

Illustration: Chuan Ming Ong

COMMENT

Covid-19 and Prisons in Latin America

The Cases of Brazil and Colombia

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The Coronavirus pandemic has affected Latin America deeply. The effects of the pandemic are reverberating most acutely across the broken prison systems in this region with searing inequalities. Most of what is happening now inside prison walls could and should have been anticipated by legislators, courts, and policy officials. The reality of health and human rights in prisons in the region has long been known by the state and largely ignored – during the pandemic this has been no different.

Prison inmates are among the most vulnerable groups in the region – living, eating, sleeping in densely packed spaces, and often struggling for basics such as soap and sanitation. They are also mostly men, non-white, and coming from the poorest communities in Latin America. Women,

although a minority of prisoners, also face significant challenges while in detention. Prison facilities rarely offer reproductive health services, or even the most basic minimum to cater to the needs of mothers and children – in Brazil, for example, by 2020 there were at least 1,850 children living with their mothers inside the prison with more than 63% of over the age of three.

Latin America has registered over 46 million confirmed cases of Covid-19 with over 1,5 million deaths. Of these, over 130,000 confirmed cases (~8% of the prison population of 1.58 million in 2018) and 1,000 deaths happened among incarcerated people.

At least 1/3 of the region's prison population is under pre-trial detention, a startling legal fact that underpins the reality that pre- and post-trial detainees live together in overcrowded, unsanitary, and violent spaces. In Brazil, the prison population is ~150% of the occupancy capacity according to 2020 data; the corresponding figure for Colombia is ~140%. The situation is exacerbated by poor health services and paucity of health workers in many prisons in both countries. Nutrition and lack of basic items such as clothing and hygiene products is also a major problem. There is excessive reliance on family networks of care from outside as the state does not provide prisoners adequately nutritious food or essentials to live a life of dignity inside prison units.

These conditions pre-date Covid-19, setting the stage for predictable and avoidable human rights violations. The pandemic, however, foregrounds what we already knew of these glaringly unsanitary and overcrowded prisons in the region while making explicit how these conditions pose enormous challenges to the health of inmates and of the overall community.

Latin America has registered over 46 million confirmed cases of Covid-19 with over 1,5 million deaths [1]. Of these, over 130,000 confirmed cases (~8% of the prison population of 1.58 million in 2018) and 1,000 deaths happened among incarcerated people [2]. The numbers are likely to be underestimates as access to reliable and public information about prisons systems in the region is difficult, with lack of transparency and therefore accountability for the scope of incarceration another fact that underlies the predations of Covid.

Prison health and community health are inextricably linked - a reality often denied by the legalistic view of prisons as places that are 'isolated from society' [3]. The clash between legal and health standpoints, and between harsh facts and views premised on a fictitious version of reality, have only exacerbated the pandemic on the ground. Most policy responses to the pandemic in the region, addressed Covid-19 by shutting down prison units and suspending visits to prisoners through 2020 and part of 2021. The interruption of networks of care that involve families, lawyers, and prisoners, resulted in the shortage of food and basic supplies inside prison walls as well as an increase in reported cases of abuse and violence inside prisons.

Policy officials and courts gave lower priority or even largely ignored concurrent and more efficient policies such as adequate testing, de-incarceration to reduce overcrowding, and implementation of strong vaccination programs. For instance, in Brazil, although the National Council of Justice recommended setting free or house arrest for prisoners that were at higher health risk due to Covid-19, such as the elderly, pregnant women or people with chronic conditions, most courts did not heed prisoners' requests on the grounds that early release would

be a threat to public safety. In Colombia, data on the vaccination rate of prisoners is still missing from the official channels and it is difficult to determine what the actual vaccination coverage of prisoners and staff is.

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The lack of clear-cut policies to ensure reliable and consistent production of data on prison populations – and on the staff that have also been significantly affected by the pandemic— signal that prison inmates were not a Covid or justice priority with Brazilian and Colombian legislators.

In Brazil, no law was passed to address the specific effects of the pandemic within the prison system despite their extremely vulnerable situation. Policy recommendations for prevention within prison facilities barely addressed inmates lives and contagion. A telling marker -one key recommendation addressed only 2 of 56 pages to the care and protection of prisoners, advising them to keep basic hygiene while “covering mouth and nose when coughing or sneezing”. In Colombia too, legislators failed to pass any comprehensive legislation that could mitigate the effects of Covid-19 in prisons. The Ministry of Health and Social Protection issued guidelines that reproduced the language of the World Health Organization (WHO) measures while ignoring that they would be impossible to comply with, given current prison conditions, such as “ensuring appropriate infrastructure” for self-distancing and hygiene. Moreover, international and regional health standards, even as promulgated, have been of little use in this context.

This commentary examines legal frameworks, including juridical practices, as clear key structural determinants of health [4]. It closely assesses the real impact of such practices by spotlighting how what appears to be important, and how high-level constitutional reviews and proclamations regarding prison health and rights have in fact produced little useful policies or action. As we detail below, a Brazilian Supreme Court decision in 2015 declared the prison system in a "state of unconstitutional affairs", following a similar decision made in 1998 by the Colombian Supreme Court. Yet, the actual practice in prisons remains unmindful of human rights. Few judges use the powers they have to protect the rights of prisoners. While the acute problems in prisons in the two countries pre-date Covid-19, the judicial regime's often-lukewarm (as opposed to proclaimed) response towards rights and health of prison inmates have made the situation far worse. There are important differences in the nature of the legal responses of the Brazilian and Colombian as we elaborate, but the health and human rights injustice effects in the two countries with two of the largest prison populations in the region, are the same.

All of this has been denounced by human rights organizations, international law bodies, and civil society for decades. Worryingly, our review suggests that a key reason behind all the confirmed cases and deaths due to Covid-19 in the region is the inaction (deliberate or not) of courts, legislature, and correctional officials.

In light of all these concerns, this commentary proceeds as follows: 1) an overview of incarceration practices in the region; 2) a brief description of some of the guidelines set by the WHO to address the Covid-19 pandemic in correction facilities, with a specific focus on the standards

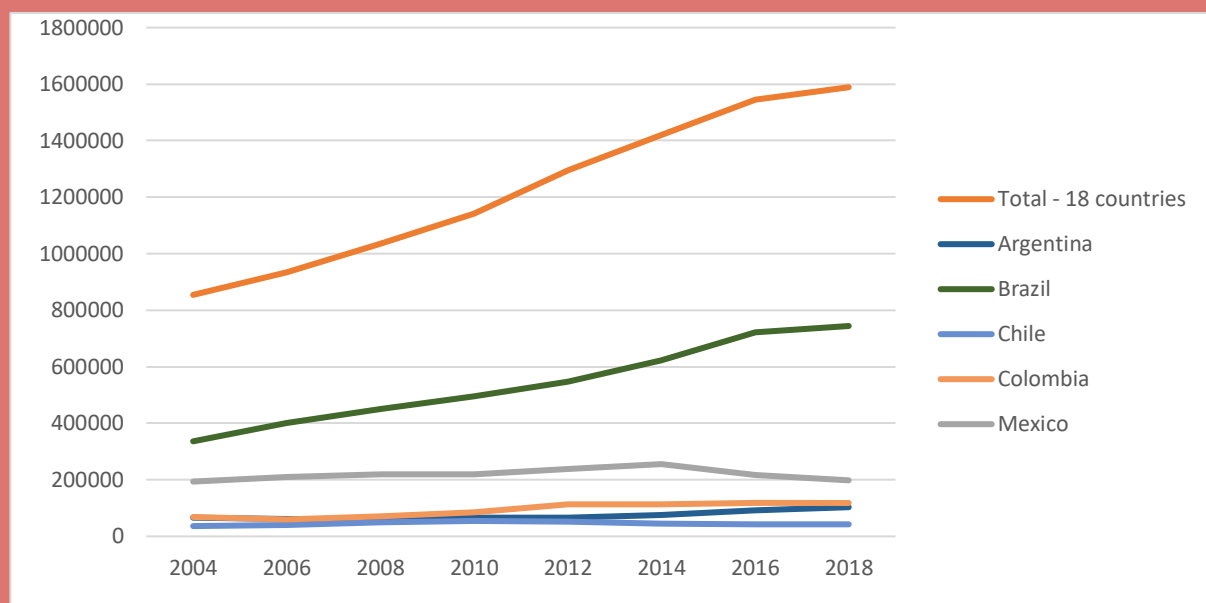
recommended to prison conditions in Latin America; 3) a capsule of available data and evidence about the pandemic within prison systems in the region, and 4) detailed case studies of Brazil and Colombia.

We end this report with a set of recommendations that emphasize good principles, policies and practices which encapsulate our key learnings during this pandemic and what we have known long before its onset.

Incarceration Practices in Latin America

The prison population in Latin America has almost doubled over the last 14 years, a growth led specially by three countries, Brazil, Mexico, and Colombia.

Graph 1: 14 years of Prison Population in Latin America



Source: Compilation of data made available by World Prison Brief (<https://www.prisonstudies.org/>)

These trends can be largely explained by choices made by the legislative and judicial system in the region. Over the past two decades, more conduct is subject to criminal penalties [5], with incarceration and harsher penalties especially for drug-related crimes and petty drug-related offenses. On top of increasing the minimum sentences for a range of drug-related crimes, many countries in the region have made pre-trial detention mandatory in drug trafficking crimes while not implementing a clear distinction between drug use and drug-trafficking. In practice, this has meant that making this distinction is often a case-by-case analysis left to local authorities, especially at the discretion of police officers. This has also meant that users, small dealers, and bigger drug traffickers receive similar treatment, are sent to jail, under pre-trial detention, without any attention to distinctions in the nature of the offense [6].

On average, every 4 out of 10 people in prisons in the region is on pre-trial detention. In some countries, this figure can reach up to 6 out of ten people, as in Venezuela (6,1/10) and Bolivia (6,7/10) or even 7,7 in Paraguay. It is useful to compare these numbers with those of the United

States, which has the largest prison population in the world but where only 2,3 out 10 [7] on average are in pre-trial detention [8].

Imprisonment is also the preferred choice of judicial decisions even when law and precedents might allow non-custodial sentences [9]. In Brazil, for instance, this dynamic makes drug-related crimes account for over a third of the entire prison population in the country and it is the second most common crime, behind property crimes [10].

Most of the prison population in the region is composed of marginalized groups and/or non-white or ethnic minorities, largely men between 21 and 35 years old with only basic or no formal education [11]. Female incarceration in the region, however, has been on the rise over the last twenty years, especially for drug-related offenses [12].

The rapid growth of prison population was not followed by investments in infrastructure and the expansion of the prison system. Hence, overcrowding became a central feature of correctional policy in the region. Some Latin American countries have among the highest levels of overcrowding in prisons in the world: an average of 170% [13] of prison capacity for all countries in the region, with some countries almost doubling this figure: 372.0% in Guatemala, 363.9% in Bolivia, 215.2% in El Salvador, 204.0% in Honduras, 240,3% in Peru 240,3%. [14]

Alongside overcrowding, prisons in the region lack most basic services and often even structural features that are integral to the provision of basic amenities. Some units experience power shortages; many lack water, sanitation, and proper nutrition for prison inmates. Healthcare facilities are often absent or very limited. This undermines prevention of common and endemic conditions within the prison system, such as tuberculosis, HIV/AIDS, mental health disorders, drug use and addiction.

Public Health Standards for Addressing Covid-19 in Prisons

Overall, international guidelines issued by the United Nations, WHO, and the Inter-American Court of Human Rights have made little impact in addressing the challenges posed by the pandemic under the broken prison systems in Latin America, either because of the disconnect between what is needed and what is actually available and implemented on the ground or through perverse application (such as suspending visits to prisoners in contexts where food and health care are solely provided by visiting family members) with attendant harmful effects. The gap between good policy and reality is revealed through a review of some of the concrete measures recommended by the WHO's interim guidance on "Preparedness, prevention and control of Covid-19 in prisons and other places of detention", issued in March 2020 by WHO's Regional Office for Europe (WHO/Europe), and later translated into Spanish by The Pan American Health Organization (PAHO) [15]. The guidelines require infrastructure and resources that have long been absent or inadequate in prison systems throughout the region for decades, despite national courts' mandates for reform. One example -- there is an advisory which states that "hands should be washed often with soap and water and dried with single-use towels; alcohol hand sanitizer containing at least 60% alcohol is also an option if available, and "physical distancing should be observed" [16]. Even these simple recommendations are practically impossible to observe given the overcrowding and lack of infrastructure. Many prison units in the country lack toilets or even constantly available running water.

Some overarching themes, however, can be extracted from most recommendations for prisons in general and for prisons in the region, which could provide some benefit:

These are: (1) reduce the prison population and overcrowding; (2) provide special attention and care to high-risk groups within the prison population; (3) prevent social and family isolation of people incarcerated; (4) implement protocols to prevent cases and secure the safety of the entire prison community, including family members, visitors, prison guards and medical staff; and (5) treat prisons as an integral part of health care policy.

Overall, international guidelines issued by the United Nations, World Health Organization and the Inter-American Court of Human Rights have made little impact in addressing the challenges posed by the pandemic under the broken prison systems in Latin America.

In March 2020, the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) issued an Advice [17] recommending that state authorities should address the pandemic within prison systems by considering the rights of all the members of the prison biosphere, including “the person deprived of liberty and their families and detention and healthcare staff”. Moreover, the PTOC recommended that any policy should follow the principles of “do no harm” and “equivalence of care”, advising prison authorities to minimize the risks of harm that prison populations are subjected to, while providing health services in an equivalent way to the services provided to the overall population of that country [18].

The SPT Advice also lists a set of guidelines that could orient policy authorities’ response to covid, setting a useful normative horizon to prison systems in the region. Among these guidelines are: Identify those individuals at most risk and vulnerable populations and provide them adequate care and accommodation that reflects the greater risk they are subject to, “while fully respecting their rights within the detention setting” [19]; Reduce the prison population “by implementing schemes of early, provisional or temporary release for those detainees for whom it is safe to do so, taking full account of non-custodial measures indicated as provided for in the Tokyo Rules” [20]; Restrict visitors as long as “sufficient compensatory alternative methods for detainees to maintain contact with families and the outside world” are provided. The Advice stresses contact with family and friends should be “both facilitated and encouraged, be frequent and free” [21]; Enable that family members or relatives can “continue to provide food and other supplies for the detainees, in accordance with local practices and with due respect for necessary protective measures” [22]; Preventing the use of disciplinary solitary confinement as a way of medical isolation. Hence, any form of medical isolation should be “on the basis of an independent medical evaluation, proportionate, limited in time and subject to procedural safeguards” [23]; Provide information to the entire prison community and media, following a principle of “transparent communication to all persons deprived of liberty, their families and the media concerning the measures being taken and the reasons for them” [24]; and Protect and care for prison personnel, including medical staff. [25]

In April, the Inter-American Commission on Human Rights (IAComHR) issued a Resolution (Resolution 01/2020) advising governments to prioritize high-risk groups while taking intersectional approaches towards their health care. The resolution places the prison population in the Americas

as a particularly vulnerable population together with the elderly, those with pre-existing medical conditions, women, indigenous peoples, LGBTQ people, people of African descent, persons with disabilities, and people living in poverty and extreme poverty [26]. The Resolution also stresses the importance of reducing the prison population and taking measures to address overcrowding, such as the reassessment of cases of preventive detention and ensuring that persons at risk can have request for prison privileges and alternatives to a sentence of incarceration. The Resolution points to the need to establish protocol to ensure prison “security and good order”, especially “to prevent acts of violence related to the pandemic, adhering to inter-American standards on the matter”.

By May 2020, a joint statement from UNODC, WHO, UNAIDS and OHCHR urged world leaders to notice “the heightened vulnerability of prisoners and other people deprived of liberty to the Covid-19 pandemic” also recommending that these countries limit “the deprivation of liberty, including pretrial detention, to a measure of last resort, particularly in the case of overcrowding, and to enhance efforts to resort to non-custodial measures.” [27]. Moreover, the declaration asked countries to adhere to WHO protocols for the preservation of health, making these facilities part of national responses and contingency plans to contain the virus while guaranteeing the protection of prisoners’ human rights [28]. This would require implementing preventive measures, ample testing, notifying cases daily to national health authorities, tracing contact between prisoners and staff, isolating and treating suspected and confirmed cases. Moreover, it would require that these measures be implemented through a human rights framework acknowledging that “people in prisons and other places of detention are not only likely to be more vulnerable to infection with Covid-19, they are also especially vulnerable to human rights violations” [29] which means that other forms of protection were urgently needed such as guaranteeing access to safe water, sanitation and hygiene, and IPC measures that are available to the general population; and increased emotional and psychological support with “assurances that continued contact with family and relatives will be upheld” so “that people are not cut off from the outside world [30].

Covid-19 in Prisons in Latin America

Clearly, Latin American national authorities were warned by human rights activists [31], researchers, and international organizations [32] that the conditions of national prison systems in the region could lead to an even greater tragedy during the pandemic. By then, over 1,5 million people were living in prisons in the region, 0,22% of the total population in the region [33]. By September 2020, the IACoMHR issued a press release based on its Recommendation 1/2020, urging countries in the region to improve their response to Covid-19 for the prison populations. By then, the IACoMHR estimated that more than 138,000 cases and 1,500 deaths among people deprived of freedom were caused by the pandemic in the region (close to 8% of the prison population). These numbers are likely highly underestimated. Data on the region’s prison system’s is known to be scarce and flawed: this has not changed during the pandemic [34].

Marmolejo and colleagues [35] look at the number of confirmed cases and deaths reported from March to September 2020 in Chile, Argentina, Mexico, and Colombia, finding close to 7,000 confirmed cases and 382 deaths, especially concentrated in Mexico (2,654 cases among people in prisons - 13% of prison population; and 285 deaths,) and Colombia (2,221 cases - 2% of prison population, and 70 deaths). In Brazil, for a similar period (October,2020) the official data pointed towards more than twice the total number for all three countries (18,073 confirmed cases

- 2% of prison population, and 98 deaths). As we will see in the next section, Brazil already registers more than three times that figure [36].

Prisons in the region are also well-known as unsafe, unsanitary, and overcrowded, as discussed previously. Lack of adequate sanitation and food, health services or even sun light, power, and water, added to a rate of overcrowding that can be higher than 3 times the average prison capacity, increases the chances of developing chronic conditions, mental health disorders, and of contracting serious communicable diseases such as tuberculosis, HIV/AIDS, and syphilis [37]. This makes prisons a “hotbed” for the proliferation of the Covid-19 virus [38]. Moreover, as incarceration targets the poorest and non-white groups in the region, these communities are ending up carrying most of the pandemic burden, as they are also the ones most affected by Covid-19 and its indirect impacts over unemployment, housing and access to food and healthcare. Historically, these populations have been among the most marginalized in Latin America, not only facing higher levels of incarceration, and tougher barriers to adequate access to any basic liberty, social and economic rights, especially the rights to health, employment, water, and sanitation. Living in poverty and in extreme poverty, these populations already suffered through higher levels of malnutrition, infectious diseases, and chronic illness before the pandemic [39]. This means, once incarcerated, they are more likely to be at high-risk groups for Covid-19.

Responses to the pandemic thus far have failed to protect those incarcerated. Marmolejo et. al. [40] point out that among the three categories of measures they identify – prison releases, end new admissions and measures for prevention and mitigation inside prisons, “governments and correctional systems have limited themselves to adopt the easiest and least demanding actions to alleviate overcrowding, improve sanitation conditions of prisoners, and provide access to goods and health-care services.” Releases were timid and not sufficient to reduce overcrowding and many releases found cannot be safely identified as a response to Covid-19. New prison admissions were reduced, but the researchers find this result does not connect to a deliberate use of alternative measures to imprisonment, but to an actual decrease in criminality caused by national lockdowns. And for prevention and mitigation, they find that all four countries have mainly locked down prisons while also restricting visits or any access to prison facilities. Testing and tracing were very limited, while and improving infrastructure and health care within prison facilities were largely not implemented.

A comprehensive survey of 96 prison facilities in Latin America by a group of researchers led by Marcelo Bergman, Fernando Cafferata, and Juan Ignacio Ambroji [41] came to similar conclusions. The researchers found that only 25% of the facilities had any capacity to separate and treat infected prisoners. Yet, the measures adopted to contain the virus mainly focused on restricting visitors and suspending programs for education and work [42], with little to no alternative set in place by prison authorities. Prisons, however, are not self-sustaining institutions, specially not in Latin America. Incarcerated people in the region heavily depend on external visitors for legal counselling, food, basic hygiene products, items for entertainment, together with emotional support. Bergman, Cafferata and Ambroji also find that due to strict lockdowns and restrictions on interactions with any outside contact, 55% of the prisons surveyed experienced strikes and riots, with at least 82 violent deaths [43]. Prison staff, an important part of the prison systems’ biosphere, and most likely in contact with outside communities, (which increases the chances of internal and external contagion), was also significantly affected. Most countries in the region, however, hardly map or make these numbers public. In Chile, for instance, one of the few countries where data on staff’s contagion is available, out of 6,804 confirmed cases of Covid-19

within the prison system, 2,513 (close to 36%) were registered among staff members (numbers for April 08, 2021) [44].

Case Studies

Brazil and Colombia have two of the largest prison populations in Latin America and some of the worst absolute numbers for Covid-19 confirmed cases and deaths. We look at both countries' responses to the pandemic focusing on four aspects.

- What the prison-system situation was **before the pandemic**, focusing specially on prison population, overcrowding, and prison conditions, especially the availability of healthcare services and facilities.
- What happened **during the pandemic**, focusing on the little information available concerning confirmed cases, deaths, and vaccination.
- What are some of the legal and policy **criminal justice system responses**, including from correctional offices to the pandemic.
- What **human rights violations** have been reported.

As we will see, Brazil and Colombia have many similarities when it comes to what was happening inside the prison system before the pandemic. And in both countries, the main response to Covid-19 was the suspension of visits and external contact with prisoners.

However, at the very beginning of the pandemic, the Colombian government decided to adopt a policy of house arrest for the following categories - prisoners over 60, mothers and children, people with co-morbidities, people imprisoned for negligence, misdemeanours, sentenced to up to 5 years or who had served more than 40% of their sentences.

It was up to the court system to make use of pre-pandemic criminal procedure law to send people in prisons to house arrest or out on probation. Their failure to use the power in this way, and its limited effects when used, suggests that the answers to overcrowding had always been there, but the will of judges to use existing rules in this direction was only— and barely -- activated after the pandemic, and even when exercised had a minor effect in an overwhelmingly carceral system.

The measure, however, did not impact more than 3% of the total prison population. Moreover, most returned to prison after six months of being released either because they were arrested a second time, or for violating the terms of their release. It was up to the court system to make use of pre-pandemic criminal procedure law to send people in prisons to house arrest or out on probation. Their failure to use the power in this way, and its limited effects when used, suggests that the answers to overcrowding had always been there, but the will of judges to use existing rules in this direction was only— and barely -- activated after the pandemic, and even when exercised had a minor effect in an overwhelmingly carceral system.

In contrast, the Brazilian response largely followed President Bolsonaro government's denial of scientific measures to address the pandemic, often second-guessing the effects of Covid-19 within the prison system. Outside visits were immediately suspended in most prison units, but even regarding this wrong-headed policy, the 26 states in the country followed their own local protocols in a decentralized and uncoordinated approach that has characterized the entire Covid-19 response in the country. In contrast to the Colombian case, courts played no major role in fighting the pandemic within the prison system: they kept deciding not to de-incarcerate, even after a National Council of Justice Recommendation, advising judges to adopt alternative measures to imprisonment during the Covid-19 pandemic.

Brazil

BEFORE THE PANDEMIC

Brazil has the largest prison population in the region, which grew steadily until 2019: from nearly 100,000 prisoners in the early 1990s (or 61 prisoners for every 100,000 habitants), the Brazilian prison population is now close 700,00 people (close to 260 prisoners for every 100,000 habitants) [45]. These numbers place the country in third in the tragic world ranking of incarceration, only after the United States and China [46].

Like other countries in the region, the rise in prison population can be directly associated to fight-on-crime or war-on-drugs policies, especially criminal reforms in the late 1990s and early 2000s which approved longer sentences to drug-related crimes. At least 32% of imprisonments in Brazil by December 2020 were related to drug crimes and 38% to crimes against property. Brazil has also given drug trafficking the status of a "heinous crime" (*crime hediondo*, in Portuguese), which not only restricts the possibilities of presidential pardons, but it is also a feature often brought up by courts to convert flagrant arrests into longer pre-trial detentions. At least a third of the entire prison population in the country is under pre-trial detention [47].

Almost half of the prison population is young, between 18 and 29 years, and almost 60% identifies themselves as *pardo* [a complex term designating mixed ethnic heritage] [48] or black [49]. Women, although not the majority of prisoners, face important challenges when incarcerated. By June 2020, more than 37,000 women were in prisons or jails, 106 of them breastfeeding their children in prison and 176 pregnant. At least 1850 children were also living with their mothers in prison, more than 63% of them over 3 years old [50].

Prison facilities rarely offer reproductive health services or basic facilities to attend to the needs of mothers and children. In fact, most of the Brazilian prison system does not meet the very minimum legal standards for the provision of any human need [51]. A telling example is the state of healthcare. On top of overcrowding, (at the level of 151,9% of occupancy rate) only 63% of prison units in the country had medical clinics available to inmates; less than 60% of these clinics have specific spaces for different healthcare provisions such as vaccination, stitching and bandaging [52]. Less than 34% of these units offer x-ray rooms, waiting rooms, areas for decontamination of personal and material, dressing rooms and bathrooms for healthcare workers or patients [53]. Moreover, the lion's share of healthcare services within the prison system is provided by nursing assistants, whereas most units do not have a single doctor or nurse present every day [54]. By June 2020, the prison system registered only 804 doctors for over 700,000 prisoners, a rate of one doctor for every 870 people [55]. This means that most healthcare services need to be provided outside prison walls, which involves organizing police escorts to hospitals, often a scarce resource to prison units [56].

Lack of healthcare services and overcrowding come on top of unsanitary and unsafe conditions of many prisons in the country. Cells are often windowless; people in prisons sleep on top of each other, on the floors or take turns standing and sleeping. In some units there might be lack of water and power, or even sanitation [57]. This allows for communicable diseases to spread easily, making levels of tuberculosis and HIV/AIDS higher inside prisons than outside [58]. Violence is also part of daily life, not only from prison staff and the police, but especially from fellow inmates in riots and rebellions [59] often orchestrated by gangs and organized crime, many of which are born inside prison units.

Law and policy makers are not solely responsible for the inhumane conditions of prisons in Brazil. Judicial practices are also part of the problem. A Brazilian Supreme Court decision in 2015 declared the prison system in a "state of unconstitutional affairs", following its counterpart in Colombia [60]. The Court, however, was very frugal in its recommendations to lower courts throughout the country. Out of the many requests from civil society and public defenders that aimed at reducing mass incarceration, the only one to be recommended by the Supreme Court was to make preliminary hearings mandatory so pre-trial detentions could be quickly reviewed. People in prisons claimed "an unconstitutional state of affairs" in multiple requests for de-incarceration through different procedure avenues such as habeas petitions or appeals in ongoing criminal procedures. The "unconstitutional state of affairs" standard, however, was never framed by the Supreme Court as a clear mandate to de-incarcerate. Hence, most criminal judges, already insensitive to prison conditions, never felt obligated to think differently and pass different orders. Moreover, in their decisions they frequently question the "state of unconstitutional affairs" while invoking "public safety" to maintain harsher sentences and mass incarceration practices [61].

Often, the only way to de-incarcerate is to appeal to or file habeas petitions before the Supreme Court. That was the case of a collective habeas corpus filed in 2017 by a group of civil society organizations in favour of all pregnant women and mothers of up-to-12-year-old-children and children with disabilities under pre-trial detention. They claimed that the "unconstitutional state of affairs" of the prison system prevented these women from having access to basic maternal healthcare while violating the rights of their children. The case was one of very few decided in favour of a large group of claimants through an "unconstitutional state of affairs" standard [62]. Human rights groups have tried similar measures during the Covid-19, this time in favour of the elderly and those in health risk group but have been largely unsuccessful [63].

With a few exceptions [64], the Court shifted its case law towards a more conservative approach when dealing with collective habeas petitions by requiring that the individual situation of each prisoner be decided by lower courts. As we will see, lower courts were also a blocked path towards de-incarceration during the pandemic.

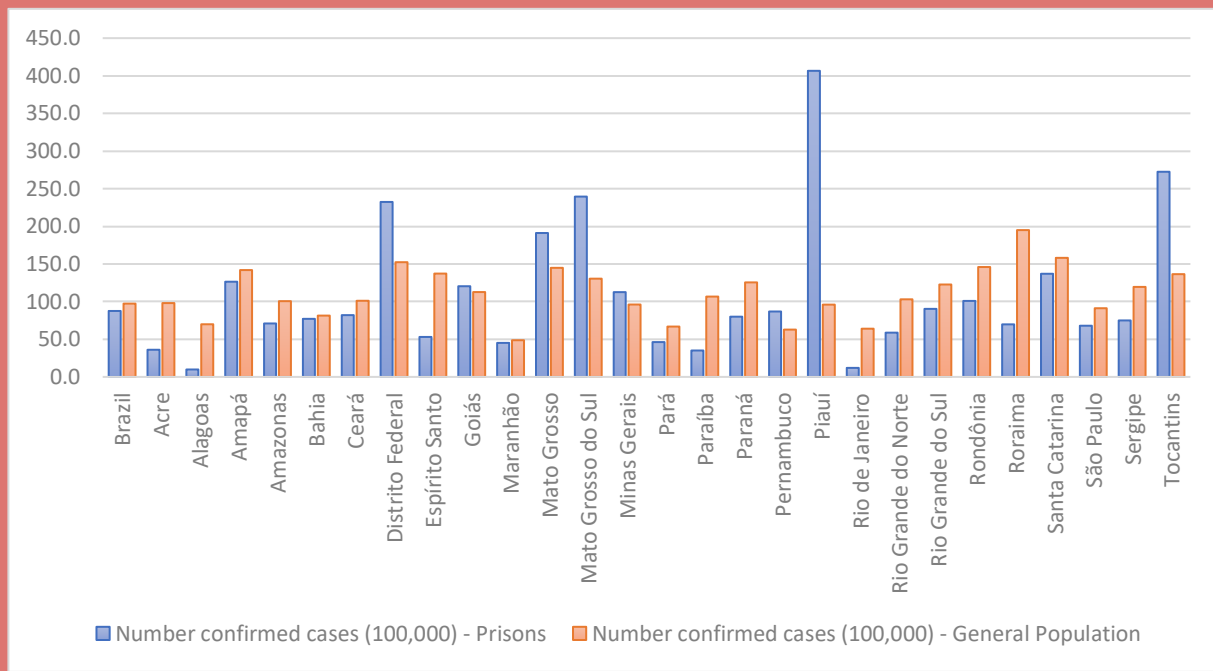
DURING THE PANDEMIC

As we have seen, the Covid-19 pandemic arrives in a prison system that was already broken by overcrowding, violence, racism, and long-term violations of human rights. The first cases were registered in April in the state of Pará and Rio de Janeiro [65]. Since then, Covid-19 spread throughout the entire prison system. All 26 states today register confirmed cases and deaths. According to the National Council of Justice, an administrative organ that issues governance protocols for the entire judicial system, by August 24, 2021 [66] the country had approximately 66,040 confirmed cases (9,6 % of the current prison population of 682,182) [67] and 272 deaths in adult prison facilities, and 10,612 confirmed cases in juvenile facilities (close to 22% of the 46,193 in juvenile facilities by December 2020) [68].

Compared to the general population, contagion among people has been, on average, better than outside, as for every 1000 people in prison in the country an average of 87 have had Covid-19, while for the general population that number is 97. However, some states register a proportion of confirmed cases among prison population up to 4 times the one found outside prison facilities.

Among prison staff, the number show 24,952 people in adult prison units (more than 21% of the 116,892 prison employees), with 291 deaths, and 7,975 in juvenile facilities, with 101 deaths (24 August 2021) [69]. Compared to the general population, contagion among people has been, on average, better than outside, as for every 1000 people in prison in the country an average of 87 have had Covid-19, while for the general population that number is 97 [70]. However, some states register a proportion of confirmed cases among prison population up to 4 times the one found outside prison facilities.

Graph 2: Covid-19 cases for every 1000 people



Source: Brazilian Minister of Health; Brazilian Federal Institute for Geography and Statistics; Brazilian Forum on Public Safety (Forum Nacional de Segurança Pública); National Council of Justice. Data extract on August 24, 2021. <https://forumseguranca.org.br/wp-content/uploads/2021/07/anuario-2021-completo-v6-bx.pdf>; <https://covid.saude.gov.br/>; <https://www.cnj.jus.br/wp-content/uploads/2021/08/monitoramento-casos-e-obitos-covid-19-2021-info-240821.pdf>; <https://www.ibge.gov.br/apps/populacao/projecao/index.html>; <https://www.cnj.jus.br/wp-content/uploads/2021/08/monitoramento-casos-e-obitos-covid-19-2021-info-240821.pdf>; <https://www.ibge.gov.br/apps/populacao/projecao/index.html>

These figures are likely to be underestimates for both prisons and general populations due to insufficient testing and tracing inside and outside the prison system [71]. For prisons, the federal summary/data depend on reports sent by states authorities who often do not update this information on a regular basis or even do not properly report their deaths or confirmed cases as Covid-19 [72] related. As evidence of lack of transparency, or even of data tampering, in the

National Prison Department Covid-19 panel, at least 9 of 26 states registered in April 2021 the same numbers of confirmed cases they had reported in December 2020. More recently (this time on the National Council of Justice panel), at least 3 states registered for 24 August 2021 the same figures as they had on 19 of May 2021.

Widespread/population-wide testing and tracking of Covid-19 cases within the prison population, which also includes prison guards and staff, seems also to be missing. The National Council of Justice Covid-19 panel shows that 354,019 tests have been administered within the prison population by August 2021 [73]. If each test corresponds to only one person tested only one time, this means that close to half of the prison population in the country had not been tested even once. There is also considerable variation among states. In Sao Paulo, for instance, a state that accounts for close to 30% of the total prison population in the country (around 220,000 individuals), by May 2021 only 164,121 prisoners had been tested [74]. This number went up to 200,058 in August, covering almost the entire state adult prison population [75]. Meanwhile, Minas Gerais, a state that accounts for the second largest prison population in the country (close to 74,000 people), had only tested less than half (20,036 tests among the prison population) [76]. And the state of Rio de Janeiro (over 51,000 people deprived of freedom) had tested even less, 3% of its prison population (or 1903 tests) [77].

CRIMINAL JUSTICE SYSTEM RESPONSES

There has been no single coordinated response to the pandemic among prison facilities in Brazil. As a federated system of government [78], Brazil's prison policy is mostly implemented by state authorities. The federal government runs a small number of federal prisons, sets guidelines, and oversees state policies, while managing the federal fund for prison policy (FUNPEN) [79]. For the pandemic, the federal government issued recommendations to its own prison facilities, but it was left to state authorities to adapt them to their local contexts, and to request for additional federal resources. What worsened the situation is a general lack of transparency and gaps in information not only for Covid-19 cases, but also for measures adopted in each correctional facility. Almost all states restricted access to visitors and circulation. These measures, however, offered no effective plan that could guarantee communication between prisoners and families, or access to food, clothing, and personal hygiene items, which are provided by family members during their visits.

On February 28, 2020, The National Department of Prisons created a discussion group that was meant to study the impact of Covid-19 over the entire prison system [80]. On March 2, this group issued a statement that encapsulated a set of measures that was intended to be mandatory in federal prisons and were recommended to states. However, these federal guidelines, updated at least three times during 2020, exemplify the general negligence towards prisoners before the pandemic. First, most recommendations are directed at the protection of staff and health care workers: only 2 pages out of 56 directly address the care and protection of prisoners, recommending basic hand hygiene, use of soap and water, the self-cleaning of cells and preventive habits like not touching one's face or nose, covering one's mouth and nose when coughing and sneezing. Second, testing of prisoners and staff is only recommended for symptomatic or suspected cases, which means that there is no obligation to test asymptomatic cases. Third, PPE and masks are only provided to at-risk group of prisoners (which the recommendation identifies as the elderly and those with chronic diseases), suspected, and confirmed cases [81]. The general prison population is largely unmasked. The federal guidelines also recommend isolating at-risk group (a category that has never been fully defined but that could assumedly include prisoners over 60 years old, and/or with serious health conditions)

prisoners, suspected and confirmed cases from general prison population and restricting access of visitors [82].

Considering the levels of overcrowding and the lack of basic resources, such as clean water or hygiene items, normally provided by families (now incapable of accessing prison facilities), most of these recommendations have little or no actual effect over prison life. To address the lack of space required to triage and quarantine prisoners, the federal government in the person of Sergio Moro, a former federal judge in the famous 'Car Wash' anticorruption operation who became a Minister of Justice in the administration of President Jair Bolsonaro, proposed the revision of norms for prison buildings and their architecture so that it could be possible to isolate confirmed and suspected cases in metal containers outside prison walls. Several human rights groups spoke against the measure, an inhumane response already tried by the Brazilian government and against which the current architecture norms were approved. These groups were successful in their claims as the measure was rejected by the National Council of Criminal and Prison Policy [83]. The same minister of justice, before leaving office, made several statements that would challenge the seriousness of the pandemic within the prison system and the need for reducing overcrowding through alternatives to imprisonment [84].

At the state level, the only measure common to all governments was restrictions on visitors. However, the forms of these restriction and their extent, together with other public health protocols such as prison isolation, quarantining, testing and vaccination, have widely varied across states. Some have tried to implement forms of online contact between families and prisoners. In the state of Sao Paulo, the policy of "Family Connection" promised to maintain the contact between prisoners and families through online mailing and virtual calls. The program, however, received severe criticism from families as they face difficulties in accessing the system and scheduling calls, which are normally too short (5 minutes) and with very little or no privacy - prison agents might accompany prisoners during the entire call [85]. Moreover, many families do not have access to internet or a stable online connection that could support the calls.

In general, families and even lawyers reported having little or no knowledge of what happens with their family members and clients under custody. A survey conducted in July 2020 with prisoners' families across the country found that almost 70% of families had no contact or information about their family members under custody since March and almost 97% of surveyed families declared not have received any support from their states' correctional facility [86]. As many of these prisons have reopened to visitors, reports of torture, violence, and starvation surface throughout the country [87].

State policies have not been protective of staff and prison guards as well. A similar survey conducted in May 2020 with prison guards across the country found that 61,79% of respondents did not feel prepared to deal with Covid-19 protocols in their work routines; only 9,3% had received some training on the matter, and only 67,44% had received PPE, such as masks, for protection inside prison facilities [88].

The National Plan for vaccination added the prison population and prison staff among the highly vulnerable groups that should have priority in vaccination [89]. However, it was up to state authorities to coordinate vaccination campaigns within their prison units following the PNAISP. This meant that, in practice, people deprived of freedom and prison staff did not get access to vaccines at the same pace as other priority groups. By August 2021, 359,018 people incarcerated (over 50% of the prison population) had received the first dose, and 84,933 were fully vaccinated (12%) [90] [91]. These numbers were far below the national average – in the

same period more than 30% of the Brazilian population was fully vaccinated and over 62% had received their or single first dose [92]. In Sao Paulo, over 96% of the entire adult population had received at least one dose, whereas that number falls to 33% (73,335 of 220,000 people) among the prison population [93].

The legislature passed no significant law that could address the specific consequences of Covid-19 within the prison system. On the contrary, some legislators tried to approve laws that would authorize the use of metal containers [94] as a response to overcrowding. The House of Representatives Commission for Public Safety approved a project that created a new drug-related crime, “narcoterrorism” [95], a specific punishment to any “association for drug-trafficking” (an already existing crime) that uses guns or explosives.

The judicial system’s answer was also decentralized and uncoordinated. By March 2020, the National Council of Justice issued a recommendation advising judges to decide in favour of early release or house arrest for non-violent crimes and/or prisoners in risk groups, exemplified by the recommendation as the “elderly, pregnant women and people with chronic, immunosuppressive, respiratory and other pre-existing comorbidities that may lead to a worsening of the general state of health from the contagion, with special attention to diabetes, tuberculosis, kidney disease, HIV and co-infections” [96].

Most judicial decisions, however, did not follow the recommendation. A study conducted in the state of Sao Paulo found that almost 90% of all habeas corpus decisions after the pandemic that cited Covid-19 in their legal reasoning (close to 7,000 petitions between March and May 2020) were denied, even if the petitioner was part of a risk group or had not committed a violent crime. Recommendation 62 was barely mentioned and when so, judges would cite it to disagree with it or to defy the National Council’s authority to “recommend” how judges should decide their cases. Some judges even questioned the overall benefits of such measures [97]. A similar pattern of judicial indifference was found by empirical studies conducted in other courts throughout the country, as in the Rio Grande do Sul state court, the Superior Court of Justice and even in cases decided by the Supreme Court itself, a strong contradiction as the National Council of Justice is presided by the Supreme Court’s Chief Justice [98].

HUMAN RIGHTS VIOLATIONS

Pastoral Carceraria – a religious group that provides aid to prisoners and families within the criminal system, reported that rights’ violations complaints had increased 82% between March 2020 to March 2021, compared to the previous year. Most complaints flagged lack of adequate access to health care, food, clothing, hygiene products, cleaning products, and accused prison staff of torture and violence.

Over the past 20 years, The Inter-American Commission of Human Rights (IACHR) has censured Brazil on many human rights violations that involved prisons and people deprived of liberty [99]. In a report issued just a month before the pandemic, the IACHR expressed concern over the state of prison conditions throughout the country, the increasing risks of incarceration of young adults and adolescents, women, the prevalent incarceration of Brazilians of African descent, and the

general state of Brazilian prisons [100]. During the pandemic, the complete isolation of prisoners without sufficient consideration for the role that their families and visitors play in their survival resulted in several riots and the escape of hundreds of prisoners throughout the country [101]. The federal government's answer was to strengthen control over prisoners and to increase public budget for the buying of grenades and armoury, so riots could be contained [102].

As prisons were under lockdown and there was no in-person supervision from lawyers, human rights groups, the public prosecutor's office, and correctional courts, cases of torture and violence against people deprived of freedom too skyrocketed. Pastoral Carceraria – a religious group that provides aid to prisoners and families within the criminal system, reported that rights' violations complaints had increased 82% between March 2020 to March 2021, compared to the previous year. Most complaints flagged lack of adequate access to health care, food, clothing, hygiene products, cleaning products, and accused prison staff of torture and violence [103]. There have been reports of people in prisons going blind after being shot by police officers with rubber bullets or being targeted and beaten with the use of pepper sprays, clubs, and wires, and even broomsticks [104].

Colombia

BEFORE THE PANDEMIC

Over the last twenty years, in Colombia, criminal and prison policy have strengthened the use of incarceration as the main mechanism to address the enormous security challenges that the country has suffered [105]. These changes have led to what can be described as a permanent state of crisis and dehumanization of life in prison, as well as a significant growth in the prison population.

In 1998, when the Constitutional Court declared for the first time that the prison system was under an "unconstitutional state of affairs" [106] (Judgment T-153 of 1998), the security situation in Colombian prisons was alarming.

Penalties for crimes in the country have been disproportionately toughened over the last twenty years.

The armed conflict between insurgent groups and the Colombian State had intensified, and the war between the guerrillas and the paramilitaries had moved into prisons [107]. The terrible cases of dismemberment and forced disappearance of more than one hundred people inside La Modelo prison in Bogotá during 1999 and 2001, [108] reflected a time when the social order of prison authorities co-existed with the order established by the guerrilla and paramilitary groups [109].

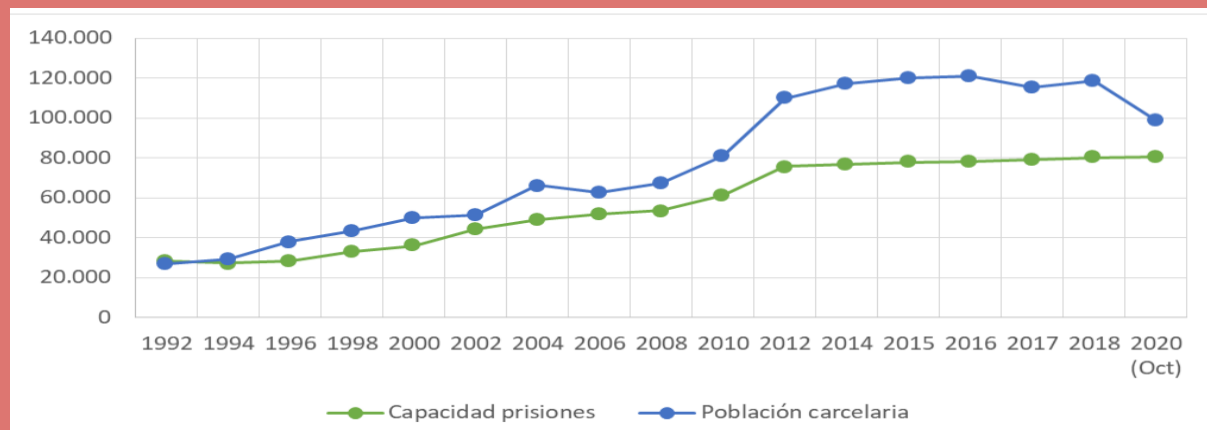
Today, twenty years after this security crisis in Colombian prisons, the use of weapons inside prisons has decreased and, in general terms, the armed conflict is no longer a fundamental factor to explain violence in prisons. However, it is clear that the process of dehumanizing life in prison continues and more and more people are suffering the direct effects of living in subhuman conditions of detention.

“The Court’s declaration of an unconstitutional state of affairs is only done when problems are so entrenched that they require the intervention of several organs of the Colombian state for their resolution,” according to Manuel José Cepeda-Espinosa, one of the nine judges serving on the *Corte Constitucional de Colombia* [110].

Between 1998 and March 2020, the prison population in Colombia more than tripled, moving from 42,000 to 118,000 people. This was not followed by a commensurate expansion and improvement of prison infrastructure necessary to serve this population [111]: overcrowding rates remained above 45%, with some Colombian prisons registering occupancy capacities above 300%. However, by September 2021 overcrowding rates have been reduced by half.

In the last two decades, the incarcerated population in Colombia has grown steadily, and dramatically, until the beginning of the pandemic [112] - from 28,332 inmates in 1996 to 118,513 people at the beginning of 2020. This increase, however, cannot only be explained by the incarceration rate, as the number of people deprived of liberty has also grown along with the size of the Colombian population in absolute numbers.

Graph 3. Comparison between the capacity of detention facilities and the number of persons deprived of liberty in Colombia (1992-2020)



Source: World Prison Brief, INPEC.

In 2021, the prison population remained stable -- around 98,000 people. While prisons are less overcrowded, it remains an issue in most prison units, at a rate of around 16% over prison capacity.

The Constitutional Court reiterated in sentences T-388 of 2013 and T-762 of 2015 the declaration of an "unconstitutional state of affairs" in Colombian prisons, addressing the prison problem as a deficiency in the design and implementation of criminal and prison policy in its three phases: primary criminalization, administration of justice and administration of the prison system [113]. As stated by the Colombian Constitutional Court [114], in recent years Congress has treated criminal policy casually, in a careless manner, creating criminal legislation that is unstable, volatile, punitive, and not reflective of the social challenges faced by Colombia [115]. As a result, penalties for crimes in the country have been disproportionately toughened over the last twenty years [116]. Since 2000, one hundred and sixty new crimes have been incorporated into the Penal Code. The Code has also been amended 53 times, with about four laws being issued every year, normally increasing penalties, or creating new crimes [117].

For the administration of justice, the duration of criminal proceedings has been reduced over the last twenty years. Still, this improvement was not translated into reducing the numbers of people incarcerated or new criminal cases [118]. On the contrary, the number of judicial cases has steadily increased. In 2016, the Superior Council of the Judiciary reported alone that more than 129,000 new cases entered the criminal system. In addition, a total of 8,505 people were declared acquitted under the accusatory criminal system, which corresponded to 19% of all cases terminated that year. This meant that only one of every six people were declared innocent [119].

Colombian prison conditions are also under a permanent crisis due to overcrowding, lack of physical and mental healthcare services, access to water and sanitation and resocialization services. As a result, the physical and mental health of incarcerated people have been seriously affected [120]. Specifically, the appalling prison conditions have facilitated the spread of diseases practically eradicated in most high- and middle-income countries, such as tuberculosis, bacterial meningitis, pneumococcal pneumonia, and most infections transmitted through the air [121]. The current prison situation also reflects an increase in criminal recidivism, a fundamental concept in criminal justice, which refers to a person's relapse into criminal behaviour, often after the person is sanctioned or undergoes intervention for an earlier crime.

The recidivism rate of the population deprived of liberty, has increased steadily in recent years, reaching 22.3% in April 2019, and then falling to 21.9 by November 2020, which indicates that re-socialization policies are not achieving the goal of reducing the number of people re-entering the system [122].

DURING THE PANDEMIC

As in the case of Brazil, the prison system in Colombia was in a state of crisis due to lack of infrastructure, limited access to health services, and inhumane conditions of detention even before Covid-19. Since the onset of the pandemic, the situation inside prisons has deteriorated substantially.

By September 2021, more than 26,000 confirmed cases of Covid-19 among people in prisons had reported (over 26% of the prison population, of 98,000 people) [123]. These numbers are likely to be underestimated - not only access to Covid-19 testing is scarce, specially within the prison system, but prison deaths are not even reported anymore by the Colombian National Institute for Prisons and Jails (Instituto Nacional Penitenciario y Cancellation - INPEC), making impossible to estimate the real projection of lethality and mortality of Covid-19 in prisons. Prison staff has also been disproportionately affected, with more than 2,799 confirmed cases until July 2021 [124] (more than 18 % of the prison staff, of approximately 14,905 people [125]).

According to the available data, the number of positive cases among the population deprived of liberty increased considerably between June and July of 2021 with a peak in Jul 23, 2021, of 3200 cases. However, as of July 28, 2021, the number of confirmed cases began to decrease. This decrease, however, has not been perfectly linear. Evidence shows various peaks in the number of infections in different prisons, suggesting that a few first infections spread through almost entire yards and prison units in a matter of weeks. Even at the beginning of November 2020, the increase in cases compared to the data registered for October is notable, which suggests the existence of constant outbreaks among the incarcerated population, and a second overall peak of infections by mid-2021 [126].

Moreover, from March 2020 to September 2021, infection spread at prison facilities have happened at a much higher rate than among the general population, which had registered two national spikes of contagion, in November 2020 and July 2021. Telling evidence of the vulnerability of the country's prisoners to Covid-19 is the difference between the contagion rate between the population deprived of liberty and the rest of the population. The available data on the number of infections registered daily within prisons and in the rest of the country until June 2021 shows that the number of infections among the incarcerated population is higher, controlling for the size of the population. Thus, by September 2021, the average number of confirmed cases for every 1,000 people among the general population was of 96,37, whereas for the prison population this number is 3 times higher – 295 for every 1,000 people in prisons [127]. This indicates that, as has happened with diseases such as Tuberculosis, Hepatitis C, or HIV/AIDS, Colombian prisons have become favourable spaces for the rapid spread of Covid-19.

CRIMINAL JUSTICE SYSTEM RESPONSES

The Colombian government began to take measures to mitigate the impact of Covid-19 by enacting the Decree n. 385 on March 12, 2020 [128]. The decree declared a national public health emergency, giving the Executive exceptional powers to make emergency contracts and request public funds to face the health crisis [129]. Based on this decree, the government issued a second Decree, n. 1144 on March 22, 2020, declaring a “state of prison and jail emergency” (*estado de emergencia penitenciaria y carcelaria*) [130], and the Resolution n. 843 of 2020 [131], which includes a package of measures to guarantee the biosafety of prison staff and the prison population through the acquisition of face masks, suspension of family visits, and the closure of prison establishments to any external organization other than public authorities or control agencies. This package also included protocols for the mitigation and care of Covid-19 cases within Colombian prisons [132].

Pressured by various international organizations and by the increase in Covid-19 infections in prisons, in April 2020, the Ministry of Health and Social Protection issued two guidelines for the control, prevention and management of Covid-19 cases among the population deprived of liberty in Colombia [133]. These guidelines recommended preventive healthcare measures recommended by the WHO. However, they ignored that many of these measures were already part of previous plans. Other measures are simply impossible to comply with, given the current infrastructure of prison facilities. For example, for the prevention of Covid-19 cases, it was recommended to “guarantee the appropriateness of the physical infrastructure (living areas and bathrooms) to isolate confirmed Covid-19 cases and possible cases with Covid-19 symptoms” [134]. This measure had been part of many previous requests from the Constitutional Court, but the State has repeatedly failed to comply with it long before the pandemic [135].

In April 2020, the Legislative Decree 546 (of April 14, 2020) ordered that prison sentences and pre-trial detention should be replaced by alternative measures of imprisonment and temporary house arrest in case of people with serious medical conditions [136]. The decree also aimed at reducing the levels of overcrowding in the country's prisons through such releases. At that time, the Minister of Justice indicated that the measure would benefit approximately 4,000 people. This figure was clearly not enough, considering that the percentage of overcrowding in March was of 51.49%, an overpopulation of 41,670 people (according to the INPEC Statistical Board) while the measure would only benefit 3.26% of the total incarcerated population. Hence, the decree's effectiveness as an extraordinary measure to avert contamination would be minimal – it would only release less than 10% of the overpopulation by that time, whereas the prison system would still house 37,600 people beyond its capacity.

However, procedure rules that existed in the ordinary legislation, such as the Colombian Criminal Procedure Code, are more flexible than the emergency decree and would allow for even more releases. For instance, access to alternative sentences such as release on probation or house arrest are relatively flexible. For some minor crimes, conditional release can be requested before a judge after serving 2/3 of the sentence, while home detention after 1/2 of the sentence. However, even before the pandemic, these types of benefits were typically denied. It was up to the discretion of criminal judges to decide if the person is ready or not to be released.

Since the beginning of the pandemic, however, judges have managed to reduce overcrowding somewhat by using the same procedural rules which existed prior to the emergency decree, although, in no case, has overcrowding been reduced to a point where the capacity of each prison facility corresponds to the number of people imprisoned. As we have shown, by 2021, the population in prisons has stabilized around 98,000 people, with an overcrowding rate of close to 20% (a current overpopulation of 15,218) [137]. This suggests that the role of judges in reducing overcrowding is limited, even if they are willing to leverage current criminal procedural rules to that end.

As with other information regarding prison policies during the pandemic, there is little transparency about the specifics of vaccination inside prison facilities, on the types of vaccines that have been administered, and the time interval between first and second doses.

What judges were able to do with current criminal procedure law greatly contrasts with the emergency decree effects. According to INPEC, The National Penitentiary and Prison Institute, from March 12 to October 26, 2020, a six-month period after the decree was issued, a total of 35,099 people left the prisons, either released, or sent to house arrest. Of this, only 2.6% (946 people) managed to get out, thanks to Decree 546. By November 30, 2020, the number of people who benefited from the decree was even smaller - reduced to 815 people, because many of those that were under this temporary measure had returned to prison after six months [138]. As of September 2021, no new reports on the effectiveness of the decree have been published by Colombian authorities [139].

Legislators failed to pass any reform that would mitigate the effects of Covid-19 among people in prison and the prison community. In fact, quite the opposite happened -- by December 2020, Congress approved life sentences for sexual crimes against children. It was up to the Courts again (this time, it was the Supreme Court) to declare life imprisonment unconstitutional [140].

The vaccination of people inside prisons started in June 2020 and advanced significantly between June and September 2021. According to the Penitentiary Services Unit (USPEC) [141], by September 1, 2021, a total of 19,976 people deprived of liberty had been fully vaccinated (1,303 women and 18,673 men) and 60,098 people had received at least the first dose (5,751 women and 54,346 men). There has been a significant reduction in the number of new confirmed cases between August and September 2021, most likely due to vaccination. Moreover, in the world outside of prison facilities, all adult individuals above 20 years of age can get vaccinated through municipal programs, as of September 2021. However, as with other information regarding prison policies during the pandemic, there is little transparency about the specifics of

vaccination inside prison facilities, on the types of vaccines that have been administered, and the time interval between first and second doses.

HUMAN RIGHTS VIOLATIONS

Since March 17, 2020, before the first reported case of Covid 19 in prisons, the Committee for Solidarity with Political Prisoners (CSPP) [142] denounced the lack of appropriate measures by INPEC to prevent the spread of Covid-19 among the incarcerated population. As in Brazil, visits to detention facilities were completely suspended since March 12. This was framed as the main preventive measure. This meant that the work of the few support networks from civil society groups was also suspended during 2020 and 2021. Researchers, NGOs, religious organizations, and even the family were denied access to the prisoners. As in Brazil, the suspension of visits in a context of institutional deficiency, has allowed for new violations of human rights and has made the contact of the inmates with the outside world or with any organization in charge of protecting their human rights practically impossible. While restricting external access and visitation, INPEC staff was not complying with basic health and safety protocols such as wearing masks and social distancing. The absence of adequate measures to prevent contagion resulted in riots and protests. On March 21, 2020, various detention centres witnessed an uprising against the passivity with which the State was facing the pandemic. These protests unleashed multiple confrontations between inmates, the INPEC custody and surveillance body, and the Public Force, which led to 24 people being killed and 83 injured in La Modelo prison in Bogotá [143]. One year after these events, no person had been formally investigated or imprisoned for these deaths.

Summary of Information Collected from Case Studies

	Brazil	Colombia
Prison population before the pandemic	~700,000 before the pandemic (with important variation between sources) 0.32% of the Brazilian population [144]	119,000 before the pandemic. 0.23 % of the Colombian population [145]]
Overcrowding rates	~150% the occupancy capacity (December 2020)	~120% the occupancy capacity (September 1, 2021)
Health services before the pandemic	Inadequate access to healthcare. Insufficient personnel, structure, and resources. Lion's share of healthcare services provided by nursing assistants. Average of 1 doctor for every 870 people.	Very poor health services in most prisons. All prisons provide a basic care service, but clearly insufficient in resources and personnel. (Constitutional Court of Colombia, Sent. 388/2013)
Access to other basic items	Reliance on family and networks of care from outside Complains of insufficient access to adequate and nutritious food, clean water, sanitation, beds, and hygiene items. Family and visitors play an important role in complementing policy.	Reliance on family and networks of care from outside Every 4 months a hygiene kit is distributed to the entire prison population, with basic personal hygiene items. Clearly insufficient to guarantee a vital minimum respectful of human dignity
Main policy responses to the pandemic	Lockdown of prison units, with suspension of visits during 2020 and part of 2021. Testing, varying from state to state, and vaccination (insufficient). Programs for communication between families and people in prisons were absent or inadequate.	Total suspension of visits during 2020 and beginning of 2021. Controlled visitation programs were attempted in some prisons, but formally visits remained suspended in most establishments.

Legal responses to the pandemic	National Council of Justice Recommendation 62/2020, recommending de-incarceration; National policy guidelines for addressing the pandemic within prison facilities	Legislative Decree 546 of April 14, 2020. The effectiveness of this legal decree was very limited – covering the release of 815 people.
Numbers of confirmed cases and deaths in the country for every 100,000 people	97,4 for every 1,000 people (August 24, 2021)	96,37 for every 1,000 people (September 06, 2021)
Number of confirmed cases and deaths in the prison system for every 1000 people in prisons	Confirmed Cases: 87 for every 1,000 people (August 24, 2021), with variation among states. Deaths: 36 for every 1,000 people (August 24, 2021), with variation among states.	Confirmed Cases: 295 for every 1,000 people (September 06, 2021). Deaths: 93 for every 1,000 people (Nov 2020, not reported during 2021).
Vaccination mandate	National plan of vaccination placed prison population and prison staff among high-risk groups who should receive priority during vaccination. Vaccination programs, however, are implemented by the states – great variation.	Vaccination is not mandatory either to prison guards or to incarcerated people. In the National Health Plan, the prison population is part of the vulnerable and high-risk groups that should take priority during vaccination.
Vaccination rate of prison population and prison staff	As of August 24, 2021, more than 50% of prison population have received their first dose. Less than 12% fully vaccinated. Vaccination rates below national average.	More than 60% of the prison population has received the first dose. Approximately 20% of the prison population is fully vaccinated. Data from September 1, 2021.
Reported Human Rights Violations	Lockdown prevented communication with family and defence attorneys. Torture and violence by prison staff and police during lockdown and riots.	Riot in la Modelo Prison in Bogotá, 23 March 2020, ended with 24 killed and 85 wounded. Thus far, no one has been formally investigated or charge.
Perceived failures of the judicial system	Courts did not follow recommendation for de-incarceration and often denied the pandemic's effects over the prison system. Decisions are like those before Covid-19, when judges would not take "the unconstitutional state of affairs" as a valid legal standard.	Courts provided the main response to overcrowding by using existing criminal procedural law to send people to house arrest or out on probation. At least 20,000 people have benefited from the measure.
Perceived failures of correctional authorities	There were no coordinated actions between different prison systems. The federal authority issued guidelines but did not oversee their implementation. Most responses did not address structural issues. General lack of reliable information.	The many protocols and plans enacted by healthcare authorities in the country were not able to deal with the limited resources and infrastructure of the prison system. Strong restriction on visitations allowed for more isolation of people in prisons and human rights violations. No public data on deaths by Covid-19 and vaccination rates, suggest prison authorities lack transparency.
Perceived failures of legislators	No law was passed to address the specific effects of the pandemic within the prison system. There was no clear response to overcrowding coming from the Legislative.	Legislators failed to pass any comprehensive legislation that could to mitigate the effects of Covid 19 in prisons. Approved life imprisonment against sexual crimes against children. Colombian Constitutional Court declared it unconstitutional.

Policy Recommendations

Covid-19 in prison systems around Latin America reinforced old patterns of exclusion and inhumane treatment of those incarcerated. In Brazil, the negligence towards prisoners translate to a lack of coordination, planning, transparency, and negligible commitment to the lack of protection and respect of human rights of prisoners. In Colombia, there is coordination and planning within a human rights framework, but little compliance, as guidelines necessitate measures that cannot be implemented, given the available resources and personnel.

In the first case, there is too little regulation, and much discretion granted to public authorities – especially correctional officers and courts. In the second case, there is a clear response from the Legislature, but lack of resources and political will from policymakers. This makes the law appear hollow as rates of contamination within the prison system greatly exceed those of the rest of the population. In both cases, national responses have been insufficient, and provoked human rights violations that could have been avoided if the lives and well-being of prisoners were taken as indisputable rights.

Long before Covid-19, these policies led to serious violations of national and international law. Many of the findings discussed in this report reiterate what other public health crises (such as tuberculosis and HIV/Aids) had already exposed. Hence, by connecting past and present concerns, we propose 5 measures that would be central to real change for the better in both countries and the region.

1 Reduction of prison populations : The release of prisoners in risk groups or those incarcerated for non-violent crimes, even if drug-related, and restrictions against the use of pre-trial detention during the pandemic. Considering that overcrowding is one of the key concerns that needs to be urgently addressed during the pandemic, the number of those incarcerated must be reduced to provide a safer environment for prisoners and staff. This means stabilizing or even reducing the number of new people incarcerated (which involves new approaches towards pre-trial decisions and sentencing); and releasing those that were already incarcerated so numbers can be reduced. This measure involves reviewing current criminal law – either through legislatures or constitutional courts; and requires the joint effort of correctional authorities, social workers, correctional judges, and families so that the likelihood of recidivism can be reduced, and people can be adequately re-socialized into a safe and careful environment.

2 Accept and make transparent a structure for joint-responsibility and inter-organizational cooperation in the criminal justice system : The only way responses to a pandemic, or to any health crisis, can work in such a complex and polycentric policy space (as the criminal and correctional ones) is if all organizations that are part on this system recognize their shared responsibility over the lives of the incarcerated. This means that protecting people deprived of liberty is not a job for only correctional officers. It necessarily involves law makers and judges. They play a crucial role as regulators – reforming legal frameworks at the general level and changing legal interpretation case-by-case. Law makers can enact national rules that guide judges and correctional policies everywhere towards alternatives to incarceration. But they can also guarantee through statutory law financial and organizational resources where these are lacking. Such regulations need to be clear and enforceable, considering what policy makers can reasonably achieve with the resources given. Judges should use imprisonment as punishment as a last resort. The “unconstitutional state of affairs” must be more than rhetoric; it must be legally mandatory to consider prison conditions in individual sentences, and to de-incarcerate. Levels of overcrowding, access to adequate sanitation, water, food, physical and mental health care should be viewed as important determinants in deciding a sentence. Especially if a habeas review is provided for misdemeanour or non-violent drug-related (i.e., only involving drug use, trafficking, and drug dealing) charges.

3 Data transparency, mass testing and tracking among prisoners and staff : A general problem during the pandemic in almost all Latin American countries, and certainly in the two cases presented here, is lack of enough data on Covid-19 within the prison system. Testing and tracking, with adequate rights and ethical protections, is probably the most important tool to guarantee the

efficacy of any lockdown or isolation measure. But beyond tracking the virus, there is a general need for transparency in all that happens in prison life. This means the provision of all relevant up-to-date information, to all those involved in the prison community and the general public. Moreover, transparency also requires that incarcerated people have free and easy access to communicate with their families, defence lawyers, and independent control authorities (such as correctional judges and public prosecutors), so there are multiple avenues for getting information out and prevent abuses, human rights violations, violence, and negligence.

4 Treating prison communities as a whole : The prison community is larger than the prison gates, involving prisoners' families, staff, lawyers, and even the towns and neighbourhoods where correctional facilities are located. All these groups play different roles in incarcerated people's lives, often being co-participants in the implementation of correctional policies (for example, through the provision of food, hygiene items, clothing, mental health conform, leisure). Like people who are incarcerated, they are also affected by overcrowding - its effects worsen the health of everyone within the prison community. Hence, these groups should have a rightful claim to co-participate in decision-making for the prison units they are directly or indirectly part of, while having access to information pertaining to all that happens within prison walls.

5 Treating prison systems as an integral part of national healthcare policies : If prison communities are not restricted to the incarcerated, their needs and the effects of disease over their health and well-being will be felt and carried by other people, such as prison staff, families, and the immediate communities outside prison facilities. This means that prison systems need to be an integral part of healthcare policies and planning, especially during a health crisis. This means providing equal access to healthcare information, vaccinations, all the preventive care available to the outside population through the National Healthcare System, along with access to primary care, complex treatments, and medicines. If courts and policy officials block the implementation of this agenda by not seeing it as a fundamental human right mandate (as the UN Standard Minimum Rules for the Treatment of Prisoners or Nelson Mandela Rules would so attest), they can at least be convinced to frame this as an overall public healthcare necessity critical in securing the public health of those outside prison facilities.

Notes

[1] WHO Covid Panel. Last access on December 10, 2021.

[2] Organization of American States (OAS) estimated **over 138,000 cases and over 1,500 deaths on September 9, 2020**. We have checked and updated that information (until 09/09/2021) for this report and included prison staff numbers whenever that was available. The reliability of estimates varies greatly from country to country. Some countries in the region have up-to-date information about contagion, deaths, and vaccination rates, such as Brazil, Colombia, Mexico, and Chile. For other countries, estimates rely on press releases or newspaper articles. For Belize, El Salvador, Guatemala, Honduras, Nicaragua, Ecuador, Peru, Paraguay, Uruguay, Venezuela, and the Dominican Republic the last figures obtained are from estimates in mid-2020.

[3] Pont J, S Enggist, H Stöver, S Baggio, L Gétaz, & H Wolff. (2021). COVID-19—The case for rethinking health and human rights in prisons. *American Journal of Public Health*, 111(6), 1081-1085.

[4] Dingake OBK. (2017). The rule of law as a social determinant of health. *Health and Human Rights*, 19(2), 295.

[5] Yepes RU, DE Guzmán, & JP Norato. (2013). **"Addicted to punishment: The disproportionality of drug laws in Latin America."** Bogotá: Dejusticia.

[6] Boiteux L. (2011). "Drugs and prisons: the repression of drugs and the increase of the Brazilian penitentiary population" in *Systems overload-drug laws and prisons in Latin America*. Amsterdam/Washington: Transnational Institute/Washington Office on Latin America (WOLA). 30-38; Lemgruber J, AC Telles, R Neder, D Borges, K Vargas, & M Siracusa. (March 2021). Um tiro no pé: Impactos da proibição das drogas no orçamento do sistema de justiça criminal do Rio de Janeiro e São Paulo. Relatório da primeira etapa do projeto. "Drogas: Quanto custa proibir." Rio de Janeiro: CESeC; de Carvalho Silva L & B Langeani. (2019). "Mal Orientada e com Baixo Impacto: Quais os Problemas da Política de Drogas do Estado de São Paulo?" *Journal of Illicit Economies and Development*, 1(2), 204-219; WOLA. (April 2020). **"Pretrial Detention for Drug Offenses in Latin America."**; Pol L. (April 24, 2015). **"Failed drug policies in Latin America: the impact on prisons and human rights."** CELS.

[7] Data from [World Prison Brief](#). Pre-trial detention, in accordance with the World Prison Brief Database, may include “one of the following stages, although not all legal systems and not all cases will involve each stage: the ‘further investigation’ stage, when they are being interrogated prior to a final decision to bring a court case against them; the ‘awaiting trial’ stage, after investigation has ended and a decision has been taken to bring a court case; the ‘trial’ stage, while the trial is actually taking place; the ‘convicted unsentenced’ stage, when they have been convicted by the court but not yet sentenced; and the ‘awaiting final sentence’ stage, when they have been provisionally sentenced by the court but are awaiting the completion of an appeal process which occurs before the definitive sentence is confirmed.”; See Walmsley R. (April 2, 2020). [World Pre-trial/Remand Imprisonment List \(4th edition\)](#).

[8] Bergman M & G Fondevila. (2021). “Prisons and Crime in Latin America.” Cambridge: Cambridge University Press. The combination of harsher sentences applied to smaller or non-violent offenses, and mass incarceration in precarious and overcrowded facilities, has been shown to have the opposite effect on criminality. In a comprehensive study on prisons and crime in Latin America, the authors argue that the region’s criminal policy does not deter criminality. On the contrary, as it reinforces the marginalization of entire social, racial, and ethnic groups, it also strengthens the reach and power of organized crime, often born out of prisons themselves.

[9] Rocha Machado M, MC de Souza Amaral, M de Barros, & AC Klink de Melo. (2019). Incarcerating at any cost: drug trafficking and imprisonment in Brazilian court reasoning. *Journal of Illicit Economies and Development*, 1(2), 226-237.

[10] Numbers from [Dados Estatísticos do Sistema Penitenciário \(SISDEPEN\)](#) for the first term of 2020 (Jan-Jun).

[11] Bergman & Fondevila. (2021). “Prisons and Crime in Latin America.”

[12] Youngers CA, T García Castro, & M Manzur. (November 2020). “[Women behind bars for drug offenses in Latin America: What the numbers make clear](#).” WOLA. The authors report that “the proportion of women prisoners who are incarcerated for drug offenses is at least 30 percent higher than in the case of men imprisoned in those countries.”; Bologna CM, A Safranoff, & A Tiravassi. (2018). “[Contextos de encierro en América Latina: una lectura con perspectiva de género](#).” UNTREF CELIV. As pre-trial detention is mandatory for most drug-related crimes in the region, this means that most women are in prisons and jails without a sentence, making the proportion of women under pre-trial detention higher in most countries than that of men. These women are often single mothers and the only source of income within their households, which makes their imprisonment devastating to their children and immediate families; See WOLA (2020) and Pol (2015), supra note 6.

[13] Average considering available data from 18 countries: Belize, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Suriname, Uruguay, Venezuela, and the Dominican Republic. Data from [World Prison Brief](#).

[14] World Prison Brief. “[Highest to Lowest - Occupancy level \(based on official capacity\)](#).”

[15] PAHO. (September 1, 2020). “[Preparación, prevención y control de COVID-19 en prisiones y otros lugares de detención](#).”

[16] Ibid, p. 18-19.

[17] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. (2020). “[Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic](#).” Adopted on March 25 (Advanced Unedited Version).

[18] Many Latin American prison systems, have long infringed the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) Rules, being systematically brought before the InterAmerican Court of Human Rights (IAHCR) (I/A Court H.R) under accusations of torture, violence, and subjecting prison population to high risk and neglect. By the time of the pandemic, the situation had not improved in the region. For example: Brazil has three ongoing cases brought before the IACHR due to violations of basic human rights in the Penitentiary Complex of Pedrinhas, in the state of Maranhão (I/A Court H.R., Matter of the Penitentiary Complex of Pedrinhas regarding Brazil. Provisional Measures); in the Penitentiary Complex of Curado, state of Pernambuco (I/A Court H.R., Matter of the Penitentiary Complex of Curado regarding Brazil. Provisional Measures); and in the Criminal Institute of Plácido de Sá Carvalho, in the state of Rio de Janeiro (I/A Court H.R., Matter of the Criminal Institute of Plácido de Sá Carvalho regarding Brazil. Provisional Measures); and the Juvenile prison system of the state of Espírito Santo (I/A Court H.R., Matter of the Socio-Educational Internment Facility regarding Brazil).

[19] Supra note 17.

[20] Supra note 17.

[21] Supra note 17.

[22] Supra note 17.

[23] Supra note 17.

[24] Supra note 17.

[25] Supra note 17.

[26] IACHR. (April 10, 2020). “[Resolution 1/2020: Pandemic and Human Rights in the Americas](#).”

[27] WHO. (May 13, 2020). “[UNODC, WHO, UNAIDS and OHCHR joint statement on COVID-19 in prisons and other closed settings](#).”

[28] WHO/Europe. (2020). “[Preparedness, prevention and control of COVID-19 in prisons and other places of detention: interim guidance 15 March 2020](#).”; For Spanish version, see Supra Note 15.

[29] WHO/Europe. (2020). p. 3.

[30] Ibid.

[31] Human Rights Watch (HRW). (May 27, 2020). “[Covid-19 Prisoner Releases Too Few, Too Slow.](#)”; HRW. (April 2, 2020). “[Latin America: Cut Prison Crowding to Fight COVID-19.](#)”

[32] OHCHR. “[INFORMATION NOTE: COVID-19, prison overcrowding, and serving sentences for serious human rights violations.](#)”

[33] Data from [World Prison Brief](#) and the [World Bank](#).

[34] In Mexico, for instance, data on Covid-19 in prisons was being publicized almost solely by civil society and journalists, as official Covid-19 reports lack specific information regarding the prison population. A [report by Observatorio de Prisiones](#) shows that Mexican public authorities have not informed most family members of preventive measures adopted or any of the protocols in place for visiting or communicating with inmates. In Bolivia, which has the largest overcrowding rate in the region (373% of prison capacity by 2018), it is simply not possible to find public and official information on the prison population contaminated by Covid-19. [Researchers](#) and [human rights activists](#), however, mention that already by June 2020, in the initial months of the pandemic in the region, 46 prisoners in the prison of Palmasola Santa Cruz had already confirmed cases, 90 were isolated under suspicious of contagion, and 13 had died of Covid-19. Another tragic example is Nicaragua, where we found no official information on the current numbers of Covid-19 cases and deaths for incarcerated individuals. Human rights advocates have, however, called out the country’s opaque prison system, also used in political repression and persecution. Amnesty International (AI) reported that throughout 2020, students and political activists had been incarcerated in the inhumane conditions of the country’s prison system – which features, among others, a lack of potable water and adequate healthcare – for publicly opposing the current government ([AI. 2020a](#); [AI. 2020b](#)). An [OAS report from October 2020](#) declares that at least 1,614 people had been incarcerated since April 2021 although there were no official reports on the precise number. A similar lack of transparency affects Covid-19 numbers.

[35] Marmolejo L, O Barberi, M Bergman, O Espinoza, & G Fondevila. (2020). Responding to COVID-19 in Latin American prisons: the cases of Argentina, Chile, Colombia, and Mexico. *Victims & Offenders*, 15(7-8), 1062-1085.

[36] Departamento penitenciário Nacional (DEPEN). “[Painel de Monitoramento dos Sistemas Prisionais.](#)”

[37] El Maerrawi I & HB Carvalho. (2015). Prevalence and risk factors associated with HIV infection, hepatitis, and syphilis in a state prison of São Paulo. *International journal of STD & AIDS*, 26(2), 120-127; Massad E, M Rozman, RS Azevedo, ASB Silveira, K Takey, YI Yamamoto, & MN Burattini. (1999). Seroprevalence of HIV, HCV, and syphilis in Brazilian prisoners: preponderance of parenteral transmission. *European journal of epidemiology*, 15(5), 439-445; Walter KS, L Martinez, D Arakaki-Sanchez, VG Sequera, GE Sanabria, T Cohen, & JR Andrews. (2021). The escalating tuberculosis crisis in central and South American prisons. *The Lancet*, 397(10284), 1591-1596; Baranyi G, C Scholl, S Fazal, V Patel, S Priebe, & AP Mundt. (2019). Severe mental illness and substance use disorders in prisoners in low-income and middle-income countries: a systematic review and meta-analysis of prevalence studies. *The Lancet Global Health*, 7(4), e461-e471.

[38] Altibi AM, B Pallavi, H Liaqat, AA Slota, R Sheth, L Al Jebbawi, & V Kak. (2021). Characteristics and comparative clinical outcomes of prisoner versus non-prisoner populations hospitalized with Covid-19. *Scientific reports*, 11(1), 1-9; Londoño E, M Andreoni, & L Casado. (April 26, 2020). “[As Coronavirus Strikes Prisons, Hundreds of Thousands Are Released.](#)” *The New York Times*.

[39] See Meneses-Navarro S, MG Freyermuth-Enciso, BE Pelcastre-Villafuerte, R Campos-Navarro, DM Meléndez-Navarro, & L Gómez-Flores-Ramos. (2020). The challenges facing indigenous communities in Latin America as they confront the Covid-19 pandemic. *International Journal for Equity in Health*, 19, 1-3. For example, in Mexico, where at least 21% of those that speak an indigenous language have no direct access to water and sanitation, 84% of indigenous districts registered Covid-19 cases, and the [Instituto Nacional de Pueblos Indígenas](#) registered a total number of 103,364 positive cases and over 10,000 deaths on March 27, 2021. See also UNESCO. (August 4, 2020). “[Pueblos indígenas y COVID-19: una mirada desde México.](#)”; Garcia AK. (January 9, 2021). “[El Covid-19 alcanzó a 8 de cada 10 comunidades indígenas en México.](#)” *El Economista*. In Peru, where 61% of Amazonian children live in poverty and only 26% of indigenous communities have safe access to water, over 30,000 cases have been confirmed among indigenous groups and 179 deaths (on March 24, 2021). These numbers are probably underestimated as this unprecedented humanitarian crisis caused many patients to die at home or resort to traditional medicine given the lack of state health services. See: UNICEF. (August 12, 2020). “[Protecting Peru’s Indigenous Children in the time of COVID-19.](#)”; Dirección General de Epidemiología. “[Sala de población indígena con COVID-19.](#)” Castañeda S. (September 1, 2020). “[In Peru’s Amazon, Indigenous COVID-19 patients get too little, too late.](#)”, *The New Humanitarian*. In Colombia, afro-Colombian and indigenous minorities have been hit hardest by Covid-19. Healthcare access is unequally distributed in the country, largely following race lines of exclusion – 103 of 106 afro-Colombian districts had no healthcare unit for intensive care before the pandemic, and the little information available points that mortality and morbidity of Covid-10 are higher there than among the general population. See Delgado J. (April 29, 2020). “[Cómo evitar que el coronavirus profundice la desigualdad racial en Colombia.](#)” *The New York Times*.

[40] Supra note 35.

[41] Bergman & Fondevila. (2021). “Prisons and Crime in Latin America.”; *Sociedad de Criminología Latinoamericana*. (June 12, 2020). “[Los efectos del Coronavirus en las cárceles de Latino América.](#)”

[42] Ibid.

[43] Ibid.

[44] Gendarmería de Chile. (2020). “[Plan de Acción de Gendarmería para enfrentar Coronavirus.](#)”

[45] There are, however, serious inconsistencies over the current number of people in prisons. As per SISDEPEN there was an [estimated 668,135 people in prisons in December 2020, and 139,010 in house arrest](#); The [Conselho Nacional de Justiça](#) (CNJ) records 913,499 people

deprived of freedom by September 2021. Independent accounts by academic researchers and civil society ([Forum de Segurança Pública](#)), show, yet, another number, 759, 518 by December 2020, and more recently [da Silva and colleagues](#) reported 682,182 in May 2021.

[46] [SISDEPEN](#), supra note 45; data from [World Prison Brief](#).

[47] [SISDEPEN](#), supra note 45.

[48] In Brazil, *pardo* is a complex ethnical and skin colour category used by the Brazilian Institute of Geography and Statistics (IBGE) in its demographic surveys. It can have multiple meanings, but it is mostly used to designate non-white groups that have mixed ethnic ancestries.

[49] Ferreira P, M Machado, N Vasconcelos, F Freitas, C Prando, C Sousa, G Costa, & T Bertolozzi. (2020). "[População negra e prisão no Brasil: impactos da covid-19.](#)" Informativo Desigualdades raciais e Covid-19. Centro Brasileiro de Análise e Planejamento (CEBRAP). Black and *pardo* groups are overall disproportionately affected by the pandemic. In Brazil, where they represent almost half of Brazil's population, a study conducted in June 2020 with hospitalized cases already found that black and *pardo* patients were at higher risk of mortality when compared to white individuals. Moreover, being *pardo* was found to be the second most important risk factor for mortality of Covid-19 in the country, after age. See: Baqui P, I Bica, V Marra, A Ercole, & M van Der Schaar. (2020). Ethnic and regional variations in hospital mortality from Covid-19 in Brazil: a cross-sectional observational study. *The Lancet Global Health*, 8(8), e1018-e1026. Similar findings, looking closely only at the Black community, show that this group faces higher fatality rates when compared to the white population across the country. Also see Martins-Filho PR, BCL Araújo, KB Sposato, AA de Souza Araújo, LJ Quintans-Júnior, & VS Santos. (2021). Racial Disparities in Covid-19-related Deaths in Brazil: Black Lives Matter? *Journal of Epidemiology*, JE20200589.

[50] [SISDEPEN](#), supra note 45.

[51] As per [Ministério da Saúde Portaria Nº 482 dated April 1, 2014](#), the PNAISP - Política Nacional de Atenção Integral à Saúde das Pessoas Privadas de Liberdade no Sistema Prisional - sets minimum standards for the provision of healthcare in all prison units in the country. The PNAISP was enacted in 2003 as a comprehensive policy, following the Mandela Rules for the treatment of prisoners, while also implementing the Brazilian constitutional right to health for people in prisons. Among other provisions, the PNAISP classifies prison units by population (1-100 people; 101-500 people; 501-1200; and over 1200) and specifies the number of basic healthcare teams and healthcare services should be provided at each type of unit. The basic team of healthcare workers, for a small unit of fewer than 100 incarcerated individuals should have a minimum of 1 dentist, 1 nurse, 1 doctor, 1 nursing assistant, and 1 dentist assistant working 6 hours/week, with an optional team of mental health workers. Bigger units of more than 100 should have at least this minimum team plus a psychologist and a social worker (with the option of an additional mental health team) working from 20 to 30 hours/week. The Ministério da Justiça e Segurança Pública (MJSP) further updated its 2011 Diretrizes Básicas para Arquitetura Penal in [Resolução no 1 dated February 1, 2019](#), for minimum structural requirements, such as number of x-ray rooms, waiting rooms, areas for decontamination of personnel and material, dressing rooms, and bathrooms for healthcare workers or patients, among others.

[52] Ferreira et. al. (2020). supra note 49.

[53] Ferreira et. al. (2020). supra note 49.

[54] Ferreira et. al. (2020). supra note 49.

[55] [SISDEPEN](#), supra note 45; Ferreira et. al. (2020). supra note 49.

[56] Soares Filho MM & PMMG Bueno. (2016). Demografia, vulnerabilidades e direito à saúde da população prisional brasileira. *Ciência & Saúde Coletiva*, 21, 1999-2010; Fernandes LH, CW Alvarenga, LLD Santos, & A Pazin Filho. (2014) The need to improve health care in prisons. *Revista de Saúde Pública*, 48, 275-283.

[57] HRW. (October 19, 2015). "[The State Let Evil Take Over: The Prison Crisis in the Brazilian State of Pernambuco.](#)"

[58] Broach S, M Petrone, J Ryan, & A Sivaram. (March 2019). "[Reservoirs of Injustice: How incarceration for drug-related offenses fuels the spread of tuberculosis in Brazil.](#)" *Yale Global Health Justice Partnership*; Coelho HC, GC Perdoná, FR Neves, & ADC Passos. (2007). HIV prevalence and risk factors in a Brazilian penitentiary. *Cadernos de Saúde Pública*, 23, 2197-2204.

[59] OAS. (January 11, 2018). "[CIDH condena a morte de pessoas privadas de liberdade em prisão no Brasil.](#)"; Dias CN & F Salla. (2013). "Organized crime in Brazilian prisons: the example of the PCC". *International Journal of Criminology and Sociology*, 2, 397-408; Chowdhury A. (August 11, 2019). "[The Story Behind Brazil's Prison Crisis.](#)" *Penn Political Review*.

[60] Machado MR. (2021). "Quando o estado de coisas é inconstitucional: sobre o lugar do Poder Judiciário no problema carcerário." *Revista de Investigações Constitucionais*, 7, 631-664.

[61] Machado MR, M de Barros, OLC Guaranha, & JA Passos. (2018). "Penas alternativas para pequenos traficantes: os argumentos do TJSP na engrenagem do superencarceramento." *Revista Brasileira de Políticas Públicas*, 8(1), 604-629.

[62] Supremo Tribunal Federal. (February 2, 2018). "[Habeas Corpus 143.641 São Paulo.](#)"

[63] See for example: Supremo Tribunal Federal. (August 20, 2020). "[Habeas Corpus 190.082 São Paulo.](#)"; and Supremo Tribunal Federal. (May 6, 2020). "[Habeas Corpus 184.916 São Paulo.](#)"

[64] The Supreme Court extended its interpretation of the collective habeas petition decided in favour of pregnant women and mothers to fathers and legal guardians. See Supremo Tribunal Federal. (October 20, 2020). "[2ª Turma concede HC coletivo a pais e responsáveis por crianças e pessoas com deficiência.](#)"

[65] Barbosa Lima Sequeira I, K Biondi, R Godoi. (June 2020). [Los efectos del coronavirus em las cárceles de Latinoamérica: Brasil.](#)

[66] CNJ. (August 24, 2021). “[Monitoramento Covid-19 - Registro de casos e óbitos.](#)”

[67] We adopt here the most recent estimates for the prison population published by the Brazilian Forum Nacional de Segurança Pública, an independent non-governmental research institution, and the Núcleo de Estudos da Violência da Universidade de São Paulo – NEV/USP. Also see supra note 45.

[68] We adopt here the most recent estimates for the juvenile facilities population published by the Federal Government through its [Sistema Nacional de Atendimento Socioeducativo \(SINASE\)](#). Last accessed in September 2021.

[69] Supra note 66.

[70] The mortality rates for the general and prison populations available from [Forum de Segurança Pública](#) and [Ministerio da Saude Painel Coronavírus](#) on August 24, 2021, were 2.79% and 0.41% respectively. Acre, Rio de Janeiro, and Roraima registered the worst mortality rates in their prison systems – 3.36% (1.57% for the general population), 3.24% (5.54% for the general population), and 1.4% (2.06% for the general population). These figures, however, are likely highly underestimated. Brazilian prison departments do not disclose disaggregated information on mortality rates in prison. Moreover, different prison units might tamper with how deaths will be registered, so they are reported as happening outside prison walls. Sánchez and colleagues were able to study individual and disaggregated data for deaths in Rio de Janeiro prisons for 2016 and 2017 through the Sistema de Informações sobre Mortalidade and found a higher all-cause mortality rate for the prison population than for the overall population. The leading causes of death found by the study were infectious diseases, cardiovascular diseases, and external causes. Moreover, only 0.7% of these individuals had access to extramural health services before dying. See: Sánchez A, CRSD Toledo, LAB Camacho, & B Larouze. (2021). Mortality and causes of deaths in prisons in Rio de Janeiro, Brazil. *Cadernos de Saúde Pública*, 37.

[71] We sent information requests based on the Brazilian open-records law to all 26 state prison authorities to obtain a more accurate picture, state by state, of what the national authority shows in its general Covid-19 panel. We asked for the gender, age, and race of imprisoned people who had been tested and confirmed for, and died of Covid-19, and of the people who benefited from alternative measures to imprisonments like early release or house arrest. Only 74% of the state authorities answered the request (i.e., 19 states). But the information provided by each state varies significantly. First, no state provided disaggregated numbers or microdata on Covid-19 within their prison population, which prevents any comparative study across the country. Second, data is only updated daily in 5 of these states – Sao Paulo, Minas Gerais, Rio de Janeiro, Mato Grosso do Sul, and Ceará, which account for half of the prison population in the country. Even if most states provide information on the gender of confirmed cases, only 7 had some information on the self-declared race of individuals with Covid-19 or some information on the age of patients. Moreover, there is almost no information on the levels of contamination among prison guards and other professionals who work on the front line apart from the National Council of Justice’s aggregated report.

[72] Infovírus. (March 21, 2021). “[Depen não atualiza os dados oficiais de COVID-19 entre a população prisional do DF desde o começo de fevereiro.](#)”

[73] CNJ. (August 25, 2021). “[Monitoramento Local Covid-19.](#)”

[74] CNJ. (April 7, 2021). “[Monitoramento Local Covid-19.](#)”

[75] Supra note 73.

[76] Supra note 73.

[77] Supra note 73.

[78] Brazil is a federation comprised of a federal government, 26 states, and thousands of municipalities. As such, each level has a set of duties and responsibilities defined by the Brazilian Constitution of 1988.

[79] Conectas. (May 26, 2021). “[ADPF-347: sistema prisional no banco dos réus.](#)” The fund was created in 1994 to finance the reform and improvement of prison conditions in the country. However, its resources have been used over the years to different ends or as a way to obtain a surplus of federal accounts.; On April 29, 2020, the [CNJ and the Conselho Nacional do Ministério Público issued a statement](#) requiring the federal government to give transparency to the use of FUNPEN’s resources while funding Covid-19 prevention within the prison system. The Supreme Court decision that declared the prison system at an unconstitutional state-of-affairs also ordered the federal government to unblock FUNPEN’s resources so they could be used to improve prison facilities.

[80] MJSP. (June 22, 2020). “[Portaria GAB-DEPEN No 135 dated 28 February, 2020.](#)”

[81] Diretoria do Sistema Penitenciário Federal – DISPF. (April 5, 2020). “[Procedimento Operacional Padrão: Medidas de Controle e Prevenção do Novo Coronavírus \(Covid-19\) no Sistema Penitenciário Federal.](#)” Government guidelines for the control and prevention of COVID-19 in prison have been revised 5 times, but former versions are not available anymore.

[82] MJSP. (March 16, 2020). “[Portaria Nº 5.](#)”

[83] DEPEN. (May 19, 2020). “[CNPCC publica resolução sobre arquitetura penal para o enfrentamento do Covid-19.](#)”

[84] Agencia Brasil. (March 31, 2020). “[“Não há motivo para temor”, diz Moro sobre novo coronavírus em prisões.](#)”; Fernandes A. (April 13, 2020). “[Moro garante que proliferação do coronavírus em presídios está sob controle.](#)” *Correio Braziliense*; Militão E. (April 23, 2020). “[Contêiner para presos doentes vira risco de nova derrota para Moro.](#)” *Uol Notícias*.

[85] Esteves E. (September 2, 2020). “[Sem visita física, só 30% dos presos conseguiram videoconferência com familiares.](#)” *iG Último Segundo*.

[86] Magri G. C Aliberti de Campos Mello, M Scaff Haddad, & G Lotta. (2020). “[Nota Técnica: A Pandemia De Covid-19 e os Familiares de Presos no Estado de São Paulo.](#)” Fundação Getulio Vargas Núcleo de Estudos da Burocracia (NEB).

- [87] Pastoral Carcerária. (April 19, 2021). “[Questionário sobre Coronavírus nas Prisões Revela que Situação no Cárcere está muito pior um ano após o início da Pandemia.](#)”
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- [115] Currently, there is a special monitoring division for the prison system at the Constitutional Court and at the Higher Criminal Policy Council. This division aims to correct laws so they can meet the criteria of reasonableness and proportionality. However, these measures have been insufficient in creating robust follow-up procedures that treat criminal policy coherently while ensuring that criminal law is the last resort.
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- [129] Similar decrees and laws were issued and enacted throughout the region, including Brazil. These decrees gave governments extraordinary powers to hire personal and make expenses without going to the usual procedures and restrictions. See, for example: Brazilian *LEI Nº 13.979* of February 6, 2020, declaring a national healthcare emergency; Argentinian *Decreto de Necesidad y Urgencia 260/2020* of March 12, 2020, declaring a public health emergency and expanding the powers given to policy officials by a previous law on health emergencies; Mexican *Decreto Presidencial de March 27, 2020*, allowing public health authorities to take immediate and extraordinary actions to contain the pandemic, including hiring personnel and acquiring needed resources.
- [130] INPEC. (March 22, 2020). *Resolución 1144/2020.*
- [131] Ministerio de Salud y Protección Social. (May 26, 2020). *Resolucion 843/2020.*
- [132] Presidencia de la República. (December 11, 2020), *Noveno Informe Semestral del Gobierno Nacional al Estado de Cosas Inconstitucional del Sistema Penitenciario y Carcelario.* p. 26- 30.
- [133] Ministerio de Salud y Protección Social. (April 2020). *Lineamientos para control, prevención y manejo de casos por covid-19 para la población privada de la libertad-PPL en Colombia.*
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- [137] *Supra* note 111, last accessed on September 06, 2021.
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