectives on Law and Justice*, vol. 103 (Springer 2022), 143.

section then focuses on the current conditions in which detainees are kept in some Latin American countries. The fifth section analyzes conditions of detention through the lens of provisional measures ordered by the Inter-American Court. The sixth section returns to the case of the *Criminal Institute of Plácido de Sá Carvalho v. Brazil*, analyzing in greater detail the terrible conditions of the prison and the measures ordered by the IACtHR. The seventh section concludes with some reflections on the Inter-American Court's role in protecting human rights in the context of detention.

2. Human Rights Standards Applicable to Persons Deprived of Their Liberty in Latin America

Respect for human dignity is the guiding principle in the context of persons deprived of their liberty. American Convention Article 5(2) provides: "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person." The Inter-American Court interprets ACHR Article 5(2) to mean that every person deprived of liberty has the right to be treated with respect for their dignity.⁸ For example, in the case of *Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*, the IACtHR found:

[C]ertain inmates of the Detention Center of Catia not only had to defecate in the presence of their [cell]mates, but they also had to live amid excrements and even eat their food in these humiliating conditions. The Court consider[ed] that said detention conditions were absolutely unacceptable, [as] they involve[d] disdain for human dignity; cruel, inhuman and degrading treatment; high risk for health and life and a clear violation of Articles 5(1)[, which provides that "[e]very person has the right to have his physical, mental, and moral integrity respected,"] and 5(2) of the American Convention.⁹

The Inter-American Court, through its jurisprudence, has developed a set of human rights standards related to persons deprived of liberty. The IACtHR

⁸ *Criminal Institute of Plácido de Sá Carvalho v. Brazil* [2018] IACtHR, para. 45; *Boyce and others v. Barbados* [2007] IACtHR, para. 88; *Lori Berenson Mejía v. Peru* [2004] IACtHR, para. 102; *De la Cruz Flores v. Peru* [2004] IACtHR, para. 124; *Bulacio v. Argentina* [2003] IACtHR, para. 126; *Durand and Ugarte v. Peru* [2000] IACtHR, para. 78; *Institute of Reeducation of the Minor "Panchito Lopez" v. Paraguay* [1995] IACtHR, para. 151; *Neira Alegria and others v. Peru* [1995] IACtHR, para. 60.

⁹ *Montero Aranguren and others v. Venezuela* [2006] IACtHR, para. 99. Similarly, the European Court of Human Rights (ECtHR) held that forcing a prisoner to live, sleep, and use sanitary facilities together with a large number of other prisoners was, per se, degrading treatment. See *Khudoyorov v. Russia* [2005] ECtHR, para. 107; *I.I. v. Bulgaria* [2005] ECtHR, para. 73; *Karalevicius v. Lithuania* [2005] ECtHR, para. 39.

recognizes that, in addition to presenting a potential violation of the right to personal liberty, the deprivation of liberty inevitably implicates other human rights. Nevertheless, the Court has held that imprisonment's direct impairment of the right to liberty and indirect impairment of other rights must be strictly minimized.¹⁰ To that effect, the Inter-American Court has stated:

[T]he State must ensure that the manner and method of any deprivation of liberty do not exceed the unavoidable level of suffering inherent in detention and that the detainee is not subjected to sufferings or hardships exceeding the unavoidable suffering inherent in detention, and that, given the practical requirements of incarceration, the detainee's health¹¹ and welfare are adequately warranted.¹²

At the same time, the Inter-American Court has asserted that the deprivation of liberty must not be accompanied by the dispossession of certain rights.¹³ The rights of detainees to life,¹⁴ personal integrity,¹⁵ and fair trial,¹⁶ for example, must be effectively respected and guaranteed just as they must be ensured to individuals who have not been deprived of liberty.¹⁷ According to the IACtHR:

[T]he poor physical and sanitary conditions existing in detention centres, as well as the lack of adequate lighting and ventilation, are per se violations to Article 5 of the American Convention, depending on their intensity, length of detention and personal features of the inmate, since they can cause hardship that exceed the unavoidable level of suffering inherent in detention, and because they involve humiliation and a feeling of inferiority.¹⁸

¹⁰ *Montero Aranguren and others v. Venezuela* [2006] IACtHR, para. 86; *López Álvarez v. Honduras* [2006] IACtHR, para. 105; *Juvenile Reeducation Institute v. Paraguay* [2004] IACtHR, para. 154; *Five Pensioners v. Peru* [2003] IACtHR, para. 116.

¹¹ The UN Standard Minimum Rules for the Treatment of Prisoners ("Mandela Rules") provide that "[p]risoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status." UN Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), UN Doc. A/RES/70/175 (December 17, 2015), Rule 24(1).

¹² *Montero Aranguren and others v. Venezuela* [2006] IACtHR, para. 86.

¹³ *Gómez Paquiyauri Brothers v. Peru* [2004] IACtHR, para. 108; *Maritza Urrutia v. Guatemala* [2003] IACtHR, para. 87.

¹⁴ Art. 4 American Convention.

¹⁵ Art. 5 American Convention.

¹⁶ Art. 8 American Convention.

¹⁷ *Institute of Reeducation of the Minor "Panchito Lopez" v. Paraguay* [2004] IACtHR, para. 155. See also the Inter-American Commission's Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, which declare that every person deprived of liberty shall have the right to health (Principle X). Similarly, the UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) adopted by the United Nations, General Assembly in Resolution A/RES/70/175, Rule 24.

¹⁸ *Montero Aranguren and others v. Venezuela* [2006] IACtHR, para. 97.

The Inter-American Court has also found that States have a special obligation to protect detainees. It has reasoned that “the State is in a special position of guarantor to the persons deprived of their liberty, since prison authorities exercise a strong control or supervision over the persons under custody.”¹⁹ Moreover, in the case of persons deprived of their liberty who belong to vulnerable groups, such as persons with disabilities, women, and children, the IACtHR has established the need for a stricter scrutiny, given this added vulnerability.²⁰ Children are also protected under Article 19 of the American Convention, which provides: “Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the [S]tate.” States therefore function as guarantors for children, which means they must adopt all the care that is required for their development.²¹ In this context, States have two specific obligations: first, Articles 1 and 19 ACHR²² obligate States to assume this special position as guarantor with particular care and responsibility, and, second, Article 19 ACHR obligates States to take special measures based on the principle of the best interests of the child.²³ With respect to the rights of children deprived of liberty, the State additionally must undertake to provide health and educational assistance in order to ensure that imprisonment will not destroy their life projects.²⁴

The Inter-American Court’s jurisprudence has also established that rape can constitute torture.²⁵ According to the IACtHR’s interpretation of Article 5(2) ACHR, torture consists of any act of ill treatment that: (i) is intentional, (ii) causes severe physical or mental suffering, and (iii) is committed with an objective or purpose.²⁶ The Inter-American Court has found that rape is, under

¹⁹ *Montero Aranguren and others v. Venezuela* [2006] IACtHR, para. 87; *Cantoral Benavides v. Peru* [2001] IACtHR, para. 87; *Neira Alegria and others v. Peru* [1996] IACtHR, para. 60.

²⁰ *Chinchilla Sandoval v. Guatemala* [2016] IACtHR, paras. 218–224; *Villagrán Morales and others v. Guatemala* [1999] IACtHR, paras. 146, 191.

²¹ This obligation, as regards the conditions of juvenile detention, is therefore reinforced. See, e.g., *Servellón-García v. Honduras* [2006] IACtHR, para. 112; *Juvenile Reeducation Institute “Panchito Lopez” v. Paraguay* [2004] IACtHR, para. 16; *Gómez-Paquiyaui Brothers v. Peru* [2004] IACtHR, paras. 124, 163, 164, 171; *Bulacio v. Argentina* [2003] paras. 126, 134; *Villagrán Morales and others v. Guatemala* [1999] IACtHR, paras. 146, 191.

²² *Institute of Reeducation of the Minor “Panchito Lopez” v. Paraguay* [2004] IACtHR, para. 160.

²³ *Gómez Paquiyaui Brothers v. Peru* [2004] IACtHR, paras. 124, 163–164, 171.

²⁴ IACtHR, Advisory Opinion OC-17/2002, “Juridical Condition and Human Rights of the Child,” August 28, 2002, paras. 80, 81, 84, 86–88. The IACHR refers to Rule 13(5) of the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), adopted by the General Assembly in Resolution 40/33, November 28, 1985. See also the UN Rules for the Protection of Juveniles Deprived of their Liberty, adopted by the General Assembly in Resolution 45/113, December 14, 1990.

²⁵ *Women Victims of Sexual Torture in Atenco v. Mexico* [2018] IACtHR, para. 191.

²⁶ *Ibid.* See also *López Soto et al. v. Venezuela* [2018] IACtHR, para. 186; *Favela Nova Brasília v. Brazil* [2017] IACtHR, para. 252; *Río Negro Massacres v. Guatemala* [2012] IACtHR, para. 132; *Rosendo Cantú et al. v. Mexico* [2010] IACtHR, para. 118; *Fernández Ortega et al. v. Mexico* [2010] IACtHR, para. 128; *Bueno Alves v. Argentina* [2007] IACtHR, para. 79.

certain circumstances, an intentional act that causes intense suffering to the victim in order to intimidate, debase, humiliate, punish, or control the victim. For rape to constitute torture, the intentionality, the severity of the suffering, and the purpose of the act must be analyzed, taking into consideration the specific circumstances of each case.²⁷

Additionally, Article 5(2) ACHR's prohibition of any injury or damage to the life, integrity, or health of a person deprived of liberty is complemented by the essential purpose of the deprivation of liberty, which is the rehabilitation of the prisoners.²⁸ Article 5(6) ACHR provides: "Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners." Failure to comply with the duty to safeguard the health and welfare of detainees and ensure that the manner and method of deprivation of liberty does not exceed the inevitable level of suffering inherent in detention could result in a violation of the absolute prohibition against cruel, inhuman, or degrading treatment or punishment.²⁹ States cannot invoke economic hardships to justify conditions of detention that do not meet the minimum international standards in this area and do not respect human dignity.³⁰ As we mentioned earlier, every person deprived of liberty must be treated with respect for human dignity and must not be subjected to torture or cruel, inhuman, or degrading treatment or punishment.³¹ Failure to respect the dignity of persons deprived of their liberty violates a basic principle of democratic societies.³² As such, Article 5(2) ACHR can never be suspended, not even in cases of war, public danger, or other threats to the independence or the security of the State Parties,³³ and not when a person has committed a crime.³⁴

As for prison conditions, the Inter-American Court has established that "imprisonment in overcrowded conditions, isolation in a reduced cell, with lack of ventilation and natural light, without a bed to lie in or adequate hygiene

²⁷ See *López Soto et al. v. Venezuela* [2018] IACtHR, paras. 186–187; *Rosendo Cantú et al. v. Mexico* [2010] IACtHR; *Fernández Ortega et al. v. Mexico* [2010] IACtHR, para. 127.

²⁸ *Penal Miguel Castro Castro v. Peru* [2006] IACtHR, para. 314; *García Asto and Ramírez Rojas v. Peru* [2005] IACtHR, para. 223; *Lori Berenson Mejía v. Peru* [2005] IACtHR, para. 101.

²⁹ *Lori Berenson Mejía v. Peru* [2005] IACtHR, para. 101; *Tibi v. Ecuador* [2004] IACtHR, para. 150; *Juvenile Reeducation Institute "Panchito Lopez" v. Paraguay* [2004] IACtHR, para. 151; *Bulacio v. Argentina* [2003] IACtHR, para. 126.

³⁰ *Boyce and others v. Barbados* [2007] IACtHR, para. 88; *Montero Aranguren and others v. Venezuela* [2006] IACtHR, para. 85.

³¹ *Durand and Ugarte v. Peru* [2000] IACtHR, para. 78; *Neira Alegría and others v. Perú* [1996] IACtHR, para. 86.

³² *Lopez-Alvarez v. Honduras* [2006] IACtHR, para. 104; *Institute of Reeducation of the Minor "Panchito Lopez" v. Paraguay* [2004] IACtHR, para. 154.

³³ The right to personal integrity is included in the list of non-derogable rights in Article 27(2) of the American Convention on Human Rights.

³⁴ *Penal Miguel Castro Castro v. Peru* [2006] IACtHR, para. 274; *Institute of Reeducation of the Minor "Panchito Lopez" v. Paraguay* [2004] IACtHR, para. 157; *Montero Aranguren and others v. Venezuela* [2006] IACtHR, para. 85; *Ximenes Lopes v. Brazil* [2006] IACtHR, para. 126.

condition, and solitary confinement or unnecessary restrictions to visitation regimes constitute a violation to the right to humane treatment.”³⁵ In the case of *Vélez Loor v. Panama*, the IACtHR held that “a population density higher than 120% [...] reaches dangerous levels.”³⁶ Prison overcrowding is a factor the Court considers when determining whether a State has violated Article 5(2) ACHR. In the *Montero Aranguren* case, the Court relied on the European Committee for the Prevention of Torture’s definition of an overcrowded prison and guidelines on the minimum size for each prisoner’s cell.³⁷ The IACtHR has even held, as it did in the case of *Pacheco Teruel et al. v. Honduras*, that “[o]vercrowding is, in itself, a violation of personal integrity.”³⁸ The prolonged isolation and coercive lack of communication experienced in prisons can also cause severe harm, such as moral suffering and mental stress, to any individual, which in turn creates a risk of aggression and abuse of authority.³⁹

On the topic of preventive detention, the Inter-American Court has asserted that it is a precautionary and nonpunitive measure.⁴⁰ Preventive detention also must meet the essential requirements in a democratic society, that is, it must be exceptional and limited by the principles of legality, presumption of innocence, necessity, and proportionality.⁴¹ Similarly, the IACtHR will find a custodial measure arbitrary unless it complies with the following standards: (i) its purpose must be compatible with the American Convention, (ii) it must be suitable to achieve the objective pursued, (iii) it must be necessary, and (iv) it must be proportional.⁴² The Inter-American Court also has repeatedly stated that the only legitimate purpose for the deprivation of liberty of a criminal defendant is to ensure that the defendant will not impede the efficient development of an investigation or evade justice.⁴³

³⁵ *Penal Miguel Castro Castro v. Peru* [2006] IACtHR, para. 315.

³⁶ *Vélez Loor v. Panama* [2010] IACtHR, para. 203.

³⁷ *Montero Aranguren and others v. Venezuela* [2006] IACtHR, para. 90, referring to CPT/Inf (92) 3 [EN] 2nd General Report, April 13, 1992, para. 43. The latest European Committee for the Prevention of Torture (CPT) minimum standard for personal living space in prison establishments is: 6m² of living space for a single-occupancy cell + sanitary facility; 4m² of living space per prisoner in a multiple-occupancy cell + fully-partitioned sanitary facility; at least 2m between the walls of the cell; and at least 2.5m between the floor and the ceiling of the cell (CPT, Living space per prisoner in prison establishments: CPT standards, CPT/Inf (2015) 44, Strasbourg, December 15, 2015, paras. 9–11.

³⁸ *Pacheco Teruel et al. v. Honduras* [2012] IACtHR, para. 67.

³⁹ *Lori Berenson Mejia v. Peru* [2005] IACtHR, para. 104; *Maritza Urrutia v. Guatemala* [2003] IACtHR, para. 87; *Cantoral Benavides v. Peru* [2001] IACtHR, para. 84; *Bamacá Velásquez v. Guatemala* [2000] IACtHR, para. 150.

⁴⁰ *Acosta Calderón v. Ecuador* [2005] IACtHR, para. 75; *Tibi v. Ecuador* [2004] IACtHR, para. 106.

⁴¹ *García Asto and Ramírez Rojas v. Peru* [2005] IACtHR, para. 106.

⁴² *Women Victims of Sexual Torture in Atenco v. México* [2018] IACtHR, para. 251; *Ricardo Canese v. Paraguay* [2004] IACtHR, para. 129.

⁴³ *Suárez Rosero v. Ecuador* [1997] IACtHR, para. 77; *Women Victims of Sexual Torture in Atenco v. Mexico* [2018] IACtHR, para. 251.

3. Legal Basis of Provisional Measures in the Inter-American Human Rights System

Article 63(2) of the American Convention expressly authorizes the Court to adopt provisional measures “in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons.”⁴⁴ The Inter-American Commission on Human Rights (Inter-American Commission, or IACHR) can also request provisional measures from the IACtHR, even when the case has not been submitted to the Court.⁴⁵

Provisional measures are both preventive and protective. They are preventive because they are issued to avoid violations of human rights.⁴⁶ Provisional measures prompt a State to act expeditiously to correct situations that may *prima facie* cause irreparable damage to individual rights. Related, when a State complies with provisional measures it will avoid being found legal responsible by an international mechanism because the State thereby corrects, in a timely manner, situations where violations of human rights could have occurred. Provisional measures are protective because they preserve the rights at issue during adjudication.⁴⁷ Due to their purpose and legal character, the adoption of provisional measures does not require the IACtHR to prejudge the merits of the case, nor does it represent a condemnation of the State.⁴⁸

⁴⁴ American Convention, Article 63(2). The procedures for provisional measures have been further developed in the Rules of Procedure and the Statute of the IACHR as well as those of the Inter-American Court of Human Rights.

⁴⁵ When the case is under consideration before the Inter-American Commission, the Inter-American Court may adopt provisional measures at the request of the IACHR. The IACtHR cannot adopt measures *ex officio* at this stage. See Article 63(2) American Convention.

⁴⁶ Eva Rieter and Karin Zwaan (eds.), *Urgency and Human Rights, The Protective Potential and Legitimacy of Interim Measures* (Asser Press 2021), 229.

⁴⁷ For an in-depth study of provisional measures, see Clara Burbano Herrera, *Provisional Measures in the Case Law of the Inter-American Court of Human Rights* (Intersentia 2010), 227; see also Clara Burbano Herrera and Yves Haecck, “Letting States off the Hook? The Paradox of the Legal Consequences following State Non-compliance with Provisional Measures in the Inter-American and European Human Rights Systems” [2010] 28(3) *Netherlands Quarterly of Human Rights* 332–360; Clara Burbano Herrera and Yves Haecck, “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 2018), 89–113; Antonio Cançado Trindade, “The Evolution of Provisional Measures Under the Case Law of the Inter-American Court” [2003] 24 *Human Rights Law Journal* 162–168; Felipe González, “Urgent Measures in the Inter-American Human Rights System” [2010] 7 *SUR* 51–73; Jo M. Pasqualucci, “Medidas provisionales en la Corte Interamericana de Derechos Humanos: una comparación con la Corte Internacional de Justicia y la Corte Europea de Derechos Humanos” [1994] 19 *Revista IIDH* 47–112; Eva Rieter, *Preventing Irreparable Harm: Provisional Measures In International Human Rights Adjudication* (Intersentia 2010), 1200.

⁴⁸ The Inter-American Court can order provisional measures in matters concerning States that have ratified the American Convention and accepted the IACtHR’s contentious jurisdiction. As of 2019, only twenty-three of the thirty-five Member States of the Organization of American States have ratified the American Convention, and of these, only twenty have accepted the contentious jurisdiction of the Inter-American Court.

Provisional measures can be adopted in urgent situations involving serious danger, as is the case for harsh detention conditions that present an imminent risk to the right to life, the right to personal integrity, or the right to health.⁴⁹ In response to the terrible conditions of detention in some prisons in the Americas, the Inter-American Court has issued provisional measures to protect both individuals and groups of persons deprived of their liberty. Provisional measures have protected clearly identified persons, such as sick detainees and detainees condemned to death, as well as large groups up to and including all inmates in some prisons.⁵⁰

Due to the urgency of the situation, the Inter-American Court responds to requests for provisional measures quickly. Sometimes the IACtHR adopts provisional measures on the same day it receives the request.⁵¹ Although, by definition, the provisional measures ordered by the Court are temporary, in practice some provisional measures have remained in place for years. These measures last because cases with which they are associated are so grave that, in spite of the implementation of certain measures by State authorities, the situation of extreme gravity is not resolved. It is thus difficult to determine in advance how long the provisional measures will be in force. Some provisional measures have remained in place for less than a year, while others have been in force for more than ten years.⁵²

4. Transformative Provisional Measures: Toward a Material Impact

The term *transformative provisional measures* has not previously been used by international courts or scholars, but we would like to introduce and use it in this

⁴⁹ *Wong Ho Wing v. Peru* [2006] IACtHR, and *Boyce and Joseph v. Barbados* [2007] IACtHR.

⁵⁰ See, e.g., *Criminal Institute Plácido de Sá Carvalho v. Brazil* [2018] IACtHR; *Curado Complex (in Recife) v. Brazil* [2016] IACtHR; *Inmates in the Urso Branco Prison v. Brazil* [2002] IACHR.

⁵¹ In the *Boyce and Joseph v. Barbados* case, the Inter-American Court granted provisional measures to protect four individuals who had been sentenced to death. The orders for execution had already been read out and the executions were scheduled four days after the request. Due to the urgency of the matter, the IACtHR issued the provisional measures on the same day that they were requested. See *Boyce and Joseph v. Barbados* [2004] IACtHR, para. 4, decides para. 1. The Inter-American Court's time frame depends on the circumstances of the case. See Clara Burbano Herrera, *Provisional Measures in the Case Law of the Inter-American Court of Human Rights* (Intersentia 2010), 96.

⁵² For example, in the *Matter of Certain Venezuelan Prisons*, the provisional measures that were adopted in 2006 have been maintained through 2020. See *Matter of Certain Venezuelan Prisons v. Venezuela* [2007] IACtHR and Order November 13, 2015. Similarly, provisional measures were adopted in 2002 to protect the inmates in the Urso Branco Prison in Brazil, and they were only lifted in 2011. See *Inmates in the Urso Branco Prison v. Brazil* [2002] IACtHR and Order August 25, 2011. Provisional measures were also adopted to protect Humberto Prado in 2009, and they are still maintained in 2020. See *Matters of Certain Penitentiary Centers of Venezuela. Humberto Prado. Mariana Sánchez Ortiz and family v. Venezuela* [2020] IACtHR, para. 3.

context. We define transformative provisional measures as provisional measures that have the following characteristics:⁵³ (i) they target structural problems, (ii) they aim to protect several persons in situations of extreme gravity and urgency, and (iii) they contain orders that must be complied with by more than one State entity. Transformative provisional measures aim to protect the rights of several people who are collectively in danger while also preventing human rights violations. Transformative provisional measures arise out of structural problems, that is, situations in which State authorities have consistently failed to respect, protect, and fulfill the rights of historically marginalized groups. As in Claudio Nash and Constanza Núñez's research on structural judgments, in this context, cultural norms maintain dominant political and legal structures and obscure the experiences of vulnerable groups.⁵⁴ Finally, coordinated action and participation of various State authorities is required to comply with transformative provisional measures. The human rights situation cannot be addressed with a single provisional measure targeting a single authority or requesting a single public policy, because a complex institutional framework has generated, enabled, and perpetuated the structural problems involved.⁵⁵

The conditions of detention in some Latin American prisons illustrate structural problems which transformative provisional measures can address and potentially alleviate. As reports and decisions adopted by the UN Special Rapporteurs and regional human rights mechanisms reveal, some Latin American prisons do not comply with the minimum international human rights standards.⁵⁶ These deplorable detention conditions are not the result of isolated

⁵³ Clara Burbano Herrera, Yves Haeck, and Alessandra Cuppini, "Transformative Provisional Measures and Prisons in the Americas: Protect the Invisible," in Clara Burbano Herrera and Yves Haeck (eds.), *Human Rights Behind Bars. Ius Gentium: Comparative Perspectives on Law and Justice*, vol. 103 (Springer 2022), 146 ff.

⁵⁴ According to Nash and Núñez, there are two reasons for State inaction: (a) States that do not act for ideological reasons, for which the establishment of fundamental rights has not been sufficient to mobilize internal political decisions; and (b) States that do not have the capacity to act because they do not have territorial control or economic resources, or are captured by interest groups. See Claudio Nash and Constanza Nunez, "Sentencias Estructurales Momento de Evaluacion, Sobre los Derechos Sociales" [2015] *Revista de Ciencias Sociales (Volumen Monografico Extraordinario)*, 267–289. The authors refer to Jonathan Di John, "Conceptualización de las causas y consecuencias de los Estados fallidos: una reseña crítica de la literatura" [2010] 37 *Revista de Estudios Sociales* 46–86; Daniel Kaufmann et al., *Captura del Estado, Corrupción, e Influencia en la Transición, Trabajo de Investigación de Políticas* (Banco Mundial 2000), 1–39.

⁵⁵ *Ibid.*, Nash and Nunez, 284.

⁵⁶ See, for example, Preliminary observations and recommendations, UN Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, Mr. Nils Melzer on the official visit to Argentina, April 9–20, 2018: the Rapporteur mentions that the conditions of detention in Argentina severely contravene international standards and are incompatible with human dignity, <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22974&LangID=E>> (accessed November 10, 2021). See also UN Report of the Special Rapporteur on torture and

incidents. They are instead the consequence of enduring, systemic problems with prison systems in the region.

Structural problems in prisons affect detainees collectively and have prompted them join together in their requests for provisional measures from the IACtHR. These requests for provisional measures enable detainees to demand that the State addresses detention conditions. The Inter-American Court similarly aims, when it responds to these requests with orders of provisional measures, to prompt the State toward the fulfillment of its international commitment to respect the human dignity of persons deprived of liberty. When State authorities implement the provisional measures ordered by the IACtHR, these measures are shown to be a legal (normative) tool and not a mere formality. The Inter-American Court also issues orders that not only seek to protect the detainees who made the request but also to transform detention conditions more broadly.

5. Detention Conditions of Persons Deprived of Their Liberty in Latin America through the Lens of Transformative Provisional Measures

For decades, the treatment of the prison populations in some Latin American countries, and in Brazil in particular, generally has been degrading and inhumane. In spite of Latin American countries' tradition of espousing human rights rhetoric in their engagement with the international community and even in spite of domestic legislation incorporating their international commitments to rights, State authorities often fail to respect, protect, and fulfill individuals' rights to equality and dignity of individuals. For example, States sometimes act as though the right to dignity belongs not to all individuals, but only to deserving individuals, among whom they do not include persons deprived of liberty.

Several Latin American prisons have structural problems that affect their entire populations. When detainees from these prisons have requested provisional measures, the ones the Inter-American Court has granted have been transformative. The IACtHR sees prisoners as a group that is at risk of human rights violations. These risks generally concern critical overcrowding, high levels of violence, lack of control by prison authorities, insalubrity, spread of contagious

other cruel, inhuman, or degrading treatment or punishment on his mission to Brazil, January 26, 2016, <<https://digitallibrary.un.org/record/831519?ln=en#record-files-collapse-header>> (accessed November 10, 2021); UN Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, Juan E. Mendez. Follow-up to the recommendations made by the Special Rapporteur to previous country visits (with regard to Uruguay), February 28, 2013, paras. 80–81, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53.Add.3_ES.pdf> (accessed November 19, 2022).

infections, lack of access to health services, and death.⁵⁷ Several examples show the terrible conditions of prisons in Brazil. For example, in the case of the *Penitentiary Complex of Curado (Brazil)*, the Inter-American Court found that detention conditions had not improved between the time it had ordered an initial set of provisional measures in 2014 and the time it revisited the situation in 2018. The IACtHR observed that the prison remained overcrowded, with a density exceeding 200 percent.⁵⁸ Similarly, the Inter-American Commission granted precautionary measures in the case of the *Inmates at the Polinter Police Station in Rio de Janeiro (Brazil)*, where 1,000 detainees, including young offenders, were held even though the police station had a capacity of only 205 persons.⁵⁹ In the case of the *Criminal Institute of Plácido de Sá Carvalho (Brazil)*, the prison had a capacity of 1,699, but contained 3,820 detainees.⁶⁰ In the case of the *Urso Branco Prison (Brazil)*, the IACHR granted precautionary measures responding not only to the terrible detention conditions but also to the conflicts among the prisoners as well as a massacre resulting in the deaths of over 30 prisoners.⁶¹

Children deprived of liberty have also faced situations of extreme danger in Brazilian prisons.⁶² Children are particularly vulnerable to violence in penitentiary circumstances. As a result, the Inter-American Court has granted provisional measures to protect all the children imprisoned in the case of the *Socio-Educational Internment Facility (Brazil)*⁶³ and the case of *Children and Teenagers Deprived of Liberty in the “Complexo de Tatuapé” of FEBEM (Brazil)*.⁶⁴ The Inter-American Commission had previously issued precautionary measures in the *Complexo de Tatuapé* case following allegations of violent acts, including

⁵⁷ *Criminal Institute of Plácido de Sá Carvalho v. Brazil* [2018] IACtHR, paras. 3, 37; *Detainees at Toussaint Louverture Police Station in Gonaïves v. Haiti* [2008] IACHR, 144/07; *Penitentiary Services Buenos Aires Province v. Argentina* [2012] IACHR, 104/12.

⁵⁸ *Penitentiary Complex of Curado v. Brazil* [2018] IACtHR, paras. 80–81. See also *Penitentiary Complex of Curado v. Brazil* [2014, 2015, 2016, 2017] IACtHR.

⁵⁹ *Men deprived of freedom in the cells located in the basement of Polinter Police District in Rio de Janeiro v. Brazil* [2005] IACHR.

⁶⁰ *Criminal Institute Plácido de Sá Carvalho v. Brazil* [2018] IACtHR, para. 17.

⁶¹ The forty-seven survivors were at risk of being killed. See *Inmates in the Urso Branco Prison v. Brazil* [2002] IACHR.

⁶² The American Declaration of the Rights and Duties of Man and the American Convention provide for the protection of children but do not define the term “child.” The Inter-American Court and Inter-American Commission have established that the definition of a child is based on Article 1 of the UN Convention on the Rights of the Child. As such, “child” refers to any person who has not yet turned eighteen years of age. See IACtHR, *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02, August 28, 2002, para. 42; *Villagran Morales (Street Children) v. Guatemala* [1999] IACHR, para. 188; *Bulacio v. Argentina* [2003] IACtHR, para. 133.

⁶³ *Unidade de Internação Socioeducativa (la Unidad o la UNIS) v. Brazil* [2011, 2012, 2013] IACtHR. See also the Resolutions adopted by the President of the IACtHR on September 26, 2014, June 23, 2015, and November 15, 2017.

⁶⁴ The Court also ordered the State to protect the lives of all of the individuals within the compound. *Matter of Children and Adolescents Deprived of Liberty in the “Complexo do Tatuapé” of FEBEM v. Brazil* [2006] IACtHR.

the death of Roni César de Souza.⁶⁵ A continuous lack of security and control by the prison staff showed that the State had not satisfactorily fulfilled its obligation to prevent attacks against the life and personal integrity of imprisoned children.⁶⁶ Since the situation did not improve and the children faced increasing dangers, the Inter-American Court adopted provisional measures in 2005. The transformative provisional measures adopted by the Court in this case have remained in place through 2020.⁶⁷

The problems with the Brazilian prison system have existed for decades. Overcrowding in the prison system dates back to at least the beginning of the nineteenth century.⁶⁸ Additionally, at the Twelfth UN Congress on Crime Prevention and Criminal Justice in 2010, the President of the Supreme Federal Court of Brazil said that Brazil's "prison system is on the brink of total collapse."⁶⁹

Similar problems to those already described in Brazil can be found in other Latin American countries, including Argentina, Colombia, Honduras, Guatemala, and Venezuela. The Inter-American Court has also granted transformative provisional measures in response to requests from persons deprived of liberty in these countries. The petitioners have alleged deplorable prison conditions related to violence and overcrowding. One consequence of overcrowding is that it becomes difficult to separate inmates by gender, age, or the seriousness of their crimes. In some cases, a lack of separation between pre-trial and convicted detainees,⁷⁰ members of armed groups and common prisoners,⁷¹ members of different armed groups (guerrilla and paramilitary),⁷² children and adults,⁷³ non-LGBTIQ+ and LGBTIQ+ detainees,⁷⁴ non-elderly and elderly detainees,⁷⁵ and able-bodied detainees and detainees with a disability has resulted in conflict.⁷⁶

⁶⁵ *Ibid.*, para. 7.

⁶⁶ *Ibid.*, para. 6.

⁶⁷ *Ibid.*, and IACHR, 2005 Annual Report, paras. 41–42. See also *Matter of Children and Adolescents Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM v. Brazil* [2005, 2006, 2007, 2008] IACtHR.

⁶⁸ Clarissa Nunes Maia et al. (eds.), *História das prisões no Brasil*, vols. I and II (Rocco 2009).

⁶⁹ Website Consultor jurídico, <<https://www.conjur.com.br/2010-abr-15/deficiencia-sistema-carcerario-beira-falencia-total-peluso>> (accessed January 2, 2022).

⁷⁰ *Convicted and tried inmates committed to the Penitentiary of Mendoza and its offices v. Argentina* [2004] IACHR.

⁷¹ *108 inmates in the Maximum Security Prison at Kilometer 14 v. Colombia* [2004] IACHR.

⁷² *Political prisoners in buildings 1 and 2 of the National Model Prison in Bogotá v. Colombia, Precautionary Measures* [2000] IACHR ("On April 27, 2000, prisoners belonging to paramilitary groups detained in cellblock 5 launched a violent attack on prisoners in cellblock 4, killing 47 inmates and injuring 17 others").

⁷³ *Minors in the San Pedro de Sula Prison v. Honduras* [1996] IACHR.

⁷⁴ *Criminal Institute Plácido de Sá Carvalho v. Brazil* [2018] IACtHR, para. 48.

⁷⁵ *Ibid.*

⁷⁶ *Curado Complex (in Recife) v. Brazil* [2016] IACtHR, para. 4.

In the case of the *Matters of Certain Venezuelan Penitentiary Centres (Venezuela)*,⁷⁷ for which the Inter-American Court ordered comprehensive provisional measures to a large number of beneficiaries, the IACtHR started to engage with the conditions of detention in a number of prisons in Venezuela.⁷⁸ In its orders, the Inter-American Court required the State to take immediate steps to ensure that no more detainees would be treated inhumanely or killed. At the same time, the IACtHR ordered more general measures, such as the separation of pre-trial and convicted detainees, healthcare to all persons deprived of liberty, reduction of overcrowding, adequately trained staff, and prison conditions that conform with applicable international standards. As of the end of 2020, the Inter-American Court is still monitoring this case and has observed the persistence of violent acts culminating in the deaths of persons deprived of liberty.⁷⁹

Several factors contribute to the prison crisis in some Latin American countries. Although describing all of these problems comprehensively is beyond the scope of this chapter, one factor appears to be a tendency to expand the use of criminal law, incarceration, and preventive detention in the face of various societal issues.⁸⁰ For example, from 2000 to 2020, the incarcerated population increased by three times in Colombia, five times in Brazil, and six times in El Salvador.⁸¹ Politicians in power have responded to the popular demand for

⁷⁷ On September 6, 2012, the Inter-American Court decided to combine the processing of some requests and established that the joint provisional measures would from then on be known as the “Matters of Certain Venezuelan Prisons.” The Orders of the IACtHR, of November 24, 2009, in *Monagas Judicial Detention Center (“La Pica”) v. Venezuela, the Penitentiary Center of the Capital Region Yare I and II (Yare Prison) v. Venezuela, the Penitentiary Center of the Central Occidental Region (Uribana Prison) v. Venezuela, the Capital Detention Center El Rodeo I and II v. Venezuela* of May 15, 2011, in the matters of the Penitentiary Center of Aragua “Tocorón Prison” and of the Ciudad Bolívar Judicial Detention Center “Vista Hermosa Prison,” as well as of September 6, 2012, the Penitentiary Center of the Andean Region. See *Certain Penitentiary Centers of Venezuela, Penitenciaría Center of the Central Occidental Region (Uribana Prison) v. Venezuela* [2013] IACtHR and Order November 13, 2015.

⁷⁸ On February 4, 2020, members of the Inter-American Commission were denied entry into Venezuela. The Commissioners wished to conduct a visit *in loco* in order to have direct contact with the beneficiaries of precautionary measures. See <https://www.oas.org/en/IACtHR/media_center/PReleases/2020/020.asp> (accessed January 2, 2022).

⁷⁹ Venezuela denounced the American Convention on September 10, 2012.

⁸⁰ For studies related to prison problems in the Americas, see Ely Aharonson, “Pro-Minority. Criminalization and the transformation of visions of citizenship in contemporary liberal democracies: A critique” [2010] 13 *New Criminal Law Review: An International and Interdisciplinary Journal* 286–308; Gerardo Ramírez Urosa, “Algunas reflexiones en relación con el ‘Derecho penal del enemigo’ dentro del contexto nacional” [2006] 61 *RDFM*; Eugenio Raúl Zaffaroni, *El enemigo en el derecho penal* (Dykinson 2006), 198; Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2008), 248; David W. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2001), 336; John Barry, “From drug war to dirty war: Plan Colombia and the US role in human rights violations in Colombia” [2002] 12 *Transnational Law & Contemporary Problems* 161.

⁸¹ International Centre for Prison Studies, *World Prison Brief*, Institute for Crime and Policy Research, <<https://www.prisonstudies.org/world-prison-brief-data>> (accessed January 2, 2022); Mario Andrés Torres and Libardo José Ariza, “Jueces y prisiones en la era del encarcelamiento

security with repressive measures, such as harsher punishments and excessive and prolonged use of pre-trial detention.⁸² These measures are ostensibly geared to prevent crimes, but, in the long term, the use of prison and preventive detention does not solve the problem of insecurity outside and inside prisons. In spite of their ineffectiveness, these measures enjoy great popularity with voters and strengthen the legitimacy of governments.

A repressive policy of criminalization results in the exclusionary treatment of the prison population, which becomes marginalized and stigmatized. This policy casts detainees as antisocial and inhuman. As a result, the interest of society is not aroused by the indignities, such as overcrowding, the many persons deprived of liberty face. The excessive and prolonged use of incarceration and pre-trial detention contributes greatly to overcrowding and its negative consequences. Preventive detention may also violate the principles of presumption of innocence, legality, necessity, and proportionality, as well as the fundamental principle that criminal law and criminal punishments, especially imprisonment, should be a last resort.⁸³ Another factor that contributes to the failure of detention centers to meet minimum international standards is that increases in prison populations are not accompanied by proportional increases in prison systems' budgets.⁸⁴

6. Case Study: Criminal Institute of *Plácido de Sá Carvalho v. Brazil*

In 2017, the Inter-American Court granted transformative provisional measures to protect the life and integrity of all persons deprived of liberty at the Criminal Institute of Plácido de Sá Carvalho.⁸⁵ State authorities told the IACtHR that the challenges faced by the Institute were not unique but were instead shared by the entire penitentiary system of the State of Rio de Janeiro.⁸⁶

masivo," in Jonathan Simon, Libardo José Ariza, and Mario Andrés Torres (eds.), *Encarcelamiento masivo, Derecho, raza y castigo* (Siglo del Hombre Editores 2020), 268.

⁸² 6.3 average in the region, IACHR Report 2017 "Measures to Reduce Pretrial Detention," 22.

⁸³ Clara Burbano Herrera, Yves Haeck, and Alessandra Cuppini, "Transformative Provisional Measures and Prisons in the Americas: Protect the Invisible," in Clara Burbano Herrera and Yves Haeck, *Human Rights Behind Bars. Ius Gentium: Comparative Perspectives on Law and Justice*, vol. 103 (Springer 2022), 148.

⁸⁴ DeJusticia, "Sistemas Sobrecargados, Leyes de drogas y cárceles en América Latina" [2010], <<https://www.dejusticia.org/publication/sistemas-sobrecargados-leyes-de-drogas-y-carceles-en-america-latina/>> (accessed January 2, 2022).

⁸⁵ *The Socio-Educational Internment Facility of the Penitentiary Complex of Curado, of the Penitentiary Complex of Pedrinhas and the Criminal Institute of Plácido de Sá Carvalho v. Brazil* [2017] IACtHR.

⁸⁶ *Criminal Institute of Plácido de Sa Carvalho v. Brazil* [2018] IACtHR, para. 3.

In the transformative provisional measures, the Inter-American Court ordered Brazil to reduce overcrowding,⁸⁷ assess the overall situation, and create a plan for the structural reform of the Institute. The IACtHR requested permission from the State to conduct an on-site visit to the Institute⁸⁸ and to organize a public hearing⁸⁹ to monitor the implementation of its provisional measures. In the months that followed, in spite of the provisional measures issued, the situation of extreme gravity persisted.⁹⁰ The detention facility was confronted with serious problems, including overpopulation, lack of medical care, and absent services. Additionally, fifty-six detainees had died within two years and, in most of these cases, the cause of death was unknown.⁹¹

Since the persons deprived of their liberty in the Institute remained in a situation of extreme danger even after it had granted an initial set of provisional measures, the Inter-American Court issued another order of provisional measures in 2018.⁹² The order showed that the IACtHR was aware it faced legal and practical limits, but also that it continued to seek concrete improvements in detention conditions. The Inter-American Court also noted that Brazil's prison crisis was not unique, comparing it to structural problems common to other prisons in the Americas. The IACtHR explained how the domestic courts of other States of the Organization of American States (OAS) and other international monitoring bodies had responded to prison crises and took into account domestic and international jurisprudence when designing provisional measures for the Institute.

In its 2018 order of transformative provisional measures, the Inter-American Court stated that the measures Brazilian authorities had adopted in 2017 had been ineffective.⁹³ The IACtHR emphasized that it was not enough for the State merely to adopt specific protection measures. In order to comply with its human rights obligations, the State must take effective action that generates positive results.⁹⁴ The Inter-American Court analyzed the situation of persons deprived of their liberty in the Institute alongside the jurisprudence of three supreme or

⁸⁷ *The Socio-Educational Internment Facility, of the Penitentiary Complex of Curado, of the Penitentiary Complex of Pedrinhas and the Criminal Institute of Plácido de Sa Carvalho v. Brazil* [2018] IACtHR, para. 3 and Provisional Measures August 31, 2017, para. 28.

⁸⁸ *President of the IACtHR, Seventeen Persons Deprived of Liberty v. Nicaragua*, Urgent Measures May 21, 2019, paras. 18 and 19.

⁸⁹ *The Socio-Educational Internment Facility, of the Penitentiary Complex of Curado, of the Penitentiary Complex of Pedrinhas and the Criminal Institute Plácido de Sa Carvalho v. Brazil* [2017] IACtHR, para. 4; *President of the IACtHR, Seventeen Persons Deprived of Liberty v. Nicaragua*, Urgent Measures, May 21, 2019, paras. 18 and 19.

⁹⁰ *Criminal Institute of Plácido de Sá Carvalho v. Brazil* [2017] IACtHR, para. 3.

⁹¹ *Ibid.*, para. 5; and *Criminal Institute of Plácido de Sa Carvalho v. Brazil* [2018] IACtHR, para. 40.

⁹² *The Socio-Educational Internment Facility of the Penitentiary Complex of Curado, of the Penitentiary Complex of Pedrinhas and the Criminal Institute Plácido de Sá Carvalho v. Brazil* [2018] IACtHR, para. 1.

⁹³ *Ibid.*, para. 84.

⁹⁴ *Ibid.*, para. 63; *Criminal Institute Plácido de Sá Carvalho v. Brazil* [2017] IACtHR, para. 67.

constitutional courts of OAS States that had addressed similar situations, namely the Constitutional Court of Colombia,⁹⁵ the Supreme Court of the United States,⁹⁶ and the Supreme Federal Court of Brazil.⁹⁷ The IACtHR also took into account the jurisprudence of the European Court of Human Rights (European Court, or ECtHR);⁹⁸ Brazilian law⁹⁹ and policy;¹⁰⁰ the UN Standard Minimum Rules for the Treatment of Prisoners (“Mandela Rules”);¹⁰¹ and the IACHR’s Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.¹⁰²

The IACtHR refers extensively to the jurisprudence of the Colombian Constitutional Court for its finding that overcrowding is the first problem to be resolved in detention centers because of its terrible effects.¹⁰³ According to the Colombian Constitutional Court, overcrowding leads to increased health risks and the spread of diseases and infections, thus adding strain to an already overburdened healthcare system.¹⁰⁴ Overcrowding also increases the risk of violent conflicts and decreases the capacity of prison guards to maintain control. The Colombian Constitutional Court understands prison overpopulation to result from excessive incarceration. It has determined that the overuse of criminal law and imprisonment is unsustainable in a social and democratic State abiding by the rule of law due to the costs it imposes on fundamental rights, social cohesion, and scarce public resources.¹⁰⁵

A solution to overcrowding, according to the Constitutional Court of Colombia, must strike a balance between individuals’ right to due process of law, on the one hand, and a State’s obligations to prevent crimes and respect for judicial decisions, on the other.¹⁰⁶ Overcrowding must be resolved with prudent judicial policies and individualized¹⁰⁷ (as opposed to

⁹⁵ *Criminal Institute of Plácido de Sá Carvalho v. Brazil* [2018] IACtHR, paras. 98–102.

⁹⁶ *Ibid.*, paras. 103–107; *Edmund G. Brown Jr., Governor of California, et al., Appellants v. Marciano Plata et al.*, Supreme Court of the United States, No. 09–1233, On Appeal from the US District Courts for the Eastern District and the Northern District of California.

⁹⁷ *Criminal Institute of Plácido de Sá Carvalho v. Brazil* [2018] IACtHR, paras. 113–117.

⁹⁸ *Ibid.*, paras. 108–112, referring to *Torregiani et al. v. Italia* [2013] ECtHR, para. 65.

⁹⁹ Resolutions N14/1994, and 09/2011 of the CNPCP; Ley de Ejecución Penal (Ley No. 7.210/84); Ministerio de Salud y Ministerio de Justicia, Portaria Interministerial, No. 1777, September 9, 2003; Consejo Nacional de Política Criminal y Penitenciaria (CNPCP), Resolutions No. 04/2014, July 18, 2014, and 02/2015, October 29, 2015; Consejo Nacional de Política Criminal y Penitenciaria (CNPCP).

¹⁰⁰ *Criminal Institute of Plácido de Sá Carvalho v. Brazil* [2018] IACtHR, paras. 8–13. The State submitted: “Diagnostico Tecnico y Plan de Contingencia para el Complejo de Curado.”

¹⁰¹ The UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), adopted by the United Nations, General Assembly in Resolution A/RES/70/175, May 18–22, 2015, Rules 19–21.

¹⁰² IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, OAS/Ser.L/V/II.131 Doc. 38, March 13, 2000, Principle XII.

¹⁰³ *Criminal Institute of Plácido de Sá Carvalho v. Brazil* [2018] IACtHR, paras. 98–102.

¹⁰⁴ *Ibid.*, para. 98.

¹⁰⁵ *Ibid.*, paras. 98–102.

¹⁰⁶ *Ibid.*, para. 96.

¹⁰⁷ *Ibid.*, para. 98.

automatic)¹⁰⁸ decisions to release detainees.¹⁰⁹ Relatedly, the State has to implement policies that facilitate these releases.¹¹⁰ The terrible conditions in the detention centers do not create a right of automatic release, since this would prevent the State from considering its obligations to the victims of the prisoners' crimes as well as to society.¹¹¹

The Constitutional Court of Colombia emphasizes that the solution to the problem of overcrowding not only requires the construction of new prisons but can also be addressed by reducing the number of people deprived of liberty.¹¹² The Court notes that there are persons who remain in prison despite there being constitutional and legal reasons for them to be released, such as age, serious terminal illness, or requests for release that have yet to be processed.¹¹³ According to the Colombian Constitutional Court, the continued imprisonment of individuals who could be released¹¹⁴ signals that building more prisons will not solve the problem of prison overpopulation.¹¹⁵

According to the IACtHR,¹¹⁶ the most significant judgment concerning detention conditions in the Americas was issued by the Supreme Court of the United States in 2011 in response to grave rights violations in the Californian penitentiary system.¹¹⁷ The California prison population had a 200 percent density during at least eleven years, with conditions of overcrowding similar to those of the Institute.¹¹⁸ In that context, two class actions were submitted to the Federal District Courts: the *Coleman v. Brown* case, brought on behalf of prisoners with serious mental disorders, and the *Plata v. Brown* case, brought on behalf of prisoners with serious medical conditions.¹¹⁹ The District Court ordered California to reduce its prison population to 137 percent over the course of two years. The State of California appealed the case to the Supreme Court of the United States. The majority (five to four) in the case said:

¹⁰⁸ *Ibid.*, para. 100.

¹⁰⁹ *Ibid.*, para. 99.

¹¹⁰ *Ibid.*, para. 101.

¹¹¹ *Ibid.*, para. 101.

¹¹² *Ibid.*, para. 99.

¹¹³ *Ibid.*, para. 98.

¹¹⁴ *Ibid.* Individuals who should not be in custody include those detained without charge, those arbitrarily detained, and those detained for offenses that should not be criminalized. See Subcommittee on Prevention of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic (adopted on March 25, 2020), <<https://www.ohchr.org/Documents/HRBodies/OPCAT/AdviceStatePartiesCoronavirusPandemic2020.pdf>> (accessed January 2, 2022).

¹¹⁵ *Ibid.*, para. 96.

¹¹⁶ *Ibid.*, para. 103.

¹¹⁷ *Edmund G. Brown Jr., Governor of California, et al.; Appellants v. Marciano Plata et al.* US Supreme Court, No. 09–1233, On Appeal from the US District Courts for the Eastern District and the Northern District of California.

¹¹⁸ *Criminal Institute of Plácido de Sa Carvalho v. Brazil* [2018] IACtHR, para. 104.

¹¹⁹ *Ibid.*

For years, the medical and mental health care provided by California prisons has not met the minimum constitutional requirements and has not met the basic health needs of inmates. Unnecessary suffering and death have been well-documented. Throughout the years during which this litigation has been pending, no other sufficient resources have been found. Efforts to remedy the rape have been thwarted by severe overcrowding in the California prison system. The short-term benefits of care delivery have been eroded by the long-term effects of severe and widespread overcrowding.¹²⁰

The IACtHR noted that the US Supreme Court also indicated that overcrowding was the primary cause of severe and illegal mistreatment of prisoners as a result of inadequate medical care. The Supreme Court held that, in order to protect the prisoners' constitutional rights, the state was required to limit the prison population. Additionally, in the case, many experts stated that overcrowding was the main cause of constitutional violations.¹²¹

The IACtHR also considered judgments from the European Court and the Supreme Federal Court of Brazil. In relation to the ECtHR, the Inter-American Court mentioned that in the case of *Torregiani et al. v. Italy*, the European Court determined that the detention conditions were incompatible with the European Convention on Human Rights (European Convention, or ECHR). The ECtHR ordered Italy to create a procedure with preventive and compensatory effects, as well as to guarantee an effective remedy for violations of the European Convention.¹²² In relation to Brazil, the Inter-American Court discussed a case¹²³ concerning overcrowding.¹²⁴ In this case, the Supreme Federal Court of Brazil ruled that, in contexts of overcrowding and overpopulation, judges should consider ordering early release, probation, or house arrest.

Returning to the facts of the case before it, the *Criminal Institute of Plácido de Sá Carvalho v. Brazil*, the Inter-American Court determined that a situation

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² *Torregiani and others v. Italy* [2013] ECtHR, para. 88 (“In general, these data reveal that the violation of the right of applicants to benefit from adequate detention conditions is not a consequence of isolated incidents, but is due to a systemic problem resulting from chronic malfunction of the Italian prison system, which affected and may still interest many people in the future [. . .]. According to the European Court, the situation established in this case is therefore constitutive of a practice incompatible with the European Convention on Human Rights”). See *Criminal Institute of Plácido de Sá Carvalho v. Brazil*, Provisional Measures November 22, 2018, Considering para. 106.

¹²³ Súmula Vinculante No. 56 of the Supreme Federal Court of Brazil, 2016.

¹²⁴ This decision is binding and mandatory for all judges, courts, and administrative entities. It can only be modified by the Supreme Federal Court of Brazil itself. *Criminal Institute of Plácido de Sá Carvalho v. Brazil* [2018] IACtHR, para. 110.

that risked causing irreparable damage to the personal integrity and life of the beneficiaries of the provisional measures persisted in the prison and required the IACtHR to order specific measures to preserve these rights.¹²⁵ According to the Inter-American Court, reducing the prison population of the Institute was the only way to end this situation of risk. The IACtHR also stated that the Supreme Federal Court of Brazil's binding judgment on this matter¹²⁶ applied to the prisoners in the Institute.¹²⁷ As such, judges are required to consider early release, probation, or house arrest for these prisoners.¹²⁸ Additionally, following the reasoning of the Constitutional Court of Colombia, the Inter-American Court stated that if, hypothetically, the conditions in the Institute violated ACHR Article 5(2), this violation could not be remedied through the construction of new prisons because, first, the State had no immediate plans to construct new prisons and, second, the State itself had claimed it lacked the resources to do so. The IACtHR also stated that the situation could not be resolved through transferring prisoners from the Institute to other prisons, since the other prisons did not have the capacity to receive more prisoners and would themselves be overcrowded.¹²⁹ The Inter-American Court thus determined that "the only way to stop the continuation of the situation that will eventually violate the American Convention is to seek to reduce the population of the Curado Complex."¹³⁰ This was the first time the IACtHR had asserted that building new detention centers or transferring detainees would not solve the problem at hand.

The Inter-American Court also stated that the poor conditions of detention make unlawful deprivations of liberty that might otherwise be lawful. Detainees are experiencing more harm than is inherent in a lawful deprivation of liberty. Given this, the IACtHR suggested that prisoners' sentences be reduced to account for the additional harm they undergo.¹³¹ In the case of the Institute, the Inter-American Court reached the unprecedented conclusion that, given that the prison had a population density double its capacity, every day of deprivation of liberty in the Institute must be counted twice toward the completion of each prisoners' sentence. The IACtHR also did not exclude the possibility of early release, probation, and house arrest, alternatives

¹²⁵ *Ibid.*, para. 116.

¹²⁶ Súmula Vinculante No. 56 of the Supreme Federal Court of Brazil, 2016.

¹²⁷ *Criminal Institute of Plácido de Sá Carvalho v. Brazil* [2018] IACtHR, paras. 110–114.

¹²⁸ *Ibid.*, para. 115; Súmula Vinculante No. 56 of the Supreme Federal Court of Brazil, 2016.

¹²⁹ *Ibid.*, paras. 115–116.

¹³⁰ *Ibid.*, para. 120.

¹³¹ *Ibid.*, para. 97.

mentioned by the Supreme Federal Court of Brazil in the 2016 case discussed previously.¹³²

According to the Inter-American Court, the situation at the Institute could also lead to a violation of Article 5(6) ACHR, since terrible detention conditions impede the reform and rehabilitation of individuals deprived of their liberty. Degrading conditions affect prisoners' self-esteem.¹³³ The fact that the Institute is controlled by dominant violent groups also results in the humiliation of detainees, a serious deterioration of their self-perception and self-esteem, and a high risk of recidivism.¹³⁴

In sum, the Inter-American Court has determined that the conditions at the Institute make the punishment degrading¹³⁵ and that when the conditions in a prison deteriorate to this point as a result of overpopulation and its effects, the deprivation of liberty itself becomes unlawful.¹³⁶ This determination could be seen as the IACtHR prejudging the merits of the case. It could also be seen, however, as the Court searching for a way to order transformative provisional measures that will result in effective protection for detainees who live in deplorable conditions and have done so, in some cases, for many years. Concretely, the Inter-American Court ordered the measures listed in Table I.8.1.¹³⁷

The Inter-American Court clarified that the potential release of prisoners convicted of, or charged with, crimes against life or physical integrity and sex crimes needed to be handled more carefully.¹³⁸ These cases require a technical criminological examination or examination of the cause of the detainees' conduct performed by experts.¹³⁹ The IACtHR also emphasized that its jurisdiction in this case was limited to the Institute and the persons deprived of liberty there, so the order of provisional measures does not have an *erga omnes* effect.¹⁴⁰

¹³² *Criminal Institute of Plácido de Sá Carvalho v. Brazil* [2018] IACtHR, enacting paras. 2, 4. See also the case of *Milagro Sala v. Argentina*, in which the Inter-American Court requested that the State replace Mrs. Sala's preventive detention with the alternative measure of house arrest to be carried out at her residence or the place where she usually lives, or by any other alternative measure to pretrial detention that is less restrictive of one's rights than house arrest. *Milagro Sala v. Argentina* [2017] IACtHR, para. 33.

¹³³ *Criminal Institute of Plácido de Sá Carvalho v. Brazil* [2018] IACtHR, para. 87.

¹³⁴ *Ibid.*, paras. 87–88.

¹³⁵ *Ibid.*, para. 87.

¹³⁶ *Ibid.*, para. 92.

¹³⁷ Table elaborated by the authors.

¹³⁸ *Ibid.*, para. 131.

¹³⁹ *Ibid.*, para. 133.

¹⁴⁰ *Ibid.*, paras. 121–122.

Table I.8.1 Measures ordered by the Inter-American Court of Human Rights in the case *Criminal Institute of Plácido de Sá Carvalho v. Brazil* [2018] IACtHR.

Structural problem		Measure ordered
Deaths	High number of deaths: 56 deaths in two years.	To take measures to prevent more deaths and to report what these specific measures are.
	Lack of information concerning the causes of the deaths. ^a Mortality higher than the free population. One doctor for over 3,000 prisoners.	To investigate the causes of the deaths and to inform the next of kin ^b and the IACtHR.
Infrastructure	Absence of a fire prevention and response plan.	To adapt the infrastructure conditions to those minimally necessary to provide a decent life. ^c
	Nine people responsible for the safety of 3,800 detainees.	To remodel all the prison pavilions. To install emergency lighting, a fire detection system, and an alarm system.
	Insufficient provision of mattresses, uniforms, footwear, bedding, and towels to detainees.	To implement the provisions of Law No. 7.210/84. ^d
	Absence of adequate lighting and ventilation. Physical insecurity due to unforeseen fires. Insufficient funds.	
Overcrowding	Overpopulation with approximate density of 200%.	To reduce the number of prisoners through counting each day of deprivation of liberty twice.
	Overcrowding in cells.	To adjust the number of guards so it would be proportionate to the number of persons deprived of liberty.
	Personal and physical insecurity resulting from the disproportionate ratio of personnel to prisoners. ^e	To subject persons deprived of their liberty for crimes against life or physical integrity, as well as sex crimes, to a criminological technical exam conducted by psychologists and social workers.
	Control of internal order in the hands of the prisoners themselves. The most violent generally organized for survival or self-defense. Insufficient number of judges. Only seven judges in the State of Rio de Janeiro oversaw the completion of sentences of more than 50,000 individuals deprived of liberty. ^f	

^a Ibid., para. 61.^b Ibid., para. 62.^c Ibid., para. 68.^d Ibid., para. 69.^e Ibid., para. 79.^f Ibid., para. 72.

7. Concluding Remarks

Studying the IACtHR's transformative provisional measures concerning persons deprived of their liberty in Latin America reveals that countless individuals live in undignified conditions of detention that are incompatible with international human rights standards. The Inter-American Court is using these transformative provisional measures to prompt gStates to change decades-old policies and practices of criminalization and incarceration. The IACtHR's transformative provisional measures concerning detention centers also provide insight into a structural problem in Latin America, a prison crisis involving overcrowding, insalubrity, rapid spread of infections and diseases, high levels of violence, deaths, lack of control by State authorities, lack of access to medical services, lack of investigation and punishment, and a lack of funds.¹⁴¹

In its order of provisional measures in the case of the *Criminal Institute of Plácido de Sá Carvalho v. Brazil*, the Inter-American Court balances the right to dignified conditions of detention on the one hand, and States' obligation to punish those who commit crimes on the other. The IACtHR does not find that dire prison conditions create an automatic right to be released, but it does find that persons deprived of their liberty in such conditions undergo a harsher punishment than is inherent to a state of imprisonment and that their additional suffering must be taken into account by domestic judicial authorities. Judges can do this by reducing the length of prison sentences in proportion to the additional pain suffered by the detainees. In the case of the Institute, the Inter-American Court reasoned that since the population density of the prison had reached 200 percent (that is, the double of the prison's capacity), the suffering of detainees had also doubled and, as such, every day of deprivation of liberty should be counted twice. The IACtHR also clearly stated that in the case of Brazil and perhaps in the Americas as a whole, pre-trial detention is not the solution to criminality, and building more prisons or transferring detainees to other prisons or detention centers is not the solution to overcrowding.¹⁴²

To reach these conclusions, the Inter-American Court relied heavily on domestic jurisprudence, not only from Brazil but also from other OAS member States, as well as the jurisprudence of the European Court to detect a growing, global consensus about how to understand and solve the prison crisis.

¹⁴¹ Burbano Herrera and Haeck, "The Innovative Potential of Provisional Measures Resolutions for Detainee Rights in Latin America Through Dialogue Between the Inter-American Court and Other Courts," in Rieter and Zwaan, *Urgency and Human Rights, The Protective Potential and Legitimacy of Interim Measures* (2021), 242.

¹⁴² *Ibid.*, 243.