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## Pretrial Detention

In 2006, an estimated 7.4 million people around the world were held in detention while awaiting trial—a practice that violates international norms, wastes public resources, undermines the rule of law, and endangers public health. This issue of *Justice Initiatives* looks at the global over-reliance on pretrial detention and examines the challenges of reducing and reforming its use.

## FOREWORD

# Reducing the Excessive Use of Pretrial Detention

Mark Shaw

The broad international consensus favors reducing the use of pretrial detention and, whenever possible, encouraging the use of alternative measures, such as release on bail or personal recognizance. The aversion to pretrial detention is based on a cornerstone of the international human rights regime: the presumption of innocence afforded to persons accused of committing a crime.<sup>1</sup> International treaties and standards require policymakers to limit the use of pretrial detention.

According to the Universal Declaration of Human Rights, “everyone charged with a penal offense has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.”

International standards permit detention before trial under certain limited circumstances only. Thus, the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders established the following principle:

Pre-trial detention may be ordered only if there are reasonable grounds to believe that the persons concerned have been involved in the commission of the alleged offenses and there is a danger of

their absconding or committing further serious offenses, or a danger that the course of justice will be seriously interfered with if they are let free.<sup>2</sup>

One of the major achievements of the Eighth UN Congress was the adoption, by consensus, of the UN Standard Minimum Rules for Non-custodial Measures (the “Tokyo

Pretrial detainees are disproportionately likely to be poor, unable to afford the services of a lawyer, and without the resources to deposit financial bail.

Rules”).<sup>3</sup> These stipulate that governments should make every reasonable effort to avoid pretrial detention. In particular, these rules provide the following:

- Pretrial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offense and for the protection of society and the victim.
- Alternatives to pretrial detention shall be employed at as early a stage as possible. Pretrial detention shall last no longer than necessary and shall be administered humanely and with respect for the inherent dignity of human beings.
- The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pretrial detention is employed.

According to the United Nations Human Rights Committee, detention before trial should be used only where it is lawful, reasonable, and necessary. Detention may be necessary “to prevent flight, interference with evidence or the recurrence of crime,” or “where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner.”<sup>4</sup>

It is important however to highlight that gaps exist between many states’ *de jure* and *de facto* compliance with international standards in this area. Many states that continue the excessive use of pretrial detention have enacted national legislation that closely mirrors international presumptions against its use and in favor of the use of alternative measures. There is thus much work to be done not only in reforming legal frameworks but in achieving effective implementation of those laws already in place.

At any given moment, an estimated three million people worldwide are in pretrial detention. Pretrial detainees are disproportionately likely to be poor, unable to afford the services of a lawyer, and without the resources to deposit financial bail to facilitate their release should this option be available to them. When poor defendants are more likely to be detained, it can no longer be said that the criminal justice system is fair and equitable. Moreover, in some countries a significant number of pretrial detainees will eventually be acquitted of the charges against them or released without

having stood trial. Others will be convicted of minor crimes that do not carry a prison sentence.

Congested pretrial detention centers are often chaotic, abusive, and unruly places where few inmates are given the supervision they require. Policies and practices resulting in the excessive use of pretrial detention contribute to prison overcrowding and, ultimately, to heightened expenditure of scarce public resources for the construction and operation of detention facilities. Moreover, as further described in this volume, in many countries the excessive use of pretrial detention has very real negative consequences for public health, family stability, social cohesion, and the rule of law. Poor pretrial detention practices not in compliance with international standards consequently endanger persons and communities far removed from those actually detained.

This edition of *Justice Initiatives* contains accounts of how a number of countries from across the globe, with varying levels of economic development and a variety of criminal jus-

tice systems, have sought to reform pretrial detention practices in often innovative ways. With varying degrees of success each of these countries developed unique interventions to reduce the excessive use of pretrial detention. It is essential reading for criminal justice policymakers and practitioners, particularly those working in developing countries who are seeking to reform their justice systems.

This volume will contribute to developing and sharing new experiential knowledge about the reform of pretrial detention around the world. By focusing attention on the emerging routines of reform—that is, the self-conscious habits, methods, and techniques being used to detect problems and introduce solutions—the articles that follow permit us to understand better which reforms have worked and which have not, and why. This book should be a significant resource for criminal justice policymakers and reformers and should play an important role in initiating an international debate on developing rights-based solutions to the excessive and inequitable use of pretrial detention.

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## Notes

Mark Shaw is the inter-regional advisor, Human Security Branch of the United Nations Office on Drugs and Crime.

1. *Universal Declaration of Human Rights*, Article 11(1) (New York: United Nations, General Assembly, Resolution 217A[III], December 10, 1948).

2. *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, August 27–September 7, 1990.

3. *United Nations Standard Minimum Rules for Non-custodial Measures* (The Tokyo Rules), Rule 6, adopted by the General Assembly December 14, 1990.

4. *Human Rights and Pre-Trial Detention. A Handbook of International Standards relating to Pre-Trial Detention*, Professional Training Series No. 3 (New York: United Nations, 1994), 14–15.

## OVERVIEW

# Grand Ambitions, Modest Scale

Efforts to reform and reduce the use of pretrial detention take many forms. **Todd Foglesong** identifies common elements among the projects described in this volume—and finds reason for optimism.

You are about to read eight reports on varied efforts around the world to reduce the excessive use of pretrial detention and improve justice systems' decision making about the lives of people accused of crimes. The experiences straddle different continents and legal traditions, and the reports depict projects with diverse goals, strategies, and outcomes. Yet they have in common the desire to reduce the harm done by unnecessary pretrial detention to individuals, families, and communities.

One report examines the introduction of paralegals in Malawi prisons to expedite trials and, where possible, secure the release of defendants from custody before trial. Another report is about the deployment of duty solicitors in police stations in Nigeria to help prevent unwarranted detention and also to release defendants from further custody. A third describes a pilot bail information scheme in South Africa that sought to diminish the frequency of detention and remove from jail defendants who could not afford to pay money bail. A fourth analyzes a prison visitors program and rights monitoring campaign in India that tried to discourage detention and

expedite trials. A fifth deals with the wholesale transformation of a system of justice in Chile, with new adversarial hearings and clear restrictions on the use of detention. A sixth explains the introduction of a new code of criminal procedure in Russia and the counterreform of rules about detention. A seventh report is about the use of strategic planning to encourage local officials to make broader use of noncustodial measures of restraint and punishment for juvenile defendants in the United States. An eighth examines investments by the Justice Initiative in reform efforts in Mexico, Ukraine, and Latvia. Additional chapters examine the global scale and consequences of pretrial detention and delve into the roles politics and data play in reform efforts.

For all their diversity, these reports capture only a part of the range of efforts underway around the world today to improve pretrial detention. Other international organizations, such as Penal Reform International, the International Centre for Prison Studies, the European Union, the Council of Europe, and the United Nations all disseminate guides and working papers and in some cases catalogues that depict the array of efforts around the world to make detention less harmful, more humane, and fairer.<sup>1</sup> The experiences described in these reports are a small and not necessarily representative sample of

what is happening or what is possible to accomplish. But they convey a sense of the excitement and opportunity underlying what appears to be a new approach to detention reform—one that emphasizes pragmatism, empiricism, and collaboration.

### 1. *Pragmatism in Detention Reform*

The real problems with detention today, these reports suggest, are not with the norms but with practices.<sup>2</sup> Almost all of the reform projects described here took place in the shadow of existing law: no revisions to basic rules of procedure were required in order to intervene or achieve important changes in Malawi, India, Nigeria, South Africa, and the United States. In fact, most of the projects involved modest adjustments to existing routines and institutions—the expansion of an existing service in Nigeria (legal aid lawyers), the creation of an auxiliary service in Malawi (a mobile fleet of paralegals), the policing of timelines for decisions in the United States (volunteer, interagency review committees), organized pressure for compliance with rules about the duration of detention in India (structured prison visits), and the provision of verified information about the risk of releasing defendants in South Africa (bail information reports). These and other promising solutions consist of practical modifications to existing operations. “The seeds of reformation and improvement in the administration of justice,” writes R.K. Saxena, “lie dormant in the existing law itself.”

Working within the confines of imperfect systems of justice is new. In the postwar, postcolonial, and immediately post-Soviet periods of the 20th century, the scale of efforts to reform criminal justice around the world was immodest—grand projects of reengineering that involved, typically, new constitutions, new justice institutions, and entirely new legal systems. Participation in the remaking of justice systems, moreover, was limited to those with legal expertise.

Almost all of the reform projects took place in the shadow of existing law: no revisions to basic rules were required in order to achieve important changes.

Justice was a realm almost exclusively for lawyers and judges and academics. Today, by contrast, we are witnessing not so much the creation of new foundational rules and fundamental institutions such as civilian police forces or public defender offices, but rather the strengthening of flawed justice systems, the better management of operations, and the establishment of adjunct or auxiliary organizations that can support, adjust, and extend the services of the state. The ambitions may remain grand, but the scale of projects is modest. And the barriers to participation are lower, because the required skill sets can be developed outside of law school.

### 2. *Empiricism and the Wheels of Measurement*

In each case described here, public officials and project managers had to manufacture new measures of pretrial detention. The information needed to detect and diagnose problems with pretrial detention, and the data needed to simulate solutions or drive indicators of progress and deterioration, simply did not exist. Because government agencies collect information to perpetuate routines, not change them, and

Because problems with pretrial detention vary so greatly around the world, the wheels of measurement in justice reform must be reinvented each time.

because the character of problems with pretrial detention varies so greatly around the world, the wheels of measurement in justice reform must be reinvented each time.

In Chile, the public defender's office had to collect new information about the frequency of applications for detention in order to debunk claims that prosecutors were too lenient on offenders. In Russia, the legislature surveyed people's experiences with justice, through conversations and polls at regional meetings of officials, to create measures of the impact of reforms that balanced the complaints of individual agencies and thus helped manage the temptation to withdraw the reforms. In both cases, the sources of information were new, and the

measures that had political meaning as well as analytical value had to be invented on the spot.

These reports also show that even rudimentary measures can be powerful. In Malawi, the paralegal services prepared simple lists of people in detention so that officials could count individuals, recognize cases, prioritize hearings, and sometimes send people home. Without prison visits and paralegals, that information did not exist in a reliable form. In India, prison visitors also produced new counts of inmates in different places according to the stages of their custody. Their lists also helped officials sort and prioritize cases.

### 3. *New Forms of Collaboration and Co-governance*

All of the accounts in this volume describe with gusto the benefits of good governance in pretrial detention. Much of this governance is being shared across the institutions of government as well as between state and civil society. Indeed, so much of the work of pretrial detention reform in these accounts involves collaboration and co-governance that it sounds strange to call the civil society organizations nongovernmental.

Each report describes the invention or invigoration of better management and interagency cooperation and closer scrutiny of detention practices. These include venues for reviewing activities within one justice institution, such as automatic review committees in the courts and new management mechanisms in the jails,

and also interagency forums such as court-user committees and national monitoring commissions and still other mechanisms for sharing information across departments, professions, and agencies. These and other interstitial and intermediate operations help preserve general government responsibility for dealing with detention while also sustaining relationships between nongovernmental activists and their colleagues in the state.

The character of the collaborations also may hold a clue about how to sustain change over time. Most projects built relationships with several different government agencies, not just one official or institutional partner. Those projects that hitched their fortunes to one leader or were dependent on one institution fared worse than those that built a wide platform of friends and colleagues. This strategy of diversification, also, was as much a conscious means of managing project risks as it was a reflection of the great peculiarity of pretrial detention: no single government agency controls detention and no one department acting alone can solve its problems. By forging unconventional alliances across government institutions and with officials at many levels of authority, project leaders helped ensure a longer shelf life to innovation. And by documenting and memorializing the experiences in a public manner, they also prepared the seeds for future rounds of collaborations.

### **Supporting New Trends in Detention Reform**

The new focus on practices instead of norms, the emerging art of collaboration and cooperation, and the insistence on sound systems of measurement may be signs of a promising and more participatory approach to justice reform. The skills needed by these practitioners of justice reform seem to come from economics and engineering, politics and social science as much as from law and human rights.

The new focus on practices instead of norms represents a promising and more participatory approach to justice reform.

Justice reform in this generation, to pinch a phrase from a young prosecutor in Chile, is as much about poetry as it is about plumbing. But the curricula in law schools and human rights training programs today emphasize theory over practice, poetry over plumbing, and the schools and instructors that can firm up the skills sets for this new generation have yet to be created. So while these accounts of reform inspire optimism about the range of people who can participate, they also illustrate the need to support the acquisition of skills for under-the-sink justice reform.

Most of the projects described here would have benefited from more scientific and internationally comparative measures and information. In Malawi, India, and Nigeria,

for example, evaluations of progress depended on simple before-and-after measures of the proportion of unsentenced inmates in prison, even though a whole range of forces and factors wholly unrelated to the intervention can affect this measure. In Russia and Chile, the fragility of measures of detention placed reform legislation in jeopardy, especially by allowing claims that higher crime rates and increased pretrial release were related.

To convince skeptical observers that investments in reform make sense, practitioners need indicators that matter to the public as a whole.

To convince skeptical observers that investments in reform make sense, practitioners need globally relevant measures of local justice as well as indicators that matter to the public as a whole. They need to compare practices across countries and to measure detention in ways that have meaning for public officials and citizens who are typically not concerned with jails and justice. Of course, the stable of questions that matter to the public will vary by country and context, but we know enough already to list a few questions that capture common concerns:

What type and proportion of victims receive timely or full restitution when offenders are placed in detention? How frequently do defendants who are not in detention have prob-

lems complying with the conditions of liberty? What is the net contribution to public safety of placing people in jail? What kind of drain on public investments in schools and roads comes from expenditures on jails and prisons?

International norms and guidance on pretrial detention are becoming more precise today, but handy answers to these kinds of questions are still lacking. There also is no database yet on what constitutes “a reasonable time” to trial or what “restricting detention as far as possible” might mean in practice. An investment in the measurement of these variables and other basic operations—such as the number of days between arrest and sentence in prosecutions for theft or assault—in a few exemplary jurisdictions would help innovators around the world locate their own practice in global context.<sup>3</sup> When reformers in Malawi can show not only how their practices accord with international standards but how they compare to routines in Botswana, Brazil, and Belgium they will command greater attention from public officials.<sup>4</sup>

Project leaders around the world will need not only access to such information; they will need training in the development, management, and interpretation of the data. There is no need for new universities or degree programs. Methods camps and summer schools organized and taught by project managers and NGO leaders would be adequate means of circulating knowledge about the arts of collaboration and measurement.



The new nature of collaborations with government agencies today, finally, creates additional training challenges for the leaders of nongovernmental organizations and the officials with whom they work. Not all organizations or donors are prepared for and comfortable with such extensive collaboration, especially with governments that are unstable, unpredictable, or responsible for great abuses. At a workshop for the discussion of these reports, one author asked, “When is a collaboration ‘collaboration’?” Privately, public officials in the justice sector sometimes admit skepticism about their partners, not knowing the backgrounds, or how long they can count on their support. There are ethical questions to be managed on both sides.

### **Optimism and Realism**

The mere existence of all this activity to reform pretrial detention is remarkable. Around the world today, NGOs are intervening in traditional operations of the state, operations in which public officials may lack the information and resources necessary to be sure about the equity and efficiency of their decisions. Justice officials have good reasons to be wary of alliances in civil society, as well as powerful incentives to resist efforts to reduce detention. And yet in most cases, the interventions described here took place not just with the indulgence of governments but with their active collaboration. Governments today, these reports show, are working closely with nongovernmental organizations in the most sensitive spheres of criminal

justice, endorsing their proposals and jointly exploring new ideas. If the degree of constructive engagement between state and non-state actors in matters of pretrial detention is a sign of progress, then there have been major advances around the globe.

Also remarkable is that many of the projects achieved or contributed to very positive results. In India, in the states in which the prison visitors program operates, the proportion of “awaiting trial persons” is much lower than in states in which it does not operate. In Malawi, not only did the proportion of inmates in detention fall during the period of the operation of the paralegal advisory scheme; so did their absolute number. In Nigeria, too, the proportion of all inmates awaiting trial in states where duty solicitors were active decreased, and a large number of detainees were also sent home before trial. And in Chile, the United States, and initially in Russia and South Africa, other innovations helped suppress the number of people put in detention.

These are two very hopeful signs of a more humane approach to pretrial detention, and yet the accounts here are not uniformly uplifting. Far from it. The reports show not only that governments routinely place in detention people who need not be there but also that it is difficult to sustain innovations and collaborations over time and assure continued restraint in the use of detention. In South Africa today, there is an active pretrial services program in only one province, and there are large numbers of people in detention solely because they cannot

afford bail. In both Russia and Chile, legislators quickly revised reforms, demonstrating the fragility of progressive laws and practices on detention. In the United States, especially in poor minority communities, juveniles are always at risk of detention, despite greater awareness of the long-term harm it can cause and a wider array of proven alternatives for managing delinquent youth. Around the world today, far too many people remain in jails, usually in conditions that are dangerous for inmates, guards, and the communities to which they eventually return.

What, then, are we to make of this field? What is the value of investing in reform if detention remains a problem in so many parts of the world? What can we expect from the field in the future?

Progress in pretrial detention is not a triumphant trend but rather an occasionally rewarded impulse. Not all projects take off, and even when good ideas are implemented, the returns can be marginal and diminish quickly. But this observation need not be discouraging. In fact, the diligent inventiveness of reformers around the world should be inspiring, for it reminds us that good outcomes in criminal justice are a human artifact—imperfect, inconsistent, and as much a matter of trial and error, as it were, as of legal science and constitutional engineering. The pursuit of justice, these reports suggest, consists of the gradual development of slightly better but usually temporary solutions to wretched human problems. That there is no end to that pursuit should not be a cause for resignation, but reinvestment.

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### Notes

Todd Foglesong is a senior research fellow at the Kennedy School of Government and coordinator of the Justice Systems Workshop at the Program in Criminal Justice Policy and Management.

1. See, for example, Adam Stapleton, *Good Practices in Reducing Pre-Trial Detention* (London: Penal Reform International [PRI], undated), [www.penalreform.org/english/frset\\_theme\\_en.htm](http://www.penalreform.org/english/frset_theme_en.htm); *Dealing with Prison Overcrowding*, Guidance Note 4 (London: International Centre for Prison Studies [ICPS], 2004), [www.kcl.ac.uk/depsta/rel/icps/gn4-prison-overcrowding.pdf](http://www.kcl.ac.uk/depsta/rel/icps/gn4-prison-overcrowding.pdf); *Pre-Trial Detention*, Guidance Note 5 (ICPS, [www.kcl.ac.uk/depsta/rel/icps/gn5-pre-trial-detention.pdf](http://www.kcl.ac.uk/depsta/rel/icps/gn5-pre-trial-detention.pdf)).

2. Even in post-conflict countries where legal systems are being reconstructed, sometimes from scratch, there is a new attentiveness to the tasks of making routine new norms and measuring practices. See, for example, the recent Request for Proposals (RFP) (No. 936) from the United Nations on building a “rule of law index” for post-conflict settings.

3. The European Union recently recommended an investment along these lines. See the “Discussion Paper: Meeting of Experts on Minimum Standards in Pretrial Detention Procedures” (Brussels: European Commission, Directorate General, Justice, Freedom and Security, June 9, 2006), 6–7.

4. An international nongovernmental organization, such as PRI, or a research center, such as ICPS, might be able to host a database on these and other issues jointly with multilateral institutions such as the UN, the European Union, or the World Bank.

# The Scale and Consequences of Pretrial Detention around the World

**Martin Schönteich** takes the global measure of the over-use of pretrial detention and its costs in both human and financial terms.

Outside of a small group of penal reformers, human rights advocates, and prison administrators, few people have given a great deal of thought to pretrial detention and its resulting problems. Not many people understand that excessive pretrial detention affects, in one way or another, all members of society. This paper seeks to catalogue and describe the pervasive impact of pretrial detention on detainees, their families, the larger community, public safety, governance, and the rule of law.

On any particular day around the world, about three million people are held in pretrial detention. During the course of an average year, 10 million people are admitted into pretrial detention. Some of these people are detained for a few days or weeks, but many will spend long periods of time in custody. In some countries, detainees will live in jail for months and even years.

In many parts of the world pretrial detainees live in worse conditions than convicted prisoners. In some countries pretrial detainees are assaulted and mistreated by police officers or guards. In almost all countries, a significant number of detainees are acquitted or,

once convicted, given a noncustodial sentence.

We are only beginning to understand the scale and consequences of pretrial detention around the world. There is considerable room in this field for better understanding of the global meaning of detention. Our measures may still be rudimentary, for until now little research has been undertaken to explore how pretrial

Not many people understand that excessive pretrial detention affects, in one way or another, all members of society.

detention affects people and institutions beyond the individual detainees and their places of detention.<sup>1</sup>

The papers in this volume give definitions and measures of detention in specific countries. This essay sets those papers in a global context, drawing together the present state of knowledge on the extent and consequences of pretrial detention. It shows that pretrial detention reform is of vital importance to anyone interested in fostering public policies that do more good than harm and that serve to support broader political, economic, and social goals in any given society.

It is worth stating at the outset that this paper does not advocate an abolition of the mechanism of pretrial detention. Unlike, for example, cruel and unusual punishment or torture, pretrial detention does not, *per se*, constitute a human rights violation.<sup>2</sup> International human rights norms recognize the need for pretrial detention provided it is applied fairly, rationally, and sparingly. In certain specific cases, pretrial detention serves an important function: namely, to ensure that defendants who pose a risk of absconding stand trial; that defendants who present a violent danger to the community do not commit serious crimes pending trial; and that unscrupulous defendants do not intimidate witnesses or otherwise interfere with the lawful collection of incriminating evidence.

### Defining Pretrial Detention

What is pretrial detention? In the English-language world alone, people in detention are referred to variously as “remand prisoners,” “remandees,” “awaiting trial detainees,” “untried prisoners,”<sup>3</sup> and “unsentenced prisoners.” In countries with other languages and different legal traditions and cultures, the terms for detention vary, too. Indeed, one can get lost in the numerous ways of classifying inmates.<sup>4</sup> But all criminal justice systems differentiate between sentenced and unsentenced prisoners, and most afford individuals in the latter category a different legal status.<sup>5</sup>

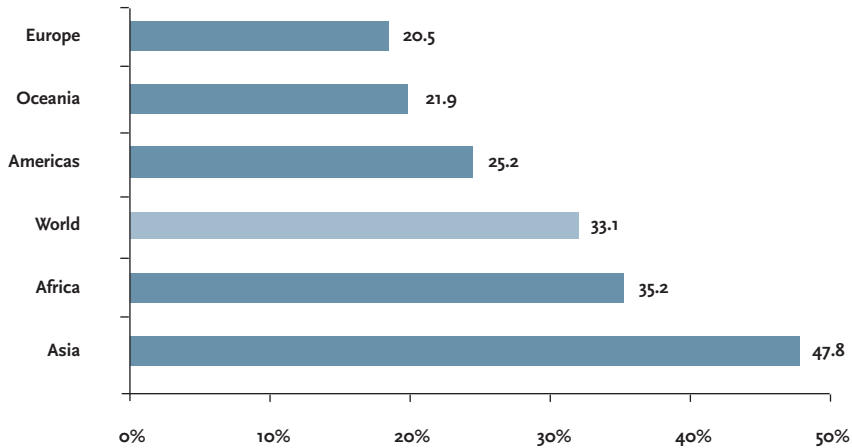
Unsentenced prisoners are, of course, not only persons who are

awaiting trial. Prisoners whose trials are underway or who have been convicted but not yet sentenced are also usually classified as pretrial detainees.<sup>6</sup>

Persons popularly understood to be pretrial detainees fall into one of four categories. In chronological order, according to the flow of the criminal justice process, the categories are the following: (i) detainees who have been formally charged and are awaiting the commencement of their trial; (ii) detainees whose trial has begun but has yet to come to a conclusion whereby the court makes a finding of guilt or innocence; (iii) detainees who have been convicted but not sentenced; and (iv) detainees who have been sentenced by a court of first instance but who have appealed against their sentence or are within the statutory time limit for doing so.<sup>7</sup> In most countries the vast majority of detainees fall into the first two categories.

Generally not included in the definition of pretrial detention is the status of arrested persons or suspects who have not yet appeared in front of a judicial officer for a determination whether they should be released or detained awaiting trial (i.e., remanded in custody).<sup>8</sup> Also excluded from most countries’ count of the pretrial detention population are asylum seekers, undocumented migrants, and others held administratively. While these categories of people are usually not considered to be pretrial detainees, the problems they face as a result of their detention and the impact on wider society is very similar to that of pretrial detainees generally.

**Figure 1: Number of pretrial detainees as a proportion of the total prison population, by region, 2006**



Source: World Prison Population List, International Centre for Prison Studies.

### The Extent of Pretrial Detention in the World<sup>9</sup>

Globally, as of late 2006, almost every third incarcerated person was in pretrial detention.<sup>10</sup> But this proportion varies considerably by region. As Figure 1 shows, the region with the highest proportion of pretrial detainees is Asia (47.8 percent), followed by Africa (35.2 percent). In Europe about 20 percent of all prisoners were pretrial detainees in 2006.

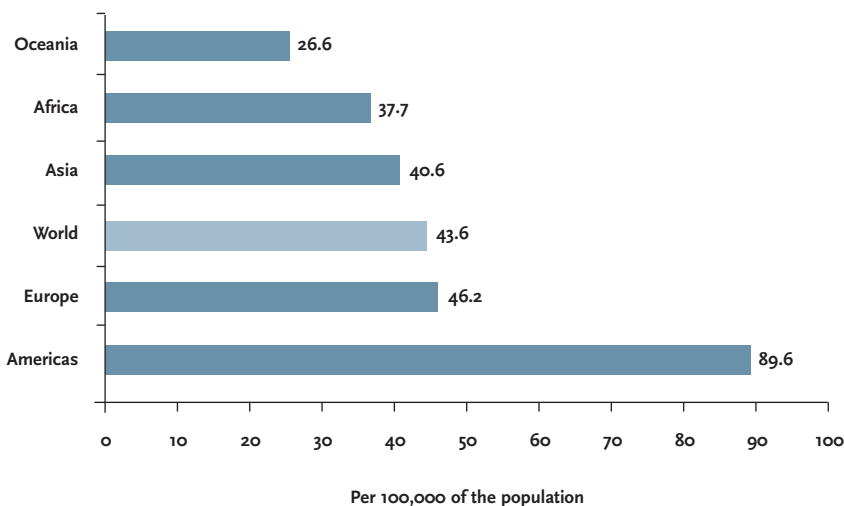
Another measure of the extent of pretrial detention is the number of pretrial detainees as a proportion of the general population. This pretrial detention rate is unaffected by changes in the actual number of sentenced prisoners and thus may be a better guide to assessing the scale of detention around the world.<sup>11</sup> It also makes it easy to compare the use of

pretrial detention between countries with different size populations.

Measured as a rate per 100,000 of the general population, almost 44 per 100,000 people were in detention worldwide at the end of 2006. The region with the highest pretrial detention rate—at more than twice the global average—is the Americas (89.6 per 100,000), followed by Europe (46.2), Asia, Africa, and Oceania (Figure 2).

This rate of pretrial detention varies not only between regions of the world but also within individual regions. For example, the pretrial detention rate in Eastern Europe (91 per 100,000) is more than six times the rate in the Nordic countries of Europe (14 per 100,000). In 2006, North America's pretrial detention rate was 137 per 100,000 (in large part due to the high level of both

**Figure 2: Number of pretrial detainees per 100,000 of the general population, by region, 2006**



Source: World Prison Population List, International Centre for Prison Studies.

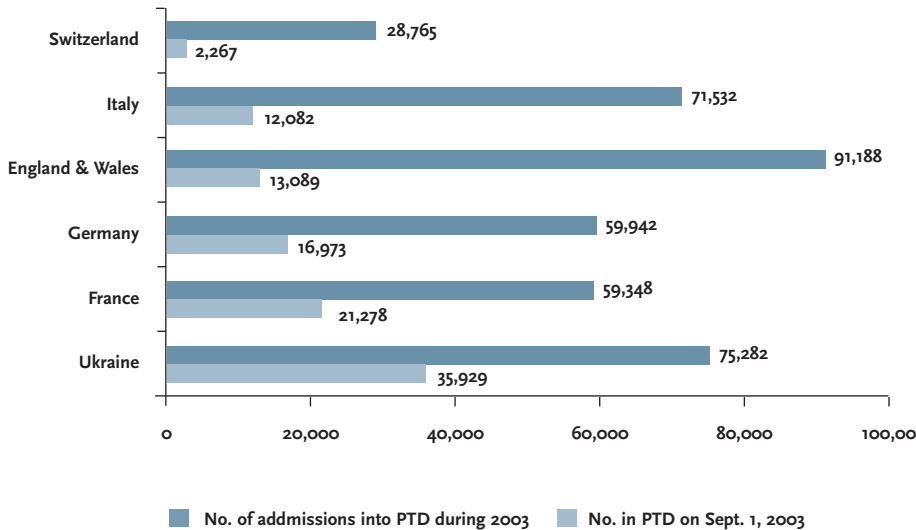
imprisonment and pretrial detention in the United States). By comparison, South America had a pretrial detention rate of 64 per 100,000, while the largely English-speaking countries of the Caribbean had a rate of 61 per 100,000.

Yet another, and perhaps more evocative, measure of the extent of pretrial detention around the world is the total number of individuals in detention.<sup>12</sup> While accurate and up-to-date data are not available for all countries, we know that at the end of 2006, some three million people were in pretrial detention. It is useful to place this large number in perspective. Some 42 percent (99 out of 237) of the world's sovereign states and dependent territories have national

populations below three million people.<sup>13</sup> If the world's three million pretrial detainees were to stand in a straight line with arms outstretched and touching, they could form a continuous line stretching from London to New York City, with enough people to spare to continue on to reach Washington, D.C.

Still, the figure of three million does not adequately convey the real extent of the use of pretrial detention around the world. This figure represents a snapshot in time, only capturing the number of persons in pretrial detention on a *specific day*—the last day of the month or year, for example. But in any prison system a significantly higher number of people are placed in pretrial detention over the course of

**Figure 3: Number of pretrial detainees on September 1, 2003, and number of pretrial admissions during 2003, selected European countries<sup>14</sup>**



Source: Council of Europe Annual Penal Statistics, Survey 2003 and 2004.

a year than can be found in detention on a particular day.

The number of individuals directly affected by a country's pretrial detention practices is therefore considerably higher than what the data at first glance appear to suggest. For example, 13,098 persons were held in pretrial detention in England and Wales on September 1, 2003. Over the course of 2003, however, 91,188 pretrial admissions were recorded in England and Wales. In other words, while the conventional way of presenting the data indicates a pretrial population of just over 13,000 for England and Wales in 2003, close to seven times as many individuals were detained during the course of that year—many for relatively short periods of time.

Switzerland presents an even starker example of this disparity whereby the number of pretrial admissions in 2003 was almost 13 times as high as the count of pretrial detainees on September 1 that year (Figure 3).

According to the Council of Europe, the 28 European prison systems for which data is available held 181,487 pretrial detainees on September 1, 2003. Over the course of that year the same prison systems processed 561,131 pretrial admissions—a ratio of 1:3.1. Non-European data is very hard to come by. We know, however, that in South Africa the comparable ratio for 2005 was 1:4.8. In the United States federal detention system the ratio was 1:6.3 in 2000/01.<sup>15</sup>

Using the relatively low European ratio of 1:3.1 and extrapolating to the world as a whole, we can estimate that the world's penal systems processed at least some 9.3 million pretrial admissions during 2006.<sup>16</sup> If we assume that the bulk of these admissions, say 80 percent, involved unique individuals, then 7.4 million persons spent some period of time in pretrial deten-

We can estimate that the world's penal systems processed at least some 9.3 million pretrial admissions during 2006.

tion in 2006. This is a large number of people. Most countries (140 out of 237) have national populations below 7.4 million people. Moreover, our hypothetical 7.4 million pretrial detainees would now have to start in Johannesburg, South Africa, to form one uninterrupted line going through the length of Africa to reach London and then cross the Atlantic to reach Washington, D.C., via New York City.

Another way of gauging the extent of pretrial detention is to measure the number of days people spend in detention. According to a 2003 European Commission investigation, the average length of pretrial detention in 19 of the then 25 member states of the European Union was 167 days, or 5.5 months.<sup>17</sup> There are no equivalent data for other countries. The global average is almost certainly likely to be longer. According to the report on Nigeria in this volume, the average length of pretrial detention in

that country is 3.7 years. It has also been reported that remand prisoners in many African countries are detained for many years before trial.<sup>18</sup> According to Human Rights Watch, pretrial detainees "in numerous countries . . . make up the majority of the prison population. Such detainees may in many instances be held for years before being judged not guilty of the crime with which they were charged."<sup>19</sup>

If we—again conservatively—presume that the global average period of pretrial detention is 167 days, then the three million persons in pretrial detention at the time of writing will spend a combined total of 501 million days in detention. It is also instructive to place the cumulative half-billion days the present group of pretrial detainees will spend in detention into perspective. It is estimated that the manpower required to build the Great Pyramid of Khufu (Cheops), the largest pyramid in Egypt, was 52 million man-days.<sup>20</sup> The Empire State Building took a "mere" 875,000 man-days to build.<sup>21</sup> In theory, therefore, the total time the present cohort of pretrial detainees will spend in detention equals the man-days necessary to build an Empire State Building in every country of the world, plus a pyramid the size of the Pyramid of Khufu on six continents, and still have a few million man-days to spare.

Measuring the length of a human chain of the world's pretrial detainees or the size of a potential labor force embodied in the pretrial detainees incarcerated at the end of 2006 may seem frivolous. It does, however, allow



us to visualize better the true extent of pretrial detention in the world today. In a crude way these accounts and the associated statistical information permit us to discern one important consequence of the widespread use of pretrial detention: the loss of liberty for a large number of people over extended periods of time. What this information fails to show is the wide-ranging and perverse consequences of pretrial detention on the physical, mental, and economic wellbeing of detainees and, importantly, its harmful impact on individuals other than the detainees and on society in general. It is to a discussion of these consequences that we now turn.

### The Consequences of Pretrial Detention

It is surprising how little information exists on the consequences and impact of pretrial detention. The available literature tends to focus on how pretrial detention affects the detainees themselves. This is understandable, as detainees are most directly affected by unfair and irrational pretrial detention regimes, especially if—as is all too often the case—the conditions under which they are detained are deplorable and inhumane.

Largely ignored in policy debates about the use and application of pretrial detention is its deleterious effect on detainees' families, wider society, state governance, and the effective administration of justice—all of which are explored more fully below. The consequence of pretrial detention on individual detainees can often have a domino effect on their families and

communities. For example, a detainee who is infected with a communicable disease while in pretrial detention may, upon his release, pose a health risk not only to his immediate family but also to the broader community with which he interacts. To illustrate this link we first look at the consequence of pretrial detention on individual detainees and thereafter explore its impact on detainees' families, society, and the state.

Largely ignored in policy debates about pretrial detention is its deleterious effect on detainees' families, wider society, and the effective administration of justice.

### Pretrial Detainees

A decision to detain a person before he is found guilty of a crime is a particularly draconian ruling for a court to make. The numerous and insidious repercussions for the defendant are ably summarized by a senior officer of the Probation Service in England and Wales as follows:

When a person is remanded in custody, they can lose their accommodation, their job, be locked away for 23 hours each day, and endure the pressures, hazards and indignities of prison life. Remand prisoners have inadequate access to legal representation, their prison conditions whilst on remand are poorer than their sentenced counterparts and the suicide rate amongst remandees is very high. Such defendants suffer regular invasions of privacy each time they are searched

and often fear danger from those incarcerated with them.<sup>22</sup>

The conditions of confinement for pretrial detainees are typically worse than for sentenced inmates, even in affluent countries such as the United Kingdom. A report from Scotland found “their conditions in custody are at best equivalent, but most commonly worse than, those of convicted prisoners.”<sup>23</sup> According to Baroness Vivien

### Conditions of confinement for pretrial detainees are typically worse than for sentenced inmates.

Stern of the International Centre for Prison Studies, for some detainees who are compelled to spend long periods of time incarcerated under poor sanitary conditions, in acutely overcrowded prisons with inadequate nutrition, and limited—if any—access to healthcare, a period of detention “can be a death sentence.”<sup>24</sup>

Detainees also suffer from neglect, not just abuse and unsafe conditions of confinement. Prison administrators tend to see pretrial detainees as a group whose imprisonment is temporary, while the main task of prison is to deal with those who have been sentenced. That is, prison administrators regard their main mandate as the custody and rehabilitation of sentenced prisoners. A multicountry study found that “most prison systems in practice frequently deny to the remand population access to many of

the facilities, rights and privileges granted to convicted inmate... [I]n some cases, such deprivations amount to an inducement to plead guilty in order to obtain better conditions of confinement.”<sup>25</sup>

In some countries, pretrial detainees are held at police stations for long periods of time under atrocious conditions. According to Human Rights Watch reports, the conditions in such police lock-ups “are filthy, often stuffy and dim, and seldom offer opportunities for exercise or recreation.”<sup>26</sup> It is also at police stations where the physical abuse of pretrial detainees is most likely to occur at the hands of the police to extract confessions and admissions. In a number of countries pretrial detention is governed by the interests of the criminal investigation agencies. Detainees are under the jurisdiction of the prosecuting authorities, who make all vital decisions regarding conditions of incarceration. According to Human Rights Watch, prosecuting authorities routinely prevent detainees from communicating with the outside world or inmates other than their cellmates.<sup>27</sup>

### *Damage and Deterioration of Detainees Mental Health*

Imprisonment is known to have negative effects on prisoners’ mental well-being.<sup>28</sup> Factors that contribute to this include overcrowding, violence and intimidation common to the prison environment, enforced solitude, lack of privacy, a dearth of meaningful activities, and inadequate mental health services. Moreover, in many countries people with mental disor-

ders are disproportionately likely to be incarcerated.<sup>29</sup> Mental disorders present at the time of admission to prison are usually further exacerbated by the stress of imprisonment.

Suicide is often the single most common cause of death in correctional settings. A survey of 36 member states of the Council of Europe revealed that 2,851 prisoners died in penal institutions in 2003, of whom 1,520 (53 percent) were suicides.<sup>30</sup> This figure does not include Russia, which has high rates of mortality in prison.

According to the World Health Organization (WHO), prisoners not only have higher suicide rates compared to their counterparts in the community, but suicide rates among pretrial detainees are considerably higher than among sentenced prisoners. Among pretrial detainees the suicide rate is 10 times that of the outside community, while sentenced prisoners have a suicide rate three times higher than in the outside community.<sup>31</sup> In the United States, the suicide rate among pretrial detainees is 9 to 14 times higher than that in the general population.<sup>32</sup> In 2002, more than a third (38 percent) of prison suicides in England and Wales were committed by pretrial detainees, even though they constituted only 19 percent of the total prison population.<sup>33</sup> Pretrial detainees are particularly at risk of committing suicide during the initial period of their confinement.

One reason for the high suicide rate among recently detained inmates is that, upon confinement, they may experience multiple situational stressors associated

with their confinement and their pending trials. These stressors, collectively termed *confinement shock*, include, for example, the experience of being torn out of their familiar social environments, of being isolated, and of losing control over their lives. Moreover, they experience increased insecurities about the unfamiliar jail environment and anxiety about their trials.<sup>34</sup>

### Suicide rates among pretrial detainees are considerably higher than among sentenced prisoners.

Other reasons for the high incidence of mental health problems among pretrial detainees include the fact that in many penal systems pretrial detainees are considered ineligible for work, educational, or vocational programs or not deemed to have been in prison long enough to demonstrate a sustained period of good behavior.<sup>35</sup> Such enforced idleness “fosters a lowering of self-esteem, loss of skills, and inevitable institutionalization.”<sup>36</sup> Moreover, the relatively high turnover of pretrial detainees poses limitations on the provision of meaningful interventions. Uncertainty about the outcome of their impending trials can also place detainees under considerable strain and has been identified as a significant contributory factor in incidents of self-harm.<sup>37</sup> Bullying—which has been shown to be more common among pretrial detainees—is a further contributor to suicides and self-injury among detainees.<sup>38</sup>

For juvenile pretrial detainees, who may be experiencing their first separation from parents or caregivers, these feelings of depression, anxiety, and hopelessness—common among prisoners—are exacerbated. In the United States it has been found that for one-third of incarcerated youth diagnosed with depression, the onset of the depression occurred after they began their incarceration and that poor men-

Overcrowding, limited access to health care, violence, and other factors make prisons a perfect habitat for the spread of infectious diseases.

tal health and the conditions of detention together increase the likelihood that incarcerated teens will engage in self-harm and suicide.<sup>39</sup>

### *Spreading Infectious Disease*

Prisoners typically come from the poorest sectors of society and consequently already suffer from health inequalities. Incarceration commonly aggravates existing health problems. Overcrowding, poor nutrition, lack of exercise, limited access to health care, violence, risky sexual practices, high rates of intravenous drug use, sharing razor blades, and tattooing make prisons a perfect habitat for the spread of infectious diseases.<sup>40</sup>

Prison overcrowding facilitates the transmission of tuberculosis (TB) bacteria among inmates. Prisoners around the world have consistently

higher rates of TB infection than the general population. In the former Soviet Union, for example, TB infection in prisoners is reported to be 200 times more prevalent than in the general population, while in the United States the infection rate among prisoners ranges from three to 11 times that of the general population.<sup>41</sup>

TB originating in prisoners can—and has—been transmitted to prison staff, visitors, external health care workers, and the broader community. Outbreaks of multidrug-resistant TB occurred in U.S. prisoners in the early 1990s, spreading to patients in local hospitals, with mortality being as high as 72 percent to 91 percent. Within two years, the TB strain originating from a New York state prison spread to Florida, Nevada, Georgia, and Colorado.<sup>42</sup>

In Russia TB is widespread in prisons. In fact, in Russia, a history of incarceration in both pretrial detention centers and prison has become a key risk factor for TB.<sup>43</sup> Unprotected from the TB epidemic and other infectious diseases, many pretrial detainees end up spending months and even years awaiting their day in court in overcrowded cells where, as one commentator put it, “a death sentence stalks people who have not yet been convicted of a crime.”<sup>44</sup>

HIV rates in prison are also significantly above the national average in many countries. In parts of Europe and the United States, up to 20 percent of inmates are HIV-positive. In prisons of Latin America and sub-Saharan Africa disproportionately high rates of HIV infection have also

been found.<sup>45</sup> While it is undoubtedly an extreme case, an account of the spread of HIV/AIDS in Lithuania is indicative of how prisons are effective vectors for the spread of infectious diseases. In 2002, 263 prisoners at a prison in Lithuania tested positive for HIV. Yet before these tests, Lithuanian officials had counted just 300 cases of HIV in the whole country, or less than 0.01 percent of the population, a figure that put Lithuania at the lowest rate of infection in Europe.<sup>46</sup>

### Disrupting Families and Communities

The impact of a person's detention on his or her family depends on a number of factors. These include the detainee's employment status at the time of detention, the size of the family—if any—dependent on the detainee, and the ability of the extended family and/or the state to take over the responsibilities to care for that family.

A book on the English bail system, *Bail or Custody*, provides an example of the impact pretrial detention has on a detainee and his family, which is symbolic of the far-reaching impact detention can have.<sup>47</sup> The example is about a defendant who was a 29-year-old truck driver living with his wife, his retired-father-in-law, and an eight-year-old son in a council house. He was arrested and charged in connection with a robbery that had allegedly been planned in his house. The police successfully opposed bail. Altogether the defendant appeared

five times at the magistrates' court and was refused bail on each occasion. Finally, when the case was committed for trial, the police withdrew their objection and bail was granted. After almost four weeks in pretrial detention, the defendant no longer had a job to return to, and the rent of the house where he had lived for seven years was in arrears. Three weeks later he and his family were evicted. The defendant

After almost four weeks in pretrial detention, the defendant no longer had a job to return to and his rent was in arrears.

had to live separately from his wife and child for three months, while his father-in-law was given hostel accommodation. The mental strain of the situation caused the defendant's wife to suffer a nervous breakdown and so disturbed his son that he had to be given psychiatric treatment. The defendant found it difficult to get work and could not obtain unemployment benefits because he was awaiting trial and was therefore not, according to the local labor bureau, available for work. Four months after his arrest the defendant was tried and acquitted. Over a year later the defendant and his wife still lived in temporary accommodation, the father-in-law was still living in a hostel, and the defendant's son was still receiving psychiatric treatment.

### *The Impact of Detention on Children*

Little research has been undertaken to explore how parental detention affects minor children and what its consequences are for their development. A few studies have found that children of incarcerated parents are “more likely to exhibit low self-esteem, depression, emotional withdrawal from friends and family, and inappropriate or disruptive behavior at home and in school . . . [and are] at high risk

Detention, like incarceration, disproportionately affects individuals and families living in poverty.

for future delinquency and/or criminal behavior.”<sup>48</sup>

A review of the literature on how children experience the loss of a parent provides some insight on how children may experience the detention of a parent, especially if the detention is for an extended period of time and results in a significant loss of contact between the parent and child. The potential deleterious effects on such children are numerous. Children experience the loss of a parent—irrespective of the cause—as a traumatic event. Depending on the child’s age, this may lead to a child’s inability to form attachments with others, anger, and antisocial behavior. The trauma of the loss of a parent can stunt a child’s development, especially as detention can bring about a great deal of uncer-

tainty in a child’s life. Children may also react to the stigma of having a parent in detention with feelings of shame and a loss of self-esteem. These consequences are exacerbated by the fact that many children of detained parents live in debilitating circumstances to begin with, often coming from poor, marginalized communities.<sup>49</sup>

Children whose mothers are detained have been identified as “among the riskiest of the high risk children.”<sup>50</sup> In a review of the literature on children whose mothers are detained or imprisoned, it was found that such “children’s lives are greatly disrupted when mothers are arrested, and most children show emotional and behavioral problems . . . experiencing internalizing (fear, withdrawal, depression, emotional disturbance) and externalizing (anger, fighting, stealing, substance abuse) problems, as well as heightened rates of school failure and eventual criminal activity and incarceration.”<sup>51</sup>

### *The Impact on Family Economy, Especially in Poor Communities*

Detention, like incarceration, disproportionately affects individuals and families living in poverty. When an income-producing parent is detained, the family must adjust to the loss of that income. The impact can be especially severe in poor, developing countries where the state does not provide reliable financial assistance to the indigent and where it is not unusual for one breadwinner to financially support an extended family network.

Thus, while there are about two dependents per working person in the developed world, in the developing world the ratio is about one to six.<sup>52</sup> In some particularly impoverished rural areas of Africa, dependency ratios in excess of 1:200 have been reported.<sup>53</sup>

A hypothetical example from a poor, rural community in the developing world reveals the medium- to long-term economic shocks within a household as a result of the detention of one of its members. After the male head of a household is arrested and detained, the family must sell its maize-milling machine to obtain cash for his legal fees, bail, and/or money to bribe him out of detention. As the milling machine brought steady income into the household, the sale of working capital means that the family soon has no money to hire labor or buy inputs for their beetroot plots. Beetroot production ceases, and so does income from the crops. The new owner of the milling machine moves it to a distant location. The absence of the machine is felt by other households in the village, and women go back to pounding maize, which increases their workload.<sup>54</sup>

It stands to reason that a family experiences financial losses as a result of the detention of one of its members. This is especially the case when the period of detention is long, families maintain regular contact with their detained member, and the detained family member functioned in a responsible parenting role prior to the detention. “Families face the

loss of the imprisoned parent’s income; legal fees associated with legal defense and appeals; and the costs of maintaining the household, maintaining contact during imprisonment, and providing personal items for the prisoner.”<sup>55</sup>

Prolonged periods of detention place considerable strain on intimate relationships. In a U.S. study of sen-

**Detainees infected with a disease while incarcerated pose a public health risk to the communities to which they return.**

tenced offenders, half of married male respondents reported that their primary source of emotional support was their wife.<sup>56</sup> The conclusion that “it is not uncommon for marital relationships to end in divorce during a prison term” is likely to apply, albeit to a somewhat lesser extent, to married persons who spend long periods of time in pretrial detention.<sup>57</sup> In England and Wales, almost half (48 percent) of all pretrial detainees report losing contact with their families while in detention.<sup>58</sup>

### **The Impact on Communities and Public Health**

Once released from prison, detainees infected with a communicable disease while incarcerated pose a public health risk to the communities to which they

return. The effect of this on poor households can be devastating and may impoverish households reliant on the good health and labor of each of their members. The excessive use of pretrial detention in marginalized communities may also have a broader debilitating effect on the social fabric, reducing social capital.

Little research has been undertaken to investigate the broader social impact of excessive pretrial detention on communities and society as a whole.

### *Detrimental Health Effects*

Detainees infected with HIV/AIDS, tuberculosis, or other communicable diseases are likely to pass these on to their families and communities after their release. Given that most persons incarcerated—especially those who have not been convicted—have a high likelihood of eventually being released, the health of detainees is a fundamental public health concern. As detailed above, prisons have emerged as structural factors fueling outbreaks of HIV and TB in Eastern Europe and Russia.<sup>59</sup> In South Africa, where an estimated 40 percent of inmates are reported to be HIV positive, some 25,000 prisoners are released every month. Many of these are former pretrial detainees who have been granted bail, are acquitted, or have had their charges withdrawn.<sup>60</sup>

In poor communities in the developing world, where many rely on subsistence agriculture for their survival, the serious illness and incapacitation of even one or two adult household members can bring about a spiral of poverty as the household is forced to sell off the few capital assets it may possess in an effort to obtain medication and professional medical help for the ill.

A U.S. study has found that high rates of incarceration including, to a somewhat lesser extent, pretrial detention can have the “unintended consequence of destabilizing communities and contributing to adverse health outcomes.”<sup>61</sup> According to the study, rates of sexually transmitted infections (STIs) and teenage pregnancies consistently increased with increasing imprisonment rates. Moreover, the population released from incarceration presents an above-average risk of infecting community members with an STI.<sup>62</sup>

### *Detrimental Social Effects*

The U.S. study cited above concludes that removals from, and releases to, communities disrupt relationships and weaken social norms, in that maintenance of these norms is based on long-term relationships. In communities where neighbors know one another, these individuals tend to be involved in each other's lives and the lives of their children, offering advice and support. To the extent that parenting affects the sexual behaviors of teenagers, juveniles with a parent who is absent as a result of being incarcerated are



more at risk of behaviors that result in a sexually transmitted infection and/or pregnancy.<sup>63</sup>

Little research has been undertaken to investigate the broader social impact of excessive pretrial detention on communities and society as a whole. It is likely, however, that the nature of the impact is similar to that of mass incarceration as seen in countries such as the United States, Russia, Belarus, Ukraine, or South Africa (all countries with incarceration rates in excess of 330 per 100,000 of the general population).

When most families in a neighborhood lose fathers to prison, the distortion of family structure affects relationship norms between men and women as well as between parents and children, reshaping family and community across generations. And, while families in poor neighborhoods have traditionally been able to employ extended networks of kin and friends to weather hard times, incarceration strains these sustaining relationships, diminishing people's ability to survive material and emotional difficulties. As a result, incarceration is producing a deep social transformation in the families and communities of prisoners—families and communities, it should be noted, that are disproportionately poor.<sup>64</sup>

### The Impact on the Rule of Law

Protecting the restrictions on the use of pretrial detention, as well as the process leading up to a pretrial detention determination, is vital to preserve one of the cornerstones of a rights-based criminal justice system:

the presumption of innocence. That is, the right of any defendant to be presumed innocent of the allegations against him until found guilty by a competent court.

In support of this principle, most countries have ratified international human rights instruments that allow the use of pretrial detention only under carefully defined circum-

International human rights instruments allow pretrial detention only under carefully defined circumstances.

stances. Many countries have, moreover, embedded the substance of such international instruments into domestic legislation. Yet, a significant number of criminal justice systems routinely contravene international instruments and their own domestic pretrial detention laws and regulations.

In theory, judicial officers' pretrial release/detention decisions are rational because they are based upon an acquired expertise about risk factors as they relate to individual defendants. The theory has, however, not been substantiated by studies of bail decisions. In fact, in some risk-of-flight studies, similarly situated defendants have received significantly different bail decisions. In some risk-of-reoffending studies, judicial officers accurately identified potential reoffending defendants in only 5 percent to 30 percent of the cases.<sup>65</sup>

In Harris County, Texas, a report revealed that the excessive use of financial bail resulted in the detention of a large number of defendants who were charged with minor crimes and who posed a low risk for absconding or committing a crime if released awaiting trial. In 2003, some 8,700 misdemeanor defendants were detained despite being classified as “low risk” on a Pretrial Services

Pretrial detention is often used as a sanction or repressive measure: it serves as a means of coercing a confession.

Bail Classification score and despite having no prior convictions.<sup>66</sup>

In a survey of detention decisions between August 2004 and July 2007 in the Mexican city of Monterrey, it was found that virtually all detained defendants resided in metropolitan Monterrey with many being employed. It was also found that half of the defendants were over 30 years of age (past the age when persons are disproportionately likely to commit violent crimes). And, two-thirds of the defendants were first time offenders.<sup>67</sup> On the face of it, these defendants posed a low risk of flight, offending while awaiting trial, or interfering with the administration of justice.

### *Debasing the Presumption of Innocence*

A multi-country study of pretrial detention law and practices suggests that at times pretrial detention is used

as a sanction or repressive measure: it serves as a means of coercing a confession or as a control of homeless persons.

In practice this leads to a blurring of the boundaries between pre-trial detention and the sentence of imprisonment. In other words, the abuse of pre-trial detention which can also be observed in European countries, whereby a period of pre-trial detention is regarded as a short term of imprisonment served in anticipation, has developed into a strategy which is used systematically by the criminal justice system. Where pre-trial detention is used, overtly or covertly, for such purposes it seems fairly clear that the “presumption of innocence”—the idea that a person should be considered innocent until proven guilty—is being breached.<sup>68</sup>

In a country visit to the Central African Republic in 2000, the Special Rapporteur on Prisons and Conditions of Detention in Africa found that while detention immediately after arrest by the police is statutorily limited to 48 hours, it can “last for six months without it being taken into account in sentencing.”<sup>69</sup> In The Gambia, the constitution limits the time period between arrest and a defendant’s court appearance to 72 hours. At the country’s police headquarters in Banjul, however, the special rapporteur did not find a single arrestee who had been brought before a court within the 72-hour time limit. In fact, some arrestees claimed to have been in police detention for a number of months without being remanded by a judicial officer.<sup>70</sup>

In some countries where pretrial detention is not used sparingly, as required by international norms, “the use of force, sometimes amounting to torture, by investigating authorities such as the police is common in order to extract confessions.”<sup>71</sup>

The excessive use of pretrial detention also undermines the presumption of innocence in other, less explicit, ways. If a defendant is ordered held in custody, or if money bail is set at an amount the defendant cannot meet, several significant consequences may result:

- There is both British and U.S. empirical evidence showing that persons in pretrial detention are more likely to be found guilty of the offense charged compared to defendants with similar backgrounds and charges who have been released awaiting trial.<sup>72</sup> The defendant who remains in prison may have difficulty participating in his own defense. An incarcerated defendant cannot look for friendly witnesses and may have limited contact with a defense lawyer.
- Defendants detained prior to trial are more likely to be sentenced to prison than are defendants who are released prior to trial.<sup>73</sup> That is, the experience of pretrial detention is known to undermine—through loss of employment, accommodation, family and other community ties—defendants’ capacities to present themselves in a light favorable to receiving a noncustodial sentence.<sup>74</sup> A defendant’s appearance and demeanor in court may not inspire confidence if he has spent

weeks or months in a prison cell; the detained defendant is less likely to have character witnesses to use in mitigation of sentence than the defendant released awaiting trial; and a detained defendant may have lost his job or home and consequently may not be considered as suitable for a suspended sentence, probation, or a fine.<sup>75</sup> By contrast,

There is empirical evidence showing that persons in pretrial detention are more likely to be found guilty than defendants with similar backgrounds and charges who have been released awaiting trial.

released suspects can be in touch with a lawyer relatively easily and can assist in developing a defense to specific charges. They can continue working, paying taxes, and supporting their families. They can also take steps to reduce the severity of a sentence if they ultimately are found guilty by, for example, getting or keeping a job, maintaining or reestablishing family ties, and developing a record of complying with conditions of release.<sup>76</sup>

- Defendants held in detention often have a heightened incentive to plead guilty, even though they may have a valid defense, simply to gain their freedom—particularly if they can receive a sentence of time served or receive credit for their jail time against a relatively short prison sentence. A British study found a strong correlation between a

defendant's pretrial detention status and the likelihood of a guilty plea.<sup>77</sup> There may be a number of reasons for this phenomenon. The influence of prison wardens and other detainees may help to convince a defendant that he would regain his freedom more quickly and perhaps be treated more lightly if he were prepared to plead guilty. Moreover, long periods of idleness, the tense-

Poor people do not have access to private counsel, and many developing countries lack a comprehensive legal aid system.

ness and uncertainty of the situation, and the relative inaccessibility of reliable legal advice may also be contributing factors. It does not take much to break the spirit of a man who has been kept in a cell most of the day, not knowing what is going to happen to him. The finding of guilt and the passing of a sentence do at least bring an element of certainty into the situation.<sup>78</sup>

The loss of liberty, the indignities, and the other repercussions pretrial detainees suffer are particularly egregious in light of the fact that a significant number of pretrial detainees are either acquitted of the charges against them or receive a noncustodial sentence. In England and Wales, for example, approximately one out of every five pretrial detainees is

acquitted. Moreover, about half of all pretrial detainees receive a noncustodial sentence (50 percent for males and 59 percent for females in 2002).<sup>79</sup> In New Zealand, too, about a fifth of all persons who spend some time in pretrial detention end up being acquitted of the charges against them, while half receive a noncustodial sentence.<sup>80</sup> Moreover, where custodial sentences are imposed, there is some evidence to suggest that "imprisonment appears at least in some times and places to be used in order to 'cover' pre-trial detention: that is, pre-trial detention is retrospectively justified by imposing a prison sentence."<sup>81</sup>

### *Discrimination against the Poor*

In many poor countries the formal criminal justice system often fails to provide justice and security to the indigent or protect their rights. According to Vivien Stern of the International Centre for Prison Studies, justice systems in poor countries exacerbate the poverty of the destitute "by bearing down most heavily on them and subjecting them to gross injustices, whilst not providing them with the protection they need."<sup>82</sup>

Pretrial detention regimes can be particularly discriminatory against the indigent. Poor people do not have access to private counsel, and many developing countries lack a comprehensive legal aid system for defendants too poor to afford their own lawyers. In countries where a rudimentary legal aid system operates, legal counsel is often provided only at the trial stage of legal proceedings, long after a decision has been made

to detain a defendant awaiting trial.

A United Nations Office on Drugs and Crime (UNODC) study of justice system integrity and capacity in three Nigerian states in 2002 found that 38 percent of awaiting trial prisoners had retained a lawyer and that only around 10 percent of the respondents had been able to pay their lawyers' fees themselves (with the remainder being supported by their family or friends, or the government).<sup>83</sup> Unlike Nigeria, which has an estimated 28,000 lawyers,<sup>84</sup> large parts of Africa face an extreme shortage of legal professionals, so that many detainees—especially those in rural areas—are unable to obtain professional legal services. For example, in 2004, the ratio of practicing lawyers to the general population was 300 to 11 million in Malawi, 400 to 26 million in Uganda, and 400 to 35 million in Tanzania.<sup>85</sup> Moreover, lawyers in many developing countries are concentrated in urban centers, leaving the rural poor with virtually no access to professional legal representation. In Sierra Leone, for example, 95 percent of the country's 125 lawyers (serving a population of five million) are based in the capital, Freetown.<sup>86</sup>

In cases where pretrial release is granted with conditions, it is usually the indigent who have the greatest difficulty complying with such conditions. This is especially true when the condition is a monetary bail bond. In many countries defendants are granted release awaiting trial provided they deposit a sum of money with the court. In Malawi, for example, a key reason for overcrowding of the

prison system was that “prisoners cannot pay bail or provide any surety.”<sup>87</sup> In South Africa about a third of all awaiting trial prisoners who are granted bail are unable to afford the amount set.<sup>88</sup>

Other conditions pose similar problems: for example, defendants are often released awaiting trial on the condition that they report to a police

In South Africa about a third of all awaiting trial prisoners who are granted bail are unable to afford the amount set.

station on a regular basis. Individuals without access to private transport, too poor to afford the regular use of public transport, or who live in a rural area far from the nearest police station, find it difficult to meet such a condition. In a survey of rural inhabitants in South Africa conducted in the late 1990s, half the respondents indicated that they were between 11 and 30 kilometers from the nearest police station, with 12 percent being more than 30 kilometers away. Just six percent of the respondents indicated they were able to drive themselves in private transport to the nearest police station, and only 10 percent said they could use a commuter bus because of the limited availability of public transport in rural areas.<sup>89</sup>

### *Fostering Corruption*

In criminal justice systems where corruption is pervasive, defendants are likely to be released awaiting trial only if they have politically powerful allies or the means to bribe the arresting officer, the prosecutor, or the judicial officer dealing with their application for pretrial release. For example, the aforementioned 2002 UNODC study found that, on average, more than 70 percent of lawyers surveyed in three Nigerian states had paid bribes in order to expedite court proceedings, including the implementation of bail orders, the commencement of trial, and speeding up trial proceedings. While most of these bribes were paid to court staff and police, a fifth of respondents stated they also had to make such payments to judges. In systems where judges do not have to provide transparent and defensible reasons why a defendant is being detained pending trial, chances are higher that some judges will accept bribes to release someone from pretrial custody. More than 40 percent of court users surveyed experienced corruption when seeking access to the justice system, with a large proportion specifically stating that they paid a bribe to obtain bail.<sup>90</sup> According to the UNODC, “the assessment revealed that in particular the poor and uneducated, as well as ethnic minorities are more likely to be confronted with corruption... and to experience delays.”<sup>91</sup>

Country reports from the office of the Special Rapporteur on Prisons and Conditions of Detention in Africa are full of examples of corrupt practices in respect of bail. In a 2000 visit to

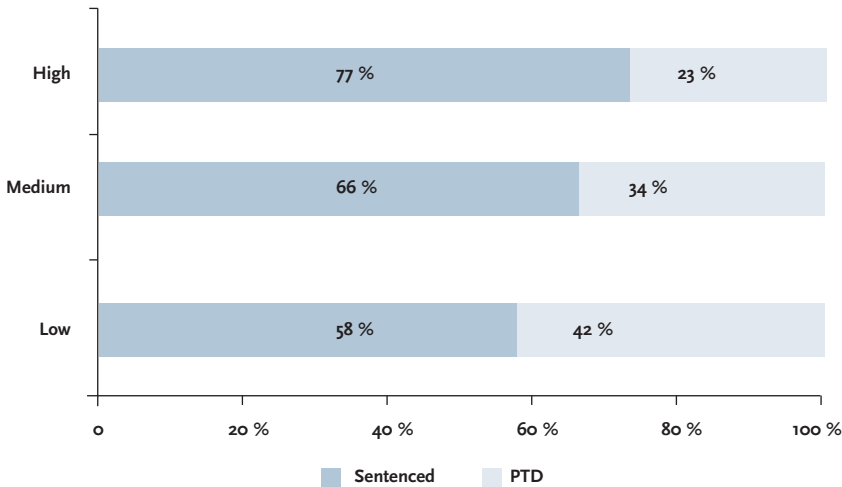
remand cells in Bangui in the Central African Republic, the special rapporteur found that “police demanded money [from the detainees] before release.”<sup>92</sup> In a 2001 report on prisons in Malawi, the special rapporteur found that “cases of ill-treatment and corruption... do not seem to be isolated cases.”<sup>93</sup> In Benin, a prisoner told the special rapporteur: “The main problem is the judiciary. [The act of] prosecution in Abomey [a city in Benin] has become an avenue for getting money. If you do not have money, your case is never examined.”<sup>94</sup>

### **The Impact on Good Governance and Development**

The negative impact of corruption on investment has been well documented. Reports by the United Nations Development Programme (UNDP) demonstrate empirically the negative impact of corruption on growth.<sup>95</sup> The World Bank agrees that, by distorting the rule of law and weakening the institutional foundations of economic growth, corruption is the single greatest obstacle to economic and social development.<sup>96</sup> The harmful effects of corruption are especially severe on the poor, who are hardest hit by economic decline, are most reliant on the provision of public services, and are least capable of paying the extra costs associated with bribery and fraud.<sup>97</sup> The International Monetary Fund, in turn, notes “there is a close association between corruption and slow growth, as well as between corruption and political instability. . .”<sup>98</sup>

The excessive use of pretrial detention can weaken governance in a num-

**Figure 4: Proportion of pretrial detainees and sentenced prisoners, by Human Development Index ranking, 2006**



Source: World Prison Population List, International Centre for Prison Studies; UNDP.

ber of ways. As discussed above, unwarranted or discriminatory pretrial detention undermines the rule of law and honest and accountable government by fostering corruption. Pretrial detention can also weaken good governance by increasing—rather than reducing—crime and by consuming scarce resources that could, from a development perspective, be spent more productively on education, health care, or infrastructure improvement. Moreover, while pretrial detention can in certain circumstances impede aspects of good governance, the reverse can hold true as well. That is, badly governed states with poor systems of public administration tend to have prisons that are disproportionately filled with pretrial detainees.

#### *Governance and Detention*

The proportion of pretrial detainees also varies by level of economic and human development. Countries with a higher level of human development have, on average, a lower proportion of their total prison population in pretrial detention. As Figure 4 above shows, countries with a high score in the UNDP Human Development Index (HDI) tend to have a lower proportion of prisoners in pretrial detention.<sup>99</sup> A similar study conducted in the late 1990s, whereby countries were classified as “industrial,” “developing,” and “less developed” reveals a similar pattern. Industrial countries had, on average, a relatively low proportion of prisoners who were pretrial detainees; less developed countries had a high proportion.<sup>100</sup>

It is possible to proffer a number of explanations for the inverse correlation between development and the ratio of pretrial detainees to sentenced prisoners. Richer, more developed countries have the resources to employ sufficient numbers of police officers, prosecutors, and judges to undertake criminal investigations and trials relatively speedily. Such countries also have the skills and resources to develop credible and effective alternatives to pretrial detention. Moreover, wealthier countries with good institutions of higher learning have a higher density of lawyers who can provide legal assistance to arrestees and thereby minimize the number of persons who are placed in pretrial detention on trivial or unfounded grounds.

### *Promoting Crime*

The excessive and arbitrary use of pretrial detention may bring about conditions that increase the number of potential offenders in a society. There is significant evidence to show that the prison environment fosters criminal behavior. That is, an unintended by-product of prisons is that they serve as schools or breeding grounds for crime.<sup>101</sup> Prisons psychologically harm inmates, making their adjustment to society upon release more difficult, with one likely consequence being a return to crime. Much of the literature on the effects of incarceration argues that the confined spaces of prisons reinforce certain forms of negative behavior. For example, by examining the social learning

conditions that existed in various prisons, it was found that prisoners faced “overwhelming positive reinforcement” by the peer group for a variety of antisocial behaviors, so much so that even staff interacted with the inmates in a way that promoted a criminal environment.<sup>102</sup>

As is the case with sentenced prisoners, pretrial detainees invariably face similar criminogenic influences, especially if detained for extended periods under crowded and poor conditions. The risk is greater in places where sentenced and unsentenced prisoners are not separated, or where pretrial detainees charged with minor offenses are incarcerated together with detainees suspected of having committed serious crimes—not uncommon scenarios in many overcrowded prison systems around the world.

A U.S. study has shown that once juveniles are detained awaiting trial, even when controlling for prior offenses, they are more likely than nondetained juveniles charged with a crime to engage in future delinquent behavior, with the “detention experience increasing the odds that the youth will recidivate.”<sup>103</sup> Moreover, juvenile detention interrupts young people’s education, making it more difficult for some to return to school and find employment. Indeed, “economists have shown that the process of incarcerating youth will reduce their future earnings and their ability to remain in the workforce, and could change formerly detained youth into less stable employees.”<sup>104</sup> The failure of detained juveniles to return to school



affects public safety as, according to the U.S. Department of Education, school dropouts are three and a half times more likely than high school graduates to be arrested.<sup>105</sup>

#### *Opportunity Cost of Pretrial Detention*

Detaining people is an expensive undertaking for most states, especially for developing countries. For poor countries, where state budgets are rarely balanced and state funding to meet even the basic needs of all citizens is inadequate, expenditure on incarcerating pretrial detainees represents a stark opportunity cost. Every bit of state revenue spent on incarceration results in potentially less money for crucial social services, health, housing, and education. Moreover, states that spend large sums of money on incarceration in an effort to promote public security could arguably use some of that money more effectively on crime prevention activities.<sup>106</sup> Alternatively, money spent on pretrial detention could also be redirected to state functions that directly promote public security, such as employing more police officers or purchasing equipment that allows the police to function more effectively, such as vehicles or automated fingerprint identification systems.

The total budget of the South African Department of Correctional Services for the 2005–06 financial year amounts to R9.2 billion and is estimated to top R10 billion per annum thereafter.<sup>107</sup> Even for a relatively prosperous African country

such as South Africa, this entails a significant opportunity cost in terms of state spending forgone elsewhere. For example, an additional R10 billion would permit the South African treasury to more than double its health-related expenditure or double its expenditure on social development and the provision of housing.<sup>108</sup>

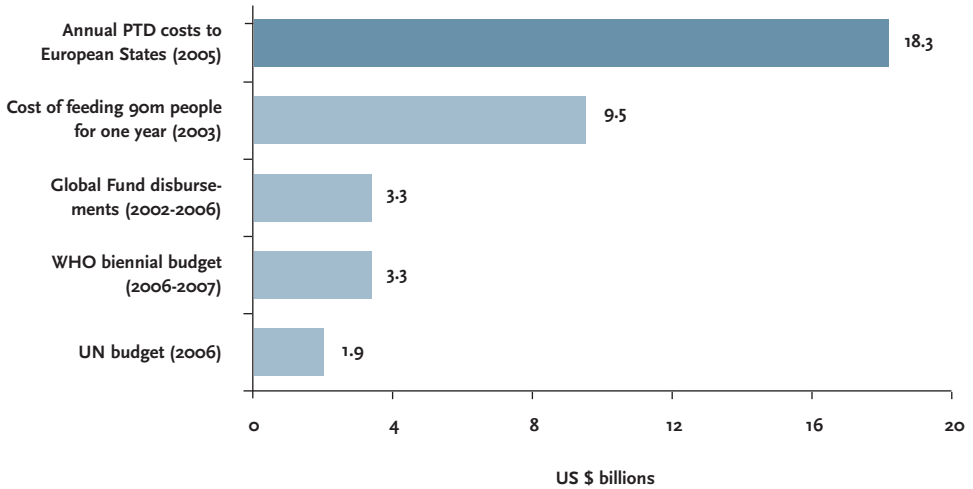
In 2004, the annual cost to the U.S. federal government of incarcerat-

States that spend large sums of money on incarceration in an effort to promote public security could arguably use some of that money more effectively on crime prevention activities.

ing one person was just over US\$23,000 per year.<sup>109</sup> The cost of keeping one juvenile in a state-level pretrial detention center in the United States is even higher, ranging from US\$32,000 to US\$65,000 per year.<sup>110</sup> In Australia, the state spends approximately AU\$60,000 per prisoner per year.<sup>111</sup>

According to a 2003 European Commission investigation, the average monthly cost of incarcerating pretrial detainees in 10 European Union member states for which data are available was €3,079 per month.<sup>112</sup> Extrapolated over Europe's 376,000 pretrial detainees in 2006, this comes to an annual cost of €13.9 billion. There were 104 countries in the world

**Figure 5: European expenditure on pretrial detention compared to selected global humanitarian, health, and governance expenditures**



Sources: European Commission; World Food Organization; Global Fund to Fight AIDS, Tuberculosis and Malaria; WHO; UN.

with a Gross Domestic Product (GDP) less than this in 2005, according to the World Bank.<sup>113</sup> By reducing their estimated annual expenditure on pretrial detention by just over 10 percent, European countries could save enough money effectively to double the annual budget of the United Nations.<sup>114</sup> By reducing their pretrial detention expenditure by just under 20 percent in 2003, they could have saved enough money to double the worldwide disbursements of the Global Fund to Fight AIDS, Tuberculosis and Malaria between 2002 and 2006.<sup>115</sup> The estimated 2005 expenditure on pretrial detention by European states is slightly more than the combined cost to the World Food Organization to feed 90 million people for one year, the Global Fund’s 2002–06 disbursements, the biennial

2006–07 budget of the World Health Organization (WHO), and the UN’s 2006 budget (Figure 5). Even where moneys saved from avoiding excessive pretrial detention will not translate into additional expenditures for AIDS prevention, housing, or other social programs, savings in this area could, at least, translate into lower taxation rates for the benefit of all citizens.

### Mutually Reinforcing Consequences of Detention

The consequences of pretrial detention are many. This paper has sought to categorize these consequences to show how the collateral damage of pretrial detention affects not only the detainees themselves but also their families, communities, and broader society, as well as the rule of law and

good governance. Such categorization makes for easier reading, but it understates the pervasiveness of the generally debilitating impact of excessive use of pretrial detention. The harm done by pretrial detention in all these categories together is greater than the sum of their parts. This is because these categories are not mutually exclusive but overlap and merge into one another.

The detainee infected with TB or HIV/AIDS while incarcerated has to live—or die—with a debilitating illness. Upon release from detention that detainee places family, friends, and acquaintances at similar risk, and these persons in turn expose other members in the community. In poor countries, detainees infected with a lifelong and debilitating illness risk impoverishing the households to which they return. In developed countries, health-related costs are passed on to the state.

Detaining a large group of people is not only costly for the state (and, thereby, the taxpayer) but has negative financial and social repercussions for society at large. Pretrial detainees are unable to earn an income, pay taxes, and provide food or other necessities for their families. In many poor countries, detainees' families suffer a double burden. Not only do they have to forgo the support they may have received from the detainee, they often have to provide food, clothing, and other necessities of life to the detainee because the prison system fails to do so. The widespread use of pretrial detention consequently

further impoverishes particularly poor and marginalized communities.

Some of the more far-reaching opportunity costs of pretrial detention are also difficult to measure and consequently fail to receive the attention they deserve from policymakers. By reducing the number of pretrial detainees by a few percentage points most countries would save enough money to build new schools or pay for

**By reducing the number of pretrial detainees, most countries would save enough money to build new schools.**

the tertiary education of numerous young people otherwise too poor to afford the cost of a university education. A more educated workforce—especially in developing countries where teachers, engineers, and doctors are in short supply—is bound to generate a better return on such an investment from an economic, social, or political perspective than keeping more people in pretrial detention.

Other consequences of pretrial detention are almost impossible to quantify yet are acutely debilitating to both citizens and the institutions of the state. As discussed above, in a number of countries pretrial detention is abused as a mechanism to extort bribes from detainees and their families. In other places, detention abets corruption as arrestees seek to bribe poorly paid police officers and

prosecutors not to request their detention at the first court hearing after their arrest. Corruption destroys citizen trust in government and undermines government legitimacy. Corruption also exacerbates poverty, deters foreign investment, stifles economic growth and sustainable development, and undermines legal and judicial systems. Moreover, by corrupting the administration of justice and undermining the rule of law, the irrational and excessive application of pretrial detention weakens governance overall.<sup>116</sup>

The reform of pretrial detention—including the extent of its use, the manner and criteria governing its application, and the conditions of detention—remains an important goal for many criminal justice policy makers and practitioners, as well as

human rights lawyers and activists. As pointed out above, however, the consequences of a dysfunctional and unjust pretrial detention regime should be of concern to everyone and not only this small group of people. This paper has sought to demonstrate that the functioning of a country's pretrial detention system is of relevance to all persons interested in sound governance, good health, public safety, and strong families and communities. The pervasive impact and perverse consequences of pretrial detention are such that its reform should not be the purview of a few professional groups and criminal justice reformers. The time has come for a broader audience of experts and interested persons to engage in this important task.

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### Notes

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1. Frieder Dünkel and Jon Vagg, eds., *Waiting for Trial: International Perspectives on the Use of Pre-Trial Detention and the Rights and Living Conditions of Prisoners Waiting for Trial* (Freiburg: Max Planck Institute, 1994), XIII. See also *Punishment First Verdict Later: A Review of Conditions for Remand Prisoners in Scotland at the End of the 20th Century* (Edinburgh: Scottish Prison Service, 2000), para. 1.19, [www.scotland.gov.uk/hmip/docs/pfvl-00.asp](http://www.scotland.gov.uk/hmip/docs/pfvl-00.asp), accessed January 8, 2007.

2. "Fact Sheet No. 26" (Geneva: Office of the UN High Commissioner for Human Rights, Working Group on Arbitrary Detention), [www.unhcr.ch/html/menu6/2/fs26.htm#A2](http://www.unhcr.ch/html/menu6/2/fs26.htm#A2), accessed May 22, 2007.

3. According to Penal Reform International, "prisoners in pre-trial detention, or on remand, are those who have been detained without a sentence and are awaiting legal proceedings. They are also known as untried or unconvicted prisoners." See *Pre-trial Detention* (London: Penal Reform International), [www.penalreform.org/pre-trial-detention.html](http://www.penalreform.org/pre-trial-detention.html), accessed February 20, 2007.

4. Various international instruments make a distinction between unsentenced and sentenced prisoners, although the line is typically drawn at the point of conviction rather than sentence. The International Declaration of Human Rights states that all "unconvicted" people in custody "...shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons" (Article 10 of the Covenant). European Prison Rule 11(3) makes a distinction between untried, convicted, and sentenced prisoners. It also states that "in principle, untried prisoners shall be detained separately."

5. International human rights treaties distinguish between people who have been found guilty, convicted by a court of law, and sentenced to prison and those who have not. Prisoners awaiting trial or the outcome of their trial are regarded differently because the law sees them as innocent until found guilty. International standards mandate the widest possible use of alternatives to pretrial detention, with pretrial detention being used as a means of last resort in criminal proceedings.
6. The Council of Europe classifies prisoners other than those who have received a “final sentence” into three sub-categories: (i) untried prisoners in respect of whom no court decision has been reached; (ii) prisoners convicted but not sentenced; and (iii) sentenced prisoners who have appealed against their sentence or who are within the statutory time limit for doing so. See Marcelo F. Aebi, *Council of Europe Annual Penal Statistics (SPACE I)*, Survey 2004 (Strasbourg, November 7, 2005), 30.
7. See also, Samuel Deltenre and Eric Maes, “Pre-trial detention and the overcrowding of prisons in Belgium. Results from a simulation study into the possible effects of limiting the length of pre-trial detention,” *European Journal of Crime, Criminal Law and Criminal Justice* 12, No. 4 (2004), 8. The authors define pretrial detention as the time before a “definitive conviction... the time before a judgment against which appeal is no longer possible.”
8. While the period between arrest and the first court appearance tends to be short—usually 24 to 72 hours—the first few hours in police custody can be crucial to subsequent decisions concerning charges, pretrial detention, and the outcome of the trial. In this period the suspect is documented, police interrogation begins, and confessions and admissions may be obtained. Moreover, in some countries the period between arrest and the first court appearance may be lengthy. Indications of a problematic practice of arrest and “police detention” in many European countries are given by the reports of the Committee for the Prevention of Torture and Inhuman or Degrading Punishment of the Council of Europe published since 1990. See also Jon Vagg and Frieder Dünkler, “Conclusion,” in Dünkler and Vagg, *Waiting for Trial* (Max Planck Institute, 1994), 919–926.
9. Like most statistical data, criminal justice statistical data need to be treated with caution. These data are only as reliable as the people who collect them and as accurate as the systems that generate them. This is also the case with prison-related data. Some countries manually collate data on prisoner numbers and related information from every prison into one central database. Others collect data at irregular intervals, while some do not consistently gather any quantitative data at all. Moreover, pretrial detention statistics do not, as a rule, include persons who have been remanded into custody but, because of insufficient prison space, are detained in police holding cells. Criminal suspects are usually held in police cells only for 48 or 72 hours until their first court appearance and thereafter transferred to a prison or detention center. Some developing countries accommodate a considerable number of pretrial detainees in police cells because of a lack of prison space or because the nearest prison is too far removed from the courthouse to justify transporting a detainee between prison and court until the trial has come to an end. Consequently, counting only the number of pretrial detainees in a prison system may substantially undercount their real number in certain places.
10. Roy Walmsley, *World Prison Population List*, 6th edition (London, International Centre for Prison Studies [ICPS], 2007); *World Prison Brief Online* (ICPS), [www.kcl.ac.uk/depsta/rel/icps/worldbrief](http://www.kcl.ac.uk/depsta/rel/icps/worldbrief). With the exception of China, all the data used in this paper (for 178 independent countries and dependent territories) have been taken directly from these sources. China does not publish its pretrial detention data. Based on discussions with Chinese lawyers and human rights specialists the author estimates that China had a pretrial detention population of 800,000 in 2006—approximately 34 percent of the total prison population.
11. Generally countries with high rates of pretrial detention also have high overall incarceration rates. For example, the three countries with the highest overall incarceration rates in Africa (South Africa, Botswana, and Swaziland), are also among the top four countries with the highest pretrial detention rate. The United States and Russia—both large countries with unusually high incarceration rates—have pretrial detention rates in excess of 100 per 100,000 of the general population, three to four times the global average. This stands to reason. Criminal justice systems

that fail to make use of alternatives to pretrial detention are also unlikely to make much use of alternatives to imprisonment as a sentencing option. Punitive criminal justice policies are likely to favor pretrial detention over release on bail, and imprisonment over a noncustodial sentence.

12. *World Prison Brief Online* (ICPS), [www.kcl.ac.uk/depsta/rel/icps/worldbrief/world\\_brief.html](http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/world_brief.html), accessed February 5, 2007.

13. *List of countries by population*, [http://en.wikipedia.org/wiki/List\\_of\\_countries\\_by\\_population](http://en.wikipedia.org/wiki/List_of_countries_by_population), accessed February 12, 2007.

14. Data obtained from Marcelo F. Aebi, *Council of Europe Annual Penal Statistics* (SPACE I), Survey 2003 (Strasbourg, September 29, 2004), 20; Marcelo F. Aebi, *Council of Europe Annual Penal Statistics* (SPACE I), Survey 2004 (Strasbourg, November 7, 2005), 44.

15. *Detention Needs Assessment and Baseline Report* (Washington, D.C.: Department of Justice, Office of the Federal Detention Trustee, undated), 5–6.

16. The annual admission figures do not relate to the number of individuals but to the number of admissions or entries. That is, the same individual may, for example, enter a pretrial detention center more than once in the same year for different cases. It is probable, however, that over a one-year period the vast majority of admissions comprise distinct individuals. For a detailed explanation of what counts as an admission see Aebi, *Council of Europe Annual Penal Statistics* (SPACE I), Survey 2003, 5.

17. *Accompanying document to the Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union*, SEC(2006)1079 (Brussels: European Commission, August 29, 2006), 10–11.

18. Dirk van Zyl Smit, “Report of the Rapporteur General,” in *Prison Conditions in Africa: Report of a Pan-African Seminar*, Kampala, September 19–21, 1996 (Paris: Penal Reform International[PRI], 1997).

19. *Excessive Pretrial Detention* (Human Rights Watch [HRW] Prison Project), <http://hrw.org/advocacy/prisons/pretrial.htm>, accessed February 12, 2007.

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21. *Empire State Building Official Internet Site*, [www.esbnyc.com/tourism/tourism\\_facts.cfm?CFID=46899](http://www.esbnyc.com/tourism/tourism_facts.cfm?CFID=46899), accessed February 15, 2007.

22. Mike Octigan, “Pre-Trial Services: Someone Else’s Agenda?” *Probation Journal* 49, No. 1 (March 2002), 19.

23. *Punishment First Verdict Later* (Scottish Prison Service, 2000), Annexure 5, para. 21, [www.scotland.gov.uk/hmip/docs/pfv1-00.asp](http://www.scotland.gov.uk/hmip/docs/pfv1-00.asp), accessed January 8, 2007.

24. Vivien Stern, *Alternatives to prison in developing countries* (ICPS and PRI, 1999), 10; see also Michael Wines, “The Forgotten of Africa, Rotting Without Trial in Vile Jails,” *New York Times*, November 6, 2005.

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27. *Ibid.*, 4.

28. See, *Mental Health and Prisons: Information Sheet* (Geneva: World Health Organization [WHO], undated).

29. *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* (HRW, 1999), 17–19, [www.hrw.org/reports/2003/usar1003/usar1003.pdf](http://www.hrw.org/reports/2003/usar1003/usar1003.pdf), accessed February 27, 2007; *Mental Health and Prisons*, (WHO, undated), [www.who.int/mental\\_health/policy/mh\\_in\\_prison.pdf](http://www.who.int/mental_health/policy/mh_in_prison.pdf), accessed February 27, 2007.
30. Aebi, *Council of Europe Annual Penal Statistics* (SPACE I), Survey 2004, 52. It is likely that the number of prison fatalities falling outside the Council of Europe area is higher but less well recorded. For example, in 1996, 2,531 prisoners died in Kazakhstan, roughly half of them from tuberculosis. At the time Kazakhstan had approximately 85,000 prisoners. The high death rate prompted a government official to defend his country's death penalty on the grounds that prison conditions were so atrocious that few prisoners would survive a long sentence anyway. See, *Prisons in Europe and Central Asia* (HRW Prison Project), [www.hrw.org/advocacy/prisons/europe.htm](http://www.hrw.org/advocacy/prisons/europe.htm), accessed February 15, 2007.
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35. See, for example, *Unjust Deserts: A Thematic Review by HM Chief Inspector of Prisons of the Treatment and Conditions for Unsented Prisoners in England and Wales* (London: HM Inspectorate of Prisons, December 2000).
36. Carl B. Clements, "Crowded Prisons: A Review of Psychological and Environmental Effects," *Law and Human Behavior* 3, No. 3 (1979), 222.
37. *Punishment First Verdict Later* (Scottish Prison Service, 2000), para. 5.4, [www.scotland.gov.uk/hmip/docs/pfvl-00.asp](http://www.scotland.gov.uk/hmip/docs/pfvl-00.asp), accessed January 8, 2007.
38. *Ibid.*, Annexure 5, para. 17, [www.scotland.gov.uk/hmip/docs/pfvl-00.asp](http://www.scotland.gov.uk/hmip/docs/pfvl-00.asp), accessed January 8, 2007.
39. Barry Holman and Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (Washington, D.C.: Justice Policy Institute, 2006), 2.
40. *Status Paper on Prisons, Drugs and Harm Reduction* (WHO: Europe, EUR/05/5049062, May 2005), 3.
41. *Tuberculosis in prisons* (Ottawa: Public Health Agency of Canada, March 2001), [www.phac-aspc.gc.ca/publicat/epiu-aeipi/tb/epio301/prison\\_e.html](http://www.phac-aspc.gc.ca/publicat/epiu-aeipi/tb/epio301/prison_e.html), accessed February 17, 2007.
42. *Ibid.*
43. Richard Coker, Martin McKee, Rifat Atun, Boika Dimitrova, Ekaterina Dodonova, Sergei Kuznetsov, and Francis Drobniowski, "Risk factors for pulmonary tuberculosis in Russia: case-control study," *British Medical Journal* 332(7533) (2006), 85.
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55. Creasie Finney Hairston, "Prisoners and Their Families: Parenting Issues during Incarceration," in Travis and Waul, *Prisoners Once Removed* (Urban Institute Press, 2003), 264.
56. Creasie Finney Hairston, "Fathers in Prison," in Katherine Gabel and Denise Johnston, eds., *Children of Incarcerated Parents* (New York: Lexington Books, 1995), 31–40.
57. Travis and Waul, "Prisoners Once Removed" in Travis and Waul, *Prisoners Once Removed* (Urban Institute Press, 2003), 21.
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# Boomerang: Seeking to Reform Pretrial Detention Practices in Chile

Pretrial detention reform efforts are often derided as “soft on crime.” **Verónica Venegas** and **Luis Vial** report from Chile, where such criticism led to a counterreform—even before the initial reform could be fully implemented.

In December 2000, Chile began implementing a new system of criminal procedure. From an antiquated, inquisitorial, and written procedure, the country moved to a modern, adversarial, and oral system administered by newly established public institutions such as the National Prosecution Service and the Office of Public Defenders. Broad revisions to the rules governing pretrial detention were a central component of this transformation, which was widely recognized as the most revolutionary change in the country’s legal system since the 19th century.

Due to the size and scope of the changes, the reforms were implemented gradually and divided into five stages. Each stage rolled out the new system in two or three of the nation’s 13 administrative regions. In June 2005, the reform program reached the Santiago Metropolitan Region, home to a third of the national population and nearly half of all recorded crime in the country. Anxiety about the way the new justice system would operate in the capital and most populous region had caused the government to post-

pone the introduction, originally scheduled for December 2004.

But concerns about crime in the capital of Chile dogged the reform process, and in mid-2003—that is, nearly two years before the reforms were implemented in Santiago—a diverse set of interests initiated a comprehensive review and revision of the new justice system. Both the ruling coalition government that had initially endorsed the reforms and the political opposition agreed to form an experts’ commission whose mandate was to evaluate the new system’s weaknesses and propose courses of action to address them, including legislative changes.

Driven by the results of the commission’s report and perceptions of the new system’s inadequacies, the government elaborated a legal counterreform measure, sent it to congress, and, in November 2005, promulgated several important changes to the newly enacted Criminal Procedural Code (CPC). Thus the counterreforms followed just months after implementation of the reform itself.

The counterreforms proposed by the commission substantially changed the rules governing pretrial detention—again. Several of these changes, as described in this report, made it easier for prosecutors to obtain orders of detention from judges.

Although these changes do not appear to have had a great impact on the extent or probability of detention, the precedent set by these counterreforms warrants attention. The ease with which the laws were changed illustrates the vulnerability of reforms to perceptions rather than fact, especially suspicions that leniency in criminal justice contributes to crime or hinders its prosecution.

This paper describes the politics behind the reforms and counterreforms. It analyzes the text of the changes in the law as well as the peculiar political alliance necessary to support the backlash against reforms. The paper also evaluates the impact of the changes by examining rates of pretrial detention in 2005 and 2006. The paper draws on conversations and interviews with senior officers from the Public Defender's Office, the National Prosecution Office, judges, and some politicians, as well as reviews of press articles and legislators' debates on the process of changing the CPC.

### The Initial Reforms

The new CPC introduced four main innovations to the rules governing pretrial detention. First, the code explicitly incorporated the presumption of innocence (Article 4) and stated that pretrial detention is now “an exceptional measure” and not the rule.<sup>1</sup> In the old CPC, which did not contain a presumption of innocence, detention was the rule, the default “measure of restraint” that followed the formalization of charges against the defendant. Under the old system,

the constitutional right to personal freedom legally ended with the act of formal processing. Not everyone was in fact detained, but release before trial was called “provisional freedom,” and this “right” to be released was actually a privilege that a defendant had to request from a judge.

Second, under the new rules, a judge could place a suspect in detention only after a prosecutor formalized

The new CPC introduced the principle of proportionality, which requires that detention not be ordered when it is disproportionate to the gravity of the crime.

charges. This process, called “formalization of the investigation,” consists of a formal notice given by the prosecutor to the defendant at a public hearing, stating that he or she is under investigation for a specific crime. Whereas in the old system, no special hearing was required for detention, the new code mandates that the defendant be assisted by his or her lawyer at any hearing in which the prosecutor asks for detention.

Third, the CPC introduced the principle of proportionality, which requires that detention not be ordered when it is disproportionate to the gravity of the crime, the circumstances of its execution, and the likely penalty upon conviction. Article 141, which declared this principle, also outlined a series of circumstances in which detention was not permitted.

Fourth, the CPC also encouraged

the use of new, noncustodial forms of restraint that are less onerous than detention and yet can be ordered only by a judge upon request from the prosecutor. These new measures of restraint include: house confinement, regular meetings with the prosecutor, prohibition against approaching the victim, travel restrictions, and others.

These four changes expressed a very clear preference for using detention sparingly. They followed closely the message of President Eduardo Frei, who, upon introducing the draft CPC in 1995, emphasized reducing the use of all types of coercion in criminal justice. In Frei's words:

In the five years between 1987 and 1991—a period which covers various different governments—the average proportion of the number of cases filed in the courts to the number of arrests was 60.6 percent; thus, the 40 percent of the total number of persons arrested in Chile—an annual average of 750,000 persons—are deprived of their liberty, albeit for a short period, without entering the jurisdictional system.<sup>2</sup>

Frei did not report the total volume of pretrial detention in his speech, and there was no solid data on which to judge its frequency. Researchers critical of government practices had limited access to official data and often had to base their conclusions on small samples and direct observation.<sup>3</sup> Only later were two scholars able to use old government reports to estimate that, in 1998—that is, before the reforms—32 percent of all defendants in Chile were tried while held in pretrial detention.<sup>4</sup> (Unfortunately, this finding is

not sound enough to allow a before-and-after study of the impact of the new CPC on the frequency of pretrial detention. Nor is that the purpose of this report; instead, it will focus on the changes in rules and perceptions about detention after the reforms were introduced.)

### The Counterreforms

The counterreform legislation approved in November 2005 significantly altered the rules governing detention. The measure introduced three main changes whose primary effects were to expand judicial discretion in granting a request for detention, emphasize the safety of the victim and society as a ground for all forms of restraint, and weaken the proportionality principle. These changes were achieved through the elimination of Article 141's general statement and two clauses forbidding pretrial detention for minor offenses and offenses that qualified for a noncustodial sentence.

This strengthening of the judge's discretionary power was achieved in an artful way: Article 139 was amended to give judges the power to determine if noncustodial measures were enough to ensure that the defendant appeared for trial.<sup>5</sup> Previously, Article 139 did not assign that power to anyone in particular, thus giving all justice system actors shared responsibility for the final decision, based on the debate produced during the hearing.

The counterreforms were introduced despite scant evidence that judges were favoring defendants or otherwise making bad decisions about

pretrial detention. Virtually no empirical support for the counterreforms was produced, and there was no projection of their likely cost or effect. So, what made the government and congress modify a set of rules before they were even fully enacted? What economic and political considerations drove this process?

### **The Unstable Coalition behind the Reforms**

The adoption of the new CPC in 2000, and in particular its progressive rules of pretrial detention, was the result of a combination of pragmatic and principled goals. First, there was a clear intention to bring criminal justice, which had been abused by the old regime, into line with constitutional and international standards, especially regarding the presumption of innocence. Second, there was a desire to alleviate the problems of overcrowded jails, especially those with many unsentenced inmates. This latter objective was closely tied to another set of broadly shared goals: making the new system more efficient and successful in resolving criminal cases. The extremely slow criminal process in the old system—which gave citizens the notion that the whole justice system was both unfair and inefficient—was a concern for everyone.

There was less agreement about the principles behind the reforms than there was about its pragmatic objectives. The goal of modernizing the system to make it efficient was strongly agreed upon by all actors. The goal of embracing international human rights standards for defendants, by contrast,

was not shared by all and was least embraced by conservative politicians.

This tension is seen in remarks made by the right-wing legislator Juan Antonio Coloma in a 1998 debate regarding the new CPC. He asserted that there was no need to enforce the code's spirit, which stresses individual freedom, and proposed not limiting protective custody as a tool for controlling crime.<sup>6</sup>

The counterreforms were introduced despite scant evidence that judges were favoring defendants or otherwise making bad decisions about pretrial detention.

The tension between support for efficiency and support for human rights became clear as the new system was implemented. When judges granted defendants new forms of restraint short of pretrial detention, these decisions were quickly held up by mainstream media as evidence of the failure of the new system, which was derided as weak and soft on criminals. Many politicians, particularly from the right wing, began to use this supposed weakness of the system as a political tool against the government, saying that the system was flawed and that the governing coalition had abdicated its responsibilities in the fight against crime.

This debate grew stronger leading up to the presidential and parliamentary elections of 2005. One of the candidates from the right wing,

Sebastián Piñera, harshly criticized judges for releasing defendants who had pleaded guilty.<sup>7</sup> Joaquín Lavín, another right-wing candidate, criticized the governing coalition's candidate, saying "Criminals prefer to vote for Michelle Bachelet because they know she is going to have the same weak hand as President Lagos does."<sup>8</sup> These charges were issued after Bachelet, who is Chile's current president, declared, "If someone breaks the

**Ironically, the initial consensus in favor of the reforms was so strong that virtually no debate preceded their passage.**

law for the first time, OK, we are going to give him an opportunity, but if he does it again, he will lose the benefit of his right to provisional freedom."<sup>9</sup>

At the electoral debate grew hotter, the public's fear of crime increased. This sense of insecurity became common in Chile in the early 1990s and is widely held today.<sup>10</sup> An alarmist discourse on crime and public safety emerged from the political opposition, which had not been in power since Chile returned to democratic rule in 1989 and thus needed grounds to criticize the government's performance.

Ironically, the initial consensus in favor of the reforms was so strong that virtually no debate preceded their passage. But once right-wing politicians began to attack the reforms, this nervous discourse on public safety was

appropriated by the government, too. Instead of strong statements in defense of constitutional principles, officials talked about being "soft" on criminals and of a supposedly "revolving door" for offenders.

By itself, this conservative complaint about excessive due process would not have been likely to upend the reforms. Many criminal justice reform efforts founder when counter-reformers find an accomplice inside the bureaucracy itself.<sup>11</sup> But in Chile, the counterreformers found an ally, paradoxically, in the academic circles that had been most responsible for the democratic reforms in the first place.

Several prominent scholars who were the brains behind the new criminal procedure, and who strongly believed in the virtue of a balance between efficiency and respect for rights in the adversarial system, began to pull back in their support of the CPC. These scholars took a pragmatic position when confronting the wave of criticism against the new system. They argued that in order to protect the whole reform from a major setback that would roll back the new rules, a sacrifice had to be made in favor of rules that would, for example, limit a judge's discretion in dealing with defendants.

The counterreform movement also benefited from the postponement of the introduction of the reforms in Santiago. The original timeline called for the new system to enter into force in the Metropolitan Region in December 2004. By early 2003, however, government officials were acknowledging that this timeline



was unrealistic because the necessary infrastructure (e.g., buildings, communication systems, staff training) was not in place. Thus, government negotiations with the political opposition led to a law authorizing a later launch of the reforms in Santiago.

At that point, all political actors, including the government, agreed to form an experts' commission that would evaluate the new system, identify its main faults, and propose measures to correct them. The formation of the experts' commission was a victory for the counterreformers: the specific goals and content of the evaluation were strongly influenced by their critical views of the system, particularly its approach to defendants' rights. Additionally, most of the members appointed to the commission were scholars with views critical of the new system.<sup>12</sup>

Another factor that abetted the counterreform movement was the absence of reliable empirical information about the extent of pretrial detention and the alleged permissiveness of judges. Neither the Ministry of Justice, which was ostensibly responsible for coordinating the introduction of the reforms, nor the Prosecutor's Office or courts measured the extent or consequences of pretrial detention under the new system in a way that could have fostered informed debate about it.

The experts' commission divided its work into three stages. The first stage studied the quantitative and qualitative data about the existing system. The second stage was designed to solicit the opinions of a range of institutional

actors engaged in the new system's functioning, including the heads of the Prosecutor's Office, the National Public Defender's Office, the judiciary, the police, and the Ministry of Justice. The third stage included the commission's internal debate, in which different members presented their proposals to the group. The commission agreed to adopt its final conclusions based on consensus, even though some members brought openly stated biases to the process.

### The absence of reliable empirical information about the extent of pretrial detention abetted the counterreform movement.

There was genuine consensus within the commission on a number of issues. Of the five matters it addressed, disagreement arose only about the rules governing pretrial detention. But the disagreement was complex, and the resulting findings and recommendations require close examination.

Almost all members of the commission agreed that judges were overreliant on Article 141, which articulated the proportionality principle and prohibited detention in cases of private prosecution as well as for offenses that could not be punished by incarceration.<sup>13</sup> Members of the commission considered changes to two of the specific provisions that prohibited detention. The first (section "a" of Article 141) ruled out detention in cases where the penalty was lower

than 541 days of imprisonment. The second provision (section “c”) eliminated detention in cases where the likely penalty would not involve incarceration, thus granting immediate freedom or noncustodial measures of restraint to an enormous number of defendants. The commission members suggested an exception might be made for cases in which “the habitual-ity and repetition of the behavior” warranted detention. Here, without explicitly saying it, the commission of experts was alluding to minor offenses, such as larcenies, that occupied great attention in the press.

The disagreements inside the commission were intricate, and at least three different positions were expressed.<sup>14</sup> One group of scholars proposed eliminating sections “a” and “c” from Article 141 as full exclusions and reinserting them as cases in which the judge should preferably grant alternative forms of restraint unless the facts of the case demand granting detention. Another more conservative group of scholars agreed on widening judges’ scope of action and recommended that judges decide based on the debate produced at the hearing in each case. They suggested the elimination of the part of section “a” that was problematic (felonies with penalties lower than 541 days) and the entirety of section “c.”

Only one scholar, Jorge Bofill, was completely opposed to the proposed amendments, arguing that there was no empirical basis for the counter-reform positions.<sup>15</sup> He also claimed there was no good reason for detention of offenders likely to be sentenced

to a penalty less than 541 days in prison and who would most likely complete their sentence out of prison. And finally, he argued that, even if the alleged problems with detention existed, they did not require a legislative solution. But behind these academic arguments lay a more profound political disagreement. Bofill believed that exceptions to good rules about detention were being proposed because of concerns about the ability of the justice system to safely supervise offenders not sentenced to prison. In Bofill’s words, “defendants must not be made to pay for the failure of the system to properly manage the convicted.”<sup>16</sup>

### Changing the Law on Detention in Chile

The government presented its draft law to congress in March 2004, embracing the more moderate proposal eliminating sections “a” and “c” as full exclusions and reinserting them in the body of Article 141 as cases in which the judge should preferably grant alternative forms of restraint unless the case demanded granting detention. However, after a 19-month process of parliamentary debate, the final reforms approved by congress differed greatly from those proposed by the government. The legislative committee in charge of analyzing the project managed to persuade the majority of the senate to reform not just Article 141 but also Articles 139 and 140, which establish the general rule of pretrial detention as the most exceptional measure of restraint and

the specific standards that should be met in order to justify it.

As detailed earlier in this paper, the change to Article 139 was achieved by making the judge responsible for determining the application of pretrial detention. Previously, the rule had not assigned that task to anyone in particular. As for Article 141, the reforms eliminated both its general statement and sections “a” and “c,” going beyond even the most conservative proposal laid out in the experts’ commission by abolishing the proportionality principle.

In exceeding the recommendation of the experts’ commission, the legislature overcame significant opposition from the institutions of the justice system. Representatives of these institutions defended the reforms and fiercely contested the senate’s proposals for counterreform. In defending the reforms, these actors often cited the lack of empirical data showing that counterreforms were necessary. Yet that very lack of data left the reforms themselves open to attack.

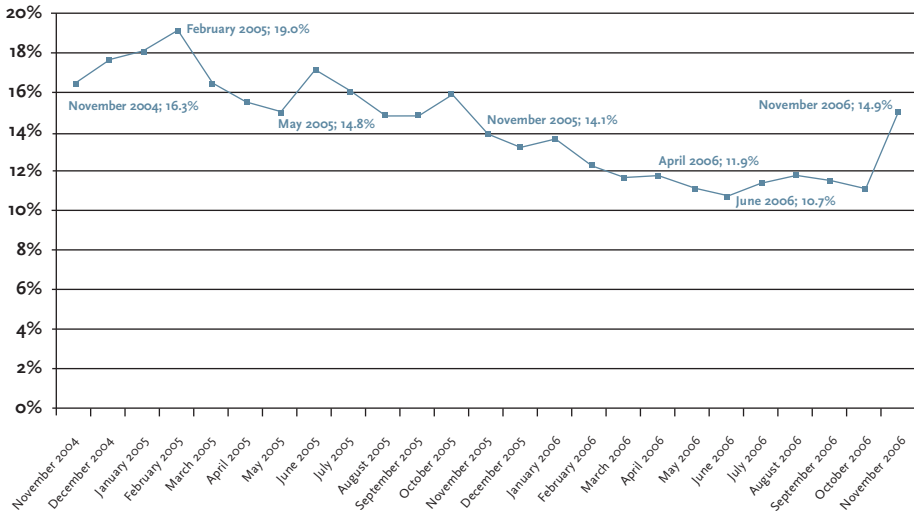
Counterreformers also argued that the reforms were in conflict with rules established in the constitution. According to these senators, the CPC set limits for the application of detention that were not present in the constitution, which gives the judge exclusive power to determine the conditions in which detention can be granted. They noted that the constitution also does not explicitly recognize the proportionality principle or the exclusionary hypothesis contained in Article 141. And they insisted that concerns about public safety could

justify detention, as Article 19, No. 7, which guarantees the right to personal freedom and individual safety, states in section “e” that “provisional freedom will follow unless arrest or detention is considered by the judge as necessary for the investigations of the ‘sumario’<sup>17</sup> or for society’s or the victim’s safety.”

The counterreformers were primarily interested in scoring political points with a public alarmed about crime and safety.

These arguments highlight the need for greater constitutional clarity in Chile. But the counterreformers’ use of these legal arguments was misleading; they were primarily interested in scoring political points with a public alarmed about crime and safety. Some senators expressed views such as “currently, there are numerous recidivist criminals and drug dealers that are left free, despite the effort invested by the police and the prosecutor’s office,”<sup>18</sup> and “this adjustment is considered as necessary at this stage, given that some judges’ liberality stands against our community’s dominant culture, which aspires to see defendants in prison.”<sup>19</sup> These arguments supporting the counterreform were particularly potent because they took place during the year and a half before the national presidential and parliamentary elections.

**Figure 1: The Proportion of Defendants Placed in Detention during Ordinary Proceedings, November 2004—November 2006**



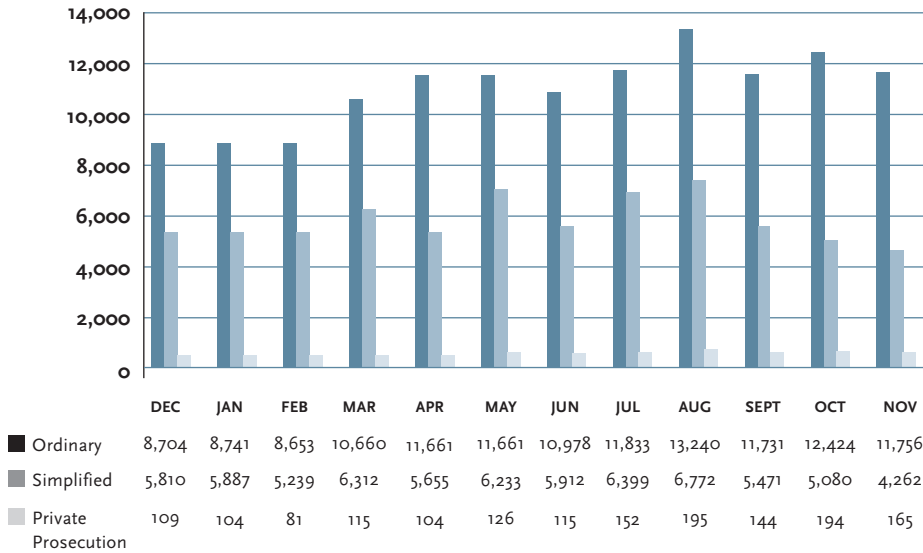
**The Impact of the Reforms**

The counterreforms that changed the CPC were enacted and enforced throughout the country in November 2005, just a month before the national presidential and parliamentary elections. Since then, little has changed in the use of the forms of restraint established in the CPC, including pretrial detention.

The data available to evaluate the impact of these counterreforms is scarce and not suited to comprehensive analysis. Indeed, the first thing that one observes in studying the reforms and counterreforms is the lack of data available to assess the quality and effectiveness of the administration of justice. Today, each

institution within the justice system manufactures its own records and monitors its own practices, producing data that cannot be compared across institutions. In order to assess the impact of the counterreform legislation on justice practices, the authors of this paper had to conduct independent research. The data found on the frequency of pretrial detention before and after the counterreforms show that little changed. As Figure 1 indicates, the proportion of defendants who were detained in Ordinary Proceedings<sup>20</sup> varied only slightly in the 12 months following the passage of the counterreform legislation. In May 2005—before the counterreform

**Figure 2: Number of Defendants Charged Each Month in Ordinary and Simplified Proceedings, December 2005—November 2006**



legislation—14.8 percent of defendants were tried while in custody. In November 2006—a year after the legislation—this figure was 14.9 percent.

This finding is surprising, because the counterreforms gave prosecutors more leeway to use Ordinary Proceedings—for which pretrial detention can be applied—in cases involving minor offenses. As Figure 2 indicates, prosecutors increased their use of Ordinary Proceedings and decreased the use of Simplified Proceedings (for which pretrial detention is not an option). Yet despite the increased use of Ordinary Proceedings, the overall proportion of defendants held in pretrial deten-

tion changed only slightly.

This data is good news to those who wish to keep rates of pretrial detention low. Yet the total number of prosecutions has been growing—with a concomitant increase in the total number of pretrial detainees—since passage of the counterreforms. By June 2006, with the new justice system fully in effect throughout the country for more than a year,<sup>21</sup> the total number of defendants placed under detention was 15,786 (total in a 12-month period), and by November 2006 that number reached 16,981. Clearly, the total number of people under pretrial detention has increased.

**Figure 3: Dispositions of Cases Involving Pretrial Detainees in which Public Defenders Participated**

Disposition Type	2005 January—December		2006 January—December	
	Percent of All Pretrial Detainees	Total Dispositions	Percent of All Pretrial Detainees	Total Dispositions
Reparation to Victim	1.1%	48,290	0.6%	82,785
Conviction	17.6%	41,475	17.7%	63,194
Acquittal	27.1%	1,682	30.6%	2,084
Sobreseimiento temporal <sup>22</sup>	10.1%	3,444	5.6%	7,141
Sobreseimiento definitivo	5.9%	9,948	6.0%	15,314
Derivación <sup>23</sup>	30.1%	6,688	33.2%	10,873
Dismissal by Prosecutor	6.2%	13,892	3.9%	23,233
Fine	1.9%	3,309	1.8%	2,067
Other	0.0%	179	0.6%	174
<b>Total</b>	<b>100.0%</b>	<b>128,907</b>	<b>100.0%</b>	<b>206,865</b>

Another means of analysis is to track the percentages of pretrial detainees according to the final disposition of their cases. For example, Figure 3 highlights the high percentage of pretrial detainees who were acquitted. Another important statistic is the proportion of pretrial detainees eventually convicted—around 17 percent. This rate changes little between 2005 (most of that year passed before the implementation of counterreform legislation in November 2005) and 2006 (after the legislation). However, the total number of pretrial detainees and the total number of all cases escalate sharply after the counterreforms.

The frequency of pretrial detention did not change significantly, despite the counterreforms. This is probably due to several factors, including the

lack of jail space to hold additional pretrial detainees and prosecutors' inability to prosecute all felonies, which leads them to use pretrial detention only when absolutely necessary (e.g. when the defendant's freedom endangers the investigation).

Also, interviews with the system's main actors (prosecutors, defenders, and judges) suggest they internalized the principles of the reforms, despite the counterreforms' following so closely behind. The rise of a new generation of judges who are strongly committed to international human rights standards is an additional factor that appears to have affected the data.

The data examined here do not support sweeping conclusions either about new trends in pretrial detention or the resiliency of the new system of

justice in Chile. But it does appear that all actors have embraced their respective roles in the new oral, adversarial process. On balance, it seems that pretrial detention is being

used according to the general principles and rules contained in the new CPC, which limit its application as the most exceptional measure of restraint.

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## Notes

Verónica Venegas and Luis Vial work in Chile's National Public Defenders Office. They helped the office form a response to the counterreforms described in this paper. This paper reflects their personal views and does not represent the position of the National Public Defenders Office.

1. Original Article 139, paragraph 2, stated: "Pretrial detention will only be used when other measures of personal restraint were insufficient to assure the completion of proceedings" ("La prisión preventiva sólo procederá cuando las demás medidas cautelares personales fueren insuficientes para asegurar las finalidades del procedimiento").
2. See "Mensaje de S. E. el Presidente de la Republica con el que inicia un proyecto de ley que establece un nuevo código de procedimiento penal," [www.ksg.harvard.edu/criminal.justice](http://www.ksg.harvard.edu/criminal.justice).
3. For an example of this research, see Cristian Riego, *La Prisión Preventiva en Chile* (1990).
4. Andres Baytelman and Mauricio Duce, *Evaluación de la Reforma Procesal Penal* (Santiago: 2003), 194.
5. Article 139, paragraph 2, states now: "Pretrial detention will be used when other measures of personal restraint have been deemed by the judge to be insufficient to assure the completion of proceedings and the security of the aggrieved party or of society." ("La prisión preventiva procederá cuando las demás medidas cautelares personales fueren estimadas por el juez como insuficientes para asegurar las finalidades del procedimiento, la seguridad del ofendido o de la sociedad.")
6. "In my opinion, this is a Code that goes off the real needs of the country, and places many obstacles to judges, with the aim that a person who is being processed—using the ancient lexicon—may get released before trial. The aim is that the person goes to prison only after being convicted. That is reasonable and rational from a theoretical point of view, but it clashes with a harsh reality that hits millions of Chilean families: the enormous amount of people who break the law—we can check it through the media—while a previous offense is investigated." Representative Juan Antonio Coloma, Sesión 24, Legislatura 336, 1998 – First Constitutional Procedure for the new Criminal Procedure Code.
7. *La Tercera* (digital edition) October 9, 2005.
8. *La Tercera* (digital edition) September 28, 2005.
9. *La Tercera* (digital edition) September 27, 2005.
10. "UDI representatives, Gonzalo Uriarte and Marcelo Forni called 'to put an end to the charade about crime' and to speed four bills that will help to improve criminal justice in the country. The members of parliament reported that during the legislative period 2002–2005 and up to June 2006, a total of 80 bills have been introduced for approval, 'which would help to reduce people's fear.' The representative called on President Michelle Bachelet to stop improvising on this subject, and asked her to label as urgent, '...projects such as those which widen the scope for granting pretrial detention, forbid release to dangerous criminals, increase penalties for recidivists, or establish as an aggravation the fact of committing a crime while on release,'" in "80 anti-crime projects lie dormant at the Congress," *La Segunda* (digital edition), June 30, 2006.
11. See, for example, David Rothman, *Conscience and Convenience: The Asylum and Its Alternatives*, (Boston: Little, Brown and Co., 1980).

12. See, for example, “Diez juristas integran comisión de la reforma,” *El Mercurio*, October 23, 2003, 1.
13. Article 141 then stated that detention shall not be ordered when it is disproportionate to the gravity of the offense, the circumstances of its commission, and the likely penalty.
14. One member, Gonzalo Vargas, abstained from making any recommendations. See “Documento de la Comisión nombrada para revisar y evaluar la marcha y funcionamiento del nuevo sistema de enjuiciamiento criminal” (Comisión de Expertos Reforma Procesal Penal, December 2003), [www.pazciudadana.cl](http://www.pazciudadana.cl).
15. The judiciary and the Public Defenders Office also believed there was little evidence to support this claim.
16. “Documento de la Comisión . . .” (Comisión de Expertos Reforma Procesal Penal), 50.
17. “Sumario” refers to the first investigative phase of the inquisitorial criminal process, whose main characteristics were that it was conducted by the same judge who would later sentence the case’s defendant, was written, nonadversarial, and kept secret from the case’s actors.
18. “Modifica los Códigos Procesal Penal y Penal en diversas materias relativas al funcionamiento de la Reforma Procesal Penal,” Intervención del Senador Alberto Espina (Informe de Comisión Mixta de Constitución, Legislación, Justicia y Reglamento del 11/05/2005, Boletín 3465-07), 24, <http://sil.senado.cl/pags/index.html>.
19. *Íbid.*, Intervención del Senador José Antonio Viera-Gallo, 23.
20. Ordinary Proceedings are the only trial mechanism in which a defendant can be placed in pretrial detention.
21. The criminal justice system reform was implemented in five stages, the last of which started in June 2005 in the capital region.
22. *Sobreseimiento* is a type of judicial resolution that suspends or ends the process for lack of cause. There are usually two types: provisional, which suspends the process for some legally predetermined reason; and definitive, which ends the judicial proceeding.
23. Cases referred to a mediator, or a juvenile or other court.



# Catalyst for Change: The Effect of Prison Visits on Pretrial Detention in India

Criminal justice reform can be dauntingly complex work. But as **R.K. Saxena** explains, a relatively simple program in India succeeded in reducing the pretrial detainee population.

The Commonwealth Human Rights Initiative (CHRI), an independent, nonpartisan, international organization, has been working for the conservation and practical realization of human rights in the countries of the Commonwealth since 1993. Its main goal is to advance constitutionalism, the right to information, and reforms in various agencies of the criminal justice system. CHRI is particularly concerned with prison reforms because they form an integral part of the preservation of human rights in custodial institutions. Prisons are typically the end product of the process of administering criminal justice, except for offenders placed in community-based programs. The operation of these institutions thus has a great impact on the experience and meaning of rights and justice in a country. They also provide an important ground for study and research on the entire structure and process of the administration of justice.

Typically, it is not easy for researchers to gain access to prisons. In India, gaining such access is an especially formidable task. These insti-

tutions cloak their operations under the guise of security. The impregnable walls of prisons, combined with the outside community's indifference toward inmates, make prisons a fertile breeding ground for human rights abuses. An unfortunate (although

**In India, gaining access to prisons is an especially formidable task for researchers.**

small) section of the society, having come into conflict with the law, languishes in prisons that are managed through archaic laws and rules, the observance or violation of which is generally beyond public scrutiny. An understanding of the actual detention conditions is blocked by several layers of security procedures that hide facts or render them out of date by the time they are discerned.

In order to assess prison conditions and add protections against the abuse of detainees' rights, CHRI capitalized on an official prison visitors program—a kind of community intervention provided in the law governing the management of prisons. Working with state human rights commissions and equipped with permission from the controlling government depart-

ment,<sup>1</sup> a CHRI study team began visiting prisons in 2001 in Madhya Pradesh, then the largest state in India.<sup>2</sup> CHRI subsequently extended this work to two other states, Rajasthan and Chhattisgarh. By 2005, a CHRI study team had visited 27 prisons in Madhya Pradesh, 22 in Chhattisgarh, and 26 in Rajasthan.

CHRI used these visits to develop an understanding of the scale and rea-

Instead of collecting data on the operation of justice from the outside, CHRI was able to monitor and scrutinize the prison system from within.

sons for overcrowding, the extent of the abuse of inmates' rights, and the sources of problems in the administration of justice. Instead of collecting data on the operation of justice from the outside, CHRI was able to monitor and scrutinize the prison system from within.

CHRI then submitted reports to respective state governments about prison conditions and organized workshops for officials to discuss prison problems and create methods to improve conditions.

Two distinct pictures emerged through the studies conducted by CHRI and through the exchange of views during workshops:

1. Overcrowding is one of the major problems facing most prisons in India, and the excessive length and use of pretrial detention is a major cause of overcrowding; and

2. The ills of prisons are not entirely the making of the penal institutions—many of them emerge out of the lack of cooperation from, and coordination with, other agencies of the criminal justice system, such as the judiciary, police, prosecution, free legal aid, and probation services.

This paper examines the various reasons for overcrowding and details the logic of prison visits as a tool for advancing rights and reforming pretrial detention. It assesses the contribution of these visits to addressing the issues of sentenced and unsentenced inmates in the prisons of several Indian states.

### Prison Population Growth, Overcrowding, and Pretrial Detainees

Overcrowding in India's prisons is directly related to the presence of a disproportionately large number of pretrial detainees (generally referred to as under-trial prisoners in India).

Between 1971 and 1980, the number of under-trial prisoners in India rose sharply. The number of persons admitted to prisons under judicial custody to face trial climbed from about 600,000 in 1970 to more than one million in 1980, an increase of 62 percent. The average daily population of under-trial prisoners also rose substantially during this period, from 42,500 to 77,500. This growth has continued to the present day. At the end of 2003, there were 229,997 under-trial prisoners in India.

The number of under-trial prisoners alone nearly exceeds the total

**Table 1: Indian Prison Population Data, 2002 and 2003**

	2002	2003
Convicts	82,121	91,766
Under-Trials	234,884	229,997
Detenues*	4,832	4,008
Others**	520	748
<b>Total</b>	<b>322,357</b>	<b>326,519</b>

\* Detenues are those detained preventively, without trial, by executive order under Preventive Laws intended to tackle terrorism and other specific offenses.

\*\* Others include debtors, insolvents, and other noncriminal inmates.

capacity of the prison system, which can hold 233,543 inmates of all kinds. And yet, there is also a large and growing number of convicted inmates, which stretches the system well beyond capacity. The number of convicted prisoners grew by 12 percent between 2002 and 2003, from 82,121 to 91,766 (Table 1). In that same year, there was a two percent decline in the number of under-trial prisoners, but the total number of prison inmates in the country (326,519) remained in excess of capacity. Reportedly, the number of inmates has further increased since then, and yet there has been hardly any increase in the capacity of prisons to accommodate inmates.<sup>3</sup>

### Sources of Excess Detention

There are many reasons why prisons are so overcrowded in India, including aspects of the operation of the justice system as well as tangential factors,

such as the level of offending and the nature of socioeconomic development in the country. The slow pace of investigation by prosecution agencies, a conservative approach to the granting of bail, and the delayed disposal of cases by the judiciary are other important contributing factors.

By visiting prisons and talking to inmates as well as officials, CHRI was able to learn more about the circumstances that affect prison population levels. Below is a list of primary factors that emerged from the study. It is not an exhaustive list nor is it a scientific explanation of the reasons for overcrowding. But, like prison conditions, these factors heavily influence the experience of justice for inmates.

#### *Indiscriminate Arrests*

It is generally acknowledged by the entire criminal justice system that apprehending agencies arrest and detain unnecessarily large numbers

of persons, often for the purpose of linking criminal conspiracy or connecting criminal events to pending cases.<sup>4</sup> There is also abundant data showing that the police do not use their powers of detention judiciously. For example, in 1980, the National Police Commission of India estimated that a large number of arrests made by the police were not necessary to control crime and needlessly costly due to expenditures on harboring arrested persons in jails. The majority of

**Most of the under-trial prisoners had been detained because they were not able to post bail.**

arrests, it concluded, were for very minor offenses, and 43 percent of all expenditures in the concerned jails resulted from the detention of prisoners who “need not have been arrested at all.”<sup>5</sup>

A study conducted in 2000 by the Law Commission of India confirmed these findings. On the basis of empirical data collected from different states in India, the Commission showed that the number of preventive arrests and arrests for petty offenses was very large.<sup>6</sup> Moreover, the proportion of under-trial prisoners was unusually high, and most of them had been detained because they were not able to post bail or furnish sureties.<sup>7</sup> In several cases the motive for the arrest was to haul in and harass as many persons as could be connected to a crime, even if the evidence was

flimsy. Other arrests were made so that the police could extract information about other crimes and obtain “illegal advantages.”<sup>8</sup>

Arbitrary arrests and prolonged judicial custody—especially in parts of the country marked by political unrest—are common. Because there is no second stage of review or judicial appraisal of the cases of those persons brought in by the police (and military), suspects languish in prisons pending a protracted trial.<sup>9</sup> Their judicial custody is in essence used as a preventive measure to threaten prospective supporters of political opponents and to deter others in the community from harboring insurgents.

### *Delay in the Production of Accused before Trying Magistrates*

There is extensive and frequent violation of Section 167 of the Criminal Procedure Code (CPC), which prohibits the extension of the period of remand beyond 15 days without the accused being physically present before the trying magistrate.<sup>10</sup> In practice, the accused person waits in prison and is not produced before the magistrate; only the warrant is sent from the prison to the court, and the court routinely extends the period of remand without hearing the accused person or his legal representative. This results in long periods of detention without trial or without even the charges being framed and read to the accused. In the absence of an interaction with the trial court, the accused person (or his legal representative) has no opportunity to make his case or request release on bail.

In most cases, the pretext for delay is the unavailability of a police guard for escorting the accused to court. It is sad and surprising that the state, which enjoys the right to curtail the liberty of a citizen, callously ignores and violates its obligation to provide proper means of delivery of justice to citizens in conflict with the law. Legally, the shortage of police personnel cannot be an excuse for the curtailment of the right to liberty and undue detention of accused persons in prisons. The judiciary has the option to release an accused person on bail under such circumstances, but this discretion is seldom used.

#### *Limited Use of Bail/Bond*

At the lower level, India's judiciary is very conservative in the granting of bail or bond, despite the clear preference in various provisions in the law and some guidelines issued by the Supreme Court of India.<sup>11</sup> A fundamental principle of the criminal justice system in India is that all defendants are innocent until proven guilty. Accordingly, and as high court decisions have reiterated, the granting of bail should be the rule rather than the exception.<sup>12</sup> Of course, pretrial detention may be justified in some circumstances—for example, to prevent the accused from absconding, committing another offense, tampering with evidence, or intimidating witnesses before the trial. But unnecessary pretrial detention subjects the accused to the stigmatizing effect of detention, including the inability to prepare an effective defense, without any proper justification in law.<sup>13</sup>

In cases when courts do grant bail, the conditions and amount of bail and/or personal bond are often beyond the reach of the accused and their families. As a result, defendants remain in prison because of their limited economic means. Professional “bailers” take advantage of such situations.<sup>14</sup> In tribal areas, where most people do not own any land or immovable property, it is impossible for the accused to produce a *patta* (document of ownership of land or

At the lower level, India's judiciary is very conservative in the granting of bail or bond, despite the clear preference in the law.

property) to the satisfaction of the court and therefore cannot secure their liberty even after an order of release on bail/bond has been issued. Overall, the amount of bail/bond prescribed by the courts (particularly by the lower courts, where most cases are pending) is not correlated to the socioeconomic status of the accused person, which creates an array of problems.

#### *Underutilization of Provisions for Releasing First-Time Offenders*

A majority of pretrial and convicted prisoners belong to the category of first-time offenders. Prison statistics show that repeat and habitual offenders make up between five percent and six percent of all persons convicted of crimes in the country.<sup>15</sup> The portion of habitual offenders among under-trial prisoners is even lower. By a rough

estimate, nearly 90 percent of the offenders in prison (convicted and under-trial) fall into the category of first-time offenders. Even if we deduct the exceptions falling under various sections of the “Probation of Offender Act,” and Section 360 of the CPC, almost 50 percent of this population should be eligible for the mandatory benefit of noncustodial correctional treatment envisaged under these special provisions.

Some of the judicial magistrates interviewed by CHRI admitted that they were afraid of being labeled as pro-offender judges.

It is a sad commentary on the criminal justice system that these provisions are not applied as they were intended. Some of the judicial magistrates interviewed by CHRI admitted that they were afraid of being labeled as pro-offender judges and penalized in their Annual Appraisal Reports if they applied these provisions as frequently as was intended. Section 6 of the Probation of Offenders Act and Section 361 of the CPC mandate that if (in the case of certain categories of offenders) the provisions are not applied, the trial magistrate/judge shall have to record reasons for not doing so. But in the large majority of cases this mandate is violated with impunity.

The use of these provisions could reduce the number of under-trial prisoners as well as the length of their detention, but it seems that neither advocates nor the judiciary vigorously apply them. The study team of CHRI has been entreating state-sponsored free legal aid functionaries to educate under-trial prisoners about these provisions.

### *Discord in the Criminal Justice System*

A fundamental reason for the problems with pretrial detention is discord and disharmony within India’s criminal justice system. The absence of coordination between institutions in India is endemic. These agencies may all share the same objectives, but they largely fail to achieve them due to a lack of concerted effort. Each agency therefore passes the blame for the failure of the system to other sister agencies.

### **Addressing the Problem**

There is no shortage of good ideas about how to reduce prison crowding in India. Remedial efforts might focus on: faster investigations by the prosecution and speedier trials; more stringent application of rules by the lower judiciary in granting bail; review of under-trial prisoners and their release on personal recognizance; and an alert prison administration, regularly producing under-trial prisoners before courts, discouraging the willful absence of the accused person on the date of hearing, ensuring requisition of escort guards on time, providing appropriate transport to carry remand

prisoners to courts, organizing regular meetings of review committees for under-trial prisoners, using free legal aid to benefit under-trial prisoners, and extending full cooperation to official and nonofficial visitors studying prison conditions so they can make recommendations for appropriate action and improvement.<sup>16</sup>

All of these innovations could take place without changes in the law. Indeed, the seeds of reform and improvement in the administration of justice lie dormant in the existing law itself. What is required, in other words, is the implementation of the provisions of law in the right spirit. But this in turn requires thoughtful coordination between various agencies of the criminal justice system.

Unfortunately, the constitutional design of the criminal justice system leads to the functioning of its various agencies in separate compartments and denies a holistic approach to justice delivery. Each organ of the criminal justice system (the police, advocates, prosecution, probation, judiciary, and prisons) claims to be doing its best, but the system as a whole fails to deliver. There is no common platform at any level—national, state or local—where all the agencies of the criminal justice system meet and sort out the complexities of their work together. Some sporadic measures to improve coordination are taken here and there to alleviate the symptoms, but the root of the disease—the constitutional design of the system—persists.

### **The Logic of Prison Visits: Supports for Reform**

Another barrier to alleviating the system's flaws is rampant corruption. CHRI initiated prison visits because of the dangerous veil of secrecy that covers the institution of criminal offender confinement. With few exceptions, conditions in prisons are appalling, making them a fertile breeding ground for human rights abuse. CHRI discov-

All of these innovations could take place without changes in the law. Indeed, the seeds of reform and improvement in the administration of justice lie dormant in the existing law itself.

ered that most of these afflictions result not from any malfeasance of the prison staff but from the collective neglect of the whole system. There is a lack of effective communication. There is no linkage, no monitoring, no deadlines, no evaluation, and therefore no result.

Jail staff and inmates alike were initially suspicious of the idea of prison visits, but perseverance and continued interaction with Non-Official Visitors (NOVs) allowed CHRI to discern the possibility of improving the system through simple interventions.

Since 2001, study teams from CHRI have visited 75 prisons, four protective homes for women, and four women's police stations in the three states of Madhya Pradesh,

Chhattisgarh and Rajasthan. CHRI teams involved as many local functionaries of the criminal justice system as possible. The tacit purpose was to sensitize them to the suffering of incarcerated persons and to the mental agony of their protracted wait for a trial. It also provides these visiting officials with an opportunity to see how cooperating with other agencies could solve difficult problems.

Local authorities from the judiciary, administration, and police have generally been cooperative. On several occasions, CHRI visits and reports have resulted in prompt orders being issued for free legal assistance, for holding Saturday courts in jails, for providing sufficient police personnel to escort under-trial prisoners to court, for referring sick prisoners to specialist medical services, and for releasing petty offenders through plea bargaining.

CHRI soon realized that it was necessary to make some common platform available to the functionaries of criminal justice agencies to discuss their problems and to find some ways of improving interdisciplinary coordination. As a result, regional workshops for the orientation of nonofficial prison visitors were organized and higher officials of the judiciary, police, prisons, prosecution, and probation services were invited to chair different sessions. As a part of the strategy to involve a wide array of criminal justice officials, the cooperation of constitutional bodies such as the State Human Rights Commissions and the State Commissions for Women was also

solicited. This approach not only ensured a large presence from all sections of criminal justice administration but also had a positive effect on the resultant decision making by these agencies.

CHRI has organized 11 such regional workshops in three states. These workshops were widely attended by a cross-section of the criminal justice agencies working at both the functional level and the policy-making level. In order to generate appropriate reaction from official and nonofficial participants, some challenging questions were raised during the sessions of each workshop. To bolster the potential for reform within the system, CHRI posed the following questions:

- Are bigger prisons the only solution to the overcrowding problem? Or are there methods to reduce the prison population?
- Are automatic arrests necessary for maintaining law and order in society? Can appropriate discretion be used immediately after the commission or reporting of crime to restrict detention to the minimum necessary?
- Can the criminal justice process be sustained if suspects in minor crimes are released on bail, bond, or personal recognizance instead of confined to custodial care?
- Can women offenders, who have roots in family and society, be more readily granted bail, bond, or release on personal recognizance



**Table 2: Number and proportion of convicts and under-trial prisoners (against total prison population) in major states of India at the end of 2002**

Name of State	Category of prisoners		% share of	
	Convicts	Under-trials	Convicts	Under-trials
All India Total	82,121	234,884	25.5	72.8
Bihar	5,064	32,101	13.6	86.1
Jharkhand	3,013	12,094	19.9	79.9
Karnataka	2,298	7,972	22.1	76.6
Orissa	2,975	9,616	23.5	76.1
Uttar Pradesh	6,073	44,951	11.6	86.1
West Bengal	2,611	16,036	13.9	85.6
Delhi	2,333	9,656	19.4	80.2
Andhra Pradesh	4,872	8,549	36.3	63.7
Assam	2,730	4,319	38.6	61.1
Gujarat	3,286	6,369	32.1	62.2
Haryana	3,633	7,717	32.0	67.9
Kerala	1,711	3,458	33.0	66.7
Maharashtra	7,198	14,517	32.7	65.9
Punjab	3,984	8,113	32.9	67.0
Tamil Nadu	5,582	14,413	25.5	65.8
Madhya Pradesh	12,057	15,635	43.4	56.3
Chhattisgarh	5,036	4,961	50.3	49.6
Rajasthan	4,976	7,322	40.2	59.1

Source: Prison Statistics India 2002, National Crime Records Bureau, Ministry of Home Affairs, <http://ncrb.nic.in>.

without risking the due process of law?

- Can under-trial prisoners be allowed to work and be paid minimum wages inside the prison to support their families outside?
- Should under-trial prisoners' review committees comprising members of the local criminal justice system

be formed at every district and subdivision and empowered to release or recommend to appropriate authorities the release of inmates to community-based trial rather than custody-based trial?

- Should such committees visit prisons for review of cases of under-trial prisoners every month or every fortnight?

- How can unnecessary delays, postponements of hearings, and the nonproduction of accused before magistrates be reduced?
- Should the cases of women and young offenders remanded to judicial custody be queued separately for early disposal?
- Could some judicial magistrates hold court within the prison premises once a month or fortnight?
- Can the amount of bail/bond be justifiably linked to the socioeconomic status of the accused?
- At what level should overcrowding in prisons be treated as unacceptable?<sup>17</sup>

These and other questions stirred animated discussions during the meetings and workshops. Representatives of the criminal justice system are often averse to taking lessons or advice from an NGO or outside agency working to reform the system, and their first reaction was tough opposition. But as the discussions proceeded, the functionaries accepted the need for reform and for cooperation and coordination among all agencies of the criminal justice system.<sup>18</sup> Meeting participants realized that there was a lack of interagency understanding of roles in the justice process; that some archaic statutes required reexamination; and that many problems were remediable and could be dealt with at the local level.

### Impact on Prison Populations

In its original design, the prison visitors program was never directly aimed at reducing the extent or duration of pretrial detention. The goal, rather, was opening up the obscure nature of prison management through permitted community interventions. It was during the implementation of the program that CHRI discovered the need to bring together all agencies of the criminal justice system at various levels as a prerequisite for building understanding and coordination among them.

The repeated emphasis on such coordination at the local level, as well as at the policy-making level, has had an impact on the under-trial prison population in the three states in which the program has been carried out. While there is no clear causality, the data in Table 2 show how the ratio of the under-trial prison population to that of convicted prisoners is lowest in Madhya Pradesh, Chhattisgarh, and Rajasthan—the three states in which CHRI has worked most intensively.

Table 2 provides data on the number of inmates in Indian prisons. In the country as a whole, nearly three-quarters of all inmates are under-trial detainees. This ratio varies considerably from state to state. In some states, such as Bihar, Jharkand, and Karnataka, the number of under-trial inmates exceeds that of the convicted inmates by a factor of four to seven. In other states it is about two times. And in Rajasthan, Chhattisgarh, and Madhya Pradesh, the states where

CHRI has been most active, the proportions are roughly equal.

CHRI has been advocating in Madhya Pradesh, Chhattisgarh, and Rajasthan for: (a) coordination among various agencies of the criminal justice system at the local level to bring the accused before the courts faster; (b) use of the Probation of (first) Offenders Act in appropriate cases; (c) holding courts in prisons for disposal of cases of under-trial prisoners apprehended on minor charges; and (d) disposal of the cases of detainees who plead guilty and who have passed sufficient time in prisons pending inquiry, investigation, and trial.

From these numbers it appears that this work has had an impact on the criminal justice system resulting in the reduction of the under-trial population. In Madhya Pradesh, for example, the size of the under-trial prison population declined during the years 2001 to 2003, from 16,837 to 15,635 to 13,993. Similarly, in Chhattisgarh the trend is generally downward, from 4,921 to 4,961 to 4,128. In Rajasthan, the impact seems to be more dramatic: the under-trial population during these years receded continuously, from 8,737 in 2001, to 7,322 in 2002, and 6,584 in 2003. These are hopeful signs in comparison to the all-India figures of pretrial detainees rising from 227,817 to 234,884 and then showing a slight fall to 229,997.<sup>19</sup>

By itself, a reduction in the number of detainees is a good sign. But what really counts for reform is the means

by which there has been a reduction in the size of the population of pretrial detainees—through: (a) judiciously restricted arrests and alternative means of bail, bond, house arrest, personal recognizance; or (b) more rapid judicial procedures leading to discharge, acquittal, or conviction.

In the long drive to reform criminal justice and preserve prisoners' rights, it is important not to jump to conclusions. A reduction in the proportion or ratio of pretrial detainees in comparison to convicted prisoners cannot serve as an absolute indicator of reform in the situation of pretrial detention. The shift from pretrial prison population to convict population can at best denote the acceleration of judicial processes and perhaps a more punitive disposition in the judiciary. It cannot detect whether there have been changes in the number of arbitrary arrests or the frequency of denials of the right to bail by defendants.

The best way to address the issue of the swelling population of pretrial detainees in prisons is through appropriate police–prosecution reforms and simultaneous improvement in judicial processes. Prisons contribute to the reform effort by registering the scale of change and by tracking changes over time. And, as the experience of CHRI has shown, prison visit programs have a significant role to play in activating interagency coordination and opening a public conversation about how to alleviate human suffering in custodial institutions without jeopardizing the security of the society.

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### Notes

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1. In each state, the “controlling government department” comprises the minister in charge of prisons together with the administrative secretary to the government. Also known as the Home Department, it is a part of the government secretariat and not connected with the Human Rights Commission.

2. The state was later bifurcated into Madhya Pradesh and Chhattisgarh.

3. The most recent published figures at the time of writing are for 2003. See *Prison Statistics India – 2002 and 2003* (Ministry of Home Affairs, National Crime Records Bureau [NCRB]), <http://ncrb.nic.in>.

4. Apprehending agencies include different departments of the police, such as the Criminal Investigation Department (CID), Anti-Corruption Department (ACD), Government Railway Protection Force (GRPF), Anti-Terrorist Force (ATF), and the Special Task Force (STF). It does not include the military.

5. *Third Report* (Government of India, National Police Commission [NPC], January 1980), 31.

6. “Preventive arrests” are arrests made to determine the commission of a crime by the individual through the process of enquiry, investigation, and trial during the period of judicial custody.

7. *Consultation Paper on Law Relating to Arrests* (Law Commission of India, November 2000).

8. This is a common expression in India for describing the extraction of bribes and other undue favors.

9. *Criminal Procedure Code*, 1973, Section 328(3).

10. The *Criminal Procedure Code*, 1973, Section 167(2)(b), states: “No Magistrate shall authorize detention in any custody under this section unless the accused is produced before him.”

11. There is no agency in India that records the number of accused persons released on bail and/or bond either within a territorial jurisdiction of courts or over a period of time by a court. Hence it is not possible to track trends in such release or measure the rates of absconding.

12. *State of Rajasthan v. Balchand*, 1978 SCR (1), 535–536.

13. *Motiram v. State of MP*, 1979 SCR (1), 335 and 341.

14. After prolonged pressure by human rights activists, and with the purpose of encouraging unsecured bail for indigent defendants, the underlined portions of the provisions on bail were added to the Criminal Procedure Code by Parliament in June 2006:

*436(1) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail: provided that such officer or Court, if he or it thinks fit, may, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail from such person discharge him on his executing a bond without sureties for his appearance as hereinafter provided.*

Explanation: Where a person is unable to give bail within a week of the date of his arrest, it shall be sufficient grounds for the officer or court to presume that he is an indigent person for the purpose of this proviso.

15. *Prison Statistics India, 2000, 2001, 2002, and 2003* (Ministry of Home Affairs, NCRB).

16. Some of these measures are in fact being introduced today, including: the provision of free legal aid to the poor through the State Legal Services Authority; the convening of under-trial prisoners' review committees; monthly review of the cases of inmates pending trial for more than six months; the introduction of fast-track courts (constituted to process cases pending in courts through faster procedures); and the creation of jail courts, by which judicial magistrates come to the prison to hold hearings.

17. In some of the prisons the inmate population is four to five times the capacity, as reported in *Prison Statistics India, 2004* (Ministry of Home Affairs, NCRB), <http://ncrb.nic.in/prisons2004>. Although the reports do not provide prison-by-prison statistics on inmate populations, it can still be seen that the overall prison population in the State of Jharkhand is three times the capacity of prisons for the entire state. In such situations some of the prisons are heavily overcrowded—as much as four to five times the actual capacity. The same is true in the states of Madhya Pradesh and Bihar. In CHRI's visits to the state of Chhattisgarh (2005), it found the population of jails at Dantewara and Surajpur to be four and five times capacity, respectively.

18. It should be noted that individual functionaries of different agencies of the criminal justice system are open to participating in workshops and seminars for open discussions. However, when the individual agency is subjected to criticism, they become defensive and resist suggestions for improvement. It takes hard work and perseverance to convince them to be open to change for the better.

19. The hypothesis that CHRI's intervention is at least partly responsible for a reduction of the under-trial population in Madhya Pradesh, Chhattisgarh, and Rajasthan is bolstered by the otherwise similar conditions across all states. That is, all states have the same criminal law and procedural legislation, and similar levels of offending.

# On the Front Lines: Insights from Malawi's Paralegal Advisory Service

Clifford Msiska writes from Malawi about the innovative use of paralegals to reduce the number of pretrial detainees.

## Introduction

This report describes the introduction of the Paralegal Advisory Service (PAS) in Malawi in 2000 and its impact on pretrial detention trends

Over 300 homicide remandees had been awaiting trial for longer than two years.

and practice, as well as levels of prison congestion.<sup>1</sup> The report explains the logic behind the introduction of PAS, as well as examining its contribution to greater fairness and better governance in the criminal justice system.

The initial purpose of PAS was to help reduce unlawful detention and prison overcrowding. PAS has made significant progress toward these goals, and its work has had other important benefits as well, including invigorating public administration and cultivating patterns of good governance in the justice sector.

The author of this report was closely involved in the development and introduction of PAS. Today he is

responsible for coordinating the ongoing activities of 38 paralegals in courts, prisons, and police stations in all four judicial regions of Malawi. Thus, this account of the evolution and impact of PAS is an insider's perspective on the challenges and success of the effort to reform the pretrial detention processes of Malawi.

## Issues of Criminal Justice and Pretrial Detention in Malawi

The criminal justice system in Malawi suffers from many ailments. Prisons are overcrowded and inadequately resourced, resulting in unhygienic conditions for most inmates.<sup>2</sup> Lay magistrates often stand in for judges due to the lack of qualified judicial personnel, which compromises the legal integrity of the pretrial process.<sup>3</sup> The quantity of lawyers is insufficient to cope with the demands of the state and the general public.<sup>4</sup> Free legal aid is available only in capital cases. Courts are poorly resourced and have huge backlogs, especially in homicide cases.<sup>5</sup> At the time of writing, 321 homicide remandees had been awaiting trial for longer than two years. Suspects are hastily arrested, typically before an investigation has been completed. Prosecutions are largely conducted by police officers who are not qualified in law. Before the advent of

PAS, some prisoners were entirely forgotten by the justice system. A 1997 report on the backlog of homicide cases in Malawi found 57 accused inmates in prison whose case files could not be traced.<sup>6</sup>

The problems with lengthy and indiscriminate pretrial detention in Malawi are not new. During the rule of the late Malawian dictator, Kamuzu Banda (president from 1964 to 1994), the state could lawfully detain suspects without trial indefinitely. *De jure*, if not necessarily *de facto*, the situation improved one year before the country's multiparty elections in 1994, when Malawi acceded to the International Covenant on Civil and Political Rights. The Covenant states that "it shall not be the general rule that persons awaiting trial shall be detained in custody"; that "everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to the law"; and that accused persons have the right "to be tried without undue delay."<sup>7</sup> In 1995, Malawi adopted a constitution with a bill of rights that recognizes the "rights of accused persons."<sup>8</sup> Today, notwithstanding a formal commitment to international standards and constitutionally entrenched protections for accused persons, there is much to do to make these commitments a reality.

### Building a Case for Paralegal Services

The problems of pretrial detention in Malawi began to receive greater international public attention in the

late 1990s after Penal Reform International (PRI), acting under the aegis of the African Commission on Human and Peoples' Rights, organized the first Pan-African Seminar on Prison Conditions in Africa. Held in Kampala, Uganda, in 1996, the seminar drew human rights non-governmental organizations (NGOs), senior prison officers, and government representatives from 40 African countries (including Malawi). One of the primary reports of the seminar documented that in some African countries remand prisoners constituted up to 80 percent of the total prison population and were detained for many years before trial.<sup>9</sup>

The movement to establish a Paralegal Advisory Service drew important ideas and political legitimacy from some of the conclusions reached at the Kampala meeting. The Kampala Declaration on Prison Conditions in Africa, for example, insisted that dangerous and violent crime could neither justify nor explain high rates of pretrial detention, as the research reports found that "the majority of detainees are in pretrial detention for petty crimes or serving short terms of imprisonment."<sup>10</sup> And the declaration strengthened the cause of external review and expediting of cases by reiterating commitments found in the new Malawi Constitution, including:

- Judicial investigations and proceedings should ensure that prisoners are kept in remand detention for the shortest possible period, avoid-

ing, for example, continual remands in custody by the court.

- There should be a system for regular review of the time detainees spend on remand.

Perhaps the most important asset of the Kampala Declaration was its insistence on unconventional approaches to justice and the vital role of NGOs. The declaration enjoined

The most important asset of the Kampala Declaration was its insistence on unconventional approaches to justice and the vital role of NGOs.

states to explore “informal avenues that do not include the courts—such as diversion, mediation, and reconciliation.” Moreover, “the role that non-governmental organisations have to play in prisons is important and should be recognised by all governments. They should have easy access to places of detention and their involvement should be encouraged.”<sup>11</sup> These exhortations were not empty propositions. One presenter, Amanda Dissel, of the Johannesburg-based Centre for the Study of Violence and Reconciliation, specifically recommended that “paralegals, articulated clerks and unqualified legal persons should be allowed to assist prisoners.”<sup>12</sup>

This idea was picked up in the Dakar Declaration of the African Commission on Human and Peoples’

Rights (1999), which states that: “Bar Associations should in collaboration with appropriate government institutions and NGOs enable paralegals to provide legal assistance to indigent suspects at the pretrial stage.”<sup>13</sup> The Plan of Action of the Ouagadougou Declaration on Accelerating Prison and Penal Reforms in Africa (2002) promotes the detention of persons awaiting trial “only as a last resort and for the shortest time possible”; and the “greater use of paralegals in the criminal process to provide legal literacy, assistance and advice at a first aid level.”<sup>14</sup>

### Establishment of the Paralegal Advisory Service

In 1999, with support from Penal Reform International and provoked by reports of the poor conditions in which juvenile prisoners were being held, three local human rights NGOs (Centre for Human Rights and Rehabilitation—CHRR; Eye of the Child—EYC; and Malawi Centre for Advice, Research and Education on Rights—CARER) conducted a study of the conditions of juveniles in three main prisons in Malawi (Zomba Central Prison, Chichiri Prison, and Maula Prison).<sup>15</sup> The goal was simple: to find out how many juveniles were there and why.

The study found that of the 179 young people in the juvenile section in Zomba Central Prison, not one had been lawfully detained. In some cases, the remand warrants had expired; in most, the detainees in the juvenile wing were already adults.



Significantly, the study found that none had been legally advised or represented and that none had committed offenses that were “so depraved” or behaved in a manner “so unruly” as to justify remand to prison.<sup>16</sup> More fundamentally, the study showed that the rest of the justice system exercised no oversight of the judiciary or the police.

The result of the study was to recommend setting up a paralegal service to work in the prisons and monitor remand cases. The option to introduce paralegal services in the criminal justice system made sense because paralegals could be more accessible compared to lawyers, who were urban based and whose legal fees were beyond the reach of most Malawians. The paralegals could bring basic legal services to those who needed it most by working in prisons, police stations, and courts on a daily basis. Moreover, paralegals could reach hundreds of prisoners at once through their legal clinics, unlike lawyers who work on a one-to-one basis.

At the same time, the aforementioned three NGOs recognized they would need additional legitimacy and support for such an idea from within the region. The Kampala Declaration conveniently had recommended that: “Regional seminars should be convened to discuss regional initiatives and disseminate the findings and proceedings of these seminars throughout the continent, and enhance bilateral, multilateral and international co-operation, assistance and networking.” And so, in late 1999 and with support from UNICEF Malawi, the United Kingdom’s Department for

International Development (DFID), the Malawi Ministry of Justice and Constitutional Affairs, and the Malawi Human Rights Commission (a constitutional body), PRI organized a regional seminar titled “Juvenile Justice in Malawi: Time for Reform.”<sup>17</sup>

There was active participation of experts from a broad cross-section

The paralegals could bring basic legal services to those who needed it most by working in prisons, police stations, and courts on a daily basis.

of the criminal justice system in Malawi as well as experts from other sub-Saharan African countries and Europe. The regional seminar recommended that:

There should be a limit on the period a juvenile can be kept on remand. Juveniles under 14 years accused of a minor offence should not be remanded in custody for longer than three months. Juveniles aged 14 to 18 should not be in custody for more than 12 months if accused of a serious offence and for no longer than three months if accused of a minor offence.<sup>18</sup>

This recommendation was necessary because Malawian law does not exclude juveniles from being held on remand in police cells, reformatory schools, and prisons while awaiting trial. In Malawi, most juveniles who are suspected of having committed

murder or manslaughter may be remanded for more than two years before their cases are tried. The human rights NGOs that attended the seminar committed themselves to establishing a “paralegal advisory service in the four main prisons in Malawi.”<sup>19</sup>

Before the project, many remand prisoners waited up to 10 years for a trial.

### Evolution of the Paralegal Advisory Service

In May 2000, together with local NGOs and with financial assistance from the DFID-funded Malawi Safety, Security and Access to Justice (MaSSAJ) Programme, PRI established the Paralegal Advisory Service with eight paralegals working in Malawi’s four main prisons (Chichiri, Maula, Mzuzu and Zomba Central prisons). The paralegals are centrally coordinated by a PAS national coordinator and employed by four NGOs working in partnership with criminal justice agencies.<sup>20</sup> The paralegals are lay workers with elementary training in law.<sup>21</sup> The Paralegal Advisory Service is assisted by an advisory council comprising senior government officials and representatives from the judiciary.<sup>22</sup>

At the outset, the pilot PAS project focused on the homicide remand backlog as DFID had provided funds for its reduction. PAS paralegals educated prisoners awaiting trial on capital offenses in the substantive law, procedures, and basic evidentiary rules surrounding the charge of murder or manslaughter. At the time, many homicide remand prisoners awaited trial for up to 10 years. Unsurprisingly, homicide or manslaughter remand prisoners were disproportionately represented among the pretrial detention population. Most homicide remand prisoners were not ready to plead guilty to a lesser charge of manslaughter because they did not understand the difference between murder and manslaughter. And, because the director of public prosecutions sought to ensure that every homicide investigation was thorough enough to win a conviction, the state was slow to take accused persons to court for trial. In the end, homicide remand prisoners remained in detention for years; at times longer than the period they would have been incarcerated had they been convicted and sentenced upon a guilty plea on manslaughter charges.

PAS’s paralegals observed 90 capital trials in the High Court. They found that most homicide charges were reduced to manslaughter. The paralegals also attended cases involving vulnerable groups in prisons, namely, young offenders, women, and the mentally and terminally ill, to assist in their early release. The paralegals then set about finding out what assistance prisoners lacked.

First, they found that prisoners did not understand the law. PAS therefore developed a series of practical workshops to inform prisoners on the criminal law and procedure and enable them to better represent themselves in court (as they could not afford the services of a lawyer). Moreover, PAS developed a paralegal aid clinic workshop on bail. This involves paralegals' interviewing awaiting trial prisoners and assisting those who wish to complete a standard bail application form and then lodge this with the appropriate court. The standardized bail application form was developed by PAS in consultation with the judiciary. These forms simplify and expedite the bail application process as judicial officers are provided with relevant information to come to a pretrial detention or release ruling. Typically, prison authorities check the completed forms against prisoners' files and, where appropriate, stamp the details recorded in the forms as accurate. In this way a number of uncontested bail applications can be heard together by one magistrate and an order can be made for the pretrial release of a number of accused persons in one hearing. Up to 30 bail applications can be heard simultaneously in this manner.<sup>23</sup>

Paralegals use interactive drama techniques to encourage the participation of prisoners at regular paralegal aid clinics. It is not unusual for up to 200 prisoners to attend such a clinic. The emphasis in the clinics is placed on self help. For example, they address how an accused person can plead in mitigation or a detainee can conduct his own bail application.<sup>24</sup> In the first

two years of PAS's operation, 714 paralegal aid clinics were held, educating 14,600 prisoners.<sup>25</sup> By mid 2007, some 3,500 clinics had educated in excess of 100,000 prisoners.

Second, they learned that many remand prisoners were held unlawfully, were "overstaying" on remand, or did not know how to gain access to bail. In response, paralegals provide legal advice and assistance to remand prisoners who are being detained unlawfully, inappropriately, or for

PAS developed a series of practical workshops to inform prisoners on the criminal law and procedure and enable them to better represent themselves in court.

undue lengths of time, with priority given to vulnerable groups such as women with small children and juveniles.<sup>26</sup>

Third, they noticed that the criminal justice agencies themselves were poorly equipped, resourced, and trained and were not talking to one another enough. Paralegals adopted a pragmatic approach by seeking partnerships with these agencies. They adopted a supportive role and reinvigorated Court Users' Committee meetings. These committees operate at the local, regional, and national levels to identify problems in the criminal justice process and come up with local solutions. The paralegal team leader in a magisterial district convenes (and pays for) the monthly local committee meetings with prison officials, police

Table 1: Prison population in December 1999

	Convicted			Remand			Total
	Male	Female	Juvenile	Male	Female	Juvenile	
All Prisons	4,265	30	198	2,258	44	164	6,959
	(4,493) 64.6%			(2,466) 35.4%			100%

Source: Malawi Prison Service

chiefs, and judicial officers to check on their progress and address any problems or complaints.

The committees have proved effective in improving communication and coordination between criminal justice agencies and addressing local problems. In one instance, paralegals, supported by prison officers, alerted a committee of the high level of overcrowding at a local prison. In response, the chief magistrate visited the prison the next day with three additional magistrates, police prosecutors, and court clerks and released a number of prisoners awaiting trial. The local committees are not expensive to administer. Some US\$10 is budgeted per meeting to cover the cost of local transport and refreshments. Committees also discuss reducing the courts' caseload by referring appropriate cases to traditional authorities for local settlement, as well as encouraging the police to investigate alleged crimes before suspects are arrested and remanded in custody rather than afterwards.<sup>27</sup>

Paralegals also assist police prosecuting officers (in Malawi, prosecutions in the lower courts are conduct-

ed by police officers) by listing the many minor cases involving accused persons who have been in detention for long periods of time, not been arraigned before a court, or are eligible for bail.

Over time, PAS discovered a need to go backward in the penal chain, because many problems stemmed in large part from detention or charging decisions made by the police and the courts. Consequently, in 2003 PAS extended its services to the courts and police to provide a broader legal aid service to all those in conflict with the law at the outset of the criminal justice process.

In mid-2007, PAS employed 38 paralegals working in 24 prisons (covering 85 percent of the prison population), 5 courts, and 5 police stations. PAS provides legal assistance and advice to poor people using non-lawyers on three different "front lines" of the criminal justice system—in prison, in police stations, and at court. PAS seeks to reduce not only the frequency of the use of pretrial detention but also to shorten its duration by improving the efficiency of the criminal justice system. By maintaining a

**Table 2: Prison population in January 2007**

	Convicted			Remand			Total
	Male	Female	Juvenile	Male	Female	Juvenile	
All prisons	8,870	98	358	1,823	55	62	11,266
	(9,326) 82.8%			(1,940) 17.2%			100%

Source: Malawi Prison Service

constant dialogue with the Malawi Prison Service, Malawi Police Service, and judiciary, PAS has enabled the justice system to operate more smoothly. Since the project's inception in May 2000, none of the criminal justice agencies has complained about the presence of paralegals at police stations, courts, or prisons.

### Assessing the Impact of the Paralegal Advisory Service

A meaningful assessment of the impact of PAS requires an examination of trends in detention and levels of prison congestion before and after paralegals began to offer assistance to inmates. Although before and after comparisons are not perfectly suited for this analysis, the figures above strongly suggest PAS has made an important independent contribution to legal aid in Malawi and the reduction in the size of the remand population in particular.

Prison data are sketchy for the period before 2000, but we were told that the remand population constituted between 40 percent and 50 percent of the number of inmates in prison in Malawi in the years 1996 to 1999.

At the end of 1999, the first period of time for which reliable information is available, there were 6,959 inmates in prison, of whom 35 percent were on remand. Table 1 shows this proportion, as well as the number of males, females, and juveniles in prison at this time.

Since 2000, the prison population has grown. In January 2007, there were more than 11,000 people in prison in Malawi. Between 1999 and 2007, the size of the remand population diminished, however. In 2007 there were fewer than 2,000 inmates on remand, and they constituted only 17 percent of all prisoners (Table 2).

### The Contribution and Logic of the Paralegal Advisory Service

Credit for these advances cannot be fully attributed to PAS. Other factors can explain the decrease in the proportion of inmates on remand, including the length of sentences, the volume of arrest, and the speed of police investigations. Still, many criminal justice stakeholders believe that PAS has played an instrumental role in reducing the size of the remand population. One analyst, closely involved in the

development of PAS, claims that during the first four years of its operation PAS “facilitated the release of approximately 2,000 prisoners” and “reduced substantially the number of persons unlawfully remanded in prison and stabilized the remand population at 22 percent (from 50 percent before the scheme began).”<sup>28</sup> Moreover, an independent evaluation concluded:

Since the Paralegal Advisory Service (PAS) came into operation in May 2000, the Service has become an important actor in the protection of poor people in conflict with the law. All the interviewed stakeholders praised the programme and spontaneously called it indispensable, bridge building, voices of the voiceless and a whistle-blower, making it possible for the management to address certain bad practices within the system. Many identified the programme as one of the main reasons why the number of remandees has dropped significantly.<sup>29</sup>

**By contributing to the reduction in the remand population, paralegals have changed the criminal justice system in several important ways.**

In addition, by contributing to the reduction in the remand population, paralegals have changed the criminal justice system in several important ways.<sup>30</sup>

First, between May 2000 and May 2007, paralegals enabled 104,000 prisoners to represent themselves at court and argue for bail cogently, enter a plea in mitigation, or defend

themselves. Magistrates have commented on the more sophisticated understanding of the law demonstrated by prisoners in court, who also prove better able to argue for their release on bail.<sup>31</sup> Magistrates have consistently observed that having clinics in prison to educate prisoners and enable them to represent themselves has lightened their caseload and moved cases more swiftly through the system. Unsurprisingly, PAS has won the support of the senior judiciary, including the firm endorsement of the chief justice of Malawi.

Second, paralegals provide a check on administrative routines, especially inside the police service. Paralegals review every remand warrant and make sure people are lawfully detained. The number of illegal remand warrants used by police has fallen from the hundreds at the beginning of the project to a few dozen today. The police can no longer dump individuals in prisons, as they are challenged by prison officers at the monthly Court Users’ Committee meeting and held to account by magistrates when they visit prisons and conduct “camp courts.”

Camp courts are, in essence, magistrates’ courts conducted in prison.<sup>32</sup> In Malawi, encouraged by PAS, magistrates go to prison with a court clerk and police prosecutor and screen lists—prepared by paralegals—of unlawfully or unnecessarily detained persons. In this way magistrates can immediately release persons who have been detained unlawfully or for whom the prosecutor has no objection to bail.

Magistrates can also fix trial dates for detainees whose cases have been remanded for long periods of time. Camp courts are effective in reducing prison congestion and in restoring prisoners' confidence in the justice system by seeing justice in action.<sup>33</sup> Between May 2003 and December 2006, 88 such camp courts were held with PAS support, resulting in the release of hundreds of remand prisoners.

Third, paralegals inculcate rigor in docket reviews. The paralegals follow up with the court and prosecution to make sure cases are not forgotten and old cases are processed as a priority by the courts. Consequently, remand prisoners are no longer lost or overlooked by the criminal justice system.

Fourth, paralegals have facilitated interagency accountability. As mentioned above, paralegals encourage magistrates to visit prisons to review the remand caseload. Working from a list prepared by the paralegals and discussed with the police prosecutor in advance, the magistrate screens the remand caseload, discharging some and granting bail to others. In support of PAS advocacy for such work, the first Judicial Circular issued by the chief justice in February 2003 encourages magistrates to visit prisons to detect illegal detention of suspects and accused persons and violations of constitutional rights, and when such violations are uncovered to take necessary action. In the same year, the chief justice issued a second Judicial Circular requiring magistrates to check warrants of commitment in

which a court imposes a sentence of imprisonment subject to confirmation or review by the High Court. Failure to comply with this practice has resulted in some prisoners' staying on in prison illegally when they should have been released.<sup>35</sup>

Fifth, paralegals have created space in police stations to divert people out of the criminal justice process. Paralegals work at the police station level to assist with the screening of juveniles in conflict with the law. Paralegals interview these young people according to a form

Following an evaluation of a pilot scheme in four police stations, the police recommended that PAS extend its diversionary services to all police stations.

pre-agreed with the police and make recommendations for disposal that police follow for the most part. Juveniles are thus diverted from the formal criminal justice system right after arrest. Following an evaluation of a pilot scheme in four police stations (jointly conducted by PAS and the police), the police recommended at a national meeting in September 2004 that PAS extend its diversionary services to all police stations. A shortage of human resources limited PAS to extending its services to only one additional police station. Between 2004 and 2006, PAS facilitated the diversion of 354 juveniles.

Sixth, paralegals are expediting the judicial process. Following paralegal

clinics on homicide law and pleas, prisoners are now entering informed pleas to their charges, saving considerable court time and expenses. In 2003, 33 homicide remandees indicated to paralegals they were ready to plead guilty to manslaughter, at which point they were referred to the Ministry of Justice's Department of Legal Aid. After consultation with one of the seven lawyers in the department, 29 defendants entered guilty pleas and were sentenced.<sup>36</sup> The actual savings for the judiciary because the trials were avoided was US\$33,000.<sup>37</sup>

Finally, paralegals provoke questions about resource management in the justice system. By working in partnership with the criminal justice agencies directly and through monthly meetings of the Court Users' Committees, questions about the use of scarce resources are raised. A 2002 PAS report quoted one senior legal professional as saying "without them [the paralegals], the whole process would go back to sleep."<sup>38</sup>

### Special Challenges

There were of course a number of obstacles to the introduction of PAS. Before paralegals earned the appreciation of the different agencies of the justice system, they had to clarify and advertise their benefits for each separate institution.

In the prisons, initial mistrust could not be assuaged solely by the signing of a strict code of conduct. The daily presence in the prisons of paralegals, their willingness to work with and through prison officers, their success in following up individual cases,

their hard work, and their impact on the atmosphere in the prison contributed greatly to their gradual acceptance.<sup>39</sup> Conducting joint trainings with prison staff and paralegals, a majority of prison officials have reported that paralegals have won their respect through their close attention to follow-up of individual cases with the police and courts, as well as their discreet conduct. Generally, paralegals facilitate the release on bail of many accused persons. Paralegals also help the speedy disposal of cases by providing information to police and courts on specific cases.

Another key challenge to overcome was access to police stations, where most abuse against detainees takes place shortly after arrest. Initially, the police were reluctant to cooperate and allow their space to be invaded by NGOs. This reluctance was overcome when PAS offered to assist the police trace parents/guardians of juvenile suspects. Over the course of a 12-month pilot program in four police stations, paralegals worked with the police to trace parents and divert young offenders. Abuse reportedly still occurs (especially in the police stations where PAS does not work), but the presence of paralegals has a deterrent effect in the target police stations and encourages greater professionalism on the part of the investigating officers. As with prisons, a strict code of conduct guiding the work of the paralegals while in police stations was designed with the police service.

Finally, the Malawi Law Society fears and resents the perceived competition from the paralegals. The para-



legals have attempted to defuse this concern by emphasizing that they do the work that does not need a lawyer and, more attractively, create work for lawyers interested in criminal matters by facilitating the preparation of cases and so enabling lawyers to focus on complicated issues where their time and expertise can be used best.<sup>40</sup>

### **Sustainability of Paralegal Advisory Service Interventions**

The strategy for sustaining the work of PAS has taken several tracks. One emphasizes the efficiency gains and economic benefits of PAS to the justice system as a whole. Another seeks to obtain recognition of the paralegals as a professional cadre. A third endeavors to create a role and demand inside the legal profession for paralegals.

The paralegals have been recognized in two draft pieces of legislation covering prisons and legal aid, which at the time of writing are yet to be passed into law. Moreover, the Malawi Law Society is considering the inclusion of paralegals in a forthcoming review of the Legal Education and Legal Practitioners Act of 1965. In 2004, PRI in conjunction with the Malawi Ministry of Justice and Constitutional Affairs organized the Lilongwe Conference titled “Legal Aid in the Criminal Justice System in Africa: The role of lawyers, non-lawyers and other service providers.” The conference adopted the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa. According to the Declaration:

Legal aid should be defined as broadly as possible to include legal advice, assistance, representation, education, and mechanisms for alternative dispute resolution; and to include a wide range of stakeholders, such as non-governmental organizations, religious and non-religious charitable organizations, professional bodies and associations, and academic institutions.<sup>41</sup>

The Lilongwe Declaration also emphasizes the scarcity of legal professionals as a reason to support paralegals.

It has all too often been observed that there are not enough lawyers in African countries to provide legal aid services required by the hundreds of thousands of persons who are affected by the criminal justice systems. It is also widely recognized that the only feasible way of delivering effective legal aid to the maximum number of persons is to rely on non-lawyers, including law students, paralegals, and legal assistants. These paralegals and legal assistants can provide access to justice system for persons subjected to it, assist criminal defendants, and provide knowledge and training to those affected by the system that will enable rights to be effectively asserted. An effective legal aid system should employ complementary legal and law-related services by paralegals and legal assistants.<sup>42</sup>

The growing pride in PAS as a home-grown “export product” was evidenced by the Minister of Justice, Honorable Henry Phoya, in his speech to open the Lilongwe Conference:

It is thus an honor for the Malawi Government that Malawi Paralegal

Advisory Services has been internationally recognized by the UN Habitat Best Practices Awards that are given out every two years. This recognition extends to our judiciary, prison and police services who are trying to make justice more accessible to ordinary people of Malawi.

The attractiveness of the experience of PAS abroad is helpful, too, in promoting its institutionalization in Malawi. In sub-Saharan Africa,

The PAS scheme has been replicated in Benin, Kenya, Uganda, and Niger and PAS has been invited to start prison-based pilot schemes in Lesotho, Liberia, Tanzania, and Zambia.

Malawi is far from unique in the small number of lawyers available.<sup>43</sup> The PAS scheme has been replicated in Benin (2002), Kenya (2004), Uganda (2005), and Niger (2006) and PAS has been invited to start prison-based pilot schemes in Lesotho, Liberia, Tanzania, and Zambia.

Still, the future of paralegals in Malawi is neither assured nor protected by law. The real challenge for sustaining the interventions of paralegals in the criminal justice system is lack of funds. The government, criminal justice agencies, and civil society organizations are looking to donors for resources to design and implement programs that would effectively tackle pretrial detention and/or overcrowding in penal institutions.

### Another Rationale for Paralegals

Legal aid poses a vexing problem for all governments because of its potentially high costs as crime rates and the number of accused persons increase. Costs are spiraling because of the exponential growth in the number of defendants, and few cost-recovery mechanisms work well because of the economic disempowerment of the beneficiaries of the service. Some proponents of expanded access to legal representation therefore advertise the overall cost effectiveness of the service and value for money. These benefits are not easily measured, but the role that legal aid can play as an engine to improve the effectiveness and efficiency of the criminal justice system cannot be overemphasized. The results achieved by PAS are telling: non-lawyers are cheaper than lawyers and can, given proper training, enable people to defend themselves and provide appropriate advice and assistance that benefit the maximum number of people.

In a 2002 evaluation report PAS was commended for using “relatively few resources to achieve maximum benefit for users of the criminal justice system in Malawi. Through well focussed assistance, it marshals goodwill and resources already present in the system to best effect, by promoting a holistic view and furthering communication between actors.”<sup>44</sup> The operational cost of one paralegal—salary, stationery, transport, and communication facilities—is less than US\$450 per month. During one month, a paralegal can effectively have an impact on hundreds of cases.

## Conclusion

A review of paralegal services in Africa concluded that “the Malawi Paralegal Advice Service (PAS) may be the strongest example of paralegals working in cooperation with government.”<sup>45</sup> The review warns, however, that “a close relationship with government may cost in independence. PAS paralegals cannot, for example, comment publicly about the conditions in the prisons where they work; this is one of the conditions under which they are granted access.”<sup>46</sup>

It would appear that in PAS’s case, a close working relationship with gov-

ernment—and the limitation on its independence this implies—is a price worth paying. Indeed, an evaluation of PAS concluded that the “highly cooperative and trusting spirit” the paralegals have developed with the criminal justice agencies is the key to its success and sustainability.<sup>47</sup> This gives paralegals daily access to prisons and detainees. Moreover, because PAS seeks to assist the criminal justice system as a whole to function better, and not to find fault with individual agencies in the system, its inputs and contributions are valued by the justice system as a whole.

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## Notes

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1. For the purposes of this paper, a pretrial detainee is a prisoner who has been charged with a crime or crimes and is awaiting trial or the finalization of his trial by any court of first instance. The term “pretrial detainee” and “remand prisoner” are used interchangeably in this paper.
2. Since 1996, when there was an average daily population of 4,500 inmates and prisons were crowded, the population in custody has grown to over 10,500 in 2006 while only a few hundred prison spaces have been added as a result of the reopening of three old prisons.
3. Malawi has 15 judges of the High Court, 7 judges of the Supreme Court, and 171 magistrates for a population of approximately 13 million people.
4. According to the Malawi Legal Aid Society, Malawi had 185 certified legal practitioners in early 2006.
5. The homicide backlog number in the summer of 2006 was over 800 cases.
6. Files were with neither the police nor the Directorate of Public Prosecutions. See: *Final Report on the Homicide Backlog* (Lilongwe: The British Council, 1997); see also Michael Wines, “The Forgotten of Africa – Wasting Away in Jails Without Trial,” *New York Times*, November 6, 2005.
7. These three provisions are taken from, respectively, Articles 9(3), 14(2) and 14(3)(c) of the International Covenant on Civil and Political Rights, [http://www.unhcr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhcr.ch/html/menu3/b/a_ccpr.htm).
8. Section 42(2)(b) of the 1995 Constitution of the Republic of Malawi states that “Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right as soon as it is reasonably possible, but not later than 48 hours after the arrest, or if the period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be released.” Further, Section 42(2)(f)(i) states that: “Every person arrested for or accused of, the alleged commission of the

offence shall, in addition to the rights which he or she has as a detained person, have the right to public trial before an independent and impartial court of law within a reasonable time after having been charged.”

9. Dirk van Zyl Smit, “Report of the Rapporteur General,” in *Prison Conditions in Africa: Report of a Pan-African Seminar*, Kampala, September 19–21, 1996 (Paris: Penal Reform International [PRI], 1997).

10. *The Kampala Declaration on Prison Conditions in Africa*, <http://www.penalreform.org/publications/reports/brf-1996-kampala-declaration-en.pdf>.

11. Paragraph 5(h) of the Plan of Action of the *Kampala Declaration on Prison Conditions in Africa*, <http://www.penalreform.org/publications/reports/brf-1996-kampala-declaration-en.pdf>.

12. Amanda Dissel, “Commentary on the Kampala Declaration,” in *Prison Conditions in Africa* (PRI, 1997).

13. *Dakar declaration and recommendations*, [http://www.chr.up.ac.za/hr\\_docs/african/docs/achpr/achpr2.doc](http://www.chr.up.ac.za/hr_docs/african/docs/achpr/achpr2.doc).

14. *The Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reforms in Africa*, 2002, [http://www.achpr.org/english/declarations/declaration\\_ouagadougou\\_en.html](http://www.achpr.org/english/declarations/declaration_ouagadougou_en.html).

15. See *Juvenile justice in Malawi – Time for Reform? Findings of Paralegal case review of Juveniles in Malawi’s Prisons* (CARER, September 1999); Dorothy Jolofani, *Juvenile offenders: From Punishment to Rehabilitation. A Study of the Juvenile Court in Malawi*, 1999 (unpublished).

16. Section 16(1)(i) of the *Children and Young Persons Act* of 1969 permits detention only in such circumstances.

17. *Juvenile Justice in Malawi: Time for Reform*, Report of the Regional Seminar, Lilongwe, November 23–25, 1999 (Lilongwe: PRI), 21–22 and Annex 2, fact sheet 1.

18. *Ibid.*, 39, para. 4.

19. *Ibid.*, 43, para. 6.

20. These NGOs are: Eye of the Child (EYC); Malawi Centre for Advice, Research and Education on Rights (CARER); Centre for Legal Assistance (CELA); and Youth Watch Society (YOWSO).

21. PAS paralegals must hold a high school diploma and undergo a month-long legal training course.

22. The PAS advisory council comprises the chief commissioner of prisons, the chairperson of the Prison Inspectorate, the chairperson of the Core Group on Criminal Justice Reform, the chairperson of the National Juvenile Justice Forum, the Director of Public Prosecutions, a representative of the Legal Aid Department, the head of prosecutions for the police, and the four chief resident magistrates who are responsible for each judicial region of Malawi.

23. Adam Stapleton, *Reducing Pre-trial Detention. An Index on ‘Good Practices’ developed in Africa and elsewhere*, (PRI, 2005), 41, <http://www.penalreform.org/publications/manuals/man-2005-pretrial-detention-en.pdf>.

24. Adam Stapleton, *Energizing the criminal justice system. Malawi’s paralegal advisory service*, <http://www.id21.org/id21ext/insights43art6.html>.

25. *Ibid.*

26. *Ibid.*

27. Stapleton, *Reducing Pre-trial Detention*, 32.

28. *Ibid.*, 42; see also Hillery Anderson, “Justice Delayed in Malawi’s Criminal Justice System. Paralegals vs Lawyers,” *International Journal of Criminal Justice Sciences* 1, Issue 1 (January 2006), 5.

29. Thomas Hansen, “Independent evaluation 2 of the PAS for DFID” (Copenhagen: Danish

Institute for Human Rights [DIHR], 2004), 3.

30. Fergus Kerrigan, “Independent evaluation 1 of the PAS for DFID” (DIHR, 2002).

31. *Ibid.*, 23; see also *Freedom inside the walls* (video, 51 min.), English/French (PRI, 2005).

32. The word “court” posed a problem in Malawi, and the formulation “Prison Screening Session” was adopted to describe more accurately the function of this mechanism and avoid any suggestion that bail decisions are being made hidden from public view.

33. Stapleton, *Reducing Pre-trial Detention*, 59.

34. Judicial Circular No. 1 of 2003, Ref. No. H/C/CJ/143, para.2.

35. Judicial Circular No. 2 of 2003, Ref. No. H/C/CJ/143, paras. 1 and 2.

36. One decided not to plead and three were not produced at court on the day.

37. In 2005, PAS-PRI further submitted a note to the Chief Justice, Legal Aid, and DPP office on ways to clear the homicide backlog. A review of cases by the paralegals showed that almost half of the caseload could be disposed of, including 30 percent by way of plea, another 10 percent could be dismissed because the defense was irredeemably prejudiced by the delay in trial over which the defendant had no control; and an additional 8 percent could be dismissed as they had yet to be committed for trial and for the same reasons the defense was prejudiced.

38. Kerrigan, “Independent evaluation 1” (DIHR), 44.

29. Of the paralegals 40 percent are women. They work in the male sections of the prisons. Prison officers have remarked how the presence of women (many of whom are in their early 20s) calms prisoners and relaxes the prison atmosphere.

40. Despite requests from the judiciary, PAS does not appear in the lower courts on behalf of accused persons, in part because legal representation is seen to be the strict province of trained lawyers, but mainly because it is not an efficient use of the time of the paralegal, who could be tied up in a court that may deal with 3 to 5 cases in the course of a morning. PAS aims at a ratio of one paralegal for every 100 prisoners.

41. *The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa* (Lilongwe, 2004), para 1, <http://www.law.northwestern.edu/legalclinic/LilongweLegalAidDeclaration.pdf>. The Lilongwe Declaration was adopted at the 40th Ordinary Session of the African Commission on Human and Peoples’ Rights, held in Banjul, November 2006.

42. *The Lilongwe Declaration*, para 7.

43. Niger has 77 lawyers for 11 million inhabitants, Tanzania has 723 for 35 million, and Senegal has 300 for 10 million. Only South Africa (17,500 for 45 million) and Kenya (4,000 for 33 million) have adequate numbers of trained lawyers, and yet in these countries, too, lawyers are overwhelmingly concentrated in the major cities and towns.

44. Kerrigan, “Independent evaluation 1” (DIHR), 3.

45. Vivek Maru, *Between Law and Society: Paralegals and the Provision of Primary Justice Services in Sierra Leone*, (New York: Open Society Justice Initiative, 2006), 26.

46. *Ibid.*, 26.

47. Stapleton, *Energizing the Criminal Justice System*, <http://www.id21.org/id21text/insights43art6.html>

# Building and Sustaining Change: Pretrial Detention Reform in Nigeria

Pretrial detainees account for nearly two-thirds of Nigeria's prisoner population. **Anthony Nwapa** reports on an innovative pilot project that addresses the root causes of the country's pretrial detention crisis.

Three outstanding features characterize Nigeria's prison and criminal justice systems. First, its total number of 40,000 sentenced prisoners and pretrial detainees is relatively small for a country with a population of some 130 million people. Second, a disproportionately high number of Nigeria's prisoners are pretrial detainees. For the last two decades, pretrial detainees have composed nearly two-thirds of the country's overall prison population. Third, pretrial detention in Nigeria is unduly prolonged, with an average duration of 3.7 years per detainee (Table 1). Pretrial detention periods of over 10 years, especially for

persons accused or suspected of serious offenses such as capital crimes or rape, are not uncommon.

This paper describes the problem of pretrial detention in the Nigerian prison system, analyzes its origins and causes, and reports on a project initiated by the Open Society Justice Initiative and the Nigerian Legal Aid Council to address this problem on a sustainable basis.

## Country and Institutional Background

Nigeria is a Federal Republic comprising 36 states and the Federal Capital Territory, Abuja. Nigeria occupies an area of 924,000 square kilometers, inhabited by more than 130 million people comprising 250 ethnic and national groups, of whom an estimated 60 percent subsist below the poverty line. While a majority of the

**Table 1: Nigerian Prison Statistics, January 2006**<sup>1</sup>

Total prison population	40,444
Number of remand (awaiting trial) prisoners	26,289
Number of sentenced persons	14,155
Overall average duration of pretrial detention	3.7 years

**Table 2: Role Allocation in the Nigerian Criminal Justice System**

Activity/Role	Responsible institution	Location
Investigation	Police	Federal
Arrest	Police	Federal
Evidence collection	Police	Federal
Detention/Custody	Police/Prisons	Federal
Legal Advice & Prosecution	Police/Ministry of Justice (Attorney-General)	Federal/State
Criminal Trial	Courts	Federal/State
Appeals	Courts	Federal/State
Sentence/Imprisonment	Prisons	Federal

population lives in rural areas, the country is undergoing a process of rapid urbanization.

Until the advent of a civilian administration in 1999, Nigeria was ruled by the military for all but 10 of its first 39 years as an independent country, through a succession of seven military rulers, six successful military coups, and several unsuccessful coup attempts. This record of prolonged political instability undermined the development of constitutional rights and the institutions for their protection, including, especially, the police, the courts, and other agencies of the criminal justice system.

To understand the mechanics of pretrial detention in Nigeria, it is necessary to understand the distribution of responsibilities within the criminal justice system in Nigeria's federal structure. Nigeria has three tiers of government: the federal government, states, and local governments. The powers of the federal government are enumerated in the Exclusive Legislative List of Nigeria's 1999 Constitution. While the federal gov-

ernment and states have concurrent legislative powers over matters in the Concurrent Legislative List, federally applicable legislation supersedes state legislation in cases of conflict on the same subject. The federal government is precluded from legislating or making policy on matters outside the enumerated matters in the Exclusive and Concurrent Legislative Lists.

Criminal justice administration lies within the concurrent powers of the federal and state governments. The principal investigating agency for all crimes is the Nigeria Police Force (NPF), which is an exclusively federal institution. The police have exclusive powers over the collection, analysis, and preservation of evidence. When investigation of a case involves the arrest or detention of suspects, the police and prisons—both federal institutions—exercise these powers (Table 2).

The prosecutorial authorities evaluate the evidence collected by the police, with ultimate control over criminal prosecution belonging to the respective ministries of justice. The

federation and the states have ministries of justice each headed by an attorney-general and minister of justice at the federal level, and state attorneys-general and commissioners for justice at the state level. A Directorate of Public Prosecutions that advises which cases may or may not be taken further to prosecution supervises criminal prosecution in these ministries. Upon conclusion of an investigation, the police forward the case file

Police can detain suspects for no more than 48 hours, after which they must be arraigned before a court. But many detainees are held for up to one year or longer.

to the appropriate director of public prosecutions (DPP) for legal advice. Although the police and prisons are federal institutions, most crimes are state crimes that are tried within state courts. The resulting asymmetry in the allocation of responsibilities between federal and state institutions lies at the heart of Nigeria's pretrial detention crisis.

### **The Problem: A Diagnosis of the Pretrial Detention Crisis**

Entry into the criminal justice system in Nigeria is easy. Once inside, suspects easily become entrapped in prolonged periods of pretrial detention. Nigeria's pretrial detention crisis is caused by a combination of factors, including both the asymmetry of role

allocations between mutually adversarial state and federal institutions, and skill and material constraints, in the personnel and institutions of the system. Nigeria's criminal justice system may exist in law, but the day-to-day practice of law enforcement bears no relationship to the process contained in the constitution and the laws.

Nigeria's 1999 Constitution requires that accused persons be tried within a reasonable time. Police can detain suspects for no more than 48 hours, after which they must be arraigned before a court. However, many detainees in police custody are held for much longer periods, often for up to one year or longer. After arraignment, accused persons may be held interminably in detention. There are four principal reasons for this state of affairs.

First, law enforcement practices are out of step with existing legal standards. Suspects should only be arrested if a police investigation links them to a crime. In Nigeria, however, arrests trigger investigation. Detainees are kept in custody while the police claim to investigate and seek the certification of the Director of Public Prosecutions as to whether or not to prosecute. Sometimes, securing this certification may take more than five years. Pending this certification, suspects remain detained. Moreover, understaffed and underresourced, Nigeria's police lack the facilities to conduct effective investigations. Complainants, therefore, often have to fund criminal investigations, including paying for the transportation and



communication costs of investigating police officers, as well as the stationery used to record statements. In the absence of an appropriate environment for investigations, the police routinely subject suspects to diverse forms of torture and coercion to encourage self-incriminations and confessions.

Second, after arrest, the police, knowing that they have yet to undertake an investigation, often arraign suspects before courts that lack jurisdiction to try them but nevertheless commit them to custody pending completion of the police's investigation. There is no requirement for these courts to set time limits for completion of investigation or for monitoring of the duration of pretrial custody. In effect, suspects suffer judicially sanctioned indefinite detention.

Third, there is a near total failure of coordination and information management between the various state and federal agencies involved in the criminal justice process. The police, a federal agency, have primary responsibility for investigating crimes and collecting, cataloguing, and storing evidence. Over 90 percent of recorded crimes are state crimes, prosecuted by state-level prosecutors. Trial courts are mostly state courts. Cases are often stalled interminably—for instance, because the Investigating Police Officer (IPO), a federal employee, is transferred from one state to another without notification to the state prosecutors with whom the IPO is working on a case or to the judges of state courts before whom the police officer will be required to appear as a

witness. Although empowered to control prosecutions, the state DPPs have no control over the federal officials on whom they depend to do their work effectively.

Interagency communication failures compound the problem of pretrial custody. Often, case files go missing between the police and the state DPPs. Many detainees do not have records of their arrest and are uncertain of the criminal charges pending against

**There is a near total failure of coordination and information management between the various state and federal agencies involved in the criminal justice process.**

them. Without such records, they are held interminably. A presidential committee that audited Nigeria's prison system in 2005 found that 3.7 percent of pretrial detainees were in custody because their case files were missing; 7.8 percent because the IPO had been transferred; and another 17 percent because of delays in the investigation.<sup>2</sup>

Fourth, most suspects do not receive access to legal advice or representation early in their contact with the police, who, in turn, do their best to deny them access to any form of contact with family or legal representatives until after they have incriminated themselves. The 2005 presidential committee found that nearly three-quarters of suspects in pretrial

custody do not have legal representation.<sup>3</sup> The state-funded Legal Aid Council, with a presence in all of Nigeria's states, has very limited coverage of law enforcement precincts. The average accused person cannot afford private legal representation.

### Previous Reform Efforts

The Nigerian government, at all levels, has failed to develop effective interventions to address the country's pretrial detention problem. The preferred governmental intervention has mostly been the ad hoc delivery or release of detainees by ministerial committees or judicial intervention. In the two decades between 1986 and 2006, there have been several such ad hoc releases of pretrial detainees.

Under the Criminal Justice (Release from Custody) (Special Provision) Decree of 1977, the chief justice of Nigeria and the chief judges of the states of the federation are mandated to release from detention any person whose detention is manifestly unlawful or of longer duration than the person would have spent in prison if convicted. However, as prisons are federal institutions under the control of a Federal Ministry of Internal Affairs, this law does not provide any coordination mechanism between the state judiciaries and the federal prisons. The law also fails to provide for any mechanism of monitoring prison populations in order to equip the chief justice or state chief judges to exercise their power effectively. A federal Administration of Justice Decree adopted in 1993 was ostensibly

designed to promote this coordination. The decree established federal and state Administration of Justice committees, chaired by the chief justice at the federal level and state chief judges at the state level. These committees are made up of representatives from the police, prisons, the attorney-general at the federal or state level, as well as representatives of the Legal Aid Council and the Bar Association. However, this Decree was accompanied by very little public or policy communication and the committees have largely failed to meet or function.

In due course, the Criminal Justice (Release from Custody) (Special Provision) Decree evolved into a means of "rent" collection for prison personnel who would not put forward cases for consideration by the chief judges on their occasional jail delivery visits until the detainees had paid some prescribed fee or bribe. Moreover, most chief judges and the chief justice do not undertake regular jail delivery exercises. Above all, with no monitoring or control of the supply chain for pretrial detainees, new detainees quickly fill the space vacated by the few detainees occasionally released by ministerial or judicial intervention.

Articulate nongovernmental advocacy for reform of Nigeria's prisons generally, and the pretrial detention pathology in particular, began in the late 1980s. By 1990, the Civil Liberties Organisation (CLO) crystallized the emergence of this voice for prison reform in a seminal report on the Nigerian prison system.<sup>4</sup> The report

called attention to the pretrial detention crisis and advocated for focused policy action to change it. Following publication of the report, the Nigerian government again established an ad hoc ministerial committee to undertake prison reform, headed by a retired Supreme Court justice. Like that of others before and since, the work of the committee effectively failed to change the pretrial detention situation in Nigeria.

Among nongovernmental organizations, litigation to secure the release of pretrial detainees became the predominant response. Such efforts, however, became bogged down in Nigeria's notoriously slow and adversarial court process. Pretrial detention delivery cases routinely take over five years to come to judgment. Litigation on behalf of detainees thus proved ineffective in reducing the number of pretrial detainees. Even where detainees get favorable judgment, they are routinely rearrested as soon as they are granted bail by a court and charged with a serious offense with a view to denying them bail. Thus, a revolving door effect develops: suspects are arrested, detained, granted bail, rearrested, and detained.

### **An Innovative Approach**

It is evident from this analysis that any attempt to confront the problem of pretrial detention in Nigeria must address its root causes rather than just the obvious symptoms. These root causes include the lack of coordination among the principal criminal justice entities, lack of legal representation for detainees at the point of contact

with the police, the tendency to charge suspects for custodial committal before courts without trial jurisdiction,<sup>5</sup> the lack of a firm cap on the duration of pretrial detention, and the dearth of skills and resources available to the system.

It is against this background that the Open Society Justice Initiative, working with Nigeria's Legal Aid Council and the NPF, has sought to address the pretrial detention crisis

**Any attempt to confront the problem of pretrial detention in Nigeria must address its root causes rather than just the obvious symptoms.**

in Nigeria. The resultant Project for Reform of Pretrial Detention and Legal Aid Service Delivery in Nigeria ("the project") focuses on the improved management of the pretrial process through better information management, improved communication and coordination between the criminal justice agencies, effective legal representation for arrested suspects and detained defendants, and legislative reform.<sup>6</sup>

In summary, the project works with the police and the states' justice ministries to establish a case file management system from the moment of arrest and identifies key steps to ensure that a case file moves expeditiously from one agency to another and from one level of administration to another. The project's Duty Solicitor

Scheme places lawyers on 24-hour call at designated police stations to provide legal assistance to suspects. Project-inspired Practice Directions issued by state chief judges mandate judicial monitoring of pretrial custodial orders and limit their duration to nine months. Draft legislation promoted by the project proposes a statutory cap on pretrial detention of not more than one month.

The project's Duty Solicitor Scheme places lawyers on 24-hour call at police stations to provide legal assistance to suspects.

### Intervention

The project was launched in September 2004 as a two-year pilot in four states: Ondo, Imo, Kaduna and Sokoto, with the intention of extending its footprint incrementally to other states of the federation. The project seeks to reduce both the number of pretrial detainees as a proportion of the overall prison population and the average duration of detention. The project also seeks to improve coordination and harmonization between agencies of the criminal justice system to ensure the prompt arraignment and prosecution of defendants (or the dropping of charges).

The project deploys trained lawyers from the Legal Aid Council and the National Youth Service Corps.<sup>7</sup> The project designed and implemented monitoring and management

mechanisms in relevant criminal justice agencies as tools for addressing the problem of lengthy pretrial detention. The project also promotes interagency cooperation, provision of skilled legal manpower, capacity development, and internal monitoring/management mechanisms. The project, moreover, is working toward the institutionalization of these tools and processes through legal reform to secure an enduring change in the management of pretrial detention in Nigeria.

In December 2004, the project undertook a national interagency consultation among the principal institutions of Nigeria's criminal justice system.<sup>8</sup> Similar interagency consultations followed in the four pilot states. The aim of these high-level meetings was to secure an interagency commitment to common diagnoses, goals, and objectives and to develop an implementation strategy. Following deliberations that sought to identify the causes of lengthy pretrial detentions in Nigeria and assess previous attempts to overcome it, each interagency consultation developed a plan of action endorsed by the participating criminal justice agencies. Each plan of action recognized that the major obstacle to earlier attempts at reform of pretrial detention was the lack of interinstitutional communication and coordination among the different criminal justice agencies.

As supplementary objectives, the project sought to contribute to the reform of legal aid delivery in Nigeria and ministerial-level work on the reform of the administration of crimi-

**Table 3: Baseline Data on the Duration of Pretrial Detention in Pilot States<sup>11</sup>**

Project pilot states	Total no. of PTDs	>10 yrs in detention	>5 but ≤ 10 yrs in detention	>3 but ≤ 5 yrs in detention	>1 but ≤ 3 yrs in detention	>6 mts but ≤ 1 yr in detention	>1 year in detention	% of PTDs >1 year in custody
Imo	1,044	20	243	179	432	170	874	83.7%
Ondo	671	6	72	107	268	218	453	67.5%
Kaduna	774	-	20	71	263	420	354	45.7%
Sokoto	622	1	21	40	102	485	137	22.0%
<b>Total</b>	<b>3,111</b>	<b>27</b>	<b>356</b>	<b>397</b>	<b>1,065</b>	<b>1,293</b>	<b>1,818</b>	<b>58.4%</b>
<b>%</b>	<b>100%</b>	<b>0.9%</b>	<b>11.4%</b>	<b>12.8%</b>	<b>34.2%</b>	<b>41.6%</b>	<b>58.4%</b>	

nal justice.<sup>9</sup> Two separate working groups were established under the auspices of the federal Ministry of Justice to work in collaboration with the project team to develop a legislative basis for the reform of the criminal justice system. Two sets of legislative proposals—a Legal Aid (Amendment) Bill and the Administration of Criminal Justice Bill—were developed. The Administration of Criminal Justice Bill seeks to limit the period of pretrial detention to a maximum duration of one month irrespective of the alleged offense, as opposed to the present practice in which pretrial detainees stay in custody for indefinite periods.<sup>10</sup> The Legal Aid (Amendment) Bill seeks to augment the services provided by about 90 lawyers of the Legal Aid Council of Nigeria with 1,000 national service lawyers annually to provide legal representation to pretrial detainees. The legislation further provides for custodial monitoring and

periodic review of cases of pretrial detainees to reduce the duration of pretrial detention.

Pending the passage of these bills into law, the project embarked on a fast-paced roll-out of its activities in the four pilot states. The states were selected to reflect different patterns of pretrial detention concentration in Nigeria. Working with the Prisons Service in each pilot state, the project collected baseline data on the size and duration of the pretrial detention problem at the beginning of the project (Tables 3 and 4). Obtaining these figures was the first evidence of progress in developing the institutional relationships required for the project to succeed.

### Capping Pretrial Detention and Managing the Holding Charge

Persons accused of capital offenses are disproportionately subjected to long durations of pretrial detention (Table

**Table 4: Baseline Data on the Duration of Pretrial Detention for Persons Charged with Capital Offenses in Pilot States<sup>12</sup>**

Project pilot states	Total no. of PTDs	No. of PTDs in detention for capital offenses	% of PTDs alleged to have committed capital offenses	No. of PTDs alleged for capital offenses >5 yrs in custody	No. of PTDs alleged for capital offenses >3 but ≤ 5 yrs in custody	No. of PTDs alleged for capital offenses >1 but ≤ 3 yrs in custody	No. of PTDs alleged for capital offenses >6 mts but ≤ 1 yr in custody
Imo	1,044	692	66.3%	230	136	307	19
Ondo	671	490	73.0%	78	108	204	10
Kaduna	774	314	40.6%	20	79	132	83
Sokoto	622	175	28.1%	20	42	110	3
<b>Total</b>	<b>3,111</b>	<b>1,671</b>	<b>53.7%</b>	<b>348</b>	<b>365</b>	<b>753</b>	<b>115</b>

4).<sup>13</sup> This is made possible by a procedure known as a holding charge, which arises when a suspect is brought before a court that has no trial jurisdiction for the alleged offense. The court declines jurisdiction to try the offense but orders the suspect to be remanded in custody pending the conclusion of the investigation and the filing of a proper charge before a higher court with trial jurisdiction on the matter. This procedure, which encourages indefinite pretrial detention, is authorized by the states' criminal procedure laws.<sup>14</sup>

It can be argued that magistrates are statutorily encouraged to assist the police and prosecution to delay the process of arraignment of a suspect before a court with trial jurisdiction. This contributes to the long period of pretrial detention, especially for persons suspected of having committed capital offenses. Most often, the

resulting patronage of the judiciary is abused to the extent that the police and the prosecutorial authorities do nothing after magistrates have issued a remand order.

Corruption further reinforces the inequity of the holding charge process. On most occasions, once a magistrate remands an accused person to detention, the police fail to complete the investigation and the filing of a charge in a timely manner, often failing to act until induced or bribed by the accused or his/her relatives. Some corrupt police officers indiscriminately arrest persons and detain them in police cells only to invent unsubstantiated capital charges for such persons if they fail to offer bribes or other material inducements. As the Criminal Procedure Law makes it mandatory for magistrates to remand capital cases, suspects are not given the opportunity to state their side of the

case. Thus begins the journey into prolonged and indefinite pretrial custody. Furthermore, corrupt police officers routinely insist on bribes before they discharge suspects whom investigation proves to be innocent. Without proper monitoring by the agencies of administration of criminal justice and/or legal advice and intervention from lawyers representing them, such suspects can languish in detention indefinitely.

To respond to this situation, the project team reasoned that if magistrates could issue custodial orders without having trial jurisdiction, they ought to be able to exercise jurisdiction to monitor the progress of the police investigation. Consequently, the project successfully lobbied for the promulgation of practice directions issued by state chief judges, as the chief administrative officer of the judiciary, to magistrates. These practice directions require magistrates not having trial jurisdiction to recall all pretrial detention orders for periodic review not more than three months after the order and to discharge the suspect or transfer the case to a court with trial jurisdiction if charges have not been filed by the third recall and review of the case file. Effectively, this caps the duration of pretrial detention at between nine and 12 months. At the time of writing, the model practice direction developed by the project has been adopted and is operational in three of the pilot states.

### **The Police—Duty Solicitor Scheme**

Arguably the most critical element of the project was enlisting the full par-

ticipation and cooperation of the police institutionally. In April 2005, the inspector-general of police instructed police commands in the project states to give unhindered access to project lawyers to visit police cells and to interview and offer legal advice and assistance to the inmates, with a view to effecting the release of those unlawfully detained. Previously,

**The most critical element of the project was enlisting the full participation and cooperation of the police.**

lawyers were routinely rebuffed, and sometimes even assaulted, at police stations and were asked to go to court if they had any complaint on behalf of suspects.

Building on this, in December 2005, the Justice Initiative and the Legal Aid Council of Nigeria collaborated with the inspector-general of police to organize a conference on a Police–Duty Solicitor Scheme for the Police High Command. The conference enjoyed the attendance of and contributions from the police at its highest command levels, including all deputy inspectors-general of police and commissioners of police in the 36 states and Federal Capital Territory. At the conference, the inspector-general publicly committed the police to humane and lawful investigation procedures and working fully with the project to achieve this. As a result of the conference in June 2006, a Memorandum of Understanding

**Table 5: Pilot Site Data before Project Intervention: March/April 2005<sup>16</sup>**

Project pilot states	No. of detainees	Average no. of days in detention per detainee	Total no. of detention days
Imo State	1,044	1,061 days	1,107,684 days
Ondo State	671	627 days	420,717 days
Kaduna State	774	291 days	225,234 days
Sokoto State	622	228 days	141,816 days
<b>Total</b>	<b>3,111</b>	<b>609 days</b>	<b>1,894,599 days</b>

(MoU) between the NPF, the Legal Aid Council, and the Justice Initiative for the formal establishment of the Police–Duty Solicitor Scheme in the major police precincts of Nigeria was signed.

Under the terms of the MoU, duty solicitors are stationed at designated police stations under a 24-hour duty schedule supervised by the Legal Aid Council. The duty solicitors employ their knowledge, professional skills, and experience to intervene and advocate on behalf of suspects/detainees at police stations by securing their rights under the law and by ensuring that the highest standards of respect for their dignity are maintained. According to the MoU, the responsibilities of the duty solicitors are complemented by the duties imposed on the NPF. Thus, the NPF is obligated through its police liaison officers to ensure that suspects are given access to duty solicitors within the police stations.

The MoU further imposes on the police an obligation to assist duty solicitors with obtaining information

leading to the quick determination of a matter. To ensure the effective implementation of the program, the MoU creates the Duty Solicitor Advisory Committee.<sup>15</sup> This committee meets every three months with the commissioner of police and the Legal Aid Council supervisor in the state to review, advise on, and resolve any outstanding issues.

Project lawyers are involved in many other activities, including making applications to the police, the Director of Public Prosecution, and the courts, advocating for bail or discharge of pretrial detainees on grounds that those detainees have no case to answer or for want of diligent prosecution. They may also apply under the Fundamental Human Rights (Enforcement Procedure) Rules through which the court releases unconditionally pretrial detainees who are unlawfully detained. Project lawyers, in collaboration with the NPF and DPP in the state, also undertake a monthly administrative review of case files of pretrial detainees. This exercise



Table 6: Pilot Site Data: December 2005 <sup>17</sup>

Project pilot states	No. of detainees in prison custody when project began	No. of releases from prison custody	No. of days in detention of project beneficiaries	Average period in detention of project beneficiaries (days)	Average baseline period in detention (days)	Reduction in avg. period of pretrial detention (days)	% Reduction in average duration of detention
Imo State	1,044 (7.4% decrease)	77	21,884	123	1,061	938	88%
Ondo State	671 (22.7% decrease)	152	135,228	436	627	191	31%
Kaduna State	774 (30.5% decrease)	236	9,806	40	291	251	86%
Sokoto State	622 (23.5% decrease)	146	47,030	89	228	139	61%
<b>Total</b>	<b>3,111</b> <b>(19.6% decrease)</b>	<b>611</b>	<b>213,948</b>	<b>171</b>	<b>609</b>	<b>438</b>	<b>72%</b>

seeks to reduce the number and duration of pretrial detentions in both police cells and prison.

The periodic reports of the project team and its lawyers to the chief judges of the state, who have powers to undertake periodic jail delivery exercises, have led to the release of numerous pretrial detainees who would have remained in detention if not for these interventions. The project's engagement with the NPF, at both the national and state levels, has led to better monitoring of incidents of abuse perpetrated by some personnel of the force. Professionalism is gradually being introduced into police investigation, thereby reducing delays in investigations and arraignment.

### Impact Evaluation

It is arguably too soon to assess definitively the impact of the project. The

early outcomes, however, are encouraging. Within its first year of operation, the project recorded significant successes in many areas. Notable among them is the marked improvement in the project team's relationship with the police. The model practice direction prepared by the project has been adopted in three states (Imo, Ondo, and Sokoto) and is under consideration in Kaduna, Plateau, and Rivers states. The practice direction creates a management review mechanism through which the judiciary (i.e., the magistrates) control and manage the remand orders issued by them. The practice direction also protects the constitutional rights of suspects to personal liberty and due process by contributing toward the prompt arraignment and prosecution of accused persons.

In addition, the project has secured substantial and measurable successes

**Table 7: Releases from Pretrial Detention in Project States, April—December 2005**

Project states	No. of pretrial detainees in prison custody	No. of releases from prison custody	% Released
Imo	1,044	77	7.4%
Ondo	671	152	22.7%
Kaduna	774	236	30.5%
Sokoto	622	146	23.5%
<b>Total</b>	<b>3,111</b>	<b>611</b>	<b>19.6%</b>

in terms of the numbers of persons released or diverted from pretrial custody, as well as in the mean duration of pretrial detention. The relevant figures are contained in Tables 5 and 6.

Before the project commenced, in March/April 2005, there were 3,111 persons in pretrial detention in the four pilot sites. Together they had spent almost a cumulative 1.9 million days in detention—or an average of 609 days or 20 months per detainee (Table 5).

By December 2005, the project had secured the release of 611 detainees from prison custody, plus an additional 644 persons from police custody (Table 6). Table 6 further shows that the project achieved a significant reduction in the average duration of pretrial detention in the pilot states of Imo (–88 percent), Ondo (–31 percent), Kaduna (–86 percent) and Sokoto (–61 percent).

Moreover, in March/April 2005 the total average period in detention before the project intervention in the four pilot states was 609 days (20 months) per detainee. The total average period in detention in the pilot states had declined to 171 days (5.7 months) per detainee (or “project beneficiary”) by December 2005.

Note: In addition to the above-listed releases of detainees held in custody in prison, over the same period 644 detainees held in police cells were also released from custody: Ima state (100 detainees); Ondo state (158); Kaduna state (7); and Sokoto state (379).

Out of the baseline total of 3,111 detainees awaiting trial at the beginning of the project cycle in the four pilot states, the project effected the release of 611 detainees awaiting trial in under one year. This represents a 19.6 percent decrease in the baseline number of persons awaiting trial in those states.

**Table 8: Releases from Pretrial Detention in Nonproject States by the Legal Aid Council in 2005** <sup>18</sup>

Project states	No. of pretrial detainees in prison custody	No. of releases from prison custody	% Released
Edo	384	25	6.5%
Taraba	401	69	17.2%
Osun	222	25	11.3%
<b>Total</b>	<b>1,007</b>	<b>119</b>	<b>11.8%</b>

The number of releases recorded in other states of the federation, where the project is not being implemented, is not as impressive. The Legal Aid Council of Nigeria is the local principal partner in this project. A comparison of the data in Tables 7 and 8 demonstrates that the intervention of the project favorably influenced the number of persons released from pretrial detention in the project states (Table 7), compared to states where the project is not being implemented (Table 8). Thus, in the project states almost 20 percent of detainees were released during 2005 (Table 7), compared to 11.8 percent in nonproject states (Table 8).

The lawyers in both project and nonproject states work with the Legal Aid Council of Nigeria. The difference in performance as revealed in Tables 7 and 8 is attributable to the innovations and infrastructure introduced by the project.

### Pretrial Detention Diversions

Apart from ensuring the release of pretrial detainees, the project lawyers have sought to reduce the supply side of the inflow of detainees into prison. Thus, apart from the aforementioned releases from prison custody, in 2005 the project succeeded in ensuring that 100 (Imo), 150 (Ondo), 7 (Kaduna), and 379 (Sokoto) pretrial detainees were not taken to a magistrates' court, where they would have been remanded in prison custody at the mercy of the police and the Directorate of Public Prosecution. This was achieved by advocacy efforts of project lawyers at police stations leading to the discharge of the complaint against the suspect as being frivolous and incapable of sustaining a charge.

### Conclusion: Sustaining Change

The intervention pioneered by the project will need to be sustained by

legal and institutional reforms. The Administration of Criminal Justice and the Legal Aid (Amendment) Bills are designed to achieve this. Some interventions will also need to be entrenched through administrative processes, training, and sound managerial practices. For instance, the Practice Direction, which has been adopted by three states, has been entrenched as a mechanism to monitor and cap the duration of precustodial orders. On the part of the police, efforts are already in place to update their compliance with human rights standards through the establishment of Human Rights Sections at the Divisional, Area, and State Command Levels of the NPF, as well as through the proper training and reorientation of officers and personnel in line with the norms of democratic policing and the rule of law. As a result of this, the syllabus of police training institutions has been revised to entrench instructions on human rights. Finally, a special investigation team of the NPF (known as the X-squad) has been reorganized to ensure the effective monitoring and sanctioning of deviant police officers.<sup>19</sup>

The Memorandum of Understanding for the implementation of the Police–Duty Solicitors Scheme signed by the NPF, the Legal Aid Council of Nigeria, and the Justice Initiative is

evidence of a new partnership between governmental and non-governmental entities in addressing the pretrial detention problem in Nigeria. Partnerships of this type are vital to ensuring the sustainability of this initiative. Ideally, more civil society organizations will become involved with the project as it is replicated in other states.

At the time of writing, the project is expanding to two more states (Plateau and Rivers), bringing the number of pilot states to six by the end of 2006. The project has also inspired a Nigerian civil society initiative, Rights Enforcement and Public Law Center (REPLACE), devoted to addressing the pretrial detention crisis in Nigeria in partnership with the NPF, the judiciary, and other government institutions. To ensure that the capacity for coordination is sustained, the project has worked with the federal and state criminal justice institutions to design a Criminal Justice Information System (CRIMSYS) software package to capture and manage information within the criminal justice system with a view to stemming the pretrial detention phenomenon. Roll-out of this system began in August 2006 in Imo and Sokoto states and is planned for Plateau and Rivers states and the Federal Capital Territory in 2007.

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Notes

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1. Data derived from the press briefing of the Honorable Attorney General and Minister for Justice, Chief Bayo Ojo San, and as contained in the *Report of the Presidential Working Group on Prison Reforms and Decongestion* (Abuja, February 2005), 6, 49.
2. *Report of the Presidential Working Group* (February 2005), 6–7, 73.
3. *Ibid.*, 6.
4. See Chidi Anselm Odinkalu and Osaze Lanre Ehonwa, *Behind the Wall: A Report on Prison Conditions in Nigeria and the Nigerian Prison System* (Lagos: Civil Liberties Organisation, 1997).
5. This phenomenon, known as the Holding Charge, is discussed in detail below.
6. The project is a collaborative undertaking between the Justice Initiative, the Legal Aid Council of Nigeria, the judiciary, the federal Ministry of Justice, the Directorate of Public Prosecution in the states, the Nigerian Bar Association, the Nigerian Police Force, the Nigerian Prison Service, civil society representatives, the National Youth Service Corps, and the National Working Group on Legal Aid Reform.
7. National Youth Service Corps lawyers are relatively new members of the Nigeria Bar Association who are on compulsory national service for one year. Such lawyers are not paid salaries but are given a monthly state allowance to augment their stipends from their places of primary assignment. As their primary assignment is under the project, they are given monthly stipends by the project.
8. That is, the judiciary, police, prisons, the prosecution service, and the Legal Aid Council.
9. Nigeria's federal attorney-general constituted a National Working Group on Legal Aid Reform in 2004, with a mandate of reviewing and updating the Legal Aid Act and improving legal aid delivery in line with best practices internationally.
10. See *Report of the Presidential Working Group on Prison Reforms and Decongestion* (Abuja, February 2005), 49.
11. Data derived from analysis from the office of the Nigerian Comptroller-General of Prisons with reference numbers PHOND: 66/VOL.III/81; PHK.91/VOL. XTX/516; PHS.676/VOL. 2/349; ISPH/66/VOL. XV/75, 6 April 2005, 14 April 2005, 9 April 2005, and 5 April 2005, respectively.
12. *Ibid.*
13. In Nigeria capital offenses exist in both the criminal law system (the penal code and the criminal code) and the *Sharia* penal system. Under criminal law it is applicable for offenses such as murder, culpable homicide, armed robbery, and treason.
14. For instance, section 236(3) of the Criminal Procedure Law of Lagos State gives magistrates' courts, without trial jurisdiction for capital offenses, mandatory powers to remand any person alleged to have committed such offenses. In effect, the procedure under section 236(3) allows for remand without the suspect's being charged. This is contrary to section 35(1) of the 1999

Constitution, which recognizes remand only after a proper charge has been filed against a suspect in a court with the requisite trial jurisdiction.

15. The committee comprises representatives of the inspector-general of police, the director-general of the Legal Aid Council, the director-general of the National Orientation Agency, the Justice Initiative, the chief judge of the state, the attorney-general of the state, and the chairperson of the Nigeria Bar Association in the state capital.

16. The data is derived from statistics provided by the office of the Nigerian Comptroller-General of Prisons given to the project team at the beginning of the project in March–April 2005, contained in compilation with reference numbers PHOND: 66/VOL.III/81; PHK.91/VOL. XTX/516; PHS.676/VOL. 2/349; ISPH/66/VOL. XV/75 on Ondo, Kaduna, Sokoto, and Imo State respectively.

17. Ibid. This data was collected and analyzed by the project team and the Legal Aid Council.

18. Data provided by the office of the Nigerian Comptroller-General of Prisons given to the Project team at the beginning of the project in March–April 2005, contained in compilation with reference numbers PHOND: 66/VOL.III/81; PHK.91/VOL. XTX/516; PHS.676/VOL. 2/349; ISPH/66/VOL. XV/75 on Ondo, Kaduna, Sokoto, and Imo states respectively and the 2005 unpublished reports of the Legal Aid Council of Nigeria.

19. Paper presented by the Inspector General of Police, Mr. Sunday Ehindero, at the *Stakeholders Meeting on Strengthening the Police-Duty Solicitors Scheme in Nigeria* (Abuja: Open Society Justice Initiative, the Legal Aid Council of Nigeria, and the Nigeria Police Force) December 16, 2005.

# Ebb Tide: The Russian Reforms of 2001 and Their Reversal

**Olga Schwartz** looks at the adoption of Russia's new Code of Criminal Procedure in 2001 and the backlash that soon followed, and examines their impact on pretrial detention.

In 2001, the Russian government adopted a new Code of Criminal Procedure (CCP) that expanded the rights of criminal defendants and erected additional barriers to the use and length of pretrial detention. The new code, for example, shortened to two months the amount of time defendants can typically be held in custody pending trial. More fundamentally, the code transferred from the prosecution to the judiciary final authority over the use of pretrial detention. Before the new code entered into force in July 2002, prosecutors were able unilaterally to arrest and detain suspects until trial. Today, Russian judges decide which suspects will be placed in detention and for how long.

These changes are important steps forward in their own right and appeared to contribute to a reduction in the frequency of detention at least in the first six months after the introduction of the new code. A number of amendments to the pre-2001 code also set in motion a decline in the use of detention from the beginning of 2001 onward. Yet the trend in pretrial detention in Russia today leads in the other direction. Legislators have introduced changes to the code that

undo some of its most important advances. Furthermore, detention is used as frequently today as it was in the first half of 2002.

The reversal of pretrial detention reform in Russia has its roots in the adoption of the new CCP—specifically in the competition among different governmental agencies and legal scholars during the process of adopting the new code. A moderate draft of the code, which represented a

Legislators introduced changes to the code that undo some of its most important advances.

compromise among many agencies and which advanced to a second reading by parliament in 1999, was abruptly revised and radicalized during the peak of reforms led by the Presidential Administration in 2000–2001. This more progressive version, with stronger protections against arbitrary detention, has met with strong resistance in the trenches of justice administration and is now gradually being reversed.<sup>1</sup>

This paper describes the evolution of the reforms to the Code of Criminal Procedure as well as some of the patterns in the use of detention in the aftermath of these changes.

It speculates about the impulses for reform and the personalities and institutions that augur for and against the progress that has been made so far. The paper begins with an account of the winding road of reform. It ends with a description of some of the signs of the restoration of a less progressive model of criminal justice in Russia.

The disagreements among justice agencies, rooted in institutional competition, were not resolved by the new code but rather swept under the rug.

### Adopting the New Code of Criminal Procedure

In 1991, the RSFSR Supreme Soviet (parliament) proclaimed the necessity of legal reform to build the rule of law and establish the separation of powers, including an independent and powerful judiciary. Judicial reform was declared one of the main objectives of the state, and criminal justice reform as the main task of judicial reform because of its role in protecting human rights.

A new Code of Criminal Procedure was passed in November 2001 and came into force in July 2002. The new code took more than a decade to draft and then required a fortuitous political situation that would allow its adoption by the legislature and signing by the president. Along the way, there were many battles, short-term victories for

“radical reformers,” and also considerable setbacks.<sup>2</sup> This paper describes some of these turns in order to illuminate the institutional interests in opposition to reform, as well as the forces—people, ideas, and organizations—that promoted change in pretrial detention.

I was a member of one of the working groups created at the Ministry of Justice of the Russian Federation in 1992 that prepared an initial draft of the new code. I later worked for the Committee on Legislation and Judicial Reform of the Duma (lower house of parliament), which prepared the draft code for the first reading by parliament in 1997. I personally collected many thousands of comments on and amendments to the draft adopted in the first reading, some of them being rather confusing and contradicting one other. I also witnessed some of the interactions on and off the official floor of debate that eventually yielded the new code. The disagreements among justice agencies, rooted in but not limited to institutional competition, were not resolved by the adoption of the new code but rather swept under the rug. These disagreements persist today, and a conservative criminal justice agenda, illustrated best by the strengthening of the Federal Security Service and its preoccupation with terrorism, is ascendant.

### *The Winding Road of Legislative Change*

Some democratic provisions in the field of pretrial detention (as the most important field from the point of view of human rights violations) were introduced even before the new code was



adopted. In 1992 the old CCP of 1960 was amended to allow so-called habeas hearings—appeals against the prosecutor’s decision to put a suspect in detention. The Russian Federation Constitution of 1993 went even further and declared that all the decisions on pretrial detention should be made by a judge. But this norm did not enter into legal force until much later.

In the mid-1990s three very different concepts of the CCP prevailed: one draft was prepared by the Legal Department of the Presidential Administration, another by the Ministry of Justice, and a third by the Prosecutor General’s Office. These different approaches ultimately led to bitter disagreements among the three agencies. This competition initially seemed healthy, as many Russians and foreign donors saw the plurality of ideas and political debate within government institutions as democratic. But within the government there was no strong will to tame this competition or reconcile the different groups, and neither the government nor the president wanted to introduce any of these drafts to the Duma. A draft was finally introduced into parliament in 1996 by a group of MPs headed by Anatoly Lukianov, who had participated in the aborted coup of August 1991.

The draft code created by the Presidential Administration was the most progressive. In the field of pretrial detention it provided for detention only by order of a court, limited to 48 hours the period of custody before a suspect must be brought before a judge, and required that detention

before trial be limited to two months.<sup>3</sup> But this draft was too progressive for many people. Some critics said it was “before its time,” implying that Russia was not ready politically or materially to adopt such radical new rules. Also, the strange language of the draft made it seem that portions had been translated from English into Russian, and even some of the sections—taken directly from American rules of criminal procedure—seemed too drastic for many legal scholars. The brash personal behavior of Sergei Pashin, the young leader of the working group for this draft, appeared high handed to many senior legal scholars and practitioners and thus undermined the draft’s political support.

A less progressive draft of the code, the result of a compromise between different agencies of law enforcement, was introduced to the Duma by the Ministry of Justice and finally adopted in the first reading in 1997. Still, more than 3,000 amendments to this draft were introduced, and it did not receive a second reading until 1999. Reasonable legislative processes were blocked by fierce competition over the nature of power in criminal justice among the institutions of justice in Russia, as well as fundamental disagreements over key principles. It was not until 2000, when the president decisively intervened in the legislative process, that these disputes were resolved. By then, the meaning of “reform” had changed.

The impasse was broken in 2000 during the presidency of Vladimir Putin, when a new wave of interest in judicial reform arose. In March 2001,

an amendment to the existing code excluded the possibility of detention for suspects facing less than two years' possible incarceration unless there were extraordinary circumstances. The amendment, moreover, repealed a provision that permitted pretrial detention solely on the grounds of the "dangerousness" or seriousness of the offense. Putin's deputy chief of staff, Dmitrii Kozak, proposed a "package of reforms" reducing the independence of the courts and diluting judicial immunity, which softened law-enforcement opposition to the more radical provisions of the new code. A new working group of legislators, led by Elena Mizulina, quickly edited the draft code so that it more closely resembled the original concept of the Presidential Administration's draft of 1993. With a Duma more loyal to President Putin, the law was adopted at the end of 2001.

### *Key Provisions of the Code Relating to Pretrial Detention*

Virtually all key provisions in the new code relating to pretrial justice procedure expanded the power of the courts and diminished that of the procuracy. The authorization of detention and all measures relating to search and seizure, including access to information about bank accounts and mail, were shifted from the procuracy to the courts. This truly was a dramatic change and major victory for the rights of the defendants and human rights, for throughout the Soviet era all decisions on pretrial detention were made by the procuracy, without the participation of the defendant or his defense

counsel and without the possibility of appeal.

In addition to this shift of power, the code introduced four rules that protect defendants' rights. First, in the absence of a judge's review of arrest or extension of detention within the first 48 hours of arrest, the code orders the suspect to be released immediately and unconditionally. A special amendment regarding this issue was introduced into the Law On the Order of Holding in Custody Suspects and Accused, which allowed the director of the jail to release the suspect or accused immediately after the expiration of this term, absent a court order extending the term.

Second, the code requires a written record of an apprehension of a suspect, and his delivery to a police station within three hours after arrest. The record shall state the time and date of alleged execution of the crime, the date, the time, and the place of the apprehension, and the grounds and reasons thereof, the results of a body search of the suspect, and the suspect's explanations.

Third, the code excludes "dangerousness of the crime" as a sufficient ground for detention and adds a penal threshold: unless there are extraordinary circumstances, officials may take into custody only those who are accused or suspected of having committed an offense punishable under criminal law by a period of imprisonment exceeding two years.

Fourth, the code discourages lengthy detention. It limits initial pretrial detention to two months, a period that can be extended to six months

only by a new decision of the same district court judge. A continuation of the period of detention can be requested only by the chief prosecutor of a region and only in the cases of “grave” and “especially grave” crimes—that is, offenses carrying more than five years’ possible incarceration. Holding a prisoner beyond 12 months is permitted only in “exceptional cases” and at the request of the prosecutor general of the Russian Federation or his deputy and granted only by a judge of the regional-level court. Pretrial detention beyond 18 months is forbidden; the accused must be released immediately after this term. This clock, of course, stops when a suspect is bound over for trial, but the judiciary now also has to abide by time limits: if the court has not issued a verdict after six months, or after a year in exceptional cases, the defendant must be released.<sup>4</sup>

Please see the appendix to this report for a side-by-side comparison of the old and new codes.

### *The Forces for Reform*

The victory of progressive forces in the reform of pretrial detention was the result of at least four factors. First, many government leaders, public officials, and nongovernmental groups wanted to belong to the West and saw the reform of criminal procedure legislation as one way to gain admission to Europe—or what was typically called the civilized world. Also, after many years of isolation, large numbers of Russians began to understand that it was possible to join this “civilized world” only after accepting its universal values, including the

concept of a rule-of-law state, the essence of which is the separation of powers into three branches. Many Russians recognized the need to create a new, democratic system of court structure and court procedure.

Second, there was a genuine concern for the protection of the rights of defendants, because there are few spheres of state activities in which the measures of restraint are applied so intensively as in the course of criminal proceedings. In a democratic society, most people agreed, criminal procedure should balance the state’s interest in prompt and complete resolution of crimes and criminal prosecution of persons committing them against the individual’s interest in being free from undue restriction of his rights by the state. Many people in Russia felt, however, that this balance could not be struck through continued use of the old Soviet Criminal Procedure Code of the RSFSR of 1960, and the new Russia started to draft a new one in 1992.

Third, Russia was under pressure from the Council of Europe to make these changes. Regulating pretrial detention became even more important when Russia joined the Council of Europe in 1996 and ratified the European Convention on Human Rights in 1998. By then, the draft code was already approved by the Russian Parliament in the first reading, so the drafters had an opportunity to use international experience and international good practices in the course of its further preparation. (The draft was assessed by experts from the Council of Europe, the American Bar

Association, and the U.S. Department of Justice).

Fourth, conditions in jails were awful. Russia's prison and jail populations rose dramatically in the 1990s, and overcrowding produced violence and illness that affected guards and inmates alike. Russia managed this growth poorly, resorting to amnesties and ad-hoc releases to keep the population of inmates under control. But there was little confidence in administrative measures to resolve

Russia's prison and jail populations rose dramatically in the 1990s, and overcrowding produced violence and illness that affected guards and inmates alike.

these concerns. The reform of criminal procedure was seen as part of the solution to these ailments.

### Problems and Patterns in the Use of Pretrial Detention

Russia has one of the highest prison population rates in the world, with an estimated 594 individuals out of every 100,000 residents in prison at the beginning of 2006.<sup>5</sup> This incarceration rate is eight to 15 times higher than that in most European countries. There is also a large population in pretrial detention. Pretrial detention centers, known as SIZOs (for *sledstvennye izolyatory*, or investigative isolators), are perennially overcrowded: on average there are 2.4 times the

number of detainees as the facilities can legally hold (in Moscow it is 2.6 times).<sup>6</sup> There are frequent and credible reports of inmates and detainees being beaten and tortured by law enforcement and correctional officials.<sup>7</sup> Prison conditions also fall well below international standards.

The overcrowded and dangerous conditions are much worse in pretrial detention centers than in prisons or labor camps. As many Russian and international human rights organizations have testified, confinement in SIZOs, where thousands of prisoners every year contracted tuberculosis as well as other diseases, amounted to torture. This conclusion was accepted by different UN and European Human Rights Commissions in 1995.<sup>8</sup> It was also embraced by the former deputy minister of justice, Yuri Kalinin, one of the leading voices for progressive penal reform in the country.<sup>9</sup>

### *The Case of Kalashnikov*

The problem of dangerous detention conditions became especially evident after Russia joined the Council of Europe. One of the first cases against Russia considered by the European Court of Human Rights was the case of Kalashnikov, who complained about both the length of detention and the conditions in the detention facility.

At the time of the court's review, Kalashnikov had been in detention for four years, one month and four days. The court accepted the suspicion that the applicant had committed the offenses and that the possibility of interfering with the investigation

could initially suffice to warrant the applicant's detention. However, once the collection of evidence was complete, that argument was moot. The court also found that detention conditions in Russia were unsatisfactory and fell below the requirements set for penitentiary establishments in other member states of the Council of Europe.<sup>10</sup> Kalashnikov's cell, designed for eight inmates, was populated on average by between 18 and 24 persons. Inmates in the cell had to sleep in turns, on the basis of eight-hour shifts of sleep per prisoner, but even that was disrupted by the constant lighting in the cell, inadequate ventilation, and infestation by vermin. The court therefore held that the conditions in the cell where the applicant was detained could be regarded as "inhuman or degrading treatment" and that the period spent by the applicant in detention pending trial exceeded a "reasonable time."<sup>11</sup>

#### *Why Are Jails So Crowded?*

The conditions in the jail in which Kalashnikov was detained were not unique. Throughout Russia in the 1990s, jails were operating at twice their capacity. There were many causes for this crowding, including increases in the amount of crime, the likelihood of prosecution, frequent use of detention, and slow growth in the amount of jail space. Although we do not have reliable information on rates of crime, we do know from the Ministry of Justice that between 1993 and 1996 there was a 40 percent increase in the number of persons convicted of crime. Even though the

rate at which convicted defendants were given custodial sentences remained fairly stable—around 28 percent—this increase in crime yielded a larger number of inmates.<sup>12</sup>

Detention also was not used sparingly. Many petty offenses in Russia were criminalized, and the criminal code allowed judges to assign imprisonment for most crimes. Experts from the Council of Europe, visiting penitentiary facilities in 1994, were shocked by several cases in which the offenders were arrested and kept in

**The cell, designed for eight inmates, was populated by between 18 and 24 persons.**

pretrial detention for shoplifting three cucumbers or stealing two jars of jam from their neighbors.

But the main reason for the lengthy detentions and overcrowded detention centers lies in the organization of Russia's investigative agencies and the structure of criminal proceedings as a whole. The CCP of 1960 determined exact time limits only in connection with the length of investigation (with the possibility of an extension) and setting the date of the trial. The extensive and very precise requirements regarding evidence collection and the relative simplicity of getting an extension from the prosecutor led to a situation in which the two-month time limit for investigation was never observed. The absence of meaningful time limits, combined with inefficiency in the investigations, resulted in the over-

crowding of detention centers by persons whose cases were stuck at different stages of the proceedings.

### **What Was the Impact of the New Code of Criminal Procedure?**

For the first time in Russian history, the government endeavored to track and evaluate the impact of the Code of Criminal Procedure on the justice system.<sup>13</sup> Headed by Elena Mizulina, a working group made up of the drafters of the code received a grant from the U.S. Department of Justice and launched a two-year project titled “Monitoring the Implementation of the Code of Criminal Procedure.” The project was approved by both the Presidential Administration and the Duma Committee on Legislation. The use of arrest and detention was an important subject of study but not the only concern of the group.

The working group traveled all over Russia and conducted seminars and conferences in all the federal circuits of the Russian Federation in order to explain to perplexed officials some provisions of the new code and also receive feedback from the agencies implementing those provisions. The attempt to monitor and evaluate the impact of the reforms yielded new and important information about the quality of justice in Russia. At the same time, this process opened up the reform of criminal procedure legislation to a backlash of changes that reversed the progressive trend of the previous five years. On the basis of the information gathered, the working group introduced to the Duma several

sets of amendments aimed at “the maintenance of exact and uniform application of the code, [and] elimination of misinterpretation of some norms.”<sup>14</sup>

### *The Initial Impact on Pretrial Detention*

Several officials reported at the final monitoring conference in Moscow in December 2003 that the use of pretrial detention had been substantially reduced. Data presented by the Office of the Prosecutor General of the Russian Federation showed that, in the first three months after the code was introduced—that is, July, August, and September of 2002—pretrial detention as a measure of restraint was applied against 33,309 persons. The courts refused detention in the cases of 3,273 persons (9.8 percent of all the applications brought by public prosecutors).<sup>15</sup> These and other numbers struck most people as a sign of both less frequent detention and success in the reform.

Vyacheslav Lebedev, the chairman of the Supreme Court of the Russian Federation, who had written a doctoral dissertation on the subject of pretrial detention, closely monitored developments and was generally very pleased with the results. At the end of 2003, he stressed in his interview with *Vedomosti*, the most important business newspaper in Russia, that as of June 1, 2003, courts had applied pretrial detention as a measure of restraint against 173,000 citizens, a figure he claimed was much smaller than in analogous periods before the new code. Public prosecutors, he said,

detained nearly twice this number in the year immediately before transfer of this power to the courts.<sup>16</sup>

The results seemed to please foreign observers. In its resolution concerning the judgment of the European Court of Human Rights in the case of *Kalashnikov v. Russia*, the Committee of Ministers of the Council of Europe noted with particular satisfaction the significant decrease in overcrowding in pretrial detention facilities (SIZOs) and the ensuing improvement of sanitary conditions. The resolution cited statistics submitted to the committee by the Russian authorities, according to which the average number of persons committed to detention on remand per month decreased from 10,000 in 2001 to 3,700 in October 2002. In addition, the International Centre for Prison Studies at the University of London noted that in 2000 Russia's prison population rate was 750 per 100,000 citizens and that by 2003 it had fallen to 680 per 100,000.<sup>17</sup>

This information suggests that the reforms had an enormous and largely positive impact on practices in pretrial detention. But unfortunately, the sustainability of these changes was never tested. New changes to the Code of Criminal Procedure stunted the reforms not long after their effects began to be felt.

### Changing the Code of Criminal Procedure: The Backlash

The Duma made a series of regressive changes to the regime of pretrial detention 12 months after the

introduction of the new code. Amendments to the CCP (dated July 4, 2003) made the position of the suspect even worse than it had been under the Soviet CCP. Today, the CCP contains a provision that allows the court to extend the initial period of 48 hours of detention by an additional 72 hours if one of the parties requests additional time to provide additional evidence in support for or in opposition to the request

### New changes to the Code of Criminal Procedure stunted the reforms not long after their effects began to be felt.

for pretrial detention. Apparently, this loophole is not widely used. According to the data presented by First Deputy Prosecutor of Moscow Yuri Sinelschikov in 2003, in the first four months after the introduction of this amendment, Moscow courts granted extensions to only 119 persons, or 2.4 percent of all applications. Still, the change in the law set a bad precedent.

An additional set of amendments introduced on April 22, 2004, went even further and extended to 30 days the amount of time prosecutors had to bring charges against suspects accused of especially grave crimes, including terrorism, taking hostages, organization of illegal armed groups and participation in such groups, gangsterism (banditry), violence to life

and person of a state official, forced assumption of state power, armed rebellion, sabotage, aggression against persons or organizations enjoying international protection, and any other offense punishable by more than 10 years of imprisonment (Article 100).<sup>18</sup> Even 10 days of detention without bringing any charges is impermissible from the point of view of the Russian Constitution and the European Convention of Human Rights because the suspect has no

### Counterreforms chipped away at the rules that eliminated indefinite detention.

information for his defense—and 30 days is clearly in breach of the European Convention.

This amendment represented the restoration of a rule first established during the 1990s. In June 1994, having conceded to the pressure of law enforcement agencies, President Boris Yeltsin signed a decree that extended up to 30 days the term of allowable detention for persons suspected of gangsterism. The decree, although clearly unconstitutional, was responsible, according to archival documents, for at least 27,000 detentions in 1995–1996. Yeltsin rescinded the decree in 1997, but the idea was revived in 2000 by then-Speaker of the Duma Boris Gryzlov. In 2001, Minister of Justice Yuri Tchaika unsuccessfully introduced to the State Duma a draft law allowing pretrial detention for 30 days without charges. In 2002,

the Federal Security Service and the Ministry of the Interior worked together to promote legislation providing one month of detention without a judicial order. In 2004, these efforts were rewarded by the Duma.

Counterreforms have also chipped away at the rules that eliminated indefinite detention. Previously, “termless pretrial detention” was allowed in the new code only during the “familiarization” of the defendant and his counsel with the criminal case. But counterreforms adopted on July 4, 2003, extended the use of indefinite detention to cases in which the defendant was apprehended in a foreign country. When necessary for the conduct of additional preliminary investigations, the court may extend the term of detention of such an individual. So, as was possible during Soviet times, pretrial detention again may be extended up to two years.

The same amendments allowed the investigator to control the defendant and his counsel’s familiarization with the case. The investigator may set a timetable for familiarization and if the defendant and his counsel do not meet the terms set by the court, the investigator can stop the familiarization and send the case to court for consideration. This amendment is a direct violation of defendants’ rights because it limits their ability to prepare for trial.

### *Gauging the Impact of These Changes*

There is no monitoring project or other vehicle to examine what impact, if any, these revisions to the code have had on practices in pretrial detention.



To study the impact of the provisions for limitless detention, one would need access to the records of the prosecution and Federal Security Service (FSB). And to analyze how frequently pretrial detention is extended, one would need access to the raw data maintained by the Judicial Department of the Supreme Court of the Russian Federation. But law enforcement and judicial institutions in Russia today only disclose certain statistics.

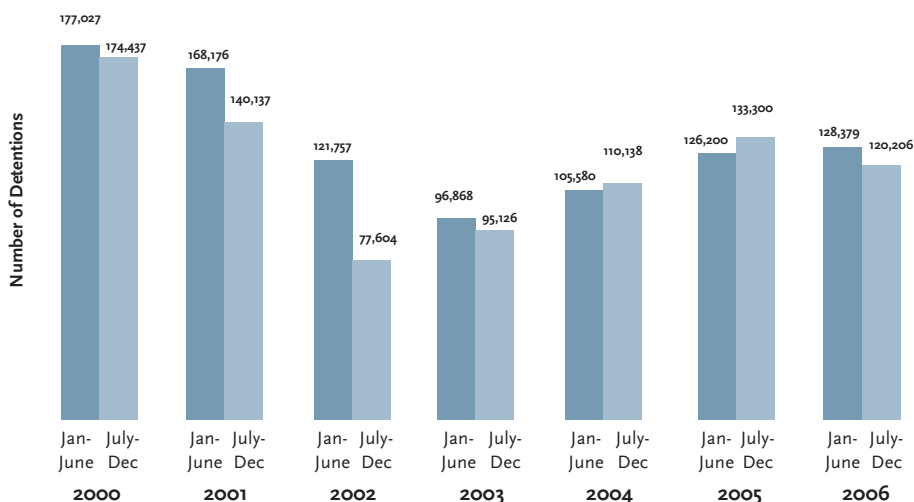
Nevertheless, it is possible to assess general trends in the use of detention, and by all accounts, it grew between late 2002 and 2005. The court statistics provided by the Judicial Department at the Supreme Court of the Russian Federation confirm that there was a steady increase in both the amount of pretrial detention and the likelihood that judges would grant prosecutors' applications for detention between 2003 and 2005. In the year 2003, there were 234,000 applications for detention, of which 211,000 (90.2 percent) were granted by the court. In 2004, there were 237,000 applications, of which 215,000 (90.7 percent) were granted. And, in 2005, there were 277,000 applications, of which 255,000 (91.8 percent) were granted. Only in 2006 (the last full year for which data is available) did the number of applications stabilize at 249,000, of which 91.3 percent were granted.

The chart on page 114 records trends in the use of detention from 2000 through 2006. It illustrates clearly that the amount of detention declined rapidly in 2001, right after

the excision from the old CCP of a large list of offenses for which the dangerousness of the charge alone could justify an order of detention. It also shows that the amount of detention continued to decline in the second half of 2002—that is, the first six months after the new CCP came into effect. Since then, however, and before the amendments to the code discussed above, the number of suspects remanded into custody by the courts has grown substantially.

It is not clear what has caused the increase in pretrial detention. The number of suspects identified by the police actually decreased between 2002 and 2004, from 1,257,000 to 1,222,504, and only afterward began to rise.<sup>19</sup> It is also not clear what role the legislative changes played in this growth. Their contribution to these trends may have been negligible, and it is possible that the significant decline in the number of detention orders between July and December 2002 was unrelated to the new CCP. One former police investigator reported that when the new CCP came into force, investigators had not been properly trained or equipped (they lacked, for example, photocopying machines to provide the court and the defense with copies of motions requesting detention) and thus frequently did not request detention, even when it was warranted. Once these weaknesses were overcome, however, the number of detention orders increased and eventually reached the level recorded immediately prior to the implementation of the new CCP. Without further investigation, of course, we cannot be

## Trends in the use of pretrial detention in Russia, 2000—2006



Sources for data: Jan. 2000—June 2002: B. Ia. Gavrilov, *The CCP of the RSFSR and the CCP of the Russian Federation: A Comparative Analysis from the Perspective of a Practitioner and Academic*, *Iuridicheskii Konsultant*, No. 9 (2003); July 2002—June 2006: Judicial Department, Supreme Court of the Russian Federation, *Forma So4*.

sure of the validity of this account. But if it is true, it suggests that trends in pretrial detention are not directly affected by changes in the law. It also implies that the “judicialization” (i.e., transferring from prosecutors to judges) of all decision-making powers regarding pretrial detention has not by itself had a sustained impact on the use of pretrial detention in Russia.

#### *The Return of Intensive Overcrowding?*

The facilities for pretrial detention in Russia can legally accommodate 130,000 inmates. But according to the deputy director of the Federal Penitentiary Service (FPS), Vladimir Semenyuk, the average daily population in 2005 exceeded 150,000.

Official data presented on the website of the FPS indicate that as of October 1, 2005, 156,600 inmates were confined in 203 pretrial detention centers (SIZOs), seven prisons, and other facilities functioning as pretrial detention centers.

The extent of overcrowding today remains well below what it was in the late 1990s, when the jails operated at nearly twice official capacity and in some jails there were three and a half inmates per jail bed. Still, there is a strong sense that Russia has not resolved the problem of overcrowding. And recent trends may place pressure on the government to adopt arbitrary policies of ad hoc releases. In October 2005, for example, the members of

Moscow Helsinki Group (MHG) demanded that the State Duma pass an amnesty bill making it possible to release up to 40,000 inmates who they claimed were sentenced for non-violent crimes. Even the Federal Penitentiary Service estimates that 25 percent of jail inmates are either acquitted or released before sentence, calling into question the necessity of detention. “Our prison population would dwindle if these people were not arrested,” say human rights activists.<sup>20</sup>

#### *The Persistence of Arbitrary and Lengthy Detention*

The problem of needlessly long detentions still exists, as was revealed when *Dolgova v. Russia* was heard by the European Court of Human Rights.<sup>21</sup> Ms. Dolgova, a member of the National Bolsheviks Party, was arrested in the waiting area of the president’s office where several members of her party chained themselves together in the hope of obtaining a meeting with the president. She was held in pretrial detention by a court decision on the ground that she was suspected of a particularly serious criminal offense. She spent almost 12 months in custody before being found guilty as charged and given a suspended sentence of three years’ imprisonment.

In its ruling, the ECHR stressed that while a reasonable suspicion that the defendant has committed a grave offense is a requirement for continued detention, this justification no longer suffices after a certain lapse of time. The European court found that

Russian courts consistently relied on the gravity of the charges as the main factor in determining the application of pretrial detention. The ECHR has repeatedly held that while the severity of the sentence faced is a relevant element in assessing the risk of absconding or reoffending, the gravity of the offense alone is not enough to justify pretrial detention.

Ultimately, the ECHR found that by failing to address concrete facts or consider alternative preventive measures, and by relying almost exclusively on the gravity of the charges, the authorities prolonged the applicant’s detention on grounds that cannot be regarded as “relevant and sufficient.” The authorities failed to justify the applicant’s detention on remand and thus violated Article 5 § 3 (concerning the excessive length of the applicant’s detention on remand) of the European Convention on Human Rights.

#### **The Future of Pretrial Detention in Russia**

There are a number of reasons to be worried about the future of detention in Russia, above and beyond the concerns about jail overcrowding. First, there is an absence of progressive political leadership on the issue of detention. Second, justice officials are taking advantage of the new norms. Third, the profile of defendants may be changing in ways that make them more likely to be detained. Fourth, there are signs that the judiciary is impatient with the setting of time limits for trials and is willing to accept longer periods of detention before sentencing.

Elena Mizulina, the MP who worked closely with the Putin administration to pass the new code, was not reelected to parliament in 2004, and the absence of her or other liberal leaders in the Duma helps explain why so many regressive amendments were adopted by the legislature. Most of the counterreforms were proposed by other deputies on behalf of the Ministry of the Interior and the Office of the Prosecutor General and were intended to strengthen the position of

The counterreforms were intended to strengthen the position of law enforcement agencies—for example, by increasing the time allowed for summary investigation.

law enforcement agencies—for example, by increasing the time allowed for summary investigation and extending the period of time for bringing the arrested person before a judge. In a short period both the prosecution and the courts have learned how to use the new rules to their advantage.

It is possible that the profile of defendants exposed to the threat of detention is changing, too. Peter Solomon, an expert on Russian criminal justice, observed that “While an increase in serious crime is unlikely to explain levels of detention or trends in their use, another factor may matter and that is the share of suspects who either come from another region or live illegally in a particular location (either without registration or even

without a visa). There is reason to believe that in Moscow and some other cities there are huge numbers of transients, guest workers, and others living in the underground economy, and when these persons become suspects in crimes, it may be necessary to detain them. Otherwise, they simply disappear.”<sup>22</sup>

### *Two Reasons for Hope*

There are, nevertheless, two signs of hope for change in the future. One comes from a much-maligned political innovation in Russia: the so-called Public Chamber. The Public Chamber includes some of the best-known and most influential members of Russian society. Members of the Public Chamber were recruited and elected under the total control of the Presidential Administration and have a right to examine human rights protections in different spheres of public affairs and also have access to draft laws before their introduction to parliament. To many people’s surprise, some of the members of the chamber took their responsibilities seriously and started real work in revealing societal problems.

For example, on March 10, 2006, the well-known defense attorney and chair of the Moscow State Law Academy, Anatoly Kutcherena, who chaired the chamber’s Commission for Control over Activities of Law Enforcement Agencies and Judicial Reform, invited Supreme Court Chairman Vyacheslav Lebedev to his commission’s meeting and expressed his concern about the alarming situation with pretrial detention.

According to Kutcherena, the statistics provided by the Federal Enforcement Service suggested that levels of detention are higher today than during the period in which prosecutors themselves decided on detention. Kutcherena cited figures suggesting that 380,000 had been detained in 2005. Lebedev disputed this claim and replied that according to court statistics the figures are much lower (254,000). Still, the disparity prompted an agreement to reexamine the figures and also another meeting with the commission in order to clarify the results.<sup>23</sup>

A second source of hope is the unswerving desire of the prison service, which reports to the Ministry of Justice, to reduce crowding, diminish the use of detention, and introduce noncustodial punishments for offenders. In December 2005, then–Minister of Justice Yuri Tchaika called for changing criminal policy, decriminalizing some offenses, and restricting the use of pretrial detention because of overcrowding in SIZOs. It is not clear if this proposal will gain any traction.

One way to reduce SIZO overcrowding is the use of noncustodial punishments. The Russian criminal code provides for the following noncustodial punishments: community service, correctional services, liberty restriction, and arrest. These punishments may be imposed for committing certain crimes. Noncustodial punishment may be imposed based on the criminal—for example, if it is his first offense. If the criminal does not serve

the noncustodial punishment, it can be replaced by incarceration.

According to the Law on Introducing Criminal Code into Force, all new alternative measures of restraint should be introduced after “the readiness of the situation” is established—but not later than the year 2005. So in theory, community service is already available as an alternative punishment. But unfortunately, noncustodial punishments require their own infrastructure—for exam-

Progressive changes are not sustainable without changes in the attitudes and values of law enforcement and justice officials.

ple, those sentenced to community service must be monitored to ensure they complete the sentence—so their use is still minimal.

The use of noncustodial punishment provides some hope for reducing pretrial detention in Russia in the future. But for now, the situation is clear: progressive changes—even those introduced by the government itself—are not sustainable without changes in the attitudes and values of law enforcement and justice officials. Even with the existence of political and institutional support to sustain these changes, nothing can be done without shifting the attitudes and values of those implementing the reforms.

## APPENDIX

The table below compares some of the provisions of the new code with the rules in the old CCP.

CCP RSFSR (1961)	CCP RF (2001)
<b>1. Speedy Trial Provisions</b>	
Detention is presumed to last only two months but is extendable to three months by decision of a district prosecutor. Extendable again to six months by decision of a regional prosecutor.	Detention is presumed to last only two months but is extendable to six months by a district court upon a motion filed by the investigator and approved by district prosecutor.
Extendable to 12 months in exceptional cases of grave and especially grave crimes by decision of Deputy Prosecutor General.	Extendable to 12 months by a district court in cases of grave and especially grave crimes only, or “exceptionally complex cases,” upon a motion filed by the investigator and approved by a regional prosecutor.
Extendable to 18 months in exceptional cases of grave and especially grave crimes by decision of the Prosecutor General.	Extendable to 18 months by a regional court in cases of grave and especially grave crimes only, or “exceptionally complex cases,” upon a motion filed by the investigator and approved by the Prosecutor General or his deputy. All decisions on extension can be appealed to the higher court.
No limitation on detention during the trial. (The detention is automatically extended until the end of the trial if the judge in the preparation stage decides to keep the defendant in custody.)	The period of detention during the trial is limited to six months from the moment of receiving the case by the judge till the moment of rendering the decision. Extension of this term is possible only for cases of grave and especially grave crimes for not more than three months each time. The decision can be appealed again to the higher court (Article 255).
<b>2. Penal Threshold</b>	
Pretrial detention can be ordered only if the offense can be punished by more than one year of incarceration (Article 96).	Pretrial detention can be ordered only if the offense can be punished by more than two years of incarceration (Article 108).
<b>3. Grounds for Detention</b>	
In exceptional cases: detention can be ordered in cases where, upon conviction, the punishment might be less than one year of imprisonment. For all crimes specifically named in the Article, the “dangerousness of the crime” alone is sufficient to justify detention (Article 96).	In exceptional cases, detention can be ordered in cases where, upon conviction, the punishment might be less than two years of imprisonment, if: <ol style="list-style-type: none"> <li>1) the person has no permanent residence in the territory of the Russian Federation;</li> <li>2) the person’s identity has not been established;</li> <li>3) the person has violated a previously imposed measure of restraint;</li> <li>4) the person has fled from preliminary investigation agencies or from court (Article 108).</li> </ol>
<b>4. Habeas Hearings</b>	
No hearings. Seventy-two hours of detention before charges are brought against the suspect (Article 122).	Forty-eight hours’ term of detention of the suspect without court decision. A court order is required to place suspect into custody (Article 94).

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Notes

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1. For a very different account of the politics and consequences of the adoption of the new code of criminal procedure, see Matthew J. Spence, “The Complexity of Success: The US Role in Russian Rule of Law Reform” (Washington, D.C., Carnegie Endowment, Carnegie Paper no. 60, July 2005).
2. For an account of these debates by a Canadian scholar, see Peter H. Solomon, Jr., “The Criminal Procedure Code of 2001: Will It Make Russian Justice More Fair?” in William Alex Pridemore, ed., *Ruling Russia: Law, Crime and Justice in a Changing Society* (New York: Rowman & Littlefield Publishers, 2005).
3. The draft code softened this rule by allowing a prosecutor to request from the court extensions of the period of detention—for not more than two months on the first application and one month on the second. Articles 165–170 and 172–177 of the draft code prepared by the Presidential Administration (Moscow: State Legal Department of the President, 1994).
4. In addition to these restrictions on detention, the new code also provided for the use of alternative measures of restraint such as house arrest and bail. At the same time, a revision of the Criminal Code eliminated incarceration as a penalty for a large number of less serious crimes, which automatically excluded the possibility of detention for those accused of committing those offenses.
5. See, for example, [www.kcl.ac.uk/depsta/rel/icps/worldbrief/world\\_brief.html](http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/world_brief.html).
6. See “Man and Prison” (Moscow: Public Center for Criminal Justice Reform Assistance), [www.prison.org](http://www.prison.org).
7. See, for example, “Human Rights Observation in Perm Region in 2000” (Moscow: Association of Civil Inspectors), [http://control.prcp.ru/pris\\_04.shtml](http://control.prcp.ru/pris_04.shtml).
8. See for example, “Comments on Russian Federation by the UN Human Rights Committee” (New York: United Nations, Doc. CCPR/C/79/Add.54, 1995); see also, “Report to the Russian Government on the visit to the Russian Federation carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 17 December 2001” (Strasbourg: CPT, CPT/Inf [2003] 30).
9. See, for example, the text of his speech in London, November 2002, “The Russian Penal System: Past, Present and Future,” [www.prisonstudies.org](http://www.prisonstudies.org).
10. The court noted that the cell in which the applicant was detained measured between 17 m<sup>2</sup> (according to the applicant) and 20.8 m<sup>2</sup> (according to the government). It was equipped with bunk beds and was designed for 8 inmates. The court thus recalled that the CPT has set 7 m<sup>2</sup> per prisoner as an approximate, desirable guideline for a detention cell (see the 2nd General Report – CPT/Inf [92] 3, § 43), i.e. 56 m<sup>2</sup> for 8 inmates.
11. *Kalashnikov v. Russia*, Judgment of July 15, 2002.
12. Irina Andriushechkina, “Arrest as a Measure of Restraint,” *Iuridicheskii Konsultant*, No. 8(44) (August 1997).
13. The impact of the reforms of criminal justice in the 19th century was studied closely by legal scholars but not government officials.

14. See explanatory note to the draft federal law, “On the Amendments to the Code of Criminal Procedure of the Russian Federation,” introduced to the Duma in December 2002.
15. See the report of Elena Mizulina, “Criminal Procedure Reform—a Year after Adoption of the New CCP,” presented at the conference of the Russian Academy of Civil Service, 2002.
16. Vyacheslav Lebedev, “Esli sudia nischii, slozhno govorit’ o bespristrastnosti pravosudia,” *Vedomosti*, July 1, 2003, [www.vsr.ru/news\\_detale.php?id=752](http://www.vsr.ru/news_detale.php?id=752).
17. See Roy Walmsley “Prison Population Size: Problems and Solutions” presented at a Council of Europe seminar for judges and prosecutors in the Russian Federation, Moscow, 2000.
18. The text of Article 100 of the CCP RF in 2001 allowed, in exceptional instances, judges to impose a measure of restraint on a suspect even if charges had not been brought within 10 days. If no charges were brought within the period specified, however, the measure of restraint was to be immediately revoked.
19. See the crime reports published on the website of the Ministry of the Interior, [www.mvdinform.ru](http://www.mvdinform.ru).
20. See “Human Rights Activists Demand Amnesty For 40,000 Inmates,” *Novye Izvestia*, October 25, 2005, <http://en.rian.ru/analysis/20051025/41883899.html>.
21. *Dolgova v. Russia*, Judgment of the European Court of Human Rights, March 2, 2006.
22. Solomon, “The Criminal Procedure Code of 2001” in Pridemore, *Ruling Russia*.
23. Alek Akhundov, “Verkhovny Sud Proschitalsya s Arestami [The Supreme Court Miscalculated the Arrests],” *Commerzants-Daily*, No. 42 (3373), March 11, 2006. According to the bureau of statistics in the Judicial Department, this disparity can be explained by the nearly 100,000 defendants who were detained by judges during trial or as a result of a conviction and sentence.



# Frustrated Potential: The Short and Long Term Impact of Pretrial Services in South Africa

**Louise Ehlers** examines South Africa's short-lived Pretrial Services project and finds promise in the concept of improving bail administration.

This paper examines the impact of efforts to improve the administration of bail on the size, experience, and management of the awaiting trial population in South Africa. It also explores questions about the politics of lasting justice reform. The paper focuses on one project in particular, the Pretrial Services project, which encouraged more rational and equitable bail decisions by providing courts with independent information about defendants.

The Pretrial Services project was conceived as an experiment and jointly implemented by the Bureau of Justice Assistance (BJA) and the South African Ministry of Justice in 1997. The South African Ministry of Justice and the Vera Institute of Justice, a nonprofit organization in New York, established the BJA in 1997. The Open Society Foundation for South Africa provided support to the Vera Institute for the Pretrial Services project.

Upon the completion of a round of pilot programs in 1999 the project was officially handed over to the Department of Justice by the BJA, under the assumption that the department would then introduce pretrial

services and more informed decision-making processes in relation to bail throughout the country. The institutionalization of pretrial services did not occur. Indeed, little further effort was made after 2000 to expand the BJA model of pretrial services. Today, even in the three locations in which the new approach to bail was piloted, there are few signs of the original innovation.

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The Pretrial Services project was not South Africa's only example of an effort to improve justice and protect human rights. Since the first democratic elections in South Africa in 1994 a wide range of initiatives has aimed at transforming the criminal justice system as a whole. These include legislative amendments to penal and procedural law and institutional and departmental restructuring. Some of these reforms endeavored to better manage and reduce the size of the prison population. But the Pretrial Services project was an example of a

particular kind of reform, a “demonstration project,” that was based on several assumptions about how meaningful and lasting change can take place in criminal justice practices. An analysis of this experience yields several observations about the difficulties of launching and sustaining systemic transformations of justice systems through discrete experiments and innovation.

This paper describes some of the immediate impacts of the Pretrial Services project on the pretrial prisoner population, prison overcrowding, and bail decisions.<sup>1</sup> But its main goal is not to evaluate that impact.<sup>2</sup> The paper instead focuses on the less visible and harder to measure processes by which innovations take place in criminal justice in South Africa and by which justice officials think about and accommodate change. Several participants and observers of these changes were asked what they remember about this experience, why this demonstration project was launched, and why it was not more closely aligned with national-level reforms which might have increased its sustainability. In this sense, the paper is about the strategies for reducing detention and the assumptions about lasting change in justice on which they appear to depend. It is also about the difficulties of making these changes in environments of acute public concern about crime and public safety, which in South Africa remains considerable.

### **Restricting Access to Bail**

In 1995 the South African government sought to clarify and codify the com-

mon law on bail given judicial officers’ uncertainty about the law’s application with the coming into force of the country’s post-1994 constitution. An amendment to the Criminal Procedure Act entrenched the constitutional notion that an accused person has the right to be released on bail, “unless the court finds that it is in the interests of justice that he/she be detained in custody.”<sup>3</sup> The new law also obliged judicial officers to play an active role in bail proceedings by seeking out relevant evidence and encouraging them to consider all potentially relevant information pertaining to bail applications, including the fact that the police require time to investigate allegations. Courts were allowed to postpone bail applications for seven days for this purpose.

Some commentators felt that, “by international standards, the 1995 amendments were strict measures. They provided, for example, for the continued detention of someone who might commit further crime rather than limiting pretrial detention only to those who might not stand trial or who might interfere with witnesses or other preparations for the trial.”<sup>4</sup>

In 1997 the Minister of Justice introduced further amendments to the bail law.<sup>5</sup> These changes included, among others, a new provision whereby an accused person charged with a serious offense, such as murder, aggravated robbery, and rape, is detained awaiting trial unless he or she satisfies the court that “exceptional circumstances” exist that in the “interest of justice” permit release. At the time a number of scholars cor-

rectly predicted that the legislative changes would increase the likelihood that accused persons would be detained awaiting trial.<sup>6</sup>

### Triggers for Legislative Change

These legislative amendments were an attempt by the minister of justice to respond to public concerns about crime—concerns that grew alongside the introduction of democracy and the demise of apartheid. Some observers suggest the crime rate spiraled upward following the transition to democracy and began to represent a threat to democracy.<sup>7</sup> It is not clear whether there was a real increase in crime in this period or by how much it might have increased. But the perceived growth in crime, at least, and its wide discussion in the media, had a strong impact on public perceptions of safety and insecurity.

Moreover, notwithstanding the tougher bail law, the public remained convinced that the right to bail, *per se*, was to blame for high levels of violent crime. This perception was fueled by a number of publicized cases in which bail was granted because of lapses in the criminal justice process.<sup>8</sup> There developed a growing belief that judicial officers were too lenient in granting bail. In 1996, President Nelson Mandela expressed the need for “legislation to tighten bail conditions despite threats by idealists to take the government to the Constitutional Court.”<sup>9</sup> Even the minister of justice was vexed by examples of dangerous repeat offenders’ being granted bail. In January 1997, he complained: “The insensitivity of the courts and the

poor handling of cases have resulted in bail being granted in serious cases. We need to promote legislation that will compel courts to refuse bail under certain circumstances.”<sup>10</sup>

The legislative restrictions to the right to bail were part of a broader strategy to enhance the government’s tough-on-crime image and strengthen the ability of law enforcement to deal with crime more effectively.<sup>11</sup> Thus, at

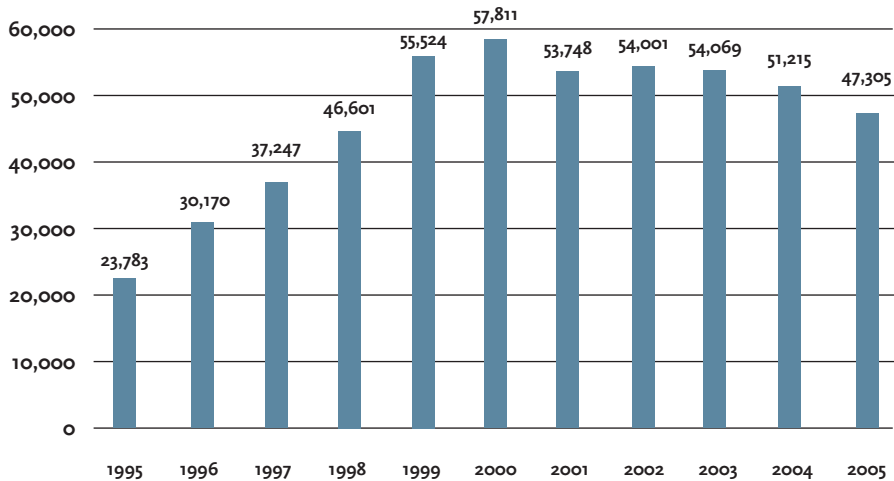
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around the same time as the bail laws were being revised, the South African government promulgated legislation that enhanced the state’s capacity to combat organized crime and criminal gangs,<sup>12</sup> provided for minimum sentences,<sup>13</sup> and restricted the release of convicted prisoners on parole.<sup>14</sup> Moreover, the government’s National Crime Prevention Strategy (NCPS) was downgraded in importance in favor of a law-and-order approach to dealing with crime.<sup>15</sup>

### Impact of Changes to the Bail Law on Detention Practices

At the time of the 1997 changes to the bail law, some analysts predicted an increase in the number of unsentenced prisoners as a consequence of the new legislation.<sup>16</sup> One study found

**Figure 1: Number of Unsentenced Prisoners, 1995—2005 (annual average)**



Source: Judicial Inspectorate of Prisons

that the new law had precisely this effect.<sup>17</sup> According to official data, the number of unsentenced prisoners almost doubled between 1995 and 1998 (Figure 1).

For any justice system, of course, it is difficult to draw a direct causal link between legislative change, judicial decision making, and prison population dynamics. The increase in the size of the unsentenced prisoner population might have many sources, including an increase in the length of time accused persons await the final disposition of their case. And many people believe there indeed was an extension of that wait time in this period, due to increased case loads in the lower courts, more frequent postponements, poor case flow management, and perhaps even an increase in the amount of time taken by police to

finalize investigations. There are other possible factors, too, including the increase in the total number of accused. We cannot sort out these effects here. All we can say is that the changes to the bail law probably helped contribute to an increase in the use of detention.

During the late 1990s, the significant increase in the number of unsentenced prisoners was a major contributor to prison overcrowding. Thus, while the number of unsentenced prisoners increased by 143 percent between 1995 and 2000, the number of sentenced prisoners increased by a more modest 26 percent over the same period. In 1995, unsentenced prisoners constituted just over one-fifth (21 percent) of the total prison population; by 2000 every third prisoner (34 percent) was unsentenced.

### Introduction of Pretrial Services

In 1997, Minister of Justice Dullah Omar decided to launch a pragmatic project to empower judicial officers to make more informed decisions in relation to the administration of bail.<sup>18</sup> In addition to the problem of dangerous offenders being released by the courts, there were large numbers of indigent persons accused of nonviolent offenses—overwhelmingly black people from poor communities—remanded into custody because they could not pay bail. Faced with criticism of these practices from human rights organizations, budgetary pressures from the increase in the prison population, and perhaps doubts about the fairness of restrictive bail legislation, Minister Omar supported the introduction of Pretrial Services (PTS).

The PTS project was one of a range of demonstration projects designed, implemented, and tested by the BJA over a seven-year period in South Africa. The BJA was itself the product of an agreement between the South African Department of Justice and the Vera Institute of Justice to support the capacity for innovation in justice administration in South Africa. The PTS project was conceived in part as a result of the success of the Manhattan Bail Project, a pretrial services project initiated by the Vera Institute of Justice in New York City in 1961 to reduce the amount of jail crowding that resulted from discriminatory and arbitrary assignment of high bail amounts to defendants who could not pay bail and thus spent long periods of time in jail awaiting trial on minor charges.<sup>19</sup> The success of

the Manhattan Bail Project and its replication in many cities throughout the United States during a period of rising crime and criminal justice transformation prompted by the growing civil rights movement, made a persuasive case to senior decision makers in the South African justice department to experiment with a similar undertaking.

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### Operational Goals and Political Logic of PTS

At the launch of the PTS project, Minister Omar commented that, “Pretrial Services seeks to achieve the constitutional objective of balancing the rights of the accused with the rights of witnesses, victims, and indeed of our most vulnerable citizens—our children, our women and communities.”<sup>20</sup> Moreover, in a letter Minister Omar wrote:

The Pretrial Services Demonstration Project is designed to do two things. First, it ensures that serious or repeat offenders are not released on bail and that petty offenders are released on affordable bail or on [non-financial] conditions. Second, it seeks to prevent accused and their associates from intimidating witnesses, thus encouraging witness participation in the criminal justice system.<sup>21</sup>

It is not easy to divine the underlying political reasons for the introduction of the PTS project. Some observers say Minister Omar was a strong advocate of human rights but was unable to advocate openly for stronger protection of the rights of accused persons in a charged political environment, and so sought relief in a discrete demonstration project that would balance the pressures

PTS would facilitate a move away from money-based bail and help reduce the economic injustice of incarcerating poor people.

for protecting the public from violent or intimidating offenders and validating the rights of citizens not to be presumed guilty and incarcerated before trial.

Whatever the motives involved, the stated assumption of this pilot project was that through PTS, the Ministry of Justice could change the *profile* of the awaiting trial population. In addition to ensuring that dangerous and violent offenders would not be granted bail, PTS would facilitate a move away from money-based bail toward release on warning with reporting conditions that would help reduce the economic injustice of incarcerating poor people who posed no evident threat but could not afford to pay bail.

Over the course of two years, the Department of Justice in collaboration

with the BJA introduced pretrial services as a demonstration project. Its chief purpose was to provide verified information about accused persons at their arraignment in court so that judicial officers could make balanced, equitable, and reliable decisions about bail. The BJA described the objectives of the project in this way:

PTS provides the court with a report for all adult accused in custody, containing verified information about the accused's community ties, employment, previous convictions and other information needed for a bail decision. This information enables the court to make more appropriate bail decisions, which should mean that high risk, dangerous and repeat offenders are detained while awaiting trial. More appropriate bail decisions should also mean that low-risk, petty first time accused are released from custody. In order to facilitate this release the PTS project attempts to strengthen supervision of bail conditions as a viable alternative to money based bail.<sup>22</sup>

Members of the Department of Justice (bail officers) and South African Police Service (SAPS) members (supervision officers) staffed the PTS offices at the courts. A bail officer took a digital photograph and fingerprints of arrested accused persons who were brought to court to apply for bail and stored this information in an electronic database. The accused person was then interviewed by a bail officer to elicit information relevant to assessing the risk of not complying with the conditions of bail, absconding, offending while awaiting trial, or posing a threat to witnesses. A supervision officer would attempt to verify

basic information provided by the accused person, such as home/work addresses, familial situation, assets, and income, either by telephone or through direct contact with other persons in court or the community. All information was then entered on a computer with an electronic link between the PTS office at the court and the SAPS criminal record database, providing information directly from the SAPS database with regard to accused person's previous convictions within three hours of arrest. (This direct link was crucial to the operation of PTS as a request for an accused person's previous convictions could otherwise take up to eight weeks.)

A report (known as the first appearance report) was then generated prior to the accused person's first appearance in court. The report contained a summary of the basic information the PTS office had obtained from the accused and other sources, with brief notes about risk factors that the PTS office wanted to bring to the court's attention. A recommendation section of the report suggested conditions of release that sought to help minimize the risks that might have been identified. For example, if an accused person had been charged with an offense involving domestic violence, the PTS report might recommend that release be conditional on the accused person's having no contact with the complainant while the case was pending.

In a departure from the model of PTS developed by the Vera Institute, the BJA added another component to the South African demonstration project: the management of witness wait-

ing facilities. Through this initiative, witnesses were offered a range of services including lay counseling and in-court witness protection. The rationale was that by making the courts more friendly to witnesses, witness appearance rates would be enhanced. This ensured fewer postponements and speedier trials, thereby reducing the likelihood that accused persons would forget or otherwise miss their court dates.

PTS schemes were piloted in one lower court in each of three different provinces: Mitchells Plain Magistrates' Court in the Western Cape (launched in August 1997), Johannesburg Magistrates' Court in Gauteng (November 1997), and Durban Magistrates' Court in KwaZulu-Natal (May 1998). The sites were identified as three of the busiest courts in the country.<sup>23</sup>

### **Impact of the Pretrial Services Project**

The BJA conducted an evaluation of the PTS project in March 1999.<sup>24</sup> This was constructed as both a process and an impact evaluation, and the findings were developed using comparative baseline data collected in 1997 prior to the implementation of the project.<sup>25</sup> The evaluation reports provide a comprehensive breakdown of the findings in terms of changes in bail amounts, the use of warnings, and the numbers of people detained awaiting trial. The detailed figures are beyond the scope of this paper. In summary however, it was found that the project produced mixed results.

The evaluation revealed that the project did not have a significant impact on the profile of detainees awaiting trial across the three sites. It also found that there was no significant change in the bail amounts set at the Durban and Johannesburg courts. Notwithstanding these sobering findings, significant positive changes in the administration of bail at the Mitchells Plain site were identified.<sup>26</sup> The median bail amount set by the Mitchells Plain court fell significantly after the introduction of the PTS project (from R500 to R300). The proportion of prisoners awaiting trial from Mitchells Plain who had been granted bail (i.e. accused who could not afford the bail set by the court) showed a sustained reduction over the period of the research. This figure decreased from the baseline of 75 percent in June 1997 (the Mitchells Plain PTS office became operational in August 1997) to below 40 percent in March 1998, after which it stabilized at around 40 percent. This decline is an indication that the PTS project provided judicial officers with reliable information on the amount of bail individual accused detainees could afford to deposit with the court.

The number of prisoners awaiting trial from Mitchells Plain declined as the proportion of accused persons released on warning—without any conditions other than to appear on their specified court date—increased from 40 percent to 50 percent between June 1997 and February 1999.<sup>27</sup> Moreover, the use of money bail in Mitchells Plain decreased from a third (34 percent) of all cases to just

over one-fifth (21 percent), while the proportion of accused persons who had bail denied was halved (Figure 2).

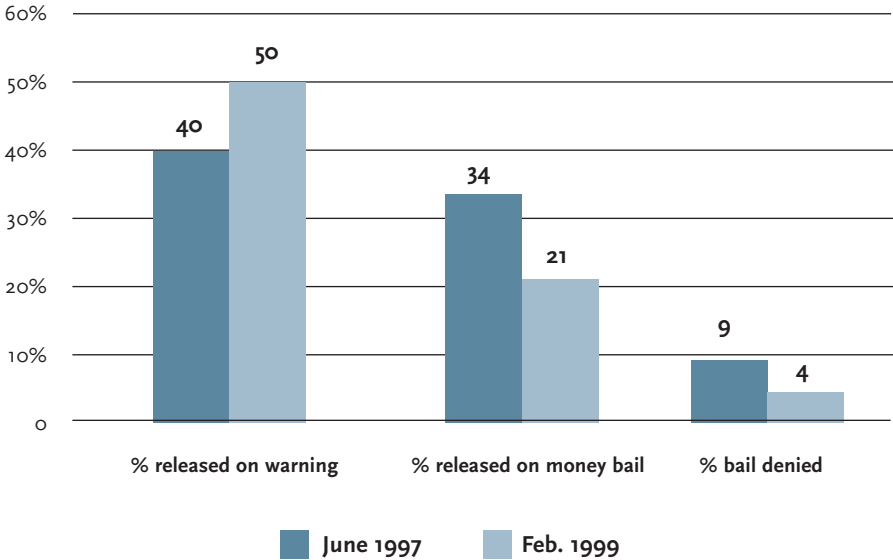
### **PTS Staff Perceptions of the Project**

To find out what participants thought of the PTS project, I conducted interviews with a total of 18 people directly involved in the conceptualization and implementation of the project. These included senior officials within the Department of Justice, previous employees of the BJA, court personnel from the Justice Department and the South African Police Service, and funders of the PTS project. Most of the justice officials interviewed thought the project had potential and showed positive results. For example, the interviewees pointed out that the number of detainees awaiting trial who originated at Mitchells Plain court halved during the project's lifespan. Moreover, information about arrested accused—such as where they lived and their employment status—was thought to be helpful to judicial officers in deciding whether to release such accused persons and, if so, on what conditions.

Erstwhile bail officers and supervision officers interviewed felt the PTS project had a positive effect on the day-to-day running of the courts. Specifically, they felt that the project created a framework for informed decision making around detention decisions. It was noted that the direct link of the PTS office to the SAPS criminal record database saved significant time in establishing the criminal



**Figure 2: Bail Decisions at the Mitchells Plain Demonstration Site, June 1997 and February 1999**



record of accused persons. These benefits were not limited to Mitchells Plain.

Not all feedback was positive, however. Some interviewees, particularly judicial officers, felt that the closure of the project did not negatively affect the functioning of the courts. Some prosecutors interviewed complained that the PTS office delayed the holding of bail hearings given the time it took to verify information provided by accused persons. It was also felt that the PTS office unnecessarily duplicated the work of other agencies by, for example, independently collecting information already available in the police’s investigation dockets. In light of this, the daily screening and evalua-

tion of accused persons was seen as impeding court productivity from the prosecution’s point of view.

**Justifications for Not Sustaining the Pretrial Services Project**

In September 1999, the BJA handed over the PTS project to the Department of Justice. The handover of the project was governed by a Memorandum of Understanding (MoU) signed in September 1999 by, among others, the minister and the acting director-general of justice. In this MoU it was agreed that the BJA would relinquish responsibility for the PTS project and donate all equipment, supplies, and materials to the Ministry of Justice. The BJA compiled a start-up

and training manual for the establishment of new PTS sites, which formed part of the handover documentation. The Department of Justice undertook to integrate PTS at the existing three sites into its day-to-day operations and to consider drafting legislation in support of PTS. The department further undertook to allocate the necessary

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resources to maintain the existing PTS sites and to roll out PTS offices to other court centers throughout the country.<sup>28</sup>

The provisions of the MoU reveal the extent of the political support that existed, at both the ministerial and departmental levels, for integrating PTS into the mandate of the Justice Department and replicating it nationally. Yet, at the time of writing, little of the original PTS model remains operational at the three pilot sites, and the project has not expanded nationally. The equipment funded by the BJA has fallen into disrepair, and the original staff has been redeployed. The police collect and verify some information on the people they arrest, but this is not done specifically to assess accused persons' risk of not complying with their conditions of bail and assist judicial officers in their pretrial decision-making process. The only remaining com-

ponents of the original PTS project are the witness waiting facilities and associated services.

It is a widely held view that things started deteriorating soon after the BJA handed the project over to the Department of Justice. A number of shortcomings help explain why the project did not take off as planned, much less continue and expand after the formal transfer of responsibility for its administration to the Department of Justice.

### **Alignment of PTS with Justice Department Objectives**

The experiment with pretrial services took place at the same time that the South African government launched a major initiative to transform the technological infrastructure of the entire justice system. Some of the components of PTS operations were not easily assimilated into this modernization plan.

A centerpiece of the South African government's National Crime Prevention Strategy (NCPS), which was launched in 1996 and introduced a comprehensive new approach to addressing crime, was the development of the Integrated Justice System (IJS). The strategic goal of the IJS was to integrate and automate the different aspects and components of the criminal justice system, and it was backed by an interdepartmental board (the IJS Board) that itself comprised representatives of the departments of Justice, Correctional Services, Social Development, and Safety and Security, as well as the South African Police

Service and the National Prosecuting Authority.<sup>29</sup> In short, the justice sector as a whole was preoccupied at this time with the successful introduction of new technology.

Some officials at the justice department, moreover, believed then that key aspects of PTS would be adequately covered by the new system and felt that the system would do away with “the explicit need for the separate institution of a PTS environment.”<sup>30</sup> Today, a key component of IJS—the Court Process Project (CPP)—provides the same linkage of fingerprint and criminal record information that the BJA piloted.<sup>31</sup>

While it appears that much energy was put into developing the relationship between the BJA and the Department of Justice, what is absent is any real commitment to cooperation between the BJA and the senior members of the IJS board despite the close proximity of their goals. This raises the question: Had there been closer collaboration between the two, would there have been a more concerted effort to ensure that the PTS components were more strategically incorporated into the broader IJS initiative? One of the views offered by a former BJA employee is that the BJA would have benefited from a strong, locally based (i.e. South African) board that could have facilitated this cooperation as well as a range of other transitional processes on behalf of the project.<sup>32</sup>

In retrospect it would have been helpful if the BJA had made a concerted effort to ensure that its information technology systems were compatible

with those being developed by the IJS prior to the handover of the project to the Justice Department. Cooperation with the technocrats within the relevant government departments might have ensured the sustainability of the BJA’s model.

### **Institutionalizing the PTS Project**

There were no institutional structures within the Justice Department to ensure the continued operation and replication of PTS; judicial officers and court personnel at the operational level were unaware of the training manual for the establishment of new PTS sites developed by the BJA. Moreover, there were a number of other obstacles to the institutionalization of the PTS model:

#### *Time and Capacity Constraints*

The BJA helped implement four discrete projects over a seven-year period, including the development of a prosecution taskforce on vehicle hijacking; a prosecution-led anti-rape strategy; and a plea-bargaining project. Given the scale and complexity of each of these projects, and the limited capacity of the BJA, the two-year period the BJA allocated to the PTS project (August 1997 to September 1999) was insufficient to establish and institutionalize a PTS model adequately within the criminal justice system. Moreover, delays in setting up PTS sites in Durban and Johannesburg meant that these sites were functional for less than two years before the BJA ceded responsibility for the project to the Justice Department. It is not sur-

prising that the results in these two sites were the most disappointing.

### *Reliance on External Funding*

The practice of donor-funded foreign consultants providing management support for a government service is fraught with difficulties. If funding for a new project is drawn from the relevant government department from the outset it is more likely the project will

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be aligned with the broader strategic plan of that department. It also ensures that there is a clear and realistic appreciation of the costs involved. Moreover, human resources departments in the relevant government agencies would be obliged to create specific job posts to staff a project and ensure that a salary line item is included in the overall departmental budget.

One year after the commencement of the PTS project, the BJA sought support from the senior bureaucracy—at the deputy director-general level—in the Department of Justice. This delay cost the BJA the necessary financial and personal support for the national expansion of the PTS project. As a result, financial support for PTS dwindled soon after the handover of the project. The BJA withdrew from the project before working through a

full three-year budget cycle (the time period for which South Africa's government departments plan their expenditure with the national treasury) and therefore was not able to monitor how the project was incorporated into the Justice Department's new spending flow.

The problem most commonly raised by interviewees was the lack of funding for PTS following the handover. According to documentation, as well as interviews with court personnel at the pilot sites, there was uncertainty about funding for the project. While it appears that some funding was allocated for the project at the national level, dedicated funding for PTS did not filter down to the provinces. The perception of personnel in the provincial offices of the Justice Department was that they were expected to draw from their core budgets to support the continuation and expansion of the project.

### *Lack of Interdepartmental Cooperation*

This PTS project required a sustained effort in ensuring interdepartmental budgeting and cooperation. However, the project was promoted strongly as a Department of Justice project. In light of this, there was little assurance from the outset that the departments of Safety and Security and Correctional Services would continue to offer their support and personnel once the project was handed over to the Justice Department. In fact, there were no supporting structures or guidelines for partner agencies such as the SAPS, resulting in the withdrawal of key staff seconded to the pilot sites by the police

and the Department of Correctional Services shortly after the handover.

On the face of it, the BJA acted correctly in gaining the buy-in of the “right” role players. The accepted wisdom is that one needs support at the top level in order for a project to be institutionalized. The minister of justice was fully supportive of PTS. He gave the project generous publicity and co-opted the support of his counterparts in other government departments. It can be argued, however, that the BJA underestimated the importance and the amount of time it would take to gain the cooperation and trust of the bureaucracy and operational staff within all the relevant government departments to ensure the successful implementation of the project at the level of the three demonstration sites.

#### *Staffing Dilemmas*

At the beginning of the BJA’s operations, a number of senior government officials were reluctant to implement a PTS project because of its potential cost and drain on departmental budgets. As a result, the BJA used existing Justice Department and police personnel, seconded to the PTS project, to administer and implement the project. This was necessary to show that government could implement PTS without having to hire new skilled personnel or train existing personnel at considerable expense to the state.

The BJA consequently negotiated with various government departments to obtain the requisite seconded staff to fill the operational positions of the PTS project. This meant in respect

to seconded staff members, the BJA did not pay salaries, did not formally influence their performance evaluations or promotions, and could not formally reward or discipline them. This awkward relationship compelled the BJA leadership to rely on informal incentives to encourage good performance. Moreover, government employees who were seconded to the PTS project complained that their work for

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the project went unappreciated and unrecognized by their government employers.<sup>33</sup>

#### *The Political Environment*

It is important to understand the political environment at the time the PTS project was launched. The minister of justice was a veteran of the anti-apartheid struggle and an enthusiastic implementer of the government’s new transformational agenda. It has been argued that the minister managed the transformation of his department rather clumsily, unnecessarily alienating significant sections of his largely white professional staff (notably prosecutors and magistrates).<sup>34</sup> The period during which the PTS project was being implemented was characterized by ongoing wage disputes between the department and prosecutors, resulting

in strike action as well as an acrimonious High Court battle between a number of white state attorneys and the Justice Department regarding the minister's affirmative action appointments. It is possible that the PTS project failed to thrive because of a general resistance by a significant number of magistrates and prosecutors to the broader transformational agenda of the justice minister.

Hostility toward the justice minister on the part of judicial officers was especially evident outside the minister's Western Cape powerbase. This may be another reason why the PTS demonstration sites outside of Mitchells Plain (which is located in the Western Cape) were the least successful. While there was no blatant refusal to implement the PTS project at any of the three demonstration sites, there seems to have been a subtle undermining of the process in Durban and Johannesburg.

### *Project Dependency on One Champion*

Another issue that should not be underestimated is the extent to which projects are the personal *idée fixe* of a particular individual (in this case, Minister Omar). Minister Omar jointly conceptualized and developed the PTS project with the BJA and promoted and supported the project during his term in office. A new justice minister had been appointed by the time the project was handed over to the Justice Department. While the new minister officially undertook to integrate PTS into the broader programs

of the Justice Department, PTS received significantly less support from the new minister, who had other priorities on his agenda.

### **Potential for Pretrial Services to Succeed in South Africa Today**

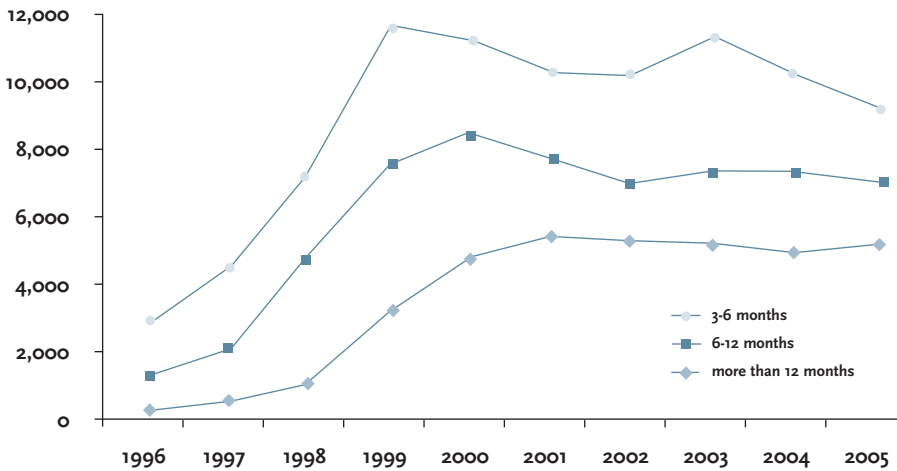
#### *The Prison Population in South Africa*

According to the International Centre for Prison Studies, South Africa's prison population rate is the 10th highest in the world (excluding a few small island states).<sup>35</sup> In September 2006, South Africa's prisons, built to accommodate 115,000 inmates, were holding 158,500 prisoners.<sup>36</sup> Of these, 43,600, or 28 percent, were unsentenced. South Africa's prison population rate of 344 per 100,000 of the general population is more than twice that of neighboring countries Zimbabwe and Lesotho.

What are the options for mitigating South Africa's prison overcrowding problem? If the government wished to reduce overcrowding from pretrial detainees, should it focus its efforts on bail reform—that is, reducing the number of people placed in prison—or shortening the amount of time it takes to adjudicate the cases of those in custody? And what benefit might the resurrection or revitalization of Pretrial Services bring to that effort?

The answer depends in part on the profile of the prison inmates and the sources of prison overcrowding. Is overcrowding the result of excessively long stays in custody while defendants await the outcome of trials

**Figure 3: Unsented Prisoners in Custody Three Months or Longer, 1996—2005**



Source: Judicial Inspectorate of Prisons

or the result of a consistently high number of accused persons being sent to prison to await trial, even if their stay there is relatively short? The answer also depends on what changes the government can effectively introduce, irrespective of the sources of overcrowding.

The direct or immediate contribution of Pretrial Services to the solution of these problems would be modest overall. Most inmates in South Africa (72 percent) are sentenced prisoners and it is this group (particularly those serving long sentences) that is currently driving the growth in the South African prison population.<sup>37</sup> The overall number of unsentenced inmates has decreased in recent years. And yet bail reform, and especially the rationalization of pretrial processes and

decisions, might help in several ways. A number of prisons contain substantially higher than average proportions of unsentenced prisoners. For example, South Africa's most overcrowded prison at the end of 2005, Johannesburg Medium A Correctional Centre, contained 5,599 unsentenced and 152 sentenced prisoners. The prison was built for 2,630 inmates.<sup>38</sup> Moreover, a large number of people are in detention because of the generally excessive amount of bail, the average duration of pretrial detention is long, and the conditions for unsentenced inmates are unsafe.

#### *The Problem of Excessive Bail*

The Judicial Inspectorate of Prisons argues that a significant number of accused persons should not be in pre-

trial custody.<sup>39</sup> In particular, the Inspectorate points at the 12,700 unsentenced prisoners (almost a third of all unsentenced prisoners) who, in February 2006, had been granted bail but were unable to pay the amount set by the court.<sup>40</sup> The courts did not have an objection to pretrial release for these people, provided they deposited a sum of money with the courts. However, as a result of insufficient information on the financial means of the accused or an unwillingness by the courts to take into account the personal circumstances of the accused, the courts imposed bail which thousands of accused simply could not afford.

### *Prolonged Detention*

Unsentenced prisoners spend lengthy periods of time in custody awaiting finalization of trial and sentence. We know that from June 1999 to December 2001 the average number of days in custody for this population increased from 130 to 145 days, or an average of five months.<sup>41</sup>

Data provided by the Judicial Inspectorate of Prisons reveal that the annual average number of unsentenced prisoners in detention for three months or longer increased substantially between 1996 and 2000 and remained at a high level thereafter. Those in detention for more than 12 months increased phenomenally over this period: from 192 detainees in 1996 to 6,006 in 2005 (Figure 3).<sup>42</sup> Put differently, in 1996 only 0.6 percent of unsentenced prisoners spent more than one year in prison; in 2005 almost 13 percent did so.

### *Conditions of Detention*

The conditions for unsentenced inmates are far worse than for their sentenced counterparts. Unsentenced inmates do not have access to rehabilitation programs, they receive no training or schooling, have little access to recreational activities, and can await trial for periods ranging from a couple of days to a number of years. Unsentenced prisoners also struggle to get access to medical treatment, reading material, bedding, and exercise. Even modest reductions in the number of unsentenced inmates would have great significance for the population of pretrial detainees.

### **Conclusion**

While the length of detention has increased since the mid 1990s and remains at a high level, the number of unsentenced prisoners has declined since 2000, albeit quite modestly in most years. The decrease in the number of pretrial detainees cannot be attributed to one specific event but rather to a broad range of factors, including a high-profile lobbying campaign by the Judicial Inspectorate of Prisons for a reduction in the number of unsentenced prisoners; the introduction of an integrated case flow management system for South Africa's criminal courts; legislation allowing for the expeditious reduction of bail amounts;<sup>43</sup> the promotion of the use of police bail;<sup>44</sup> a drive by the Department of Correctional Services to increase the use of correctional supervision in lieu of pretrial detention;<sup>45</sup> and the introduction of plea bargaining.<sup>46</sup>



Pretrial Services would likely reduce the number of unsentenced prisoners who are granted bail at unaffordably high amounts. A PTS program could ascertain and verify an accused person's income and his access to money held by relatives and friends. A PTS program would also encourage judicial officers to make use of nonfinancial conditions of bail based on the circumstances of and risk posed by the individual accused. Moreover, a PTS program is likely to recommend the pretrial release (either on money bail or some nonpecuniary condition) of accused persons who are currently denied bail altogether because judicial officers lack reliable and verified information about them and not because the accused persons in question pose levels of risk that warrant detention.

By helping to reduce the number of unsentenced prisoners, a PTS program would indirectly contribute to better conditions of detention. Everything else remaining equal, lower rates of overcrowding in detention facilities should provide the average detainee with more space and better access to recreational facilities, medical treatment, and food.

An effective PTS program could have some influence on the average duration of detention. PTS would allow judicial officers to conduct bail hearings more efficiently. Moreover, a reduction in unsentenced prisoners should result in fewer bail applications, thereby freeing court time for holding trials. As trials are finalized more quickly, the average duration of detention should decline. PTS would,

however, have only a limited impact on the duration of detention. A range of other factors outside the control of PTS, such as the efficiency of the police's investigations, the availability of witnesses, and the competence of prosecutors and defense lawyers, may all influence the length of the pretrial period and the duration of the subsequent trial.

Pretrial Services would almost certainly reduce the number of unsentenced prisoners who are granted bail at unaffordably high amounts.

South Africa's PTS project was short lived and was tested in only three sites for a limited period. The data is thus inconclusive. Even so, some promising trends emerged from the Mitchells Plain site in relation to the administration of bail. These included the reduction in the median bail amount, the increase in the use of warnings as an alternative to money bail and incarceration, and the resultant decrease in the number of people in Pollsmoor Correctional Centre referred from Mitchells Plain court who had been granted bail. Moreover, the decision to allow more accused persons to await trial in the community did not have a negative impact on the absconding rate.

PTS is no panacea for South Africa's inefficient and costly pretrial detention regime. PTS can, however, gather better and more detailed infor-

mation on accused persons than judicial officers, prosecutors, or defense lawyers typically have at their disposal and use it to guide better decisions and minimize the chances that a dangerous criminal will abscond or that an individual is wrongfully detained. Properly applied, such services can encourage courts not to rely unduly on pretrial detention by minimizing the risk of defendants' failing to comply with the

conditions of their release. PTS could assist judicial officers in coming to fair and rational pretrial decisions—an important service in a country like South Africa where the poor are disproportionately likely to be detained awaiting trial as they cannot afford to post bail. In sum, PTS has the potential to balance individual rights to liberty with society's interest in public security.

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### Notes

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1. This paper is not intended as an evaluation of the BJA or its work but as a look at what can be learned about criminal justice transformation from one of the few projects that has focused specifically on the pretrial detention population in South Africa.
2. For internal evaluations of the Pretrial Services project by the BJA, see R. Paschke, *Process and impact assessment of the pretrial services demonstration project* (Cape Town: Bureau of Justice Assistance [BJA], BJA Report No. 3, March 1999); M. Baird, *Update on the Bureau of Justice Assistance* (report to Dullah Omar, Minister of Justice, and Hishaam Mohammed, Regional Office of Justice, Western Cape). See also R. Paschke, *Accused, their charges and bail decisions in three South African magistrates courts—baseline information prior to the implementation of pretrial services* (BJA, BJA Report No. 2, November 1998); and R. Paschke, *Pollsmoor awaiting trial population profile and a study of its appearance decisions in Mitchells Plain Magistrates Court: Preliminary results and the role of the pretrial services demonstration* (BJA, November 1997). For a more critical appraisal of this impact, see W. Scharf, and B. Tshela, "Stumbling at the first hurdle? Pretrial services project: Lost opportunity in the transformation of the South African justice system," in Jonathan Burchell and Adele Erasmus, eds., *Criminal justice in a new society, essays in honour of Solly Leeman* (Cape Town: Juta, 2003).
3. Criminal Procedure Second Amendment Act No. 75 of 1995.
4. Jeremy Sarkin, Esther Steyn, Dirk van Zyl Smit and Ron Paschke, "The Constitutional Court's Bail Decision: Individual Liberty in Crisis? S v Dlamini," *South African Journal of Human Rights* 16 (2000), 297.
5. Criminal Procedure Second Amendment Act No. 85 of 1997.
6. See E. Steyn, "Pretrial Detention: Its Impact on Crime and Human Rights in South Africa" *Law, Democracy and Development* 4(2) (2000); and G. Burse, "Bail – time for a return to sanity," *De Rebus* 33 (September 1999).
7. Scharf and Tshela, for example, claim that crime escalated dramatically between 1994 and 1996. They contend that the time lag between the dismantling of the old South African system and the construction of the new proved to be a fertile breeding ground for crime. See Scharf and Tshela, "Stumbling at the first hurdle?" in Burchell and Erasmus, *Criminal justice in a new society* (2003).
8. One case that received much media coverage was that of an accused man released on bail who murdered a six-year-old girl shortly before she was to testify against him for allegedly raping her.

The man had been released on bail of R2,000 despite the fact that the police were investigating two other allegations of rape against him and that the police were opposed to the granting of bail. See: "Mamokgethi: and justice for all?," *Weekly Mail & Guardian*, July 31, 1998.

9. *The Citizen*, September 27, 1996.

10. *Fast Facts* (Johannesburg: South African Institute of Race Relations, March 1997).

11. See M. Schönteich, "Criminal justice policy and human rights in the New South Africa," *Law and Justice Journal* 3, No. 2 (2003).

12. Prevention of Organised Crime Act No. 121 of 1998.

13. Criminal Law Amendment Act No. 105 of 1997; see also J. Sloth-Nielsen and L. Ehlers, *A Pyrrhic victory? Mandatory and minimum sentencing in South Africa*, ISS Paper No. 111 (Pretoria: Institute for Security Studies [ISS], 2005).

14. Correctional Services Act No. 111 of 1998, Chapter VII.

15. Eric Pelser, "'Operation Crackdown': The New Policing Strategy," *Nedbank/ISS Crime Index* 4(2), (2000), 7–10.

16. See Marion Edmunds, "Restricting bail may limit rights, experts say new bail laws will paper over the cracks," *Mail and Guardian*, June 6–12, 1997.

17. M. Schönteich, *Making courts work. A review of the IJS Court Centre in Port Elizabeth*, ISS Monograph No. 75 (ISS, October 2002).

18. The Vera Institute and its South African subsidiary, the Bureau of Justice Assistance, were instrumental in conceptualizing and developing this intervention and initiated the idea within the South African justice ministry. A project committee chaired by the minister of justice oversaw the BJA. With the exception of the director, who was from the Vera Institute, the BJA's staff were South African. During its operations in South Africa, the BJA was funded by the Open Society Foundation for South Africa, Atlantic Philanthropies, and Chase Manhattan Bank and received some financial support for administrative functions from the Department of Justice.

19. "History," Vera Institute of Justice, [http://www.vera.org/section8/section8\\_4.asp](http://www.vera.org/section8/section8_4.asp), accessed January 15, 2007.

20. Address by Dr. A.M. Omar, minister of justice, at the launch of the Pretrial Services Office, Mitchells Plain Magistrates' Court, August 29, 1997.

21. Letter from Minister Omar to the Minister for Safety and Security, Sydney Mufamadi, inviting the latter to the launch of the Pretrial Services project, August 13, 1997.

22. Paschke, *Process and impact assessment of the Pre-Trial Services Demonstration Project*, BJA Report No. 3 (BJA, March 1999).

23. The BJA also played a role in opening a PTS office in Port Elizabeth in 1999, shortly before the PTS project was handed over to the justice department. The work of the Port Elizabeth PTS office was neither managed nor evaluated by the BJA. See *The Integrated Justice System Court Centre. A blueprint of the Eastern Cape experience April 1999 – February 2002* (Port Elizabeth: Business Against Crime, 2002).

24. Paschke, *Process and impact assessment* (BJA, March 1999).

25. See Paschke, *Accused, their charges and bail decisions in three South African magistrate's courts – baseline information prior to the implementation of pretrial services*, Report No. 2 (BJA, 1998).

26. Interviews with court personnel indicate that the Mitchells Plain site went furthest in implementing the PTS model and experienced less bureaucratic and political resistance than the other two sites.

27. Paschke, *Accused, their charges and bail decisions* (BJA, 1998), 31–32.

28. Memorandum of Understanding, between the South African Ministry of Justice and the Bureau of Justice Assistance, September 2, 1999.
29. H. Ebrahim, *The Integrated Justice System: How far we've come*, SDR 2, No. 3 (2003).
30. "Embedding the functionality of the Pretrial Services (PTS) demonstration in the Court Process Project (CPP)" (Department of Justice).
31. Pieter Du Rand, Chief Director, Court Services, Department of Justice, *Towards an integrated justice system approach* (Cape Town: Centre for the Study of Violence and Reconciliation, Criminal Justice, a new decade: Consolidating transformation, conference paper, February 7–8, 2005).
32. A South African BJA board was eventually established in 2002, but this was only after the handover of the PTS project to the Department of Justice.
33. Michelle India Baird, *Ten lessons learned from the Bureau of Justice Assistance* (New York: Vera Institute of Justice, unpublished briefing paper, October 2005), 7.
34. See, M. Schönteich, *Lawyers for the people: The South African prosecution service*, ISS Monograph Series, No. 53 (ISS, March 2001). Magistrates are judicial officers who work in South Africa's lower courts. All three PTS demonstration projects were situated at the level of the lower courts.
35. World Prison Brief (London: International Centre for Prison Studies [ICPS]), [www.prisonstudies.org/](http://www.prisonstudies.org/), accessed January 16, 2007.
36. Statistics (Department of Correctional Services), [www.dcs.gov.za/WebStatistics/](http://www.dcs.gov.za/WebStatistics/), accessed January 16, 2007.
37. C. Giffard and L. Muntingh, *The effect of sentencing on the size of the South African prison population* (Cape Town: Open Society Foundation for South Africa, 2006).
38. *Annual Report 2005/2006* (Cape Town: Judicial Inspectorate of Prisons), 20, <http://judicialinsp.dcs.gov.za/Annualreports/ANNUAL%20REPORT%202006.pdf>, accessed January 16, 2007.
39. The Judicial Inspectorate of Prisons is a statutory body mandated by Parliament to monitor prison conditions and report on the treatment of prisoners.
40. *Annual Report 2005/2006* (Judicial Inspectorate of Prisons), 28–29, <http://judicialinsp.dcs.gov.za/Annualreports/ANNUAL%20REPORT%202006.pdf>, accessed January 16, 2007.
41. T. Leggett, A. Louw, M. Schönteich, and M. Sekhonyane, *Criminal Justice in Review: 2001/2002*, ISS Monograph No. 88 (ISS, November 2003).
42. *Annual Report 2005/2006* (Judicial Inspectorate of Prisons), 14, <http://judicialinsp.dcs.gov.za/Annualreports/ANNUAL%20REPORT%202006.pdf>, accessed January 16, 2007.
43. One of the key contributors to the awaiting trial population is unaffordable bail. A 2001 amendment to the Criminal Procedure Act allows the head of a prison to apply to court on behalf of prisoners in a particular facility to have their bail amounts reduced.
44. In respect of minor offenses, the Criminal Procedure Act allows for the police to grant bail without the case's going to court.
45. The Criminal Procedure Act allows three options for release of an accused prior to trial. Namely, release on warning, bail, or under the supervision of a correctional officer in lieu of bail. The Departments of Justice and Correctional Services are promoting the latter option.
46. An amendment to the Criminal Procedure Act in 2001 introduced a formalized system of plea and sentence agreements to achieve a quicker turnaround time on cases, thereby reducing both the backlog in the lower courts and the number of prisoners awaiting trial.

# Pathway to Justice: Juvenile Detention Reform in the United States

**D. Alan Henry** considers the problem of juveniles in pretrial detention in the United States and a novel project that reduced their number.

In the United States, the presumption of innocence is a constitutional guarantee and a pillar of the criminal justice system. Perhaps as a result, there are numerous pretrial service agencies throughout the nation that provide risk assessments to judicial officers to aid in the release or detention determination, as well as supervision services for persons deemed to require them for safe pretrial release. These supervision services include drug testing, monitoring of house arrest, electronic monitoring, and more. Given the constitutional framework and the existence of supervision alternatives to detention, it may be surprising to find that there are many pretrial detainees in the United States.

The problem of pretrial detention in the United States is complex and multifaceted, in part due to the different ways in which each of the 50 states has developed its criminal justice and corrections systems.<sup>1</sup> To add complexity, the term detention in the United States is used in various forms. A foreign national found in the country without proper documentation, for example, is held in “detention,” which is distinguished from being “under

arrest.” This paper will discuss juvenile detention—the detention of juveniles charged with a criminal act pending disposition of their charge—and discuss one simple way to reduce it that has been shown to work in various different states of the nation.

In the United States, the juvenile justice system was created to emphasize—to a greater degree than the adult system—rehabilitation and caretaking. For this reason, juveniles are almost always detained separately from adults, go to a different court than adults, and have different sentencing guidelines if convicted.<sup>2</sup> A central principle of this system holds that the detention of juveniles should be an exceptional event.<sup>3</sup> Unfortunately, this principle has been more or less abandoned in favor of a juvenile system that increasingly resembles the adult criminal justice system and emphasizes incapacitation and punishment. As a result, the detention of juveniles in the United States is anything but exceptional. Juvenile detention in the country increased by 72 percent between 1985 and 1995,<sup>4</sup> and existing juvenile facilities did not expand to handle this increase. During that same period the number of detention facilities categorized as overcrowded grew from 24 to 178.<sup>5</sup>

To address this problem a reform effort called the Juvenile Detention Alternatives Initiative (JDAI) was developed and supported by the Annie E. Casey Foundation, a private philanthropic organization. This reform effort has proven successful in reducing juvenile detention—both admissions and lengths of stay—in pilot jurisdictions across the country. The JDAI supported a number of local governments in effecting changes that would reduce the placement of

### Juvenile detention in the United States increased by 72 percent between 1985 and 1995.

juveniles in detention. One tactic employed involved improving the speed with which courts adjudicated cases, thereby reducing the number of juveniles detained pretrial.

What follows is a description of part of this initiative and of the role played by the Pretrial Services Resource Center (PSRC),<sup>6</sup> a non-governmental organization based in Washington, D.C.<sup>7</sup> Between 1993 and 2004, the Annie E. Casey Foundation contracted with PSRC to support the efforts of the JDAI pilot sites to reduce the amount of time in adjudicating criminal cases against juveniles.<sup>8</sup> As part of this work PSRC interviewed justice leaders, supported a process of deliberation and research into processing patterns, and helped local officials as they sought to achieve greater efficiency and introduced alternatives to detention.

### The Problem of Juvenile Detention

The pretrial detention of juveniles, though not a new problem in the United States, has seen a significant spike in numbers over the past 30 years. Between 1985 and 1995, the number of juveniles locked up in detention centers nationwide on an average day went from 14,000 to nearly 23,000—an increase of approximately 72 percent.<sup>9</sup> In the same period, the number of overcrowded detention centers in the United States increased by 640 percent, from 24 to 178 facilities. And the percentage of juveniles held in overcrowded facilities tripled, from 20 percent to 62 percent. For some observers, another statistic was the most disturbing: during the same period, operating expenses for public detention centers more than doubled, from \$362 million to \$820 million.<sup>10</sup>

The growth in detention of juveniles created many problems for states, counties, and cities, and these problems followed a similar pattern. Crowding forced facility administrators to rearrange existing space to hold the increasing numbers of juveniles. Classroom and recreation areas were the first to disappear, followed by the implementation of double- and triple-bunking. The indefensible conditions of confinement that resulted created legal problems for governments. Lawsuits were often filed challenging the legality of the crowding and the conditions of confinement that resulted.<sup>11</sup> Violent incidents in these facilities involving the incarcerated juveniles and facility staff became commonplace.

Finally, the courts stepped in, frequently ordering changes in facilities to establish adequate care and safety for the incarcerated juveniles. But court orders failed to ameliorate the problems, given that many county and state justice systems, already financially strapped, were unable to absorb the costs of implementing these orders. Even for relatively wealthy jurisdictions there was a more basic and troubling question: “Why is this happening and who’s to blame?”

To add to the complexity of the problem, criminal justice decision makers—judges, police, probation officers, prosecutors, and other elected officials—erroneously believe that the juveniles detained are too dangerous to be released and few alternatives to detention exist. This perception has been proved unfounded by surveys that examine detention populations. These reveal that many juveniles held in facilities are charged with minor offenses and/or technical violations of probation, not with the commission of violent crimes. One of the JDAI sites took a “snapshot survey” of the juveniles in their county detention facility on a randomly chosen day in 1995, revealing the following:

- Of the population of detainees, seven percent were charged with drug offenses; only one-sixth of those were charged with selling or distribution of narcotics;
- Another 30 percent were detained for property, public order, and “other” charges;
- A further 34 percent were incarcerated for technical violations of probation requirements and status offenses. These violations included missing a court date, breaking a rule of probation, or otherwise violating a court order;
- The remaining 29 percent were detained on violent charges, although some were not classified as major.<sup>12</sup>

Similar findings surfaced in other jurisdictions in the early- to mid-1990s. Because of the level of the offenses many of those detained did not appear to require incarceration. Nevertheless, the number of juveniles detained continued to increase dramatically, and while federal courts were ordering change, the causes of the problem and its solutions remained elusive.

### A Better Way

“It is probably fair to say that no area of domestic policy—not even welfare—has been so thoroughly abandoned to misinformation, overstatement, oversimplification, emotion and disregard for consequences as has the arena of juvenile justice.”

— Douglas W. Nelson, President, Annie E. Casey Foundation

In 1993, the Annie E. Casey Foundation launched a multiyear, multisite project known as the Juvenile Detention Alternatives Initiative (JDAI). Its aim was to demonstrate that governments could establish better systems to accomplish the actual purposes of juvenile deten-

tion. Experts in juvenile law, alternatives, programming, management, community outreach, and research were called together from around the country to help the foundation devise a plan for taking on this national problem.

The idea that emerged and that guided all subsequent efforts was simple but challenging: transfer responsibility for the solution of the problem from delinquent juveniles to adults in positions of public power. According to Bart Lubow, the senior associate at the foundation who has headed the national JDAI project since its inception, “Even people who work in the juvenile system largely operate as if things will only get better if the kids start behaving differently.... JDAI took a different tack. It sought to change the way the adults who operate, guide, monitor, or support the system behave as a prerequisite to any change in juvenile conduct and any improvements in public safety or the quality of justice.”<sup>13</sup>

The Casey Foundation initially identified five local governments in which to try to inculcate a more swift and accountable process of administering juvenile justice. Each local government received a planning grant from the foundation and the opportunity to receive financial support to implement changes proposed in the planning process. The five sites selected were Portland, Oregon; Sacramento, California; Chicago, Illinois; Milwaukee, Wisconsin; and New York City. Two of the sites—New York and Milwaukee—subsequently decided to withdraw from the initiative due to insufficient local support.

During a lengthy planning period in each site stakeholders and the foundation jointly selected areas of primary focus and prepared for the work of the initiative. Some places made efforts to reduce time spent on special detention cases; others targeted the conditions of confinement. In all of the sites local governments tasked newly formed committees of justice officials to study judicial processes and outcomes in three main areas:

- 1) How admission to detention decisions were made;
- 2) How cases were processed through the juvenile justice system from arrest to disposition—the focus of this paper; and
- 3) Whether there were sufficient alternatives to detention for decision makers to reach just decisions.

In each site a JDAI manager was appointed. The manager’s primary job was to coordinate the various JDAI efforts within the jurisdiction and to schedule technical assistance visits from the foundation as needed.

### **The Role of the Pretrial Services Resource Center**

PSRC was brought into the initiative to provide case processing assistance to the sites. PSRC also worked with other technical assistance providers such as the Center for the Study of Youth Policy in developing alternatives to detention (such as electronic monitoring) and risk assessment instruments that helped officials evaluate objectively the needs of juveniles and



the likelihood of reoffending. The focus of PSRC's work was changing the way cases were processed. PSRC had extensive experience in case processing and its impact on institutional crowding, but up to this point its work had been limited to adult jail systems; this was the first foray into the juvenile field. PSRC staff was relieved to find that much of their experience was transferable to the juvenile system and that many of the techniques and data requirements were virtually identical.

### The Diagnosis

It was not automatically assumed that poor case processing was a part of the pretrial detention problem in the three sites. Each site had different time lines for case processing; some were faster than the others. But while it was not assumed that case processing delays were a cause of crowding, there was a strong and shared belief that a review of case processing in the sites might reveal opportunities to increase efficiencies and improve the justice system, no matter how fast cases were currently processed.

The difference between increasing efficiencies, on the one hand, and reducing detention, on the other, was critical for site personnel. The assumption that case processing patterns must change in order to reduce crowding was not welcomed by all judges, prosecutors, or defense lawyers. As one judge pointed out, "My job is to adjudicate according to the laws of this state. Where they put them is up to [the facility administrator]. Finding beds is his job; not mine."

So while judges and other actors didn't believe they were responsible for correcting the crowding problem, they were willing to listen to information and suggestions about changing their practices to make the system more efficient and just.

Multiple visits to each of the sites and one-on-one interviews with the critical actors in the system—judges, probation officers, prosecutors, defense, and detention facility administrators—were conducted. The interviews sought descriptions of all the steps in the process, from arrest to disposition of the case. While the interviewers focused on the particular work done by the person interviewed, they also asked interviewees about the system's workings in general in order to learn their perceptions of how the system operated.

The hypothesis, based on case processing efforts in other courts, was that front line officials—prosecutors, judges, and defense lawyers—often did not know how long cases could take if not closely monitored and had little understanding of the needs and routines of their justice system partners.

JDAI's assessment supported this hypothesis: interviews uncovered significant disparities between reality and the interviewees' perceptions of how the other system actors worked. For example, when a defense lawyer was asked how long it usually takes a probation officer to prepare a placement recommendation,<sup>14</sup> the response was, "They have thirty days, but they always take longer so I take that into account when asking for my next court date."

Yet probation officials said they were capable of making placement recommendations in a matter of days, if required, and that only a very few cases required more than two weeks. In another instance, a juvenile court judge believed that he was compelled to provide a continuance in a case,<sup>15</sup> “if the defense and prosecution

The hypothesis was that front line officials—prosecutors, judges, and defense lawyers—had little understanding of the needs and routines of their justice system partners.

agree”—only to find that another judge in his court sets a limit of one continuance per case except in the most desperate circumstances.

Similarly, the interviews often turned up forms and reports that were not required, investigations that were no longer necessary, and other repetitive or wasteful practices.<sup>16</sup>

Finally, a map of the stream of decisions and actions taken by each actor and agency in the justice system was created to see if any particular steps could be eliminated or combined with another step and whether any of these steps could be completed more quickly. Where possible, at least one example was provided of another jurisdiction where the suggested change was already in place.

The goal was to provide the key actors with a series of options, a menu

of choices that if adopted would decrease the time to disposition.

A question that arises when talking about improving case processing is, “why didn’t the governments do it themselves?” There are two answers to this question: first, the local professionals certainly had the capacity and the intelligence to identify areas for change; in fact, they often made suggestions during the interviews that were incorporated into the recommendations and work plans. But as outsiders, the JDAI staff members were able to ask questions that would be difficult for system actors to pose to each other about how they work.

Second, there is the reality of bureaucratic inertia, even in courts. Several interviewees cited a culture in which certain processes were followed simply because they had always been followed.

### The Intervention

Armed with information about how the systems actually worked and a list of suggested changes, JDAI proposed action, beginning with the acknowledged leader of the local juvenile justice system, the chief judge. The chief would be thoroughly briefed on the suggested/recommended changes; why they made sense, how they would improve case processing, the data supporting the need for the changes, and reports from other jurisdictions where the proposed change(s) had already been adopted.

After obtaining the support of the chief judge, other members of the JDAI committee were briefed, either

individually or together. Finally, the committee members would decide when the changes would be implemented and in what order.

The actual changes introduced at each site varied, but they all fell into one of four categories: early disposition efforts; early prosecutorial screening; continuances; and post-adjudication hearings.

Early disposition efforts began by first identifying the types of cases that might be concluded quickly—cases where there was general agreement as to their likely final disposition. These were usually minor cases in which the juvenile had little or no prior criminal activity. Such cases would then be accelerated to their agreed upon disposition, usually by an identified judge who would hear the cases at a certain time every day.

Early prosecutorial screening was very similar but involved all cases entering the system. In some of the sites, cases brought into the system after arrest would have to wait a lengthy period of time before the prosecutor's office was ready to file a formal case in court. The juvenile would have to remain in detention during that time. With this screening accelerated, cases that would eventually be dropped could be dismissed immediately, saving detention and court time.

Continuances were addressed by the sites in three ways: reducing the number of continuances; reducing the number of days between continuances; or both. For example, in one site all new cases were brought to a single court for their initial appearance and then assigned to an adjudica-

tion court. It was standard practice for the initial appearance judge to set the next court date for 15 days thereafter, during which the juveniles were routinely detained. By order of the chief judge, this practice was eliminated: every case in the initial appearance court is now heard the very next day in its assigned court. This simple adjustment has significantly reduced unnecc-

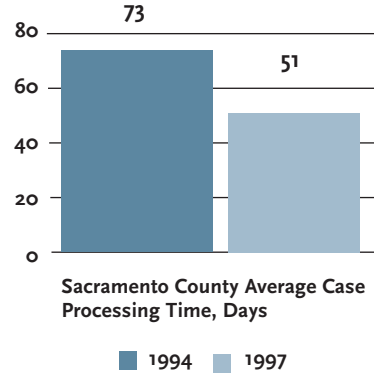
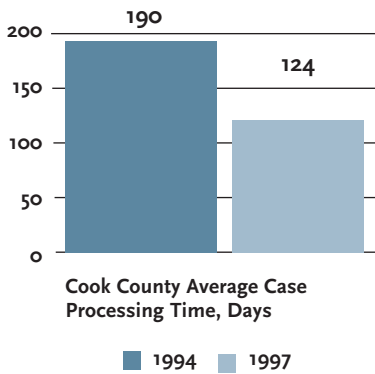
The case processing segment of the JDAI effort had a noticeable impact on the detention problem in the selected sites.

essary detention. In other sites, continuances began to be scheduled for the earliest date available on the calendar of the court; no longer did the convenience of the adversarial parties govern the selection of the next hearing date.

Other changes included earlier intervention by defense, better notification to defendants and victims as to court dates, earlier court action on probation violations and other administrative hearings, and tighter scheduling rules for the court, all of which reduced the number of continuances and length of detention.

In two of the sites it was found that detention time didn't end when the case was adjudicated. Juveniles were held for weeks while probation officers developed a plan for their supervision or tried to find a facility that could accept the juvenile. In one of the

## Changes in case processing time in Cook County and Sacramento County, 1994 and 1997



sites the procedures for preparing placement plans were streamlined. The new procedures still provided the sentencing judge with the critical information needed but eliminated other extraneous material, resulting in a shortening of the time between the adjudication and the actual sentencing/placement.

### The Impact

The case processing segment of the JDAI effort had a noticeable impact on the detention problem in the selected sites. The data collected showed that case processing times in all three sites decreased significantly. In Cook County (Chicago), the average delinquency case took 190 days to disposition in 1994. By 1997, that number had been reduced by 35 percent, to 124 days. Sacramento County lowered its average case processing time for a delinquency case from 73 days in 1994 to 51 days in 1997, a reduction of 30 percent.

Perhaps most important, all three sites were successful in substantially reducing case processing times for juveniles in detention: 39 percent in Chicago, 28 percent in Portland, Oregon, and 43 percent in Sacramento.<sup>17</sup>

The changes had other beneficial effects for the justice systems. In theory, decreasing case processing times should also decrease the rate of failures to appear (FTA) for court. FTAs have a corrosive effect on the entire court system, as witness participation, delivery of evidence, and coordination of juries is affected at a sizable expense to the court. In addition, victims suffer: they must return repeatedly to court and can become more disappointed with the justice system with every delay. The new attention to case processing and reduction in time seemed to carry over to FTAs, particularly in one site. In 1994, the Juvenile Court in Chicago had a 38 percent failure to appear rate,

according to the court clerk. By the second quarter of 1995, when case processing changes had been implemented, the rate had dropped below 20 percent and remained there through the end of 1996, when tracking ended. The other two sites began with low FTA rates and maintained them during the same period.

Cases can be processed differently without added cost; it involves simply a change in the rules governing how long a particular activity will take. Although each of the sites was given a planning grant and was eligible for up to \$2.25 million over the first three years of the initiative to assist in implementing the many recommendations that were made, this money was used primarily in other areas of the initiative: developing a risk assessment protocol and instrument, subsidizing the start-up of new alternative programs, hiring temporary help to allow system actors to continue their day-to-day work while data collection and/or research was undertaken, and other critical activities for the site.

Finally, speedier court processing reduces the harmful impact of delay on the juvenile. Slow justice postpones the acceptance of responsibility. As Jeffery Butts, a noted researcher in the area of juvenile courts claimed: “When the arrest for an alleged offense is followed by months of inaction before disposition, the juvenile will fail to see the relationship between the two events.”<sup>18</sup>

In sum, JDAI’s efforts to reduce case processing times had a significant effect in the three sites. Not only

were juveniles detained for shorter periods, but the counties recognized savings in the cost of running their correctional facilities.

### Sustaining Change

Sustaining reform in any system is difficult, and the U.S. juvenile justice system is no exception. The work of the

Officials identified two factors that they believed were critical to the success of case processing reforms: collaboration and timing.

Casey Foundation continues to this day, with new sites being introduced to the JDAI concepts and practices, while sustaining change remains one of the foundation’s goals.<sup>19</sup>

As for the first three sites selected, the reforms and improvements made by the sites during their JDAI experience are solidly in place at the time of writing. The three counties discussed here have replaced the foundation’s support and taken on the fiscal responsibility of continuing these efforts after experiencing their economic, social, and practical benefits.

### A Final Note

Officials at the three sites identified two factors that they believed were critical to the success of case processing reforms: collaboration and timing.

While other system changes—such as improving detention facilities or introducing new programs—were

introduced comparatively easily during the JDAI experience, most of these could be implemented by a single system actor. Case processing changes, however, needed the support of all the system actors to occur, and as such, required a great degree of collaboration and coordination between these actors.

Second, the site officials felt strongly that case processing should not be a site's first effort in addressing juvenile

detention reform. "You have to build up trust before you take on case processing," said one of the judges, "get some little wins first." A public defender from another site agreed: "Case processing takes such a high degree of collaboration and confidence and trust among all the players...it probably would be easier to start with something that would be easy to achieve and build from there."

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### Notes

D. Alan Henry is the former executive director of the Pretrial Services Resource Center, now known as the Pretrial Justice Center.

1. Under the U.S. Constitution, individual states are given great latitude as to the definition of criminal acts and the responses to such acts. As long as the state criminal laws do not conflict with the federal constitution, the federal government will rarely interfere.

2. For over 60 years the U.S. Supreme Court has recognized that minors are different in the eyes of the law. As one noted jurist stated, "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a state's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953). (Justice Frankfurter concurring opinion). For a review of Supreme Court holdings related to the special circumstances of juvenile offenders see, for example, *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

3. For further background information about the juvenile system in the U.S., contact the Center on Juvenile and Criminal Justice, [www.cjcj.org](http://www.cjcj.org), or the National Juvenile Detention Association, [www.njda.com](http://www.njda.com).

4. *Census of Public and Private Juvenile Detention, Correctional and Shelter Facilities, 1985-1995* (Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention, 1996).

5. *Ibid.*

6. The author was the executive director of the Pretrial Services Resource Center from 1982 to 2006.

7. For more information on the Pretrial Justice Center, contact: [www.pretrial.org](http://www.pretrial.org).

8. This account draws from the Casey Foundation's series of publications, *Pathways to Juvenile Reform*, particularly one of the publications, No. 5, "Reducing Unnecessary Delay," which I wrote for the Foundation in 1999. Persons wishing to learn more about this reform effort are encouraged to contact the Annie E. Casey Foundation at [www.AECF.org](http://www.AECF.org).

9. See, "Reducing Unnecessary Delay," 4. The statistics in this paper focus on the period immediately preceding JDAI's reform effort. The number of detained juveniles in more recent years has in fact decreased. See percent change from 1997 to 2003 on the Juvenile Offenders and Victims 2006 National Report at the U.S. Department of Justice web site, <http://ojjdp.ncjrs.org/ojstatbb/nr2006/downloads/chapter7.pdf>.

10. See “Planning for Juvenile Detention Reforms,” *Pathways*, No. 1 (JDAI, 1995), 10.
11. While pleas were sometimes filed by individual defense lawyers, in most instances national groups such as the Youth Law Center, the Juvenile Law Center, and similar not-for-profit entities either filed the initial pleadings or came in as partners to the filings.
12. See “Reducing Unnecessary Delay,” 5. The term “status offenses” traditionally refers to infractions such as missing school, out after curfew, and other minor infractions. Some of these juveniles were held simply because no adult could be located to take custody of them.
13. R. Stanfield, *The JDAI Story: Building a Better Juvenile Detention System* (Baltimore: Annie E. Casey Foundation, 1999), [www.aecf.org/publications/data/overview.pdf](http://www.aecf.org/publications/data/overview.pdf), 9.
14. “Placement recommendation” is the term used for the recommendation that probation officers make about the type of supervision a child should receive. The word “placement” specifically refers to the juvenile being “placed” or assigned to a program (such as substance abuse or mental health treatment program), a school, or a type of facility (such as a group home or other correctional facility).
15. A “continuance” in the United States is a postponement of a hearing to a later date. Usually it is granted when parties in a case need more time to prepare and/or the court must wait for evidence or reports from other agencies.
16. For other examples, see, “Reducing Unnecessary Delay,” 40–41.
17. R. Stanfield, *The JDAI Story: Building a Better Juvenile Detention System* (Baltimore: Annie E. Casey Foundation, 1999), [www.aecf.org/publications/data/overview.pdf](http://www.aecf.org/publications/data/overview.pdf).
18. See J. Butts, *Waiting for Justice* (Pittsburgh: National Center for Juvenile Justice, 1996), 4.
19. For up-to-date information on the AECF’s JDAI work please visit their web site <http://www.aecf.org/initiatives/jdai/index.htm>.

# Studies in Reform: Pretrial Detention Investments in Mexico, Ukraine, and Latvia

Efforts to improve the practice of pretrial detention can employ many different strategies—and encounter many different obstacles. Current and former Justice Initiative personnel **Benjamin Naimark-Rowse**, **Martin Schönteich**, **Mykola Sorochinsky**, and **Denise Tomasini-Joshi** describe three reform efforts supported by the organization.

There should be less detention, shorter periods of confinement, and better conditions for inmates.

## Introduction

In many countries where the Open Society Justice Initiative works, arrest is often arbitrary, pretrial detention is unduly prolonged, the conditions of detention threaten public health, and vulnerable groups suffer disproportionate confinement. The hazardous situation to be found in many pretrial detention centers around the world provided the initial impetus for the Justice Initiative to select pretrial detention as an important area of focus. Excessive and/or prolonged pretrial detention not only undermines the rights to liberty and speedy process, but contributes to other rights

abuses in overcrowded prisons, and promotes social and economic dislocation for detainees and their families.

## *The Justice Initiative's*

### *Programming Methodology*

Consistent with international standards, the Justice Initiative aims to rationalize resort to pretrial detention, and to encourage its use only where there is a genuine risk of flight, obstruction of justice, or serious further criminal activity. In short, the Justice Initiative believes there should be less detention, shorter periods of confinement, and better conditions for inmates. It is also interested in strengthening the role of international norms, and especially human rights standards, in the process of administering criminal justice in the pretrial phase, and it hopes to prevent discrimination in the application of detention. The Justice Initiative works to accomplish these objectives by:

- promoting alternatives to pretrial detention through research and advocacy, developing demonstration projects, and providing technical assistance to pretrial detention reform initiatives;
- promoting the adoption of international pretrial detention standards and norms in domestic criminal



justice systems, and highlighting the gaps between a state's *de jure* and *de facto* compliance with international standards;

- positively influencing public opinion on the issue of pretrial detention; and
- documenting and interpreting pretrial detention initiatives which have succeeded in reducing the use and the negative consequences of pretrial detention.

#### *Justice Initiative Interventions*

The Justice Initiative has developed a number of projects that aim to reduce and rationalize the use of pretrial detention in compliance with international standards, and promote alternatives to pretrial detention. In 2002-05, the Justice Initiative worked in Latvia to reduce the number of juveniles and young adults held in pretrial detention, through the establishment of pilot pretrial release programs in the form of bail supervision centers. During these years, the Justice Initiative also worked in Ukraine to help develop and disseminate judicial guidelines which specify the manner in which international standards, designed to limit the use of pretrial detention, can best be deployed by judges in the context of Ukrainian law and practice. In 2004, the Justice Initiative began working in Mexico to reduce and rationalize the use of, and promote alternatives to, pretrial detention practices through research, public awareness raising, training, policy advocacy, and the development of a pilot pretrial evaluation and bail super-

vision center. These three country-specific projects are reviewed in detail below.

#### **Mexico: New Laws Require New Practices**

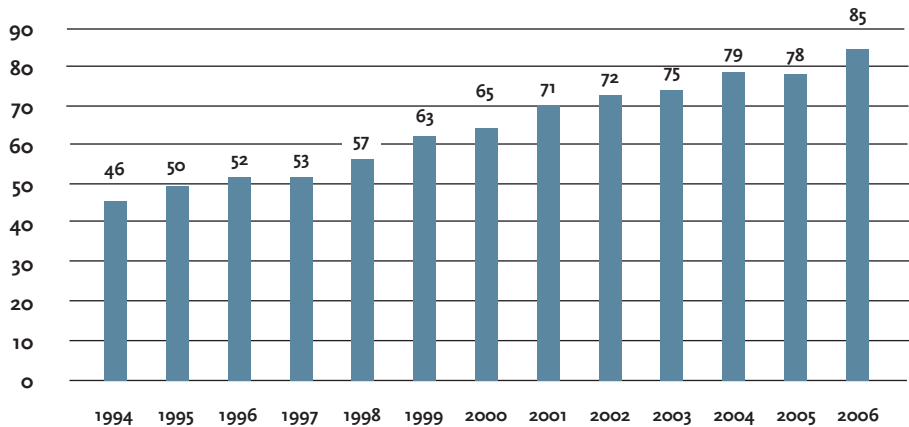
The use of pretrial detention in Mexico is widespread, rigid, and excessive—it is the rule, rather than the exception. Traditionally, Mexico's federal and state constitutions and criminal procedure codes govern the use of pretrial

In much of Mexico, pretrial detention is *mandatory* for persons charged with a wide range of “grave” crimes.

detention, which is *mandatory* for persons charged with a wide range of “grave” crimes. Contrary to international standards, which require that pretrial detention be used in exceptional and narrowly circumscribed circumstances only, Mexican law compels judges to apply pretrial detention purely on the basis of the crime with which a defendant has been charged.

Even charges of “non-grave” offenses can result in pretrial detention if a conviction could result in a prison term. Even where pretrial release is theoretically possible, the lack of alternatives to unconditional release discourages many judges from authorizing it. Mexico's legal system also sets onerous financial hurdles for the application of financial bail, making pretrial release virtually impossible for the indigent.

**Figure 1: Pretrial Detainees per 100,000 of the General Population, 1994-2006**



Unsurprisingly, given its rigid legal framework, Mexico's pretrial detention data is predictably gloomy. In late 2006, the country's prisons housed 214,500 inmates of which 92,600, or 43 percent, were awaiting trial (up from 71,500 in 2001). The number of detainees measured as a rate per 100,000 of the general population almost doubled from 46 to 85 per 100,000 between 1994 and 2006 (Figure 1). Many Mexican prisons are overcrowded, with the national median occupancy rate hovering around 134 percent of capacity.<sup>1</sup> They are also dangerous centers of violence and disease, and have proven porous for violent criminals who appear to escape with ease.

A new era in Mexican politics was ushered in with Vicente Fox's victory at the polls in 2000. With this peaceful transition from over seven decades of authoritarian one-party rule,

Mexico's 100 million inhabitants took an important step towards democratic governance.

Mexico's new administration assumed power intending to significantly reform the country's archaic and inefficient criminal justice system.<sup>2</sup> A significant part of this intention was rights related; officials were quick to acknowledge abuses under the old system. However, widespread concerns over public security quickly made criminal justice reform one of the knottiest political challenges facing the new government. Reports of high-profile kidnappings in Mexico City and the unsolved murders of hundreds of women in Ciudad Juarez pervaded the national and international media. Suspects were frequently coerced into making confessions, yet only three percent of crimes committed resulted in a prosecution.<sup>3</sup> In June 2004, hundreds of thousands of

Mexicans marched through a dozen cities expressing their frustration at the crime situation and demanding change. More accountable and sensitive to public opinion in Mexico's new democratic dispensation, criminal justice policymakers were confronted with a dilemma faced by most liberal democracies at one time or another—the challenge of balancing individual rights to liberty with the societal interest of public security.

#### *The Intervention*

In mid-2004 the Justice Initiative began to work on pretrial detention reform in Mexico. Several factors motivated the decision to engage in this effort. Mexico is an important regional power in Latin America, with a population and economy second only to that of Brazil. Should Mexico's criminal justice reforms fail, it would weaken the country's democratization process. Moreover, the Fox administration's patent—albeit diminishing—enthusiasm for criminal justice reform, the lack of a strong domestic lobby for pretrial detention reform, and the opportunity to strengthen local civil society capacity to provide alternatives to pretrial detention, all made a case for Justice Initiative engagement.

From the beginning of its work in Mexico, the Justice Initiative partnered with a local non-governmental organization (NGO), Renace. The Justice Initiative–Renace project has sought to promote pretrial detention reform through a number of interrelated activities, including:

- Undertaking a cost-benefit analysis of Mexican pretrial detention practices and alternative models to pretrial detention. The results of such an analysis will raise awareness of the financial cost of the excessive use of pretrial detention and provide policy makers with valuable information to craft more cost-effective pretrial detention laws.
- Working with state-level policy makers and criminal justice officials to promote pretrial detention reform,

Suspects were frequently coerced into making confessions, yet only three percent of crimes committed resulted in a prosecution.

and presenting trainings on rights-based pretrial detention practice in a number of Mexican states.

- Focusing attention on the social costs of Mexico's rigid pretrial detention policies by compiling and disseminating personal histories of individuals who have been detained awaiting trial.

The Justice Initiative's long-term goal in Mexico is to foster and entrench a fair, rational, and rights-based pretrial detention regime which is respectful of international standards and norms. Initially, however, the objective was to reduce—and eventually eliminate—the catalogue of grave offenses, and thereby increase judicial discretion, through legislative change.

The project would accomplish this goal by working at the federal and state level to promote criminal code reforms.

By 2005, it was clear that the Fox administration would not be able to deliver on its much touted criminal justice reform package. President Fox lacked a majority in congress and proved unable to win approval of any significant legislative reforms. Moreover, the details of the administration's reform package were disappointing. While the reforms sought to introduce adversarial and oral proceedings and entrench the presumption of innocence in the constitution it also—somewhat paradoxically—did not advocate eliminating the “grave” crimes classification for which pretrial release is prohibited.

### *State-Level Opportunities*

As the federal reform reforms stalled, a number of states became interested in implementing criminal justice reforms of their own. Most reform proposals focused on radically overhauling state-level criminal procedure codes to introduce oral, adversarial proceedings. An important component of a number of state-level legislative reform packages is reducing the number of crimes classified as “grave” or eliminating the distinction between “grave” and “non-grave” offenses altogether.

This unexpected development, whereby a number of states overtook the federal government as the vanguard of criminal justice reform in

Mexico, prompted the Justice Initiative project to shift its focus from the federal to the state level. After investigating a number of states in early 2006, the state of Chihuahua was identified as being suitable for a project-sponsored intervention to promote and entrench rights-based pretrial detention practices in compliance with international norms.

In mid 2006, Chihuahua's legislature, with support from all three major parties, passed an ambitious package of legislative reforms which came into effect in the state capital, Chihuahua City at the beginning of 2007 (the reforms are being implemented in a staggered manner). The reforms radically change the way in which pretrial detention decisions are made and administered. Crucially, the traditional distinction between “grave” and “non-grave” offenses was repealed. As a result, all defendants—including those charged with a serious offense—are eligible for pretrial release as they await their trials. (However, shortly before publication the category was reinstated for five offenses.) Moreover, Chihuahua's new criminal procedure code provides statutory guidance to judicial officers to use pretrial detention as an exceptional measure and only on grounds which mirror those found in international standards (i.e. risk of flight, risk of offending, and interference with the proper administration of justice).

The reforms brought about three specific challenges for Chihuahua's criminal justice officials dealing with pretrial detention issues, namely:

- a significantly greater volume of cases requiring a pretrial release/detention decision by a judicial officer;
- a greater proportion of cases requiring a pretrial release / detention decision which involve serious crimes; and
- an increase in the number of alternatives to pretrial detention.

In late 2006, after the project identified Chihuahua as a promising candidate for reform and began discussions with the office of the state attorney general, a consortium of state entities (including the Secretariat for Public Security and the three major political parties) asked the project to help the state manage the implications of its new, more progressive, pretrial detention law. In response the project proposed to help develop and implement a pilot bail evaluation and supervision center in Chihuahua City.<sup>4</sup>

The key objectives of such a center are twofold. The first is to undertake a risk assessment of individual defendants by collecting information from a variety of sources about detainees, and provide criminal justice officials with trustworthy information on the potential risk a defendant may pose reneging on his conditions of release, and to assist judicial officers in coming to a fair and effective release / detention decision based on objective and reliable criteria. The second objective is to provide professional supervisory services for high-risk defendants who would otherwise not be released awaiting trial.

In essence, the project offered to develop an institutional model to empower judicial officers and other criminal justice officials to make informed and rational pretrial decisions, and provide supervisory services for selected defendants, so that the maximum number of pretrial detainees can be released without undue risk to public safety.

**A bail evaluation and supervision center would provide criminal justice officials with trustworthy information on the potential risk a defendant may pose.**

The project created a pretrial detention working group in Chihuahua, made up of senior members of the Department for Public Security, the attorney general's office, congress, and the Supreme Court. The working group is responsible for maintaining governmental support for the pilot bail evaluation and supervision center and ensuring effective collaboration and coordination between the key state agencies whose support is crucial to the center's success. The working group, moreover, fosters local ownership in the development of the pilot center and can be used as a conduit through which local in-kind and financial support for the center can be obtained to ensure its long-term sustainability. At the time of writing, key state officials (and a few business lead-

ers in Chihuahua) are trying to consolidate support for a pretrial services project. The impending application of the new code to Ciudad Juarez, Chihuahua's largest city, has raised the political stakes greatly.

### *Future Challenges*

As the project goes about promoting political reforms it faces a number of challenges. At the operational level, the project continues to grapple with a recalcitrant judiciary which is uncomfortable with the added responsibility

Many judges fear criticism should they release a defendant who subsequently commits a serious crime.

of issuing a pretrial ruling for all detained defendants, irrespective of the seriousness of the charge levelled against them. Understandably, many judges fear media criticism and public disquiet should they release an awaiting trial defendant who subsequently commits a serious crime or absconds. The mistaken release of a dangerous defendant could also discredit the work of the pilot center in the context of a society plagued by violent crime.

Further risks are posed by the broader criminal justice reforms underway in Chihuahua. It remains to be seen whether the ambitious transition from an inquisitorial to an accusatory, adversarial, and oral system can be accomplished given the massive change this implies in how justice is

administered. Policymakers have provided little time and limited resources for training the judges, prosecutors, police officers, and defense lawyers responsible for making the new system work effectively. Should the broader impetus for reform abate or even stall, it is likely to negatively affect the reform of pretrial detention practices.

Although the attorney general's office and the Secretariat of Public Security have so far been ardent champions of the center's proposed mission, it remains to be seen how the system's agents react in practice. As is the case in most of Mexico, Chihuahua's system of legal aid is weak and poorly funded. The defense bar is largely inexperienced at marshalling relevant information and arguing forcefully for pretrial release. A pretrial services center will have to be nimble with outreach and training if its materials are to be put to use by all litigants. Lastly, there is time pressure: the project must find ways to ensure that system actors do not simply fall back on old habits and effectively thwart the reform.

With a new president, Felipe Calderon, in power, federal-level criminal justice reforms are still pending. At the time of writing, significant advances had been made that appear to favor the chance of a progressive new federal pretrial detention policy which follows Chihuahua's lead. For example, recent drafts would significantly limit the use of the "grave" crime category.

To succeed, the project must anticipate and manage the challenges dis-

cussed above. To date the project has trained prosecutors and judges in several states on the use of bail evaluation and supervision services. Provided such trainings are repeated at regular intervals and expanded to defense lawyers and police officers, the anxiety criminal justice personnel may have about the new pretrial detention system and the pilot center can be minimized. The project will also have to work with the media and civil society groups to market the benefits of the new system and bail evaluation and supervision.

Over the longer term the project hopes to establish an inter-state forum to allow state-level criminal justice policymakers and officials to exchange good practices regarding the implementation of pretrial detention reform. Such a forum can serve as a platform for promoting pretrial detention reform throughout the country, thereby dispersing the risk should the reforms fail in a particular state. Moreover, such a forum can play an important role in aligning federal reform proposals with state-level reforms.

### **Ukraine: Improving Pretrial Detention Practice through Judicial Training**

According to Ukraine's Code of Criminal Procedure (CCP), pretrial detention may only be imposed if reasonable grounds exist that a defendant may attempt to abscond; obstruct the investigation; or pursue criminal activities. To determine the type of restriction to place on an awaiting trial

defendant, a judge has to take into account the gravity of the alleged offense, as well as the defendant's age, health, family circumstances, financial situation, primary economic activity, and place of residence.

The code further provides that a defendant can be placed in pretrial detention only if the offense with which he is charged is punishable, upon conviction, by more than three years imprisonment. An exception to this rule provides for pretrial detention, even for defendants charged with minor offenses, in "exceptional circumstances" where, for example, a defendant has no fixed abode, has a record of absconding, or the true identity of the defendant cannot be ascertained.

The law, therefore, neither requires nor allows the imposition of pretrial detention based solely on the crime with which a defendant is charged. This was not always the case in Ukraine. Prior to major amendments to the CCP in 2001, pretrial detention could be applied on the basis of the gravity of the crime with which a defendant was charged. The 2001 amendments also "judicialized" (i.e. transferred from prosecutors to judges) all decision-making powers regarding restrictions on individual liberty, including decisions to impose pretrial detention.<sup>6</sup>

The 2001 amendments to the CCP largely aligned Ukrainian pretrial detention law with the requirements of the European Convention on Human Rights.<sup>7</sup> At the time of the amendments, Ukraine had one of the highest imprisonment and pretrial

detention rates in Europe.<sup>8</sup> Conditions in Ukraine's pretrial detention facilities were severely criticized by the European Committee for the Prevention of Torture.<sup>9</sup> Moreover, many pretrial prisons in Ukraine were chronically overcrowded and were fertile breeding grounds for the transmission of communicable diseases.

### The amended CCP presented an opportunity to reform an ailing and inhumane pretrial detention system.

#### *The Intervention*

The amended CCP presented an opportunity to reform an ailing and inhumane pretrial detention system. This legislative opening and Ukraine's strategic importance presented a compelling case for Justice Initiative engagement.<sup>10</sup> In early 2002, in cooperation with Ukraine's Soros foundation, the International Renaissance Foundation (IRF), the Justice Initiative implemented a three-year project aimed at maximizing the revised code's potential to limit the use of pretrial detention.<sup>11</sup> The project sought to achieve this by enhancing the quality of judicial decision-making during the pretrial phase of criminal proceedings and thereby reduce the incidence of cases where pretrial detention is used.

During the first phase of the project, a survey of judicial practices in the application of pretrial detention was conducted in Ukraine's second largest

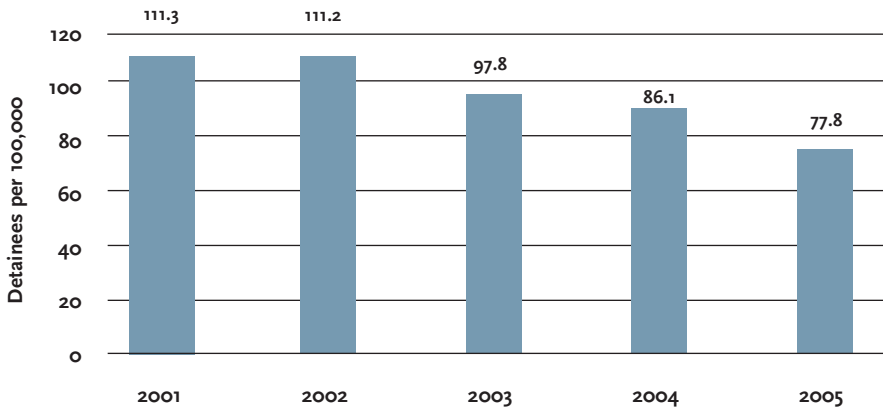
city, Kharkiv. A representative sample of cases in which pretrial detention was imposed during 2002 was analyzed. The survey focused on the decision-making process judges used to come to a pretrial release or detention decision.

According to the survey results, most judges applied pretrial detention on the basis of a few variables, notably the gravity of the offense with which a defendant is charged, a defendant's lack of a registered permanent residence (in large part a leftover from Soviet times when every citizen had to be formally registered at an address), and a defendant's prior criminal conduct and employment status. Some 69 percent of cases surveyed revealed that detention decisions were based on the gravity of the offense with which defendants were charged. Judges generally did not take into account the full array of factors mandated by the code when deciding which defendants to detain. Crucially, most judges failed to properly evaluate the risk individual defendants posed of absconding, obstructing the criminal investigation, or offending.

The survey results also provided some evidence that judges' pretrial detention rulings were discriminating against the poor. Over four-fifths (81 percent) of the cases surveyed involved unemployed persons. This occurred even though the unemployed constitute "only" two-thirds of convicted defendants. It was also found that a mere 7 percent of defendants covered by the survey were represented by a lawyer during their pretrial hearing.



**Figure 2: Pretrial Detainees per 100,000 of the General Population, 2001-05**



Source: Center for Judicial Studies; Supreme Court of Ukraine.

The survey consequently revealed that many judges tended to ignore important aspects of the CCP when making a pretrial release or detention ruling. This finding led to the second stage of the project: namely, the production of a series of publications, including a workbook for project-sponsored trainings on pretrial detention, and guidelines for judges on the correct application of Ukraine's pretrial detention law. All materials provided examples of good and bad practices in pretrial detention based on actual cases found by the project's researchers in the aforementioned survey. The materials also stressed European regional standards governing the application of pretrial detention, in particular the case law of the European Court of Human Rights. The project enlisted a justice of the

Supreme Court as both a coauthor of the guidelines and a trainer at project-sponsored seminars, which significantly enhanced the status and appeal of the project's written materials and trainings.

During 2004-05, a series of project-sponsored judicial trainings were held in Kharkiv and Kyiv. The trainings were conducted by the Center for Judicial Studies, an NGO with a good working relationship with the Ministry of Justice and the Supreme Court. The center also had several years' experience in organizing training seminars for Ukrainian judges on aspects of the European Convention on Human Rights.

The final phase of the project involved the development of pilot legal aid schemes for arrested persons in Kyiv and another regional center,

Chernihiv. Project-sponsored lawyers were placed on duty at police stations to provide assistance to arrestees who were at risk of being placed in pretrial detention.

### *Project Impact*

During the years of the project's operation, the overall number of pretrial detainees in Ukraine declined, from 111 per 100,000 of the general population in 2002 to just under 78 per 100,000 in 2005 (Figure 2). Over the

Lawyers were placed on duty at police stations to provide assistance to arrestees who were at risk of being placed in pretrial detention.

same period the number of pretrial detainees, calculated as a proportion of the total prison population, declined from 23 percent to 18 percent.<sup>12</sup> Much of this decline cannot be attributed to the project, as only a small proportion of the country's judges had participated in the project sponsored trainings by the end of 2005. Moreover, recorded crime decreased over much of this period—a factor which may have contributed to a reduction in the application of pretrial detention.<sup>13</sup>

It is interesting, however, that in Kyiv, where a significant number of judges attended the project trainings (which commenced in March 2005), the number of pretrial detainees declined by over four percent between

2004 and 2005. This decline occurred notwithstanding the fact that over the same period the level of recorded crime in Kyiv rose (contrary to the national trend) by 14 percent and the number of defendants by two percent.

In Kharkiv (a site for the project-sponsored trainings) the number of appeals against pretrial detention rulings of the lower courts declined by 12 percent in a five-month period after the project trainings, compared to a similar five-month period prior to the trainings. This decline in the number of appeals is likely to be at least partly the result of judges being more faithful to the CCP as it applies to pretrial detention.

There are also indications that the project's judicial skills-building activities were effective in changing judicial attitudes. In June 2005, the Center for Judicial Studies surveyed judges of the Kyiv regional and local courts who had participated in the project-sponsored trainings. The survey revealed that 89 percent of the surveyed judges believed the number of defendants who are detained awaiting trial is excessively high. Moreover, almost four-fifth of the respondents (78 percent) felt that efforts should be made to reduce the number of pretrial detainees in Ukraine.

### *Facilitators of Project Successes*

A repeat of the survey of judicial practices in the application of pretrial detention, which the project undertook in 2003, would be required to accurately measure the project's impact on the quality of judicial

decision-making during the pretrial phase of criminal proceedings. But it can be ascertained from the above, albeit imperfect, data that the project made a positive impact on judicial attitudes and practices. Given that these successes were achieved in a country which until 2001 had one of Europe's most draconian pretrial detention regimes, what enabled the project to achieve these accomplishments over such a short period of time? It is possible to identify at least two cogent explanations.

First, the project was not promoted purely as a pretrial detention reform undertaking. Rather, it was presented as a vital component in the government's effort to humanize criminal justice policy and practice in compliance with European human rights standards. In this respect the project capitalized on a widely shared belief among Ukraine's criminal justice policy makers: namely, that it was necessary to move away from a repressive Soviet-style system, and that this was possible only by incorporating European standards into a more humane criminal justice system.

Second, a key policy goal for the Ukraine government was to nurture the country's membership in the Council of Europe (CoE). Ukraine was permitted to join the CoE in 1995 on the condition that, among other changes, it reformed its criminal justice system in accordance with European norms. The amendments to the CCP in 2001 were motivated by a need to bring the country's criminal procedure in line with Ukraine's Constitution. The constitution, in

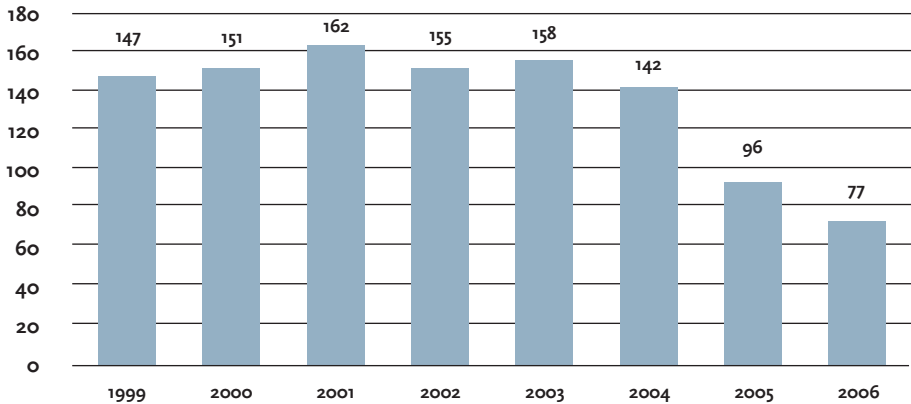
turn, was a product of Ukraine's obligations to the CoE.<sup>14</sup> A CoE treaty monitoring body, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), visited Ukrainian pretrial detention facilities in 1998, 1999, and 2000. The CPT made it known that the poor conditions under which pretrial detainees were incarcerated could realistically be improved only if there was a decrease in the number of pretrial detainees or a reduction in the average length in their detention.

#### *Sustaining Project Impact*

As a consequence of the project's activities and at the urging of the Justice Initiative's partner, the IRF, several international donor organizations have started supporting pretrial detention-related projects in Ukraine.<sup>15</sup> This is an encouraging development as no major donor was working in this field when the project began in late 2002.

Moreover, the IRF itself has continued its engagement with pretrial detention issues in Ukraine. In 2006 it provided a grant to the Center for Judicial Studies to train judges on alternatives to pretrial detention. The center will also provide joint practical training sessions for judges, prosecutors and lawyers on the application of alternatives to detention and to improve their skills regarding good pretrial detention practice. A different IRF grant permits the continued provision of free legal aid to arrestees at risk of being placed in pretrial detention at two Kyiv police districts.

**Figure 3: Pretrial Detainees per 100,000 of the General Population, 1999-2006**



Source: Latvian Prison Administration

### Latvia: Reducing Pretrial Detention through Bail Supervision

With the collapse of the Soviet Union, Latvia regained its independence in 1991. Almost immediately, the small Baltic state of 2.3 million people began reforming its criminal justice system. By the turn of the century, Latvian law permitted the imposition of pretrial security measures only if there were sufficient grounds to believe that the persons concerned will abscond, interfere with the criminal investigation, commit new crimes, or to ensure the enforceability of a court's judgement. Judicial officers have to consider various, statutorily enumerated, criteria in deciding whether to impose a security measure. These include the seriousness of the offense and the character of the accused, including his familial and personal circumstances.

The Latvian Criminal Procedure Code provides for eight different security measures in respect of persons awaiting trial. Only judges have the authority to impose the two most restrictive security measures—pretrial detention and house arrest. The onus is on the police and prosecution to apply—formally, and in writing—to a judge for the detention of a suspect. While detention may be used as a security measure only where the alleged offense may, upon conviction of the perpetrator, result in a custodial sentence, there are very few offenses where imprisonment is not a potential sentence.

#### *Reformist Pressure*

Between 1991 and 2002, the number of sentenced prisoners in Latvia decreased by 21 percent, while the

number of pretrial detainees increased by 53 percent. The number of pretrial detainees as a proportion of all prisoners increased from 28 percent in 1991 to 43 percent in 2002. Disconcertingly, in 2002 almost two-thirds (63 percent) of incarcerated juveniles were pretrial detainees. Accused juveniles faced a significantly greater risk of being detained awaiting trial than their adult counterparts.

In 2003, Latvia had the highest rate of pretrial detainees of European prison systems for which figures were available, incarcerating 158 detainees per 100,000 of the general population compared to a European mean of 66 (Figure 3).<sup>16</sup>

A 2000 United Nations country assessment of Latvia estimated that “only half of the population behind bars is incarcerated under humane and secure living conditions.”<sup>17</sup> Under such conditions “pursuit of their own human development for many or most individuals is impossible while in detention, which bears a negative influence on rehabilitation, and on the rest of an individual’s life.”<sup>18</sup> A report released in early 2002 by the Latvian Center for Human Rights and Ethnic Studies, an NGO, stated: “In 2001 the primary human rights problem in Latvia remained the same as in previous years: a huge backlog in the courts resulting in long pre-trial detention periods.”<sup>19</sup>

In a 2001 report on Latvia, the European Committee for the Prevention of Torture (CPT) commented on the “intolerable” conditions which it found in the country’s

pretrial detention establishments.<sup>20</sup> The CPT recommended that Latvia’s pretrial detention law and practice be reconsidered. Among the international standards designed to limit the use of pretrial detention, the CPT specifically suggested implementation of a recommendation of the Committee of Ministers of the Council of Europe which provides that: “When examining whether custody pending trial can be avoided, the judicial authority shall consider all available alternative measures.”<sup>21</sup>

### Juveniles were more likely to be detained awaiting trial than their adult counterparts.

In mid 2002, the Latvian parliament amended the Criminal Procedure Code to expedite trials and thereby reduce the average length of time persons are detained awaiting trial. Parliament also established a working group to draft a new law on criminal procedure for the country. These legislative developments, Latvia’s high rate of pretrial detention, the above-mentioned CPT report, and the reformist pressures placed on Latvian policy makers by their country’s eagerness to join the European Union (EU), provided an opening to promote pretrial detention reform.

#### *The Intervention*

In September 2002, the Justice Initiative and the Center for Public Policy-Providus, a Riga-based NGO, initiated a three-year project with the

goal of reducing the number of juveniles and young adults held in pretrial detention.

In order to make sense of the high pretrial detention rate, and to recommend ways of reducing the number of detainees, the project undertook a study to evaluate Latvian pretrial detention practices. During 2002-03, the project analyzed almost 300 randomly selected criminal case files involving accused persons assigned pretrial detention. A second survey,

### The project established two pilot bail supervision centers to demonstrate how a system of bail supervision can function in Latvia.

to elicit the views judges, prosecutors and police officers had on pretrial detention issues was carried out in 2003.

The case study and survey results provided an empirical basis for identifying problems in Latvia's pretrial detention regime. It was found that Latvia's pretrial detention legislation was often incorrectly interpreted and applied, and that aspects of the legislation were vague and did not always comply with international standards. In response, the project commissioned a renowned expert to advise Latvian policymakers on amending the Criminal Procedure Code to bring the country's legislation, as it applies to pretrial detention, in line with European standards.

The project also sought to respond to the supply side of the excessive use of pretrial detention—that is, the process through which persons were placed in detention and remained there. The project established two pilot bail supervision centers to demonstrate how a system of bail supervision can function in Latvia. In December 2003, the project set up the first such center in the coastal city of Liepaja.

From the outset, the project's ability to develop an effective alternative to pretrial detention was impeded by legislation which did not allow bail supervision as a security measure for persons awaiting trial. So in lieu of bail supervision, the project decided to operate through a pretrial security measure that was allowed under the law: police supervision. Police supervision is a measure designed to restrict an accused person's freedom of movement. Specifically, it means that the person is not allowed to leave their region of permanent or temporary residence, or to frequent specified places or establishments, and the accused must report to the police at regular intervals. Conditions of police supervision are limited by law and it is impossible for the courts to add bail supervision as a condition under the rubric of police supervision.<sup>22</sup> The project responded to this legislative lacuna by entering into a series of cooperation agreements with the police, prosecution, and courts in Liepaja to establish their formal support for the Liepaja center and its activities.

Accused persons released on police supervision have to comply with cer-

tain rules to remain at liberty as they await trial. Informally, the Liepaja center developed its own rules for its clients. For example, anyone under supervision had to commit to participate in regular center activities and not be intoxicated while at the center. The weakness of this informal approach is that the police and the courts are powerless to penalize accused persons who do not comply with the center's rules. The police can only react in cases where an accused breaks a court-imposed condition of release on police supervision. In practical terms, center staff could exert some influence to get accused persons to comply with their rules, however. Judges would frequently ask the center to submit pre-sentence reports on behalf its clients who were convicted by the courts. As positive reports could influence the courts to impose more lenient sentences, the center's clients had an incentive to cooperate with staff.

During the first year of its operation the Liepaja center had difficulties establishing itself as a supervision service. Initially the center's staff completed numerous pre-sentence reports and supervised convicted offenders post-trial, in effect operating as a probation service. For strategic reasons it was decided by the project that the center would perform such tasks at the request of the police, prosecution, and courts to establish a good relationship with local criminal justice actors and promote a professional and trustworthy image for the center. It was only with the opening of a State Probation

Service office in Liepaja in late 2005 that the center could focus exclusively on bail supervision activities.

A second pilot center was opened in the city of Rezekne in May 2005. At the time of the opening, Rezekne had the highest crime rate in the country, and 54 percent of arrested juveniles were kept in detention awaiting trial.

#### *Lack of Sustainability*

At the end of 2006 the Liepaja center closed its doors, and the Rezekne center did so in late 2007. The inability of the project to ensure their long-term financial sustainability is the main reason for discontinuing the work of the two pilot centers. From its inception, the Liepaja center was funded exclusively by the project, while the Rezekne center received some modest support from the Rezekne municipality. There are a number of reasons why the pilot centers were neither sustained nor led to the development of additional bail supervision centers in other parts of Latvia.

At its inception, the project benefited from the high-level contacts that Providus had cultivated in the Latvian criminal justice system. Providus enjoyed considerable credibility within government institutions and had been invited to participate in governmental working groups, including a working group to establish a national probation service. When the Liepaja center was created, the project gambled on the support of the Ministry of Justice—especially that of the minister of justice—to amend the Criminal Procedure Code and formally add bail

supervision as an alternative to pretrial detention. This, in turn, would have made the country's new Probation Service responsible for the provision of bail supervision services. At the time, the Probation Service expressed interest in providing such services through its own staff and offices in some locations, while funding and contracting civil society organizations to provide bail supervision in others locales. In early 2004, the country's

The project succeeded in placing the concept of bail supervision on the agenda of Latvia's policy makers.

governing coalition collapsed and the project was unable to establish as good a relationship with the new minister of justice. It was consequently a setback to the project when Latvia's new Criminal Procedure Code, which came into force in October 2005, did not make provision for bail supervision as an alternative to pretrial detention due to a lack of support from the Ministry of Justice.

After Latvia joined the European Union in May 2004, the threat that a lack of progress in reforming its pretrial detention regime could delay its accession to the EU was no longer credible. Moreover, the number of pretrial detainees declined dramatically between 2003 and 2006, from 158 to 77 per 100,000 of the general population (see Figure 3). This decline is attributable to the opening of new

court facilities and an increase in the number of judges in Latvia's capital city, Riga (where a third of all Latvians live) in 2003. At around the same time amendments to the Criminal Procedure Code shortened the pretrial investigation phase of the criminal process under certain circumstances, and imposed statutory time limits for the maximum duration of detention. Moreover, an increased focus on judicial training in the years immediately prior to Latvia's accession to the EU increased judges' awareness of European pretrial detention standards.

### *Future Opportunities*

It is sobering to conclude that the project's first pilot bail supervision center in Liepaja closed its doors after three years, and that the pilot center in Rezekne did so after just over two years of operations. Notwithstanding this setback, the project succeeded remarkably well in placing the concept of bail supervision on the agenda of Latvia's policy makers—although too late to sustain the operations of the two pilot centers.

In late 2006, the State Probation Service, in a report to the Ministry of Justice, commented positively about the impact of the project's pilot centers. The probation service noted that bail supervision services provide effective and individualized attention to persons in conflict with the law, thereby changing the behavior of juvenile accused and encouraging them to lead a law-abiding life.<sup>23</sup>

In a Ministry of Justice strategy document for the years 2007-2009,



the ministry committed to drafting an implementation plan for a national bail supervision service by 2009. Providus, the Ministry of Justice, and the State Probation Service are collaborating on developing a project proposal to solicit foreign financial assistance to support the implementation of bail supervision throughout Latvia.<sup>24</sup>

Providus also serves on a Ministry of Justice working group tasked with considering proposed amendments to the Criminal Procedure Code. It is likely that Providus's proposal—that bail supervision as an alternative to pretrial detention be included in a future amendment to the code—will be supported by both the Ministry of Justice and the State Probation Service. It is unclear, however, when such an amendment would come into force. Providing bail supervision nationally will require considerable financial resources and the expansion of the probation service as the likely agency responsible for the effective implementation of bail supervision services. At the time of writing it appears unlikely that bail supervision services will be introduced in Latvia before 2009 or 2010.<sup>25</sup>

## Conclusion

The Justice Initiative faces several important challenges when working on rights-based pretrial detention reform on a global scale. First, criminal justice remains a local and varied phenomenon, despite the pressure of

uniformity embedded in processes of globalization, and the information necessary to comprehend local problems from a distance is not readily available. In addition, the inventory of ready solutions to many of the problems in pretrial detention is small, often highly specific, and usually expensive. The history of specific legal transplants, too, whether in the form of statutory borrowing or the adoption of international legal covenants, is full of instances of poor portability. It is not clear that remedies devised for problems in one country are easily transferable to others.

To mitigate these challenges the Justice Initiative has adopted the principles of diversity, collaboration, and replicability in its programming. Promoting better decisions about detention across the globe requires an eclectic approach, with agile responses to different environments and changing expectations. Creating the environment to bring about lasting change in the field of pretrial detention requires new kinds of collaboration between governments and NGOs, and a commitment to learning by all parties. Cooperation with donors makes it possible to build upon current efforts to improve justice, and benefit from their local knowledge and experience. The Justice Initiative strives to generate learning which will be applied by others in analogous situations and thereby serve as a catalyst for a process of change in the arena of rights-based pretrial detention reform.

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## Notes

The authors are current and former personnel of the Open Society Justice Initiative's National Criminal Justice Reform program.

1. *World Prison Brief Online*, (London: International Centre for Prison Studies, 2007).
2. The Fox administration's proposed reform of the public security and criminal justice system was ambitious. It involved revising several constitutional provisions, promulgating six new laws and amending a further eight.
3. Guillermo Zepeda Lecuona, *Crimen sin castigo: Procuracion de Justicia Penal y ministerial publico en Mexico*, (Mexico City, Fondo de Cultura Económica y Centro de Investigación para el Desarrollo, 2004), 220.
4. Bail evaluation and supervision is more commonly known as “pre-trial services” (PTS), especially in the United States where PTS have been in existence the longest. In the United States, PTS generally provide two major functions: evaluation and supervision. At the evaluation stage, background information on a defendant, including criminal record information, is obtained and verified by an impartial party. The risks of the defendant absconding, interfering with the administration of justice, or committing a serious crime while awaiting trial are evaluated. Based upon the evaluation, a recommendation is made to the presiding judge as to whether the defendant should be released pretrial and, if so, under what conditions. This mechanism provides judges with the necessary information to make informed release decisions. The supervision function provides a number of oversight options for defendants whom a judge would otherwise not release pretrial. For example, PTS may provide drug testing to defendants whom the judge has ordered into drug treatment, and visits or telephone calls for defendants under house arrest.
5. The proposal for federal-level reform was submitted to congress in late 2006 by a network called *Red Nacional a Favor de Juicios Orales y Debido Proceso Legal* (“National Network for Oral Trials and Due Process of Law”).
6. Under the old pre-2001 system, a procurator made the decision to detain someone without contemporaneous judicial or other independent scrutiny.
7. The Council of Europe (of which Ukraine became a member in 1995), recommends that in deciding whether or not to detain, a court should consider: (i) the seriousness of the alleged offense, (ii) the strength of the evidence that the accused committed the offense, (iii) the penalty to be incurred upon conviction, (iv) the character, and personal and community ties of the accused, and (v) the conduct of the accused. See: Council of Europe Recommendation No. R (80) 11 of the Committee of Ministers to Member States Concerning Custody Pending Trial (27 June 1980), <https://wcm.coe.int/ViewDoc.jsp?id=679045&Lang=en>.
8. Marcelo F. Aebi, *Council of Europe Annual Penal Statistics: Survey 2002*, (Strasbourg: Council of Europe, 2003).
9. *Report to the Ukrainian Government on the Visit to Ukraine Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 24 November to 6 December 2002*, CPT/Inf (2004), (Strasbourg: Council of Europe, 2004) 35.
10. Ukraine, which gained its political independence from Russia in 1991, is the second largest and sixth most populous (population 46.7 million in 2006) country in Europe.
11. The IRF, a member of the Soros Foundations network, is an independent, charitable organization and one of the largest private charities in Ukraine. Since 1990, the IRF has both funded and helped implement numerous law reform and rule of law projects in Ukraine.
12. Tsentr Suddivskikh Studiy, Otsinka Efektyvnosti Vykonnannya Proektu “Znyzhennia Kilkosti Dosudovykh Zatryman V Ukraini: Monitoryng Ta Udoskonalennia Suddivskykh Navychok”. [Center for Judicial Studies, Evaluation of Effectiveness of the Implementation of the Project “Reducing Pre-Trial Detention in Ukraine: Monitoring and Judicial Skills-Building”] (2006).

13. Between 2002 and 2003, the rate of recorded crime increased from 939 to 1,168 cases per 100,000 of the population, and thereafter declined to 1,100 (2004) and 1,035 (2005) recorded cases per 100,000 of the population.
14. A draft of the Ukraine Constitution was vetted by a body affiliated with the Council of Europe, the Venice Commission for Democracy through Law. See *Opinion on the Draft Constitution of Ukraine* (Text approved by the Constitutional Commission on 11 March 1996 (CDL (96) 15), available at, <[http://www.venice.coe.int/docs/1996/CDL\(1996\)020-e.asp](http://www.venice.coe.int/docs/1996/CDL(1996)020-e.asp)>).
15. These donor organizations include the Swiss Agency for Development and Cooperation, and the American Bar Association's Central and Eastern European Law Initiative (ABA-CEELI).
16. Figures for the Russian Federation were not available. See, Marcelo F. Aebi, *Council of Europe Annual Penal Statistics, Survey 2003, SPACE I*, (Strasbourg: Council of Europe, 2004), 23.
17. *Putting People First. Challenges and Opportunities for Cooperation between Latvia and the United Nations, A United Nations Common Country Assessment*, (New York: 2000), 24.
18. *Ibid.*, 26.
19. *Human Rights in Latvia in 2001*, (Riga: Latvian Center for Human Rights and Ethnic Studies, 2002), 7.
20. *Report to the Latvian Government on the visit to Latvia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 24 January to 3 February 1999*, CPT/Inf (2001) 27, (Strasbourg: Council of Europe, 2001), 36 and 46.
21. Recommendation No. R (80) 11 of the Committee of Ministers of the Council of Europe. See, *Report to the Latvian Government on the visit to Latvia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 24 January to 3 February 1999*, CPT/Inf (2001) 27, (Strasbourg: Council of Europe, 2001), 42.
22. Under the rubric of police supervision, the law permits the imposition of four conditions only: compulsory school attendance, house arrest, prohibition to go to certain places, and regular reporting at a police station. See Article 75, *Latvian Criminal Procedure Code* of 1961, as amended.
23. Personal communication, Inese Avota, Project coordinator: Bail supervision and alternatives to custody, Center for Public Policy-Providus, January 27, 2007.
24. Funding is being sought through the Norwegian Financial Mechanism which is making 1.17 billion euros available to ten new European Economic Area (EEA) states—including Latvia—in a wide range of priority sectors.
25. Personal communication, Inese Avota, Project coordinator: Bail supervision and alternatives to custody, Center for Public Policy-Providus, January 27, 2007.

# Mixing Politics, Data, and Detention: Reflections on Reform Efforts

**Robert O. Varenik** reviews common themes among pretrial detention reform efforts and the lessons that can be extracted from them.

Within the already fraught territory of criminal justice policy, issues of detention and punishment are particularly charged. The case of *pretrial* detention is further complicated because the affected population<sup>1</sup> is not only often

It is hard even to gauge the impact of any reform effort or the cause of a particular outcome.

poor but transient, complex, and hard to document, or even describe. With consequently few advocates, their numbers are almost never measured precisely, although in many countries the pretrial population is significantly higher than the prison population. It is hard even to gauge the impact of any reform effort or the cause of a particular outcome. It comes as no surprise, then, that many societies have failed to take to heart the requirement of international law that detention of (presumptively innocent) accused persons should be the exception rather than the rule.

Despite the difficulties of the endeavor, there is a growing number

of attempts to address pretrial detention policies. The reforms described in this volume include two significant legislative efforts (Chile and Russia); creation of a new administrative entity (South Africa); an administrative interagency reengineering (United States); and third-party efforts at inspection of or legal representation in detention venues (India and Malawi, and Nigeria, respectively). Have these initiatives mastered the difficult politics and the elusive metrics of this field? Do they signal any trustworthy directions for ensuring that the problems (and solutions) are properly appraised and appreciated? With these initiatives as a backdrop, this article suggests that reformers should focus on achieving clarity about the challenges they are tackling and the results they obtain, and on fashioning empirical arguments that appeal to a wider range of political values. The successes and setbacks found in these seven initiatives, diverse in contexts and content, point to this conclusion.

The accounts can be regrouped according to a few principal narratives that highlight the difficulties in managing both the politics and the metrics of pretrial detention reform. In a first group, including Chile, Russia, and South Africa, reform politics faltered, leading to a counter-reform that rolled back the laws, or in

the case of South Africa, meant a gradual administrative abandonment of the pilot project and the practices inculcated by the project. In India and Malawi, political support for two inspired initiatives appears to be significant and sustained, but reformers themselves express questions about how to interpret the results and their relation to the intervention. In two cases (Nigeria and the United States), reformers were able to generate value for official stakeholders. Believing that they had isolated the problem and could demonstrate the appropriateness of the approach and the desired impact, they were able to secure some institutional changes that seem likely to persist.

The political and technical underpinnings of success are often profoundly intertwined. One succinct recipe for successful reform calls for providing doers and decision makers with “information, options, and incentives.”<sup>2</sup> That is, public officials need new knowledge that helps them make good choices and a set of political reasons to take action. Common experience in the field seems to suggest that the politics of reform—the key incentives—are paramount, making it a good place to start.

As Olga Schwartz relates, a liberalized criminal procedure code had long been stalled in the Russian Duma until an unlikely source, incoming President Vladimir Putin, pushed it through as an early salvo in (as hindsight now suggests) a long campaign to limit the influence of the judiciary and the legal establishment. Other political elites also supported these

reforms, although for different reasons, including a desire at the time for greater proximity to the West and a way to address pressure from the Council of Europe and human rights activists regarding Russia’s record in this area. Law enforcement officials, especially prosecutors, were largely opposed to the reforms for institutional as well as ideological reasons. Keenly aware that the opportunities created by their unlikely coalition were highly evanescent, a small group of well-placed reform leaders adopted a very opportunistic approach, removing prosecutors and other opponents of the reform from the legislative working group in order to ensure rapid passage of a revised code.

Yet the experiences of Russia and also Chile suggest that identifying and even temporarily neutralizing opponents of reform may not be enough. Adversaries resurfaced, reinforced, in short order. In Russia, subsequent elections thinned the ranks of legislative reformers, while a suddenly indifferent presidency presided over a reconstituted working group that undermined some important elements of reform barely a year after their passage. Key reformers had been intent on a victory while there was a window of opportunity and opted to exclude opponents and shorten the time for debate rather than win them over or seek a lasting compromise. Because the other side hadn’t been converted to the cause or presented with a reason to forgo opposition, it did not; biding their time, opponents had the next, if not the last, word on reform.<sup>3</sup> Ironically, it appears that the

counterreformers were aided by some of the “beneficiaries” of the new legislation. Judges were never really prepared for the new authority granted to them or the new standards for applying it, and after a brief honeymoon they reverted to form, their decisions mimicking those of the prosecution service which had previously determined pretrial detention or release.

### The acid test of reform should not be what can be attained, but what can be sustained.

Given the inevitability of political shifts, the acid test of reform should not be what can be attained, but what can be sustained. Adversity, whether in the form of a public relations disaster stemming from a case gone bad or sharp tilts in the political balance, needs to be anticipated. When opponents of reform gained increased influence over the legislative process in Chile, supporters were caught unprepared to respond to what they viewed as demagoguery about increased impunity for criminals. Although fierce in their opposition to rollbacks, even the most ardent reformers lacked data to refute the charges because none of the system entities measured the impact of the reforms on detention, absconding, or recidivism. Some of the academics who had championed the initial reforms became a somewhat surprising constituency for counter-reform, arguing that concessions would be

needed to avoid wholesale dismantling of the original project. As Verónica Venegas and Luis Vial point out, the use of consensus as a political modality for decision making may have masked simmering differences and lulled some players off their guard even in Chile, where deep schisms had historically divided the political camps. The ideological right remained ready to pounce on an opportunity, and did. Veterans of the Russian and Chilean campaigns might well advise that, as with electoral politics, the time to begin planning for the next skirmish is right after the initial victory.

Beyond the legislative level, the delicate courtship of parties in the reform process is equally critical. Working closely with several juvenile justice agencies, the Juvenile Detention Alternatives Initiative (JDAI) identified numerous sources of delay and inefficiency that contributed to an acknowledged growing problem of juvenile facility overcrowding in the United States. Lessons from past practice—for instance, never assume that related agencies know what the others are doing—prompted them to broker information in a way that made them, and the reform process, valuable to officials, who then benefited from a host of low-cost solutions that relied on minor administrative changes rather than legislation. The Commonwealth Human Rights Initiative (CHRI) in India found that agency representatives who had traditionally been dismissive of input from NGOs reacted positively to CHRI’s often critical findings from its lay visits to detention sites. Dialogue, leavened by new information, can be

surprisingly fruitful.

In Malawi, filling the needs of the police force created an unlikely alliance and defused a potentially adversarial relationship. Reformers had been unable to win police cooperation until their nongovernmental Paralegal Advisory Service (PAS) project expanded to address juvenile detention, which the police had acknowledged as a problem area. Offering to assist the police and parents of juvenile arrestees, the PAS then helped develop a screening mechanism for diverting young offenders, where appropriate, out of the criminal justice process. In exchange, paralegals gained access to monitor police– detainee interviews. The PAS then went one better, recruiting officers to train paralegals in investigative interviewing techniques and custody procedures, which enhanced the paralegals’ monitoring skills while reinforcing the standards among police. The police also helped design the paralegals’ code of conduct for police station monitoring.

The PAS was forced into some difficult choices to forestall another political obstacle. Rather than risk further alienating the Malawi Law Society, which it correctly perceived as resentful of incursions into the Society’s traditional territory, the PAS demurred on several requests from the judiciary to send paralegals into the lower courts, championing the position that representation before a judge is strictly the Bar’s province.

Although political imperatives can frustrate the pursuit of evidence-based policy, empiricism has a role in mak-

ing and sustaining political inroads. The implementation of pretrial release and detention policies is a high-volume undertaking well suited to data capture and analysis and offers opportunities to provide many system actors and policymakers with results that will make reform a better political deal for them. As D. Alan Henry puts it, once “armed with information” his U.S. JDAI team was ready to begin politicking for change. The Justice

Isolate and observe different components in order to pinpoint the problem area(s) among many moving and interconnected parts.

Initiative’s chief ally in an effort to implement liberalized pretrial release rules in Chihuahua, Mexico, turned out to be the state attorney general, who was explicit that pretrial release was not her office’s natural calling but who recognized that project-generated data provided strong arguments in favor of related reforms that law enforcement should support.

The subtle complexities of criminal justice systems require that reform should flow from careful diagnosis. The hunt for the source of the problem should approximate a mechanic’s approach under the hood of a car: try to isolate and observe different components in order to pinpoint the problem area(s) among many moving and interconnected parts. Reforms that spring fully formed, like Minerva from Jupiter’s brain, without gestation

or significant research, may be both relevant and useful, but when the rationale for choosing a specific intervention is slender, the results may be correspondingly modest, and the mechanism of impact hard to divine.

Even due diligence does not inoculate against surprises. The PAS's pre-project research in prisons revealed widespread, lengthy, and unlawful detention of inmates who lacked the legal knowledge and/or representation

**Drawing up a plan without a clear sense of the desired outcomes is an admission that we don't know exactly where to aim.**

to challenge their status. However, a lack of reliable data made it hard to pinpoint where in the criminal process these phenomena had their roots. At its inception in 2000, the project targeted prison sites. Only after the project had been operating for two years was it discovered that the reform was aimed too far downstream: much of the pretrial detention problem stemmed from decisions made earlier in the prisoner intake process. By 2005 reformers were faced with results both mixed and hard to interpret: a small reduction (just under four percent) in the pretrial detainee population over six years, and a contemporaneous, massive 74 percent increase in the overall prison population.<sup>4</sup> Happily, however, with an expanded cadre of paralegals focusing on gaining release of prisoners who had "overstayed" their remand period, scarcely 15 months later the number of

remanded prisoners dropped an additional 18 percent. Going forward, reformers will have to address those problematic detentions stemming from decisions made earlier in the process.

CHRI's program of lay visits to prisons in several Indian states clearly constitutes a useful intervention on several grounds: it mobilizes civil society, creates a crucial precedent for external oversight, and undoubtedly helps individuals who otherwise lack anyone to champion their rights. Yet for subsequent reformers trying to tackle pretrial detention across India, the true measure of its value may not be the four-year reduction in the number of pretrial detainees (although this appears to be significant) but rather the degree to which it enabled CHRI to prompt diverse stakeholders to probe a procedural and institutional thicket. Indeed, the project outstripped its aim of "opening up the obscure character of prison management through permitted community interventions" by discovering, as did its Malawian counterpart, the interconnected and mutually determined nature of the criminal justice system. R.K. Saxena is skeptical of one-dimensional measures, aware that the "price of a reduction" in the pretrial population may be an increase in the number of convicts and the speed with which they are condemned. Looking back on this complexity, Saxena poses an invaluable question when he asks, "[what] would be a dependable indicator of reform in the situation of pretrial detention?"

By way of response, we might look to Malcolm Sparrow, a widely respect-



ed government innovations expert (and a former detective chief inspector in Britain) for a seemingly obvious but essential reminder: define your indicators *before* deciding on your intervention.<sup>5</sup> Drawing up a plan of attack without a clear sense of the desired outcomes is an admission that we don't know enough about the target to know exactly where to aim.

The uncertainty of our authors is not theirs alone, and their skepticism about the results is healthy for the field. Unfortunately, the world of pretrial detention is still cast in some darkness regarding the nature of success and how to measure it. The problem has diverse manifestations: excessive (too frequent and/or too lengthy) pretrial problems, discriminatory application, flaws in the process used for detention and release decisions, and inadequate physical conditions are the most common. But how do we define these problems quantitatively? How much is too much of a lawful, if ostensibly rare, measure? What do you compare it to? Although some policy experts have begun to articulate better standards of measurement, for most human rights groups, researchers and lawmakers, there is little choice but to utilize a core indicator—the percentage of the overall “in custody” population awaiting trial<sup>6</sup>—that can be profoundly misleading for precisely the reasons our reformers suspected: it provides only a partial glimpse of a multifaceted picture.

In Mexico, to cite but one example, in the decade since 1995 the percentage of pretrial detainees among all inmates fell from 50 percent to 42

percent. This reduction took place despite a 75 percent increase, cited by Benjamin Naimark-Rowse and colleagues<sup>7</sup>, in the number of people detained awaiting trial, because the overall size of the prison population more than doubled in the same period.<sup>8</sup> Without contextualizing information, this indicator helps obscure the fact that Mexico has relied for decades on an inflexible legislative scheme, repeatedly toughened in the face of security fears, that renders perhaps two-thirds of all charged offenders ineligible for pretrial release.

So what might a measure of success in pretrial detention reform (or for that matter, a model of the problem) look like? What indicators would we look to, and which way would they be pointing (assuming that we are not limited to data that is typically recorded by governments and thus readily available)? To begin with, the numbers of people in detention (both before and after conviction) might each be compared to population size (and expressed in per capita terms) rather than comparing the two detainee groups to one another. In order to detect the possible effect of law enforcement activity, which might swing detainee populations up or down independently of how release or detention decisions are then made, those numbers might be also be compared to the number of arrests. Thus the rate at which suspects are held in detention might be expressed, for example, as two pretrial detainees per five arrests. (Care should be taken to control for other factors, such as high rates of juvenile or gang crimes, which,

as with “organized” crime generally, tend to receive higher rates of pretrial detention.) The median length of time someone spends in pretrial detention would also be a useful indicator. Tracking median times to disposition (a measure of the time it takes to resolve the case at the first instance level) would tell us if a significant speeding up of the judicial process was also at play and possibly a cause of a diminished pretrial detainee population.

Conviction rates, and a qualitative assessment of the process, from arrest through charging and arraignment (or its equivalents) and on to verdict, also could shed helpful light on the question of whether other changes in the way judges are handling cases might explain why the pretrial population may have appeared to shrink in comparison to the postjudgment pool. Of course, such studies of the diligence and fairness demonstrated by judges, prosecutors, and defense lawyers as the process unfolds would provide invaluable additional information on whether judges are actually changing the way they make pretrial release decisions, although the high volume of relevant incidents that we would want to evaluate might place some extraordinary demands on this sort of methodology. Thus, *prima facie* statistical evidence of a beneficial change without a corresponding cost might look like this: judges ordering pretrial detention at a slower rate,<sup>9</sup> while other statistics hold steady. Going back to Sparrow’s injunction, with numerous indicators and the desired trend lines identified, one can proceed to consider specific interventions.

Of course, this might lead reformers to unsettling conclusions: that the most helpful and feasible approach is something unanticipated, or (worse) not part of their repertory—or even that there are many more critical fronts to this campaign than they had previously considered. Confronting this may pose a profound challenge on several levels to some actors. Like the proverbial man with just a hammer, organizations tend to see most problems as nails—apparently tailor-made for just the tools they have at hand. Admit that the problem derives from unexpected and/or diverse sources and you are obligated to consider that multiple approaches may be in order. If resources are limited, and the reform agenda not politically popular within the mainstream, individual reform groups may be hard-pressed to recruit new staff or partners capable of filling gaps in capacity.

However daunting the challenge of tailoring the response to carefully measured symptoms, it does not imply obsolescence for any of the activities described. Better representation at the pretrial stage might help marshal facts that could make release more common; defense lawyers could be well served by trained visitors to holding cells who can interview detainees to develop relevant favorable facts; appropriate legislative changes could, if faithfully implemented, directly attack a tendency to detain too readily. From this perspective, the interventions described in this volume might be reframed as useful probes, an initial phase in a better-informed, possibly broader effort at

measurable, sustainable change.

The important step of looking laterally at other experiences, not just for other tools but for a broader perspective on the dynamics of reform, seems to be difficult to take, or at least not typical. None of our accounts mentioned efforts in other countries, although it is not entirely clear what this indicates. The Justice Initiative certainly perceives a gap in the literature, which this volume is intended to help address. Would forging links between reformers in different places be difficult because diverse experience is not viewed as a terribly relevant source of ideas? Or would fostering the practice of checking for counterparts and advice from abroad be fruitful?

In fact, the range of experience discussed here usefully cautions us to rethink the instinct to divide policy and politics into separate concerns. Missed opportunities to measure (and then trumpet) policy impact are actually a symptom of a failure to identify the political points that might bolster or sway various constituencies. Indeed, the closer one looks at the individual situations, the more evident it becomes that the line we attempt to draw actually marks a broad interface rather than a division. What South African reformers might have seen as a technical problem—the incompatibility of their new pretrial services software with the emergent systems being rolled out by the Department of Justice and the courts—also reflected, as Louise Ehlers suggests, a missed opportunity to understand and play to the motivations of agencies that had

just invested significant sums and precious time in their own information management. These agencies could have been a favorable audience for new information if it had been delivered in a way that enhanced, rather than competed with, their recent efforts.

Boiled down, the suggestion for advocates and reformers is to make the politics serve the policy and vice

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versa. Data (e.g., the high or hidden costs of detention, the incidence of disease and violence affecting detainees still innocent in the eyes of the law) and analysis (e.g., the vast disparities in pretrial decisions that correlate with illegitimate factors like race or poverty) can enhance the justifications for reform or counter the opposition platform. Promoting a politics of economic efficiency can not only reframe the debate away from the traditional polarities of “hard” versus “soft” on crime but also encourage greater scrutiny of the real impact of policies that have no empirical foundation. Attending to both politics and policy, and acknowledging their interdependence, at least ensures the right posture for success, as it guarantees that reformers will be oriented toward the greatest potential problems and opportunities.

How would our reformers respond to this suggestion? One response might be that it is too dangerous to attempt in a policy arena characterized by far more demagoguery than detail. The technocrat's definition of success may be sublime in its nuanced complexity, but for precisely that reason—its lack of simplification—is ridiculously uninspiring as a political objective. Russian code reformers who conducted outreach among implementing agencies, only to have their opponents seize on the resulting feedback as the basis for undermining the reforms, might say that their political opportunity was both too valuable and too fragile to expose it up to a real dialogue.<sup>10</sup> These are fair objections, and cannot be dispelled until someone has successfully piloted a synthetic approach and inspired others to follow (and validate) the way forward.

Is that feasible? The future challenge will lie in expanding the spectrum of “winning” issues. Only the account from the United States mentions the costs of incarceration, a potential trump card. To many, this will come as no surprise: in countries with high labor costs and arguably tougher rules on prison overcrowding, putting defendants in pretrial custody is more expensive than just about any alternative means of ensuring that defendants make it to trial without flight or further charges. Although some governments have actually invested in prisons as a down payment on a crude form of local economic development, jurisdictions with stagnant or sinking economies should be ripe for an examination of how overin-

carceration is depriving the public of resources (although ensuring that the savings are actually redeployed to useful ends is another daunting battle). Some advocates of detention reform in the United States have turned to exposing the ways in which officials have tried to hide the costs of prison construction through privatized financing and the financial risks to the governments (and taxpayers) that have pledged to make good on defaults.<sup>11</sup>

In many countries, the marginal cost of an additional detainee is considered negligible, as labor costs are low, little public money is spent on food or other items for the inmates, and overcrowding does not generally prompt the building of new facilities. Even in countries with lower fixed costs, however, estimates of more indirect expense—lost employment, heightened exposure to disease and/or violence, and other expenses incurred by inmate families to help maintain their detained relative—can begin to look significant. If we stop to consider, as Martin Schönleich suggests, the spread of infectious diseases such as tuberculosis and AIDS among prisoners and by them to the general population upon release,<sup>12</sup> the impact on families, business, the health care system, and the public coffers could dwarf other concerns about incarceration and soften resistance to reform.

In Mexico (with an officially estimated per capita prisoner cost of about one-fifth of that in the United States)<sup>13</sup> the actual calculated public savings as a result of a modest bail supervision project in one Mexican state have proven a powerful incentive

for a neighboring state government to explore proposals designed to help lower historically high levels of pretrial detention. A forthcoming study of indirect costs of incarceration in Mexico should add an important new dimension to the debate there.

Marshaling comparative experience—a rich source of data—has political as well as technical value. The United States’ deserved reputation as “addicted to incarceration” might enhance the political value of examples of alternative approaches tried here. Because successful initiatives are universally attractive, politicians will characteristically be interested to learn what previously undetected advantages may have impelled others to embrace such experiments.

In some cases a more give-and-take approach to politics might provide an alternative to “winning” the policy debate. The most successful of our examples here all incorporated some element of this approach. We have noted above the PAS’s *quid pro quo* with the Malawi Law Society and D. Alan Henry’s account of the search for efficiencies he could offer to implementing agencies in the United States in order to bring them on board. In fact, an important commonality across the five best-sustained initiatives was a workable arrangement with agencies having some operational control over the subject matter. Even Nigeria’s project organizers, who enjoyed strong political support at high levels of government, were quick to seek formal collaborations with the police and obtain agreements with them at the precinct level.<sup>14</sup> By contrast, the

Chilean and Russian accounts of legislative efforts suggest that the agreements among different factions were tenuous or illusory and withered quickly. The chief advocates of Russian reform were not able to find ways to avoid key changes through compromise and instead witnessed rollbacks that, according to Olga Schwartz, sent a crucial signal that the

There is much yet to be tried and learned.

legislature was once again favoring the prosecution—and detentions skyrocketed. (Ironically, some of Chile’s most influential reformers, lacking sufficient data to rebut the claims arising from the repeal factions, took a transactional approach in selling off parts of the pretrial detention reform in order to safeguard the larger re-engineering of Chilean criminal procedure.) South Africa’s pretrial services project, in many ways the brainchild of the justice minister, faltered because the frontline agencies were never properly incorporated and felt that the project’s primary currency—new information about cases and defendants—never came downstream to them in a usable form.

There are, of course, caveats. Even a battery of seemingly highly relevant statistics remains subject to multiple interpretations. Additionally, the public response to data can be unexpected. A 2002 survey of public attitudes in the United Kingdom regarding

the shockingly high cost of incarceration largely provoked calls to cut back on the prison “luxuries” that were presumed to be driving up expenditures.<sup>15</sup> Finally, political marriages of convenience can become, without prior warning, inconvenient for one or both parties—witness Putin’s divestment from the reform movement of 2002.

Reform advocates can help counter negative influences by working with different messages and making sure that they are timely. Case studies about individual successes with alternatives to detention can be powerful vehicles for public education and particularly useful in the wake of unfortunate incidents that stoke fears about the dangers of liberalized treatment. Success in politics, partisan operatives remind us, is about crafting the right messages for shifting audiences. Having good information—better, at least, than that proffered by oppo-

nents of reform—should be a distinct advantage in bringing together numerous interests and producing collaborative actions.

The ambiguities touched on here and highlighted throughout this volume suggest there is much yet to be tried and learned and that future efforts should embody a rigor and sophistication equal to the complexity and sensitivity of the task. Even if the relationship of the reform impulse to politics—defined as the processes and calculations that determine stakeholder decisions whether to promote and/or implement change—is inevitably characterized by tensions, it should not be ignored. Good information is one critical tool for mediating these tensions, while allowing advocates to marshal political support, define appropriate interventions, and develop accurate and effective measures of impact.

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### Notes

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1. Pretrial detainees generally form a subset of the jail population, which in turn can include defendants detained awaiting trial; defendants who have been convicted already but are detained for a violation of their probation while they await trial on another offense; transferees from other facilities who have not been permanently assigned; and convicts serving relatively short sentences for misdemeanor-level crimes. When one considers the ever-changing nature of the population due to the relatively short-term stays (compared to post-conviction sentences) it becomes more apparent why it is extremely difficult even to isolate the pretrial detainee population for measurement.

2. This formulation comes from Christopher Stone of the Kennedy School of Government.

3. Another, more positive account of the Russian reforms avoids mention of the counterreform that followed. Lauding the tactics of the reformers for achieving something while circumstances permitted, the author notes that a more deliberate, less opportunistic approach might not have yielded anything before the tide turned against reform. Matthew Spence, “The Complexity of Success in Russia” in Thomas Carothers, ed., *Promoting the Rule of Law Abroad* (Washington, D.C.: Carnegie Endowment for International Peace, 2006). It is clear however, that after initial significant decreases in pretrial detention, the numbers shot up dramatically after 2002. Statistics

from the Federal Enforcement Service actually indicate that the detention numbers were higher in 2005 than before the reform, although court data suggest they are still lower than prereform levels. See Olga Schwartz, “Ebb Tide: The Russian Reforms of 2001 and Their Reversal” on pp. 116-117 of this volume.

4. The project report provides statistics covering only the catchment area of the project.
5. Remarks at seminar, “Measuring Impact in Human Rights: Models for a Path Forward” (Cambridge Massachusetts: Carr Center for Human Rights, July 7, 2006).
6. See, for example, L. Bhansali and C. Biebesheimer, “Criminal Justice Reform in Latin America,” in Carothers, *Promoting the Rule of Law Abroad* (2006), 313–15. In a survey of results across Latin America, perhaps the world’s largest laboratory for criminal justice reforms, the authors draw upon figures from USAID, national governments, and UN and OAS-sponsored agencies mandated to study and compile data on criminal justice; for pretrial detention, this is the sole indicator cited. USAID’s technical guidance for its field personnel suggests that even this statistic represents a luxury, because outside Latin America many developing countries do not record much information about detainees. “Handbook of Human Rights and Governance Program Indicators” (Washington, D.C.: U.S. Agency for International Development, 1998), [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/pnacc390.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacc390.pdf).
7. See Benjamin Naimark-Rowse, et al., “Studies in Reform: Pretrial Detention Investments in Mexico, Ukraine, and Latvia” on pp. 152-171 of this volume.
8. In fact, as a proportion of the general population, pretrial detainees rose from 49 to 85 per 100,000 inhabitants in the decade after 1995.
9. In other words, fewer new pretrial detainees per arrest.
10. On the other end of the spectrum, Venegas and Vial point to an unusually high degree of consensus on pretrial detention reforms at the time Chile’s initial reforms were considered. This consensus resulted in there being virtually no debate on the issue, and reformers appeared unprepared for the fracturing of what they now view as an “unstable” coalition behind the reform. The consequent absence of crucial pretrial detention data to accurately gauge the impact of reform left advocates ill-positioned to stem the damage from the mushrooming partisan demagoguery about the new system’s “promoting criminal impunity.” For reformers there, a more disciplined approach to the technical aspects of policy might have been better politics.
11. Kevin Pranis, *Doing Borrowed Time: The High Cost of Back-door Prison Finance* (Brooklyn: Justice Strategies, 2006) (citing bond experts who warn that “[a] wave of private jail construction designed to spur economic development in the rural Southwest poses a growing risk to bondholders and the counties that stand behind the projects”).
12. Martin Schönleich, “The Scale and Consequences of Pretrial Detention around the World,” on pp. 11-13 of this volume.
13. A recent study commissioned by the Justice Initiative preliminarily put the total of direct and indirect marginal per diem costs in one state at about \$50 per prisoner.
14. Subsequent events have since proved the utility of this approach. Despite significant turnover among allies of the project, the reforms have survived and prospered.
15. “What do the public really feel about non-custodial penalties?” (London: Esmée Fairbairn Foundation, November 2002), [www.rethinking.org.uk/PDFs/Briefing%203%20-%20Attitudes%20to%20custodial%20sentences.pdf](http://www.rethinking.org.uk/PDFs/Briefing%203%20-%20Attitudes%20to%20custodial%20sentences.pdf).

# Justice Initiatives

The Open Society Justice Initiative, an operational program of the Open Society Institute (OSI), pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies worldwide. The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in the following priority areas: national criminal justice, international justice, freedom of information and expression, and equality and citizenship. Its offices are in Abuja, Budapest, and New York.

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