

Inputs to the report of the High Commissioner for Human Rights on causes and human rights implications of over-incarceration and overcrowding

April 2015

I. Foreword

This document presents the inputs of the **Center for Legal and Social Studies (Centro de Estudios Legales y Sociales, CELS)** to the analytical report of the High Commissioner for Human Rights on the human rights implications of over-incarceration and overcrowding, and ways to remedy such situations, including alternatives to detention and other relevant good practices or experiences, as established by the resolution 24/12 of the Human Rights Council on *“Human rights in the administration of justice, including juvenile justice”*¹.

CELS is a non-governmental organization, which has worked since 1979 for the promotion and protection of human rights and the strengthening of the democratic system in Argentina². Its main objectives are to report human rights violations, influence the process and design of public policies based on the respect for fundamental rights, foster legal and institutional reforms aimed at improving the quality of democratic institutions, and promote the exercise of human rights among the most vulnerable sectors of society.

CELS devotes itself to the protection of human rights of persons deprived of their liberty, by taking action before courts of justice, producing specialized knowledge and seeking to influence the design and implementation of public policies. CELS also advocates for the development and implementation of international human rights standards. Among other examples, in the past few years, CELS has been greatly involved in the review process of the Standard Minimum Rules for the Treatment of Prisoners of the United Nations (SMR)³.

This document was elaborated considering the reality of the places of detention in Latin America, especially in Argentina. To this end, it will draw on the experience that we have acquired throughout our work with the prison system in Argentina. For this reason, it touches upon some topics in depth, as well as identifies other topics that deserve the attention of the High Commissioner.

We will consider mainly the situation in the Federal Penitentiary Service (henceforth referred to as SPF, for its acronym in Spanish) and the Buenos Aires Penitentiary Service (henceforth referred to as SPB, for its acronym in Spanish). Both bring together almost 60% of the

¹ A/HRC/24/12 8 October 2013, Para. 35.

² CELS is a non-governmental organization with consultative status before the Economic and Social Council of the United Nations (ONU). Cf. List of non-governmental with consultative status in the Economic and Social Council, E/2012/INF/6, 5 April 2013, available at: <http://csonet.org/content/documents/E2012INF6.pdf>

³ CELS has taken part in the expert meetings held in Vienna, Buenos Aires and Cape Town, as well as in the sessions of the Commission on Crime Prevention and Criminal Justice, monitoring together with a group of national and international organizations the progress in the discussion regarding the revision of the document.

population behind bars countrywide.⁴ Their situation is relevant to this report as both the SPF and the SPB possess high rates of overcrowding.⁵

Before going into the inputs to analyze the relationship between the excessive use of imprisonment, the ensuing overcrowding and violations of human rights in these places, we should note some considerations regarding criminal and penitentiary policies that will serve as a background for considering the entire document.

First, we should emphasize **the serious structural problems taking place in the prison service and the urgent need for prison reform.** In the absence of the democratization of prison services, there are militarized structures within which lawlessness and networks of corruption thrive. In this context, there are serious and repeated acts of institutional violence and torture combined with serious deficiencies in the material conditions of imprisonment. These structural problems exceed and are independent of the level of overload of the Penitentiary Services, but are of course accentuated in situations of overcrowding. Thus, without prejudice to the specific considerations made concerning the excessive use of imprisonment and overcrowding, it is very important that the High Commissioner does not miss the opportunity offered by this report to also emphasize the need to move towards prison reforms capable of modifying the foundations of the structures which today characterize penitentiary systems in Latin America.

Secondly, we underline that **a necessary, although insufficient condition, to work on policies to prevent ill-treatment and torture is to reduce the number of detainees.** As outlined below, overcrowding worsens the conditions of detainees and leads to human rights

⁴ According to the latest National Statistic System of Penal Execution, in the province of Buenos Aires, 28.273 people were detained in December 2013 while in the SPF there were a total of 9.795 detainees at that time. In total, they amount to 38.068 people, coming to about 60% of detainees countrywide and amounting to 64.288 (SNEEP, for its acronym in Spanish) (SNEEP 2013), data available at: <http://www.jus.gob.ar/media/2736750/Informe%20SNEEP%20ARGENTINA%202013.pdf>.

In this context, it is important to highlight that the number of people deprived of their liberty in the Buenos Aires province has risen from 29 234 in December 2012, to 34 898 in March 2015, the larger number in history. In this period, the incarceration rate reached the number of 209 per 100,000 inhabitants, in comparison to the rate of 2012 182 per 100,000 inhabitants.

See: “Realineamientos punitivos en los debates sobre seguridad y las derivaciones en la política criminal”, in CELS. Derechos humanos en Argentina: Informe 2015.- 1ª ed.- Buenos Aires: Siglo Veintiuno Editores, 2015.

⁵ Data on overcrowding rates are scarce and, as we shall see later, this is part of the problem, in as much as the capacity of systems cannot be defined according to clear and stable criteria. But some reports have noted these issues. For example, the Council of Public Defenders of the province of Buenos Aires stated in 2010 that the SPB had a 195% overpopulation rate. See: <http://www.informereservado.net/noticia.php?noticia=34463> and <http://www.laverdadonline.com/noticia-14595.html>. In turn, in recent years there have been a number of collective habeas corpus filed, challenging the prison capacity maintained by the SPB and denouncing overpopulation. Although the SPF has shown lower rates of overcrowding than the SPB, in recent years this situation has changed, given the rise in numbers of inmates, which was superior to 15% in the last seven years. The Procurator's Penitentiary Office of the Nation (PPN, for its acronym in Spanish), the federal prison ombudsman, denounced in 2014 that the various federal units show high levels of overcrowding. For more information, see the video presented by the PPN in relation to this topic <https://www.youtube.com/watch?v=FXnapumk-lk>

violations. In addition, any efforts made to advance policies to prevent ill-treatment, torture and violence among detainees are diluted in overcrowded prison services. Different experiences make the point that is far more complex to work on prison structures when these are large and even more so when they are overcrowded. Thus, we believe that reducing overpopulation is a necessary condition, albeit insufficient in itself, for the advancement of the implementation of policies to prevent mistreatment, torture and violence among detainees.

Thirdly, it is important to note that **overcrowding is closely linked to the overuse of incarceration** and that this should not be understood as a problem of lack of space in prison. In recent decades there has been a steady increase in the number of detainees worldwide as well as in that of the region, which is the result of the hardening of the penal system arising from reforms designed to increase penalties and promote the widespread use of preventive detention. The *war on drugs* has also had an impact in this same direction. An emblematic case is that of Brazil where an incarceration rate of 289 per 100,000 inhabitants was reached.⁶ In Argentina, the incarceration rate has increased by 65% over the last 15 years⁷ and nearly 60% of detainees around the country has not been sentenced. In the province of Buenos Aires, which accounts for about half of the prison population in the country, the incarceration rate has increased by almost 80% over the last 16 years. In this context, overpopulation cannot be explained due to the lack of space, but rather due to the sharp rise in the number of prisoners which the prison services are unable to absorb. Building more prisons will not solve the problem, as long as the authorities fail to develop policies to limit incarceration.

In short, the dynamics of the situation reveal a vicious circle: there are structural problems in the penitentiary services compounded by overcrowding in prisons, which has been exacerbated in recent years by the overuse of incarceration.

We present below an analysis of (i) The impacts of over-incarceration and overcrowding on the human rights of persons deprived of their liberty; (ii) the causes of over-incarceration and overcrowding; and (iii) lessons learned and recommendations. It is worth mentioning that this division by no means indicates that the impacts and causes are not related. On the contrary, they are intrinsically intermingled, as this document conveys with data and examples.

II. The impacts of over-incarceration and overcrowding in the human rights of the persons deprived of their liberty

Prison services of the region have structural deficiencies. Their structures are riddled with practices of violence and corruption. In turn, construction problems are historical (old buildings have not been repaired), and there are problems in the way health, education and

⁶ Data from the International Center for Prison Studies available at: http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All

⁷ Statistical data collected in the National System of Penal Execution. However, it should be noted that these data are partial, since they do not include detainees held in police stations.

work systems are designed in the units. The overview is much worse in overcrowded conditions.

Overcrowding is one of the main problems of the places of deprivation of liberty in Latin America and in many other parts of the world. Extreme overpopulation results in the serious and continuous violation of the rights of the persons deprived of their liberty, and structural reforms are required for its management.

In this section, we are going to address the impacts of over-incarceration and overcrowding in the human rights of the persons deprived of their liberty, with a special emphasis on the relation of overcrowding and (i) violence among detainees and practices of degrading treatment and torture; (ii) corruption; (iii) lack of access to basic rights: health, education and work; (iv) the holding of detainees in inappropriate or prohibited premises; (v) heightened propensity to fires. To this end, we will draw on the experience that we have acquired throughout our work with the prison system in Argentina and, based on that, present examples of how overcrowding impacts the aforementioned topics.

(i) Violence among detainees and mistreatment and torture practices

The diagnosis of the Inter-American Commission on Human Rights (IACHR), which correlates overcrowding with an increase in the level of violence among detainees, corroborates the findings that we have reached throughout our work in Argentina. As the IACHR puts it, “*The overcrowding of persons deprived of liberty generates constant friction between inmates and increases the levels of violence in prisons*”⁸.

Overcrowding increases the tension between detainees because it intensifies inhumane and degrading treatment, and given the worsening conditions of detention, contexts which are conducive to violence arise. In this sense, overcrowding generates situations in which the inmates are more likely to be physically harmed. On some occasions, this has led to grave harm and even to deaths.

While there is a small amount of analyses on the causes of violence among detainees, it is known that many times the fights break out over access to basic goods and services which are in short supply in the units. The more overcrowding there is, the more the scarcities are accentuated and the greater the potential for conflict. Furthermore, in many cases officials may provoke violence among detainees by, for example, placing people who have had previous conflicts together in the same cell, or abandoning certain areas to allow violence to take place, or even “outsourcing” it by sending some inmates to injure others.

In such contexts, the possibility of violent backlashes by the Penitentiary System is also heightened. This reflects structural deficiencies in the way the prison services intervene in conflicts between inmates and the violence they often deploy in critical situations. The

⁸ IAHR. Report on Human Rights of the Persons Deprived of their Liberty in the Americas. OAS/Ser.L/V/II.Doc. 64, December, 31, 2011. Para. 455.

response is usually to let fights develop and intervene only when the situation have acquired prominent dimensions, or only to get involved to suppress conflict by disproportionately violent means. There are very few situations where they engage timely and with the tools necessary to prevent violence from escalating.

Overcrowding also affects the governance of the detainees. In overcrowded units the regulation of strategic areas (such as visiting areas or courtyards), and the provision of food, water, among other goods are usually delegated to the inmates themselves. In the Buenos Aires Penitentiary Service, the inmates carrying out this role are called “*los limpieza*” (the literal translation would be “*cleaning staff*”), who are elected by prison officers. This form of administration of the detained population generates high levels of tension, and results in situations that lead to lethal consequences in some cases. Overcrowding exacerbates this situation, because the system of the “*los limpieza*” is upheld largely by the excess of detainees in comparison with the number of prison officers.

We have also found a correlation between overcrowding and torture or inhuman and degrading treatment of prisoners. Namely the practice of grave human rights abuses is exacerbated by overcrowding. In overcrowded detention places, there exists a notable disproportion between officials and detainees. In the province of Buenos Aires, this rate reached an alarming situation and, for example, 20 guards were in charge of up to 400 detainees in the Penitentiary Complex where the torture and murder of Patricio Barros Cisneros occurred on January 28, 2012⁹.

In short, overpopulation increases violence between inmates and creates a greater margin for provocation and violent reaction by the prison system. But this also means that in the context of overpopulation, there are not even the minimum conditions required to enable measures to be applied to prevent violence. This dynamic, which is in itself a vicious cycle, has been recognized by the Government of the Province of Buenos Aires. The first steps taken to work on these risks in the units in San Martín in the framework of the precautionary measures imposed by the Inter-American Commission on Human Rights were to reduce the population of inmates held there.¹⁰

(ii) Prison Corruption

The prison bureaucracies are riddled with corrupt practices. There are frequent complaints about the “sale” of access to accommodation, the possibility of receiving visits and the issue of favorable criminal reports. In systems where there is a widespread lack of access to rights,

⁹ On the case of Patricio Cisneros Barros, see: [http://www.cels.org.ar/common/CELS%20-%20Newsletter%20\(January%202015\).pdf](http://www.cels.org.ar/common/CELS%20-%20Newsletter%20(January%202015).pdf)

¹⁰ In 2012, in response to a petition brought by CELS to the Inter-American System, the IACHR granted precautionary measures regarding the units 46, 47 and 48 of the Buenos Aires Province Penitentiary Services. These precautionary measures relate to the high levels and patterns of violence in these units where overcrowding and the delegation of power by guards to some detainees generate even more violence and violations. CELS (2014). "Prison Units 46, 47 and 48 of the Buenos Aires Penitentiary Service of the province of Buenos Aires - Argentina MC-104-12". For more information see <http://www.oas.org/en/iachr/decisions/precautionary.asp>

overcrowding increases the demand for such goods and services which in turn thus facilitates the possibility that the agents of the correctional services themselves administer them on a discretionary basis. In turn, the larger the prison structure, the harder it is to maintain control of the circulation of forbidden items such as drugs and home-made weapons.

(iii) Lack of access to basic rights: health, education and work

When it comes to the health conditions of detainees, as the IACHR has pointed out, overpopulation “*fosters the spread of illness; creates an atmosphere in which health, sanitary and hygienic conditions are deplorable...*”¹¹ In this sense, overcrowding is an extremely worrying factor, as the health of the persons deprived of their liberty deserves particular attention and policies of prevention and promotion are vitally important for the comprehensive protection of the health of detainees. Overcrowded detention places prevent such policies to be implemented, as they essentially present high levels of unsanitary conditions, including low light and scarce ventilation, exposition to the weather, etc.

Overcrowding also has negative impacts on the right to work and education of detainees. It accentuates systems of scarcity with little access to working and educational activities in general.

(iv) Accommodation in inappropriate or prohibited places

The overcrowding of detention systems also increases the chances of the use of inappropriate and even prohibited premises. As the IACHR states “*In countries where overcrowding has reached critical levels, authorities have resorted to the practice of imprisoning persons for extended periods of time at makeshift detention centers and police stations or headquarters*”¹². In Argentina it was decided, for example, to use Gendarmerie units and even “*container pavilions*” to the holding of people before collapsed prison services.

In the Buenos Aires province, the increase in detainees has led people to be held in police stations. This was banned by the Federal Supreme Court¹³ in 2005 and the detainees were

¹¹ IAHR. Report on Human Rights of the Persons Deprived of their Liberty in the Americas, OAS/Ser.L/V/II.Doc. 64, December 31, 2011. Para. 456

¹² IAHR (2011) Report on Human Rights of the Persons Deprived of their Liberty in the Americas, Paragraph 458 Available at: <http://www.oas.org/en/iachr/pdl/docs/pdf/PPL2011eng.pdf>

¹³ In the context of the Federal Supreme Court of Justice case V856/02 “Verbitsky, Horacio (representative of Centro de Estudios Legales y Sociales) s/ Habeas Corpus”, the Federal Supreme Court of Argentina stated in 2005 that the United Nations Standard Minimum Rules for the Treatment of Prisoners should be considered the minimum contents to interpret Section 18 of the National Constitution that establishes that prisons should be healthy and clean, construing this as the basic standards to which custody should conform. In its resolution, the highest court considered that the legislation on remand and release in force in the Province did not adjust to constitutional and international principles. The decision goes beyond establishing basic standards for custody conditions and a statement on the excessive use of cases on remand, as it also refers to equally relevant issues such as access to justice in collective cases; the articulation of federal and provincial proceedings on human rights issues; the application of international standards in the domestic level, and the judicial control of public policies,

gradually being evicted, but the sharp increase in the numbers of people arrested last year as a consequence of the declaration of a "security emergency" created a new peak in the numbers of people deprived of their liberty in these units¹⁴ which was even validated by official resolutions¹⁵¹⁶.

Another strategy that has been used in the Buenos Aires province against overpopulation has been the use of "low-cost modules", building extensions made to increase the original capacity of the prison units without increasing additional services (kitchens, workshops, etc). These are spaces where inmates are held in substandard conditions: collective pavilions of more than 50 people, insufficient number of toilets, lack of recreational areas or facilities for visitors.

In these premises, international minimum standards for holding detainees are breached and even more violations are caused. In this context, it should be noted that in October 2005, 33 inmates of the Unit No. 28 Magdalena died in the fire of a low cost module that did not have the authorization necessary to accommodate people and did not have any of the fire fighting systems required.¹⁷

(v) Heightened propensity of fires

This last example brings to our attention the worrying problem of fires in the places of deprivation of liberty which is directly connected to overpopulation, as it heightens their propensity. As stated by the IACHR *"The risk of fire at centers of deprivation of liberty is inherently high. This is particularly so in the case of facilities that are overpopulated, dilapidated, and/or were not originally built as centers of confinement"*¹⁸. In fact, fires have been a constant in Latin American countries, where the overcrowding condition of the places of deprivation of liberty is a widespread reality, claiming the lives of hundreds of persons, which make them a major concern at the regional level.

All things considered, as it was expressed by the Inter-American Court of Human Rights *"Overcrowding increases the friction and outbreaks of violence between inmates, fosters the spread of disease,*

when the latter affect the exercise of rights. For more information see: http://www.cels.org.ar/common/documentos/english_summary.pdf

¹⁴ By 2014, there were as many as 2235 detainees held in police stations in the province, an increase of 185% compared with the 785 detainees held at police stations as of January 2013.

¹⁵ Such as, for example, Resolution 642/14 of the Minister of Security of the province of Buenos Aires, Alejandro Granados. See: CELS. Human rights in Argentina: Report 2015.- 1st Ed.- Buenos Aires: Siglo Veintiuno Editores, 2015

¹⁶ Therefore, this also failed to comply with the recommendations of the Rapporteur on the Rights of Persons Deprived of Liberty of the Inter-American Commission on Human Rights, who, after his visit to Argentina in June 2010, urged the Argentine State to take steps to stop using the police stations as places of permanent accommodation. For more information on Commission's visit to Argentina, see: <http://www.cidh.oas.org/Comunicados/Spanish/2010/64-10sp.htm>

¹⁷ *"La tragedia de magdalena"* Center for Legal and Social Studies (CELS), available at: <http://www.cels.org.ar/common/documentos/InformeMagdalena2013.pdf>

¹⁸ IACHR (2011) Report on Human Rights of the Persons Deprived of their Liberty in the Americas. Paragraph 286. Available at: <http://www.oas.org/en/iachr/pdl/docs/pdf/PPL2011eng.pdf>

*binders access to basic services and health services of the prisons, increases the risk factor for the occurrence of fires and other disasters, and prevents access to rehabilitation programs, among other serious effects*¹⁹. These IACHR's conclusions on overcrowding go hand in hand with the findings that we have observed throughout our work in Argentina.

III. Causes of overcrowding and over-incarceration

In this section, we are going to address different causes that result in over-incarceration and overcrowding. These causes are multifaceted and, therefore, involve a plethora of different and distinct factors. Among them, we will consider **(i) norms, regulations and the legislative reforms that make pretrial detention a rule, increase the length of sentences, impede anticipated releases and give more discretion to security forces to carry out arrests.**

Also we will take into account the **(ii) problems in the operation of the justice system**, in particular: (a) the fact that judges do not exercise their role as guarantors of the rights of persons deprived of their liberty and consequently do not take into account international standards; (b) the over-punitive dynamics of the legal system and its bureaucracy; (c) the impact of political discourses on court decisions, as well as the persecution of judges who take decisions to free detainees.

Another factor to be addressed is **(iii) the "war on drugs"** that incorporates over-incarceration premises and, therefore, directly has an impact in overcrowding.

Finally, we will also touch upon **(iv) the lack of adequate and comprehensive definitions of the notion of "plaza penitenciaria"** and the need to design and implement measures to combat overcrowding and **(v) institutional problems concerning information about the criminal justice system and penitentiary services.**

These are some of the main causes that combine with security policies and criminal policy to exercise a greater influence in specific contexts in this sense. These include contexts such as that of the "security emergency", which encourage mass arrests and give the police increased powers to detain people.²⁰

(a) Norms that make pretrial detention a rule, increase the length of sentences, impede anticipated releases and endow security services with greater discretion to carry out arrests.

¹⁹ IACHR (2011) Report on Human Rights of the Persons Deprived of their Liberty in the Americas. Paragraph 286. Available at: <http://www.oas.org/en/iachr/pdl/docs/pdf/PPI.2011eng.pdf>

²⁰ This has occurred, for example, in the Province of Buenos Aires since April 2014 when the "Security emergency" was declared, leading to an important increase in the number of detainees. For more information see CELS "A cuatro meses de la emergencia de seguridad en la provincia de Buenos Aires abril / agosto 2014" available at <http://www.cels.org.ar/common/documentos/Emergencia%20seguridad%20PBA.pdf> and "Realineamientos punitivos en los debates sobre seguridad y las derivaciones en la política criminal." in CELS. Derechos humanos en Argentina: Informe 2015.- 1ª ed.- Buenos Aires: Siglo Veintiuno Editores, 2015.

Different causes converge towards an increase in incarceration. For example, in recent years in Argentina, legislative reforms have been implemented in response to the demands of insecurity which had the effect of hardening the criminal system. These reforms combine different kinds of standards that impact on increased incarceration: rules which increase penalties, rules establishing preventive detention as a general purpose norm and limit release options; changes to the system of enforcement of sentences which limit opportunities to access the early release system (temporary release, parole, probation, etc.)²¹

As expressed above, the incarceration rate in the province of Buenos Aires has risen by nearly 80% in 15 years, from 114 persons incarcerated per 100,000 inhabitants in 1998 to 209 per 100,000 in 2015. This increase was accompanied by the enactment of a new Criminal Procedure Code, adopted in 1997 by the Legislature of Buenos Aires. While the spirit of the Code was, within reason, respectful of the guarantees provided to persons subject to criminal proceedings, as a result of successive amendments, it has become, in practice, a code which is conducive to massive and expeditious incarceration. For example, in 2000, the Law 12405 included the obligation of the judge to deny the release of the accused in various scenarios²², and added the conviction as grounds for the revocation of release, before the final sentence. It also gave greater powers to the police to conduct raids and search people in the street.

(ii) Problems in the workings of the justice system

The over-punitive dynamics of the judicial system and its bureaucracy many times result in over-incarceration and, therefore, lead to overcrowding. For example, judges frequently validate the proof and criteria required for police to detain people, which is seen most clearly when it comes to summary criminal proceedings initiated as a result of arrests *in flagrante*.²³

²¹ For example, Law 14296 of August 4, 2011, amends the regulations regarding temporary releases in the province of Buenos Aires in order to set higher requirements for their award, as well as specific prohibitions concerning people convicted of the following offenses: aggravated homicide, sexual crimes, kidnapping followed by death, torture followed by death and kidnapping for ransom. This prohibition also covers probation, discontinuous imprisonment or semi-detention, community work, day release and trial releases. Inmates may only be eligible for temporary release as from 6 months prior to eventual parole, of one day per year worked or studied during the period of imprisonment. For convicted criminals who are not excluded by Article 100, minimum penalty enforcement requirements are established, such as having no outstanding convictions or open cases where it is of interest that the subject be detained and they show exemplary behavior.

²² These include crimes committed with firearms, crimes committed repeatedly, and those committed by a person who was on parole, etc.

²³ For example, we found that in the province of Buenos Aires, the initial hearings in cases of flagrant crimes did not present any discussions regarding the conditions or the situation in which a suspect is arrested and the evidence provided by the police is validated without any questioning. It should not be overlooked that this is a system that works on cases brought by the Buenos Aires Police, which in recent years has been involved in allegations of setting up and fabricating cases. For more information see CELS, "*Casos penales armados, presos inocentes y el funcionamiento del sistema penal bonaerense: cuando la justicia penal es miope o prefiere mirar para otro lado*" in Informe Anual 2005, SXXI Editores, Buenos Aires, 2005.

Moreover, in most countries in the region, the application of punishment has been historically linked to the abuse of preventive detention.²⁴ The use of preventive detention is often the rule rather than the exception. In Argentina, if the conviction itself involves a penalty of effective enforcement (either because the accused has a criminal record, or because they are being tried for a crime with a conviction greater than three years of imprisonment), the person has very likely to remain detained during the judicial process²⁵. The norm is automatically applied by virtue of the penalty under the expectation of the offense charged, rather than considering the procedural risk of flight or obstruction of the investigation, as required by international standards.

In turn, imprisonment is the main response employed and there is resistance against developing alternative measures, such as house arrest, electronic monitoring or other kind of restrictions to movement. Elements such as the automatic use of pretrial detention, and the resistance against other alternative measures to imprisonment were corroborated by the Inter American Commission on Human Rights during its visit to Argentina in June 2010²⁶. This concerns deficiencies in the ways that judges perform their duties as guarantors of detainees' rights which have an impact on the excessive use of imprisonment.

This occurs in a context in which the judges have normalized the issue of overpopulation and are often reluctant to take measures to address the overcrowding they verify in the context of the presentations of collective habeas corpus or on their visits to the units.

The abovementioned practices are fostered by the political pressures on the judiciary to promote the use of preventive detention. This can be seen in different countries throughout the region²⁷.

In the case of Argentina, political discourses as well as the concrete persecution of judges who take decisions to free detainees have fed the dynamics of over-incarceration and overcrowding. Such pressures are usually framed in the context of complaints about the high levels of insecurity and occur in reaction to the decisions to release a defendant identified as the person responsible for a new offense or in reaction to the freedoms granted during the enforcement of sentences. These reactions by leading politicians and public figures are reflected in the

²⁴ For more information see: Iud, Alan y Hazan, Luciano, "Informe de evaluación del proceso de fortalecimiento del sistema acusatorio en la Provincia de Buenos Aires. Plan de flagrancia", Centro de Estudios de Justicia de las Américas (CEJA), 2009. Available at http://www.cejamericas.org/index.php/biblioteca/biblioteca-virtual/doc_view/3304-informe-de-evaluacion-del-proceso-de-fortalecimiento-del-sistema-acusatorio-en-la-provincia-de-buenos-aires-plan-de-flagrancia; Also, CEJA, "Prisión Preventiva y Reforma Procesal Penal en América Latina - Evaluación y Perspectiva". 2008. Available at: http://www.cejamericas.org/index.php/biblioteca/biblioteca-virtual/doc_view/3325-prision-preventiva-y-reforma-procesal-penal-en-america-latina-evaluacion-y-perspectiva

²⁵ "Independencia judicial insuficiente, prisión preventiva deformada, Los casos de Argentina, Colombia, Ecuador y Perú", Due Process of Law Foundation (DPLF), 2013

²⁶ For more information see: <http://www.cidh.oas.org/Comunicados/Spanish/2010/64-10sp.htm>

²⁷ "Independencia judicial insuficiente, prisión preventiva deformada, Los casos de Argentina, Colombia, Ecuador y Perú", DPLF, 2013, Op. Cit.

media. Usually, these persecutions often become threats or specific calls for impeachment²⁸. Thus, the public message this creates is that the judge should restrict freedoms in general, and should only in exceptional cases allow the defendant to remain at liberty during criminal proceedings.

Political, social and media claims have a very strong disciplinary effect on the judiciary throughout the country and crystallize traditional judicial practices which are peculiar to the inquisitorial systems of the region.²⁹ In turn, this context also allows those judges who usually uphold restrictive criteria for freedom during the trial proceedings to find a framework of general support.

In short, the problem of the misuse of preventive detention with a substantive criterion of social defense without limiting its sphere of action to that of a precautionary measure, is closely linked to the reaffirmation of old judicial practices on which are based a whole host of political, social and media demands to keep on using this resource.³⁰

(iii) 'The "War on Drugs"'³¹

Furthermore, when analyzing over-incarceration and overcrowding, another factor that must be taken into account is the so-called "War on Drugs". The "War on Drugs" has been waged over the last four decades and has had a tremendous impact on security operations and judicial and prison systems in Latin America, as nearly one-third of all detainees are incarcerated for non-violent drug-related crimes. The fact that so many people are being incarcerated for non-violent drug-related crimes further overpopulates prisons in the region.

The main tool employed by drug control policies in our region has been criminal law. During the twentieth century, especially in the second half of it, criminal laws throughout the region became harsher regarding various drug-related conducts. To combat organized crime, some countries have established special norms. In many cases, the repertoire of repressive measures included the conduct of drug users, who were criminalized as part of the strategy to reduce demand ("*no users means no drug trade*").

The emphasis of drug control aspects on penalties has led to major increases in the number of people imprisoned for drug offenses. The implementation of stricter laws for drug offenses has led to the overload of courts and prisons, and the suffering of tens of thousands of people

²⁸ As an example of the persecution of judicial officials see the impeachments of the judges Sal Lari and Axel Lopez. In the province of Buenos Aires. For more information see: <http://cels.org.ar/comunicacion/?info=detalleDoc&ids=4&lang=es&ss=46&idc=1906>

²⁹ "Informe Argentina" CELS. "*Independencia judicial insuficiente, prisión preventiva deformada, Los casos de Argentina, Colombia, Ecuador y Perú*", DPLF, 2013

³⁰ "Informe Argentina" CELS. "*Independencia judicial insuficiente, prisión preventiva deformada, Los casos de Argentina, Colombia, Ecuador y Perú*", DPLF, 2013

³¹ This section is based on the document. "The impact of drug policies on human rights in the region of the Americas" (CELS et al), Report presented to the Inter-American Commission on Human Rights in the framework of the first regional hearing on drug policy and human rights in March 2014

behind bars for minor drug offenses or simply for drug possession. The weight of the drug laws has been felt more strongly among the most vulnerable sectors³².

For example, in Argentina, where the rule which criminalizes possession for personal use is still in force, studies carried out during the 1990s indicated that about 70% of the cases filed for the violation of this law in fact corresponded to personal consumption, usually by people in public spaces, using small amounts of drugs - in general marijuana or cocaine - who were not only unarmed, but also not in the process of committing another crime. In this sense, the statistical analysis performed by police and judicial data suggests that many of the efforts in this field focus on smaller cases involving drug possession for personal consumption rather than trade or drug dealing. In many cases these arrests feed the growth in the number of people deprived of liberty.

The disproportionate use of criminal law to punish behavior related to illicit drug use is a threat to human rights. The American Convention on Human Rights (ACHR)³³ establishes that restrictions on personal freedom should be exceptional and should obey minimum criteria of reasonableness, necessity and proportionality. The evidence indicates that from 1950 to the present, in seven countries in the region (Argentina, Brazil, Bolivia, Colombia, Ecuador, Mexico and Peru) the number of criminal articles that punish such conducts have increased tenfold, while the total number of cases of behavior related to illicit substances which were effectively penalized went from 67 to 344³⁴. This feature of Latin American legislation³⁵ occurs because of the desire to punish any behavior and any person who has any kind of relationship with psychoactive controlled substances, regardless of the damage generated.

Another factor that contributes to the disproportionate criminalization of these behaviors is a gradual increase in criminal penalties. Both the number of minimum sentences and the maximum penalty imposed have increased by up to twenty times over the last 50 years. For example, while in 1950s Colombia drug dealing was punished with a sentence of between six months and five years in prison, this offense, at present, receives a punishment of between 10.7 and 30 years in prison (without the presence of aggravating circumstances). Similarly, in Mexico the minimum sentence for drug dealing offenses went from 6 months in prison in 1950, to 10 years at present. In Peru, during the 1950s there was a minimum sentence of two years for a crime which at present is punishable by at least eight years of imprisonment.

³² A research carried out in eight Latin American countries coordinated by the WOLA (Washington Office on Latin America) and TNI (Transnational Institute), "Systems Overload: Drug Laws and Prisons in Latin America. Reform of Drug Laws in Latin America", presents the conclusions mentioned in this section. Available at: http://www.wola.org/es/informes/sistemas_sobrecargados_leyes_de_drogas_y_carceles_en_america_latina

³³ Article 7 of the American Convention on Human Rights concerning the right to personal liberty.

³⁴ For example, in Argentina, while the criminal law existing in 1950 typifies as offenses only four drug-related behaviors, by 2012 that number had increased to 52. The same thing happened in Colombia, which criminalized nine such activities in 1950, to a total of 50 patterns of drug offenses in 2012. Punitive addiction, pp. 22, 24 and 57.

³⁵ The same phenomenon also occurs in Central America. For example, Article 307 of Guatemala's penal code defines the crime of drug dealing using eight verbs: to introduce, sell, deliver, transport, supply, retain, keep or conserve.

The lack of reasonableness and proportionality in the criminal laws of the region is evident when comparing to the punishments applied to other types of crimes that are unquestionably more serious than those involving drugs. In some countries in the region, a similar or greater punishment is set for a person selling prohibited substances to adults who voluntarily seek to use them, in comparison to the punishment of a person committing a sexual violation or even murder. Although the severity of these last two behaviors is greater than the first. In Bolivia the current maximum penalty for the crime of drug dealing (25 years of imprisonment) is greater than that provided for murder (20 years of imprisonment) and rape (15 years of imprisonment). This trend is similar in Mexico, where the maximum penalty for drug dealing is 25 years imprisonment and murder is 24 years, and in Ecuador, where the maximum penalty for drug dealing (16 years of imprisonment) is four years more than the one for murder (12 years of imprisonment)³⁶.

The severity of the current drug laws and its hard line enforcement are determining factors in the increase in the rates of incarceration and overcrowding. Although it is difficult to prove a direct causal relationship, especially given the lack of reliable data from the prison authorities and other government sources, at least one obvious correlation may be observed. In some countries of the region, the incarceration rate increased on average by more than a 100 percent between 1992 and 2007. Despite the differences between countries, in general, incarceration for drug offenses shows an upward trend. It is usually the second or third leading cause of judicial prosecution. The case of the federal prison service in Argentina is striking in that, while in 1985 those imprisoned for drug-related offenses were only one percent of the total number of detainees, by 2000 this number had risen to 27%.

There is a high percentage of people held in prison simply for the possession of drugs (consumers arrested for holding a relatively small amount of drugs). In most countries, the distinction between consumers and drug dealers is not developed properly in jurisprudence and is subject to misinterpretation by both the police and the courts. Even in countries where the possession of a small amount of drugs for personal use is not a crime, there are many people in jail for the simple possession of drugs for personal use, including cannabis.

The issue of pre-trial detentions, mentioned above, plays a major role when it comes to drug-related crimes, being overused as a system and one which often drags on for years before a final judicial sentence is passed. The overuse of preventive arrest for suspected drug offenses has been observed, and this detention frequently stretches out over years without the situation being resolved for the detainee. For example, in Bolivia, Brazil, Ecuador, Mexico and Peru preventive detention is mandatory in cases of drug offenses, regardless of whether this involves minor offences or grave crimes. Drug crimes are classified on the same level as murder, rape and kidnapping as serious crimes, no matter the degree of participation.

³⁶ Similarly, in Brazil the maximum penalty for drug dealers (15 years of imprisonment) is five years less than that facing a sexual violator. Meanwhile, in Colombia the maximum sentence for violent sexual assault is 20 years in prison, while that for drug dealing is 30 years.

Moreover, those accused or convicted of drug offenses are often denied access to alternative measures, of which those accused of other crimes do have. Drug laws are especially tough on the most vulnerable sectors of the population.³⁷ Of particular importance is the fact that a growing number of women are being incarcerated for drug offenses. The percentage of women in prison has increased significantly in recent years. According to a study recently published by the International Drug Policy Consortium (IDPC)³⁸ the vast majority of women in prison are being held for drug offenses. Some estimates are between 75 and 80% in Ecuador, 64% in Costa Rica; 60% in Brazil and between 65 and 80% in Argentina, where the population of women prisoners grew by 350% from 1990 to 2007. All things considered, the “War on Drugs” uses over-incarceration on premise and is a direct cause of overcrowding.

(iv) The lack of adequate and comprehensive definitions of the notion of “*plaza penitenciaria*” and the need to design and implement institutional measures against overcrowding

In many prison systems, the lack of a precise definition of “*plaza penitenciaria*” prevents an accurate assessment of the actual capacity of prison systems³⁹. This would require making the criteria used to establish the “*plaza penitenciaria*” and verifying the correlation between those patterns and legal standards.

Determining the capacity of places of detention should arise from establishing the characteristics which a place to house them should offer in order for it to be considered "decent" in terms of international standards. In this regard, a mere indication, without any supporting information, of the amount of people who may be held in a prison facility, is definitely not enough to establish whether that place is crowded or not.

The lack of a precise definition of “*plaza penitenciaria*” detracts credibility from the official diagnostic denying overcrowding, drawing attention to the discretionary capabilities of the authorities responsible for allocating the capacity of the different places of detention.

Thus, the “*plaza penitenciaria*” does not correspond exclusively to the physical space indispensable for the survival of the person deprived of their liberty; rather, it is a broader concept referred to the set of necessary provisions to ensure a decent life to the persons

³⁷ Research carried out in eight Latin American countries coordinated by the WOLA and TNI (Transnational Institute), "Systems Overload: Drug Laws and Prisons in Latin America. Reform of Drug Laws in Latin America", presents the conclusions mentioned in this section. Available at: http://www.wola.org/sites/default/files/downloadable/Drug%20Policy/2011/TNIWOLA-Systems_Overload-def.pdf

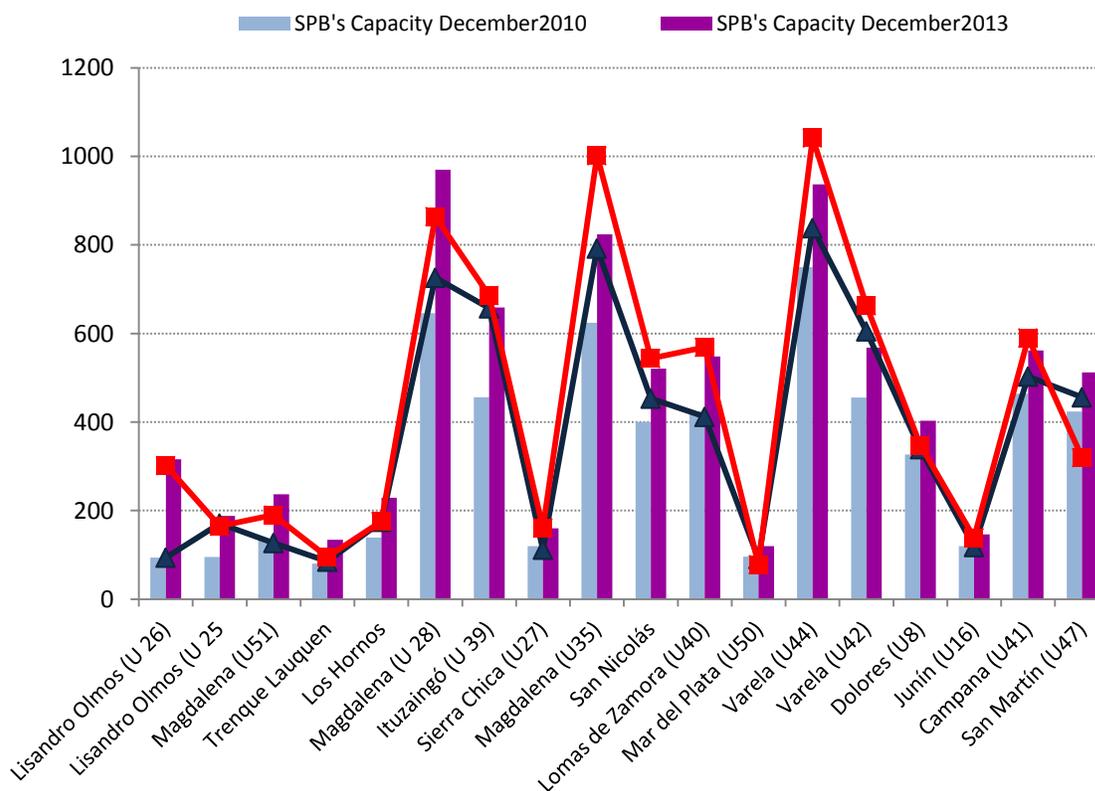
³⁸ International Drug Policy Consortium (IDPC), "Mujeres, delitos de drogas y sistemas penitenciarios en América Latina, 2013.. Available at: <http://idpc.net/es/publications/2013/11/mujeres-delitos-de-drogas-y-sistemas-penitenciarios-en-america-latina>

³⁹ Here, it is worth mentioning that in the current process of revision of the existing United Nations Standard Minimum Rules for the Treatment of Prisoners it was included in rule 7 that the “(5) Prisoner file management systems shall also be used to generate reliable data about trends relating to and characteristics of the prison population, including occupancy rates, in order to create a basis for evidence-based decision-making”. Report on the meeting of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners. Cape Town, 2015 E/CN.15/2015/17*/ Rule 7 (5)

deprived of their liberty. Consequently, in addition to the physical space that each person deprived of liberty must be provided with, the notion used to measure the capacity of the places of deprivation of liberty must, in turn, ensure that the persons counts with the services and provisions that contribute to basic living conditions such as, heating, bathrooms, light and air spaces, ventilation, as well as the access to medical services and opportunities to study and work.

At present, the only data on “*plaza penitenciaria*” available is the one defined by the Penitentiary Services themselves. For example, as shown in the chart below, the SPB declared a capacity which was subsequently modified to match the growth in the population of inmates. Although the number of buildings constructed in relation to the sharp increase in the number of detainees has been minimal, declared capacity has increased by very similar proportions to the growth in the number of detainees. This suggests that it is changed according to the numbers of mattresses in the units, regardless of minimum standards of living conditions.

Changes in capacity declared by the SPB from 2010 to 2013



Source: CELS, on the basis of data from the Ministry of Justice of the province of Buenos Aires and the Ministry of Justice (2013) and Security of the province of Buenos Aires (2010). Note: The data refers to December 2010 and 2013. Note: "U " refers to the prison units.

(v) Problems of information about the criminal justice system and correctional services.

In Argentina, the vast majority of the data on the penal system are out-of-date, the criteria for their production are unclear, the information available is fragmented and of poor quality, and access to it is both limited and difficult. In turn, it should be noted that while various agencies produce information on these topics, the data are scattered, decentralized and sometimes contradictory. The absence of explicit criteria on the construction of core indicators such as the rate of incarceration, means that the data produced is unreliable. The most important data that should be produced are those related to:

- **People charged:** Number of defendants, trial status, use of preventive detention, crimes people have been charged with, age, previous situation in the criminal justice system (recidivism), number of people under house arrest, etc.
- **Operation of the criminal justice system:** total number of cases by type of crime, judgments, etc.
- **Prison Services:** number of detainees, of prison officers, of prisons, of deaths in confinement, number of prisoners freed, etc.
- **Post-confinement policies:** potential users of these policies, families with detainees, etc.

However, this information is either unavailable or presents serious deficiencies. The precarious nature of the information available has reached such a level that at present there is no updated and reliable information on the total number of prison inmates in Argentina. The latest available national data on detainees at countrywide level date back to 2013 and do not include data concerning those detained at police stations in the provinces nor any data on children in detention.

The problems of the statistical information on penal systems, with regard as much to the justice system and correctional services as to criminal policy, are also causes of over-incarceration. The opacity of the penal system makes it difficult to develop and maintain a system of control and monitoring. In turn, the lack of information on crimes, use of preventive detention, recidivism, and prison inmate quotas, among others, makes it hard to develop strategies for discussion in the context of increasing punitiveness.

IV. Lessons learned and recommendations

What we present here shows that there is a need to reform penitentiary structures. Almost no progress has been made in this regard in any of the countries in the region.

On the other hand, it is essential to move forward with initiatives to reduce overcrowding. In this regard, it is important to limit the policies of mass incarceration and implement measures to reduce the numbers of detainees. Only in these conditions will the right scenarios arise to

help promote policies to prevent violence and other measures to improve detention conditions.

We shall point out here, some lessons learned about initiatives that have already been implemented.

- **In order to counter excessive incarceration it is necessary to halt the mass influx and decongest the system**

Although almost obvious, it should be noted that, any efforts that can be applied to relieve the system, become diluted by policies that promote the influx of detainees to the prison system (for example, with the increase in police custody). As mentioned, this is happening, for example, in the Province of Buenos Aires within the framework of the measures taken in the wake of the declaration of a security "emergency".

In the same jurisdiction, the use of magnetic bracelets was encouraged, and reached 700 according to the latest data available. In a system that holds more than 30,000 inmates, such resources fail to relieve either units or police stations. Magnetic bracelets are a resource to be applied on individual cases of specific urgency, such as sick people or to enable women inmates to be with their children out of confinement, or for seniors, for instance. They play an important role in terms of the life situation of people who with the use of them can be under house arrest, but they are far from having any impact on the structural problem. The 700 bracelets available represent only 2% of the prison population throughout the province.

- **Building prisons does not solve the problem**

Another measure tested in various contexts has been to build prisons as a way to alleviate overcrowding. New units have been built in almost all the countries in the region. However, overcrowding remains an endemic problem. In this context, overpopulation is not so much due to a lack of room, but rather to the sharp rise in the numbers of prisoners which the prison services are unable to absorb. Thus, building more prisons does not solve the problem, as long as the authorities fail to develop policies to limit incarceration. The new prisons are usually filled by the new prisoners entering the system.

Having made these points, we present below some recommendations which we believe are important to be included in the High Commissioner's report. These should be read jointly with the recommendations that derive from previous sections⁴⁰.

I. Definition of “*plaza penitenciaria*” and institutional mechanisms to respond to overcrowding

As it was expressed above, it is necessary to expressly set out that the “*plaza penitenciaria*” does not correspond exclusively to the physical space indispensable for the survival of the person

⁴⁰ Namely, sections III.i. III.ii and III.iii.

deprived of his/her liberty; rather, it is a broader concept referred to the set of necessary provisions to ensure a decent life to the persons deprived of their liberty⁴¹.

Accordingly, the IACHR has endorsed the assessment of the International Red Cross, which holds that to determine the accommodation capacity of a place of deprivation of liberty it should be take in account the actual space available for the person deprived of liberty, ventilation, light, access to sanitary services, number of hours that the inmates spend in their cells or rooms; number of hours that they spend outdoors; and the possibilities that they have to do physical exercise, work, among other activities⁴². Furthermore, the State have the fundamental duty to determine, grounded on clear criteria, the accommodation capacity of centers of deprivation of liberty. In this respect, for example, Principle XVII of the *"Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas"* (*Principles*) entitled *"Measures against overcrowding"* points out that the number of places available should be defined *"according to international standards related to living conditions."*⁴³. To ensure that control of overcrowding is effective, the *Principles* clarify that it is necessary for information regarding the capacity of establishments and their actual occupation ratio to be made available to the public. Also, that there be the possibility for inmates, their relatives and attorneys, as well as the different bodies of control and monitoring, to question the official data submitted by the authorities⁴⁴.

Concerning the institutional mechanisms in place to respond to overcrowding, there have been two legislative initiatives presented in Argentina, although they have not so far been approved. These include important points concerning the issue of the control of overpopulation⁴⁵. These

⁴¹ Notwithstanding that this element is not enough to properly establish the capacity of places of detention, it is important to consider the standards which several international organisms of Human Rights have established regarding physical space for each detainee. In this vein, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, has pointed out that the desirable standard for individual cells to measure at least 7 m², with a minimum distance of 2 meters between walls and at least 2.5 meters between the floor and the ceiling. *Cfr.* European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)/Inf (92) 3 [EN], *2nd General Report*, 13 April 1992, Para.43.

⁴² International Committee of the Red Cross (ICRC), *Water, Sanitation, Hygiene and Habitat in Prisons* (2011), page 19 and ICHR. OAS/ Ser.L/V/II.Doc. 64, December, 31, 2011. Para. 465

⁴³ Principle XVII of the Principle and Good Practices on the Protection of Persons Deprived of their Liberty in the Americas, Resolution 1/08 of the ICHR., OAS.

⁴⁴ Principle XVII of the Principle and Good Practices on the Protection of Persons Deprived of their Liberty in the Americas, Resolution 1/08 of the ICHR., OAS.

⁴⁵ The first of which is a legislative proposal for 2010 that proposed the creation of a *"Prison Quota Registration System"* including the obligation of those responsible for all premises holding persons deprived of their liberty to immediately communicate with the Penitentiary Registration System when their local capacity fell to 90 percent. In turn, the list of inmates would be established every six months by the unanimous decision of a Commission composed of government and civil society representatives. Moreover, the project provided that judges *"must ensure that inmates are held in those units with capacity, as according to the periodic reports"*. For more information see: [http://www.diariojudicial.com/documentos/2010_Octubre/2010-10-](http://www.diariojudicial.com/documentos/2010_Octubre/2010-10-26)

[26](http://www.diariojudicial.com/documentos/2010_Octubre/2010-10-26) *Impulsan ley de cupos para el sistema penitenciario bonaerense - FALLO.pdf*. The second legislative proposal in 2013 envisaged the creation of a capacity accreditation mechanism as well as *"A system of access to real-time information about capacity levels, in order to allow for the continuous monitoring and decision-making based on solid data"* and *"A Mechanism for Prevention and concrete remedy"*. See: <http://www.ppn.gov.ar/sites/default/files/Proyecto%20PPN%20Superpoblaci%C3%B3n.pdf>.

initiatives go hand in hand with the provisions established by the *Principles* that state that “...*the occupation of an institution over its maximum capacity shall be prohibited by law*” and also that “...*the law shall establish remedies intended to immediately address any situation of overcrowding. The competent Judicial Authorities shall adopt adequate measures in the absence of an effective legal regulation (...) Moreover, States shall adopt measures to prevent the repetition of such situations...*”⁴⁶

II. Improve information on the criminal justice system

It is important to move ahead with developing official statistical information on the functioning of the penal system, the evolution of offenses, the prison population, recidivism, the functioning of criminal justice, among others. This will make it possible to control the evolution of the penal system, the use of imprisonment and overcrowding, among other issues. In turn, it allows for the consideration of the necessary aspects still to be developed regarding criminal policy and the functioning of the criminal justice system in order to lower the number of detainees. Data on police arrests by type of crime, areas, ages, etc, are also important as a way of controlling policing and in turn to be able to critically interpret the numbers of arrests and seizures.

III. Alternative measures

The promotion of alternative measures to imprisonment helps to decongest the system. However, this only makes sense when these measures reach a sufficiently large number of the population proportionate to the volume of detainees, and when those measures promoting the mass influx of detainees to the system are brought to a halt.

IV. Post-incarceration policies

It is also important to strengthen the institutions working for the inclusion back to society of former prisoners as a way of reducing the number of inmates. This involves strengthening the bodies in charge of monitoring the progression of a person’s sentence, providing the human and technical resources to improve its sphere of action.

On the other hand, the articulation of post-incarceration policies becomes unavoidable in contexts where the rate of incarceration has increased sharply, with more and more people passing through the penal system. These measures should counteract the harmful effects of the passage through the criminal justice system, prevent recidivism and promote a state presence from the social point of view at critical moments, such as the release from prison.

When they return to their community, those who have lived through the prison experience often encounter multiple difficulties entering the labor market, access to the education system or the health system. This is also a critical time for their family, friends and loved ones.

⁴⁶ Principle XVII of the Principle and Good Practices on the Protection of Persons Deprived of their Liberty in the Americas, Resolution 1/08 of the IACHR., OAS.



It is essential to develop a comprehensive policy targeting the social inclusion of former detainees and those subject to criminal proceedings, which, from a multi-agency point of view, includes the mechanisms of coordination and cooperation between the competent bodies in the field.