

PRACTICAL GUIDE
**to Reduce Pretrial
Detention**



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Presentation

A. Scope and purpose

1. The Practical Guide on Measures to Reduce the Use of Pretrial Detention constitutes the first initiative on the part of the Inter-American Commission on Human Rights (hereinafter "the IACHR" or "the Commission") to present the main recommendations contained in its thematic reports in a didactic manner directed specifically at the authorities responsible for dealing with a particular issue. In particular, this Practical Guide includes the principal recommendations regarding lines of action and public policies contemplated in the *Report on Measures to Reduce the Use of Pretrial Detention in the Americas*. The IACHR trusts that it will prove to be an effective practical tool facilitating implementation of the recommendations contained in that report.

2. In light of the above, the purpose of this Guide is to present the recommendations relating to reduced use of pretrial detention to the authorities responsible for addressing the challenges encountered in the region that prevent that regime being used in a manner compatible with international standards. Thus, the Guide is directed at authorities in the judicial, legislative, and executive branches of government, in Public Prosecutor Services (*Ministerios Públicos*) and Public Defender Offices, and in penitentiary systems. Above all, this tool offers succinct recommendations for actions relating to the design, implementation, and monitoring of measures aimed at reducing the use of pretrial detention pursuant to international standards in this matter and focusing primarily on the following aspects: a) general measures regarding state policies; b) the implementation of alternative measures; c) measures to expedite proceedings; and d) the incorporation of a gender perspective and differentiated approaches in respect of

women and other persons belonging to groups at special risk* .

3. This Guide starts from the premise that the use of pretrial detention must guarantee the presumption of innocence principle, be limited due to its exceptional nature, and be guided by the principles of legality, necessity, proportionality, and reasonableness. This Guide is an instrument for promoting a change in paradigm in the way authorities conceive of the legal basis and need for the use of pretrial detention. At the same time, it draws attention to the advantages of, and need to, expand the use of alternatives to pretrial detention, as a way to optimize the social utility of the criminal justice system and of the resources at the State's disposal.

4. The IACHR stresses that this Practical Guide is not limited solely to the sphere of actions by State authorities. It also seeks to ensure that other relevant actors, such as civil society and persons who have been tried and released from prison, are involved in establishing and monitoring the measures it addresses. The rationale here is to ensure that implementation and follow-up to the recommendations contained in the second IACHR report on pretrial detention are comprehensive, participatory, and inclusive; and, in particular, incorporate the notion of the persons State policies are meant to serve, as holders of rights able to play an active part in decision-making regarding matters that concern them and who have both the ability and opportunity to insist on protection of their rights and on accountability of the government officials involved.

B. Structure

5. In light of the purpose of this Practical Guide and the fact that the presentation of these recommendations is based mainly on the format used for the *Report on Measures to Reduce the Use of Pretrial Detention in the Americas*, it is structured as follows, in three sections:

- General measures regarding state policies.
- Alternatives to pretrial detention.
- Other measures to reduce the use of pretrial detention.
- Women and other persons belonging to groups at special risk.

6. In each section, the IACHR first outlines its core considerations regarding the topics to be addressed and the most representative of the challenges faced in the region that prevent pretrial detention being used in the exceptional manner that is required by its very nature. Where necessary, this Guide also includes a brief explanation of the basic concepts needed for a better understanding of the actions entailed in preparing, implementing, and monitoring the kinds of measures referred to in each section. This Guide also includes brief narratives from relevant actors who have been directly involved in the design, implementation, and operation of certain measures aimed at reducing the use of pretrial detention, such as supervising the implementation of non-custodial measures, hearings in prisons, electronic monitoring mechanisms in criminal matters and custody hearings (*audiências de custódia*).

7. At the same time, in each section, the Commission highlights examples of good practices adopted by various States in each subregion to illustrate, for the authorities concerned, the types of

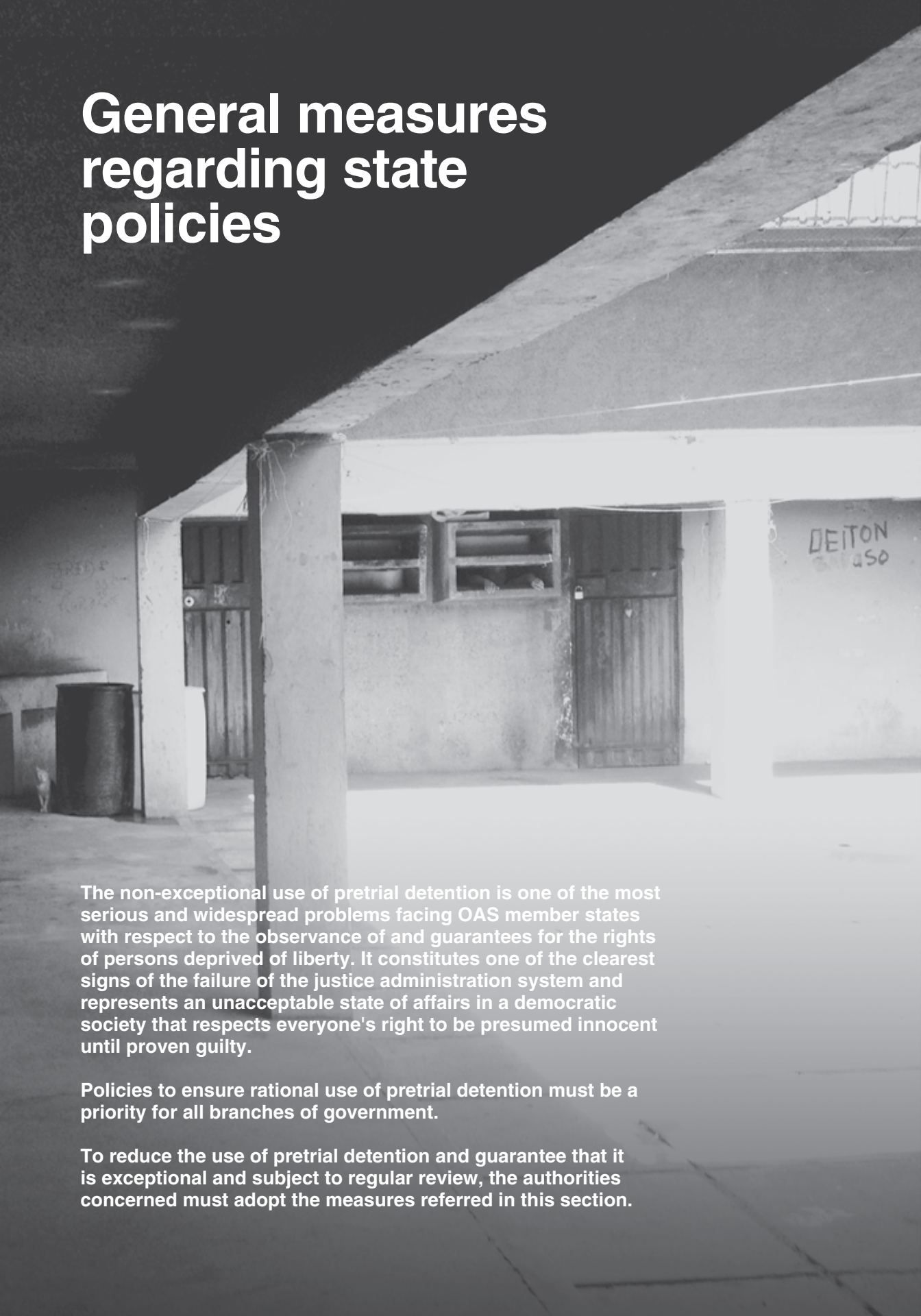
measures that States in the region have adopted and that reflect their commitment to and understanding of the importance of using pretrial detention in accordance with international standards. In this regard, like the *Report on Measures to Reduce the Use of Pretrial Detention in the Americas*, this Practical Guide attempts to follow up on the first IACHR report on pretrial detention, published in 2013. It therefore includes examples on good practices adopted by States in the region from January 2014 to April 2017, which could offer a solution to the challenges of reducing the use of pretrial detention and complying with the recommendations of the IACHR. The Guide contains references to good practices recently adopted by the following 13 States in the region: Argentina, Bolivia, Brazil, Canada, Colombia, Costa Rica, Ecuador, Jamaica, Haiti, Mexico, Paraguay, Peru, and the United States. Those references include hyperlinks to facilitate more in-depth consultation regarding the measures, provisions, or policies mentioned.

* In this regard, as established in the *Report on Measures to Reduce the Use of Pretrial Detention in the Americas*, the thematic on the situation of pretrial detention with respect to children and adolescents, is not included in the scope of this Guide. This is because as of the adoption of this report, that situation, as well as the state measures to respond to it, are to be followed up on by the IACHR's Rapporteurship on the Rights of the Child, in the context of carrying out recommendations of the *Report on Juvenile Justice and Human Rights in the Americas*, issued by the IACHR in 2011, and other initiatives, such as issuing the *Report on Children and Adolescents in the Adult Prison System in the United States*.

Section 1



General measures regarding state policies



The non-exceptional use of pretrial detention is one of the most serious and widespread problems facing OAS member states with respect to the observance of and guarantees for the rights of persons deprived of liberty. It constitutes one of the clearest signs of the failure of the justice administration system and represents an unacceptable state of affairs in a democratic society that respects everyone's right to be presumed innocent until proven guilty.

Policies to ensure rational use of pretrial detention must be a priority for all branches of government.

To reduce the use of pretrial detention and guarantee that it is exceptional and subject to regular review, the authorities concerned must adopt the measures referred in this section.

A. Correct the excessive use of pretrial detention

Basic concepts

The starting point for any analysis of the rights of, and the treatment accorded to, persons in pretrial detention is based on the **presumption of innocence principle**, which means that even should it be necessary to deprive someone of his or her liberty during proceedings, that person's legal status is "innocent."

The **use of pretrial detention** must abide by the following **principles**:

Exceptionality	Anyone subject to criminal proceedings must be tried in liberty and may only exceptionally be deprived of liberty.
Legality	The liberty of the accused may only be curtailed strictly in accordance with law.
Necessity	Pretrial detention shall only be admissible when it is the only way to ensure that the purposes of the proceedings are accomplished.
Proportionality	This entails a rational relationship between the precautionary measure and the purpose sought, so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or excessive compared to the advantages obtained from the restriction.
Reasonableness	Pretrial detention must be for a reasonable period of time. Even when there are reasons for keeping a person in pretrial detention, he or she must be released if the period of detention has exceeded a reasonable limit.

At the same time, the only **legitimate grounds for pretrial detention** are:

Danger of flight	Risk of an accused attempting to evade justice.
Risk of obstruction of justice	Danger that the accused might attempt to obstruct the criminal investigation.

Judicial, Legislative, and Executive Branches

- √ Adopt the measures needed to correct the excessive use of pretrial detention, in order to ensure that its use abides by the principles of exceptionality, legality, necessity, and proportionality.
- √ Take steps to reduce the use and duration of pretrial detention.
 - These measures stem from a technical understanding of the following:
 - The nature of the crime.
 - How a criminal justice system can be effective.
 - General strategies for crime prevention.
- √ Promote dialogue and inter-agency debate to ensure effective implementation and evaluation of the measures designed to reduce pretrial detention, based on the following:
 - International standards in this matter.
 - Gender perspective.
 - Differential approaches to different persons belonging to groups at special risk.
 - Clear strategies for collaboration.
- √ Involve civil society in the design of the above-mentioned policies, so as to ensure that their implementation is comprehensive, participatory, and inclusive.
- √ Generate mechanisms to enable persons deprived of liberty and those that have been released to play an active part in the formulation, implementation, and evaluation of measures designed to reduce pretrial detention.
- √ It is essential that persons who are the ben-

Good practices in Bolivia, Mexico, and the United States

Reduction of the duration of pretrial detention

In **Bolivia**, Law No. 586 on Clearing Up Backlog and Making Effective the System of Criminal Procedure (Ley No. 586 de Descongestionamiento y Efectivización del Sistema Procesal Penal) caps pretrial detentions at 12 months without indictment and at 24 months if there is no verdict.

In **Mexico**, the National Code of Criminal Procedure (Código Nacional de Procedimientos Penales) establishes that the maximum duration of pretrial detention shall be one year. This amendment adopts a standard that is more protective than even the Constitution of Mexico, which provides for a maximum duration of two years.

The establishment of services that allow verification of procedural risks and supervision of precautionary measures

In the **United States**, SB 91 was enacted in July 2016 in Alaska, establishing a program for these kinds of services. Their main purposes are to a) assess the risk of accused persons not appearing before the judicial authorities if they are released before trial; and b) to exercise supervision over persons released by the court. In particular, before the person's first appearance before a judicial authority, the officers running this program issue recommendations relating primarily to the advisability of release and the least restrictive release measures needed to safeguard the investigation and appearance before the court.

eficiaries of state policies are treated as the holders of rights who can participate actively in decision-making on issues that affect them, with a capacity and opportunity to claim protection for their rights and demand accountability.



Judiciary

- ✓ Order the use of a precautionary measure other than pretrial detention if States are not capable of guaranteeing conditions compatible with the human dignity of persons subject to legal proceedings.
- ✓ Promote a veritable change of paradigm in judicial culture and practice regarding the notion of the admissibility of, and need for, pretrial detention

Good practice in Argentina

Design and implementation of public policies based on a debate with civil society and other relevant actors

The "Justice 2020" Program (Programa "Justicia 2020") in Argentina, began being implemented in March 2016, offering an opportunity for dialogue between authorities and civil society aimed at formulating, implementing, and evaluating access to justice policies. "Justicia 2020" is a government program developed over the past four years. It has lines of action in the following core areas: institution-building, civil law, criminal justice, access to justice, human rights, and justice and the community.

Visit to Guatemala, 2017 — Credit Luis Soto / CIDH

B. Eradication of the use of pretrial detention as anticipated punishment

The implementation of criminal justice policies and legal reforms that call for more incarceration as the solution to citizen insecurity problems is one of the main factors contributing to the non-exceptional use of pretrial detention

There is no empirical evidence that shows that policies based on greater restrictions on the right to personal liberty have a real impact on reducing crime and violence, or resolve more broadly the problems of citizen security.

To avoid the use of this exceptional regime as a response to measures based on restrictions on the right to personal liberty that seek to solve citizen insecurity problems through more incarceration, the authorities concerned must adopt the following measures:

Judicial, Legislative, and Executive Branches

- √ Step up efforts and muster the political will necessary to eradicate the use of pretrial detention as a tool of social control or a form of anticipated punishment.
- √ Send an institutional message of support for the rational use of pretrial detention and for observance of the presumption of innocence principle.
 - That message needs to be sent from the

highest echelons of government and of the administration of justice.

Judiciary

- √ Hand down rulings on the use of pretrial detention, based on the following:
 - The principles of exceptionality, proportionality, legality, and necessity.
 - Exhaustive, not just formal, analysis of each case.
- √ A resolution ordering pretrial detention must:
 - Identify the accused by name.
 - List the charges against him or her and their legal characterization.
 - State the circumstances warranting the measure.
 - Clearly set the date when pretrial detention ends.

Good practice in Colombia

Progress made in case-law aimed at rationalizing the use of pretrial detention

In **Colombia**, the Supreme Court of Justice has handed down various judgments that constitute important judicial precedent with respect to the prohibition on excluding certain offenses from the regime established for ending pretrial detention, without any basis in objective criteria, merely to answer to standards such as “social alarm” (*“alarma social”*), “social repercussion” (*“repercusión social”*), or “dangerousness” (*“peligrosidad”*). In Judgment 85126 of April 20, 2016,

the Criminal Chamber of the Supreme Court of Justice determined that pretrial detention timeframes to investigate and prosecute should be applied to all types of offenses. That ruling was in the context of Law 1121 of 2006, which excluded from pretrial release those persons accused of committing offenses related to kidnapping, terrorism, or extortion.

In addition, considering that no type of “reduction in sentences, benefits, or subrogates” were available, legislatively or judicially, for persons accused of committing crimes against liberty, integrity, sexual formation, or kidnapping of minors, Judgment 84957 of the Chamber of Criminal Cassation of the Supreme Court of Justice, handed down May 11, 2016, allowed for the application of provisional release of persons charged with sexual offenses against minors due to the running of the limitations period.

Legislative Branch

- ✓ Repeal any provision requiring pretrial detention based on the type of crime.
- ✓ Increase the number of criminal offenses precluding the use of pretrial detention.
- ✓ Refrain from increasing restrictions on procedural mechanisms and possibilities for release from prison.
- ✓ Refrain from excluding certain offenses from the regime established for ending pretrial detention.
- ✓ Refrain from treating some cases differently from certain offenses during proceedings, without any basis in objective criteria, merely to an-

swer to standards such as “social alarm,” “social repercussion,” “dangerousness,” or the like.

- ✓ Consider that the provision precluding the possibility of using precautionary measures other than pretrial detention based on the penalty for the alleged offense ignores the principles of necessity and proportionality.

Good practice in Argentina and judicial decision in Colombia

Repeal of provisions envisaging mandatory pretrial prevention

In **Argentina**, the new criminal code of procedure (nuevo Código Procesal Penal) adopted in 2015 and still not in force -- unlike the Code of Procedure still in force -- does not provide for the so-called “*delitos inexcusables*” (offenses for which no non-custodial measure may be granted).

Case law that prohibits differential treatment in relation to pretrial release

The Supreme Court of Justice of Colombia, by Judgment 85126 of April 20, 2016, determined that the time frames of pretrial detention for investigating and prosecuting should apply to all types of criminal offenses. This decision was handed down in the context of Law No. 1121 of 2006, which excludes from prison benefits those persons accused of committing criminal offenses related to kidnapping, terrorism, or extortion.

C. Guarantees for the independence of judicial officers

The lack of independence of judicial officers still poses one of the principal challenges to the use of alternatives to pretrial detention and, consequently, to a reduction in its use.



Considering the challenges judicial officers face in using pretrial detention in a manner that meets international standards, the authorities concerned must:

Judicial, Legislative, and Executive Branches

- √ Adopt the judicial, legislative, administrative, and institutional measures needed to guarantee the independence, autonomy, and impartiality of judicial officers.
- Those guarantees are necessary to allow said officers to perform their functions free from any kind of interference.

- √ Refrain from making public opinions that directly discredit judicial officers for acts related to the use of pretrial detention.
 - That obligation remains even when such statements are not offenses or misdemeanors under domestic law.

Judiciary and the Public Prosecution Service

- √ Create institutional incentives and draw up strategic plans for training and sensitizing judicial officers with regard to:
 - The importance of their acting independently and autonomously.
 - The exceptional nature of pretrial detention and the principles governing its use.
 - The necessity and advantages of using alternatives to pretrial detention.
- √ Establish clear and detailed rules regarding conduct giving rise to disciplinary sanctions.
- √ Decisions relating to disciplinary sanctions must:
 - Be commensurate with the infraction committed.
 - Be designed to enhance the conduct and performance of government officials.
 - Be substantiated and public.
 - Guarantee due process.
 - Be subject to review.
- √ Ensure that information relating to disciplinary procedures is accessible and transparent.

Visit to Guatemala, 2017 — Credit Luis Soto / CIDH

D. Strengthening public defender services

Inadequate public defender services continue to be one of the main reasons for the prolongation of the pretrial detention regime.

The shortcomings in defense stem mainly from insufficient resources to carry out public defenders' mandates; lack of diligence in their work; late access to the provision of such services; and lack of independence of the public defenders' offices.

- √ Under domestic law, grant public defender services functional, administrative, and financial autonomy.

Public Defenders' Office

- √ Provide public defender services from the moment of arrest by the police.
 - The advantages of involving the defense from the start are that it:
 - Guarantees more effective defense.
 - Shortens pretrial detention time.
 - Prevents ill-treatment and torture during detention.

Judicial, Legislative, and Executive Branches

- √ Afford public defenders sufficient guarantees to enable them to do their job efficiently and on an equal footing with prosecutors, for instance with regard to:
 - Capacity to call for, present, and produce evidence.
 - Access to files and to the various different investigative proceedings.
- √ Accord priority attention to the coverage and quality of public defender services.
- √ Guarantee that public defender services are made available from the moment a person is arrested by the police, so as to ensure that such services are timely and effective and geared to protecting the fundamental rights of the accused.

Legislative Branch

Good practice in Brazil

Establishment of a specific policy for persons in pretrial detention

In **Brazil**, thanks to a Decision No. 297 (Deliberação CSDP No. 297) of May 8, 2014, the Public Defenders' Office in São Paulo implemented the practice of visiting detention centers to interview persons in pretrial detention and thus be in a position to offer them better legal counsel. The object is to guarantee the right of due process of law to persons subject to judicial proceedings and also to safeguard their lives and personal integrity.

According to official figures, in 2015 a total of 12,253 men and 1,588 women were visited by defenders in the prisons of São Paulo. On average, 20.7% of the persons served by the Office of the Public Defender secured release within 90 days of the visits.

Experience

Experience applying the special policy of attention to persons in pretrial detention, in Brazil

Next is a description of a documentation visit that included the program described, by a researcher from the Stanford Human Rights Center.

As a result of participating in a visit by the Stanford Human Rights Center, in February 2016 I became aware of several lessons learned in the context of applying the special policy of attention for persons in pretrial detention. Perhaps the most important is that the very institutions of the State are perfectly capable of designing and implementing innovative mechanisms without necessarily requiring personnel or a (significant) budget increase. In São Paulo, designing the technological framework and implementing this policy took only four months and the staff of the Department of Prisoner Assistance of the Office of the Public Defender was in charge of that process.

Second, the success of the policy shows that even in overburdened institutions such as the public defenders' offices implementing new policies is possible – even if they require an investment of additional time and effort on the part of their staff. In large measure, this is due to public defenders' admirable dedication to their work. At the same time, it is important for the institutions to take care not to excessively overburden their staff members. It is important that they provide adequate compensation if these staff members incur additional expenses or hours.

Third, the experience shows that it is important to adopt a gender perspective. In the São Paulo experience, the defenders interview detained persons using a pre-established questionnaire that is different for men and women, and for LGBTI persons. This policy recognizes that these persons face different situations and difficulties when entering a prison. It tends to be more common for women to bear sole responsibility for family care, and for their detention to give rise to major problems in caring for children and other persons in

vulnerable situations (such as older persons and persons who are ill). In addition, there may be concerns for the physical safety of LGBTI persons in prison. Sensitivity to those differences will make it possible to better address these persons' needs.

Finally, the special policy shows the value added that the use of technology may have for protecting human rights and access to justice. The use of electronic forms makes it possible to quickly process and systematize the information compiled. This facilitates sharing these data with defense counsel, as well as to compile statistics for designing new public policies.

Mirte Postema — Researcher from the Stanford Human Rights Center

E. Supervision of measures aimed at reducing the use of pretrial detention



One of the main challenges in implementing these measures is the lack of appropriate mechanisms for monitoring their implementation

Executive, Legislative, and Judicial Branches

- ✓ Establish mechanisms to monitor effective implementation of these measures.
- ✓ Involve civil society, persons deprived of liberty, and persons released from prison in the supervisory mechanisms.
 - That involvement will allow the supervision process to be comprehensive, participatory, and inclusive.

Executive and Judicial Branches

- ✓ Establish measurable objectives for monitoring any measure adopted.
- ✓ Establish monitoring mechanisms that incorporate a gender perspective and differentiated approaches and that permit an assessment of the suitability of the attention provided to persons belonging to groups at special risk, given their special circumstances.
- ✓ Have reliable data collection systems that make it possible to identify those aspects that need to be improved to overcome any challenges that may arise in implementing the respective measures.

In order for the authorities concerned to be able to establish mechanisms for appropriate supervision of the application and implementation of measures aimed at reducing the use of pretrial detention, the following actions need to be taken:

Visit to Argentina, 2016 — Credit Sofía Galván / CIDH

F. Conducting abbreviated trials in accordance with human rights standards

The characteristic features of "abbreviated trials" are shorter procedural time frames, expedited affirmance of judgment, an offer to conduct oral proceedings, and a waiver of in-depth examination of the merits by the accused.

In connection with these trials, the number of persons in pretrial detention is declining but the number of arbitrarily convicted persons is increasing, due to the lack of sufficient guarantees and lack of time for preparing an adequate defense.

In order to avoid subjecting accused persons to trials geared mainly to reducing pretrial detention at any cost, without fully guaranteeing due process, the authorities concerned must:

Executive, Legislative, and Judicial Branches

- ✓ Ensure that persons subject to guilty plea or abbreviated trials enjoy all due judicial guarantees, including adequate defense.

Judiciary

- ✓ Ensure that persons subject to these kinds of trials can provide their voluntary consent in full knowledge of the scope of the consequences thereof.
- ✓ Verify the absence of any form of coercion to make the accused agree to these kinds of trials.

- ✓ Ensure that conviction is substantiated by an exhaustive analysis of the case and not just on an agreement presented by the public prosecutor.
- ✓ Ensure that appropriate and comprehensive information is available for determining the effectiveness of guilty plea or abbreviated trials.
- ✓ Publish the data on the number of proceedings conducted. Those data must include, at a minimum, information regarding the following:
 - The use made of alternative measures.
 - Early releases.
 - The decision to order pretrial detention.
 - The issuance of a conviction.
- ✓ Ensure that the data relating to such trials contain a statistical breakdown specifying:
 - Type of offense.
 - Reason for choosing an abbreviated trial (*causal de aplicación*).
 - Age.
 - Gender.
 - Sexual orientation.
 - Gender identity and expression.
 - Race.
 - Ethnicity.
 - Type of disability.

Section 2



Alternatives to pretrial detention



One of the principal recommendations formulated by the IACHR in its *Report on the Use of Pretrial Detention in the Americas* –aimed at rationalizing the use of pretrial detention and thereby addressing the issue of overcrowding– was to use alternatives to pretrial detention.

In order to rationalize the use of pretrial detention, address the overcrowding issue, and optimize available resources, the authorities concerned should use alternatives to pretrial detention, bearing in mind the obligations referred in this section.

A. Use of alternatives to pretrial detention

Basic concepts

"**Alternative measures**" are measures or options of a procedural nature that allow the accused to live in freedom during criminal proceedings.

The following are **examples** of alternative measures:

- A promise to submit to the proceedings and not to obstruct the investigation.
- Periodic presentation before a judicial authority or a designated authority.
- Subjection to the care or supervision of a given person or institution.
- Prohibition on leaving a given area without authorization.
- Withholding of travel documents.
- Immediate separation from domicile, in cases of domestic violence.
- Bail bond.
- House arrest.
- Electronic monitoring mechanisms in criminal matters.
- Restorative justice programs in criminal matters.

Advantages

The use of alternative measures has the following advantages compared to deprivation of liberty:

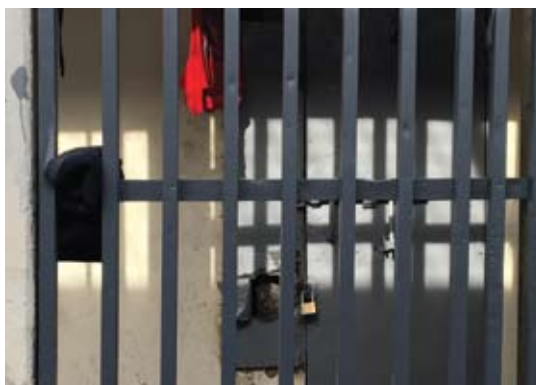
- It is an **indispensable tool for reducing overcrowding in prisons.**
- It **avoids the disintegration and stigmatization of communities** associated with the personal, family, and social consequences of pretrial detention.
- It **lowers the repeat offender (recidivism) rate.**
- It **makes more efficient use of public resources.**
- It is a way of **optimizing the social utility of the criminal justice system and of the resources available.**

Legislative and Executive Branches

- ✓ Guarantee allocation of the financial resources needed to ensure that alternatives to pretrial detention function and can be used for as many accused as possible.

Judiciary

- ✓ Use alternative measures except when the danger of escape or of obstruction of the investigation cannot reasonably be avoided, bearing in mind the basic principles and standards governing the use of pretrial detention.



Visit to Argentina, 2016 — Credit Sofía Galván / CIDH

- √ Choose to use the least harsh measure and taking into consideration at all times:
 - A gender perspective.
 - Where applicable, the best interests of the child.
 - The special impact it could have on other persons belonging to groups at special risk.
- √ Do not put off the decision to use alternative measures.

Public Prosecution Service (Ministerio Público)

- √ When requesting pretrial detention, state the reasons why using alternative measures would not be viable, taking into consideration the basic standards governing the use of pretrial detention.

Good practices in Ecuador, Mexico, Peru, and the United States

Regulations providing for the use of alternative measures

In **Ecuador**, the Comprehensive Organic Criminal Code (Código Orgánico Integral Penal) provides for four types of alternative measures: prohibition on leaving the country; periodic appearance before a designated authority or institution, house arrest, and wearing an electronic surveillance device.

In **Mexico**, the National Code of Criminal Procedure (Código Nacional de Procedimientos Penales) establishes a wide

variety of alternative measures, such as: periodic presentation before a judicial authority or a designated authority, a bail bond, attachment of property, subsection to the care or supervision of a given person or institution, institutionalization, prohibition on approaching certain persons or places, immediate separation from the domicile, temporary suspension of work activity, electronic locators, and house arrest.

In **Peru**, Legislative Decree No. 1229 of September 2015 (Decreto Legislativo No. 1229 de septiembre de 2015), which amends the 2004 Code of Criminal Procedure, provides for additional alternative measures not contemplated in that Code, such as: subsection to the care and supervision of a determined person or institution; a ban on leaving the area of residence; a ban on visiting certain places; presentation before a particular authority; prohibition to communicate with or approach the victim or certain persons; a bail bond; the wearing of an electronic surveillance device.

Public policies for implementing alternative measures

In the **United States**, in the context of the initiative launched in July 2015 by the mayor of New York City – to reduce pretrial detention by increasing the number of persons tried in the community – the local judiciary promoted mainly the adoption and use of alternatives to pretrial detention such as: (a) i.e. the obligation to report in person periodically to the judicial authority; (b) determination of bond subject to the appearance of the accused, and not to monetary conditions; and (c) strengthening the use of supervised release programs, by which the person appears in a certain place or is monitored by telephone.

B. Supervision of the use of alternative measures

One of the main challenges associated with the use of alternative measures is the lack of readily available information regarding their monitoring and supervision.

The lack of clear and reliable records on the degree of compliance with the obligations imposed in the context of the alternative measure ordered may indicate ineffective mechanisms for overseeing and monitoring such measures, as well as inadequate coordination among the authorities involved.

Judicial, Legislative, and Executive Branches

- √ Promote and supervise the use of alternative measures by:
 - Conducting periodic assessments to analyze and verify the goals pursued, how they are working, and effectiveness.
 - Incorporating a gender perspective and differentiated approaches when setting up supervisory and monitoring mechanisms.
- √ Generate statistics and produce reliable and systematic information regarding outcomes, in order to identify obstacles and good practices in the use of alternative measures.
- √ Have information in the public domain that enables possible beneficiaries, their defenders, and other stakeholders to tap relevant data on how alternative measures work, including:
 - Beginning of implementation.
 - Criteria for their use.
 - Procedure.
 - General obligations imposed while the non-custodial measure is in force.
 - Statistics on application broken down by age, gender, sexual orientation, and gender identity and expression.
- √ Ensure efficient coordination among authorities involved in criminal justice issues and other supporting entities, and between those bodies and civil society organizations.
- √ Guarantee full community involvement connection with the implementation of alternative measures.
- √ Establish more solid arrangements for monitoring compliance with alternative measures, through:
 - More support for efforts to raise awareness of the advantages of using them.
 - Greater trust among beneficiaries regarding their use.

Good practices in Mexico and the United States

The establishment of participatory and inclusive mechanisms

In the **United States**, in May 2015, the President of the Supreme Court in the state of Maine installed a working group comprised of government representatives and experts on the subject to review the pretrial detention situation in the state and issue pertinent recommendations. That group also focused primarily on the supervision of alternative measures. In that regard, guidelines were established specifically for creating and supervising community service programs and to develop and improve the procedures related to imposing fines and other alternative measures.

In **Mexico**, evaluation and supervision of alternative measures were conducted through the "precautionary measures units" (Unidades de Medidas Cautelares ("UM-ECA")). Based on the information available, in September 2015, various federative entities exhibited high levels of compliance with alternative measures to pretrial detention. Thus, the states of Baja California, Guerrero, Morelos, and Puebla, and Mexico City, have rates of effectiveness of approximately 95%. The UMECA also have the participation of civil society organizations, which help supervise the precautionary measures.

to be followed in deciding whether to modify or revoke them:

- Carefully analyze the arguments submitted by the supervisory authorities and by the person subject to the alternative measure.
- Noncompliance with alternative measures may be punishable, but does not automatically warrant imposing pretrial detention.

Good practices in Ecuador and Mexico

Regulations on noncompliance with alternative measures

In **Ecuador and Mexico**, the Comprehensive Organic Criminal Code (Código Orgánico Integral Penal) and the National Code of Criminal Procedures (Código Nacional de Procedimientos Penales), respectively, contain provisions focusing on actions to be taken in the event of noncompliance with alternatives to pretrial detention that in general, meet international standards.

Judiciary

- √ When faced with noncompliance with the obligations imposed in connection with the use of alternative measures, the following steps need

Experience

Experience with measure related to supervising alternative measures in Mexico

Following is a description of the experience of the executive director of the Instituto de Justicia Procesal Penal (Institute for Criminal Procedure Justice), who is very much associated with the implementation of the new adversarial system in Mexico, and who discusses his experience with respect to the operation of Mexico's precautionary measures units.

To date the precautionary measures units in Mexico, report average compliance – consisting of the appearance of the person accused before the judicial authority – of around 90%; in Mexico City it is 87%. Moreover, they reduce the cost associated with keeping a person in pretrial detention, since the cost of non-custodial supervision is about 80% less. This degree of compliance shows that it is possible for persons, under arrangements involving supervised release, to be able to participate in their trials without being removed from society, without obstructing justice, and without endangering victims or witnesses. The methodology of the units implies having an organizational structure, designing manuals, holding intensive trainings, and establishing networks of civil society organizations to carry out the supervision effort.

One of the lessons learned for consolidating this institution in the Mexican procedural system was to spell out the scope of its authority in the statute. Another key is training based on human rights and empathy for persons who are facing criminal charges, treating them as human beings, not as a case number. This human approach is what results in the high compliance rates, because the supervisor designs his or her strategy based on each person's particular circumstances. The judicial authority imposes the conditions of supervised release, the supervisor explains what happened in the hearing, what the measure means, how supervision is to take place, and the consequences of failing to comply with the terms. This communication is one of the keys for supervision;

in addition, permanent contact with the person supervised is important so that he or she feels accompanied, whether through phone calls, home visits, visits to the supervising organizations, or interviews at the units.

Another key is involving government programs and civil society organizations in supervision so that the persons supervised can go to the places closest to them in their communities. Community supervision makes it easier for people not to have to travel long distances, thereby saving the associated costs in addition to travel time. In Mexico, we have published the manual "*Comunidad en Libertad*" to support the units that are forming their own networks of supervisory organizations.

We have to address several challenges: (a) the authorities need to be allocated the human and financial resources needed to do the field work performed by the unit; (b) the prosecutors, defense counsel, and judicial authorities should use the information produced by the unit in every case; (c) when there is a change in the leadership team at the units, the new authorities should not try to change the model that is already working; (d) they should be endowed with information technologies; (e) it must be assured that the two components of the unit, risk assessment and supervision, complement one another; and (f) make decisions based on evidence and information.

At this time, the model in Mexico is being consolidated and is evolving; it is important to continue training the personnel and producing teaching materials so as to continue expanding the relevant knowledge. The precautionary measures units have supported curtailing the use of pretrial detention, have seen high rates of compliance, and have also driven down the cost of pretrial detention to the state.

Javier Carrasco Solís — Instituto de Justicia Procesal Penal, A.C., Executive Director

C. Types of alternative measures

C1. Electronic monitoring mechanisms



Using electronic mechanisms poses major challenges, such as: their limited use; delays in putting them in place; and obstacles to accessing this measure by persons living in poverty or with low incomes.

These kinds of mechanisms may also lead to stigmatization of the beneficiaries because of the visibility of the devices used.

With respect to the use of electronic mechanisms, the authorities concerned must strive to do the following:

Judicial and Legislative Branches

- ✓ Ensure that the use of electronic mechanisms does not constitute a form of discrimination against persons who cannot afford to finance the use of them.

Judiciary

- ✓ Take all necessary steps to ensure that the use of electronic surveillance mechanisms is compatible with material equality criteria.
- ✓ In cases in which the inability of the person on trial to pay has been shown, another measure to ensure appearance that does not entail deprivation of liberty must be used, or else there should be no charge for the use of such mechanisms.
- ✓ Take the financial circumstances of the ac-

Basic concepts

"Electronic monitoring mechanisms" comprise surveillance of an accused by means of an electronic tracking or positioning device showing his or her location.

cused into account when deciding on the use of electronic surveillance mechanisms.

- ✓ Take steps to ensure that the use of these devices meets material equality criteria and does not discriminate against those who cannot afford them.

Executive Branch

- ✓ Support the technological progress needed in respect of the use of electronic surveillance mechanisms so that they can be used without danger of stigmatization.

Good practices in Argentina and Brazil

Establishment of special programs for electronic surveillance in criminal matters

In **Argentina**, in the federal jurisdiction, the Ministry of Justice and Human Rights adopted Resolution No. 1379 of June 16, 2015 (Resolution No. 1379 de 16 junio de 2015), creating the Program of Assistance for Persons under Electronic Surveillance. In March 2016, by Resolution 86/2016 (Resolution 86/2016), the scope of application of this program was expanded to include persons tried or convicted by the national, federal or provincial courts whose domicile is in any part of the territory of the Argentine State. As of October 2016 a total of 192 persons, at the federal level, were wearing the electronic bracelets; most are in pretrial detention (79%); and 63% of the beneficiaries are women. The provinces of Buenos Aires and Mendoza had, respectively, 1,245 and 68 persons who were beneficiaries of this measure.

In **Brazil**, through Administrative Act No. 42 of 2015 (executive order No. 42 [Portaria] de 2015), the Ministry of Justice developed a management model for electronic surveillance in criminal matters. Following that measure, the Ministry issued several documents containing guidelines for the use of such mechanisms, including: “The implementation of the electronic monitoring policy of persons in Brazil” (A implementação da política de monitoração eletrônica de pessoas no Brasil), of 2015; “Guidelines for the treatment and protection data of electronic monitoring of persons” (Diretrizes para tratamento e proteção de dados na monitoração eletrônica de pessoas), of 2016; and “Educational plans for the monitoring of persons” (Planos educacionais para monitoração eletrônica de pessoas), of 2017, covering electronic surveillance policy, related data protection instructions, and educational plans for the electronic monitoring of persons.



Visit to Honduras, 2014 — Credit Daniel Cima / CIDH

Experience

Experience establishing the use of electronic monitoring mechanisms in criminal matters

Next is a description of the experience of an authority in the Executive branch of the Argentine State regarding the use of electronic monitoring mechanisms in criminal matters.

The main difficulties related to the use of electronic surveillance in Argentina are: (a) lack of knowledge of the measure on the part of many judicial authorities, and (b) inadequate coordination among the actors who are involved in the process to ensure effective monitoring of the surveillance process.

To address those challenges – in addition to the respective statutory and regulatory changes introduced – the professionals who make up the Program for Assistance to Persons under Electronic Surveillance are holding trainings nationwide to provide information on implementing electronic surveillance for judicial officers, prison staff, and professionals in the psychosocial area. In addition, through these trainings an effort is made to disseminate and raise awareness of the importance of using non-custodial measures, and to improve communication and coordination among the actors of the Judicial branch who are involved in the process of oversight and monitoring of house arrest.

In addition, the electronic surveillance mechanism, as well as the corresponding Program of Assistance, constitute means of supporting the judicial function and an essential tool that pursues the reinsertion and social integration of those persons who were engaged in activities at odds with the criminal law. In this context, one of the lessons learned by the National Bureau for Social Re-adaptation (Dirección Nacional de Re-adaptación Social) is the importance of adopting a comprehensive approach in addressing the issues faced by persons under electronic monitoring, from a human rights perspective, and of be-

ing mindful of the particular situation of risk faced by persons in vulnerable situations.

José Brian Schapira — Undersecretary for Protection of Human Rights

C2. Restorative justice programs in criminal matters

Basic concepts

Using "**restorative justice programs in criminal matters**," the victim, the person accused and, where appropriate, other persons impacted by a crime participate together and generally with the help of a facilitator to resolve the issues stemming from the commission of the offense.

Conditions for use:

- Sufficient evidence exists to indict the person.
- Free and voluntary granting of consent by the victim and by the person who purportedly committed the crime.
- Agreement by both parties on the basic facts of the case.
- Legal representation for both parties and, where applicable, translation or interpretation services.
- Use restricted to cases involving minor offenses not involving violence.

These processes, **may include**:

- Mediation.
- Conciliation.
- Meetings to decide judgments (sentencias).

Judicial, Legislative, and Executive Branches of Government

- ✓ Establish instructions and rules governing the use of restorative justice programs containing, inter alia, the following:
 - Conditions and instructions for the referral (*remisión*) of cases.
 - Follow up and management of cases after a restorative justice process.
 - Qualifications, training, and evaluation of facilitators.
 - Administration of restorative justice programs.
 - Rules governing jurisdiction.
 - Rules of conduct in respect of these programs.



Judicial and Executive Branches

- √ Formulate strategies and policies geared to promoting a culture conducive to its use among the authorities concerned, civil society, and local communities.

Judiciary

- √ Ensure that agreements reached within the framework of these processes are negotiated voluntarily and contain reasonable and proportional obligations.
- √ Exercise judicial oversight of those agreements with a view to their being included in judicial decisions, thereby precluding the possibility of prosecution for the same facts.

Good practices in Brazil, Costa Rica, and Jamaica

Public policies regarding restorative justice

In **Brazil**, restorative justice has been part of its justice agenda since August 2014, with the signing of a cooperation agreement by the National Justice Council, the Association of Judges of Brazil (AMB), and other institutions (Cooperação Interinstitucional para difusão da Justiça Restaurativa), to promote the use of this type of justice for settling disputes nationwide. These programs have taken on greater significance with the issuance by the National Justice Council of Resolution 225 of May 2016 (Resolução 225), which establishes restorative justice as a national policy within the national judiciary.

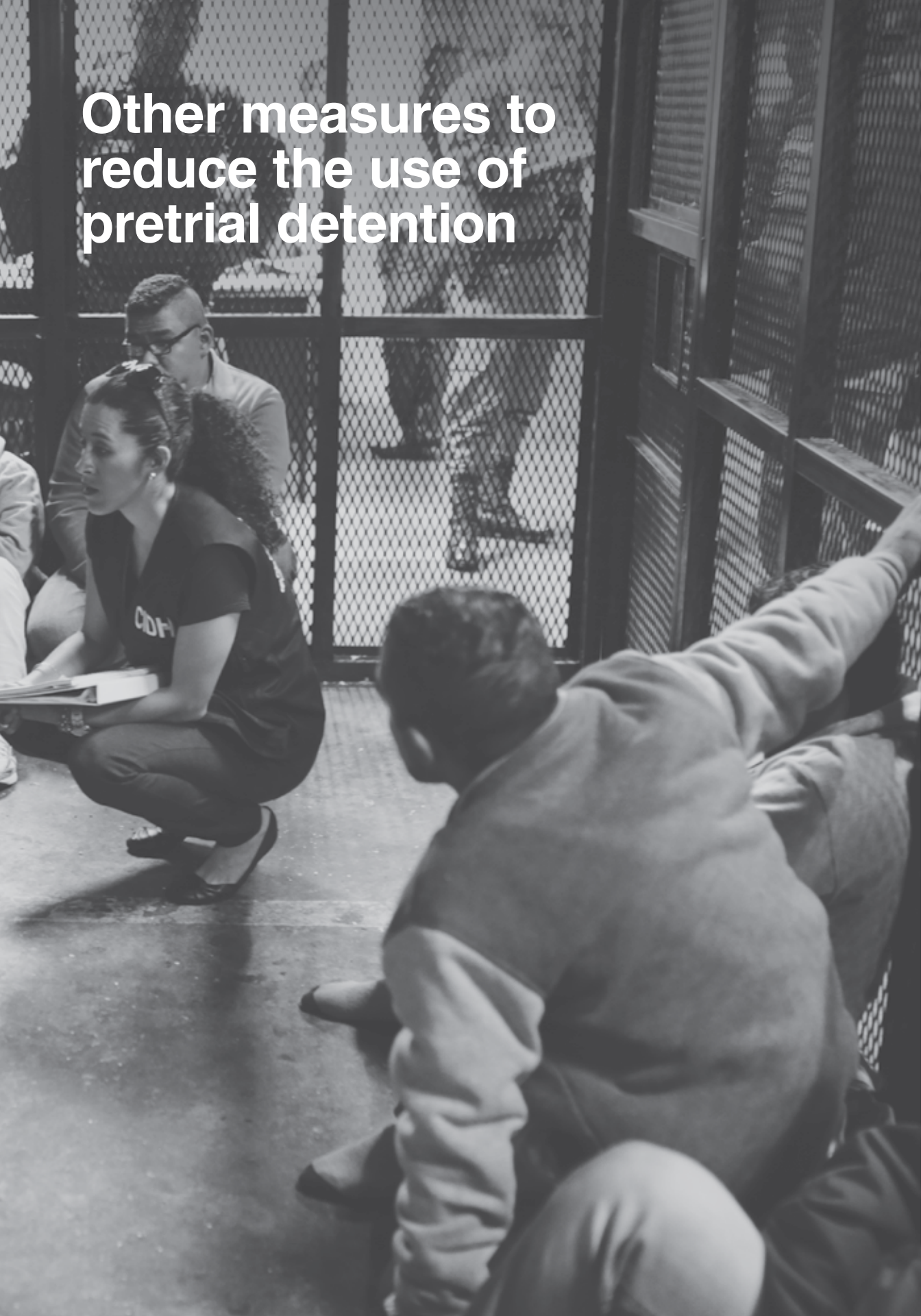
In **Costa Rica** the “Program for Restorative Justice in Criminal Matters involving Adults” (Programa de Justicia Restaurativa en Materia Penal de Adultos) began to operate in 2013. It seeks to apply restorative justice in those cases that meet, inter alia, the following requirements: that the offense not be considered violent, that it make possible the benefit of conditional enforcement of the penalty, that the accused be a first-time offender, and that the victim be willing to participate. As of February 2016, a total of 1,044 persons had taken part in the program. According to the Costa Rican public defender service, thanks to the donations received by the program’s beneficiaries, several therapeutic and socio-educational services were provided that benefited the community. There are several economic advantages of this program. For instance, the cost of resolving a case by means of restorative justice mechanisms is approximately 630 dollars, whereas the amount spent for a regular criminal proceeding comes to 12,342 dollars, plus the daily cost of incarceration – estimated by the Ministry of Justice of Costa Rica to be 48 dollars a day.

In **Jamaica**, as of 2014, the National Restorative Justice Policy, has expanded and now operates in eight communities. The Jamaican Ministry of Justice published the National Restorative Justice Policy, which outlined the Ministry’s protocols with regard to restorative justice. According to the procedures established by that program, for a person to avail himself of its benefits he must accept responsibility for his acts; he must have been informed and in a free and informed manner have consented to participate in the program, and been advised of his rights without delay by his defense counsel, in addition to having had a reasonable opportunity to contact his lawyer.

Section 3



Other measures to reduce the use of pretrial detention



A. Measures to expedite proceedings

A persistent problem in the region is the lengthy waits faced by detainees before being sentenced

- ✓ Exercise appropriate oversight of compliance with maximum times allowed for pretrial detention.

To address this issue, the authorities concerned must take the following steps to correct procedural delays:

Judicial, Legislative, and Executive Branches of Government

- ✓ Adopt the necessary measures to ensure that persons in pretrial detention are brought to trial without undue delay.
- ✓ Give priority to expediting these trials, with full observance of due process.

Judiciary and the Public Prosecution Service

- ✓ Establish special programs for monitoring the duration of pretrial detention and keeping adequate records of persons tried.
- ✓ Ensure that any pretrial detention is warranted by the procedural purposes pursued in each specific case and from the moment deprivation of liberty is imposed.
- ✓ Periodically review the ongoing validity of the circumstances prompting initial application of pretrial detention and whether the time in detention has exceeded the limits set by law and reason.
- ✓ Maintain efficient systems containing records of pretrial detention orders and records of any communication with the courts.

Good practices in Canada, Haiti, and the United States

Laws or policies to review pretrial detention

In **Canada**, in 2015 and 2016, the Ministry of Justice in Saskatchewan province carried out a review of cases in the Office of the Public Prosecutor emphasizing early preparation for trial with a view to halving the number of persons in pretrial detention in that province by 2020.

In the **United States**, regulations approved in the state of Alaska, in July 2016, provide for the obligation of judicial authorities to review the situation with respect to pretrial detention in the state, focusing in particular on circumstances that prevent an accused person from being released.

In **Haiti**, in March 2005, the Ministry of Justice and Public Security formed a high-level commission to review the pretrial detention situation. Thanks to the work of that commission, by end-July 2015, 427 cases had been examined. One year later, at the behest of the same ministry, an ad hoc itinerant committee was installed to visit 18 courts in the country and construct a database, identifying in particular all cases of prolonged pretrial detention.

Experience

Experience establishing the Inter-institutional Office for guaranteeing the holding of hearings, in Paraguay

Below is a description of the experience of the then-Vice Minister for Criminal Justice Policy at the Ministry of Justice, focused on establishing an inter-institutional mechanism to ensure that hearings are held, and with that, to reduce the waiting time for a judgment to be handed down.

In Paraguay, one of the main challenges related to the prison system has been to reduce the number of prisoners held without a firm judgment; at this time, such prisoners account for 78% of the total prison population. To address this challenge, and with a view to reducing the duration of the criminal proceeding in each case, the “Inter-institutional Agreement” was signed among the Judicial branch, the Office of the Public Prosecutor, the Ministry of Justice, and the Office of Public Defense, in order to coordinate and supervise the effective holding of hearings during the preparatory and intermediate stages.

The gains of the Agreement include, for example, establishing minimal bases for inter-institutional cooperation grounded in the need to limit putting off preliminary hearings on grounds that could be overcome through basic cooperation among the authorities. Similarly, the Agreement was useful for obtaining and analyzing data on the number of preliminary hearings suspended and the reasons why. The model also entailed an activity for looking ahead so as to avoid difficulties transferring persons deprived of liberty given the simultaneous programming of hearings in different offices of the Office of the Public Prosecutor and the Judicial branch.

In addition, at the outset of the actions taken in the context of this Agreement, operational obstacles arose such as the following: (a) inadequate infrastructure, (b) insufficient human resources, and (c) difficulty obtaining data due to inadequate cooperation by the officers of the courts. The measures adopted that helped address these obstacles consisted mainly of the assignment, by the court, of a person exclusively in charge of pro-

viding data, facilitating cooperation between the court and the Inter-institutional Office to obtain the information required. Even though such obstacles were largely overcome, on occasion there is still a lack of judicial personnel dedicated specifically to providing data.

Finally, one of the lessons learned was gaining an awareness of the importance of holding the hearings in the agreed upon time frames, and the negative impacts when they are suspended. In addition, attention was given to the need to provide material and human resources to the prison system, so as to hold the hearings scheduled. The efforts made have resulted in a slight increase in the holding of hearings. According to data from March 2016, 45% of the hearings scheduled were held; and in June 2017, this figure increased to 49%. Based on the foregoing, I believe that it would be appropriate to replicate the model in other judicial districts, mindful of the particularities of each region.

Raúl E. Caballero Cantero — Former Vice Minister for Criminal Justice Policy (*Ministry of Justice*) Former Public Defender (*Office of Public Defense*)

B. Hearings in prisons

Basic concepts

"Hearings in prisons" are held in prisons and attended by judicial authorities in order to carry out certain procedures.

Their purpose is to **circumvent various potential difficulties with taking persons deprived of liberty to court**, such as

- Lack of transportation.
- Lack of gasoline.
- A shortage of guards.
- Danger of escape.

To ensure that so-called prison hearings are effective, the authorities concerned have the following obligations:

Judiciary, Public Prosecution Service, Public Defenders' Service, and prison authorities

- ✓ Put clear mechanism in place for cooperation between the judiciary, the prosecutors' office, defense counsel, and prison authorities, so that prison hearings are conducted efficiently.

Judiciary

- ✓ Establish criteria for prioritizing cases to be discussed.
- ✓ Take the steps needed for adequate preparation of the cases to be analyzed.
- ✓ Determine the date and place of the judicial hearings.
- ✓ Notify all those involved in good time of the schedule and organizational arrangements for the hearings.

Prison authorities

- ✓ Provide a setting within the prison to accommodate hearings, with adequate space, lighting, electricity and restrooms.
- ✓ During the hearings, assign extra guards to safeguard the security of all those involved in the proceedings.
- ✓ Make sure that the person accused is present and that he or she participates.

Good practice in Bolivia

Establishment of mechanisms for holding a larger number of judicial hearings

In **Bolivia**, Law No. 586 on Reducing the Backlog (Ley No. 586 de Descongestionamiento) initiated prison hearings, which have had a positive impact, increasing the number of judicial hearings, primarily through so-called "Judicial Days for Reducing the Criminal System Backlog." According to official information, in 2015, these day-long sessions started in the departments of Santa Cruz, La Paz, and Cochabamba and, in light of the progress made, were then extended to the other departments.

According to the same source, hearings are prioritized based on the length of time a person has been in detention. To organize those sessions, the Office of the President of the Departmental Court issues instructions establishing the venue and times of the hearings and ordering judges and clerks of the courts, prosecutors and defense counsel to file the petitions and the arrangements required for the cases to be considered during the day-long judicial sessions.

Experience

The experience of establishing hearings in prisons, in Bolivia

Then is a discussion of the experience of the then-executive director of the Fundación CONSTRUIR, regarding the implementation of hearings in prisons in Bolivia, an initiative that was established to address the large number of suspensions of precautionary measures hearings due to the failure to attend of persons accused, prosecutors, defense counsel, and judicial authorities.

In Bolivia, considering that there is 300% overcrowding (relative to capacity) in the prison system, and the rate of pretrial detention is 84%, in 2015 a process of clearing up the backlog in the criminal justice system was undertaken, resulting in a 69% reduction in the number of prisoners in the country's prisons who have not been convicted of any crime.

In this context, by circular 11/2014, the Supreme Court of Justice instructed the departmental courts to coordinate and order that the judges in the criminal area in the capital cities and provinces announce the holding of hearings on precautionary measures at the prison, and cessation of pretrial detention, and conclusive hearings. To implement this measure the Supreme Court signed an agreement with the Bureau of Prison Regime (Dirección de Régimen Penitenciario) to put in place adequate infrastructure and guarantees so as to be able to hold hearings in the prisons.

One important lesson to be drawn from this process is that a preliminary effort is required for design, planning, and information-gathering. Accordingly, this measure covered four phases: (a) inventory of cases with closing hearing, with an alternative outcome pending and identification of all cases with pretrial detention; (b) organization of the teams for reducing the backlog; (c) drawing lots for redistributing cases and the work of reducing the backlog; and (d) monitoring performance and evaluation. The implementation of these hearings began as a pilot experience in Chuquisaca, and that experience was then replicated in the most critical judicial districts, such as Cocha-

bamba, Santa Cruz, La Paz, El Alto, and Oruro; more than a thousand cases pending were identified in each of these locations. In each judicial district work was being done to inventory the cases, review the case files, organize folders, assign tasks, and set up the hearings.

The action was taken based on a survey and comprehensive analysis of information on the procedural status of each case, prioritizing cases involving serious offenses, in addition to those cases that had gone longest without a judicial decision. An effort is also made to see to it that the files of persons deprived of liberty be updated permanently by the judges of criminal enforcement, and that it contain their personal data as well as procedural information about their case, with remote access via the Internet. It was also agreed that the judicial authorities and the Office of the Public Prosecutor (Ministerio Público) will issue instructions to give priority to attending to cases of children and adolescents who have been victims of sexual offenses or crimes against integrity, as well as older persons deprived of liberty, considering the preferential treatment they deserve.

Accordingly, the judicial days for clearing up backlog met their objective of keeping hearings from being suspended. However, the abbreviated procedure was used in a large number of the hearings held during the judicial days in the prisons, the result being a very large number of convictions. This is one of the challenges pending, since in many cases, given their lengthy pretrial confinement, innocent persons opt to plead guilty to secure their release as a perverse effect encouraged by the pardon laws. As a result, they transition from being prisoners who have not been convicted to convicts who have not been tried.

Ramiro Orias A — Due Process of Law Foundation, Program Officer



C. Prior hearings on the admissibility of pretrial detention

In order to abide by the principles of audi alteram partem, procedural immediacy, and the right to public and expeditious proceedings, the decision whether or not to use pretrial detention must be taken in oral hearings, with all parties participating.

To safeguard the right to defense, the accused must be present and be heard by the judicial authority.

Bearing in mind the negative consequences of the absence of these kinds of hearings, the authorities concerned must adopt the following measures:

Public Prosecution Service

- ✓ Ensure that the accused persons are present and listened to by the judicial authority.
- ✓ Guarantee that defense attorneys be given access to those documents in the investigation that are necessary to effectively challenge the lawfulness of the accused person's detention.

Judiciary

- ✓ Decide whether or not to impose pretrial detention in an oral hearing in which all parties participate, in order to abide by the principles of audi alteram partem and procedural immediacy, and the right to public and expeditious proceedings.
- ✓ Examine the reasonableness of the suspicion on which detention is based and the legitimacy of its purposes.

- ✓ Ensure equality of arms between the parties, the prosecutor and the detained person
 - For that, it is essential to verify that the defense attorney has access to the file in question.
- ✓ Above all analyze the use of alternatives to pretrial detention.
- ✓ Explain the purpose of the hearing, the decision adopted, and the consequences thereof to the accused in clear and readily understandable language.
- ✓ Ensure that the accused has been properly defended and has had access to family members and medical care.
- ✓ Investigate the commission of possible acts of torture or cruelty during detention.



Visit to Honduras, 2014 — Credit Daniel Cima / CIDH

Good practice in Brazil

Custody hearings (*audiências de custódia*)

In **Brazil**, pursuant to Resolution 213 of the National Council of Justice (*Resolução 213*), of December 15, 2015, "custody hearings" were established to avoid unnecessary deprivation of liberty by promoting the use of alternative to pretrial detention. These hearings require that persons arrested in flagrante delicto, regardless of the motivation or nature of the offense, must be brought before a judge within 24 hours of being deprived of liberty, in order to be heard in the presence of the Public Prosecution Service and the Public Defenders' Office. Currently, custody hearings are operating in 26 states in Brazil, as well as in the Federal District. Since they started, through January 2017, a total of 186,455 custody hearings have been held nationwide.

Custody hearings take place in especially fitted out rooms. They are conducted in the presence of a judge, a prosecutor, public or private defense counsel, and the accused. Before the hearing begins, the detained person has a right to consult his defender in private. The custody hearing begins with a brief explanation by the judicial authority of the objective pursued. Once the detained person has been heard, the judicial authority defers to the Public Prosecution Service and the Defense to ask questions related to the nature of the criminal act, in order to establish the facts that might lead to a criminal indictment. The custody hearing concludes with substantiated deliberations by the judicial authority regarding legality and determination of the legal status of the accused.



Credit Ribamar Pinheiro / Portal do Poder Judiciário do Estado do Maranhão, Brasil

Experience

Experience implementing custody hearings in Brazil

Next is the experience of the judge in charge of implementing custody hearings, a mechanism adopted by the Brazilian State to avoid unnecessary deprivations of liberty by promoting the use of non-custodial measures.

The most significant aspect of implementing the custody hearings (*audiências de custódia*) was understanding that the judges realized that the person being held had “the right” to be brought before them before being transferred to a prison or jail. Changing the mindset is not easy, it requires that professionals step out of their “comfort zone,” and resistance had to be overcome on several fronts. From the legal standpoint, the idea spread that the lack of a “national statute” did not stand in the way of the requirement on the Brazilian State to carry out an obligation arising from an external source. In the context of the institutions that make up the justice system the most effective challenge was to make them believe that, in principle, their actions were not calling into question the custody hearings paradigm, but rather that the hearings implement a guarantee that benefits all. Accordingly, the State invested in the training and education of those agents, providing them data, figures, and statistics capable of convincing them that if the traditional approach had not succeeded when it comes to guaranteeing greater public security it was because something had to change. The judicial authorities ended up understanding the true role of their jurisdiction at the moment that the matter of imprisonment must be analyzed since “the human face of the detainees had been forgotten, their senses and smell, even that they spoke and were capable of defending themselves.” More than that, the institutions were obligated to speak with one another and harmonize their operational differences, for it was the only way custody hearings could be held.

In addition, the executive branch was won over – the transfer of the person detained before the judicial authority depending on it; emphasis was placed on the public expenditure entailed in unnecessary incarceration, and in the magnitude of the social harm caused to both the person locked up and his or her family and social circles. Public information campaigns, broad-

cast by the media, focused on strengthening citizenship through this procedure. Pilot experiences were organized in the capital cities of the various states of Brazil and served as a paradigm for replicating this novel practice, hitherto unknown to all, in other localities, always respecting the regional peculiarities of each place. The participation of civil society, through the Instituto de Defesa do Direito de Defesa, as an outside observer of the implementation of the project, ensured that different points of view would be shared and that proper methodologies would be used for establishing and operating custody hearings. An electronic system was designed, known as the SIS-TAC, to provide information on custody hearings to the whole country in real time, making it possible to supervise the results on an ongoing basis.

The initial idea of custody hearings arose from the concern that being brought before the judicial authority should not be a mere “rite of passage” for the person accused. Accordingly, multidisciplinary teams were designed to quickly respond to all persons detained so that they not be kept in prison and to give them some social assistance, in the latter case with the specific objective of preventing recidivism. In addition, simple structures were organized for medical experts to verify, before the courts, whether there was torture, thus allowing for immediate measures to be adopted in confirmed cases of mistreatment and abuse. In addition to being useful for “stopping the unbridled intake [of persons going to prison] answering to few criteria,” the great accomplishment of the custody hearings was to turn judges into guardians of the physical integrity of the persons subjected to imprisonment, since they had the authority to verify, in a quick review and without delay, assaults and abuses perpetrated by the security agents of the State before the persons detained were brought before them.

Luis Geraldo S. Lanfredi — Judge responsible for implementing custody hearings in Brazil

Section 4



Women and other persons belonging to groups at special risk



A. Women

The incarceration of women has implications of its own that result in specific violations of their rights, based on their gender, and they are exposed to special risk when subjected to the pretrial detention regime.



Considering that pretrial detention affects women differently and disproportionately, States must adopt special measures that include a gender perspective and ensure that the rights of women deprived of liberty are observed and guaranteed, as presented in the following section.

A1. Incorporating gender perspective

Basic concepts

The **gender perspective** must take into consideration:

- The historical discrimination and gender stereotypes that have afflicted women and that have severely curtailed the exercise of their rights in contexts in which they are deprived of liberty.
- The special risk of violence of all kinds (physical, psychological, sexual, financial, obstetric, spiritual, and others).
- The fact that the great majority of such incidents go unpunished.

In particular, a gender perspective also needs to consider:

- The specific risks faced by persons who have diverse or non-standard sexual orientations and gender identities and expressions, or whose bodies vary from the standard female or male body types.
- An intersectional and intercultural perspective that takes into consideration the possible aggravation and frequency of human rights violations due to factors such as race, ethnicity, age, or economic position.

Visit to Guatemala, 2017 — Credit Luis Soto / CIDH

Judicial, Legislative, and Executive Branches of Government

- ✓ Mainstream a gender perspective in the establishment, implementation, and monitoring of measures aimed at reducing the use of pre-trial detention.
- ✓ In formulating, implementing, or supervising those measures, exclude stereotypes regarding the functions and roles of which perpetuate de facto discrimination against them and generate obstacles to the full exercise of their rights.
- ✓ Adopt the comprehensive measures needed to ensure the rights of incarcerated women are effectively observed and guaranteed, so that they are not discriminated against and are protected from violence and exploitation.
- ✓ Ensure autonomy and empowerment in the implementation of those measures, eschewing stereotypes regarding women's functions and roles that only perpetuate de facto discrimination against them.

Judicial and Executive Branches of Government

- ✓ Act with all due diligence and expeditiously to prevent and eradicate all forms of violence and discrimination against women in contexts in which they are deprived of liberty.
- ✓ Enforce measures designed to observe and guarantee the rights of incarcerated women within the framework of the law and international human rights law.
- ✓ Investigate with all due diligence denunciations of gender-based violence in order to address the impunity so prevalent in prisons.

Good practices in Colombia, Brazil, and Mexico

Laws or public policies designed to observe and guarantee the rights of women deprived of liberty

In **Brazil**, in connection with the National Policy for Attending to Women Deprived of Liberty and Those Released from Prison, the National Survey of Data on Women in Prison was published in November 2015, in an effort to provide important information about the female population to enable the authorities concerned to develop and implement policies for incarcerated women.

In **Colombia**, Law 1709 of 2014 (Ley 1709 de 2014) adopts a differentiated approach to the protection of women and persons belonging to groups at special risk.

In **Mexico**, Article 6 of the National Execution of Judgments Act of 2016 (Ley Nacional de Ejecución de Sentencias de 2016), the scope of which also covers "interment due to pretrial detention," regulates the specific rights of women deprived of liberty and grants special protection for pregnant women and mothers.

A2. Use of alternatives to pretrial detention

For women heads of single parent households who are, due to that circumstance, the sole caregiver for their children, incarceration has severe consequences for their children and other persons under their care.

The disruption of protection ties caused by the incarceration of women means that the persons under their care are exposed to poverty, exclusion, and abandonment. That can have long-term consequences, including involvement in criminal organizations or even institutionalization.

Taking into account the different consequences faced by women deprived of liberty, the advantages of using alternative measures, and the harm caused by their incarceration to persons under their care, the authorities concerned must adopt the following measures designed to incorporate a gender perspective in the use of alternative measures.

Judicial, Legislative, and Executive Branches

✓ Foster the use of alternatives to deprivation of liberty for women.

- ✓ Prioritize the establishment and financing of mechanism for their implementation and monitoring.
- ✓ Promote mainstreaming of all dimensions of the gender perspective.
- ✓ Consider, where applicable:
 - A best interests of the child.
 - Special protection for persons belonging to groups at special risk, such as persons with disabilities and older persons.
- ✓ Provide the appropriate resources needed for women beneficiaries of alternative measures to integrate themselves in the community.
- ✓ Provide a range of options for solving the most common causes of women coming into contact with the criminal justice system, such as:
 - Psychological treatment.
 - Educational and training programs to increase their chances of employment.

Judiciary

- ✓ In applying alternative measures, take the following factors into account:
 - The particular position and historical disadvantage of women in society.
 - Any history of previous victimization.
 - The absence of aggravating factors in the commission of the offense.
 - The different and incremental impact of imposing deprivation of liberty with regard to the persons the accused looks after.
- ✓ Based on the best interests of the child and a differential approach to persons in the care of

incarcerated women:

- Accord priority to measures that do not entail deprivation of liberty.
- Be especially rigorous in applying necessity and proportionality criteria when deciding on pretrial detention.
- Consider that the incarceration of women is a measure of last resort.



Visit to Honduras, 2014 — Credit Daniel Cima / CIDH

Good practices in Costa Rica, Peru, and Ecuador

The establishment of alternative measures that include a gender perspective

In **Costa Rica**, Law No. 9271, "Electronic Surveillance Mechanisms in Criminal Matters" (Ley No. 9271 "Mecanismos electrónicos de seguimiento en materia penal"), of September 2014 provides for the use of "house arrest with electronic surveillance" for women at an advanced stage of pregnancy and for women heads of household responsible for children under the age of 12 and persons with disabilities or suffering from a serious illness.

In **Peru**, Legislative Decree No. 1322 (Decreto Legislativo No. 1322), of January 2017, includes a gender perspective when it provides that priority be given to the following cases: a) pregnant women; b) women with children under three years of age; and c) women heads of household with minors or a spouse or children with permanent disabilities.

In **Ecuador**, the Comprehensive Organic Criminal Code (Código Orgánico Penal Integral) of August 2014 provides for pretrial detention being replaced by house arrest and the use of an electronic surveillance device, when women are pregnant and for the first 90 days after giving birth.

A3. Incorporation of the gender perspective in criminal policies relating to drugs

Since 2000, the increase in the incarceration of women in the Americas, together with the increase in Asia, exceeds that found in any other part of the world. Over the past 15 years, the female prison population in the region has increased by 51.6%.

The increase in the number of women deprived of liberty in the region stems primarily from tougher anti-drug policies, the use of pretrial detention for this population, and the lack of a gender perspective in dealing with the problem.

In light of the impact of drug-related criminal policies on the incarceration of women, the authorities concerned should, in addition to adopting the aforementioned general measures, comply with the following obligations:

Judicial, Legislative, and Executive Branches

- √ Adopt comprehensive measures that include a gender perspective and therefore take into account, at a minimum:
 - Women's low level of participation in the

chain of commercial activities and trafficking in these substances.

- The absence of violence in their drug-related criminal conduct.
- The care and protection implications of their incarceration.
- Inclusion of a social reintegration approach.
- Circumstances involving violence against women, their social exclusion, and job market discrimination.

Executive Branch

- √ When applying alternative measures in cases involving accusations of problematic drug use, provide for access to community services that take account of gender issues and provide psychological support.

Good practice in Costa Rica

Enactment of laws with a gender perspective to address the drug problem

In **Costa Rica**, Law 9161 (Ley 9161), which includes the amendment to Article 77 of Law 8204 and contains regulations regarding criminal conduct related to "unauthorized drug use," provides for the use of alternative measures for women bringing drugs into prisons who meet certain conditions: being poor; being a head of household; or having persons under their care who themselves are living in vulnerable circumstances. The alternative measures to be considered include: house arrest, semi or "assisted liberty", "trust centers", and the use of electronic (surveillance) devices. In addition, the law reduces the penalties for such illicit conduct.



B. Persons belonging to groups at special risk

This array of negative consequences arising from pretrial detention has a much greater impact on persons who belong to historically vulnerable groups, which is even more serious when they pertain to economically especially vulnerable groups, since they are also victims of other forms of social exclusion.

Measures conducive to reducing pretrial detention are, generally speaking, governed by provisions common to the rest of the pretrial detention population and lack a differentiated approach. That prevents special attention being paid to the specific needs of persons belonging to groups at special risk.



Visit to Guatemala, 2017 — Credit Luis Soto / CIDH

Policies on pretrial detention with respect to persons belonging to groups at special risk should be geared to fully ensuring their safety when under this regime and to reducing subjection to pretrial detention by making priority use of alternative measures. Therefore, the authorities concerned must adopt the following measures:

B1. Incorporation of a differentiated approach

Basic concepts

A "**differentiated approach**" involves taking into consideration:

- Special vulnerability factors.
- Factors that can raise the risk of acts of violence and discrimination in pretrial detention contexts.
 - Race.
 - Ethnicity.
 - Age.
 - Sexual orientation.
 - Gender identity and expression.
 - Disability.

That approach also entails taking into account:

- The **frequent intersectionality** of the factors mentioned, which may accentuate the risks faced by persons held in pretrial detention.

Judicial, Legislative, and Executive Branches of Government

- √ Adopt special measures envisaging a differentiated approach to persons belonging to groups at special risk, such as:
 - Persons of African descent.
 - Indigenous persons.
 - LGBTI persons.
 - Older persons.
 - Persons with disabilities.
- √ Ensure the participation of civil society and of the beneficiaries in the design and implementation of policies and services aimed at reducing the use of pretrial detention.
- √ Such participation will ensure that policies in this field are imbued with a human rights perspective and view beneficiaries as persons who possess rights.

Good practices in Colombia, Mexico, Costa Rica, Ecuador, and Peru

Legislation upholding differentiated approaches

In **Colombia**, Law 1709 (Ley 1709) of January 2014 recognizes that incarceration measures should reflect the particular characteristics of different population groups, based, for instance, on age, gender, gender identity, sexual orientation, race, ethnicity, and disability.

In **Mexico**, the National Code of Criminal Procedure (Código Nacional de Procedimien-

tos Penales) of June 2016 provides for special protection for older persons and persons suffering from a "serious or terminal illness," by according priority to house arrest.

Regulations providing for the prioritization of electronic surveillance mechanisms for persons with disabilities and older persons.

In **Costa Rica**, Law 9271, "Electronic Surveillance Mechanisms in Criminal Matters" (Ley No. 9271 "Mecanismos electrónicos de seguimiento en materia penal"), of September 2014 guarantees the use of such mechanisms for persons with disabilities, older persons, and persons addicted to the use of illicit drugs "in order to ensure that they recover."

In **Ecuador**, pursuant to the Comprehensive Organic Criminal Code (Código Orgánico Penal Integral) of August 2014, alternatives to pretrial detention shall be used for persons with severe disabilities, persons over the age of 65, persons suffering from a "catastrophic" or incurable disease at a terminal stage, or persons who have no parents and cannot "get by on their own."

In **Peru**, Legislative Decree No. 1322 (Decreto Legislativo No. 1322) of January 2017 establishes that alternatives to pretrial attention shall be accorded priority in cases involving persons over 65 years of age, or who are seriously sick, or who have permanent disabilities that hinder their movements.

B2. Gathering of data and statistics

A serious problem in the region is the widespread lack of disaggregated statistics on persons in pretrial detention: a factor that may exacerbate the violence and discrimination faced by persons belonging to groups at special risk

In light of this problem, and with a view to ensuring adequate data collection mechanisms to facilitate the design and analysis of effective public policies for combating forms of violence and discrimination against persons belonging to groups at special risk, the authorities concerned must take the following steps:

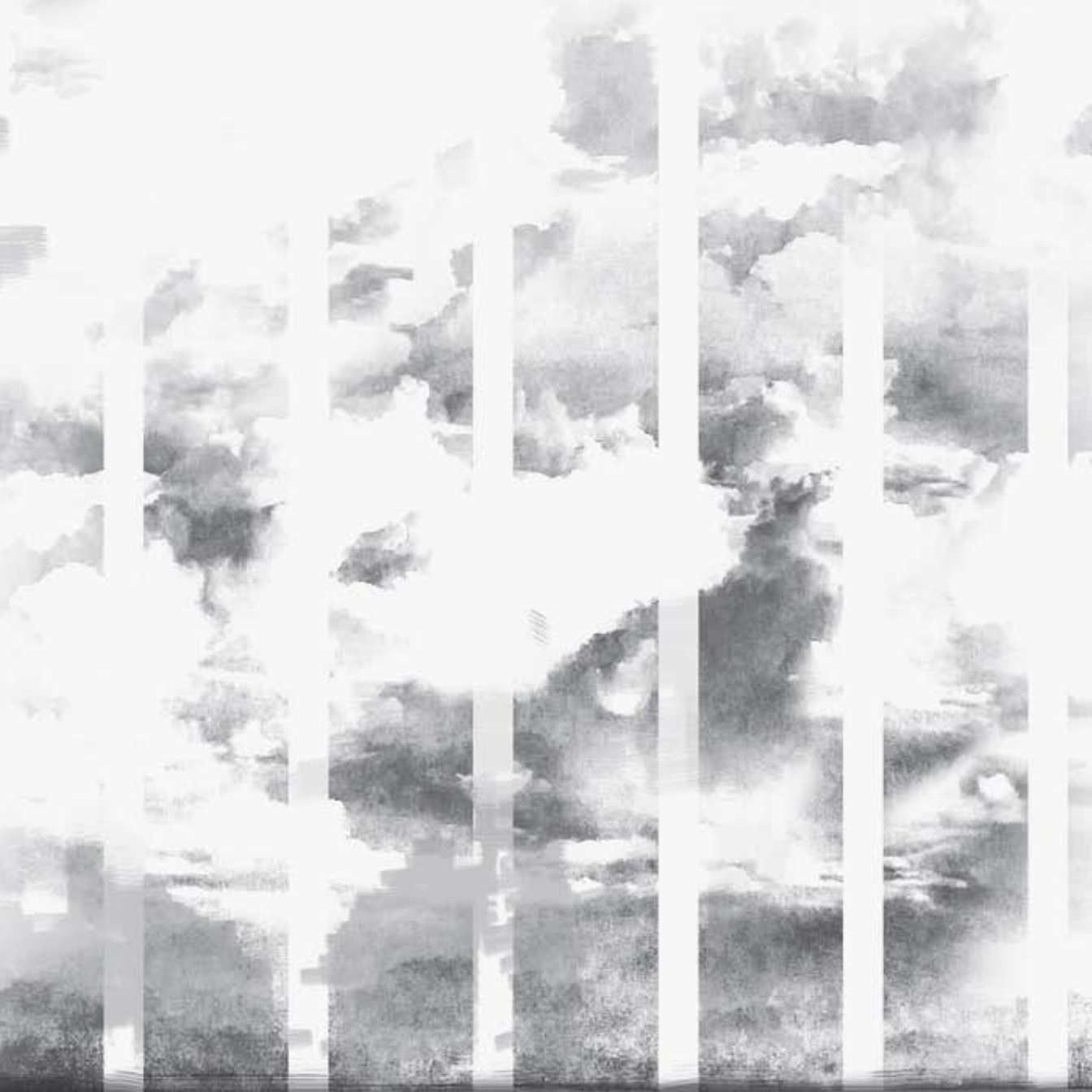
Judicial and Legislative Branches

- ✓ Periodically update the data.
 - ✓ Adopt such measures as are needed to ensure that those data come with the information and understanding required for the design and formulation of State policies on behalf of persons belonging to groups at special risk, such as:
 - Persons of African descent.
 - Indigenous persons.
 - LGBTI and older persons.
 - Persons with disabilities.
-
- ✓ Make every effort, and allocate sufficient resources, to collect and analyze statistics systematically and comprehensively, taking into consideration such factors as:
 - Race.
 - Ethnicity.
 - Age.
 - Sexual orientation.
 - Gender identity and expression.
 - Disability.
 - Interculturality.
 - Intersectionality.
 - ✓ Guarantee that those data can be accessed and are in the public domain.



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