Transformative Provisional Measures and Prisons in the Americas: Protecting the Invisibles

Clara Burbano-Herrera* , Yves Haeck and Alessandra Cuppinni*****

Introduction

The incorporation of human rights into international and domestic legal instruments represents one of the great conquests of humanity.[1] There remains, however, a large gap between the nominal consecration of certain rights and their effective enjoyment, which raises questions as to what can be done so that rights are not simply rhetorical, and what can the international human rights protection systems do to avoid their violation. The purpose of provisional measures (thereafter: PM or measures) is precisely to close that gap.[2] These measures aim to guarantee the practical effectiveness of rights so that they are not just rhetorical.[3] In the end, what is most significant is the recognition that human rights are not only included on an international level and that States are internationally responsible in the event of their violation, but that all individuals believe that those rights will be protected before they are affected.[4]

The aim of this chapter is to analyse the role of PMs and, more specifically, the role of transformative PMs ordered by the Inter-American Court of Human Rights (thereafter: IACtHR

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[1] Some ideas of this chapter have been discussed in C. Burbano Herrera, and Y. Haeck, "The Use of Transformative Provisional Measures by the Inter-American Court of Human Rights: Towards a Material Impact." *Almost Magical Transformations on the Ground: How the Inter-American Human Rights System and Ius Constitutionale Commune Impact Latin-America*, edited by Armin von Bogdandy et al., Oxford University Press, 2021 (forthcoming).

* Clara Burbano-Herrera, Professor of Human Rights and Director of the Programme fort Studies on Human Rights in Context, Human Rights Centre, Ghent University (Belgium).

** Yves Haeck, Professor Human Rights and Director of the Programme fort Studies on Human Rights in Context, Human Rights Centre, Ghent University (Belgium). All internet sites were last accessed on 1 August 2021.

*** Alessandra Cuppini, Associate Lecturer European Union Law, the OU School of Law, The Open University (UK)

[2] In international human rights law, provisional measures are also often called 'interim measures', 'urgent measures', 'precautionary measures', 'conservatory measures', and 'immediate measures'. Provisional measures are contemplated in international human rights treaties or additional protocols, and/or in the rules of procedure of the respective human rights bodies. Five UN treaty bodies and two regional human rights courts explicitly received the power to grant PMs from their respective constituent treaty, namely the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) (Art 5 Optional Protocol to CEDAW), the Committee for the Protection of All Persons from Enforced Disappearance (CED Committee) (Art 31(4) CPED), the Committee on the Rights of the Child (CRC Committee) (Art 6(1) Optional Protocol to Convention on the Rights of the Child; the Committee on the Rights of Persons with Disabilities (CRPD Committee) (Art 4 Optional Protocol to the Convention on the Rights of Persons with Disabilities), the Committee on Economic, Social and Cultural Rights (CESCR) (Art 5 Optional Protocol to International Covenant on Economic, Social and Cultural Rights); the IACtHR (Art 63(2) American Convention on Human Rights, and the ACtHPR (Art 27(2) Protocol to the African Charter on Human and Peoples' Rights on the Establishment on an African Court on Human and Peoples' Rights). These powers are specified further in their respective rules of procedure. The remaining three relevant UN treaty bodies and four relevant regional human rights bodies have incorporated the power to grant urgent measures in their rules of procedure (RoP). It concerns the Human Rights Committee (HRCttee) (Rule 92 HRCttee RoP), UN Committee Against Torture (Rule 114 CAT RoP), the Committee on the Elimination of Racial Discrimination (CERD Committee) (Rule 94(3) CERD RoP), the ECtHR (Rule 39 Rules of the Court), the ECSR (Rule 36 Rules of Procedure), the IACHR (Art 25 IACHR RoP), and the ACHPR (Rule 100 ACHPR RoP). Sometimes additional Guidelines (CESCR, *Guidelines* [2019]; CRC Committee, *Guidelines* [2019]) or a Practice Direction (ECtHR, *Practice Direction* [2003]) provide for further guidance.

[3] See C. Burbano Herrera, *Provisional Measures in the case law of the Inter-American Court of Human Rights*, Antwerp, Intersentia, 2010, p 1

[4] Ibid.

or the Court) to collectively protect persons deprived of liberty. We hold that given the degrading conditions in which many detainees are kept in some prisons in the Americas, PMs may play a transformative role in the prison context because they aim to change the reality in which persons deprived of liberty are living.[5] The orders given by the Court seek to collectively protect the detainees kept in deplorable conditions whilst at the same time using transformative PMs as an instrument for social change. The IACtHR activates the performance of the diverse powers of the State, articulating a response from PMs as a legal (normative-live) tool and not merely as a formal provision.

In doing so, special attention will be given to the transformative PMs adopted in Brazil in the *Instituto Penal Plácido de Sá Carvalho* (thereafter: the Institute or the *Instituto Penal Plácido*) in 2018. These PMs aim to protect the rights of 3,820 detainees kept in terrible conditions. This resolution is interesting to analyse because the Court goes beyond the traditional way of dealing with detention cases through PMs. The Court, in its resolution, balances the rights and principles in conflict: on the one hand, the right of society to punish those who commit crimes, and on the other hand, the right to be detained in conditions with dignity. Importantly, the Court establishes that it is not enough for the State to merely adopt specific protection measures, there must also be effective action with positive results. The IACtHR also establishes that when the prison's conditions put at risk the life or personal integrity of the persons deprived of liberty, then early release of the prisoner, his or her monitored liberty, or house arrest should be decided. Additionally, the Court holds that when detained persons are kept in horrific conditions, they are suffering more than they are supposed to suffer; the execution of the deprivation of liberty is being implemented in an illegal way and, therefore, every day of deprivation of liberty must be counted double.

This is a revolutionary and wide-ranging resolution that may eventually be considered as a benchmark for studies of PMs in international human rights law in the context of prisons. Furthermore, the particularities of this PM could open a debate about the legitimacy of the Court to intervene in public policy as well as a debate about its role and limits. In other words, it is not known whether this resolution can be considered as an appropriate form of using PMs to prevent human rights violations and protect detainees' human rights, as stipulated in Article 63(2) of the American Convention, and whether it will be completely complied with, somewhat neglected, or simply ignored by the Brazilian authorities.

To comply with the aim of this contribution, the remainder of the text is divided into five parts. In the first part, the legal aspects and the concept of transformative PMs are explained. The second and third part analyse the current conditions in which detainees are kept in some Latin-American countries, and in Brazil in particular. These two parts examine the detention conditions through the lens of transformative PMs ordered by the IACtHR. In the fourth part, the attention shifts to the case of the *Instituto Penal Plácido de Sá Carvalho v. Brazil*, where the horrific prison conditions in which detainees are kept and the orders given by the IACtHR are analysed in detail. We finish with some remarks about the Court's role to protect human rights in the context of detention.

[5] The concept of transformative provisional measures is developed in Part I: "Transformative provisional measures in the inter-American human rights system".

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I. Transformative Provisional Measures in the Inter-American Human Rights System

Provisional Measures: A Brief Introduction

The fundamental purpose of PMs is to guarantee the practical effectiveness of human rights so that they are not just rhetorical.[6] PMs play a dual role: they have a preventive or precautionary character as well as a protective character. In their preventive role, PMs are issued to avoid violations of human rights. They allow the State to act expeditiously to correct situations that may *prima facie* cause irreparable damage to the rights of the person(s). In this sense, the PMs with which the State complies will also provide States with the opportunity to avoid legal responsibility at the international level because they are able to correct, in a timely manner, situations where violations of human rights could have occurred.[7] In turn, in their protective role, PMs preserve the rights at issue during the adjudication stage.[8]

The American Convention on Human Rights (thereafter: The American Convention or the ACHR) in Article 63(2) expressly authorises the IACtHR to adopt PMs in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons.[9] PMs may be requested by the Inter-American Commission (thereafter: the IACHR or the Commission) to the Court, even when the case has not been submitted to the Court:[10]

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6 See C. Burbano Herrera, *Provisional Measures in the case law of the Inter-American Court of Human Rights*, Antwerp, Intersentia, 2010, p 1

7 The Court may request PMs to States that have ratified the ACHR and accepted its jurisdictional competence. As of 2021, only 23 of the 35 Member States of the Organization of American States (OAS) have ratified the ACHR, and of them, only 20 have accepted the contentious jurisdiction of the Inter-American Court. The States that have accepted the jurisdictional competence of the IACtHR are Argentina, Barbados, Bolivia, Brasil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haití, Honduras, México, Nicaragua, Panamá, Paraguay, Perú, República Dominicana, Surinam and Uruguay. On 26 May 1998, Trinidad and Tobago presented an instrument denouncing the ACHR to the Secretary General of the Organization of American States (OAS). Pursuant to Article78(1) of the American Convention the denunciation took effect one year later, on 26 May 1999. Also, Venezuela presented an instrument denouncing the ACHR to the OAS Secretary General on 10 September 2012. The denunciation took effect on 10 September 2013.

8 For an in-depth study of PMs, see C. Burbano Herrera, *Provisional Measures in the case law of the Inter-American Court of Human Rights*, Antwerp, Intersentia, 2010, 227 p. See also, J.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", *Revista IIDH*, 1994, vol. 19, 47-112; A. Cançado Trindade, "The Evolution of Provisional Measures Under the Case Law of the Inter-American Court", *Human Rights Law Journal*, 2003, vol. 24, no. 5-8, 162-168; F. González, "Urgent Measures in the Inter-American Human Rights System", *Revista SUR,* 2010, vol. 7, no. 13, 51-73; E. Rieter, *Preventing Irreparable Harm: Provisional Measures In International Human Rights Adjudication*, Antwerp, Intersentia, 2010, 1200 p.; C. Burbano Herrera and Y. Haeck, "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", *Netherlands Quarterly of Human Rights*, 2010, vol. 28(3), 332-360; C. Burbano Herrera and Y. Haeck, "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*, London, Palgrave Macmillan, 2019, 89-113.

9 American Convention, Article 63(2). Provisional measures have been further developed in the Rules of Procedure of the IACtHR, Article 27; and in the Rules of Procedure of the IACHR, Article 25 (12) (13). The American Convention (also called 'Pact of San José, Costa Rica') was adopted on 22 November 1969, and entry into force on 18 July 1978.

10 When the case is under consideration before the Commission, the Court may adopt PMs at the request of the Commission. At this stage of the procedure, the Court cannot adopt measures *ex officio*. See Article 63(2) American Convention.

> Article 63(2): In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

The PMs may, as indicated, be adopted in urgent situations, which would clearly be present when there is an imminent risk to the right to life, the right to personal integrity, or the right to health, involving, for example, serious danger arising from harsh detention conditions.[11] Given the horrendous conditions of detention in some prisons in the Americas, persons deprived of their liberty have received protection as individuals and as collectives through PMs. In other words, PMs have protected clearly identified persons, such as sick detainees[12] and detainees condemned to death,[13] as well as groups of very significant sizes, for example, *all* inmates in certain prisons.[14]

Although in principle PMs ordered by the Court are by definition temporary, in practice some of them have lasted for years. This is due to the fact that some cases submitted to the IACtHR are so grave that, in spite of the implementation of certain measures by the state authorities, the situation of extreme gravity does not disappear. It is difficult, therefore, to determine *a priori* how long these measures will remain in force. In practice, depending on how each situation develops, some PMs have been maintained for periods of less than a year, whilst others have been in force for more than ten years.[15] Given their object and legal nature, the adoption of PMs does not prejudge the merits of the case, nor does it represent a condemnation of the State.[16]

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[11] For example, See IACtHR, Loayza Tamaya *v* Peru, Provisional Measures 2 July 1996; IACHR Inmates in the Urso Branco Prison *v.* Brazil*,* Precautionary Measures, Order 14 March 2002; See IACtHR, Case Vélez Loor *v* Panamá. Urgent Measures, 26 May 2020; and IACtHR, Penal Miguel Castro Castro *v.* Peru, Provisional Measures 29 July 2020.

[12] The first time that the Court adopted PMs to protect a person deprived of liberty was in the case Loayza Tamayo *v* Peru in 1996. In this case, the Court ordered measures to protect professor Loayza Tamayo condemned to terrorism without a due process and kept in harsh conditions. See IACtHR, Loayza Tamaya *v* Peru, Provisional Measures 2 July 1996. See also IACtHR, Maria Lourdes Afiuni *v* Venezuela, Provisional Measure 2 March 2011.

[13] For example, IACtHR, Boyce and Others *v.* Barbados, Order of Provisional Measures, 25 November 2004, and Order of 14 June 2005; IACtHR, Tyrone Dacosta Cadogan *v.* Barbados, Order of Provisional Measures, 2 December 2008; IACtHR, Dottin and others *v* Trinidad and Tobago; Order of Provisional Measures, 26 November 2001 and 3 April 2009.

[14] For example, IACtHR, Matter of Certain Venezuelan Prisons *v.* Venezuela, Order of Provisional Measure, 2 February 2007, and 13 November 2015; IACHR Inmates in the Urso Branco Prison *v.* Brazil*,* Precautionary Measures, Order 14 March 2002; IACtHR, Curado Complex (in Recife) *v.* Brazil, Provisional Measures 23 November 2016; IACtHR, Instituto Penal Plácido de Sá Carvalho *v.* Brazil, Order of Provisional Measures, 22 November 2018, and President of the IACtHR, Matter of seventeen persons deprived of liberty v Nicaragua, Order of Urgent Measures, 21 May 21 2019.

[15] For example, in the Matter of Certain Venezuelan Prisons *v* Venezuela, the provisional measures were adopted in 2006 and they are still maintained in October 2021. See IACtHR, Matter of Certain Venezuelan Prisons *v.* Venezuela, Order of Provisional Measures, 2 February 2007, and 13 November 2015. In another case, PMs were adopted in 2002 to protect the inmates in the Urso Branco Prison in Brazil, and they were only lifted in 2011. See IACtHR Inmates in the Urso Branco Prison *v.* Brazil*,* Provisional Measures, Order of Provisional Measures, 18 June 2002 and 25 August 2011. Provisional measures were also adopted to protect Humberto Prado in 2009, and they are still maintained in 2020. See IACtHR, Matters of Certain Penitenciary Centers of Venezuela. Humberto Prado. Marianela Sánchez Ortiz and family *v.* Venezuela, Order of Provisional Measures, 8 July 2020. In a case involving a human rights defender, PMs have been maintained for almost 20 years. In this case PMs were initially ordered in 2002 and they are still maintained in 2021. See IACtHR, Matter of Helen Mack Chang and others *v.* Guatemala, Order of Provisional Measures, 5 March 2019.

[16] IACtHR, Rules of Procedure, Article 25 (9).

Transformative Provisional Measures: Concept and Scope

The authors of this contribution use the term *transformative provisional measures* to refer to PMs that aim to protect the rights of several people who are collectively in danger whilst at the same time preventing human rights violations.[17] Transformative PMs are PMs that have three characteristics: *(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 organ.[18]

The structural problems that give rise to transformative PMs are fundamentally based on situations where State authorities have not implemented measures of respect, guarantee, and non-discrimination affecting groups traditionally excluded.[19] This context results in situations where State authorities have not carried out public policies to guarantee the effective enjoyment of human rights, creating a context where certain groups of society are put collectively at risk. Similar to how structural judgments are explained by Profs Nash and Nunez, in this context, the political and legal structures work on the basis of certain cultural standards that allow the maintenance of those practices, whilst at the same time allowing the rights of vulnerable groups to be invisible.[20]

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[17] See, C Burbano Herrera, and Y. Haeck, "The Use of Transformative Provisional Measures by the Inter-American Court of Human Rights : Towards a Material Impact." *Almost Magical Transformations on the Ground: How the Inter-American Human Rights System and Ius Constitutionale Commune Impact Latin-America*, edited by Armin von Bogdandy et al., Oxford University Press, 2021. (forthcoming)

[18] From a conceptual point of view, this work is informed by ideas from legal constructivism and transformative constitutionalism. The analysis is legally constructivist in nature since it deals with the process through which UMs, and those institutional norms governing the powers and competences of HRs organs, acquired the qualities that they have. Norms are influenced by culture and ideas, but at the same time, change the societies in which they are supposed to deploy their effects. Transformative constitutionalism -developed during the last decade by researchers of the Max Planck Institute for Comparative Public Law and International Law, Heidelberg- has been used to explain the innovations that countries of the Global South have made to classical liberal constitutionalism. It helps to explain the difference between a constitutionalism that today is mostly understood as preservative of hard-fought political battles and that of the Global South, which is mostly understood as notions to be deployed so that law and reality align. See Rodriguez Garavito, Cesar. "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America". *Texas Law Review* 89, no. 7 (2011): 1669-98 ; M García, *La eficacia simbólica del derecho*, Sociología política del campo jurídico en América Latina, IEPRI, Debate, 2014; F Piovesan, 'Ius Constitutionale Commune Latinoamericano en Derechos Humanos e Impacto del Sistema interamericano: Rasgos, Potencialidades y Desafios, in A von Bogdandy, H Fix-Fierro, M Morales (eds), *Ius Constitutionale Commune en America Latina*, Mexico DF, Instituto de Investigaciones Juridicas, 2014, 61-84 ; F Piovesan, M Morales,'COVID 19 and the Need for a Holistic and Integral Approach to Human Rights Protection. On Latin America and the Inverted Principle of Interdependence and Indivisibility of Human Rights', 25 of April 2020, *Verfassungsblog*; A von Bogdandy, 'Pluralismo, efecto directo y ultima palabra: la relacion entre Derecho internacional y Derecho Constitucional', in C Escobar (ed), *Teoria y Practica de la Justicia constitucional,* Quito, Ministerio de Justicia y Derechos, 2010, 407-429; A von Bogdandy, E Ferrer Mac-Gregor, M Morales (eds), *La Justicia Constitucional y su Internacionalización. Hacia un Ius Constitutionale Commune en América Latina?* Mexico DF, UNAM, Instituto de Investigaciones Juridicas, 2010; A von Bogdandy, *Hacia un Nuevo Derecho Publico. Estudios de Derecho Publico Comparado, supranacional e internacional*, Mexico UNAM, 2011; A von Bogdandy, H Fix-Fierro, M Morales (eds.), *Ius Constitutionale Commune en América Latina: Rasgos, Potencialidades y Desafíos,* Mexico, UNAM, Instituto de Investigaciones Juridicas, 2014 ; A von Bogdandy, "Ius Constitutionale Commune en America Latina: Una Mirada a Un Constitucionalismo Transformador (Ius Constitutionale Commune in Latin-America: A look at a Transformative Constitutionalism)', (2015) *Revista Derecho del Estado*, 3-50.

[19] Ibid., C. Burbano Herrera, Y. Haeck; Oxford University Press, 2021. (forthcoming)

[20] According to Nash and Nunez, there are two types of States: (a) States that do not act for ideological reasons, and the establishment of fundamental rights has not been sufficient to mobilise internal political decisions; (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 C. Nash and C. Nunez, "Sentencias Estructurales Momento de Evaluacion, Sobre

To respond effectively to the situation of extreme danger and urgency, coordinated action and participation of diverse States' authorities is required at the domestic level. In other words, this type of situation cannot be addressed with a single PM targeting a single authority, or by requesting a single public policy, because behind the situation of extreme gravity and urgency there is a complex institutional framework that generates, allows, and encourages the dangerous situation.[21]

II. Transformative Provisional Measures Applied in Prisons: the Latin-American Context

For decades, the treatment given to persons deprived of liberty in some Latin-American countries has been, as a general rule – not the exception, degrading and inhumane. This is true in spite of Latin-American countries' tradition of rhetoric favouring human rights on the international level, especially since the late 1980s and the transition towards democracies.[22] This situation has to do with the fact that, in practice, State authorities fail to implement the notions of equality and dignity of individuals which are already incorporated in their political constitutions and in the international human rights treaties ratified by them. In practice, it seems that their concept of dignity is tied not to the human being but rather to what the human being does or does not do. Under these circumstances, the IACtHR has been asked to grant transformative PMs. As such, persons deprived of liberty are seen as a group that is at risk. The general pattern on these cases is related to detained people in overcrowded, violent, and inhumane prisons that do not provide treatment, education, or rehabilitation.

Several factors have caused the prison crisis in some Latin-American countries. Whilst all of these factors cannot be described here in a comprehensive way, we could mention the tendency to maximise the use of criminal law, the prison, and the preventive detention to face diverse social problems.[23] For instance, data shows that in the last twenty years, the incarcerated population in Colombia tripled, in Brazil it increased five times, and in El Salvador it increased six times.[24] The political powers in the driving seat respond repressively to the social demand for security, and this is reflected in the systematic increase in penalties and the excessive and prolonged use of pre-trial detention, with the aim of preventing crimes and communicating a strong commitment to

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los Derechos Sociales", *Revista de Ciencias Sociales (Volumen Monografico Extraordinario)*, Universidad de Valparaiso, 2015, 267-289. The authors refer to: J. Dijohn, "Conceptualización de las causas y consecuencias de los Estados fallidos: una reseña crítica de la literatura", *Revista de Estudios Sociales*, 2010, vol. 37, 46-86; D. Kaufmann et al., *Captura del Estado, Corrupción, e Influencia en la Transición, Trabajo de Investigación de Políticas*, Banco Mundial, 2000, 1-39.

21 Ibid., Nash p. 284.

22 For example, the International Covenant on Civil and Political Rights, and the UN International Convention on the Elimination of All Forms of Racial Discrimination have been ratified by all Latin-American States. See here

23 For studies related to prison problems in the Americas, See D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society*, Chicago, University of Chicago Press, 2001, 336; J. Barry, "From drug war to dirty war: Plan Colombia and the US role in human rights violations in Colombia", *Transnational Law & Contemporary Problems*, 2002, vol. 12, 161; E.R. Zaffaroni, *El enemigo en el derecho penal*, Madrid, Dykinson, 2006, 198; D. Husak, *Overcriminalization: The Limits of the Criminal Law*, Oxford, Oxford University Press, 2008, 248; R. Urosa, "Algunas reflexiones en relación con el 'Derecho penal del enemigo' dentro del contexto nacional", *RDFM*, 2009, 61 (255); E. Aharonson, "Pro-Minority. Criminalization and the transformation of visions of citizenship in contemporary liberal democracies: A critique", *New Criminal Law Review: An International and Interdisciplinary Journal*, 2010, 13, 286-308; and Washington Office in Latin-America, *Sistemas Sobrecargados, Leyes de drogas y cárceles en América Latina*, Washington, 2010, here, accessed 1 October 2021.

24 International Centre for Prison Studies, *World Prison Brief*, Institute for Crime and Policy Research, here; M.A. Torres and L. Ariza, "Jueces y prisiones en la era del encarcelamiento masivo", in J. Simon, L. Ariza and M.A. Torres (eds), *Encarcelamiento masivo, Derecho, raza y castigo*, Bogota, Siglo del Hombre Editores, 2020, 268 p.

public safety.[25] As to the social effects, these measures enjoy great popularity within the population and this, in turn, strengthens the legitimacy of governments towards public opinion. Their symbolic effectiveness is high, but in the long term the use of prison and preventive detention does not solve the problem of insecurity outside and inside prisons.

The most notable negative effect of a repressive penal policy is the exclusionary treatment of the prison population, which becomes marginalised and stigmatised. A repressive penal policy gives detainees the image of being antisocial, which has as a consequence that their undignified situation of overcrowding and unworthiness does not arouse any social censorship. The excessive and prolonged use of the prison and pre-trial detention contributes greatly to overcrowding and its negative consequences. Additionally, preventive detention may violate the principles of presumption of innocence, legality, necessity, and proportionality; the excessive use of criminal law goes against one of its basic principles and the penalties for deprivation of liberty, which indicates that these mechanisms should be used as a last resort.[26]

Transformative Provisional Measures

Until 2021, the IACtHR has granted 32 PMs to protect persons deprived of liberty[27] concerning 11 states.[28] From this data, 16 PMs correspond to transformative PMs targeting four states, namely:[29] Argentina,[30] Brazil,[31] Panama,[32] and Venezuela.[33] In these cases, the petitioners pointed out critical prison conditions generated by overcrowding,[34] high levels of violence, lack of control

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[25] According to the IACHR, on average 36.3% of the entire prison population in the region was in pretrial detention in the Americas in 2017. However, in some countries the figure was much higher. See IACHR, Report 2017 "Measures to Reduce Pretrial Detention", p 22 here.

[26] See, American Convention, Article 7 Right to Personal Liberty, and Article 8 Right to a Fair Trial. UN Convention on the Rights of the Child, Article 40, Right to a Fair Trial.

[27] The first time that the IACtHR adopted PMs to protect a person deprived of liberty was in the case Loayza Tamayo *v* Peru in 1996. In this case, the Court ordered PMs to protect Prof Loayza Tamayo condemned to terrorism without a due process and kept in harsh conditions. See IACtHR, Loayza Tamayo *v* Peru, Provisional Measures 2 July 1996.

[28] Argentina: 1 case; Brazil: 8 cases; Ecuador: 1; Mexico: 2; Peru: 3; Venezuela: 10; Costa Rica: 1; Barbados: 2; Guatemala: 1 and Trinidad and Tobago: 2 cases.

[29] The PMs requested to Nicaragua in the matter 17 persons deprived of liberty is not included in this group because the Court orders the protection of 17 inmates only. In other words, the PM does not protect all the persons deprived of liberty who are in the detention centre. See, President of the IACtHR, 17 persons deprived of liberty *v.* Nicaragua, Order of Urgent Measures, 21 May 2019.

[30] IACtHR, Mendoza Prisons *v* Argentina, Order of Provisional Measures, 22 November 2004, 7 November 2007, and 10 September 2010.

[31] The cases related to Brazil are explained in section III entitled 'Transformative Provisional Measures Applied in Brazil's Prisons'.

[32] President IACtHR, Case Vélez Loor *v* Panamá, Order of Urgent Measures, 26 May 2020; IACtHR, Case Vélez Loor *v* Panamá, Order of Provisional Measures, 29 July 2020.

[33] For example, IACtHR, Monagas Judicial Detention Center ("La Pica") *v.* Venezuela, Order of Provisional Measures, 6 July 2011, the Penitentiary Centre of the Capital Region Yare I and II (Yare Prison) *v.* Venezuela, Order of Provisional Measures, 6 September 2012; the Penitentiary Center of the Central Occidental Region (Uribana Prison) *v.* Venezuela, Order of Provisional Measures, 6 July 2011; the Capital Detention Center El Rodeo I and II *v.* Venezuela, Order of Provisional Measures, 6 July 201; IACtHR, Penitenciaria Center of the Central Occidental Region (Uribana Prison) *v.* Venezuela, Order of Provisional Measures, 13 February 2013, and Order 13 November 2015.

[34] Among other consequences the overcrowding makes it difficult to separate inmates by their gender, age, or the seriousness of their crimes. In fact, there were cases where dangerous situations were caused from detainees not being separated despite belonging to different categories, for instance: pre-trial and convicted inmates; members of armed groups and common prisoners; members of different armed groups (guerrilla and paramilitary); minors and adults; common detainees and detainees belonging to the LGBT+ group; common detainees and elderly detainees; or common detainees and detainees with a disability.

by prison authorities, insalubrity, spread of contagious infections, lack of access to health services, and death.[35] The case probably involving the most comprehensive PMs and the largest number of beneficiaries is the *Matters of Certain Venezuelan Penitentiary Centres v. Venezuela*.[36] In fact, the IACtHR has been engaging with the conditions of detention in a number of prisons in Venezuela since 2006.[37] In its orders, the Court requires the State to take immediate measures to ensure that no further detainees are treated inhumanely or killed. Furthermore, the IACtHR also requires measures of a more general nature, such as the separation of accused from convicted inmates, as well as requiring the provision of healthcare to all inmates, the reduction of overcrowding, the provision of adequately trained staff, and the provision that prison conditions conform with applicable international standards. At the end of 2021, this matter is still being supervised by the Court, as horrific conditions as well as violent acts culminating in the deaths of inmates have persisted.

Recently, transformative urgent measures were ordered by the Court's President in the *Case Vélez Loor v. Panamá* to collectively protect migrants deprived of their liberty in two reception centres, namely: Estación de Recepción Migratoria Lajas Blancas and Estación de Recepción Migratoria La Peñita.[38] The transformative urgent measures aimed to protect migrants' right to life, integrity, and health. Among others, the Court's President was informed that minors and pregnant women were kept in conditions of overcrowding and that 58 persons had been infected with Covid-19.[39] The lack of adequate health services for those exposed to the virus was emphasised. The circumstances in which migrants were kept made it difficult to adopt the hygiene and social distancing measures required to prevent the spread of Covid-19. In their reasoning, the Court's President mentioned the *Covid-19 and Human Rights* statement, which was published by the IACtHR in 2020.[40] The statement points out that the measures implemented by States Parties to the American Convention as a result of Covid-19 should respect the rule of law, the Inter-American human rights instruments, and the standards developed in the IACtHR's case law.[41] Given the critical situation in Panama, the IACtHR ratified the transformative urgent measures on 29 July 2020. Moreover, the IACtHR expanded the measures on 21 June 2021[42] with the aim to protect migrants maintained

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[35] For example, IACtHR, Instituto Penal Plácido de Sá Carvalho *v.* Brazil, Order of Provisional Measures, 22 November 2018, paras. 3, 37; and IACtHR, The Penitentiary Complex of Pedrinhas *v.* Brazil, Order of Provisional Measures; Order of 14 November 2014, Order of 14 March 2018, and Order 14 October 2019.

[36] On 6 September 2012 the IACtHR decided to join the processing of some matters and to establish that, thereafter, the joint PMs would be known as the "Matters of Certain Venezuelan Prisons". The Orders of the IACtHR, of 24 November 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 15 May 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 6 September 2012, the Penitentiary Center of the Andean Region. See IACtHR, Certain Penitentiary Centers of Venezuela, Penitenciaria Center of the Central Occidental Region (Uribana Prison) *v.* Venezuela, Provisional Measures 13 February 2013 and Order 13 November 2015.

[37] The IACHR delegation had planned to observe the human rights situation in the country on the ground. However, they were denied entry into Venezuela on 4 February 2020. They decided to meet the victims and civil society organizations on the border between Colombia and Venezuela. Information can be found here

[38] See President IACtHR, Case Vélez Loor *v* Panamá. Urgent Measures, Order of 26 May 2020. Considering para. 13-30

[39] IACtHR, Case Vélez Loor *v* Panamá, Order of Urgent Measures, 26 May 2020. Considering para. 13-30

[40] IACtHR, Statemet *1/20 "Covid-19 and Human rights: the problems and challenges must be addressed from a human rights perspective and with respect for international obligations",* 9 April 2020. It can be found here

[41] Ibid.

[42] The transformative PMs adopted with respect to one reception Centre were lifted because the place had been closed.

in two additional reception centres, namely: Estación de Recepción Migratoria de San Vicente and the Comunidad receptora de Bajo Chiquito en la Provincia de Darién.[43]

The Impact of Covid-19 in Latin-American Prisons

Many detention centres across Latin-America have been impacted negatively with Covid-19.[44] However, it is difficult to assess how negative the impact has been. As the IACHR has pointed out, there has been a 'failure to gather and report accurate data concerning the impact of the Covid-19 pandemic in the various prison systems'.[45] The Justice Project Pakistan reported that by mid-August 2020, an estimated 138,522 prisoners had tested positive for Covid-19, and at least 1,504 prisoners had died of complications linked to the virus in Latin America.[46] As to specific countries, until mid-July 2021, Argentina reported 1,629 total Covid-19 cases in prisons.[47] In Chile, 2,743 confirmed Covid-19 cases had been reported among prisoners as of 18 February 2021, and 18 prisoners had died.[48] In Colombia, at least 17,757 total cases had been registered in the national prison system as of 23 July 2021, and 84 prisoners had died.[49] In Peru, 2,606 total positive cases had been reported as of 6 July 2021, with 249 dead.[50] There was an increase in violence in places of deprivation of liberty. Riots occurred as a protest against overcrowding and the lack of personal hygiene and protection elements to prevent the spread of the Covid-19 in prisons. According to information given by the IACHR, protests were registered in 13 prisons in Colombia, in particular in La Modelo prison in Bogotá, where 23 inmates died and more than 80 were injured on 21 March 2020.[51] Inmates of the El Milagro prison in Trujillo in Peru mutinied, demanding better conditions in the face of the health emergency situation caused by Covid-19 and against the lack of food, leaving 31 inmates injured. Similarly, in the Santa Fe province in Argentina two riots were registered between 23 and 25 March, where prisoners demanded for sanitary measures to be adopted in the face of the pandemic. In these episodes, five people died and a dozen others were injured. There has also been a massive escape of prisoners, as in the case of Venezuela on 18 March, where 84 people escaped. In addition, in at least three immigration detention centres in New Jersey, United States, inmates were on hunger strike to protest the measures promoted by

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[43] President IACtHR, Case Vélez Loor *v* Panamá, Order of Urgent Measures, 21 June 2021.

[43] IACtHR, Statemet *1/20 "Covid-19 and Human rights: the problems and challenges must be addressed from a human rights perspective and with respect for international obligations",* 9 April 2020. It can be found here

[44] The complex human rights context in Ecuador and Colombia are well described in two opinions published in the Human Rights in Context Blogpost. See C. Burbano Herrera and G. Prieto, *The Virtues and Limits of Transformative Constitutionalism: Ecuador's Court Decision on Prisons*; and M. Torres and J. Parra, *The darker side of the security policy and dehumanization of detainees in Colombia.* They can be found here and here

[45] IACHR, Press Release, 'IACHR concerned about specific risks faced by Persons Deprived of Liberty in the Americas during the COVID-19 pandemic', 9 September 2020. here

[46] Ibid.

[47] National Committee for the Prevention of Torture, "Reporte: Estado de la situación de las personas privadas de libertad (PLL) durante el período de emergencia sanitaria por el COVID-19 al 14/07/2020," 14 July 2020. here.

[48] Gendarmería de Chile, "Reporte diario de contagios y proceso de vacunación," June 26, 2020. here

[49] Instituto Nacional Penitenciario y Carcelario (INPEC), "Situación Actual Coronavirus (COVID-19) Establecimientos Carcelarios del Orden Nacional," 6 August 2020. It can be found here

[50] Ministerio de Gobierno, Dirección General del Sistema Penitenciario, "Cuadro Estadístico del Comportamiento de la COVID-19 en los Centros Penitenciarios del País", República de Panamá, October 29, 2020, It can be found here

[51] IACHR, Press Release: "The IACHR urges States to guarantee the health and integrity of persons deprived of liberty and their families in the face of the COVID-19 pandemic," 31 March 2020. It can be found here

the State against the spread of the new coronavirus.[52] As it was mentioned before, the IACHR has warned generally 'that actual figures could be significantly higher', given the lack of accurate data.[53]

Paradoxically, during Covid-19, authorities of various States such as Brazil, Colombia, Honduras, Mexico, Panama, and Peru implemented judicial, legislative, and/or executive measures aimed at reducing the prison population and bettering basic hygiene to avoid infections and deaths.[54] 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.[55] For example, during the pandemic, the pretrial detention system was re-evaluated, and alternative sentencing measures such as house arrest and presidential pardons (for humanitarian reasons) were adopted.[56] Most of the prison release efforts focused on a small fraction of the total prison population: those who were most vulnerable to contracting the disease or those who had not committed serious crimes and had served most of their sentence.[57]

Unfortunately, these measures did not exponentially improve the prison situation in the region. 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.[58] In other words, the direct impact of these measures has not been high, given the current level of overcrowding in the region. Nevertheless, analysing these measures from a broader perspective may let us conclude that their indirect impact is high.[59] 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.

III. Transformative Provisional Measures Applied in Brazil's Prisons

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[52] IACHR, Press Release: "The IACHR urges States to guarantee the health and integrity of persons deprived of liberty and their families in the face of the COVID-19 pandemic", 31 March 2020. It can be found here

[53] Press Release: "IACHR concerned about specific risks faced by Persons Deprived of Liberty in the Americas during the COVID-19 pandemic", 9 September 2020. here

[54] M. Romero, L. Stalman and A. Hidalgo, The Covid-19 pandemic and prison policy in Latin-America, April 2021. p 12. The report can be found here

[55] Ibid., M. Romero, et al. p14. See also, IACHR "Reports on the Human Rights of Persons Deprived of Liberty in the Americas," 31 December 2011, p 156-157. The report can be found here

[56] M. Romero, L. Stalman and A. Hidalgo, The Covid-19 pandemic and prison policy in Latin-America, April 2021. here

[57] Ibid., p 15.

[58] Ibid., p 15.

[59] 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 C. Burbano Herrera and Y. Haeck, "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*, London, Palgrave Macmillan, 2019, 89-113.

Brazil is the country with the world's third largest prison population (after the United States and China), with roughly 750,000 people deprived of liberty.[60] As a result of horrendous prison conditions, acts of prison violence, and notorious overcrowding, the IACtHR has adopted six transformative PMs in diverse prisons located in different states and regions of Brazil, four of which are still maintained. The purpose of these measures is to protect not only the detainees, but also all the people who are in said establishments, including visitors and prison staff.[61]

The first time that such measures were granted was in *the Inmates in the Urso Branco Prison v. Brazil* case, in 2002. It was alleged that there were appalling prison conditions and several conflicts between groups of inmates, as well as a massacre among the prisoners resulting in deaths.[62] Transformative PMs were also ordered in the *Penitentiary Complex of Curado v. Brazil* case. In this case, the IACtHR verified overpopulation with a density that exceeded 200% when international criteria, such as that of the Council of Europe, indicate that exceeding 120% implies critical overpopulation.[63] In this case, the IACtHR expressed in 2018 that despite the adoption of PMs in 2014, the prison conditions had not improved.[64] In the *Instituto Penal Plácido de Sá Carvalho v. Brazil* case it was also mentioned that whilst the prison had a capacity of 1,699, it contained 3,820 detainees.[65] Similarly, in the case of the *Penitentiary Complex of Pedrinhas v. Brazil* deaths and terrible prison conditions were reported even despite the adoption of PMs.[66]

Imprisoned minors have also been in situations of extreme danger in Brazil. As a result, the IACtHR has granted transformative PMs to protect the children and adolescents institutionalised in the *Complexo de Tatuapé of FEBEM*[67] and in the *Unidade de Internação Socioeducativa (la Unidad* or *la UNIS).*[68] In the first case, transformative PMs were adopted in 2005, and they were lifted in 2008,[69]

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[60] See World Prison Brief the section related to 'World Prison Brief data Brazil', December 2019, here. According to official data issued by the National Prisons Department there were 748,009 persons deprived of liberty in Brazil at the end of December 2019. here

[61] For example, Matter of Children and Adolescents Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM *v.* Brazil, Order of Provisional Measures, 4 July 2006, Deciding 1; and IACtHR, The Penitentiary Complex of Pedrinhas *v.* Brazil, Order of Provisional Measures, 14 November 2014 and 14 October 2019, Deciding 1.

[62] IACtHR, Inmates in the Urso Branco Prison *v.* Brazil, Order of Provisional Measures, 18 June 2002, Order of 29 August 2002, Order of 22 April 2004, and Order of 7 July 2004. See also the precautionary measures adopted by the IACHR in this case.

[63] IACtHR, Penitentiary Complex of Curado *v.* Brazil, Order of Provisional Measures, 22 May 2014, Order of 7 October 2015, Order of 23 November 2016, Order of 15 November 2017, and Order of 22 November 2018, paras 80-81.

[64] IACtHR, Penitentiary Complex of Curado *v.* Brazil, Order of Provisional Measures, 22 November 2018, paras 80-81.

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

[66] IACtHR, The Penitentiary Complex of Pedrinhas *v.* Brazil, Order of Provisional Measures, 14 November 2014, Order of 14 March 2018, and Order of 14 October 2019, Considering para. 84(3).

[67] The Court also ordered to protect the life of all the people within said compound. IACtHR, Matter of Children and Adolescents Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM *v.* Brazil, Order of Provisional Measures, 4 July 2006.

[68] IACtHR, Unidade de Internação Socioeducativa (la Unidad o la UNIS) *v.* Brazil, Order of Provisional Measures, 25 February 2011, Order of 1 September 2011, Order of 26 April 2012, Order of 20 November 2012, Order of 21 August 2013, and Order of 29 January 2013. See also the Resolutions adopted by the President of the IACtHR on 26 September 2014, 23 June 2015, 15 November 2017, and 20 April 2021.

[69] The IACtHR expresses that the State had made significant progress after the President of the IACtHR had granted Urgent Measures on 17 November 2015. For example, the State continued decommissioning the *Complexo do Tatuapé* gradually, transferring the beneficiaries to other Foundation units which, according to the records in the case file would not be overpopulated, taking into account in doing so, among other standards, the closeness of the

whilst in the second case, the PMs were granted in 2011 and they are still maintained.[70] In both cases, the Commission issued precautionary measures following allegations of violent acts, including the death of the adolescents Alessandro da Silva Sena,[71] Jonathan Felipe Guilherme Lima,[72] Eduardo Oliveira de Souza Cleber, [73] Nogueira da Silva,[74] and Roni César de Souza.[75] There was a continuous lack of control by the prison staff that showed that the State had not satisfactorily fulfilled its obligation to prevent attacks against the life and personal integrity of children and adolescents.[76] As the situation did not improve and the children were subjected to increasing dangers, the IACtHR ordered transformative PMs by the IACHR request.[77]

The Brazilian penal system's problems have existed for decades. Historians confirm that overcrowding in the prison system is not a recent phenomenon, and it has existed at least since the beginning of the 19th century.[78] Furthermore, the President of the Brazilian Federal Supreme Court was quoted as saying at the 12th United Nations Congress on Crime Prevention and Criminal Justice, held in 2010 in Salvador de Bahia, that Brazil's 'prison system is on the brink of total collapse'.[79] Recently, on 2 June 2021 during the public hearing organised by the IACtHR regarding the implementation of transformative PMs in four detention centres in Brazil, namely, the *la UNIS*, the *Penitentiary Complex of Curado*, the *Penitentiary Complex of Pedrinhas*, and the *Instituto*

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new confinement center to the residence of the parents of the beneficiaries or of those responsible for them. The Court also pointed out that the State adopted various measures, among others, the building of new confinement units de following a new structural pattern and teaching system for the *Fundação CASA*, in which it would have invested during the last three years more than seventy million dollars; the setting aside of administrative decision No. 90/2005; institutional changes leading to a reduction in the number of rebellions in the Foundation units and in the criminal recidivism index of the adolescents after they comply with the socio-educational measures. See, IACtHR, Matter of Children and Adolescents Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM *v.* Brazil, Provisional Measures 25 November 2008, Considering 17 and 20.

70 President IACtHR, Unidade de Internação Socioeducativa (la Unidad o la UNIS) *v.* Brazil, Order of Urgent Measures, 20 April 2021.

71 IACtHR, Matter of Children and Adolescents Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM *v.* Brazil, Order of Provisional Measures, 17 November 2005. Having Seen para. 2 (d).

72 Ibid.

73 Ibid.

74 Ibid.

75 The IACHR had granted precautionary measures in 2004 (in the first case) and in 2009 (in the second case). See IACtHR, Matter of Children and Adolescents Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM *v.* Brazil, Order of Provisional Measures, 17 November 2005, Having Seen para. 2; and IACtHR, Unidade de Internação Socioeducativa (la Unidad o la UNIS) *v.* Brazil, Order of Provisional Measures, 25 February 2011, Considering para. 3.

76 IACtHR, Matter of Children and Adolescents Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM *v.* Brazil, Order of Provisional Measures of 17 November 2005, Considering para. 9.

77 IACHR, *2005 Annual Report*, paras. 41-42. See also IACtHR, Matter of Children and Adolescents Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM *v.* Brazil, Order of Provisional Measures, 17 November 2005, Order of 30 November 2005, Order of 4 July 2006, Order of 3 July 2007, and Order of 25 November 2008. The IACtHR expressed in Considering 17 the following: "(…) since the Order by the President was issued in this matter on November 17, 2005, remarkable progress has ensued in complying with the PMs. Along such lines, the State continued decommissioning the *Complexo do Tatuapé* gradually, transferring the beneficiaries to other Foundation units which, according to the records in the case file would not be overpopulated, taking into account in doing so, among other standards, the closeness of the new confinement center to the residence of the parents of the beneficiaries or of those responsible for them ;" and in Considering 20: "(…) finally, the Court observes that the State adopted various measures, among others, the building of new confinement units de following a new structural pattern and teaching system for the *Fundação CASA*, in which it would have invested during the last three years more than seventy million dollars; the setting aside of administrative decision No. 90/2005; institutional changes leading to a reduction in the number of rebellions in the Foundation units and in the criminal recidivism index of the adolescents after they comply with the socio-educational measures".

78 M. Nunes, F. de Sa Neto, M. Costa, M. Bretas (eds), *História das prisões no Brasil*, 2009, Volumes I and II.

79 Legal Clinic. It can be found here . Accessed on 11 November 2020.

Penal Plácido, the IACHR's representative expressed that the IACHR had been following the prison situation in Brazil for 20 years already, and it had conducted an in loco visit in 2018. In this visit, the IACHR verified the horrendous situations in prisons which constituted inhumane treatment.[80] The Preliminary Observations related to the visit show the complex situation in Brazil's legal and criminal justice. The IACHR refers to a dual problem, namely:

'(…) on the one hand, there is chronic impunity in crimes committed against the most vulnerable communities; on the other hand, there is a disproportionate impact of the State's repressive apparatus on those same communities. By going unpunished, rights violations committed by law enforcement officers become systematic across the country, while the mass incarceration of poor people leads to overcrowded prisons. In this context, the policy known as the "war on drugs" amounts in practice to a criminalization of a major portion of poor, black Brazilians and of residents of the country's disadvantaged suburbs.'[81]

According to the report published by The Dialogue, around 4% of Brazil's prison population was released during Covid-19.[82] However, it is not clear whether this figure is significantly higher than the typical release rate in a non-pandemic context.[83] Additionally, there have been suspensions in some of the release processes that may affect the total estimated figures. For example, in the state of São Paulo in late March 2020, it was reported that prison authorities stopped the temporary release of thousands of prisoners, stating that releasing more than 34,000 persons could elevate the potential of spreading the new coronavirus in a vulnerable population.[84] As of 12 July 2021, in total 19, 241 persons deprived of liberty have died as a result of Covid-19 in Brazil.[85]

IV. *Instituto Penal Plácido de Sá Carvalho v. Brazil*: Case Study

In 2017, the IACtHR ordered transformative PMs to protect the life and integrity of all persons deprived of liberty at the *Instituto Penal Plácido,* numbering 3,820 detainees and all the people who were in said establishment, including visitors and staff.[86] The general situation of Brazil's prisons was so critical that the responding authorities expressed to the IACtHR that the prison problem was not something exclusive to the *Instituto Penal Plácido*, but was a problem that encompassed the

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80 The IACHR visited various Brazilian cities and states, including Brasilia, Minas Gerais, Pará, São Paulo, Maranhão, Roraima, Bahia, Mato Grosso do Sul and Rio de Janeiro, and many state institutions, including incarceration facilities, facilities to assist homeless persons, facilities to welcome and assist migrants and refugees, and the migrant shelter in Pacaraima, Roraima. This in loco visit was the IACHR's second such visit to Brazil. The first one took place in 1995. It can be found here

81 IACHR, *Observations of IACHR's In Loco Visit to Brazil,* 2018. here

82 M. Romero, L. Stalman and A. Hidalgo, The covid-19 pandemic and prison policy in Latin-America, April 2021. p 17. The report can be found here

83 Ibid.

84 Ibid.

85 The Justice Project Pakistan. It can be found here. See also, IACHR, Press Release: "IACHR concerned about specific risks faced by Persons Deprived of Liberty in the Americas during the COVID-19 pandemic," 9 September 2020. It can be found here

86 IACtHR, Instituto Penal Plácido de Sá Carvalho *v.* Brazil, Order of Provisional Measures, 31 August 2017. See also IACtHR, The Socio-Educational Internment Facility of the Penitentiary Complex of Curado, of the Penitentiary Complex of Pedrinhas and the Instituto Penal Plácido de Sá Carvalho *v.* Brazil, Order of Provisional Measures, 13 February 2017.

entire penitentiary system of the State of Rio de Janeiro.[87] Through the transformative MPs, Brazil was ordered to reduce overcrowding,[88] carry out a diagnosis of the situation, and design a plan for the structural reform of the Institute. Additionally, the IACtHR requested permission from the State to conduct an on-site visit to the Institute and organise a public hearing with the objective of verifying the implementation of its PMs.[89] Months later, despite the adoption of the PMs and the on-site visit carried out by the IACtHR, the situation of extreme gravity persisted.[90] The detention facility was confronted with serious problems: it had an overpopulation with approximate density of 200%; there was only one doctor in charge of more than 3,000 prisoners; and the control of internal order was in the hands of the prisoners themselves. Reports showed that 56 detainees had died within two years, and in most cases the reason for death was unknown.[91] Therefore, the IACtHR issued another resolution of transformative PMs in 2018.[92] This resolution develops various aspects that deserve attention, for example, the IACtHR recognises that the prison crisis is a phenomena that occurs in Brazil, but also in other States in the Americas and Europe; the IACtHR also takes into account the judicial decisions delivered by domestic courts in Colombia and the United States regarding prisons crises. Furthermore, the IACtHR considers that the binding precedent of the Súmula Vinculante No. 56, issued by the Supreme Federal Court of Brazil,[93] is fully applicable to the situation of the beneficiaries of the transformative PMs in the Institute. In the following lines, these various aspects will be explained in detail.

Prison Crises Beyond Brazil

The order of PMs, above all, shows that the IACtHR is aware that this prison crisis is not unique to Brazil, and it refers to the structural problems in other prisons in the Americas. The IACtHR explains how the domestic courts of other states in the Organization of American States (OAS) and other international monitoring bodies have responded to the prison crisis. In addition, the IACtHR explains how it takes into account these judicial decisions at the national and international level to design its transformative PMs in the *Institute Penal Plácido*. In that context, the IACtHR analyses the situation of persons deprived of their liberty in the Institute using various resources, such as the case law of three supreme or constitutional courts of states in the OAS that have already dealt with similar situations, namely: the Constitutional Court of Colombia,[94] the Supreme Court of the United States,[95] and the Federal Supreme Court of Brazil.[96] Additionally, the IACtHR

[87] IACtHR, Instituto Penal Plácido de Sa Carvalho *v.* Brazil, Order of Provisional Measures, 31 August 2017, Considering para. 9; and Order of 22 November 2018, Considering para. 3.

[88] IACtHR, Instituto Penal Plácido de Sa Carvalho *v.* Brazil, Order of Provisional Measures, 13 February 2017, and Order of 31 August 2017, Considering para. 28.

[89] IACtHR, Instituto Penal Plácido de Sa Carvalho *v.* Brazil, Order of Provisional Measures, 13 February 2017, Deciding para. 4.

[90] IACtHR, Instituto Penal Plácido de Sá Carvalho *v.* Brazil, Order of Provisional Measures, 31 August 2017, Deciding para. 1 and 81.

[91] IACtHR, Instituto Penal Plácido de Sa Carvalho *v.* Brazil, Order of Provisional Measures, 22 November 2018, Considering paras. 1 and 40; Deciding para. 1.

[92] Ibid.

[93] Ibid., Considering paras. 110-114

[94] Ibid., paras. 98-102. The IACtHR does not indicate which judgment of the Colombian Constitutional Court it is referring to. The IACtHR simply gives a non-functioning link here.

[95] Ibid., Considering paras. 103-107. See also, Supreme Court of the United States, No. 09–1233, Edmund G. Brown Jr., Governor of California, et al., Appellants Vs. Marciano Plata et al. On Appeal from the United States District Courts for the Eastern District and the Northern District of California.

[96] IACtHR, Instituto Penal Plácido de Sá Carvalho *v.* Brazil, Order of Provisional Measures, 22 November 2018, Considering paras. 113-117.

takes into account the case law of the European Court of Human Rights.[97] As to legislation, regulations, and reports at the domestic Brazilian level, the IACtHR relies on the Technical Diagnosis, elaborated by the Brazilian authorities,[98] and the domestic law of Brazil.[99] Additionally, the Court relies on the UN Standard Minimum Rules for the Treatment of Prisoners ('Mandela Rules'),[100] and the Principles and Good Practices on the Protection of Persons Deprived of Liberty in the Americas of the IACHR.[101]

Colombian Constitutional Court

The IACtHR extensively refers to the vision of the Colombian Constitutional Court for stating that overcrowding is the first problem to be resolved in detention centres because of its horrendous effects.[102] Overcrowding leads to increasing health risks and chances of diseases and infections, and consequently adds strain to an overburdened healthcare system.[103] It also leads to a higher risk of violent conflicts and less capacity for prison guards to maintain control. For the Colombian Constitutional Court, prison overpopulation is a product of the exaggerated use of deprivation of liberty. The excessive and exaggerated use of a harsh criminal and penitentiary policy is unsustainable in a social and democratic State abiding by the rule of law, due to the costs involved in fundamental rights, social cohesion, and the scarce public resources that the States have in order to fulfil the varied and multiple tasks and State functions.[104]

Faced with the question of what solution should be given to the problem of overcrowding, the Colombian Constitutional Court reiterates the importance of weighing constitutional principles that are under pressure such as, on the one hand, the right to have due process of law, and on the other hand, the right to have criminals convicted in order to prevent the commission of crimes and to have respect for judicial decisions.[105] In that sense, the problem of overcrowding must be resolved with prudent judicial policies and decisions of non-indiscriminate release, since there is no automatic right to release.[106]

When confronted with a situation in a prison that is incompatible with the constitutional order, the State has to implement policies that can lead to the right for certain people to be released.[107]

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[97] Ibdi., Considering paras. 108-112. See also ECtHR, Torregiani *et al v.* Italia, Applications 43517/09, 46882/09, 55400/09, Judgment, 8 January 2013, para. 65.

[98] IACtHR, Instituto Penal Plácido de Sá Carvalho *v.* Brazil, Order of Provisional Measures, 22 November 2018, Considering paras. 8-13. The State submitted: "Diagnostico Tecnico y Plan de Contingencia para el Complejo de Curado".

[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 Justica, Portaría Interministerial, No. 1777, 9 September 2003; Consejo Nacional de Política Criminal y Penitenciaria (CNPCP), Resolutions No. 04/2014, 18 July 2014, and 02/2015, 29 October 2015; Consejo Nacional de Política Criminal y Penitenciaria (CNPCP).

[100] The UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), Rules 19–21. They can be found here

[101] IACHR, Principles and Good Practices on the Protection of Persons Deprived of Liberty in the Americas, 13 March 2000, Principle XII. They can be found here

[102] IACtHR, Instituto Penal Plácido de Sá Carvalho *v.* Brazil, Order of Provisional Measures, 22 November 2018, Considering paras. 98-102.

[103] Ibid., Considering para. 98.

[104] Ibid., Considering paras. 98-102.

[105] Ibid., Considering para. 96.

[106] Ibid., Considering para. 99.

[107] Ibid., Considering para. 101.

Even so, the Colombian Constitutional Court insists that this is not an automatic issue.[108] The decision to release a person must be individually determined.[109] It is precisely for that reason that, despite the terrible conditions of the detention centres, this situation by itself does not entitle persons deprived of their freedom to be automatically released, as that would imply a broad sacrifice to the victims of criminal acts.[110]

To confront the prison and penitentiary crisis, the Colombian Constitutional Court is emphatic in stating that the solution to the problem of overcrowding requires the construction of new prisons, but can also be resolved with fewer prisons.[111] The Colombian Constitutional Court evidences the fact that there are people deprived of liberty, despite there being constitutional and legal reasons for them to be released, such as their age, serious terminal illness, or requests for their freedom, which have not yet been processed by the respective judge for the execution of penalties and security measures.[112] These reasons, according to the Colombian Constitutional Court, are a clear sign that prison overpopulation is not exclusively a matter of having to build more prisons,[113] since not all persons deprived of liberty (as in the cases just mentioned) should be in prison.[114]

US Supreme Court

According to the IACtHR, the most significant judgment related to detainees kept in terrible conditions on the American continent[115] was delivered by the US Supreme Court in 2011.[116] The case was related to grave violations that were occurring in the Californian penitentiary system. The California prison population reached a 200% density for at least eleven years, with overcrowding conditions similar to those of the *Instituto Penal Plácido* in Brazil.[117] In that context, two class actions with respect to two cases were submitted to the Federal District Courts. These cases were the *Coleman v. Brown* case, which concerned prisoners with serious mental disorders, and the *Plata v. Brown* case, which concerned prisoners with serious medical conditions.[118]

The District Court ordered California to reduce its prison population to 137% within a framework of two years. The State of California brought the case to the US Supreme Court, which, finally, by a majority of five votes, said that '(…) (f)or 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.

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108 Ibid., Considering para. 100.
109 Ibid., Considering para. 98.
110 Ibid., Considering para. 101.
111 Ibid., Considering para. 99.
112 Ibid., Considering para. 98.
113 Ibid., Considering para. 96.
114 Ibid. One must also think about people who should not be in custody, such as those detained without charge, arbitrarily detained, or detained for offenses that should not be criminalised. 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 25 March 2020. link accessed 1 September 2021.
115 IACtHR, Instituto Penal Plácido de Sá Carvalho *v.* Brazil, Order of Provisional Measures, 22 November 2018, Considering para 100.
116 US Supreme Court, No. 09–1233, Edmund G. Brown Jr., Governor of California, et al.; Appellants v Marciano Plata et al. On Appeal from the United States District Courts for the Eastern District and the Northern District of California.
117 IACtHR, Instituto Penal Plácido de Sa Carvalho *v.* Brazil, Order of Provisional Measures 22 November 2018, Considering para. 101.
118 Ibid., Considering para. 101.

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 (…)'.[119] The IACtHR further pointed to the fact that the US Supreme Court also indicated that overcrowding is the 'primary cause of violation of a federal law', specifically the 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, it was required to limit the prison population. In the case, numerous experts stated that overcrowding was the main cause of constitutional violations.[120]

The European Court of Human Rights

The IACtHR also referred to a judgment of the European Court of Human Rights (ECtHR or European Court). The Court mentioned that in the *Torregiani et al. v. Italy* case, the detention conditions were defined as a practice incompatible with the European Convention on Human Rights (ECHR or European Convention). The European Court stated: '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 was therefore constitutive of a practice incompatible with the European Convention. As a solution to the problem, Italy was then ordered to create an appeal with preventive and compensatory effects, and to guarantee an effective remedy for violations of the European Convention.[121]

Specific Considerations

In the following lines, specific considerations developed by the IACtHR in the Order of PMs will be analysed.

It is not enough for the State to merely adopt specific protection measures, there must also be effective action with positive results

The Court states that the measures adopted by the Brazilian authorities, in compliance of the Order of PMs issued by the IACtHR in 2017, had been ineffective.[122] In that regard, the IACtHR points out that it is not enough for the State to merely adopt specific protection measures. In order to comply with the obligations within the human rights regime, there must also be effective action with positive results.[123] In sum, the Court imposes an obligation of result. The IACtHR wishes its transformative PMs would have a real impact on the improvement of detention conditions.

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[119] Ibid., Considering para. 103.

[120] Ibid.

[121] Ibid., Considering para. 106. ECtHR, Torregiani and others *v.* Italy, Applications 43517/09, 46882/09, 55400/09, Judgment 1 March 2013, para. 88.

[122] Instituto Penal Plácido de Sá Carvalho *v.* Brazil, Order of Provisional Measures, 22 November 2018, Considering para. 84.

[123] Ibid., Considering para. 63 and 84. See also, IACtHR Instituto Penal Plácido de Sá Carvalho *v.* Brazil, Order of Provisional Measures,13 February 2017, Considering para. 67.

When the life or personal integrity are in danger then early release of the prisoner, his or her monitored liberty, or house arrest should be decided

The IACtHR considers that the beneficiaries of transformative PMs are still in a situation of risk.[124] For the IACtHR, the only means to end the situation of risk is through the reduction of the prison population. In that sense, the IACtHR considers that the binding precedent, issued by the Supreme Federal Court of Brazil in the Súmula Vinculante No. 56, was fully applicable in the Institute.[125] Concretely, the Brazilian Court had ordered that in cases of overcrowding and overpopulation, the Judge of Execution of Penalties should determine the early release of the prisoner, his or her monitored liberty, or house arrest.[126] In this Brazilian case, the issue of places in criminal establishments was significant.[127]

New prisons and the transfer of inmates to other prison establishments are not solutions to overpopulation

The Court maintains, following the reasoning of the Colombian Constitutional Court, that if in the *Instituto Penal Plácido de Sá Carvalho v. Brazil* case it would find – hypothetically speaking – a violation of Article 5(2) of the American Convention, this violation could not be remedied with the construction of new prisons for two reasons. Firstly, no new establishments had been projected nationwide, and secondly, the State of Brazil itself had alleged a lack of resources. In addition, the critical situation could not be resolved through transfers of inmates to other prison establishments, since the other prisons also did not have the capacity to receive more prisoners. If transfers were made, overpopulation would simply be generated in the other detention centres.[128] Therefore, the IACtHR states that '(…) the only way to stop the continuation of the eventual illicit situation under the American Convention is to try to reduce the population of the detention centre'.[129]

When persons deprived of liberty are suffering more than they are supposed to suffer, the execution of the deprivation of liberty is being implemented in an illegal way and, therefore, every day of deprivation of liberty must be counted double

The IACtHR affirms that as a result of the poor prison conditions, the execution of the deprivation of liberty is being implemented in an illegal way. In practice, the detainees are suffering more than they are supposed to suffer, that is, more than what is inherent in any legal deprivation of liberty. The IACtHR indicates that in this type of situation, the excessive suffering that the person is undergoing (suffering that was not arranged or authorised by the judges) must be taken into account with the objective of deducting the time of deprivation of their liberty.[130] Since persons deprived of liberty are suffering much more than they should, it is fair to reduce their confinement

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[124] IACtHR Instituto Penal Plácido de Sá Carvalho *v.* Brazil, Order of Provisional Measures, 22 November 2018, para. 116.

[125] Supreme Federal Court of Brazil, Súmula Vinculante No. 56 2016. This decision is binding and mandatory for all judges, tribunals, and organs of the government administration, and can only be modified by the Supreme Tribunal itself.

[126] IACtHR Instituto Penal Plácido de Sá Carvalho *v.* Brazil, Order of Provisional Measures, 22 November 2018, Considering paras. 110-114.

[127] Ibid., Considering paras 110 and 115.

[128] Ibid., Considering paras. 115-116.

[129] Ibid., Considering para. 117 (own translation of the authors of): "Por ende, el único medio para hacer cesar la continuidad de la eventual situación ilícita frente a la Convención Americana consiste en procurar la reducción de la población del IPPSC."

[130] Ibid., Considering para 97.

time. In the specific case concerned, given that overcrowding in the Institute is 200%, a density doubled its capacity, it must be concluded that the suffering of detainees has also doubled. In that sense, the IACtHR – quite revolutionarily – concludes that every day of deprivation of liberty in such a situation must be counted double. Additionally, the IACtHR does not exclude the possibility that Brazil may use other means as a substitute for deprivation of liberty, such as those mentioned by the Federal Supreme Court of Brazil in its earlier-mentioned 2016 precedent, namely: early release of the prisoner, his or her monitored liberty, or house arrest.[131]

Such a deprivation of liberty could never comply with the social reform and rehabilitation of the convicted person

According to the IACtHR, the living conditions in the Institute might violate Article 5(6) of the American Convention, since such a deprivation of liberty could never comply with the social reform and rehabilitation of the convicted persons. The prison conditions result in a degrading penalty that affects the inmate's self-esteem.[132] Moreover, a prolonged violation of Article 5(6) of the ACHR seriously endangers the rights of all persons deprived of liberty. According to the IACtHR, the *Instituto Penal Plácido* was controlled by dominant violent groups that caused humiliation to detainees, causing a serious deterioration of their self-perception and self-esteem. These detention conditions provoked a high risk of the reproduction of violence with criminal deviations that were even more serious than those that motivated the prison sentence in the first place.[133] The prison conditions also resulted in degrading punishment.[134] Therefore, the IACtHR points out that when the conditions of the detention centre deteriorate and give way to a degrading penalty, partly as a result of overpopulation and its effects, the distressing content of the deprivation of liberty increases to a degree where it becomes illicit or unlawful.[135] With this statement, it seems that the IACtHR is subtly prejudging the merits of the matter. However, it could also be seen as the IACtHR being desperate to find a way to order transformative PMs that will result in effective protection for detainees who are kept in horrific conditions, in some cases for many years already.

Some types of crimes deserve different treatment

The Court clarifies that prisoners convicted of, or charged with, crimes against life and physical integrity or sexual offences require particular treatment.[136] In these cases, a technical criminological examination or examination of the prognosis of the detainees' conduct is required. That exam must be performed by at least three groups of experts.[137]

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131 Ibid., Considering Enacting paras 2, 4. See also the case of Milagro Sala *v.* Argentina, where the Court requested the State to replace Mrs Sala's preventive detention with the alternative measure of house arrest to be carried out at her residence or place where she usually lives, or by any other alternative measure to pre-trial detention that is less restrictive of one's rights than house arrest. IACtHR Milagro Sala *v.* Argentina, Order of Provisional Measures, 23 November 2017, Considering para 33.

132 IACtHR, Instituto Penal Plácido de Sá Carvalho *v.* Brazil, Order of Provisional Measures, 22 November 2018, Considering para 87.

133 Ibid., Considering paras. 87–88.

134 Ibid., Considering para. 87.

135 Ibid., Considering para. 92.

136 Ibid., Considering para. 131.

137 Ibid., Considering para. 133.

This transformative PM does not have an erga omnes effect

The IACtHR emphasises that its competence to order PMs refers exclusively to the situation of the *Instituto Penal Plácido* and of the persons staying there, thereby excluding an *erga omnes* impact of the PMs' resolution beyond the case at hand.[138]

The IACtHR orders the following measures to address the specific structural problems:[139]

Structural problem		**Measure ordered**
Deaths	High number of deaths: 56 deaths between 2016-2018.[140] Lack of information on the causes of high number of deaths.[141] Mortality higher than with the free population.[142] One doctor in charge of 3,000 prisoners.[143]	To take measures to prevent more deaths and to report what these specific measures are.[144] To investigate the causes of the deaths and to inform the next of kin and the IACtHR. [145]
Infrastructure	Absence of a fire prevention and combat plan. [146] Physical insecurity due to unpredictability of fires. [147] Nine people responsible for the safety of 3,800 detained persons.[148] Absence of mattresses, uniforms, footwear, bedding, and towels for all detainees.[153]	To adapt the infrastructure conditions to *those minimally necessary* to provide a decent life.[149] To remodel all the prison pavilions.[150] To install emergency lighting, a fire detection system, and an alarm system. [151]

[138] Ibid., Considering para. 121-122.
[139] Table elaborated by the authors.
[140] Ibid., Considering para 41.
[141] Ibid., Considering para. 61.
[142] Ibid., Considering para. 79.
[143] Ibid., Considering para. 79.
[144] Ibid., Considering paras. 61, 62, 67; Deciding paras. 1, 8.
[145] Ibid., Considering para. 62-63
[146] Ibid., Considering para. 66.
[147] Ibid., Considering para. 79.
[148] Ibid., Considering para. 67.
[149] Ibid., Considering para. 68.
[150] Ibid., Considering para. 134 (i).
[151] Ibid., Considering para. 134 (v)
[153] Ibid., Considering para. 68.

	Absence of adequate lighting and ventilation.[154]	To implement the provisions of Law No. 7.210/84.[152]
	Budget obstacles.[155]	
Overcrowding, Judiciary, and Executive	Overpopulation with approximate density of 200%.[156] Overcrowding in bedrooms.[157] Personal and physical insecurity resulting from the disproportion of personnel in relation to the number of prisoners.[158] Control of internal order in the hands of the prisoners themselves, as a rule the most violent organised for survival or self-defence.[159] Insufficient number of judges: only seven judges of criminal execution in the state of Rio de Janeiro to supervise the execution of sentences and the execution regime of more than 50,000 persons deprived of liberty.[160]	To reduce the number of inmates through double counting for each day of deprivation of liberty. [161] To foresee a number of guards adjusted to the number of persons deprived of liberty. [162] To subject persons deprived of their liberty for crimes against life, physical integrity, or of a sexual nature to a criminological technical exam consisting of at least psychologists and social workers. [163]

On 2 June 2021, the IACtHR organised a public hearing with the aim of evaluating the implementation of four transformative PMs, including this one.[164] During the public hearing the IACHR informed the Court about overcrowding conditions, lack of access to water and health services, lack of control, and deaths. Further, the Commission mentioned that the Court's request regarding the order 'that every day of deprivation of liberty in such a situation must be counted double' has been complied with respect to some detainees but not with respect to others, and in others, the State decided to stop with the implementation. [165]

V. Conclusions

Despite Latin-American countries have had advances in terms of protecting and promoting human rights at the national and international level, the dignity of prison population seems to be a

[154] Ibid., Considering para. 68.
[152] Ibid., Considering para. 69.
[155] Ibid., Considering para. 76.
[156] Ibid., Considering para. 78. International criteria – like those of the Council of Europe – indicate that exceeding 120% implies critical overpopulation.
[157] Ibid., Considering para. 79.
[158] Ibid., Considering para. 79.
[159] Ibid., Considering para. 81.
[160] Ibid., Considering para. 72.
[161] Ibid., Considering para. 121, 134 (ii)
[162] Ibid., Considering para. 134 (vi)
[163] Ibid., Considering para. 129-130.
[164] IACtHR, The Socio-Educational Internment Facility of the Penitentiary Complex of Curado, of the Penitentiary Complex of Pedrinhas and the Instituto Penal Plácido de Sá Carvalho *v.* Brazil, Order of Urgent Measures, 20 April 2021, Considering para. 1 The public hearing may be seen here
[165] Ibid

principle to assume, without necessarily having any obligations to fulfil it. The horrific prison conditions that affect persons deprived of liberty has proved to be the result of the structural problems of the penitentiary system, which operates on the basis of practices that put at risk the right to life, personal integrity and health. This chronic malfunction of the prison system prompted detainees to request protection from the IACtHR through transformative PMs. Through this request, they demand a response from the State's authorities to their deplorable situation. In this sense, when PMs are ordered, the IACtHR seeks to mobilise the State apparatus towards the fulfilment of its international commitments of maintaining persons deprived of liberty in conditions of dignity. The IACtHR activates the performance of the diverse powers of the State, articulating a response from PMs as a legal (normative-live) tool and not merely as a formal provision. The orders given by the IACtHR seek to collectively protect the detainees kept in deplorable conditions, whilst at the same time using transformative PMs as an instrument for social change; the IACtHR aims to transform the reality of these detainees. Transformative PMs have the merit to draw the attention to structural reforms to tackle the problems of the prison systems in the Americas, namely the overpopulation and consequent lack of adequate healthcare and practices of systematic violence tolerated by state and federal authorities.

Among the transformative PMs adopted to combat the prison problem in Brazil, the resolution of PMs regarding the *Instituto Penal Plácido de Sá Carvalho v. Brazil* case stands out. In these PMs, the IACtHR is inclined to balance the rights and principles in conflict: on the one hand, the right to be detained in conditions with dignity, and on the other hand, the right of society to punish those who commit crimes. In its analysis, the Court introduced innovative considerations on PMs in the context of prisons that can potentially start a debate about to the extent to which the IACtHR is legitimate to intervene in public policy. First, the IACtHR considers that in dire prison conditions there is no automatic right to be released, but considers that, in light of the poor prison conditions, persons deprived of their liberty are undergoing a greater suffering than what is inherent in a term of imprisonment. Therefore, the additional suffering must be taken into account by domestic judicial authorities. In that sense, the penalty of deprivation of liberty can be reduced proportionally to the additional pain suffered by the detainees. In the Brazilian case at hand, since overcrowding amounted to 200% – that is, the double of the prison capacity – the suffering of detainees has also doubled and, as such, every day of deprivation of liberty should be counted as two days. Second, the Court imposed on Brazil an obligation to comply with the order of PMs not only through the adoption of specific protection measures but also by means of effective action with positive results. The aim of the transformative PMs to effectively improve the conditions of the person deprived of liberty urges States to achieve a tangible result. The IACtHR stressed the importance of ordering transformative PMs that result in effective protection for detainees, otherwise, detention will never comply with social reform and rehabilitation of the convicted person. The IACtHR remarked that degrading prison conditions result in degrading punishment, which negatively impact the self-perception and self-esteem of the detainees, making it difficult, if not impossible, to successfully rehabilitate the detainees. Because of the seriously deteriorated prison conditions, the level of distress experienced by detainees can become unlawful. In addition, the IACtHR takes a clear approach by stating that (preventive) detention is not the answer to combat criminality, and building more prisons or transferring detainees to other prisons or detention centres might not be the answer to the problem of overcrowding. In cases where the beneficiaries of transformative PMs still face risks to their life, personal integrity or health, the

judicial authorities should decide for the early release of the prisoners, their monitored liberty, or house arrest.

Importantly, to reach these conclusions, the IACtHR heavily relies on a range of judicial decisions of Brazil and other national tribunals of OAS member states, as well as of the European Court of Human Rights. The Court extended its considerations beyond the Brazilian context to include an overview on similar structural problems of the prison system experienced by other countries, like Colombia and the US, and by another regional human rights monitoring body, that is the ECtHR. This analysis aims to expose the solutions implemented to improve the quality of the detention of persons deprived of liberty, with specific attention to situations of overcrowding and of prisoners with serious medical conditions or mental disorder. Thereby, the IACtHR tried to detect a trend towards a growing consensus about how the prison problem should be understood and solved.