conflict, a useful interpretation of the standard addresses the law of the place within the Spanish territory in which the provision was executed. In our case, however, the criterion is inoperative insofar as the assumption we are discussing, precisely, of the will created abroad, otherwise, article 1 of CH 61 would govern.

Secondly, it is also necessary to endorse the formal validity of the provision according to the “applicable law to its content” as well as “the personal law of the person making the disposition.” The 9.8 CCesp. in the field of wills allows for both laws to coincide. Therefore, the law of the civil neighborhood would be highlighted by article 1(b), CH 61, and articles 11 and 9.8 of CCesp.87

Article 27 of Regulation 650/2012 refers, in any case, to the law of the corresponding member state. If it is a plurilegislative system, article 36.3, which provides a specific rule for the case of an internal conflict derives from article 27. Essentially, this provision: first, refers to the internal conflict rules; second, and in the case of not having them, requires applying the law of the territorial unit with which the testator or grantor of the agreement have a stronger link. Two assumptions demonstrate, essentially, the difference between the adopted system by one and another text.

The first would be of the foreign testator, for example, in Catalonia. If interested in referring to the connection point in the place in which the provision was granted, article 1 of CH 61 would allow us to directly refer to the Catalan law. On the other hand, using the same connection point, the Regulation contains the Spanish law, as well as the Catalan law.88 The result, therefore, ends up being the same despite that it defers to one another in its textual content.

The second would be that of the foreigner whose domicile or habitual residence is in Catalonia and who has been outside of Spain. If one refers to the connection point of the domicile or the residence, CH 61 directly derives to the Catalan system; the Regulation, again, to article 11 CCesp—89 being as civil neighborhood is lacking abroad. Then, it should be resorted to the residual discretion of art. 36.3 of Regulation 650/2012 and apply the law of territorial unity that shows close links with the testator, which could be Catalan law.

87. C.C.Esp. art. 14.
88. 2012 O.J. (L 201) art. 36.3; C.C.Esp. art. 11.
89. CH 61, supra 26, art. 1(c)-(d).
This paper, through a study of existing drug law in Bolivia, Colombia, and Peru and a comparison to Costa Rica's "new model" of prison systems, argues that before judicial and legislative reforms of any kind can be successfully undertaken, there must be a paradigmatic shift in the way Latin American government's view the role of the penitentiary system and prison populations.

Depriving a person of his or her liberty is one of the most formidable powers of any State. The way in which States exercise this power, striking a balance between the duty to guarantee public safety and the obligation to respect fundamental human rights, is of utmost importance. The operation of the justice system has repercussions for society as a whole.²

INTRODUCTION

Prisons throughout Latin America are notoriously overcrowded, underfunded, and lacking in proper internal security. A recent report by the Iberoamerican Federation of Ombudsmen found that over seven Latin American countries maintain prison populations over 200 percent of designated levels, on the aggregate.³ This is not to mention individual prisons within the region that are operating, in the worst scenarios, at over 300 percent capacity.³ Prison systems working at such overwhelming overcapacity simply cannot guarantee the international minimum standards for the treatment of prisoners.⁴ Overcrowding can lead to shortages of food, water, beds, and basic personal hygiene items. It also leads to a stark absence of internal security, with many Latin American prisons now being controlled, de facto, by gangs.⁵ Large human tragedies, such as the death of more than 300 prisoners in a prison fire in Honduras,⁶ or the continuous deadly gang


3. Id.

4. SYSTEMS OVERLOAD, supra note 1, at 6.


8. See generally SYSTEMS OVERLOAD, supra note 1.


10. Id.

11. SYSTEMS OVERLOAD, supra note 1, at 5.

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I. INTRODUCTION

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riots in Mexican penitentiaries,⁷ have sporadically brought international attention to the harsh realities of prison systems in the region, but the question remains as to what is being done on the ground to reform these penal systems.

The proliferation of harsh drug laws and policies that spread throughout much of Latin American, starting in the 1980s, has been a key driver in the increase of prison populations in the region.⁸ In some countries, mandatory sentences for drug offenses can mean up to thirty years imprisonment.⁹ Moreover, these policies often make no distinction between minor offenses and involvement in organized crime.¹⁰ Put simply, in many drug-related offenses, the punishment does not fit the crime. Not only are low-level, non-violent offenders being arrested and imprisoned for exorbitantly long periods of time, many people are held in pre-trial detention for longer than their maximum sentence would require, without access to justice. Such arbitrary and disproportionate deprivation of liberty not only undermines the rule of law, but also unnecessarily contributes to the region’s alarming prison overcrowpopulation rates, further propagating dismal prison conditions.

While the majority of these strict policies were enacted at the beginning of the “War on Drugs” under pressure from the United States as a precursor to receiving economic aid, studies have shown that the imprisonment of low-level, non-violent offenders hardly makes a dent on the drug trade, calling for a reconceptualization of the predominant prohibitionist model.¹¹ This has led international organizations involved in rule of law reform to prescribe Latin American governments a potent cocktail of reforms aimed at reducing prison overcrowding by decreasing drug-related incarcerations.¹² These reforms include, inter alia, ensuring proportionality in sentencing, establishing and expanding alternatives to incarceration for low-level offenders, abolishing mandatory minimum sentences, and avoiding pre-trial detention in the case of low-level, non-violent offenders.¹³ However, implementation of such reforms faces a steep uphill battle given many Latin American countries’ lack of political will to attempt meaningful prison reform.

8. See generally SYSTEMS OVERLOAD, supra note 1.
10. Id.
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13. Id.
While for many Latin American countries, prison reform ranks low on the priorities list, Costa Rica has in recent years undertaken a slew of judicial and legislative reforms aimed at reducing overcrowded prison populations.14 Dubbed Latin America’s “new model” for prison standards,15 Costa Rica’s reforms are, for the most part, too recent to establish a baseline for comparison with other Latin American systems; however, the Costa Rican experience proves instructive in a discussion of the political and social pressures necessary for successfully undertaking these types of reforms.

This paper suggests that while judicial and legislative reforms, like those listed above, are effective responses to addressing Latin America’s prison overcrowding crisis, such reforms will not be successfully undertaken without a paradigmatic shift in the way Latin American governments view the role of the penitentiary system and prison populations. In keeping with this analysis manageable, the scope of the paper will be limited to Bolivia, Colombia, Costa Rica, and Peru.16

II. DRUG-RELATED INCARCERATIONS AS A CAUSE OF PRISON OVERCROWDING

It is no secret that prison overcrowding plagues a large number of Latin American prison systems. Horrific stories of hundreds dying in prison fires and gang riots periodically make the international news, and popularized novels, such as Thomas McFadden and Rusty Young’s Marching Powder, have spurred a growing trend in tourists overcrowded, squalid prisons.17 While it is widely known that the majority of Latin American prisons systems suffer from extreme overcrowding, an understanding as to why this occurs is lacking. There are two main causes for such high levels of prison overcrowding in relation to drug-related crimes: (1) harsh sentencing and mandatory minimums for drug-related crimes; and (2) excessive use of pretrial detention.18

A. Sentencing for Drug-Related Crimes

The Single Convention on Narcotic Drugs of 1961 and its subsequent protocols regulates the criminalization of drug-related activities.19 Under the Convention’s 1988 Protocol, State parties must establish as criminal offenses under domestic law when committed intentionally, inter alia, the production, manufacture, offering for sale, sale, distribution, and delivery of any narcotic drug or psychotropic substance controlled by the Convention.20 In addition, and in accordance with the State parties’ “constitutional principles and the basic concepts of its legal system,” States must criminalize under domestic law the possession, purchase, or cultivation of narcotic drugs or psychotropic substances controlled by the Convention for personal consumption.21 While these provisions lay the groundwork for criminalizing drug-related activities, they do not mandate the harsh drug-related sentencing characteristic of many Latin American countries.

The United States has historically been the key driver in the proliferation of harsh drug laws and sentencing schemes in Latin America.22 Since the early 20th century, the United States has advocated for strict prohibitionist policies, at home and abroad.23 The prohibition model, based on the “ demonization of drugs,”24 views even the casual use of illicit drugs as immoral, and combines a “penchant for punitive sanctions with a view of drug use best described as ‘pharmacological Calvinism,’” resulting in the

16. I have chosen to focus on Bolivia, Colombia and Peru, all coca-producing nations of the Andean ridge, because these three countries have been greatly affected by the War on Drugs, as reflected in their legislation and view towards drug-related crimes.
While for many Latin American countries, prison reform ranks low on the priorities list, Costa Rica has in recent years undertaken a slew of judicial and legislative reforms at risk of reducing overcrowded prison populations.\textsuperscript{14} Dubbed Latin America’s “new model” for prison standards,\textsuperscript{15} Costa Rica’s reforms are, for the most part, too recent to establish a baseline for comparison with other Latin American systems; however, the Costa Rican experience proves instructive in a discussion of the political and social precursors necessary for successfully undertaking these types of reforms.

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17. See generally supra notes 6-7 and accompanying text, See generally, Thomas McFadden & Rusty Young, Marching Powder: A True Story of Friendship, Cocaine, and South America’s Strangest Jail (2004).

18. Systems Overload, supra note 1, at 5.


20. U.N. Convention against Illicit Traffic in Narcotic Drugs, supra note 19, at art. 3(1)(a)(1).

21. Id. at art. 3(2).


24. Id. at 19.
idea that the only “legitimate objective drug control policy” is the complete elimination of illicit drug use.25

Beginning in the 1980s, the United States began an annual certification process to ensure countries were fully cooperating with U.S. drug policy.26 Passed as part of the Anti-Drug Abuse Act of 1986, the certification legislation requires the Executive to identify countries that are “significant direct or indirect sources” of illicit drugs “significantly affecting the United States,” referred to as “drug majors,” and grant or deny certification based on these countries’ cooperation with United States drug policy.27 Countries that are deemed not to have “fully” cooperated with the United States are not certified, and all U.S. foreign aid, with the exception of humanitarian and drug-related aid, is suspended.28 In 2002, the certification process was reformed, allowing the President to suspend the original certification process with its “full cooperation” mandate for one that sanctioned only the worst offending drug majors: those who “failed demonstrably” to make substantial efforts to combat drugs.29 While the certification process today is “widely viewed as having lost much of its strength as a diplomatic tool,”30 during the late 1980s and 1990s, many Latin American countries promulgated harsh criminal sanctions in line with the United States’ prohibitionist view in order to maintain compliance, including Bolivia, Colombia, and Peru. These policies and the ideological framework supporting them have subsequently become entrenched in these countries’ policy, while the door has slowly begun to open for governments to choose models alternative to the one espoused by the United States.


28. DRUG STRATEGIES, supra note 27, at 1. However, if the Executive decides that cutting off U.S. assistance would not be in the best interest of the United States, it may grant a “national interest” waiver for countries otherwise decertified.


30. SIEHELKE, supra note 29, at 22.

1. Bolivia

The Bolivian National Assembly enacted its major drug legislation, Ley 1008—Ley del Regimen de la Coca y Sustancias Controladas (Law 1008: Law on the Regime Applicable to Coca and Controlled Substances) in 1988.31 Law 1008 criminalizes drug-related conduct, establishing specific forms of criminal conduct, prosecution, and competent agencies.32 Some of the main criticisms of Law 1008 include, inter alia, that it inadequately characterizes criminal acts and allows for disproportionate penalties.33 Law 1008 defines “illicit traffic” in controlled substances as:

Any action directed towards or arising out of producing and manufacturing, illegally possessing, holding in storage, transporting, supplying and delivering controlled substances, buying, selling and giving them away, smuggling them into and out of the country and/or carrying out [related] transactions on any basis, as well as the financing of activities contrary to the provisions of the present Law or of other legal regulations.34

Under this definition, the illegal possession of even the smallest amounts of illicit drugs is classified as trafficking.35 Any person who engages in such trafficking “shall be punished with imprisonment for a term of ten to twenty-five years.”36 Both the definitional vagueness in establishing volume limits and breadth in enumerating actions that merit “trafficking”—such as mere possession—foster excessive penalization.37 The law makes no distinction between a teenage dealer on the street corner selling minimal amounts of drugs and a large-scale drug trafficker involved in criminal gang activities.38 Both these actors would face at least ten and up to twenty-five years in prison for substantially different crimes.


33. Id.

34. Law No. 1008, art. 33(b).

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36. Id. at art. 48.

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Additionally, Law 1008 adopts the strict prohibitionist model espoused by the United States. While the traditional consumption of the coca leaf is not criminalized, any consumption of the additional controlled substances regulated by the law is strictly prohibited. More progressive than some of its neighbors, Bolivia allows for rehabilitation treatment, as an alternative to jail time, for drug-dependent persons or non-habitual consumers apprehended with minimal amounts of controlled substances intended for their own immediate personal consumption. However, if the amount of controlled substances is deemed to fall outside this “minimum quantity”—which is decided on a case-by-case basis by a panel of two experts, mandatory prison terms range from ten to twenty-five years. This individualized determination of what constitutes ‘personal use quantities’ has led to uncertainty and arbitrary arrests for varying quantities of drugs.

2. Colombia

Colombia has long been the focal point of the United States’ global “War on Drugs.” While the country’s first drug laws did not criminalize trafficking or consumption of drugs, throughout the 20th century, Colombia began enacting stricter and more repressive drug-related legislation. During the 1970s, the government enacted legislation criminalizing consumption, imposing and increasing penalties for trafficking and cultivation of addictive drugs, such as marijuana, cocaine, and morphine. In 1986, the Colombian Congress passed a new, overarching drug-regulation legislation, Ley 30 de 1986—Estatuto Nacional de Estupefacientes (Law 30 of 1986, National Narcotics Statute). Law 30, and its subsequent amendments, impose long mandatory sentences for those who

without the permission of the competent authority, except as provided with regard to a dose for personal use, brings into the country, even in transit or removes from it, transports, takes with him, stores, maintains, produces, sells, offers, acquires, financies or supplies a drug that causes dependency in any capacity.

Less arbitrary than Bolivia’s anti-trafficking laws, Colombia establishes different mandatory sentencing ranges in relation to the amount of drugs involved:

if the drug amount does not exceed, inter alia, 1000 grams of marijuana; 200 grams of hashish; or 100 grams of cocaine, the term for an offender shall be between one to three years; for those involved with 1001-10,000 grams of marijuana; 201-3000 grams of hashish; and 101-2000 grams of cocaine, prison sentences are between four and twelve years.

For all those involved in drug amounts more than the previously stated amounts, prison sentences must be between six and twenty years long. In addition to prison sentences, convicted drug offenders must also pay steep fines. These fines are seen as the principal penalty and offenders cannot secure their release until the fines have been paid. This creates a sometimes insurmountable barrier for indigent prisoners who cannot pay these fees, even after having completed their sentences. Additionally, those prosecuted for drug-related crimes are ineligible for certain procedural benefits provided to other convicts, including electronic surveillance as an alternative to prison.

Personal consumption of illegal drugs has recently been re-decriminalized. The Colombian legislature and Constitutional Court have volleyed back and forth since the 1980s as to the status of personal

46. Id. at art. 33; L. 33, Febrero 21, 1997, DIARIO OFICIAL [D.O], Articulo 17 (Colom.).
47. See L. 30, Feb. 5, 1986, art. 33.
48. Id.
49. Id.
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consumption. The Constitutional Court struck down the legislature’s original prohibition against personal consumption in 1994 as a violation of the constitutional right to the “free development of personality.” Personal consumption was, for a second time, prohibited by a 2009 Constitutional amendment; however, the Constitutional Court again struck down this restriction in 2012. Presently, anyone caught with less than twenty-two grams of marijuana or one gram of cocaine, intended for personal use, may not be arrested or prosecuted, but may be referred to a drug treatment program. The minimum weight for other drugs, however, has not been established.

3. Peru

The Criminal Code of 1991 and its subsequent modifications establish Peru’s criminalization of drug-related offenses. While steep penalties exist for drug trafficking, legislation does, to an extent, differentiate in regards to quantity of drugs involved: under the code, anyone who promotes, encourages, or facilitates illegal drug use through trafficking shall be subject to imprisonment between eight to fifteen years. While anyone caught in possession of illegal drugs meant for sale shall be imprisoned for six to twelve years. However, possession for trafficking of small amounts of drugs is punishable by a prison sentence between two and eight years, while distribution in small amounts to individual consumers shall be punishable only by a prison sentence of one to four years. “Small amount” is defined as up to fifty grams of cocaine paste, twenty-five grams of cocaine hydrochloride, and a hundred grams of THC. In aggravated cases, such as when those involved are agents of the State, educators or workers in the medical field, prison sentences range from fifteen to twenty-five years.

Possession of drugs for personal use is not criminalized, in theory. While the exact quantity of drugs intended for personal use was originally left up to judicial determination (based on a weighing of the weight-dosage correlation, purity, context of the arrestee’s apprehension, and reforms), legislation enacted in 2003 establishes bright line minimum carry amounts for a number of illegal substances. Possession of up to five grams of cocaine paste, two grams of cocaine hydrochloride, or eight grams of THC is not punishable. However, while possession has never been a criminal act, this has not stopped the police force from targeting low-level users to bolster arrest statistics—it is estimated that sixty percent of detentions on drug-related charges are based on use or legal possession. In practice, persons apprehended with small amounts of illegal drugs are “detained [legally for up to fifteen days] until authorities determine whether the person was carrying drugs for his or her own consumption or for sale.” While such determinations should be easily made, given the bright line rules regarding personal use quantities, persons caught in this situation often spend up to the fifteen-day maximum in preventative detention. Aptly stated, “two weeks in prison is an interruption in anyone’s life, but it is a serious violation when one considers that the alleged crime doesn’t even exist in the law.”

B. Pretrial Detention

The majority of Latin American prison systems are plagued with excessive use of pretrial detention. While under international law, use of pretrial detention is viewed as an exceptional measure, many Latin American...
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55. Id. at 3.
56. See generally PSmith, supra note 53, at 2.
57. Id.
59. Legislative Decree 635, supra note 58, at art. 296.
60. Id.
61. Id. at art. 298.
62. Id.

when those involved are agents of the State, educators or workers in the medical field, prison sentences range from fifteen to twenty-five years. Possession of drugs for personal use is not criminalized, in theory. While the exact quantity of drugs intended for personal use was originally left up to judicial determination (based on a weighing of the weight-dosage correlation, purity, context of the arrestee’s apprehension, and reforms), legislation enacted in 2003 establishes bright line minimum carry amounts for a number of illegal substances. Possession of up to five grams of cocaine paste, two grams of cocaine hydrochloride, or eight grams of THC is not punishable. However, while possession has never been a criminal act, this has not stopped the police force from targeting low-level users to bolster arrest statistics—it is estimated that sixty percent of detentions on drug-related charges are based on use or legal possession. In practice, persons apprehended with small amounts of illegal drugs are “detained [legally for up to fifteen days] until authorities determine whether the person was carrying drugs for his or her own consumption or for sale.” While such determinations should be easily made, given the bright line rules regarding personal use quantities, persons caught in this situation often spend up to the fifteen-day maximum in preventative detention. Aptly stated, “two weeks in prison is an interruption in anyone’s life, but it is a serious violation when one considers that the alleged crime doesn’t even exist in the law.”

B. Pretrial Detention

The majority of Latin American prison systems are plagued with excessive use of pretrial detention. While under international law, use of pretrial detention is viewed as an exceptional measure, many Latin American

63. Id. at art. 297.
64. Legislative Decree 635, supra note 58, at art. 299.
65. Id.
66. Id.
69. Garrido, in SYSTEMS OVERLOAD, supra note 1, at 77.
70. Drug Laws and Prisons in Peru, supra note 68, at 2.
countries view the mechanism as the "rule and the basis for criminal prosecution." Pretrial detention is employed in the region at rates between two and five times greater than the international average. Not only does pretrial detention arbitrarily deprive detainees of their right to liberty and security, the exorbitant length of pretrial detention, sometimes without even being formally charged with a crime, effectively denies detainees' access to justice. In all three of the case study countries, pretrial detention is heavily utilized, both broadly and narrowly in drug-related crimes. Pretrial detainees represent eighty-four percent of the prison population in Bolivia, thirty percent of the prison population in Colombia, and fifty-nine percent of the prison population in Peru. Additionally, drug-related offenses consistently rank high among the leading causes for pretrial detention, as illustrated in the previous example of Peru's personal consumption detentions.

In Bolivia, where pre-trial detainees comprise more than eighty-three percent of the prison population, preventative detention for drug-related offenses is mandatory, with no chance of pre-trial release or release during trial. More than sixty-seven percent of people being held for drug-related crimes are being held under pre-trial detention. In Peru, preventative detention is mandatory for all arrests for a maximum of twenty-four hours; however, in the case of drug-related crimes, this detention is extended to fifteen days. After such time, a judicial determination is made as to whether detention needs to be extended. Pre-trial detention is not strictly mandatory in drug-related cases in Colombia, and both Colombia and Peru apply similar tests in determining the use (or continuance) of pretrial detention. In Colombia, pretrial detention only needs to be applied when the accused "poses a danger to public safety or that of the victim." There are two subjective criteria, which the judge must analyze when deciding to impose pretrial detention:

(1) is there sufficient evidence to reasonably infer that the accused is guilty; and (2) is pretrial detention necessary to: (a) prevent the accused from obstructing justice, (b) protect society from the accused, or (c) ensure that the accused complies with the judicial process.

In addition, while certain detainees, including those who are at least seven months pregnant, recent mothers, or heads of households with minor or disabled children, may opt for house arrest rather than pre-trial detention, people held on drug-related charges are not eligible for this provision. In Peru, pre-trial detention is extended as a precautionary measure to "prevent re-offending" and "ensure future penal execution." Judges must weigh three factors in determining whether pre-trial detention is necessary:

(1) whether there exists serious and well-founded evidence to reasonably believe the accused is guilty; (2) the appropriate sanction for the accused act is more than four years imprisonment; and (3) the accused, based on his background and other circumstances particular to the case, will try to evade or obstruct justice.

Despite these frameworks aimed at imposing pretrial detention only when necessary, studies show that pretrial detention is often evoked as a matter of course, rather than as the reasoned result of legislatively mandated analysis. Recent statistics show that in Colombia, over 6000 people, or roughly seventeen percent of the pretrial detention population, are imprisoned while awaiting trial for drug-related crimes; while in Peru, fifteen
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73. Id. at 4.
74. INTER-AM., Pretrial Detention, supra note 71, at 20–21.
75. See supra notes 68–70 and accompanying text; see also INTER-AM., Pretrial Detention, supra note 71, 63, at 27.
76. Aborn & Cannon, supra note 72, at 4.
77. Giacoman, in SYSTEMS OVERLOAD, supra note 1, at 24–25.
79. Id.
80. See generally id.
84. Pásara, supra note 81, at 2; See generally DUE PROCESS LAW FOUNDATION, supra note 72.
85. DUE PROCESS LAW FOUNDATION, supra note 82, at 152.
86. See generally Pásara, supra note 81.
percent, out of more than 34,500 pretrial detainees, are being held on drug-related offenses.87

III. THE NEGATIVE EFFECTS OF HARSH DRUG POLICIES

Strict mandatory minimum sentencing for drug-related crimes, which often do not account for proportionality, coupled with an overuse of pre-trial detention, has severely strained the prison systems of our case study countries. It has caused: (1) prison overcrowding, which in turn spurs (2) human rights abuses and (3) high levels of recidivism.88

A. Prison Overcrowding

It is widely accepted that the rise in drug-related arrests and convictions has contributed to the general overcrowding in Latin American prisons.89 While anecdotal evidence has long pointed to the connection between drug laws and prison overcrowding in Latin America, a recent study by the Washington Office on Latin America (WOLA) and the Transnational Institute (TNI) has illustrated the strong causal relationship between the two.90 The year-long study focused on eight Latin American countries and analyzed each countries drug-related legislation, prison populations and conditions, prisoner’s socio-economic status, and level of involvement in the drug trade.91 Statistical information was solicited from national authorities, and was supplemented with additional investigations and interviews with officials, experts and detainees.92 The study illustrates a rise in the prison population subsequent to the passage of strict drug-law legislation.93 For example, Bolivia, the country with the highest prison overpopulation in South America at 277 percent capacity, has maintained an average of forty-five percent of its prison population held for drug related crimes since the passage of Law 1008.94 The percentage of people behind bars in Colombia

87. INTER-AM. Pretrial Detention, supra note 71, at 22-23.
88. See generally Prisons in Latin America: A Journey into Hell, supra note 5 (discussing overcrowding, unhealthy facilities, and high recidivism rates in Latin American prisons).
89. See generally SYSTEMS OVERLOAD, supra note 1.
90. Id. at 8.
91. Id. at 9.
92. Id.
93. Id.

for drug-related offenses has fluctuated between sixteen to nineteen percent of the overall prison population, which operates at 150 percent capacity, and imprisonment for drug-related crimes is consistently in the top three categories of crime represented in the prison system.95 Similarly, the growth in Peru’s prison population since 2003, which operates approximately around 162 percent capacity, corresponds with its enactment of drug policy reforms, with prison populations incarcerated for drug crimes hovering around twenty-three percent of the total prison population.96

B. Human Rights Abuse

There simply cannot be “dignified living conditions in the context of overcrowding.”97 High levels of overcrowding are straining Latin American prison systems, which are generally neglected and underfunded.98 As funding and physical infrastructure remaining relatively unchanged, increasing prison populations are producing a gap in basic human needs, including food, clothing, sanitation, health care, shelter, and physical security.99 As prison populations have continued to rise, our three case study countries have not kept up with the growing demand for penitentiary services.100 Reports from Bolivia, Colombia, and Peru outline the appalling conditions of prisons in these countries.101 Lack of physical space for inmates have led to overcrowded jail cells, often times in violation of international standards for minimum space, causing prisoners to sleep in

95. See generally Repository of Datos, supra note 94; Yepes & Guzmán, in SYSTEMS OVERLOAD, supra note 1, at 42-43.
96. Garrido, in SYSTEMS OVERLOAD, supra note 1, at 76.
97. Yepes & Guzmán, in SYSTEMS OVERLOAD, supra note 1, at 47.
98. See generally SYSTEMS OVERLOAD, supra note 1.
99. Id.
101. See generally sources cited supra note 100.
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89. Id. at 8.

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91. Id.

92. Id.

93. Id.


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shifts on the ground, in shared beds, or in bathrooms. overcrowding has also been identified by the Inter-American Commission on Human Rights (IACHR) as a main cause for shortages in adequate health care and physical security. It leads to the overwhelming need of medical care facilities; the spread of contagious diseases of all kinds; uncertain availability of space to provide adequate treatment for inmates... and... increased friction and quarrelling among prisoners that often results in serious injury.

For instance, inmates in Colombia suffer disproportionately from contagious diseases due to unsanitary conditions and a general lack of proper alimentation and preventative healthcare. Additionally, the “increased friction” between inmates held in such close quarters leads to increased levels of prison violence. For example, seventy-four percent of prisoners in Peru feel less safe in prison then where they lived before incarceration, and more than fifty-eight percent report having been beaten by other inmates while imprisoned. In addition, prisons administered under open regimes, either by policy choice or lack of ability for understaffed personnel to control overpopulated prisons, present key economic and physical integrity concerns. While many prisons in Latin America operate as open regimes as


103. Garrido, in SYSTEMS OVERLOAD, supra note 1, at 76.


105. Id.

106. Iturralde, supra note 100, at 2.


108. Citizen Security with a Human Face, supra note 107, at 11.

109. HMP Leyhill Prison Regime Info, INSIGHTIME (Dec. 13, 2014) (“Open regimes are prison regimes in which guards and police authority play limited roles within the four walls of the prison, usually leaving the prisoners’ cells unlocked and allowing them to roam freely within the prison’s perimeter.”), http://insightime.org/hmp-leyhill-prison-regime-info/.

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a policy matter, others by default relinquish internal control of the penitentiary to prisoners (usually gangs) as they lack the personnel to adequately impose control over the system. In open regimes, prisoners face greater insecurity by essentially having to provide for themselves. Overcrowding “creates conditions for the commission of routinely and systematic acts of corruption, in which prisoners must pay for receiving basic and necessary goods.” For detainees unable to afford it, food, clothing, a bed, and physical integrity are not guaranteed. As some have aptly stated, a visit to an overcrowded Latin American prison is analogous to “a journey into hell.”

C. High Levels of Recidivism

Not only do overcrowded prisons create and exacerbate health and human rights crises, they fail to adequately provide rehabilitation and lead to higher levels of recidivism. Recidivism rates in Latin America are high, especially when considering the fact that large percentages of prison inmates have not been formally charged, much less convicted, of crimes. Bolivia maintains a recidivism rate of sixteen percent, while Colombia’s recidivism rate hovers around thirteen percent, and Peru tops the group at twenty-two percent recidivism. Under the American Convention, prisons in Latin America shall aim to reform, socially readapt, and personally rehabilitate prisoners. According to an IACHR study,
shifts on the ground, in shared beds, or in bathrooms.\textsuperscript{102} Prison infrastructure is furthered strained, resulting in shortages or lack of water, electricity, and sanitation.\textsuperscript{103}

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\textsuperscript{102} \textit{Overcrowding, Penal Reform Int’l. 2, http://www.penalreform.org/priorities/prison-conditions/overcrowding/} (last visited Sept. 19, 2015); Aramayo, \textit{in SYSTEMS OVERLOAD, supra note 1, at 25.}

\textsuperscript{103} Garrido, \textit{in SYSTEMS OVERLOAD, supra note 1, at 76.}


\textsuperscript{105} Ibid.

\textsuperscript{106} Iturralde, supra note 100, at 2.


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\textsuperscript{104} Prison in Latin America: A Journey into Hell, supra note 5, at 1.

\textsuperscript{111} INTER-AM., \textit{Persons Deprived of Liberty, supra note 104, at 455.}

\textsuperscript{112} Aramayo, \textit{in SYSTEMS OVERLOAD, supra note 1, at 25.}

\textsuperscript{113} Prison in Latin America: A Journey into Hell, supra note 5, at 4.


\textsuperscript{115} Néstor Ramírez & Ximena Poveda, ¿Cuánta población carcelaria es reincidente en Colombia?, LA REPÚBLICA (Feb. 4, 2013) (Colom.), http://www.larepublica.co/antologias/6c29a4bc9f1c354111a-poblaci0%3A-carcelaria-es-reincidente-en-colombia_30884.


\textsuperscript{117} INTER-AM., \textit{Persons Deprived of Liberty, supra note 104, ¶ 605, at 212.}
"any expectation of personal rehabilitation and reintegration into society is impossible in correctional systems . . . in which high indices of prison violence are reported; existence of prisons where the actual control of internal security is exercised by prisoners themselves and not the competent authorities; and in which the State does not provide the minimum space, nourishment, sanitation, and medical attention." 118

Overcrowding necessarily strains any existing attempts at establishing rehabilitation programs, which are in short stock in any Latin American country, as it impedes access to education and work opportunities for the majority of inmates. 119

Not only are prisoners not benefiting from rehabilitative programs while in prison, they are often subjected to conditions which additionally increase the likelihood of recidivism. 120 Overcrowding often times makes it impossible to classify inmates by categories, such as separation of the convicted versus the accused. 121 Prolonged contact with other prisoners "entrenches criminal behavior," especially in situations where innocent or low level drug consumers or sellers are exposed to hardened criminals and gang members, and forced to fend for themselves in overcrowded, understaffed prisons for places to sleep, food to eat, or to protect their physical integrity. Possible rehabilitation and social reintegration is further stymied by policies like those implemented by Colombia and Peru, where those incarcerated for drug offenses are denied common prison benefits such as, inter alia, reduction in sentences for work and study, probation, semi-liberty, and conjugal visits. 122 Restrictions such as these directly foster recidivism. 123

118. Id. § 611, at 213.

119. Id. § 611, at 213.


121. INTER-AM., Persons Deprived of Liberty, supra note 104, § 457, at 613.


IV. PRESCRIBED REFORMS

According to the World Justice Project's Rule of Law Index, it is integral for a State's criminal justice system to both protect due process of law and rights of the accused and effectively reduce criminal behavior. 125 In relation to the first requirement, States must ensure that the basic rights of criminal suspects are respected, "including the presumption of innocence, [ ] the freedom from arbitrary arrest and unreasonable pre-trial detention" and continued respect for the basic rights of prisoners once they are convicted. 126 In relation to the latter requirement, States must also ensure that "corrective institutions are secure, respect prisoners' rights, and are effective in preventing recidivism."

As demonstrated above, the overcrowding of prison systems, including its causes and effects, have contributed to a breakdown of the rule of law in the prison systems of Bolivia, Colombia, and Peru. First, harsh and arbitrary drug laws, coupled with excessive use of pre-trial detention in relation to drug-related arrests, in all three countries fail to provide criminal suspects with their basic rights of due process and personal liberty. Second, high levels of prison overcrowding, aggravated by increases in drug-related arrests, undermine both the protection of prisoners' human rights and the penal systems' goal of rehabilitation.

However, the adoption of a core set of reforms to drug laws and their implementation could "help alleviate prison overcrowding while protecting public safety and respecting civil and human rights." 127 As discussed in Part III, a recent report by TNI and WOLA, which links prison overcrowding and its deleterious effects to increased incarceration for drug-related crimes, pertinently provides a number of recommendations to Latin American State actors aimed at reforming this very specific problem. 128 A number of these drug specific reforms are analogous to more general recommendations for prison reform in the region. 129 However, by tailoring these reforms more towards reducing drug-related low-level or personal consumption detention and arrests, these reforms aim to address not only the deleterious effects of


127. THE WORLD JUSTICE PROJECT, supra note 125, at 166.

128. SYSTEMS OVERLOAD, supra note 1, at 7.

129. See supra text accompanying notes 89-92.

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overcrowding on the system, but also the negative effects of a misguided policy which continues to propagate arbitrary and disproportionate deprivation of liberty.

These recommendations, especially as they apply to the case study countries include, inter alia:

1. establish and expand alternatives to incarceration for those charged with low-level drug offenses, including removing criminal sanctions for possession for personal use; (2) ensure proportionality in sentencing, distinguishing between: (a) drug trafficking and other types of crimes; (b) low, medium and high-level drug offenses; (c) rank or position of the accused in drug-trafficking networks; (d) violent and non-violent offenses; and (e) different types of drugs; (3) abolish mandatory minimum sentences; (4) avoid preventative detention in the case of low-level, non-violent offenders following arrest and during the investigative phase to determine whether or not formal charges will be filed; and . . . (5) establish equal access for drug offense suspects to procedural benefits and opportunities for alternative sentencing—such as treatment, educational opportunities or community service—that are offered to those involved in other types of offenses.131

A. Alternatives to Incarceration

Alternatives to prison should be available to all persons charged with low-level drug offenses, including possession for personal consumption.132 Studies show that the mass incarceration of low-level drug traffickers and drug users has not had a significant effect on reducing the production, trafficking, or consumption of illicit drugs; conversely, this policy has had a devastating effect on those incarcerated for low-level trafficking or consumption.133 These persons are usually representative of economically deprived social classes; those most likely to suffer in harsh prison conditions and who need the most assistance in reintegration and rehabilitation.134 For example, in countries like Bolivia with high unemployment, underemployment, and poverty, small-scale drug trafficking has presented

131. SYSTEMS OVERLOAD, supra note 1, at 7.

132. Id.

133. See generally id.


B. Proportionality in Sentencing

In drug-related cases, multiple factors should be taken into consideration when establishing length of prison sentences, including the type of crime, the type of drug involved, the level of the drug offense, the convicted persons position in broader drug-related schemes, and whether the crime was violent or non-violent.135 In order to protect the liberty and due process of arrestees and provide for judicial independence, courts should be able to take into account such mitigating circumstances in proscribing prison sentences. Extensive imprisonment for first time drug-offenders or drug users runs counter to the inter-American policy of imprisonment as rehabilitative, not punitive. Similarly, long prison sentences for small-scale traffickers, or those whom comprise the lowest rung of drug trafficking ladders, also appear punitive in nature. Moreover, disproportionate prison sentences contribute to the overcrowding of prisons, leading to a myriad of unintended negative consequences.

C. Abolish Mandatory Minimum Sentencing

In line with the reasoning above, mandatory minimum sentences should be abolished in order to thoroughly provide for proportionality in sentencing.136 While often times, sentencing guidelines set a range in which prison terms must be placed, high mandatory minimums have the potential to negate the fairness and effectiveness of proportional sentencing. For example, in countries like Bolivia, where legislation makes no distinction regarding the amount of drugs involved in trafficking crimes and provides for a sentence between ten and twenty-five years, mandatory minimums mean sentences can be “grotesquely disproportionate to the gravity of the
overcrowding on the system, but also the negative effects of a misguided policy which continues to propagate arbitrary and disproportionate deprivation of liberty.

These recommendations, especially as they apply to the case study countries include, *inter alia*:

1. establish and expand alternatives to incarceration for those charged with low-level drug offenses, including removing criminal sanctions for possession for personal use; 2. ensure proportionality in sentencing, distinguishing between: (a) drug trafficking and other types of crimes; (b) low, medium and high-level drug offenses; (c) rank or position of the accused in drug-trafficking networks; (d) violent and non-violent offenses; and (e) different types of drugs; 3. abolish mandatory minimum sentences; 4. avoid preventative detention in the case of low-level, non-violent offenders following arrest and during the investigative phase to determine whether or not formal charges will be filed; and . . . (5) establish equal access for drug offense suspects to procedural benefits and opportunities for alternative sentencing—such as treatment, educational opportunities or community service—that are offered to those involved in other types of offenses.

**A. Alternatives to Incarceration**

Alternatives to prison should be available to all persons charged with low-level drug offenses, including possession for personal consumption. Studies show that the mass incarceration of low-level drug traffickers and drug users has not had a significant effect on reducing the production, trafficking, or consumption of illicit drugs; conversely, this policy has had a devastating effect on those incarcerated for low-level trafficking or consumption. These persons are usually representative of economically deprived social classes; those most likely to suffer in harsh prison conditions and who need the most assistance in reintegration and rehabilitation. For example, in countries like Bolivia with high unemployment, underemployment, and poverty, small-scale drug trafficking has presented itself as necessary for survival. Non-custodial sanctions, such as electronic monitoring or community service, present low-level offenders the opportunity to reintegrate into society without the damaging economic, social, and physiological effects of overcrowded prisons. The benefits of alternatives to prison, therefore, trickle down to other proposed reforms as well; for example, by helping to reintegrate and rehabilitate drug convicts.

**B. Proportionality in Sentencing**

In drug-related cases, multiple factors should be taken into consideration when establishing length of prison sentences, including the type of crime, the type of drug involved, the level of the drug offense, the convicted persons position in broader drug-related schemes, and whether the crime was violent or non-violent. In order to protect the liberty and due process of arrestees and provide for judicial independence, courts should be able to take into account such mitigating circumstances in proscribing prison sentences. Extensive imprisonment for first time drug-offenders or drug users runs counter to the inter-American policy of imprisonment as rehabilitative, not punitive. Similarly, long prison sentences for small-scale traffickers, or those whom comprise the lowest rung of drug trafficking ladders, also appear punitive in nature. Moreover, disproportionate prison sentences contribute to the overcrowding of prisons, leading to a myriad of unintended negative consequences.

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131. SYSTEMS OVERLOAD, supra note 1, at 7.

132. Id.

133. See generally id.


135. Aramayo, in SYSTEMS OVERLOAD, supra note 1, at 21.


137. Id. at 3.

138. SYSTEMS OVERLOAD, supra note 1, at 7.

139. Id.
offense.\textsuperscript{140} A first-time, low-level, drug seller arrested for trafficking will face at minimum ten years in prison, regardless of any of the mitigating factors mentioned above. In order to fully provide for punishments that truly fit the crime, mandatory minimums must be abolished.

D. Avoid Pre-Trial Detention for Low-Level, Non-Violent Offenses

Pre-trial detention should be used sparingly in cases concerning low-level, non-violent drug-related offenses.\textsuperscript{141} Pre-trial detention is an overused and abused procedural tool in our case study countries. In Bolivia and Peru, pre-trial detention for drug-related arrestees is mandatory, and in Colombia, judicial discretion has allowed for large amounts of pre-trial detention as a result of public pressure and lack of judicial independence.\textsuperscript{142} High levels of initial and extended pre-trial detention use has been linked to a societal preference for citizen security over presumption of innocence coupled with the weakening status of judges and prosecutors.\textsuperscript{143} However, pre-trial detention is thought to actually increase citizen insecurity by “provid[ing] a vulnerable pool of recruits to prison gangs, and [leading] to more low-level offenders getting sucked into more serious criminal activity.”\textsuperscript{144} Additionally, pre-trial detainees “suffer direct harm in terms of quality of their family relations and their ability to earn an income,” along with being at a “procedural disadvantage” compared to other individuals facing criminal prosecution.\textsuperscript{145} For low-level offenders and drug-users, both traditionally economically vulnerable groups, the negative effects of prolonged periods of pre-trial detention are exacerbated.\textsuperscript{146}

E. Equal Access to Procedural Benefits

Drug-related offenders should have equal access to procedural benefits, such as treatment and participation in vocation training programs.\textsuperscript{147} As discussed in Section III, prisoners serving time for drug-related offenses in Colombia and Peru are denied, \textit{de jure,} common prison benefits, including reduction in sentences for work or education, semi-liberty, parole, and conjugal visits.\textsuperscript{148} The restriction of many of these benefits deny prisoners a fair chance at rehabilitation, re-socialization, and reintegration by isolating them from society for long periods of time, with no chance at earning parole or semi-liberty with good behavior.\textsuperscript{149} The prison systems’ goal of reformation, re-socialization, and rehabilitation cannot be facilitated when prisoners are wholesale blocked from partaking in education, vocation, and social programs. In order to have maximum effect, programs such as these should be implemented as soon as possible.\textsuperscript{150} In order to ensure to the greatest extent possible the rehabilitative role of the prison system, the prison period is best utilized as a time to prepare the prisoner for re-entry into society.\textsuperscript{151}

V. Diagnosis

The continued influx of drug-related arrests will further exacerbate these problems until reforms are undertaken to aim at addressing these rule of law gaps, their causes, and consequences. However, the political will in many Latin American countries to undergo prison reform is sorely lacking, while political support for imprisoning larger numbers of law-breakers for more extended periods of time always chimes the right political bells.\textsuperscript{152} In Latin America, factors preventing prison reform include: generally high levels of public fear of crime; disillusionment with the criminal justice system; increasing belief that prisoners cannot be rehabilitated; and growing dominance of retributive philosophies of punishment.\textsuperscript{153} As a general, yet emblematic example, the Due Process of Law Foundation has identified that public pressure in favor of harsher punishments, as compensation for weak


\textsuperscript{141} SYSTEMS OVERLOAD, supra note 1, at 7.

\textsuperscript{142} See supra text accompanying notes 74–75.

\textsuperscript{143} PASARA, supra note 81, at 14.


\textsuperscript{145} INTER-AM., Pretrial Detention, supra note 71, ¶ 128, at 54.

\textsuperscript{146} Id.

\textsuperscript{147} SYSTEMS OVERLOAD, supra note 1, at 7.

\textsuperscript{148} See generally Drug Laws and Prisons in Peru, supra note 68; Yagoub, supra note 123, at 2.

\textsuperscript{149} Why Promote Prison Reform?, supra note 130, at 5.

\textsuperscript{150} Id.

\textsuperscript{151} Id.


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\textsuperscript{140} Drug Legalization, Criminalization, and Harm Reduction: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources, 106th Cong. 10 (1999) (testimony of David Houz).

\textsuperscript{141} SYSTEMS OVERLOAD, supra note 1, at 7.

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judicial systems, has caused many Latin American judicial officials to apply extensive and arbitrary pre-trial detention.154

Moreover, even when reforms aimed at addressing prison overcrowding are undertaken, they are either too small-scale, unsustainable, unpopular, or contain carve-outs for drug-related crimes which inhibit them from truly addressing the problem of overcrowding as related to drug arrests. Examples from each country in review illustrate this point. In Bolivia, prison overcrowding has not ranked high on the reform agenda; however, in September 2013, President Evo Morales implemented a one-time policy pardoning “low-level offenders” in pre-trial detention and people sentenced to less than eight years in prison.155 While this presidential decree was successful in releasing those arrested in connected to any drug-related crimes deemed “low-level,” it had no effect on releasing those convicted of small scale drug crimes, given that the mandatory minimum for such crimes is ten years.156 Colombia, perhaps the most advanced of the three countries in regards to prison reform, has recently enacted a number of reforms aimed as reducing prison populations.157 Under this new legislation, persons serving less than four years are eligible for pardons, convicted individuals with good behavior who have completed three fifths of their sentence are eligible for probationary release, and the maximum sentence for house arrest can be extend to eight years.158 However, the benefits of these reforms are unavailable to prisoners in custody for drug-related crimes.159 In Peru, plans to address prison overcrowding by expanding a local prison in Cañete province were so vehemently opposed by local residents that anti-expansion demonstrations left one dead and twenty more injured.160 Without a change in political will, it is unlikely that any attempt at reducing both the number of persons held arbitrarily, or excessively imprisoned due to drug-related crimes and the prison overcrowding, will be successful.


156. See supra text accompanying note 36.


158. Id. at 2.

159. Id.


VI. COSTA RICA: THE NEW MODEL

While prison reform has not ranked high on the priority list of many Latin American countries, Costa Rica has undertaken a number of reforms aimed at reducing drug-related imprisonment. While it is too early in the life of these reforms to measure success, or to create benchmarks for comparison, a discussion of the country’s reforms proves useful in an analysis of the necessary precursors for enacting these sorts of reforms elsewhere. From an analysis of Costa Rica’s recent drug law reforms, it is clear that strong internal political will to address this issue head on is a necessary precursor to enacting successful drug law reforms.

Costa Rica, similar to our case studies, passed its first overarching drug legislation in the late 1980s.161 Following major reforms, the current drug legislation, Ley 8204—Ley Sobre Estupefacientes, Sustancias Psicotropicas, Drogas de Uso No Autorizado, Legitimacion de Capitales y Actividades Conexas (Law 8024: Law on Narcotics, Psychotropic Substances, Unauthorized Drugs, Money Laundering and Related Activities) was established in 2001.162 Law 8024 criminalizes, inter alia, the distribution, cultivation, production, storage, transport, distribution, and trafficking of drugs with prison sentences from between eight to fifteen years.163 Drug possession for personal consumption is not criminalized, however, minimum amounts to carry for personal use have not been established.164 If a person is found using drugs in public, voluntary treatment must be “promoted, facilitated and provided free of charge” for the purposes of detoxification or breaking drug addiction.165

Unlike the Andean countries analyzed above, which began experiencing large amounts of drug-related crime early in the 1980s, Costa Rica’s experience with drug trafficking is of more recent vintage. Over the past decade, crime levels have been steadily rising, causing incarceration and preventative detention rates and prison overpopulation to rise alongside


163. Id. at art. 73.


judicial systems, has caused many Latin American judicial officials to apply extensive and arbitrary pre-trial detention.\footnote{Pre-trial Detention, DUE PROCESS OF LAW FOUNDATION 1, http://www.dplf.org/en/pre-trial-detention (last visited Sept. 19, 2015) [hereinafter Pre-trial Detention].}

Moreover, even when reforms aimed at addressing prison overcrowding are undertaken, they are either too small-scale, unsustainable, unpopularity, or contain carve-outs for drug-related crimes which inhibit them from truly addressing the problem of overcrowding as related to drug arrests. Examples from each country in review illustrate this point. In Bolivia, prison overcrowding has not ranked high on the reform agenda; however, in September 2013, President Evo Morales implemented a one-time policy pardoning "low-level offenders" in pre-trial detention and people sentenced to less than eight years in prison.\footnote{Elyssa Pachico, Bolivia Struggles to Resolve Its Prison Crisis, INSIGHT CRIME (Sept. 24, 2014), http://www.insightcrime.org/news-briefs/bolivia-struggles-to-resolve-its-prison-crisis/; Williams Farlise, EVO Da Indulto y Amnistia para al Menos 2.000 Reos en el País, LA RAZÓN 2 (Bol.) (Sept. 12, 2013), 3:41 PMA, http://www.la-razon.com/seguridad_nacional/Evo-indulto-amnistia-reos-pais_0_190540498.html.} While this presidential decree was successful in releasing those arrested in connected to any drug-related crimes deemed "low-level," it had no effect on releasing those convicted of small-scale drug crimes, given that the mandatory minimum for such crimes is ten years.\footnote{See supra text accompanying note 36.} Colombia, perhaps the most advanced of the three countries in regards to prison reform, has recently enacted a number of reforms aimed as reducing prison populations.\footnote{Id. at 2.} Under this new legislation, persons serving less than four years are eligible for pardons, convicted individuals with good behavior who have completed three fifths of their sentence are eligible for probationary release, and the maximum sentence for house arrest can be extend to eight years.\footnote{Id.} However, the benefits of these reforms are unavailable to prisoners in custody for drug-related crimes.\footnote{Id.} In Peru, plans to address prison overcrowding by expanding a local prison in Cañete province were so vehemently opposed by local residents that anti-expansion demonstrations left one dead and twenty more injured.\footnote{Elyssa Pachico, Peru Protests Against Prison Expansion, Despite Desperate Overcrowding, INSIGHT CRIME (Dec. 6, 2011), http://www.insightcrime.org/news-briefs/peru-protests-against-prison-expansion-despite-desperate-overcrowding.} Without a change in political will, it is unlikely that any attempt at reducing both the number of persons held arbitrarily, or excessively imprisoned due to drug-related crimes and the prison overcrowding, will be successful.

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Prisons began facing overcrowding in 2008, with overpopulation levels rising annually. In 2013, Costa Rican prisons were 137 percent above capacity, with more than twenty-four percent of prisoners being preventative detainees. With prison overcrowding came the common negative consequences of increased violence and prisoner human rights abuse.

However, unlike the other case study countries, various factions of the Costa Rican government have been concerned with prison overcrowding and its negative effects on prisoners' human rights since the problem began. The Defensoría de los Habitantes (Ombudsman) first discussed the overcrowding problem at length in the 2011 Annual Report of the National Prevention Mechanism against Torture. Similarly, judicial authorities have long expressed concern for overcrowding, with the last two Ministers of Justice speaking out against increased overcrowding, its negative implications, and the need for reform. In 2013, governmental and non-governmental organizations, including the Ombudsman, the Partido Acción Ciudadana (PAC) (Citizens' Action Party), and the Asociación Nacional de Empleados Públicos y Privados (ANEP) (National Association of Public and Private Employees) joined together in calling on the president to declare the country's prison system in a state of emergency; the Ombudsman also requested that the Organization of American States inspect the country's prisons.

The legislature has also actively taken on attempts at prison reform, proposing several initiatives aimed at modifying Law 8204 to reduce prison populations. The legislature has made several attempts to modify the drug trafficking law, in order to differentiate between small, medium, and large scale traffickers and to provide for proportionality of sentencing as such; however, attempts at reform are ongoing. Conversely, the Ministry of Justice and certain legislators have fought off pressures from within Congress aimed at toughening drug sentences. Congress has had success in reforming article 77 of Law 8204, in which the introductions of drugs into certain public venues, including prisons, were made punishable by eight to twenty years. Under the new law, judicial discretion is expanded for women who "for reasons of extreme poverty or due to coercion bring drugs into prison." Sentencing can be reduced to three to eight years imprisonment for women who are living in poverty, are head of household, or caretakers of children, the elderly, or disabled persons. Additionally, prison terms may be served under house arrest or probation. Costa Rica has also recently undertaken broader prison reforms with international assistance aimed at improving security and prison conditions and expanding rehabilitation and re-insertion programs.

Costa Rica's prison reform process has led some to herald it as a "new model" for prison standards in Latin America. One of the reasons Costa Rica

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167. INFORME ANUAL, supra note 166, at 26.


169. INFORME ANUAL, supra note 166, at 30–33.

170. See generally INFORME ANUAL, supra note 166; Evans, supra note 168.

171. See generally INFORME ANUAL, supra note 166.


173. Evans, supra note 168.


175. Thale & Beltran, supra note 15, at 3.


178. L.2024, art. 77.


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Rica’s reforms have thus far been successful is that the reform process is being driven from within the government. Successive Ministers of Justice, the Ombudsman’s office, judicial authorities, and the president herself are all in support of enacting drug-law reforms, along with other prison reforms, that will effectively aid in reducing disproportionate sentences, increasing rehabilitation and reintegration, and ultimately, reducing overcrowding.183 The Costa Rican government’s view of the drug problem as a public health challenge, as opposed to a criminal law issue, has shaped the way in which the government views excessive and abusive prison sentences for drug-related crimes.184 While Costa Rica’s unique political and economic history, such as its “relatively low crime rate, relatively strong State structure, [and] relatively well-established respect for the rule of law,” clearly differentiate it from source countries such as Bolivia, Colombia, and Peru (which historically and presently struggle with high crime rates, high levels of poverty, and lack of strong, and uncorrupt, State structures); lessons can be drawn from the Costa Rican experience.185 Drug-related prison reforms will not succeed unless there is strong will within the government to remedy the injustices acted upon low-level traffickers and consumers. There must be a shift in the view of incarceration from punitive to rehabilitative before any of the reforms prescribed to our case study countries can be undertaken.

VII. CONCLUSION

Reforms prescribed by non-governmental actors aimed at reducing overcrowding in Latin American prisons through drug-law reform will not succeed without a fundamental shift in the way Latin American governments, like those of Bolivia, Colombia, and Peru, view the role of the prison system. While harsh mandatory sentencing and pre-trial detention policies have historically been externally imposed on these governments, the prohibitionist stance towards drug-control has become entrenched within many Latin American policies. While the causal link between harsh drug policies, which lead to disproportionate jail time, prison overcrowding, and subsequent human rights abuses, and high levels of recidivism, can be clearly demonstrated, this will not spur Latin American governments to action. While international organizations and rule of law reformers may aim to undertake small scale prison reforms (on a project-to-project or prison-to-prison basis), what is need to address the larger justice issues described in this paper is wholesale reform, lead from within the government, aimed at truly addressing the key drivers of the overcrowding problem—draconian drug laws. Thus far, reforms undertaken in the case study countries have failed to address this catalytic issue. While positioned within a markedly different political, social, and historical setting, an examination of Costa Rica’s recently undertaken drug law reforms serves as a useful example of the sort of internal, government support needed to begin to undertake such reforms. Costa Rica’s drug-reform process is young, and still underway; however, it demonstrates what is needed to begin the potent drug-law reforms prescribed to the majority of Latin American countries—a broad base of strong governmental support.

183. See generally Id.
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\textsuperscript{185} Thale & Beltran, supra note 15, at 3.