

THE COVID-19 PANDEMIC AND PRISON POLICY IN LATIN AMERICA

María Luisa Romero, Luisa Stalman and Azul Hidalgo Solá

APRIL 2021

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Foreword

The Inter-American Dialogue's Peter D. Bell Rule of Law Program is pleased to present *The Covid-19 Pandemic and Prison Policy in Latin America*. Since the onset of the pandemic, the Dialogue has sought to understand and analyze its far-reaching effects on democratic governance and social progress in the Americas. This policy brief represents an important contribution to the Dialogue's work in this area.

Latin America's prisons have long been plagued by poor infrastructure, unsanitary conditions, and severe overcrowding. In the context of a global pandemic, these preexisting conditions became not just human rights concerns and citizen security vulnerabilities, but public health risks as well. As the policy brief documents, the potential for prisons to become epicenters of the Covid-19 outbreak triggered serious concerns for the wellbeing and lives of both prisoners and the broader public.

As the brief also shows, Latin American countries largely recognized the need to adapt their penitentiary policies in response to the pandemic. In some cases, they acted nimbly to introduce policy innovations, including in politically sensitive areas such as reducing prison populations. The extensive research reflected in the policy brief shows the wide variety of measures adopted by policymakers, and also some of the limitations that governments encountered.

While this brief offers an initial assessment of Latin American prison policy in the early stages of the Covid-19 pandemic, it also poses critical questions that require additional study. Some of the policy innovations adopted during the pandemic provide a basis on which to fundamentally rethink prison policy in the region. However, further analysis is needed to understand the scope and impact of these reforms. In this regard, the policy brief aims to provoke and inform an urgent conversation on the future of Latin American prisons, and its conclusions and takeaways offer a roadmap for this conversation.

The policy brief was authored principally by María Luisa Romero, a member of the Inter-American Dialogue, former Minister of Government of Panama, and member of the United Nations Subcommittee on Prevention of Torture. Romero wrote the report in her personal capacity. The brief was co-authored by Luisa Stalman, a senior at Duke University studying Political Science and Latin American History, and Azul Hidalgo Solá, a senior studying International Affairs at The George Washington University. Both Stalman and Hidalgo are former interns with the Peter D. Bell Rule of Law Program. The report was coordinated and edited by Michael J. Camilleri and Catharine Christie, director and program assistant of the Peter D. Bell Program. Catharine Christie also led the final review and layout of the report, with the support of Dialogue intern Sofía Corzo, a student at Harvard University.

The Dialogue is grateful to the authors of the policy brief for their important work on this critical topic, and to the Ford Foundation for its ongoing support of the Peter D. Bell Rule of Law Program.

MICHAEL SHIFTER

President, Inter-American Dialogue

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EXECUTIVE SUMMARY

The novel coronavirus (Covid-19) pandemic has brought about unprecedented challenges on a global scale, revealing and exacerbating policy failures that affect the most marginalized communities, including those deprived of their liberty. In Latin America, where prisons have suffered from decades of abandonment and official neglect, the pandemic has brought tragedy and unrest to prisons and posed unique challenges for governments, monitoring bodies, civil society and international institutions. The post-pandemic period, however, presents a unique and historic opportunity for Latin American policymakers to reassess and shift course with respect to prisons and criminal justice, building on fragile but innovative policy experiments triggered by the pandemic.

Prisons in Latin America have long been characterized by deficient health and sanitary conditions, inadequate infrastructure, recurring public health challenges, and widespread overcrowding. The Covid-19 pandemic exposed and exacerbated these weaknesses, putting both the incarcerated population and the community-at-large at higher risk of infection.

Our report finds that in the early months of the pandemic between March and July 2020, Latin American countries confronted this reality by adopting a range of policies with the objective of mitigating public health risks to prisoners and the broader population. At the most basic level, public authorities attempted to address critical sanitation deficiencies in prisons. The suspension of visits due to Covid-19 also forced nations to mobilize around improving communication between prisoners and the outside world. Our research shows that many nations across the region have introduced telephone communication and video conferencing to supplement suspended visitations.

Most significantly, this report analyzes how nations in Latin America have implemented processes to reduce their overall prison populations through judicial, legislative, and/or executive measures. Initiatives to address overcrowding include reevaluating pretrial detentions, adopting alternative sentencing measures such as early release or house arrest, and presidential pardons. The impact of these various measures is difficult to measure with complete accuracy given most countries provide inconsistent or incomplete information. Notwithstanding, our research suggests that prison releases in response to Covid-19 were likely less than five percent of the overall Latin American prison population. Even so, in some cases efforts to mitigate prison overcrowding in the context of the pandemic faced significant political and judicial pushback.

This paper posits that the measures implemented by countries in Latin America during the pandemic provide valuable lessons for government authorities, policymakers, international human rights bodies, and advocates. Policy reforms adopted out of necessity during the pandemic, some of which were considered politically unpalatable before the Covid-19 emergency, offer important lessons and in some cases proof of concept for overdue shifts in prison policy. Based on this body of evidence and experience, Latin American governments can and should mobilize to address the systemic weaknesses in prison systems across the region and adopt prison policies that are respectful of human rights and more effectively protect the interests of society at large. The policy decisions made during and in the wake of the pandemic may very well define prison and criminal justice policy in Latin America for the near future. Covid-19 has made glaringly clear a reality that should be the starting point for a new type of reform: prisons and society are intrinsically interdependent and face shared risks as well as responsibilities.

The report concludes with the following takeaways and recommendations:

1. PRISON HEALTH IS PUBLIC HEALTH

The Covid-19 pandemic has highlighted that prison conditions in Latin America, such as overcrowding, limited access to hygiene products, poor ventilation, inadequate nutrition, and deteriorated infrastructure represent important challenges to public health. It has also emphasized the possible public health costs of over-incarceration.

2. STATES CAN AND SHOULD MOBILIZE TO IMPROVE PRISON CONDITIONS

Faced with the imminent and grave threat that Covid-19 presented for the prison population and beyond, several countries in Latin America advanced initiatives to address some of the vulnerabilities in their prison systems. In particular, the efforts to reduce overcrowding were diverse and came from all three branches of government. In an area in which prison administrators are too frequently left alone, the involvement of the legislative and judiciary branches in the search for viable responses to the pandemic in the prison context has been refreshing. The efforts to reduce overcrowding were unprecedented.

3. GOVERNMENTS NEED TO SERIOUSLY RETHINK THE IMPORTANCE OF REDUCING PRISON OVERCROWDING

The Covid-19 pandemic highlighted what has been reiterated by criminal justice and human rights experts – overcrowding not only violates the rights of persons deprived of liberty but is also extremely dangerous from a public health perspective. Covid-19 serves as a wake-up call for governments in the region to reconsider the laws, policies, and practices that have led to such high levels of overcrowding and inhumane prisons in the first place.

4. TECHNOLOGY SHOULD BE USED TO COMPLEMENT IMPORTANT ASPECTS OF PRISON LIFE

Crisis can and should spark innovation. Such has been the case of the prison systems in the region that attempted to mitigate the worst effects of the restrictions on contact with the outside world by using technology to provide alternative means of communication. Technology can also be beneficial and should be explored to alleviate other collateral consequences of confinement, such as the lack of effective and sufficient educational and rehabilitation programs as well as inadequate medical attention.

5. GREATER TRANSPARENCY IS NEEDED ABOUT THE IMPACT OF PANDEMIC-RELATED PRISON POLICIES

Before the Covid-19 pandemic, several prison systems in the region were already marked by difficulty in the access to statistics and information. During the pandemic, which called for closer scrutiny of the system, there has been a troubling lack of complete and updated data as well as underreporting from States regarding the impact of Covid-19 in prisons. For example, most countries have not released publicly available information as to the impact of the measures taken to alleviate Covid-19's impact in the prison context, including the number of prisoners released, which renders their evaluation difficult.

6. FURTHER RESEARCH IS NEEDED FOR POLICY DESIGN/MAKING

For real transformation to take place, research and science need to be part of the solution. Even while we remain in the midst of the pandemic, a roadmap detailing necessary further research can help to ensure that we learn the right lessons. The knowledge acquired should then be used to design better public policies and build more effective prison systems that respect human rights. This roadmap should include: further study and assessment of Covid-19 impact in prisons across the region, comparative analysis of the different measures taken by countries and their impact, and greater information sharing and cooperation among Latin American countries regarding the impact of Covid-19 and priorities for future policy reform.

I. Introduction

Beyond the public health emergency unleashed by the new coronavirus, the Covid-19 pandemic has exposed and exacerbated the vulnerabilities faced by the world's poorest and most marginalized people, including those deprived of liberty. In Latin America,¹ where prisons have suffered from decades of abandonment and official neglect, the Covid-19 pandemic has brought tragedy and unrest to prisons and posed unique challenges for governments, monitoring bodies, civil society and international institutions. The pandemic, however, presents a unique and historic opportunity for Latin American policymakers to reassess and shift course with respect to prisons and criminal justice reform, building on fragile but innovative policy experiments triggered by the pandemic. The region must prioritize human dignity and ensure that persons deprived of liberty are not isolated and forgotten but, rather, understood as inextricably linked to the well-being of society at large, not just from a security perspective but also from a health, social and moral one.

The pandemic presents a unique and historic opportunity for Latin American policymakers to reassess and shift course with respect to prisons and criminal justice reform, building on fragile but innovative policy experiments triggered by the pandemic.

United Nations Secretary-General Antonio Guterres has emphasized that the response to the Covid-19 pandemic needs to be human rights-focused so that we know “who is suffering most, why, and what can be done about it.”² From the early stages of the pandemic, international bodies such as the World Health Organization (“WHO”) and the United Nations Subcommittee on the Prevention of Torture (“SPT”), as well as regional ones such as the Inter-American Commission on Human Rights (“IACHR”) and the European Committee for the Prevention of Torture, highlighted the vulnerability of people deprived of liberty around the world and made important recommendations that sought to protect their health and human rights.

These calls are particularly relevant in Latin America, where for decades local stakeholders and international watchdogs have called on governments to address the systemic weaknesses of the region's prison systems, often to little avail. However, the public health emergency represented by the pandemic led many governments in the region to implement a variety of policies to finally address some of these weaknesses. Perhaps most significantly, several Latin American states have attempted, through different methods, to directly address the longstanding problem of prison overcrowding by reducing the prison population. In general, these efforts have come late, been insufficient and faced important challenges at the national level. Their effectiveness in terms of preventing Covid-19 transmission and related deaths are also difficult to measure. However, at the same time these measures also offer a glimmer of hope that governments in the region can and should take action to address the chronic problems prisons have historically faced.

This paper posits that the prison policies adopted by Latin American states in response to the Covid-19 pandemic (or lack thereof) offer important lessons to governments and policymakers. It first provides a brief overview of the challenges faced by prisons in the region prior to Covid-19 and seeks to explain why the ongoing pandemic threatens to exacerbate these problems and deepen the public health risks in the general population. It then describes several of the policy measures taken by Latin American governments in the early months of the Covid-19 pandemic, as well as some of the obstacles these measures confronted. The paper concludes by drawing several preliminary conclusions with respect to the region's management of the Covid-19 pandemic in the context of Latin American prisons and providing policymakers with relevant takeaways to consider as they construct more humane and secure prison systems that maximize wellbeing for both persons deprived of liberty and society at large. The paper relies on information from international organizations, government databases, local media outlets and the World Prison Population List.³ It also incorporates information and analysis by other publications that focus on the response of Latin American countries to the Covid-19 pandemic in the prison context.⁴ Unless otherwise noted, the information included spans the time period of March-July 2020.

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II. Background: Prisons in Latin America, a Public Health Tinderbox

Prisons in Latin America are notoriously known for being overcrowded, unsanitary, chaotic and violent; places in which the rehabilitation of a person deprived of liberty represents a real challenge.⁵ International and local organizations have consistently documented these severe systemic weaknesses over the last several decades. For example, the IACHR has stressed the seriousness of prison overcrowding in the region for over 45 years.⁶ The Inter-American Development Bank (“IADB”) highlighted recently that the alarming growth of the prison population in the region over the past 20 years “has collapsed the prison systems and is putting at risk the main objective of prisons: social reintegration of inmates.”⁷ With the Covid-19 pandemic, the preexisting conditions that have been deemed to violate the human rights of people deprived of liberty in the region now exponentially exacerbate inmates’ vulnerability and, in turn, that of society at large.

1. Latin American Prison Population in Numbers

There are approximately 1.5 million prisoners in Latin America and the Caribbean.⁸ The region has experienced a growth in prison population of 120 percent, compared to 24 percent worldwide.⁹ South America leads the trend in the region with a 175 percent increase.¹⁰ The rate of incarceration for women in the past decade in Latin America and the Caribbean has also grown by 52 percent.¹¹

As of September 2018, the world prison population rate, based on national population levels worldwide, was 145 per 100,000 persons.¹² In Latin America, the prison population rate is considerably higher: in South American countries, the median rate is 233, while in Central American countries the median rate is 316.¹³ On average, prisons in the region are operating at 144.2 percent capacity.¹⁴ In many countries, the overcrowding problem is extreme, with over-capacity levels reaching more than 300 percent.¹⁵ According to a recent IADB study, around 58 percent of prisoners in the region do not sleep in beds, a fact that illustrates the severity of this issue.¹⁶

2. Root Causes of Overcrowding

Latin America’s prison overcrowding problem is attributable to multiple factors, including the following: a lack of adequate infrastructure, the implementation of repressive social control policies that resort to the deprivation of liberty as the first response to public security, the excessive use of pre-trial detention and deprivation of liberty as a criminal sanction,

and the lack of a quick and efficient response by the court systems.¹⁷ The use of pretrial detention has increased in the Americas by 71 percent from 2000 to 2020, “with numbers more than trebling in Brazil, Paraguay and Venezuela and doubling in Argentina, Bolivia, Ecuador, El Salvador, Guatemala, Haiti, Nicaragua and Peru.”¹⁸ In countries such as Honduras, the Dominican Republic, Bolivia and Venezuela, more than half of the total prison population has not been sentenced.¹⁹ In Paraguay, prisoners without a sentence constitute more than 70 percent of the prison population.²⁰ According to the IACHR, the use of pre-trial detention is one of the most serious and widespread problems affecting the human rights of persons deprived of liberty in the Americas.²¹

3. Recurring Public Health Challenges in Prisons

In addition to the inherent, practical problems that arise from overcrowding, prisons in the region suffer from widespread unsanitary conditions, including inadequate access to healthcare, hygienic services, drinking water and food. Although States owe a duty of care to prisoners that should be equivalent to the standards of health care that are available in the community,²² the precariousness and lack of resources within prisons directly affect healthcare access and the quality of care that persons deprived of liberty receive. A recent survey by the IADB revealed that 29 percent of the prison population in the region does not receive medical care, 20 percent of prisoners do not have regular access to drinking water and only 37 percent have access to soap.²³ The IACHR has noted that the medical services provided in the region’s prisons generally “do not meet minimum standards of care” and has highlighted several deficiencies such as insufficient and untrained medical personnel, as well as inadequate medicine, medical supplies and equipment.²⁴ The IACHR has also observed that food is not provided in appropriate conditions of quantity, quality and hygiene.²⁵

Many persons deprived of liberty, in part because they come from socially disadvantaged segments of the community, tend to be more susceptible to disease and suffer from worse health conditions than the general population.²⁶ According to the WHO, persons deprived of liberty “frequently face greater exposure to risks such as smoking, poor hygiene and weak immune defense due to stress, poor nutrition, or prevalence of coexisting diseases, such as bloodborne viruses, tuberculosis and drug use disorders.”²⁷ For example, the IADB notes that tuberculosis in the region’s prisons is 81 times more prevalent than in the general population and that results are similar when analyzing the incidence of HIV, hepatitis, and syphilis.²⁸ Inadequate infrastructure²⁹ and lack of space due to institutions operating beyond their capacity adds another complication that makes isolation of the sick very difficult.

III. An Urgent New Challenge: Latin American Prisons and Covid-19

All of the aforementioned conditions are common in the region and facilitate the spread of disease behind bars. In addition, prisons suffer from generally closed and poorly ventilated spaces that make them fertile ground for outbreaks of infection. It is therefore no surprise that viral epidemics have historically represented a threat in prison settings.³⁰ In the case of the Covid-19 pandemic, the two main prevention measures recommended for the general population are handwashing and social distancing. However, these necessary measures cannot be effectively instituted under the endemic overcrowding and unsanitary conditions suffered by most Latin American prisons. Water is scarce in many prisons in the region and even basic hygiene products such as alcohol and hand sanitizer have traditionally been banned from prisons for security reasons.

Adding to these challenges, people deprived of liberty with Covid-19 symptoms may avoid seeking medical attention for fear of being placed in isolation. Isolation is seen by prisoners as a form of punitive solitary confinement.³¹ As if this were not enough, according to the IADB, around 90,000 persons deprived of liberty in Latin America are over the age of 65, constituting the most vulnerable age group for contracting the virus.³² Older people in prisons also tend to suffer more frequently from chronic health conditions like hypertension, asthma, and diabetes that increase the risk of serious complications from contracting Covid-19.³³

Rapid transmission within prisons can have an amplifying effect, affecting countries' ability to control Covid-19 infection in the general population if strong prevention and control measures, adequate testing, treatment and care are not implemented.

1. Covid-19 Inside and Outside the Prison Walls

Prisons during the Covid-19 pandemic also represent a public health risk beyond their walls. Physical and mental illness inside prisons can become a burden on the public health-care system.

Prisons are also subject to a constant flow of people. Even when family visits and prisoners' temporary day or night releases are suspended, prison officers and other staff are constantly oscillating between prisons and their communities,³⁴ which may pose significant health risks for the wider community. As stated by the WHO, rapid transmission within prisons can have an amplifying effect, affecting countries' ability to control Covid-19 infection in the general population if strong prevention and control measures, adequate testing, treatment and care are not implemented in prisons and other places of detention.³⁵

2. Initial Impact of Covid-19 in Prisons

Covid-19's impact in Latin American prisons is difficult to assess. 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."³⁶ Countries have also varied in their degree and frequency of testing in prisons.³⁷ Despite this, rough numbers indicate the severity of the pandemic's impact. By mid-August, an estimated 138,522 prisoners had tested positive for Covid-19 and at least 1,504 had died of complications linked to the virus in Latin America.³⁸ As to specific countries, between mid-March and mid-July 2020, Argentina reported 801 total Covid-19 cases in prisons.³⁹ In Chile, 1,663 confirmed Covid-19 cases had been reported among prisoners and prison staff as of June 26, 2020 and of the 746 prisoners infected with Covid-19, seven had died.⁴⁰ In Colombia, at least 3,194 total cases had been registered in the national prison system as of August 5, 2020, with 2,964 of those being among the prison population and the rest among prison staff.⁴¹ In Panama, 2,177 total positive cases had been reported as of October 29, 2020, with 2,124 prisoners recovered and six dead.⁴² The IACHR has warned generally "that actual figures could be significantly higher," given the lack of accurate data.⁴³

3. Pandemic Related Surges in Violence

Since the early stages of Covid-19, violent uprisings related to the pandemic have sprung up in prisons across the region. According to the IACHR, riots have occurred as a form of protest against overcrowding and the lack of hygiene and personal protective equipment available to prevent Covid-19 transmission.⁴⁴ On March 16, 2020, the state of São Paulo announced that around 1,000 prisoners escaped following

riots in several prisons.⁴⁵ Brazilian troops were deployed for the recapture, leading to violent confrontations.⁴⁶ On March 18, 2020, there was a massive escape of 84 prisoners in Venezuela, with reportedly ten being killed in the recapture efforts.⁴⁷ On March 19, 2020, a riot broke out in the San Roque prison in El Salvador, where prisoners demanded better health care following the first known positive case of Covid-19.⁴⁸ On March 21, 2020, at least 23 prisoners were killed and more than 80 were injured in La Modelo prison in Bogotá, Colombia, amidst a widespread uprising across various prison units denouncing the lack of preventive measures against Covid-19.⁴⁹ Similarly, in Trujillo, Peru, prisoners mutinied, resulting in 31 inmates injured. Prisoners were demanding better conditions in the face of the pandemic and were protesting the lack of food.⁵⁰ Moreover, in late March 2020, prisons in Santa Fe, Argentina, experienced riots against the overcrowding situation and demanding more preventive measures in the face of the pandemic.⁵¹ These riots resulted in five prisoners being killed as well as another dozen wounded.⁵² In May in Venezuela, prisoners of Los Llanos prison rioted against conditions in the center and the prohibition of visits to stop Covid-19 propagation.⁵³

The confrontation reportedly resulted in 47 deaths and 75 persons wounded,⁵⁴ including the director of the prison, who was stabbed in the back.⁵⁵

Many Latin American prisons have historically experienced high levels of violence, with cases of prisoners themselves organizing criminal acts from inside the prison and gaining control over internal prison security.⁵⁶ Therefore, the riots, escapes, injuries and deaths related to Covid-19 are tragically unsurprising, though no less concerning. Some have argued that the Covid-19 pandemic increases the risk of “criminal opportunism,”⁵⁷ efforts by criminal organizations to leverage the pandemic for concessions from prison authorities. Still, the fact remains that prisons in the region have been put under heightened pressure and tension due to fear, uncertainty and poor communication between authorities and those detained.⁵⁸ The combination of isolation in inhumane conditions, regular violations of fundamental human rights and the threat posed by the pandemic “are a dangerous recipe for acts of aggression and violent prison uprisings.”⁵⁹ Ineffective management of the crisis by authorities has broad human rights, health, and security implications for the region.⁶⁰



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IV. Covid-19 and the Prison Policy Response in Latin America

Even before the Covid-19 pandemic, the unsanitary, underfunded and overcrowded prison systems for which Latin America is notorious lacked the capacity, or the will, to implement even some of the most basic health prevention measures. However, since it became clear that the Covid-19 pandemic would not discriminate across borders or prison walls and given the ample and consistent advice from international organizations, authorities across Latin America were forced to mobilize, albeit to different degrees and speeds, to try to avoid a foreseeable health and humanitarian disaster in their nations' prisons.

1. Recommendations of International Human Rights Bodies

In the midst of this urgent panorama, international bodies and experts gave prison authorities around the globe ample and detailed guidelines that reflected a general consensus on health, sanitary and other policy measures that needed to be prioritized.⁶¹ In addition to the frontline sanitary measures—hygiene, handwashing, adequate personal protective equipment, and, when required, quarantine and isolation—as well as the importance of providing accurate and complete information to people deprived of liberty and alternatives to guarantee their right to communication, the recommendations all emphasized the reduction of prison overcrowding.

Since it became clear that the Covid-19 pandemic would not discriminate across borders or prison walls, authorities across Latin America were forced to mobilize to try to avoid a foreseeable health and humanitarian disaster in their nations' prisons.

Michelle Bachelet, the United Nations High Commissioner for Human Rights, called for urgent action in March 2020 to prevent Covid-19 “rampaging through places of detention,” emphasizing the need to reduce the number of people in detention.⁶² The UN's SPT also recommended taking measures to reduce prison populations “by implementing schemes of early, provisional or temporary release for those detainees for whom it is safe to do so.”⁶³ Moreover, the WHO pointed to the need for the “limitation of persons in pre-trial detention and implementation of non-custodial measures” to reduce the risk of spreading the virus in prisons.⁶⁴ The IACHR urged States in the Americas to reduce overcrowding as a necessary measure to contain the pandemic and the Inter-American Court of Human Rights emphasized the need for rational and orderly alternative measures to the deprivation of liberty.⁶⁵ The recommendations made it clear that States needed to implement strict health and control measures just as they would for the general population, but that in the context of prisons, these would likely be insufficient at best because of overcrowding and the other systemic challenges already mentioned. In order to prevent potentially catastrophic consequences in prisons (and beyond), States would have to take measures, some very basic, others more difficult, that were long overdue.

2. Policy Responses to Address Critical Sanitation Deficiencies

National authorities and prison systems in the region had to respond to the pandemic first and foremost by addressing obvious and critical sanitation deficiencies. Countries issued protocols and guidelines for the prevention and management of Covid-19 that emphasized measures to improve basic hygiene.⁶⁶ In Honduras, the Secretary of Health guidelines called for complete cleaning and disinfection of common areas and entrances, as well as the necessary provision of necessary cleaning supplies.⁶⁷ In Colombia, the Ministry of Health and Social Protection highlighted the importance to train and educate prisoners and prison staff on hygiene protocols, including good cough etiquette, thorough and regular hand washing, and avoiding sharing of materials or touching the eyes, nose, and mouth.⁶⁸ Mexico also planned a wide dissemination campaign for its federal prisons to promote prevention and hygiene measures that involved the prison population, guards, authorities, and family members.⁶⁹

Nations in the region have also attempted to address chronic sanitary deficiencies in prisons by increasing access to critical health needs. In Peru, the government informed that water, electricity, and food rations were increased, and sanitary services and drainage systems were given maintenance.⁷⁰ In Panama, the Minister of Government enacted a three-phase plan to combat potable water shortages in prisons. This plan

consists of enabling new tanks for transportation, opening new wells and taking surplus water from other prisons to those most in need.⁷¹ In Paraguay, Panama, and Chile, the prison systems teamed up with their governments' Ministry of Health to protect the prison population from contracting influenza.⁷² Governments have also received donations from international organizations or through local charity.⁷³

Some countries also involved their prison populations in the manufacturing of sanitary supplies to benefit prisons as well as society-at-large. In Brazil, women in detention manufactured face masks for prison and security officials.⁷⁴ The secretary of Brazil's prison system championed these efforts as a way to help society with urgent pandemic equipment needs.⁷⁵ In Paraguay, persons deprived of liberty partnered with a local trading company to manufacture masks, and as of April 15, 2020 roughly 3,500 masks were produced daily.⁷⁶ Paraguay's prison system director described this partnership as an excellent opportunity to provide prisoners with work while also positively contributing to society's well-being.⁷⁷ In Peru, as part of the program "Productive prisons", inmates produced for sale masks with traditional Cusco textile designs.⁷⁸ In Guatemala, a former gang member in prison producing masks for front-line public servants was quoted as saying that "in addition to helping Guatemala, I am helping myself."⁷⁹

3. Policy Responses to Facilitate Safe Communication with the Outside World

As soon as the first cases of Covid-19 reached Latin America, governments rushed to restrict or eliminate prison visits to help mitigate disease transmission. In Latin American prisons, due to some of the systemic weaknesses already mentioned, visits not only constitute the principal way to communicate and maintain contact with family, they are instrumental to the rehabilitation process and an important source of food, basic hygiene and health supplies.⁸⁰ The suspension of visits due to Covid-19 threatened to bring a whole new set of challenges, also related to mental health and the potential eruption of tension and violence that, as mentioned above, could even turn deadly.

Against this backdrop, several prison systems in Latin America turned to technology as a way to connect prisoners with the outside world, some in ways that had never been attempted before. In Argentina, the Prison Ombudsman at the federal level declared telephone communication with family as fundamentally important, especially during the pandemic, and highlighted the need for all people deprived of liberty to be able to receive phone calls in their respective living sectors in addition to the videoconferencing opportunities that had already been established.⁸¹ In Paraguay, the Director

of the Specialized Unit for Information and Communication Technologies explained that persons deprived of liberty may now feel accompanied by their relatives during the national quarantine through the use of technology.⁸² In Guatemala, the General Directorate of the Prison System indicated that video conference calls would be implemented to avoid riots and other violent instances.⁸³

In an unprecedented move, the Criminal Court of Cassation of Buenos Aires province authorized all of the province's prisons to allow use of cell phones so prisoners could maintain contact with their families while visits remained restricted.⁸⁴ Reports in June 2020 from the province's Minister of Justice and Human Rights indicated that roughly 22,000 prisoners had registered cell phones since the Court's authorization.⁸⁵ At the same time, it was made clear that restrictions would be in place to prevent potential criminal activity.⁸⁶

Restrictions in prisons due to the pandemic have also meant the end of many educational and outreach services for those deprived of liberty. These services can be critical for the prison population, both in rehabilitation and mental health efforts. In Chile, the Gendarmerie collaborated with the Universidad Católica de la Santísima Concepción to allow 150 prisoners to remotely access cultural activities.⁸⁷ Similarly, prisons in Argentina partnered with the Universidad Nacional Villa María to offer a variety of remote artistic courses, such as theater, chorus, and a literary workshop for prisoners.⁸⁸

The suspension of visits due to Covid-19 threatened to bring a whole new set of challenges, also related to mental health and the potential eruption of tension and violence that could even turn deadly.

4. Policy Responses to Reduce Prison Overcrowding

Policy responses related to sanitation and technology are by no means easy or inexpensive to implement. However, they are much less controversial and complex than measures to reduce prison population, which are arguably the most important in the context of prisons and Covid-19 (see section IV.1 above). For decades, international organizations, human rights advocates and criminal justice experts pushed governments to implement policies to reduce the alarming levels of overcrowding in Latin America.⁸⁹ Yet, the region has yet to see coherent, consistent, and effective efforts in this regard. For this reason, it was encouraging, and almost promising, to see the efforts taken by some nations at the beginning of the pandemic to reduce overcrowding.

Since March 2020, various countries in Latin America, through their judiciary, legislative, and/or executive branches, started processes aimed at reducing their prison populations.⁹⁰ These initiatives took various forms, including presidential pardons, executive decrees, emergency legislation, and directives from justice officials. Following the guidelines from international bodies, which recognize that there are different degrees and types of vulnerability among the prison population⁹¹ and that there are also important safety and security considerations,⁹² most of the prison release efforts

focused on a small fraction of the total prison population: those who are most vulnerable to contracting the disease or those who have not committed serious crimes and have served most of their sentence. The remainder of this section summarizes several national initiatives adopted with the aim of reducing prison populations as a response to the pandemic. It is followed by an evaluation of the impact of these measures, and a summary of some legal and practical challenges that to some extent may have limited the effectiveness of such measures.

i. Judicial Measures

Brazil

Brazil's judiciary was among the first in the region to take actions towards the reduction of the country's prison population. On March 17, 2020, the National Justice Council issued extensive recommendations to federal judges aimed at reducing the prison population by adopting alternative measures.⁹³ The recommendations included reviewing pretrial detention cases for those in overcrowded conditions, those who had exceeded 90 days in detention or those related to non-violent crimes, as well as early release, house arrest or alternative socio-educational measures for pregnant or breastfeeding women, minors, and the elderly, among other risk groups.⁹⁴ Even before these recommendations were issued, there had already been similar responses at the state level in Brazil, in particular in the State of Minas Gerais. On March 16, 2020, the Justice Tribunal recommended house arrest for those in open and semi-open regimes and for those detained for not having paid alimony, as well as a review of pre-trial measures and an evaluation of alternatives to deprivation of liberty for those facing higher risk, such as persons over 60 and diabetics.⁹⁵

Argentina

In Argentina, courts at both the federal and state levels called on relevant judicial actors to adopt measures addressing overcrowding in the country's prisons.⁹⁶ The President of the Supreme Court of Justice of the Province of Buenos Aires established in a March 25, 2020 resolution that it was the responsibility of the competent magistrates to evaluate and discern the adoption of alternative or mitigating measures in favor of the most vulnerable persons deprived of liberty in the context of Covid-19.⁹⁷ In early April, the Federal Chamber of Criminal Cassation shared with the judges in its jurisdiction the recommendations of the IACHR regarding Covid-19 in the prison context,⁹⁸ including addressing overcrowding, reevaluating cases of pretrial detentions and evaluating the possibility of adopting alternative measures such as early

Policy responses related to sanitation and technology are by no means easy or inexpensive to implement. However, they are much less controversial and complex than measures to reduce prison population, which are arguably the most important in the context of prisons and Covid-19.

release and house arrest.⁹⁹ On April 13, 2020, the Federal Chamber issued additional guidelines regarding applicable alternative measures.¹⁰⁰ The Federal Chamber recommended prioritizing, among others, people who have committed non-violent crimes who are in pre-trial detention or close to serving their sentence, pregnant women and persons with higher health risks, such as the elderly and persons with disabilities.¹⁰¹ The Court also emphasized “extreme prudence” for the application of these provisions in cases of serious crimes.¹⁰²

Costa Rica

In Costa Rica, starting in early April, sentencing judges issued different corrective measures calling for the swift relocation or removal of prisoners suffering from preexisting conditions.¹⁰³ According to one judicial order, due to humanitarian reasons, prison authorities had to carry out evaluations of persons deprived of liberty whose health was at risk according to the Ministry of Health guidelines, and, consequently, the National Institute of Criminology had to expeditiously resolve each recommendation of relocation or release.¹⁰⁴ Based on the order, the Ministry of Justice issued instructions as to who qualified for release: those who were close to the end of their sentence and did not imply a risk to themselves or a third party, those suffering from diseases including chronic kidney failure, heart disease, autoimmune diseases, lung disease, cancer patients, multiple sclerosis and immunosuppressed patients, pregnant women or those with babies in intensive care and people over 65 years of age.¹⁰⁵ In addition to medical criteria, the Ministry determined that viable support outside prisons (understood as support from families or others) to those persons deprived of liberty that qualify for release would be “indispensable.”¹⁰⁶

Ecuador

In Ecuador, the National Court of Justice, making reference to the IACHR’s recommendations, exhorted judges in the country to privilege non-custodial precautionary measures, especially in the case of minors and women.¹⁰⁷

Dominican Republic

In the Dominican Republic, it was the Attorney General who instructed prosecutors to request from judges, with urgency, alternative custodial measures for persons over the age of 60 and those with chronic or terminal illnesses.¹⁰⁸ Excluded from the instruction were those who committed serious crimes of gender, sexual, or domestic violence or drug trafficking, among others.¹⁰⁹

Following the guidelines from international bodies, most of the prison release efforts focused on a small fraction of the total prison population: those who are most vulnerable to contracting the disease or those who have not committed serious crimes and have served most of their sentence.

ii. Legislative Measures

Chile

In Chile, on April 17, 2020, the government passed a law commuting prison sentences to house arrests with the objective of preventing the spread of coronavirus in prisons.¹¹⁰ The general commutative pardon only applies to a select portion of the prison population—to balance the objectives of reducing the prison population size and ensuring the safety of society at large— including men over the age of 60, women over the age of 55, women who are pregnant or have a child under 2, and those who are serving night incarceration sentences.¹¹¹ Only those who comply with strict sentencing requirements, for example, having served at least half their sentence and having a remaining 36 months or less of their remaining term to serve, are eligible for this pardon.¹¹² President Piñera clarified that the General Commutative Pardon Act does not confer impunity from criminal responsibility; these pardons were merely issued as a means to modify or substitute existing prison sentences with alternative home confinement.¹¹³ Additionally, the act will not apply to those incarcerated for serious crimes, including but not limited to torture, rape, femicide, migrant smuggling, terrorism, or crimes against humanity.¹¹⁴ These exclusions are meant to respect the victims of these crimes, as expressed by President Piñera at a press conference: “the main commitment of our Government and State will always be the victims of crime, but we also need to treat people deprived of their liberty humanely and protect their health and lives.”¹¹⁵

Mexico

Like Chile, Mexico also took legislative measures as a response to Covid-19 and on April 20, 2020, the General Congress of Mexican States passed an Amnesty Law intended to reduce prison overcrowding by granting amnesty to persons serving pre-trial detention or sentences at the federal system.¹¹⁶ The law is clear that only those who are first-offenders may qualify, and only certain crimes: abortion, drug-related, robbery, and sedition.¹¹⁷ In the case of indigenous people, any crime could qualify if the judicial proceeding did not follow due process or if the right to an interpreter was violated.¹¹⁸ Similar to Chile, the Mexican law also excludes those committed for serious crimes.¹¹⁹ As to the process to request amnesty, the law established that a special commission would be created by the Executive branch to evaluate each case, that the request would have to be made by the person deprived of liberty, a family member or a public human rights organization, and that the commission would have up to four months to make its determination.¹²⁰

Honduras

In Honduras, the National Congress issued Decree No. 36-2020, which reformed the Criminal Procedure Code, on June 2, 2020.¹²¹ The decree cited in its introduction the recommendations issued by the international bodies of human rights protection, particularly those of the IACHR that urged states to adopt measures to guarantee the health and safety of persons deprived of liberty and their families in the context of Covid-19, especially those to reduce overcrowding.¹²² Thus, the Honduran penal code reform

allowed for persons detained who have not yet been convicted of a crime or are in vulnerable health groups to obtain house arrest during the pandemic. Eligibility for alternate pre-trial detention was not granted to those accused of crimes linked to drug trafficking, rape, arms trafficking, or who are related to criminal groups known as maras or pandillas.¹²³

iii. Executive Branch Measures

Colombia

In Colombia, in the context of the national emergency declared due to the pandemic, the instrument to facilitate prison population reduction was an Executive legislative decree, which has the force of law. Legislative Decree No. 546 of April 14, 2020 cited the recommendations by the IACHR, the United Nations High Commissioner for Human Rights and the WHO, stating that it was clear that the country's current overcrowding situation required urgent and immediate action.¹²⁴ The decree allows house arrest for persons over 60, pregnant women, those with underlying diseases, persons with disabilities, those convicted for sentences under 5 years, and those who have served 40 percent of their sentence, among others.¹²⁵ The Colombian decree also specifically excludes a series of crimes including forced disappearance and crimes against humanity.¹²⁶

Bolivia

In Bolivia, the interim government issued a presidential decree on May 4, which had to be previously approved by the Legislative Assembly, providing the benefit of amnesty (applying to pretrial detainees) or pardon (applying to those convicted) for humanitarian reasons in the context of the national health emergency.¹²⁷ This decree references the recommendations issued by the WHO on preventive health measures and the IACHR on guidance for mitigating the spread of the virus in prison systems, as considerations for the reform.¹²⁸ Presidential Decree N°4226 established that people deprived of liberty meeting the following qualifications may qualify for amnesty or pardon: those over the age of 58, with advanced or terminal chronic disease, with severe or serious disabilities, pregnant or lactating women and those who have under their sole care one or more sons or daughters under the age of six.¹²⁹ The benefits do not apply to repeat offenders and to those who are being investigated or have been convicted for a series of crimes, including homicide, rape, sexual assault against children, arms smuggling, terrorism and genocide. In order to qualify, persons deprived of liberty must present an application to the public defender, the prison system must provide a report for the evaluation, and the judge must make the final decision.¹³⁰

While there is information about the initial policy measures taken in Latin America with the aim of reducing prison populations, the actual implementation process and results from such measures are difficult to assess.

Panama

In Panama, the Ministry of Government has issued a number of decrees through which the President grants early releases to persons deprived of liberty with chronic illnesses, above the age of 60, or who have served two-thirds of their sentences and complied with good practices.¹³¹ In Panama, presidential grants of early release occur periodically in the country regardless of pressing health crises, but the recent decrees mention the national emergency as reasoning for releases.¹³²

Peru

In Peru, on April 23, 2020, the government issued Executive Decree No. 004-2020-JUS, which allows for the evaluation and proposal for releases granted by the President to benefit a prioritized group of inmates during the health emergency due to Covid-19.¹³³ This decree permits for releases through common presidential pardons as well as due to humanitarian reasons, and also commutations of sentences.¹³⁴ To qualify for a pardon based on humanitarian reasons, the person would have to suffer from a chronic disease that would increase the vulnerability to Covid-19 contagion.¹³⁵ For common pardons or commutation of sentence, the decree lists several conditions, including: being a mother with her child in prison, being pregnant, having six months left to complete the sentence imposed, and being over 60 years old.¹³⁶

Nicaragua

Nicaragua, unlike the rest of the countries reviewed here, has not had an official policy response related to prisons releases during the pandemic, but, like Panama, has relied on executive powers to release persons deprived of liberty.¹³⁷ On May 13, the government granted 2,815 prisoners the legal benefit of family coexistence to release them from prison, citing Mother's Day as the motivation.¹³⁸ The news regarding the release did not mention Covid-19 but did emphasize the release of elderly prisoners with chronic illnesses.¹³⁹ These releases took place amid increased complaints of Covid-19 transmission in prisons, complaints by the families of political prisoners, and denunciations made by a top United States official.¹⁴⁰

5. Results of Measures to Reduce the Prison Population

While there is information about the initial policy measures taken in Latin America with the aim of reducing prison populations as described above, the actual implementation process and results from such measures are difficult to

A preliminary conclusion is that, in the early stages of the pandemic, no country except Nicaragua, whose government never attributed its mass releases to the pandemic, released more than 10 percent of its prison population in response to Covid-19.

assess. Very few countries have released specific and updated information about the number of persons deprived of liberty who have been released on humanitarian reasons due to the Covid-19 pandemic. The section that follows attempts to present some preliminary and approximate results of the efforts in Latin America to reduce prison populations.

Brazil

In Brazil, according to numerous non-official sources, around 30,000 prisoners were released in the first months of the Covid-19 pandemic.¹⁴¹ In the country with the world's third largest prison population (after the United States and China), with roughly 750,000 people deprived of liberty,¹⁴² this would mean that around 4 percent of its population was released. However, it is not clear that this figure is significantly higher than the typical release rate in a non-pandemic context.¹⁴³ 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, 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.¹⁴⁴

Argentina

In Argentina, according to data published by the Prison Ombudsman's National office, at least 2,185 prisoners were released between March 12 and May 31, 2020 in the federal prison system.¹⁴⁵ The information is not broken down to explain how many of those releases are related to the pandemic but it does indicate that only 13 percent of

The question of why so few prisoners were released from Latin American prisons despite the numerous and diverse efforts across the region to reduce overcrowding needs to be further studied.

the releases are due to completion of sentence.¹⁴⁶ It also concludes that the higher number of releases during the pandemic months is due to the “noticeable increase” of house arrests: between March and May 2020 there were 735 house arrests granted compared to 62 in the same period in 2018.¹⁴⁷ At the provincial level, the number of releases are less clear but unofficial sources mention that by the end of April there had been around 800 releases in Buenos Aires province.¹⁴⁸ With a total prison population of around 103,000,¹⁴⁹ numbers available indicate that between 2 percent and 3 percent of the population may have been released in Argentina between March and May 2020.

Chile

In Chile, the General Commutative Pardon Act benefited around 1,860 persons according to preliminary official statistics released by the national prison service at the end of June 2020.¹⁵⁰ With around 39,000 prisoners nationally, this likely represented the release of around 5 percent of Chile’s prison population.¹⁵¹

Mexico

In Mexico, according to a study on the effects of coronavirus in the region’s prisons,¹⁵² as of June 1, approximately 3,400 prisoners had been released in the context of Covid-19, with over 2,500 in the state of Mexico.¹⁵³ Of these, the majority were persons over 65 or with particular health issues, with very few pregnant women or women living with children in prisons

benefitting from early release.¹⁵⁴ With a prison population of over 200,000, these releases related to Covid-19 constitute less than 2 percent of the total incarcerated population.

Panama

In Panama, according to official government data, as of August 4, 2020, 273 prisoners benefited from the sentence reduction by the Executive decree outlined previously.¹⁵⁵ With around 18,000 prisoners, this constitutes around 1.5 percent of its prison population. Judges have also ordered house arrests as a measure during the pandemic,¹⁵⁶ but those numbers are not included in the official statistics published by the prison system.¹⁵⁷

Peru

In Peru, according to a study on the effects of coronavirus in the region’s prisons, as of June 2020, approximately 1,355 prisoners had been released in the context of Covid-19, compared to the 10,000 that had been projected at the beginning of April.¹⁵⁸ With a prison population of around 96,000,¹⁵⁹ these releases related to Covid-19 constitute less than 2 percent of the total incarcerated population.

Colombia

According to statements by the Colombian Minister of Justice in early June 2020, around 6,000 persons had been released from prison as part of the measures to prevent Covid-19 contagion in prisons—1,000 under Legislative Decree No. 546¹⁶⁰ and 5,000 due to “ordinary measures.”¹⁶¹ This would constitute around 5 percent of Colombia’s prison population, which before the pandemic was around 120,000.¹⁶² According to official statistics, the total prison population before the pandemic, in February 2020, was 122,820 prisoners, and it decreased to 102,534 in August 2020.¹⁶³ There was also an increase of around 5,700 house arrests in that same time period¹⁶⁴ although it is not clear from the publicly available information how many of those were part of Covid-related measures.

Bolivia

In Bolivia, the Vice-Minister of Interior and Police, within the Ministry of Government, was reported stating in mid-May that around 2,000 prisoners would benefit from Presidential Decree 4226 that provided amnesty and pardons in the context of Covid-19.¹⁶⁵ However, according to non-official sources, the Vice-Minister had reported by July that 300 people had benefited from the decree.¹⁶⁶ With a prison population of around 19,000,¹⁶⁷ this would constitute less than 2 percent.

Honduras

In Honduras, multiple non-official sources have indicated that around 1,600 persons deprived of liberty had been released as of mid-June in the context of the pandemic.¹⁶⁸ In a country with a total of 21,629 persons deprived of liberty,¹⁶⁹ this would indicate that 7.4 percent of the population was released in that period. A spokesperson for the Supreme Court of Justice pointed out that 48 percent of those released were granted early release due to a plan to address overcrowding in the context of Covid-19.¹⁷⁰ Others were released due to terminal illnesses, completion of sentencing, or granted conditional liberty, among other considerations.¹⁷¹

Nicaragua

Nicaragua has released around 6,000 prisoners between April and July of this year: 1,700 in April;¹⁷² 2,815 in May¹⁷³ and 1,605 in July.¹⁷⁴ As mentioned above, the Nicaraguan government has not stated that these releases have been made in the context of the Covid-19 pandemic; rather the government has emphasized special dates such as Easter and Mother's Day when announcing the releases. Moreover, the Nicaraguan Government has recently, and before the pandemic, carried out massive prison releases.¹⁷⁵ Still, the number of releases during the pandemic months is significant. With a total prison population of around 21,000¹⁷⁶, they may constitute around 20 percent. According to a regional study on the effects of coronavirus in prisons in Latin America, Nicaragua's releases during the pandemic are amongst the highest in the region, calculated in June 2020 at 10-15 percent.¹⁷⁷ It should be noted that, according to news media publications, none of the releases during the pandemic included political prisoners.¹⁷⁸

To sum up, from the limited information available for the countries reviewed for this paper, a preliminary conclusion is that, in the early stages of the pandemic, no country except Nicaragua, whose government never attributed its massive releases to the pandemic, released more than 10 percent of its prison population in response to Covid-19 and most were actually less than 5 percent. The conclusions from the June 2020 regional study "The Effects of Coronavirus in Prisons in Latin America" conducted by the Sociedad de Criminología Latinoamericana (SOCLA) and the Centro de Estudios Latinoamericanos sobre Inseguridad y Violencia UNTREF (CELIV) similarly point to the fact that although two out of every three prison systems in Latin America (roughly 69.2 percent) adopted measures to deal with overcrowding in prisons, including early release or house arrest,¹⁷⁹ less than 2 percent of incarcerated people in the region had obtained any release benefit.¹⁸⁰

While international organizations, human rights activists, and criminal justice experts recommended prison releases in the context of the pandemic, there was also vocal opposition from various fronts.

The question of why so few prisoners were released from Latin American prisons despite the numerous and diverse efforts across the region to reduce overcrowding needs to be further studied. However, in addition to the ever-present challenge of political will, there are some important factors worth mentioning that may have delayed and challenged efforts to reduce overcrowding and which merit analysis for any future efforts at prison reform.

6. Challenges to Efforts to Reduce Prison Overcrowding

i. Public opposition to prisoner releases and challenges in courts

One challenge that is perhaps obvious, and at the same time unavoidable, is the unpopularity of mass prisoner releases. While on the one hand there were international organizations, human rights activists and criminal justice experts recommending prison releases in the context of the pandemic, there was also vocal opposition coming from various fronts, including defenders of victims' rights and those who saw this as a challenge to public security.¹⁸¹ In some countries, this led to legal challenges in courts with successful results.

After a civil association for victims' rights filed an amparo in April 2020,¹⁸² the Argentine Federal Chamber of Criminal Cassation's recommendations and guidelines regarding prisoner release during the pandemic¹⁸³ were declared unconstitutional by a lower court judge who reasoned that "the independence of the judge is absolute."¹⁸⁴ Similarly, the Buenos Aires Supreme Court (SCBA) revoked a habeas corpus that allowed house arrest during the pandemic for persons detained for minor offenses who exhibited higher health risks,¹⁸⁵ stating that it is up to individual judicial bodies to evaluate the requests from the persons deprived of liberty while considering the rights of victims.¹⁸⁶

In Brazil, opposition to prison release efforts came from judges as well as from the Ministry of Justice. Then-Minister of Justice made statements against the National Justice Council recommendations to release prisoners in high-risk groups, in pretrial detention, or those convicted of non-violent crimes.¹⁸⁷ According to the report published by the Sociedad de Criminología Latinoamericana, since there was no centralized policy for releases, decisions were made at the local level and “some judges followed the criticism of the then-Minister.”¹⁸⁸ For example, a judge denied a house arrest grant, reasoning that of the approximately 7,780,000,000 inhabitants on Earth, only the three occupants of the international space station were not subject to contamination by the notorious coronavirus.¹⁸⁹

ii. Concerns over Impunity

In several Latin American countries, there were also concerns expressed by civil society, human rights advocates, policymakers and others that those convicted for crimes against humanity and other human rights abuses could take advantage of the extraordinary circumstances created by the pandemic to be released from prison.¹⁹⁰ In Guatemala, for example, civil society organizations denounced that a health crisis was being used to facilitate impunity both in adjudicated cases and in ongoing processes involving crimes against humanity.¹⁹¹

There was also the issue that requests from high-profile prisoners responsible for very serious crimes, and who benefited from privileged living and sanitary conditions compared to the general prison population,¹⁹² took focus and time away from the principal reason for prison releases, which, as already explained above, is overcrowding. In Chile, when the Constitutional Court rejected a request for unconstitutionality pushed by senators who alleged that the

Commutative Pardon Act¹⁹³ was discriminatory because it excluded serious human rights crimes, a concurring opinion drew attention to the timing of this legal action, stating that it suspended “the entry into force and execution of the pardon law for days and eventually valuable weeks, subtracting days needed to save lives.”¹⁹⁴ In addition to concerns regarding impunity for serious human rights crimes, there were also arguments put forth, for example in Honduras, that politicians were taking advantage of the opportunity created by the pandemic to pass controversial reforms to protect former officials from facing corruption or money laundering charges.¹⁹⁵

iii. Questions as to whether extraordinary measures passed were actually effective

In June 2020, the then-Minister of Justice of Colombia was reported to have said that Decree Law 546 of 2020¹⁹⁶ presented several exclusions and exceptions and that more prisoners had been released through the ordinary measures than through the Decree passed due to the pandemic.¹⁹⁷ An analysis of whether the decree had worked to reduce overcrowding concluded, similarly, that there were so many exclusions, even more than in ordinary laws, that the measure was ineffective.¹⁹⁸ In Bolivia, the World Organization Against Torture expressed concern that the Presidential Decree of Amnesty and Pardon¹⁹⁹ had “proven completely inefficient to reduce the concerning levels of overcrowding in Bolivian prisons” and requested that the decree be modified to allow for more flexibility.²⁰⁰

iv. Reintegration challenges

Life post-prison, with its related social and economic implications on the former prisoner and society in general, is an important consideration under normal conditions, one that becomes more salient as release efforts increased in the early stages of the pandemic. As mentioned, in Costa Rica, the Ministry of Justice decided that support to prisoners once they left prisons was an indispensable criterion for release.²⁰¹ In at least one country, Chile, it was reported that one hundred prisoners rejected the general pardon in April 2020 and decided to remain in prison facilities rather than serve their remaining sentences under house arrest.²⁰² According to unofficial sources, some persons decided to remain in the prison system because they would have no home to return to upon leaving, and others preferred to stay because leaving prison would mean losing the jobs and benefits they have while in prison that may not be available otherwise.²⁰³ This example in Chile is indicative of a more complex issue common in the region, which is that without material, psychological and social support, whether it comes from family, the government, or not-for-profit organizations, former prisoners may have a very difficult time breaking the cycle of release and recidivism.²⁰⁴

Life post-prison is an important consideration under normal conditions, one that becomes more salient as release efforts increased in the early stages of the pandemic.

V. Takeaways and Recommendations

Prisons everywhere too frequently become places where we try to hide society's and humanity's failures. The Covid-19 pandemic has opened a small window of opportunity for prison reform by increasing society's visibility (and hopefully empathy, too) for those behind bars. First, stay-at-home orders, lockdowns, and social distancing have allowed people to better understand the mental, physical, and emotional exhaustion of isolation. Second, the risk of Covid-19 transmission in confined settings has highlighted the vulnerability of prisons, not only because of their closed and unsanitary nature but also because they are overcrowded and house a large population with health concerns.

The human lives that have been lost in prisons in Latin America, whether due to Covid-19 or to related violence, should trigger reflection on the undeferrable need to rethink prison policy. The efforts of some countries in the region described in this paper, alongside the (albeit insufficient) results of these efforts, should provide valuable lessons for government authorities, policymakers, international human rights bodies, and advocates. Timing has never been as ripe for a more humane and sensible discussion about prison conditions and respect for the human rights of people deprived of liberty. Below we offer some key takeaways, recommendations, and a suggested agenda for future research and policymaking.

Takeaways and Recommendations:

1. Prison health is public health

The Covid-19 pandemic has underscored in vivid terms that prison health is public health and should be treated as such. Health is a human right and should extend to all people, without discrimination, including those who are incarcerated and who are therefore disproportionately vulnerable. Despite the porous borders between communities and prisons, the latter are often excluded from public health efforts and the right to health of prisoners is frequently disregarded. The Covid-19 pandemic has highlighted that prison conditions in Latin America, such as overcrowding, limited access to hygiene products, poor ventilation, inadequate nutrition, and deteriorated infrastructure represent important challenges to public health. It has also emphasized the possible public health costs of over-incarceration.

In the region, some governments responded to the threat of Covid-19 by implementing very basic and long overdue health and sanitation measures. Governments finally addressed chronic problems of water shortages, increased food ratios,

and gave maintenance to sanitary and drainage systems. Cleaning supplies were distributed, spaces disinfected with the help of prisoners themselves, and vaccination programs strengthened. The importance of training and involving prisoners, personnel, and family members in prevention, was emphasized. Moving forward, both during and post-pandemic, governments across the region must include prisons as a major public health priority and address it using a human rights approach. Multiple challenges exist, such as lack of funding and human resources and public misperception about persons deprived of liberty. However, clarifying the connection between prisons and public health is an essential step in the right direction. There is, in fact, a public health case for prison and criminal justice reform.

2. States can and should mobilize to improve prison conditions

Faced with the imminent and grave threat that Covid-19 presented for the prison population and beyond, several countries in the region pushed for initiatives to address some of the vulnerabilities in their prison systems. As the then-Chairman of the SPT, Sir Malcolm Evans, described in his 2020 address to the United Nations General Assembly, referring to nations across the globe: "[W]e have seen States being able to do some positive things which they had previously said were impossible – such as dramatically reducing prison populations in order to reduce overcrowding, allowing phones and tablets in prisons in order to enhance communications with the outside world, for example."²⁰⁵

In Latin America, the initiatives to reduce overcrowding were diverse and came from all three branches of government. In an area in which prison administrators are too frequently left alone, the involvement of the legislative and judiciary branches in the search for viable responses to the pandemic in the prison context has been refreshing. The efforts to

The Covid-19 pandemic has underscored in vivid terms that prison health is public health and should be treated as such. Health is a human right and should extend to all people without discrimination.

reduce overcrowding through legislation, judicial guidelines, or executive orders were unprecedented and the allowance of technology to compensate for the lack of human contact was innovative. The results and impact of the different measures taken by several nations in Latin America, both in terms of Covid-19 transmission prevention and in terms of overcrowding reduction, are at best, largely unknown, and at worst, not positive. However, they deserve further study and analysis precisely because they were extraordinary in many ways.

3. Countries need to seriously rethink the importance of reducing prison overcrowding

The Covid-19 pandemic highlighted what has been reiterated by criminal justice and human rights experts – overcrowding not only violates the rights of persons deprived of liberty but is also extremely dangerous from a public health perspective. Covid-19 serves as a wake-up call for governments in the region to reconsider the laws, policies, and practices that have led to such high levels of overcrowding and inhumane prisons in the first place. It should also encourage analysis and lessons learned from the recent experience of countries attempting to reduce prison population during the pandemic.

Covid-19 should be a convincing reminder to government authorities and society in general that deprivation of liberty should be used only as a matter of last resort, in contrast to the current practice in Latin America. This means that any criminal justice reform that seeks to reduce prison population should have at its core those people who should not be in prison in the first place and those who have not been convicted of a crime. Vulnerable populations such as the elderly, children, pregnant women, and those in ill physical or mental health, should also be given due regard.

There are a variety of alternative measures that States can consider even before individuals enter the prison system, such as community service for non-violent offenders, rehabilitation for drug-users, educational opportunities for juveniles, restorative justice techniques, and therapeutic assistance. Options for sentenced prisoners who advance in their rehabilitation process through education, work, or other activities include nightly/weekend prison sentences and partial release to work or be at home with family. These opportunities also help prepare those deprived of liberty for the reintegration process. Also, similar to what several of the recent country initiatives included, States can consider early release for those above a certain age, who have completed most of their sentence, or who have abided by good behavior during their time in prison.

As the efforts of some countries in the region to release people from prison during the pandemic show:

- any programs that promote alternatives to prisons should acknowledge that society should be informed and receive sensible explanations as to the importance of these measures, since public perception can be key in shaping policy related to crime and security;
- alternatives to imprisonment should never be used to advance impunity for serious crimes such as human rights violations and public corruption;
- working to obtain adequate opportunities for former prisoners is vital to ensure a healthy transition back into the community and reduce recidivism rates; and
- constant information and data are required to design policies that are the most sustainable and effective.

4. Technology use should be expanded to complement important aspects of prison life

Crisis can and should spark innovation. Such has been the case of the prison systems in the region that attempted to mitigate the worst effects of the restrictions on contact with the outside world by using technology to provide alternative means of communication. During this pandemic, people everywhere have learned to use virtual means to communicate better with loved ones, study, work, and even exercise. These experiences also offer important lessons for places of deprivation of liberty. The right of people deprived of liberty to receive physical visits should continue to be respected both during and post-pandemic, but technology can aid tremendously in complementing the contacts that

Covid-19 should be a convincing reminder to government authorities and society in general that deprivation of liberty should be used only as a matter of last resort, in contrast to the current practice in Latin America.

prisoners have with family and friends. In the specific case of those persons deprived of liberty who do not receive visits because they are foreigners or because their families live too far away, technology can help build important bridges for them to be in touch with their outside world. Digital connections can also prove especially helpful during the pandemic because they can help ease tensions generated in the prison population due to lack of information.²⁰⁶

Technology can also be beneficial and should be explored to alleviate other collateral consequences of confinement, such as the lack of effective and sufficient educational and rehabilitation programs as well as inadequate medical attention. Using technological alternatives such as video-calling or virtual courses to connect prisoners with education and vocational materials could greatly enhance rehabilitation efforts in prisons. Prisons in the region that partnered with universities to offer cultural activities to inmates provide good practices that should be analyzed and possibly replicated. Similarly, the use of telemedicine can help treat prisoners who otherwise would not receive health care in prisons.

Of course, like other changes implemented during this pandemic that can far exceed the longevity of Covid-19, technology also comes with its challenges. For one, virtual calls, distance learning, and telemedicine can never replace in-person contact in the prison context. Persons deprived of liberty, many of whom have lived marginalized lives, benefit especially from human interaction. Separately, technology is costly. In addition to the resources that governments need to invest to offer technological alternatives in prisons, it may be difficult for family members of people deprived of liberty, given the significant levels of poverty amongst the prison population in Latin America, to have access to adequate equipment and internet to connect with their loved ones. Another concern from prison administrators regarding the use of technology to connect prisoners with the outside world is security. Hardware and other equipment can be vandalized and weaponized and cellular or digital connections have been used to coordinate criminal activity or to access pornography.

Policy makers and administrators need to be aware of all these considerations while at the same time acknowledging that with the pandemic, access to technology has become more essential than ever, outside and inside prisons. If leveraged correctly, and accompanied by thoughtful and innovative policies, technology can complement existing practices and greatly improve living conditions in prisons while also contributing to the rehabilitation process of those deprived of liberty.

During the pandemic, which called for closer scrutiny of the system, there has been a troubling lack of complete and updated data as well as underreporting from States regarding the impact of Covid-19 in prisons.

5. Greater transparency is needed about the impact of pandemic-related prison policies

Before the Covid-19 pandemic, several prison systems in the region were already marked by difficulty in the access to statistics and information and a lack of transparency. During the pandemic, which called for closer scrutiny of the system, there has been a troubling lack of complete and updated data as well as underreporting from States regarding the impact of Covid-19 in prisons.²⁰⁷ Similarly, most countries have not released publicly available information as to the impact of the different measures taken to alleviate Covid-19's impact in the prison context, including the number of prisoners released.²⁰⁸

Transparency and consistent flow of information are essential for better management and oversight practices required during times of crisis and also help alleviate possible tension and anxiety from family members and amongst prisoners. Also, governments should be accountable to their citizens regarding the results of the different measures they have adopted.

It is not too late for States to gather data about both the impact of the pandemic on the prison population and the impact of the implemented measures. Going forward, this information could help improve health in prisons and disease prevention as well as shape prison policy more generally.

Covid-19 has made glaringly clear a reality that should be a starting point for a new type of reform: prisons and society are intrinsically interdependent and face shared risks as well as responsibilities.

6. Further research is needed for policy design/ making

For real transformation to take place, research and science need to be part of the solution. Even while we are still in the midst of the pandemic, a roadmap detailing necessary further research can help to ensure that we learn the right lessons from these difficult times. The knowledge acquired should then be used to design better public policies and build more effective prison systems that respect human rights. Below we offer a few suggestions for a research and policy agenda.

Further study and assessment of Covid-19 impact in prisons across the region. Accurate and updated information regarding Covid-19 cases in prisons, numbers of deaths, as well as types and frequency of testing can provide prison administrations with important tools to manage this and future crises better and faster. Additionally, public health experts, policy makers, criminal justice, and other relevant professionals can still benefit from access to such detailed data to make recommendations that can more effectively address the specific challenges faced by each country and the region as a whole.

Comparative analysis of the different measures taken by countries and their impact. It is essential that countries analyze the implementation process and results of their policy solutions enacted and recommended during the coronavirus pandemic and understand why they did not

have the expected outcome. The information should include, for example, numbers of prisoners who were released, the method that was used, and recidivism rates among the relevant population, which will be important for guiding future efforts and also for convincing the public this can be done safely. Comparisons should be made at the regional level to more effectively identify best practices and lessons learned.²⁰⁹ Due consideration should also be given to the differential impact that Covid-19 has had in particularly vulnerable groups within the general population deprived of liberty, such as women, children and the elderly.

Regional cooperation, solidarity and innovation will be key in assessing research and results as well as establishing policy going forward. There must be greater information sharing and cooperation between Latin American countries regarding the impact and risk of Covid-19 as well as for setting the priorities in the policy agenda. International bodies, such as the United Nations, specifically the Subcommittee on the Prevention of Torture, and regional bodies such as the IAHCR have an important role to play in identifying best practices and in providing advice to States. Other regional institutions such as the Inter-American Development Bank and more broadly the Organization of American States can help spearhead comparative research at the regional level and provide technical assistance to States.

VI. Conclusion

Covid-19 will undoubtedly continue to drive policy changes in crucial ways in the coming decades. This paper has made the case that Latin American prisons need to be part of this change. The timing and circumstances are present for a more humane and sensible discussion about prison conditions, respect for the human rights of people deprived of liberty and the urgent need to rethink prison policy. The policy decisions made during and in the wake of the pandemic may very well define prison and criminal justice policy in Latin America for the near future.²¹⁰ Covid-19 has made glaringly clear a reality that should be the starting point for a new type of reform: prisons and society are intrinsically interdependent and face shared risks as well as responsibilities. If something as major and tragic as the current pandemic does not provoke a positive paradigm shift in the region's approach to people deprived of liberty, it is difficult to imagine that anything else in the near future will. After a year of so much tragedy, the lessons of the Covid-19 pandemic offer Latin American governments and societies a historic opportunity to reimagine their prison systems and their relationship with individuals deprived of their liberty.

ENDNOTES

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3 The World Prison Population List is produced as part of the World Prison Brief project hosted by the Institute of Crime & Justice Policy Research (ICPR), at Birkbeck, University of London. The World Prison Population List compiles and updates information about prison systems throughout the world, information such as prison population rates, the extent of pre-trial/remand imprisonment, and prison overcrowding among other indicators. To access the database: https://www.prisonstudies.org/research-publications?shs_term_node_tid_depth=27.

4 The Inter-American Development Bank (IADB) issued a report titled “Las cárceles de América Latina y el Caribe ante la crisis sanitaria del COVID-19,” by Nathalie Alvarado et al. in August 2020, <https://publications.iadb.org/publications/spanish/document/Las-carceles-de-América-Latina-y-el-Caribe-ante-la-crisis-sanitaria-del-COVID-19.pdf>. The Sociedad de Criminología Latinoamericana (SOCLA) and Centro de Estudios Latinoamericanos sobre Inseguridad y Violencia (CELIV) issued a report titled “The Effects of Coronavirus in Prisons in Latin America,” by Marcelo Bergman, Fernando Caffera, and Juan Ambrogio in June 2020, <https://icpa.org/wp-content/uploads/2020/06/The-Effects-of-Coronavirus-in-Latin-America-EN.pdf>. The Instituto Latinoamericano de las Naciones Unidas para la Prevención del Delito y el Tratamiento del Delincuente (ILANUD) issued a report titled “El Sistema Penitenciario ante la Encrucijada producto de la crisis provocada por el COVID-19” in April 2020, <https://www.ilanud.or.cr/ilanud-informe-covid-19-y-prisiones/>.

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8 Ibid. The Inter-American Development Bank’s calculation is for all 26 borrowing member countries, which includes, in addition to the Spanish and Portuguese-speaking countries, also English, Dutch, and French-speaking countries in Latin America and the Caribbean.

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[oas.org/en/iachr/pdl/docs/pdf/PPL2011eng.pdf](https://www.oas.org/en/iachr/pdl/docs/pdf/PPL2011eng.pdf), para. 536-537.

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209 In this sense, a recent and welcome contribution that should be mentioned and used is the Covid-19 Digital Mapping: Justice and Deprivation of Liberty, a joint initiative of the Association for the Prevention of Torture and the United Nations Development Program that "allows monitoring and accessing updated information on

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