

Measures to Reduce Pretrial Detention



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EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

1. For the last two decades, the Inter-American Commission on Human Rights (hereinafter “the IACHR” or “the Commission”) has noted that the arbitrary and illegal application of pretrial detention is a chronic problem in the region. The IACHR recalls that for this regime to be compatible with international standards, pretrial detention must be based on consideration of the right to the presumption of innocence and must take into account the exceptional nature of this measure; moreover, it should be applied in keeping with the criteria of legality, necessity, and proportionality. The deprivation of liberty of the person accused should have a procedural aspect, and, accordingly, can only be based on its legitimate aims, namely to ensure that the accused will not obstruct the development of the procedure or elude the action of justice. Similarly, the IACHR recalls that the provisions that exclude the possibility of noncustodial measures in light of the seriousness of the act or the expected sentence are contrary to the applicable standards.
2. In its *Report on the Use of Pretrial Detention in the Americas*, issued December 30, 2013, the IACHR concluded that the non-exceptional use of pretrial detention is one of the most serious and widespread problems faced by the member States of the Organization of American States (OAS) when it comes to respecting and ensuring the rights of persons deprived of liberty. The excessive use of pretrial detention is one of the clearest signs of the failure of the administration of justice and constitutes an unacceptable structural problem in a democratic society that respects the right of every person to the presumption of innocence. In that report, the Commission incorporated a series of recommendations to the States – legislative, administrative, and judicial – to make the use of pretrial detention as a precautionary criminal justice measure compatible with their international obligations in respect of human rights.
3. The purpose of this study is to follow up on the 2013 report on pretrial detention by analyzing the main gains and challenges regarding the use of this measure by the States. The recommendations with respect to which the IACHR will focus on in its follow-up were selected based on considering that the efforts made to carry them out reflect with greater clarity the accomplishments and difficulties that have arisen in the use of pretrial detention in the region. In addition, the IACHR considers that analyzing the

follow-up to these recommendations is most useful for the States to better understand the matter, and, therefore, for them to have an additional instrument for adopting state policies aimed at reducing pretrial detention in the Americas. In particular, the recommendations examined in this follow-up report address the following: (a) general measures regarding state policies; (b) eradicating pretrial detention as an anticipated penalty or a tool for social control; (c) public defender services; (d) the use of alternatives to pretrial detention; and (e) celerity in the procedures and correcting the procedural delay. Considering that the IACHR's first report on pretrial attention was issued on December 30, 2013, the period covered in this analysis runs from January 2014 to April 2017.

4. This report also provides more detailed standards with respect to the adoption of specific measures that seek to reduce the use of pretrial detention in keeping with the relevant international standards, such as periodic review of the pretrial detention regime; actions to guarantee that hearings are held; hearings in prisons; oral hearings on the admissibility of pretrial detention; use of alternatives to pretrial detention; electronic monitoring mechanisms for criminal matters; restorative justice programs in criminal matters; and drug courts. The IACHR notes that this study places emphasis on applying alternative measures, which are procedural measures or options that allow the accused to be free while the criminal trial is ongoing. The report notes the need to incorporate a gender perspective, applying alternative measures for women, considering the discriminatory sociocultural patterns and stereotypes that expose women, in particular, to human rights violations. The report also aims to go forward in implementing a differentiated approach to address the specific needs for respect and guarantee of their rights of a variety of at-risk and vulnerable persons and groups in the context of deprivation of liberty, including persons of African descent, indigenous persons, LGBTI and older persons, and persons with disabilities.
5. Considering the purpose of this report, the following are the main issues addressed, each of which is covered in an individual chapter: (a) main gains and challenges, more than three years after the publication of the Report on the Use of Pretrial Detention in the Americas; (b) alternative measures to pretrial detention; (c) other measures aimed at reducing the use of pretrial detention; and (d) women and other persons belonging to groups at special risk. The principal contents of these chapters will be described briefly in the following paragraphs.
6. The IACHR further notes that this second report on pretrial detention is accompanied by a *Practical Guide of Measures to Reduce Pretrial Detention*, designed to be used by the authorities in charge of addressing the challenges inherent to reducing the excessive use of pretrial detention, and

which includes the main lines of action and public policies contemplated in this study. More specifically, this guide is aimed at serving as a frame of reference for the state to implement general policy measures, to make practical use of alternatives to pretrial detention, and to incorporate a gender perspective and a differentiated approach to the application of all those measures aimed at reducing pretrial detention.

- **General Measures**

7. More than three years after the publication of the *Report on the Use of Pretrial Detention in the Americas*, the Commission recognizes that the member States have made major efforts to implement the IACHR's recommendations, which reflect their commitment and understanding of the importance of using this regime in keeping with the relevant international standards. Nonetheless, despite such gains, the IACHR notes the persistence of serious challenges to pretrial detention becoming an exceptional measure, and it continues to be one of the main concerns with respect to the rights of persons deprived of liberty in the region. The following are among the main challenges the States face to reduce the use of this measure and to apply alternatives: (a) criminal justice policies that propose more incarceration as a solution to the problem of citizen insecurity, which translate into the existence of legislation and practices that accord priority to the use of pretrial detention and that restrict the possibility of adopting alternative measures; (b) prevalence of tough policies in the discourse of the high-level authorities to put an end to citizen insecurity through custodial measures, and in the consequent pressure from the media and public opinion in this regard; (c) the use of disciplinary measures to pressure or punish judicial authorities who order alternative measures; (d) inadequate public defender services; and (e) the lack of inter-institutional coordination among actors involved in the administration of justice.

8. On the legislative front, the Commission observes that various States in the region have adopted measures that represent major gains in terms of ensuring that the use pretrial detention is in keeping with international standards. Among these gains, the IACHR highlights the following: (a) reducing the terms of pretrial detention; (b) establishing procedures to expedite the processing of criminal cases; (c) imposing greater requirements for determining that it is appropriate to impose pretrial detention; and (d) establishing services that make it possible to evaluate procedural risks and to supervise precautionary measures. Despite those gains, the IACHR notes that in other respects the recent reforms have also included elements at odds with the exceptional nature of pretrial detention, mainly by implementing legal reforms and criminal justice policies that

propose more incarceration as the solution to citizen insecurity. Those legislative reforms translate mainly into an increase in the duration of pretrial detention; expanded use of pretrial detention beyond its precautionary logic; and establishing a list of crimes for which one cannot be released, and greater restrictions on the procedural mechanisms for release from detention.

9. The Commission expresses its concerns over the adoption of state measures that seek to punish drug-related conduct – specifically minor drug-related offenses, such as consumption and possession for personal use – and finds worrisome what appears to have been a notable increase in the number of persons deprived of liberty for drug-related criminal acts. In this context, the offenses related to drug use are characterized as “grave offenses” (*“delitos graves”*), and therefore, pretrial detention is applied automatically, and without the persons accused being able to benefit from alternatives to incarceration. The IACHR also reiterates its concern over the fact that drug users in the region are treated based on a logic of repression and criminalization instead of according them treatment from a public-health approach. The IACHR also values the efforts made by several States to address the problem related to the excessive use of pretrial detention imposed after guilty pleas or abbreviated trials. At the same time, the IACHR has information on the various due process violations that such procedures entail; these procedures are aimed at arbitrarily convicting the accused, in summary proceedings, without sufficient guarantees, in violation of the right to an adequate defense.
10. The IACHR observes that various States have adopted measures related to speedy process and correcting the procedural delay, both administrative and judicial, such as: review of the pretrial detention regime; holding hearings in prisons; and taking actions to ensure that hearings are held. In addition, efforts have been made related to holding prior hearing on the admissibility of pretrial detention, and applying alternative measures, mainly electronic monitoring mechanisms in criminal matters, restorative justice programs for criminal matters, and drug courts. In terms of the case-law, the IACHR points to decisions by several courts – from countries such as Argentina, Colombia, Peru, and the United States – that have represented progress towards reducing the use of pretrial detention.

- **Alternatives to Pretrial Detention**

11. The IACHR reiterates the importance of applying alternative measures to rationalize the use of pretrial detention, and thereby address overcrowding and bring its use into line with applicable international standards. The IACHR analyzes the considerable advantages that stem from their use, so as to: (a) avoid the community disintegration and stigmatization that stem

from the personal, family, and social consequences of pretrial detention; (b) reduce recidivism; and (c) make more efficient use of public resources. In addition, the IACHR reiterates that persons in pretrial detention find themselves at a procedural disadvantage with respect to those who can go into their criminal trial in liberty.

12. In recent years the IACHR has observed that several States – such as Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, the Dominican Republic, El Salvador, Ecuador, Guatemala, Jamaica, Mexico, Panama, Peru, and the United States – have taken actions aimed at using alternative measures to reduce the use of pretrial detention. In general, the types of measures whose implementation involved major efforts by the States in recent years, are: (a) electronic monitoring mechanisms in criminal matters, (b) restorative justice in criminal matters, and (c) drug treatment programs under judicial supervision.

- **Other Measures Aimed at Reducing the Use of Pretrial Detention**

13. As regards the regional issue of the long wait times before verdicts are handed down, the IACHR welcomes various actions adopted by several countries such as Bolivia, Canada, Colombia, Haiti, Panama, Paraguay, and the United States to accelerate proceedings and correct the procedural delay. Among these measures the IACHR notes the following: (a) periodic review of the situation of persons held in pretrial detention; (b) measures to guarantee that hearings are held; and (c) holding hearings in prisons. Among other measures, the IACHR analyzes the actions taken by the Bolivian State to establish hearings in prisons, which have had a positive impact in that more judicial hearings are being held.
14. Regarding pretrial detention hearings, , the IACHR highlights the implementation of the custody hearings (*audiências de custódia*) in Brazil, which constitute a mechanism adopted by the State to avoid unnecessary deprivation of liberty by promoting the use of alternatives to pretrial detention, and which have led to a reduction in its use.

- **Gender Perspective and a Differentiated Approach for Persons Belonging to Groups at Special Risk**

15. In general, the IACHR observes that the efforts made to incorporate a gender perspective and a differentiated approach with respect to certain persons belonging to groups at special risk include primarily: (a) reinforced protection in the context of deprivation of liberty and special measures to prevent human rights violations; and (b) priority application

of alternatives to pretrial detention, particularly with respect to house arrest and electronic monitoring in criminal matters.

16. In addressing the situation of women deprived of liberty, the IACHR urges the States to adopt diligent measures with a gender perspective that take into consideration the historical discrimination and gender stereotypes that have had a negative effect on women and adolescent females, and which have severely limited the exercise of their civil, political, economic, social, and cultural rights in contexts of deprivation of liberty. A gender perspective also means taking account of the special situation of the risk of violence in all its expressions, including physical, psychological, sexual, economic, obstetric, and spiritual, among others, as well as the fact that most such incidents end in impunity. That perspective also implies considering the specific risks faced by persons who have diverse or non-normative sexual orientations and gender identities and expressions, or whose bodies vary from the standard female or male body types. The States should also include an intersectional and intercultural perspective that takes into consideration the possible aggravation and frequency of human rights violations due to factors such as race, ethnicity, age, or economic position.
17. Considering that pretrial detention disproportionately affects certain persons belonging to groups at special risk, the States should adopt special measures with a differentiated approach with respect to persons of African descent, indigenous persons, LGBTI and older persons, and persons with disabilities. A differentiated approach means considering particular conditions of vulnerability and the factors that may increase the risk of exposure to acts of violence and discrimination in contexts of pretrial detention, such as sex, race, ethnicity age, sexual orientation, gender identity and expression, and disability. It is also important to consider the frequent intersectionality of the factors mentioned, which may accentuate the situation of risk of persons held in pretrial detention. Policies on pretrial detention with respect to persons belonging to groups at special risk should be geared to ensuring fully their safety when under this regime, and, considering the disproportionately serious impact stemming from prior confinement, to reducing subjection to pretrial detention by making priority use of alternative measures.

- **Conclusions and Recommendations**

18. The last part of the report presents the study's conclusions, and offers recommendations. The recommendations are focused on the following main areas: (a) general measures regarding state policies; (b) eradicating pretrial detention as an anticipated sentence; (c) public defender services; (d) independence of judicial officers; (e) alternatives to pretrial detention;

(f) electronic monitoring in criminal matters; (g) restorative justice programs in criminal matters; (h) drug treatment programs under judicial supervision; (i) measures related to speedy process and correcting the procedural delay; (j) pretrial detention hearings; and (k) women and other persons belonging to groups at special risk. These recommendations are geared to providing the States more specific tools for making rational use of pretrial detention and bringing its implementation into line with their relevant international obligations.

19. The Commission and its Rapporteurship on the Rights of Persons Deprived of Liberty will continue strictly and steadily monitoring the use of pretrial detention in the Americas, paying special attention to the measures adopted by the States of region to effectively implement the recommendations made in this report. In this regard, the IACHR urges the States, civil society organizations, and specialists in the area to use its different mechanisms to continue providing the information they consider relevant to the implementation of these recommendations. In addition, the Commission notes the importance of the States establishing the mechanisms necessary for guaranteeing the involvement of civil society in implementing the measures aimed at reducing pretrial detention; this will make it possible for these processes to be comprehensive, participatory, and inclusive, and thereby provide a better response. Both the Rapporteurship on the Rights of Persons Deprived of Liberty and the Inter-American Commission emphasize and reiterate their disposition to cooperate with the States to address the challenges to reducing the use of pretrial detention in the Americas that have been identified, and, accordingly, to apply this measure on an exceptional basis, as is required, given its nature.

CHAPTER 1
INTRODUCTION

INTRODUCTION

A. *Background, Scope, and Purpose of the Report*

20. In its *Report on the Use of Pretrial Detention in the Americas* the Commission concluded that that excessive and non-exceptional use of pretrial detention is one of the most serious and widespread problems that the OAS member States face when it comes to respecting and ensuring the rights of persons deprived of liberty. It noted that the excessive or abusive use of this measure is one of the clearest signs of the failure of the administration of justice, and constitutes a situation that is inadmissible in a democratic society that respects the right of every person to the presumption of innocence.¹ In addition, it established that the non-exceptional and prolonged use of pretrial detention has a direct impact on the increase of the prison population, and, therefore, on the negative consequences of overcrowding.²
21. The Commission also indicated that persons held in pretrial detention suffer major personal stress due to the loss of income and the forced separation from their families and communities. Moreover, they suffer the psychological and emotional impact of the very fact of being deprived of liberty without having been convicted, and in general they are exposed to the milieu of violence, corruption, insalubrious conditions, and inhuman conditions characteristic of the region's prisons. Persons held in pretrial detention are also at a procedural disadvantage compared to those persons who face a criminal proceeding in liberty. In addition, the longer the pretrial detention, the greater the risks of the accused becoming disconnected from the community, and of recidivism.³ Accordingly, the

¹ IACHR, *Report on the Use of Pretrial Detention in the Americas*, OEA/Ser.L/V/II., Doc. 46/13, December 30, 2013 (hereinafter "*Report on the Use of Pretrial Detention in the Americas*"), para. 317.

² Among these consequences, the IACHR highlighted the following in its report: increased levels of violence, impossibility of having a "minimum of privacy," difficulty accessing basic services, increased spread of diseases, corruption, impairment of prisoners' contact with their families, serious problems in prison management, and the impossibility of classifying prisoners by categories. IACHR, *Report on the Use of Pretrial Detention in the Americas*, paras. 289 & 295.

³ Christopher T. Lowenkamp *et al.*, *The Hidden Costs of Pretrial Detention*, LIAF, November 2013, p. 4. See also: Clear, Frost, et al., "[Predicting Crime through Incarceration: The Impact of Rates of Prison Cycling On Rates of Crime in Communities](#)," National Criminal Justice Reference Service, 2014; Cullen, Jonson, and Nagin, "Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science," *The Prison Journal*, July 19,

IACHR reiterates the special seriousness of this measure and the pressing need to bring its use into line with the relevant international standards.⁴

22. More than three years after the publication of its first report on pretrial detention the Commission recognizes that the States have made major efforts to comply with its recommendations, and, consequently, to reduce the use of pretrial detention. Nonetheless, the IACHR notes that there are still serious challenges that make it such that the measure is used generally and excessively, and not in the exceptional manner that is required by its very nature. This is clearly reflected in the large number of persons currently held in pretrial detention in the Americas, who account, on average, for 36.3 percent of the entire prison population in the region.⁵ Nonetheless, in certain countries the figure is much higher. The IACHR received information that indicates that as of 2014 this population has increased in countries such as Argentina⁶, Colombia⁷, El Salvador⁸, Guatemala⁹, Honduras¹⁰, Mexico¹¹, Paraguay¹², and Peru.¹³ In this respect,

2011; Bench and Allen; “Investigating the Stigma of Prison Classification: An Experimental Design, *Prison Journal*, Volume: 83 Issue: 4, December 2003; Chen and Shapiro, “Does Prison Harden Inmates? A Discontinuity-based Approach,” Cowles Foundation Discussion Paper No. 1450, January 2004. Cited in: Inter-American Drug Abuse Control Commission (CICAD/OAS), Technical Report on Alternatives to Incarceration for Drug-related offenses, 2015.

⁴ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 9.

⁵ Institute for Criminal Policy Research and University of Birkbeck, World Prison Brief - World Pre-trial/Remand Imprisonment List, 3rd edition, November 30, 2016, p. 2. Likewise, in this source, statistics on pretrial detention in the region can be found, in particular those related to: a) number of persons in pretrial detention; b) percentage of total prison population; c) pretrial population rate per 100k of national population; and d) comparative data by year and age from 2000 to date.

⁶ As of 2014, the population put on trial has increased notably, from 5,673 persons in 2013 to 6,329 persons in 2015. Defensoría General de la Nación, Argentina. Response to the Questionnaire, sent on June 22, 2016. Annex I “Pretrial Detention: Analysis of case-law and statistical information,” and Office of the Federal Ombudsperson for the Rights of Prisoners, Argentina. Response to the Questionnaire, sent on May 22, 2016.

⁷ According to figures from the national prison authority Instituto Nacional Penitenciario y Carcelario (INPEC), in 2013 a total of 37,052 persons were being held in pretrial detention, and as of October 2015 this figure increased to a total of 42,753 persons. Colombia, Note from the Permanent Mission of Colombia to the OAS, S-GAIIID-16-056191 of June 15, 2016. Response to the Questionnaire; and Colombia, Note S-GAIIID-16-109909 of December 2, 2016, received on December 16, 2016. Observations on Chapter V of the 2016 Annual Report.

⁸ In 2013, 13,587 persons were being held in pretrial detention; and in 2015, it increased 19,481. El Salvador, Note from the Permanent Mission of El Salvador to the OAS, OEA-055/2016 of May 25, 2016. Response to the Questionnaire.

⁹ National Mechanism Office for the Prevention of Torture, Guatemala. Response sent on May 16, 2016.

¹⁰ Honduras noted that since 2013 pretrial detention has increased “since there is no discrimination whatsoever in terms of [its] application.” Honduras. Note from the Secretariat for Foreign Affairs and International Cooperation – General Bureau for Foreign Policy, No. 2174-DGPE/DPM-16 of May 20, 2016. Response to the Questionnaire.

¹¹ In 2013 persons held in pretrial detention accounted for 50% of the prison population, and in late 2015, 55%. Mexico. Note from the Permanent Mission to the OAS, No. Oea-01285 of June 1, 2016. Response to the Questionnaire.

¹² In 2013, 72% of the total prison population was being held in pretrial detention; this figure climbed to 77% in 2015. Information from the Ministry of Justice, Paraguay. Information sent to the IACHR, June 22, 2016.

the Commission reiterates that having a large percentage of the prison population in pretrial detention is “a symptomatic and troubling fact ... which should be addressed with the greatest attention and seriousness by the respective States.”¹⁴

23. The Commission considers that the main challenges the States face to reducing the use of pretrial detention and embracing alternatives include: (a) criminal justice policies that propose greater levels of incarceration to provide citizen security, which translate into legislation and practices that accord priority to pretrial detention and that limit the possibility of applying non-custodial measures; (b) prevalence of tough policies in the discourse of the high-level authorities to put an end to citizen insecurity through custodial measures, and in the consequent pressure from the media and public opinion in this regard; (c) the use of disciplinary oversight mechanisms to pressure or punish judicial authorities who order alternative measures; (d) inadequate public defender services; and (e) the lack of inter-institutional coordination among actors in the administration of justice.
24. In this context, the purpose of this study is to follow up on the 2013 report on pretrial detention by analyzing the main gains and challenges related to the use of this measure by the States; in addition to offering more detailed standards regarding the specific measures aimed at reducing the use of pretrial detention in keeping with the relevant international standards. This report places emphasis on the application of non-custodial measures, and on incorporating a special approach to protection with respect to women and other persons belonging to groups at special risk. Considering that this study is a follow-up report, the IACHR analyzes the initiatives adopted by various States from January 2014 to April 2017 that have represented major gains, and that could offer a response for addressing challenges in the region to reducing the use of pretrial detention.
25. The IACHR notes that the selection of the recommendations it will follow up on was based on the efforts made to carry them out clearly reflecting both the gains and challenges in addressing the use of pretrial detention in the region. The IACHR also considers that the analysis of the follow-up to these recommendations is most useful for the States to have state policies focused on reducing pretrial detention, and considers that said analysis may contribute to a better understanding of the phenomenon and

¹³ According to the National Prison Institute (Instituto Nacional Penitenciario), in 2013 a total of 36,670 persons were held in pretrial detention, and in 2015, a total of 39,439 persons. Peru, Note from the Permanent Mission of Peru to the OAS, 7-5-M/124 of July 7, 2016. Response to the Questionnaire.

¹⁴ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 295.

consequent actions aimed at reducing its use. Accordingly, this report will focus on following up on the following types of recommendations:

General State Policy Measures¹⁵

- States should adopt the judicial, legislative, administrative and other measures required to correct the excessive use of pretrial detention, ensuring that this measure is used exceptionally and is governed by the principles of legality, presumption of innocence, necessity and proportionality....

Eradicating Pretrial Detention as a Tool of Social Control or as Anticipated Punishment¹⁶

- Step up efforts and muster the political will necessary to eradicate the use of pretrial detention as a tool of social control or a form of anticipated sentence and to ensure that it is used as a truly exceptional measure....
- [...]edirect public policy to make the exceptional nature of pretrial detention one of the centerpieces of policies on crime and citizen security, and avoid hardline criminal justice systems that end up imprisoning individuals during criminal proceedings in response to demands for citizen security.
- Study the possibility of increasing the crimes or offenses for which pretrial detention cannot be legally applied...
- [N]ot imposing greater restrictions on the mechanisms and procedural possibilities for the release of detainees awaiting trial. These actions would contribute to the use of this measure being truly exceptional and in accordance with its precautionary nature.

Public Defender Services¹⁷

- An attorney trusted by the detainee or, alternatively, an official public defender, shall be present in the proceeding regarding any precautionary measure. This right shall be notified with sufficient time and in a language that the detainee understands, so that he or she can prepare his or her

¹⁵ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendation A “General recommendations pertaining to State policy.”

¹⁶ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendations A “General recommendations pertaining to State policy” and C “Legal framework and application of pretrial detention”.

¹⁷ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendation E “Legal Defense.”

defense adequately. To that end, the detainee shall be notified with sufficient time of the elements that will be used to request the precautionary measures....

- Strengthen the systems of public defenders (or legal defense that is tendered, if such is the case) by devoting priority attention to the quality and coverage of the service, so that defenders can render prompt and effective service, from the moment of police apprehension, aimed at protecting the fundamental rights of every person suspected of or formally charged with the commission of a crime.
- Member States shall provide in their domestic legislation for the functional, administrative and financial autonomy of the public defenders' system, seeking the functional equivalency of the prosecutors' office, and the job stability of public defenders. The public defenders' office should have the same institutional capacity to manage proceedings as the prosecutor's office.

Use of Alternatives to Pretrial Detention¹⁸

- [...U]se pretrial detention as an eminently exceptional measure and to opt instead for alternative measures whenever possible....
- [...P]roperly regulate the use and application of these alternative measures; to guarantee the resources needed to make them operational and available to as many people as possible; and to make a rational use of such measures, taking into consideration their purpose and effectiveness, according to the characteristics of each case.
- [...T]he application of the following measures should be considered....¹⁹ The judge should privilege the less restrictive measure adequate to prevent the flight risk or the hampering of the proceedings.

¹⁸ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendation B "Application of other precautionary measures different from pretrial detention."

¹⁹ In particular, the IACHR referred to the following ones: (a) obtain the defendant's commitment to appear for the proceedings and not obstruct the investigation; (b) the defendant's obligation to submit to the custody or care of a specified person or institution, under stipulated conditions; (c) the obligation to make periodic appearances before the judge or the authority the judge designates; (d) a restriction on any travel beyond the boundaries set by the court; (e) withholding travel documents; (f) an order for the defendant's immediate eviction from the family home in cases involving domestic violence and when the victim lives with the defendant; (g) a warranty, bond or security of sufficient economic value posted by the interested party or a third party; (h) surveillance of the defendant by means of an electronic tracking device or a positioning device that determines his or her physical location; (i) arrest either in his/her own or another person's house, with no surveillance or with the surveillance that the court orders; or (j) pretrial detention in the event that the previous measures were not sufficient to serve the intended purposes. IACHR, *Report on*

- While failure to abide by the alternative measures may carry penalties, this failure should not constitute automatic justification to impose pretrial detention....

Speedy Process and Correcting the Procedural Delay²⁰

- Adopt the necessary measures to ensure that detainees are brought to trial without undue delay. In this regard, the IACHR recommends that member States give priority to those criminal proceedings in which persons are being held in pretrial detention. Ensure that the periods of pretrial detention are strictly within the limits allowed by law.
 - Urgently adopt the measures needed to correct the procedural delay and reverse the high percentage of persons deprived of liberty without a final conviction. One of these measures should be the sufficient allocation of financial resources.
 - The decision to order pretrial detention will be made in an oral hearing in which all parties participate, including the victim(s), thereby guaranteeing the principles of *audi alteram partem* and procedural immediacy, and the right to a public and rapid proceeding. Under certain circumstances, this requirement may be satisfied using appropriate video technology.
 - Establish supervision mechanisms through which the situation of persons in pretrial detention is periodically reviewed to ensure that criminal proceedings move diligently and that any persons in pretrial detention who are not tried and convicted within a reasonable time are released until the proceedings conclude. The responsibility for ensuring that these periodic reviews are done shall rest with the prosecuting authority in charge of the case or the competent investigating judicial authority. When pretrial detention is no longer necessary, it must be lifted immediately.
26. Finally, the IACHR notes that this second report on pretrial detention is accompanied by a “Practical Guide to Reduce Pretrial Detention,” geared to the authorities in charge of addressing the challenges inherent in reducing the excessive use of pretrial detention, and including the main lines of action and public policy considered in this study. This guide seeks to provide a frame of reference for implementing general measures regarding state policies; the practical use of alternatives to pretrial detention; and the

the Use of Pretrial Detention in the Americas, para. 326. Recommendation B “Application of other precautionary measures different from pretrial detention.”

²⁰ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendation C “Legal framework and application of pretrial detention.”

incorporation of gender and differentiated approaches when it comes to applying all the measures aimed at reducing pretrial detention.

B. Structure

27. Mindful of the purpose of this report, it is divided into the following chapters:

- I. Introduction
- II. Main gains and challenges: More than three years after publication of the *Report on the Use of Pretrial Detention in the Americas*
- III. Alternatives to pretrial detention
- IV. Other measures to reduce the use of pretrial detention
- V. Women and other persons belonging to groups at special risk

28. In Chapter II, “Main gains and challenges: More than three years after publication of the Report on the Use of Pretrial Detention in the Americas,” as its title indicates, the IACHR analyzes the main accomplishments and difficulties that have arisen in carrying out the recommendations that are analyzed in this report, especially those on general measures related to state policy; eradicating pretrial detention as anticipated punishment and as a tool of social control; and public defender services. Among the general measures, this report follows up on the actions taken by the States in the legislative, administrative, and judicial spheres. In particular, the IACHR analyzes the implications of the use of guilty pleas or abbreviated trials, which have been promoted as a response to address excessive and prolonged pretrial detention, as well as the implementation of reforms and criminal justice policies that propose greater levels of incarceration as a solution to criminal insecurity, thereby hindering initiatives aimed at rationalizing the use of pretrial detention. The IACHR notes with concern, for example, that all drug-related conduct is treated as “serious crimes” with no distinction whatsoever, thereby ignoring the principles on which the use of pretrial detention is based, especially proportionality.

29. In Chapter III, “Alternatives to pretrial detention,” the Commission goes further into the standards related to the general obligations to apply them, such as the determination of the measures, supervision of their implementation, and breach of the obligations imposed in the context of applying them; and analyzes the advantages of applying these measures compared to pretrial detention. The IACHR also monitors the legislative and administrative gains made in applying these measures, and the efforts made to supervise their application and to regulate the actions to be taken in case they are violated. The Commission addresses electronic tracking

options, restorative justice in criminal matters, and drug treatment programs under judicial supervision. The foregoing matters are examined considering that based on the research done for this study, the IACHR identified these as the measures that the States of the region have done the most to implement.

30. In Chapter IV, “Other measures aimed at reducing the use of pretrial detention,” the IACHR follows up on the recommendations related to holding preliminary hearings to determine whether pretrial detention is in order, and on the adoption of measures to speed up judicial procedures and to correct the procedural delay, such as reviewing pretrial detention, and holding hearings in prisons. The IACHR presents an analysis of the main challenges faced as well as the practices that the States have adopted to implement those measures; and it develops applicable standards. Considering the importance of two practices adopted, the IACHR delves further into the workings of the custody hearings (*audiências de custódia*) in Brazil and of the special “judicial days” (*las jornadas judiciales*) in Bolivia.
31. In Chapter V, “Women and other persons belonging to groups at special risk,” the IACHR analyzes the special dimension of the incarceration of women and other persons belonging to groups at special risk. With respect to women deprived of liberty, the IACHR examines the disproportionate negative impacts they face, as well as the severe consequences of their incarceration when these women are responsible for raising their children, are heads of their families, and have persons under their care. The Commission also develops, considering a gender perspective and with a differentiated approach, the measures adopted by the States related to women and other persons belonging to groups at special risk who are deprived of liberty. Such measures have focused mainly on: (a) reinforced protection in the context of deprivation of liberty and special measures to prevent human rights violations; and (b) the priority application of alternatives to pretrial detention, especially with respect to house arrest and electronic monitoring mechanisms for criminal matters.
32. With respect to this chapter the IACHR notes that the analysis of the particular impacts of pretrial detention with respect to children and adolescents is not included in the scope of this study. This is because as of the adoption of this report, that situation, as well as the state measures to respond to it, are to be followed up on by the IACHR’s Rapporteurship on the Rights of the Child, in the context of carrying out recommendations of the Report on Juvenile Justice and Human Rights in the Americas, issued by

the IACHR in 2011²¹, and other initiatives, such as issuing the Report on Children and Adolescents in the Adult Prison System in the United States.

33. The last part of the report presents the conclusions of the study, and offers pertinent recommendations. The frame of reference for the conclusions and recommendations is constituted by the instruments of the inter-American human rights system, and its case-law, as well as the international corpus juris in respect of the human rights of persons deprived of liberty. The recommendations are presented in 11 main areas, with a view to giving the States more detailed tools with which to make rational use of pretrial detention and to bring its use into line with the states' relevant international obligations.

C. Methodology

34. The information presented in this report is based on primary and secondary sources. As regards the primary sources, the Inter-American Commission has received information from the States, civil society, and specialists in the area through the following activities carried out specifically to prepare this report: (a) three working visits; (b) colloquia with authorities and other specialists; (c) sending out and publishing questionnaires; (d) two regional consultations with experts; and (e) the public hearing "Measures to reduce pretrial detention in the Americas," called by the IACHR on its own initiative during its 157th Regular Period of Sessions.²²
35. With respect to the working visits, the Rapporteur on the Rights of Persons Deprived of Liberty, Commissioner James Cavallaro, accompanied by staff of the Executive Secretariat, visited the States of Costa Rica (February 15 to

²¹ IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II. Doc. 78, July 13, 2011.

²² IACHR, *Public hearing "Measures to reduce pretrial detention in the Americas,"* 157th Regular Period of Sessions, April 5, 2016. The organizations that participated in this hearing: Legal Assistance Division of the Universidade Federal de Minas Gerais (DAJ/UFMG); Human Rights Clinic of the UFMG (CdH/UFMG); Grupo de Estudos em Direito Internacional dos Direitos Humanos (GEDI-DH/UFMG); Instituto Brasileiro de Ciências Criminais; Instituto dos Advogados; State Human Rights Council; Centro Acadêmico Afonso Pena; Comissão de Direitos Humanos OAB/MG; Asistencia Legal por los Derechos Humanos; Fundación CONSTRUIR; Centro de Estudios Legales y Sociales (CELS); Due Process of Law Foundation (DPLF); National Mechanism for the Prevention of Torture, Guatemala; Colectivo por una Política Integral hacia las Drogas (CUPIHD); Intercambios Puerto Rico; Open Society Foundations; Instituto de Estudios Comparados en Ciencias Penales de Guatemala (ICCPG); Asociación Costarricense para el Estudio e Intervención en Drogas (ACEID), Costa Rica; El Centro de Estudios de Derecho, Justicia y Sociedad (DeJusticia), Colombia; Equis Justicia para las Mujeres, Mexico; Corporación Humanas, Chile; Corporación Humanas, Colombia; Instituto de Estudios Legales y Sociales del Uruguay (IELSUR); National Secretariat on Drugs/National Drug Board/Presidency, Oriental Republic of Uruguay; Office of the Federal Ombudsperson for the Rights of Prisoners (PPN), Argentina, and Washington Office on Latin America (WOLA), United States of America.

18, 2016); Argentina (September 13 to 17, 2016); and Peru (February 24, 2017). The main purpose of these visits was to analyze the main gains made and challenges still faced by the respective states to reduce the use of pretrial detention. The Commission expresses its gratitude to the States of Argentina, Costa Rica, and Peru for their valuable collaboration and the facilities offered to make the visits possible. Similarly, the Commission is grateful for the information provided by the respective authorities, and by civil society organizations and specialists from the three countries. In the context of each visit the IACHR notes the holding of colloquia to analyze and discuss the main challenges and gains with respect to adopting non-custodial measures. These forums included the presence of the three branches of government, in addition to representatives of civil society and academia.

36. On April 25, 2016, the IACHR published a questionnaire that was sent to all the member states of the OAS and to more than 1,000 civil society contacts and human rights specialists.²³ The States that answered the questionnaire were: Bolivia, Brazil, Colombia, Ecuador, El Salvador, Honduras, Jamaica, Mexico, Panama, and Peru.²⁴ In addition, the following autonomous entities sent in their own responses: Office of the Federal Public Defender Service (Defensoría General de la Nación), Argentina; Office of the Federal Ombudsperson for the Rights of Prisoners (Office of the Federal Ombudsperson for the Rights of Prisoners), Argentina; Office of the Human Rights Ombudsperson, Costa Rica; National Mechanism Office for the Prevention of Torture, Guatemala; and National Commission on Human Rights, Mexico.²⁵ The civil society organizations that sent in their responses to the questionnaire for consultation were the following: Avocats sans frontières, Canada; Centro de Estudios Legales y Sociales (CELS),

²³ IACHR, [Consultation Questionnaire on Measures Designed to Reduce the Use of Pretrial Detention](#).

²⁴ Response from Brazil. Note from the Permanent Mission of Brazil to the OAS, July 28, 2016; Response from Bolivia. Note from the Permanent Mission of Bolivia to the OAS mpb-oea-nv117-16, June 28, 2016; Response from Colombia. Note from the Permanent Mission of Colombia to the OAS, S-GAIIID-16-056191, June 15, 2016; Response from Ecuador. Note from the Permanent Mission of Ecuador to the OAS, No. 4-2-142-2016, of June 14, 2016; Response from El Salvador. Note from the Permanent Mission of El Salvador to the OAS, OEA-055/2016, May 25, 2016; Response from Honduras. Note from the Secretariat of Foreign Affairs and International Cooperation, General Bureau for Foreign Policy, No. 2174-DGPE/DPM-16, May 20, 2016; Response from Jamaica. Note from the Permanent Mission of Jamaica to the OAS, No. 6/50/84, June 3, 2016; Response from Mexico. Note from the Permanent Mission of Mexico to the OAS, No. Oea-01285, June 1, 2016; Response of Panama, Note from the Ministry of Foreign Affairs, A. J.D.H. MIRE-2016-26215, May 20, 2016, and Response from Peru, Note from the Permanent Representative of Peru to the OAS, 7-5-M/124, July 7, 2016.

²⁵ Response from the federal public defender service (Defensoría General de la Nación), Argentina, sent to the IACHR June 22, 2016; Response from the Office of the Federal Ombudsperson for the Rights of Prisoners, Argentina, sent to the IACHR May 22, 2016; Response from Office of the Human Rights Ombudsperson of the Republic, Costa Rica, sent to the IACHR June 16, 2016; Response from National Mechanism Office for the Prevention of Torture, Guatemala, sent to the IACHR May 16, 2016; and Response from the National Commission on Human Rights, Mexico, sent to the IACHR May 23, 2015.

Argentina; Comité de Derechos Humanos de Colima, Mexico; Corporación Defensoría Militar, Colombia; Fundación Biopsicosis, Colombia; Instituto de Justicia Procesal Penal and Documenta, Mexico; Intercambios, Puerto Rico; Instituto de Defensa Legal (IDL), Peru; and the Observatorio Internacional de Prisiones, Argentina.²⁶ In addition, the Prisons Group at the Law School of the Universidad de los Andes, Colombia, and Víctor Mosquera Marín, an academic from Colombia, sent in their responses to the questionnaire.²⁷ The Commission notes that the information submitted in the form of responses to the questionnaire proved invaluable for preparing this study, and it is grateful for the contributions of all who participated.

37. The IACHR also held two meetings of experts in criminal procedure reform and human rights. The first, held May 20, 2016, in Washington, D.C., was aimed at receiving specialized technical information on good practices in the use of pretrial detention. At the second meeting, held March 20, 2017, during the 161st Regular Period of Sessions of the IACHR, the Rapporteurship consulted with specialists on the conclusions and recommendations of this report.
38. In addition, in preparing this report the IACHR considered information received in other public hearings and working meetings held before the Commission, and through the system of cases and precautionary measures, and in other related activities, such as requests for information. Similarly, it considered the documentation produced as a result of the visits of the Rapporteurship to Honduras (in the context of the onsite visit, December 1 to 5, 2013); Mexico (September 17 to 19, 2014, and September 22 to 24, 2015); Panama (June 17 to 19, 2015); Paraguay (August 25 to 29, 2014), and Peru (May 26 to 29, 2014, November 17 to 18, 2015, and May 5 to 12, 2017).
39. As for secondary sources, the report took account of the following: (a) official public information obtained from state sources; (b) reports, resolutions, and pronouncements of intergovernmental organizations; (c)

²⁶ Response from *Avocats sans frontières*, Canada, sent to the IACHR May 31, 2016; Response from the Centro de Estudios Legales y Sociales (CELS), Argentina, sent to the IACHR July 13, 2016; Response from the Comité de Derechos Humanos of Colima, Mexico, sent to the IACHR May 21, 2016; Response from the Corporación Defensoría Militar, Colombia, sent to the IACHR May 22, 2016; Response from Fundación Biopsicosis, Colombia, sent to the IACHR June 24, 2016; Response from the Instituto de Justicia Procesal Penal and Documenta, Mexico, sent to the IACHR May 23, 2016; Response from Intercambios Puerto Rico, sent to the IACHR May 23, 2016; Response from Instituto de Defensa Legal (IDL), Peru, sent to the IACHR May 18, 2016; and Response from the Observatorio Internacional de Prisiones of Argentina, sent to the IACHR May 25, 2016.

²⁷ Response from the Prisons Group at the Law School, Universidad de los Andes, Colombia, sent to the IACHR August 2, 2016, and Response from Víctor Mosquera Marín, Candidate for Doctoral Degree in Public International Law, Colombia, sent to the IACHR May 22, 2016.

studies by nongovernmental organizations, both national and international; (d) academic research; and (e) articles in the press.

40. The Commission values and recognizes, in particular, the outstanding work of Commissioner James Cavallaro, Rapporteur for the Rights of Persons Deprived of Liberty, in directing this report, as well as in carrying out the activities performed to document it. The Commission would also like to thank the Stanford Human Rights Center at Stanford University – directed by Commissioner Cavallaro – for its important collaboration in the research and analysis of good practices for reducing the use of pretrial detention, mainly in the States of Bolivia and Brazil. The Commission also recognizes the valuable support provided by Coletta Youngers, Senior Fellow at the Washington Office on Latin America (WOLA), which made it possible to strengthen its work and perspective related to drug courts; and finally, the Commission is grateful for the research input provided by the American University Washington College of Law, and its Center for Human Rights and Humanitarian Law’s Impact Litigation Project.
41. The production of this report was made possible thanks to the valuable financial support of the Government of Spain.

CHAPTER 2
MAIN GAINS AND CHALLENGES:
MORE THAN THREE YEARS
AFTER THE ISSUANCE OF THE
REPORT ON THE USE OF
PRETRIAL DETENTION IN THE
AMERICAS

MAIN GAINS AND CHALLENGES: MORE THAN THREE YEARS AFTER THE ISSUANCE OF THE REPORT ON THE USE OF PRETRIAL DETENTION IN THE AMERICAS

42. In this chapter, the IACHR analyzes the main accomplishments and difficulties in implementing the recommendations analyzed in this report, especially those related to general state policy measures; eradicating pretrial detention as anticipated punishment or a tool of social control; and public defense. Among the general measures, there is follow-up of the actions taken by the States in the legislative, administrative, and judicial arenas. The IACHR analyzes the implications of the use of guilty pleas or abbreviated trials in the region, which have been promoted to address the problem of the excessive use of pretrial detention, as well as the reforms and criminal justice policies that propose high levels of incarceration as a solution to citizen insecurity.

A. General Measures in Relation to State Policies

43. In its *Report on the Use of Pretrial Detention in the Americas*, the IACHR stated: “States should adopt the judicial, legislative, administrative and other measures required to correct the excessive use of pretrial detention, ensuring that this measure is used exceptionally and is governed by the principles of legality, presumption of innocence, necessary and proportionality....”²⁸ In order to get the States to have recourse to the deprivation of liberty only when it is essential to satisfy a pressing social need, in a manner proportionate thereto, the measures to be adopted should include, among others: (a) legislative and institutional reforms necessary for ensuring more rational use of pretrial detention, and that such a measure only be turned to on an exceptional basis; (b) observance

²⁸ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendation A “General recommendations pertaining to State policy.”

of the maximum lawful time periods for keeping persons in pretrial detention; and (c) promoting the use of other precautionary measures.²⁹

44. As developed throughout this study, the States have adopted, at the various levels of government, various and numerous measures aimed at reducing the use of pretrial detention in the region, and that reflect the States' commitment and understanding with respect to the importance of using this regime in keeping with relevant international standards. The IACHR urges the States to work on the adequate implementation of these measures, and reiterates that the policies aimed at making rational use of incarceration, and accordingly of pretrial detention, should be assumed as a priority requiring the attention of all the branches of government³⁰, and should have an adequate legal framework, a sufficient budget, and institutional integration.³¹

45. The IACHR urges the States, in adopting these recent measures, as well as the actions focused on following up and monitoring their implementation, to consider the applicable human rights standards, and to include: a) perspective accounting for gender; b) differentiated approach with respect to race, ethnicity, age, sexual orientation, gender identity and expression, disability, interculturality, intersectionality; and c) special protection for children and adolescents. The effective application and evaluation of the measures aimed at reducing pretrial detention requires that the States promote an inter-institutional dialogue and debate based on the relevant international standards and differentiated approaches with respect to different persons belonging to groups at special risk, and that seeks mainly to establish clear strategies for collaboration. In designing such policies, the IACHR recommends that the States involve civil society to ensure that their implementation is comprehensive, participatory, and inclusive. The States should also put mechanisms in place that enable persons deprived of liberty and persons who have been released from prison to participate actively in the design, implementation, and even evaluation of the measures. The Commission notes the importance of the persons who are the beneficiaries of state policies being treated as the holders of rights who can participate actively in decision-making on issues that affect them, with a capacity and opportunity to claim protection for their rights and accountability by the respective public officials.

²⁹ IACHR, *Report on the Use of Pretrial Detention in the Americas*, paras. 221 and 292.

³⁰ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 324.

³¹ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 325.

46. Finally, for monitoring any measure adopted, the IACHR recommends that the States establish measurable objectives as well as forms of monitoring that include differentiated approaches, with a view to assessing the effectiveness of the implementation of these measures, as well as the suitability of the response given to persons belonging to groups at special risk, considering their specific conditions. The IACHR also recommends that the States have reliable data collection systems that make it possible to identify those aspects that need to be improved to overcome challenges that may arise in implementing the respective measures.

1. Legislative Measures

47. During the period covered by this report, the IACHR observes that the states have adopted legislative measures that reflect their commitment to adapt the use of this regime to the relevant international standards. In particular, the Commission observes that the legislative reforms that have been adopted in recent years have represented major progress in reducing pretrial detention. Among these, the IACHR makes special mention of the following:

- (a) reducing the times for pretrial detention;
- (b) establishing procedures to expedite the processing of criminal cases;
- (c) imposing greater requirements for determining whether pretrial detention is in order; and
- (d) establishing services or measures that make it possible to verify probative information prior to the determination of procedural risks, as well as supervising precautionary measures.

48. Nonetheless, the IACHR notes that in other respects the reforms adopted have also included elements at odds with the exceptional nature of pretrial detention, for example by increasing its duration; expanding the grounds for applying pretrial detention beyond its precautionary logic; the inclusion of a list of offenses requiring pretrial detention; and the establishment of greater restrictions on the procedural mechanisms for release. In addition, the IACHR is particularly concerned about the reforms that have promoted the use of abbreviated trials, which, by diminishing the number of persons in pretrial detention, appear to result in an increase in the number of persons arbitrarily convicted, in proceedings with insufficient guarantees,

and in a short time, impairing the ability of the victim to prepare an adequate defense.

49. The IACHR notes that legislative modifications have been presented with respect to the following aspects: differentiated treatment of women and other persons belonging to groups at special risk; regulation of alternative measures; the use of electronic tracking in criminal matters; the implementation of restorative justice programs in criminal matters; drug courts; review of the pretrial detention regime; holding hearings in prisons; and holding pretrial detention hearings. All these reforms will be analyzed in detail in the corresponding sections.

a. Duration of Pretrial Detention

50. The IACHR has indicated that as part of the policies in the pretrial stage aimed at reducing overcrowding, the States must adopt “measures designed to reduce the use and duration of pretrial detention.”³² Those measures are part of a comprehensive approach to a technical understanding of the criminal problem, the effective operation of the criminal justice system, and the general crime prevention strategies.³³ The IACHR welcomes the amendment of their legislations by the States of Bolivia, Colombia, and Mexico to reduce the time for ending pretrial detention. In particular, in Bolivia Law No. 586 on Clearing Up Backlog and Making Effective the System of Criminal Procedure (Law on Clearing Up Backlog), of October 2014, caps pretrial detentions at 12 months without any indictment, and at 24 months if there is no verdict.³⁴ In the case of Mexico the Federal Code of Criminal Procedure establishes at Article 165 that the maximum duration of pretrial detention shall be one year³⁵; this amendment adopts a standard that is more protective than even the Constitution of Mexico, which provides for a maximum duration of two years.³⁶ Colombia’s Law No. 1760, known as the “Law for Rationalizing Pretrial Detention,” established that it could not exceed one year, and would be subject to an extension in special cases related to proceedings under the jurisdiction of the specialized criminal justice system; when there are three or more accused in corruption investigations or trials; or

³² IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 293.

³³ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 293.

³⁴ Law No. 586 on Clearing Up Backlog and Making Effective the System of Criminal Procedure (Law on Clearing up Backlog), Bolivia, October 30, 2014, Article 239.

³⁵ Federal Code of Criminal Procedure, Mexico, published March 5, 2014, in force as of June 18, 2016, Article 165.

³⁶ Constitution of Mexico, Articles 18 and 20.

for crimes against liberty, integrity, and the “sexual formation of the child” [“la formación sexual del niño”].³⁷

51. Moreover, with respect to Peru, the IACHR states its concern over the increase in the duration of pretrial detention, provided for in Legislative Decree No. 1307 of January 2017, which amends the Code of Criminal Procedure “to endow with effective measures the prosecution and punishment of crimes of corruption of public officials and organized crimes.”³⁸ In particular, with that modification the time limit for pretrial detention for “proceedings involving organized crime” is extended to 36 months, which may be further extended for up to an additional 12 months.³⁹ That change is different from what had been stipulated in the Code of Criminal Procedure, which established a maximum term of 18 months in cases involving “complex proceedings,” which could be extended up to an additional 18 months.⁴⁰ Civil society organizations and the Public Defender Service (Defensoría del Pueblo) of Peru have stated their opposition; in particular, the Defensoría noted that this increase in pretrial detention is “excessive” and only shifts to the accused “the judicial branch’s and prosecutors’ problems investigating.”⁴¹ For its part, the Commission considers that this change is at odds with those actions that seek to rationalize the use of pretrial detention in keeping with the relevant international standards, and as part of a comprehensive approach to technical aspects of the crime problem and the effective application of the criminal justice system.

b. Imposition of Greater Requirements for Applying Pretrial Detention

52. For its part, the IACHR notes the adoption in Colombia of Law No. 1760, which limits the use of pretrial detention. In particular, that law imposes the obligation on the judicial authorities to show that pretrial detention is

³⁷ Republic of Colombia, *Avances en materia de promoción, garantía y defensa de los derechos humanos en Colombia (2013-2014) Primer Semestre de 2015*. Note S-GAIIID-15-088842, September 14, 2015, p. 56. In this regard, see IACHR, *2015 Annual Report*, Chapter V: Colombia, para. 328.

³⁸ Legislative Decree No. 1307, which modifies the Code of Criminal Procedure to provide effective measures for prosecuting and punishing the crimes of corruption by public servants and organized crime, Peru, published December 30, 2016 and coming into force 90 days after its publication.

³⁹ Legislative Decree No. 1307, which modifies the Code of Criminal Procedure to provide effective measures for prosecuting and punishing the crimes of corruption by public servants and organized crime, Peru, published December 30, 2016 and coming into force 90 days after its publication, Articles 272(3) and 274(2).

⁴⁰ Code of Criminal Procedure, Peru, in force as of July 29, 2004, Articles 2722 and 274(1).

⁴¹ Information referred by the public defender service (Defensoría del Pueblo), during the colloquium on measures aimed at reducing pretrial detention in Peru. IACHR, Visit to Peru, February 2017.

the only measure to assure appearance at trial that is useful for the aims pursued and to weigh whether the person facing charges represents a danger to the community.⁴² In addition, that law establishes the procedural terms that should be observed between the filing of the indictment and the beginning of the oral proceedings (maximum 120 days), and between the beginning of the oral trial and the reading of the verdict (maximum 150 days). The IACHR addressed this situation in its 2015 Annual Report and urged the State to work to adequately implement this law, and to develop other measures to reduce the number of persons being held in pretrial detention.⁴³

c. Establishment of Pretrial Services

53. Pretrial services are those measures that make it possible to verify procedural risks and to supervise precautionary measures. In this regard, the Commission has noted that such mechanisms are a good practice that enables the authorities involved in the decision-making process for determinations on pretrial detention to have adequate probative information about the procedural risks and legal presumptions that will be evaluated.⁴⁴ Thus, for example, the Commission observes that the Federal Code of Criminal Procedure of Mexico and the Bill SB 91 of the state of Alaska, United States of America, provide for the establishment of such mechanisms.
54. In this respect, the Commission notes that in July 2016, the state of Alaska, United States of America, adopted the law known as SB 91 related to criminal and procedural law⁴⁵; it entrusts the Department of Corrections with establishing a program of services that evaluates procedural risks and supervises precautionary measures by developing a standardized methodology for risk assessment and issuing regulations for its implementation.⁴⁶ The purpose of that mechanism is to perform risk

⁴² [Law No. 1760 “partially modifying Law 906 of 2004 in relation to measures to ensure appearance at trial,”](#) Colombia, July 6, 2015. See also IACHR, [2015 Annual Report](#), Chapter V: Colombia, para. 329.

⁴³ IACHR, [2015 Annual Report](#), Chapter V: Colombia, para. 329.

⁴⁴ IACHR, [Report on the Use of Pretrial Detention in the Americas](#), para. 178.

⁴⁵ The IACHR emphasizes that this law is based on the recommendations made by the Criminal Justice Commission of Alaska, established by the state legislature in 2014, with the mission of evaluating and making recommendations “to improve criminal laws and practices.” The Commission includes 13 members from the three branches of government; legislators, judges, the attorney general of the state and the public defender, the commissioner of the prison system, the director of the Mental Health Trust Authority, and representatives of crime victims and native persons of Alaska. The PEW Charitable Trusts, [Brief “Alaska’s Criminal Justice Reforms”](#), December 2016.

⁴⁶ Attorney General Craig W. Richards, [SB 91: Omnibus Criminal Law and Procedure; Corrections, Overview](#), June 17, 2016.

assessments of the persons accused to help the judicial authority make a determination regarding pretrial release as well as to supervise persons with respect to whom it has been determined to apply a non-custodial precautionary measure. In particular, before the first appearance of the person before a judicial authority, the officials in this program must perform a risk assessment and prepare a report for the judicial authority with recommendations related mainly to the suitability of the release, and less restrictive conditions of release to ensure appearance at trial and public safety.⁴⁷ In Mexico, the Federal Code of Criminal Procedure provides that the authority supervising precautionary measures and conditional suspension of the proceeding is to provide such services, and accordingly to offer the parties the necessary information on the need to impose precautionary measures so that they, in turn, can make the corresponding request to the judicial authority.⁴⁸

d. Guilty Pleas or Abbreviated Trials

55. In recent years several States in the region have reformed their laws and regulations to simplify criminal proceedings by regulating guilty pleas or abbreviated trials, as part of the effort to respond to delays in the justice system and the excessive use of pretrial detention. More specifically, during the period covered in this report the IACHR observes that States such as Argentina, Bolivia, Ecuador, Mexico, and Peru have promoted such procedures through legislative reforms; the procedures are often applied in situations of flagrancy.
56. In Bolivia the abbreviated procedure – incorporated in the 1999 procedural reform⁴⁹ – was given new impetus in Law No. 586 of 2014 on Clearing up the Backlog, which introduces changes to expedite it.⁵⁰ In Peru, Legislative Decree No. 1194 of 2015, which regulates immediate trial in cases of flagrancy, establishes the obligation of the prosecutor to institute immediate proceedings in cases of in flagrante delicto, failure to pay family

⁴⁷ [SB91](#), Alaska, published July 11, 2016. See also: Attorney General, Craig W. Richards, [SB 91: Omnibus Criminal Law and Procedure; Corrections, Overview](#), June 17, 2016.

⁴⁸ [Federal Code of Criminal Procedure](#), Mexico, published March 5, 2014, in force as of June 18, 2016, Articles 164 and 177.

⁴⁹ [Law No. 1970 on Reform of Criminal Procedure](#), Bolivia, March 25, 1999, Articles 373 and 374.

⁵⁰ [Law No. 586 on Clearing Up Backlog and Making Effective the System of Criminal Procedure](#), Bolivia, October 30, 2014, Article 8, which modifies Article 326 of the Code of Criminal Procedure.

assistance, and drunk driving.⁵¹ These measures stand in contrast to the procedure provided for in the 2004 Code of Criminal Procedure, which established that in those situations the abbreviated trial was begun at the discretion of the prosecutor.⁵² In Argentina, Law No. 27,272 – which amends the Federal Criminal Code, and came into force on December 1, 2016 – incorporates into the procedural system a new abbreviated procedure for cases of in flagrante delicto with respect to offenses for which the maximum sentence is 15 to 20 years in prison.⁵³ The procedural laws of Ecuador and Mexico, in force, respectively, as of August 2014 and June 2016, also regulate abbreviated trials.⁵⁴

57. The IACHR values the efforts made by several States to address the problem related to the excessive use of pretrial detention by using abbreviated trials characterized by reduced procedural time frames, confirmation of verdicts in less time, and offer of oral procedure. Nonetheless, the IACHR has information on various impairments of due process that are said to be characteristic of such called guilty pleas or abbreviated trials, and which, while implemented to reduce the excessive use of pretrial detention, are said to result in convictions of persons tried summarily and “arbitrarily” based on proceedings “without sufficient guarantees” and without the possibility of preparing an adequate defense.⁵⁵
58. In particular, with respect to Argentina, the IACHR received information that indicates that the Federal Public Defender Service (Defensoría General de la Nación) does not have the capacity to appear in all the hearings in the

⁵¹ [Legislative Decree No. 1194](#), Peru, in force as of November 29, 2015, Article 2, which modifies Articles 446, 447, and 448 of the Code of Criminal Procedure. See Peru, Note from the Permanent Representative of Peru to the OAS, 7-5-M/124, July 7, 2016. Response to the Questionnaire.

⁵² Code of Criminal Procedure, Legislative Decree No. 957, published July 29, 2004, Article 446. With respect to this modification, the IACHR has received criticisms from civil society since that reform is alleged to violate the autonomy of the prosecutorial authority (Ministerio Público). Instituto de Defensa Legal (IDL), Peru. Response to the Questionnaire, sent May 18, 2016.

⁵³ [Law 27,272, Modifying the Code of Criminal Procedure](#), Argentina, in force as of December 1, 2016, Article 2. CELS. Information provided to the IACHR on December 6, 2016. See also: Agencia de Noticias Redacción, “[Nueva ley de flagrancia: Una herramienta contra el pueblo trabajador](#),” September 12, 2016.

⁵⁴ [Comprehensive Organic Criminal Code](#), Ecuador, in force as of August 10, 2014, Articles 635 to 639. In particular, Article 637 regulates the abbreviated procedure for offenses committed in flagrancy. [Federal Code of Criminal Procedure](#), Mexico, published March 5, 2014, in force for the entire national territory as of June 18, 2016, Articles 201 to 207.

⁵⁵ Fair Trials, [The Disappearing Trial: Towards a rights-based approach to trial waiver systems](#), April 2017; Instituto de Defensa Legal (IDL). Information provided in the context of the visit by the Rapporteurship to Peru, February 2017; CELS. Information provided in the context of the visit by the Rapporteurship to Argentina, September 2016; IACHR, Expert Consultation “Measures to Reduce Pretrial Detention in the Americas,” Washington, D.C., May 20, 2016. Information provided by Ernesto de la Jara, IDL, and by Úrsula Indacochea, DPLF; and Instituto de Defensa Legal (IDL), Peru. Response to the Questionnaire, sent May 18, 2016.

context of these proceedings.⁵⁶ In the case of Peru, even though in recent years there was an increase in the number of public defenders, it is insufficient to handle the high demand for guilty pleas, stemming from the implementation of Legislative Decree 1194, which regulates the abbreviated trials for cases of in flagrante delicto.⁵⁷ Similarly, with respect to the Peruvian State, the IACHR was informed that the data provided by the judicial branch for determining the suitability of the application of these procedures, as well as complying with due process requirements in the context of such procedures, are insufficient, for that information refers only to the number of abbreviated trials conducted and with respect to which crimes, without providing any other details, for example, on the cases that went to trial, that concluded by early termination, or that were subject to a determination of pretrial detention.⁵⁸ With respect to Bolivia, the IACHR has information that indicates that in the context of those procedures the “offer” of the penalty to an accused by the prosecutor is not based on an evaluation of the case, but on the seriousness of the offense; plus the determination of the matter by the judicial authority is done mindful only of the “agreement” between the prosecutorial authority and the person accused, without considering the probative elements in the record.⁵⁹ In consideration of the foregoing, the Commission notes with concern that the convictions secured in the context of these initiatives may be the result of processes that did not show guilt based on an impartial investigation and that did not guarantee the conditions required for the accused to have an adequate defense.

59. The IACHR has also received information on the “boom” in recognition of criminal liability that has occurred in the context of these procedures. This is because in most cases the persons accused decided to opt for these procedures – though some pleaded innocent – induced by their own defense counsel to incriminate themselves, or in light of the possibility of being released or having an attenuated sentence⁶⁰, or even, in some cases, as a result of having been coerced to accept some kind of “agreement.”⁶¹ In this regard, the IACHR has indicated that under no circumstance should

⁵⁶ CELS. Information provided in the context of the visit by the Rapporteurship to Argentina, September 2016.

⁵⁷ Instituto de Defensa Legal (IDL), Peru. Response to the Questionnaire, sent May 18, 2016.

⁵⁸ Instituto de Defensa Legal (IDL). Information provided in the context of the Rapporteurship’s visit to Peru, February 2017.

⁵⁹ Stanford Human Rights Center, Best practices to reduce the excessive use of pretrial detention and create more rehabilitative prisons in the Americas (internal document), October 2016 (primary researcher: Mirte Postema).

⁶⁰ Defensa Pública, Costa Rica. Information provided in the context of the Rapporteurship’s visit to Costa Rica, February 18, 2016; Instituto de Defensa Legal (IDL), Peru. Response to the Questionnaire, sent May 18, 2016.

⁶¹ IACHR, Second expert consultation “Measures to Reduce Pretrial Detention in the Americas,” Washington, D.C., March 20, 2017. Information provided by Rebecca Schaeffer, Fair Trials.

one tolerate the use of pretrial detention as a mechanism for inducing the person detained to engage in self-incrimination and to opt for an abbreviated trial “as a way to obtain prompt release.”⁶² Such practices, like the non-exceptional use of pretrial detention, “are contrary to the very essence of the rule of law and the values that inspire a democratic society.”⁶³

60. Regarding guilty pleas and abbreviated trials the IACHR notes that the European Court of Human Rights has indicated that even if the person has waived an examination of his or her case on the merits, such processes need to guarantee due process, and in particular: (a) that the acceptance of the accused is voluntary and based on full knowledge of the facts of the case and of the legal consequences of such acceptance, and (b) that the decision arrived at in these procedures be subject to “effective judicial review.”⁶⁴ In this regard, and in the context of the use of guilty pleas or abbreviated trials, the IACHR calls on the States to adopt the necessary measures so as to prevent the accused from being subjected to procedures that answer primarily to the motivation to reduce pretrial detention at any cost so as to show an “efficient” administration of justice, and that do not fully guarantee due process guarantees. In particular, the States should ensure that the persons subject to such procedures are able to convey their voluntary acceptance, consenting fully to the scope of their application; and in this sense, they should verify the absence of any type of coercion in this respect. In addition, the States are under an obligation to ensure that the persons participating in these procedures have the proper judicial guarantees, including an adequate defense. In particular, and despite the expeditious nature of the procedure, the handing down of the conviction must be based on an exhaustive analysis of the case, and not just on the agreement presented to the judicial authority by the prosecutor.

61. Finally, in order to have adequate and comprehensive information that makes it possible to determine the efficacy of these processes the States must make public the data related to the number of procedures performed, which should include at least the following statistics: (a) application of alternative measures; (b) early terminations; (c) determination of pretrial detention; and (d) handing down of the conviction. In addition, that

⁶² IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 268; See also: Committee of Ministers, Council of Europe, *Recommendation Rec(2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse*, adopted September 27, 2006, para. 41.

⁶³ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 268.

⁶⁴ ECtHR, *Case of Natsvlishvili and Togonidze v. Georgia*, Third Section, Application No. 9043/05, September 8, 2014, para. 92.

information should reflect statistics broken down by type of offense and grounds for application; and by age, gender, sexual orientation, gender identity and expression, race, ethnicity, and type of disability.

2. Administrative Measures

62. In the period covered by this report, several States, including Argentina, Bolivia, Colombia, and the United States, have adopted administrative measures to reduce the use of pretrial detention, such as: (a) promulgating pardons; (b) establishing forums for dialogue with civil society and specialists on the matter to design, implement, and evaluate public policies; and (c) adopting executive instruments to rationalize the use of pretrial detention.
63. First, the Commission observes that one of the measures used by the Bolivian State to address overcrowding in prisons and the excessive use of pretrial detention involved issuing decrees on the prison situation. Accordingly, from 2013 to 2015 three presidential decrees were promulgated to expand the situations in which the members of the prison population could avail themselves of the pardon.⁶⁵ Those situations were originally provided for in Presidential Decree No. 1145 of December 2012, which regulated the granting of pardons and amnesties on humanitarian grounds.⁶⁶
64. The IACHR notes that the publication of the presidential decrees issued from 2013 to 2015 expanded the benefit of pardon to persons held in pretrial detention, if they were to submit to “the abbreviated trial and be given a final judgment of liability,”⁶⁷ or if they had a final judgment as of a given date.⁶⁸ In this respect, according to civil society organizations, expanding the benefits contemplated in the latest executive decrees would have given impetus to the self-incrimination of a large number of persons

⁶⁵ [Presidential decree of pardon and amnesty, No. 1723](#), Bolivia, September 18, 2013; [Presidential Decree No. 2131](#), October 1, 2014; [Presidential Decree No. 2437](#), July 7, 2015; and Bolivia, Note from the Permanent Mission of Bolivia to the OAS mpb-oea-nv117-16, June 28, 2016. Response to the Questionnaire.

⁶⁶ Those conditions include: (a) older persons who have served one-third of their sentence and adolescents subject to criminal charges; (b) youths up to 25 years of age who have served one-third of their sentence; (c) persons with serious or incurable illness, in the terminal period; (d) persons with disabilities that are “serious or very serious” who require special care and have served one-fourth of their sentence; (e) fathers and mothers with children under 12 years of age; and (f) persons convicted of minor offenses for which the penalty is eight years or less and who have served one-third of their sentence. [Presidential Decree Granting Pardon, No. 1145](#), Bolivia, December 31, 2012.

⁶⁷ [Presidential Decree Granting Pardon and Amnesty, DP No. 1723](#), Bolivia, September 18, 2013.

⁶⁸ [Presidential Decree No. 2437a](#), Bolivia, July 7, 2015, Article 6(l).

who had been held in pretrial detention for several years⁶⁹; this situation would run counter to a genuine strengthening of the administrative of justice so as to render decisions in cases.⁷⁰ In this respect, and mindful of the considerations put forth in the section on abbreviated trials⁷¹, the IACHR expresses its profound concern over the use of procedures which, on seeking to simplify criminal prosecutions, may culminate in guilty verdicts handed down in trials that do not guarantee an effective defense, and which, indeed, have resulted in an increase in the number of persons convicted. The IACHR further highlights the issuance of a fifth presidential decree on December 24, 2016, on amnesty and pardon for persons detained, and its approval the legislature on January 15, 2017.⁷²

65. Similarly, with respect to the Bolivian State, the IACHR also observes that to carry out what is established in Law No. 586 on Clearing up the Backlog, the Supreme Court of Justice of Bolivia – in an alliance with the nine Departmental Courts of Justice (Tribunales Departamentales de Justicia) at the national level – in late 2014 promoted the application of the National Plan to Clear up the Backlog in the System of Criminal Procedure which proposed to reduce the backlog in the criminal justice system by increasing the capacity of the Courts of Criminal Investigation (Juzgados de Instrucción Penal) of the Departmental Courts of Justice to resolve cases with the backlog reduction teams (equipos de descongestión) (made up of criminal law judges with lesser caseloads) and the adoption of a series of measures to expedite judicial action and urgent adjustments in the practices of litigation and the conduct of hearings.⁷³ In the context of this plan, “judicial days” were also promoted in the prisons, as well as the establishment of inter-institutional working groups to adopt decisions that could resolve address the crisis in the criminal justice system and in the prison system.⁷⁴ The IACHR also notes the creation of a Follow-Up Unit, by the Presidency of the Supreme Court, as well as greater and more efficient inter-institutional coordination between the Office of the Attorney General

⁶⁹ IACHR, Expert Consultation “Measures to Reduce Pretrial Detention in the Americas,” Washington, D.C., May 20, 2016. Information provided by Ramiro Orias, DPLF.

⁷⁰ Fundación CONSTRUIR, Cáritas Boliviana, and others, Prisión Preventiva y Derechos Humanos, Informe Bolivia, October 2014, p. 8.

⁷¹ For more information on the considerations of the IACHR on abbreviated proceedings, see paras. 54-60.

⁷² Presidential Decree No. 3030, Bolivia, issued December 24, 2016, and approved by the Legislative Assembly on January 15, 2017.

⁷³ Supreme Court of Justice, Plan Nacional de Descongestionamiento del Sistema Penal, Bolivia, Boletín institucional No. 1, January 2015, p. 3.

⁷⁴ Fundación CONSTRUIR, Medidas para Reducir la Prisión Preventiva en Bolivia (Informe temático), April 2016. Information provided at: IACHR, Public hearing “Measures to reduce pretrial detention in the Americas,” 157th Regular Period of Sessions, April 5, 2016. Information provided by Fundación CONSTRUIR. For more information, see paras. 171, 177- 181.

(Ministerio Público) and the Prison System.⁷⁵ Another measure implemented to reduce the caseload in the Bolivian judicial system was to do away with collective judicial vacations, and the archiving of matters that have been in the investigative phase for more than one year.⁷⁶

66. The IACHR also welcomes the implementation of the “Justicia 2020” program in Argentina, which began in March 2016 at the initiative of the Ministry of Justice and Human Rights of the Nation⁷⁷, and which constitutes a forum for dialogue between authorities and civil society to design, implement, and evaluate policies related to access to justice.⁷⁸ “Justicia 2020” is a state policy that is to unfold over a four-year period. Its lines of action correspond to the following thematic areas: institutional, civil, criminal, access to justice, human rights, justice and community.⁷⁹ One of the objectives of this initiative is to promote the use of alternatives to penalties entailing deprivation of liberty, with the main focus on pretrial detention.⁸⁰
67. With respect to Colombia, the IACHR notes that on May 19, 2015, the National Council on Economic and Social Policy⁸¹ published the document CONPES 3828 Prison and Jail Policy (Política Penitenciaria y Carcelaria), which “seeks to re-focus prison and jail policy.” The main organizing ideas for prison policy and criminal justice policy include, among others, rationalizing the use of measures that entail deprivation of liberty, and seeking solutions for persons held in pretrial detention.⁸² In particular, among the results hoped to be attained by implementing the document in question, special mention should be made of reducing overcrowding,

⁷⁵ Supreme Court of Justice, Plan Nacional de Descongestionamiento del Sistema Penal, Boletín institucional No. 1, Bolivia, January 2015, p. 6.

⁷⁶ Law No. 586 to Reduce Backlog, Bolivia, October 30, 2014, Article 1 (object). See also: Fundación CONSTRUIR, Cáritas Boliviana, and others, Prisión Preventiva y Derechos Humanos, Informe Bolivia, October 2014, p. 23. For more information on reducing the time periods, see paras. 176-180.

⁷⁷ IACHR, Press Release 151/16, Rapporteurship on the Rights of Persons Deprived of Liberty Visits Argentina. Washington, D.C., October 19, 2016.

⁷⁸ Ministry of Justice and Human Rights, Argentina, Justicia 2020. See also: IACHR, Press Release 151/16 - Rapporteurship on the Rights of Persons Deprived of Liberty Visits Argentina. Washington, D.C., October 19, 2016.

⁷⁹ Ministry of Justice and Human Rights. Information provided in the context of the Rapporteurship’s visit to Argentina, September 2016.

⁸⁰ Ministry of Justice and Human Rights. Information provided in the context of the Rapporteurship’s visit to Argentina, September 2016; Information referred by the Undersecretary of Relations with the Judicial Branch and Prison Affairs, Juan Bautista Mahiques, during the colloquium on measures aimed at reducing pretrial detention in Argentina. IACHR, Visit to Argentina, September 2016.

⁸¹ This Council is the maximum national planning authority in the State, and serves as an advisory body on all aspects related to the country’s economic and social development. National Planning Department, Colombia, website “El Consejo Nacional de Política Económica y Social, CONPES.”

⁸² National Economic and Social Council, Colombia, Documento CONPES 3828, May 19, 2015, p. 3.

reducing the ratio of persons facing criminal charges to the number of convicts, and the technological strengthening of the prison system with an increase in the number of hearing rooms.⁸³ In this respect, and as it did in its 2015 Annual Report, the IACHR recognizes the goals established in the document CONPES No. 3828 and recommends that the State see to its adequate implementation.⁸⁴

68. In addition, as regards the United States, the IACHR notes that by executive order of May 27, 2014, the Commission to Reform Maryland's Pretrial System was established in the state of Maryland for the purpose of bringing together specialists and relevant players to issue recommendations aimed at ensuring improved operation of the pretrial system.⁸⁵ Among the recommendations, the IACHR makes special mention of the following: (a) creating a uniform pretrial services agency as assesses procedural risk and supervises persons released under pretrial supervision; (b) promoting the use of pretrial supervision as an alternative to pretrial detention; (c) creating a system so that only one entity in the pretrial process has to pull and summarize the arrestee's record, consistent with and in accordance with state and federal law; (d) prompt presentment no later than 24 hours of arrest; y (e) producing data to effectively determine impact of process and procedures on persons based on race, gender, non-English speaking, and indigence.⁸⁶
69. Finally, the IACHR notes that the respective sections will analyze the implementation of the administrative measures concerning the following aspects: (a) use of alternative measures; (b) electronic monitoring in criminal matters; (c) drug courts; and (d) actions related to speedy process and correcting the procedural delay, such as reviewing the pretrial detention regime, and measures to guarantee that hearings are held, and holding hearings in the prisons.

3. Judicial Measures

70. The IACHR observes that since 2014 several States have made major efforts to adopt judicial measures related to speedy process and correcting the procedural delay, such as: reviewing the pretrial detention regime; holding hearings in the jails, and ensuring that hearings are held. The States have also adopted other measures to reduce pretrial detention, including:

⁸³ National Economic and Social Council, Colombia, Colombia, *Documento CONPES 3828*, May 19, 2015, p. 4.

⁸⁴ IACHR, *2015 Annual Report*, Chapter V: Colombia, para. 327.

⁸⁵ Commission to Reform Maryland's Pretrial System, *Final Report*, December 19, 2014.

⁸⁶ Commission to Reform Maryland's Pretrial System, *Final Report*, December 19, 2014.

holding pretrial detention hearings; applying restorative justice programs in criminal matters; and establishing drug treatment programs under judicial supervision. All these actions will be analyzed by the Commission in the corresponding sections of this report; nonetheless, in this section the IACHR makes special mention of some decisions that have represented gains to reduce the use of pretrial detention, and which have been handed down by national and local courts of countries such as Argentina, Colombia, Peru, and the United States, and which have represented progress in reducing the use of pretrial detention. The main challenges judges face when it comes to applying alternatives to pretrial detention and, accordingly, to reducing the use of this measure, will also be discussed.

a. Relevant Gains in the Case-Law

71. The IACHR observes that of the main gains in the case-law when it comes to reducing the use of pretrial detention, the following stand out:

- (a) delimiting the grounds for finding pretrial detention to be in order;
- (b) beefing up the requirements for such a determination;
- (c) prohibition on excluding particular offenses from the regime established for ending pretrial detention;
- (d) promoting the use of alternatives to it;
- (e) submitting the detention to judicial review; and
- (f) regularizing the procedural situation of those persons detained without any judicial order.

72. With respect to the Colombian State, the IACHR recognizes the work of the Supreme Court of Justice, on having handed down judgments that constitute important precedent with respect to the prohibition on excluding certain offenses from the regime established for ending pretrial detention, without any basis in objective criteria, merely to answer to standards such as “social alarm” (“*alarma social*”), “social repercussion” (“*repercusión social*”), or “dangerousness” (“*peligrosidad*”). By Judgment 85126 of April 20, 2016, the Criminal Chamber of the Supreme Court of Justice determined that the time frames for pretrial detention to investigate and prosecute should be applied to all types of offenses.⁸⁷ This holding was

⁸⁷ Supreme Court of Justice, Chamber of Criminal Cassation, Colombia, Case No. 85126, April 20, 2016. See also: IACHR, *2016 Annual Report*, para. 337.

in the context of Law No. 1121 of 2006, which excludes from pretrial release those persons accused of committing offenses related to kidnapping, terrorism, or extortion.⁸⁸ In addition, considering that no type of “reduction in sentences, benefits, or subrogates” were available for persons accused of committing crimes against liberty, integrity, sexual formation, or kidnapping of children and adolescents, legislatively or judicially⁸⁹, the IACHR salutes the adoption of Judgment 84957 of the Chamber of Criminal Cassation of the Supreme Court of Justice, handed down May 11, 2016, which allowed for the application of provisional release of persons charged with sexual offenses against children or adolescents due to the running of the limitations period.⁹⁰

73. The IACHR also notes that the Standing Criminal Chamber of the Supreme Court of Justice of Peru, by Cassation No. 626-2013 Moquegua of February 27, 2016⁹¹, established various criteria for determining the exceptional nature of pretrial detention⁹², such as the obligation to state the reasons for applying it, and the finding that a determination of no community ties and the seriousness of the offense are merely elements to consider in determining the risk of flight and, accordingly, do not automatically result in pretrial detention.⁹³ In addition to this judgment the IACHR was informed that Cassation No. 631–2015 Arequipa of December 21, 2015, contains positive elements on reiterating the exceptional nature and requirement of proportionality in pretrial detention⁹⁴, considering the need to show more elements to establish connectedness in the community⁹⁵, and establishing that being a foreigner does not mean there is a per se risk of flight.⁹⁶

⁸⁸ [Law 1121 of 2006 by which provisions are issued for the prevention, detection, investigation, and punishment of the financing of terrorism and other provisions](#), Colombia, published December 29, 2006.

⁸⁹ Along these lines, a line of case-law had also been established in the judgments of September 17, 2009, April 28, 2010, and May 30, 2012. Prisons Group at the Law School, Universidad de los Andes, Colombia. Response to the Questionnaire, sent August 2, 2016, pp. 26 and 27.

⁹⁰ Supreme Court of Justice, Chamber of Criminal Cassation, Colombia, [Case No. 84957](#), May 11, 2016, Francisco Acuña Vizcaya writing for the Court. See also: IACHR, [2016 Annual Report](#), para. 337.

⁹¹ Standing Criminal Chamber of the Supreme Court of Justice, Peru, [Cassation No. 626-2013 Moquegua](#), February 27, 2016.

⁹² Peru, Note from the Permanent Representative of Peru to the OAS, 7-5-M/124, July 7, 2016. Response to the Questionnaire; Instituto de Defensa Legal (IDL), Peru. Response to the Questionnaire, sent May 18, 2016.

⁹³ Peru, Note from the Permanent Representative of Peru to the OAS, 7-5-M/124, July 7, 2016. Response to the Questionnaire; Instituto de Defensa Legal (IDL), Peru. Response to the Questionnaire, sent May 18, 2016.

⁹⁴ Instituto de Defensa Legal (IDL), Peru. Response to the Questionnaire, sent May 18, 2016; and Supreme Court of Justice of the Republic, Peru, [Cassation No. 631 – 2015 Arequipa](#), December 21, 2015, pp. 3-11.

⁹⁵ Peru, Note from the Permanent Representative of Peru to the OAS, 7-5-M/124, July 7, 2016. Response to the Questionnaire.

⁹⁶ Instituto de Defensa Legal (IDL), Peru. Response to the Questionnaire, sent May 18, 2016. To see the decision, Supreme Court of Justice of the Republic, Peru, [Cassation No. 631 – 2015 Arequipa](#), December 21, 2015, pp. 3-11.

74. The IACHR notes that courts in Argentina and the United States have handed down decisions that strengthen the use of alternative measures. Accordingly, the United States District Court for Southern Mississippi set an important precedent to ensure that bond does not constitute a discriminatory measure to the detriment of persons who do not have the amount required for release on bond. In its judgment in the case of *Thompson v. Moss Point*, handed down in November 2015, the District Court for Southern Mississippi, United States, determined that under the U.S. Constitution no one can be held in custody after an arrest “because the person is too poor to post a monetary bond.”⁹⁷ In this respect, according to information available to the Commission, this case is an important precedent – in contraposition to the practice of the city of Moss Point, of setting bond without considering the financial situation of the persons charged – in favor of homeless persons and others who do not have the funds to cover the amounts required to post bond, as an alternative to pretrial detention.⁹⁸ The IACHR looks favorably upon the decision by the Supreme Court of Justice of the province of Buenos Aires, on November 12, 2014, recommending the use of electronic monitoring devices for (a) persons over 50 years of age and those with serious illness; (b) pregnant women; and (c) mothers with children under 5 years of age.⁹⁹
75. Similarly, as regards the Argentine State, information available to the IACHR indicates that in various cases the National Chamber of Cassation for Criminal and Corrections Matters for the Federal Capital (Chamber of Cassation) held that the expected sentence may not be used per se as a legitimate motive for presuming danger of flight¹⁰⁰, and noted the obligation to justify the imposition of pretrial detention as the only way to address the procedural risks in each case.¹⁰¹

⁹⁷ Prison Legal News, [“Mississippi Town Ordered to Abandon ‘Secured Bail’ Arrest Bond System,”](#) April 26, 2017. To consult the decision, see: United States District Court for the Southern District of Mississippi, U.S.D.C. (S.D. Miss.), [Case No. 1:15-cv-00182-LG-RHW](#), November 12, 2015.

⁹⁸ The University of Mississippi, Litigation [“Settlement Ends Mississippi City’s Jailing of Impoverished People Awaiting Court Appearances for Misdemeanor Charges,”](#) November 16, 2015, and Prison Legal News, [“Mississippi Town Ordered to Abandon ‘Secured Bail’ Arrest Bond System,”](#) April 26, 2017. For the decision, see: Mississippi, U.S.D.C. (S.D. Miss.), [Case No. 1:15-cv-00182-LG-RHW](#).

⁹⁹ Supreme Court of Justice of the Province of Buenos Aires, [Expediente 167/12](#), November 12, 2014.

¹⁰⁰ In this regard, in the “O.J.” case, the court ruled on the possibility of releasing a person accused of committing offenses against sexual integrity. Cassation Chamber, Argentina, Case No. 74012/2014/1. Record No. 375/2015. Judgment of August 28, 2015; and federal public defender service (Defensoría General de la Nación), Argentina. Response to the Questionnaire, sent June 22, 2016. Annex I “Pretrial Detention: Analysis of case-law and statistical information,” p. 20.

¹⁰¹ In the case of “BI, EA” the Chamber of Cassation took into consideration the justification of the need for pretrial detention, and in this regard overturned a decision that did not argue the issue. Chamber of Cassation, Argentina, Case No. 10322/2014. Record No. 99/15. Judgment of May 28, 2015.

76. Finally, the IACHR values the granting of a collective writ of habeas corpus, dated December 23, 2015, by the Supreme Court of Justice of the province of Mendoza that represents progress in several respects, such as: (a) regularizing the procedural situation of the persons detained without court order within 60 days; (b) submitting the detention to judicial oversight within no more than 24 hours; and (c) registering the information on pretrial detention in the province.¹⁰² In addition, the Supreme Court of Mendoza lays down the following requirements for the judges of guarantees (jueces de garantías) and investigative judges (jueces de instrucción) who order pretrial detention: (a) it provides that pretrial detention be ordered within ten days from the filing of charges or, as the case may be, within six days of the detention, or if there is no detention, from the taking of the statement, (b) the ruling on pretrial detention must establish the duration and periodic reviews, and (c) alternative measures to pretrial detention must be applied, in keeping with the principles of subsidiarity and progressivity.¹⁰³
77. In this respect, this Commission laments the actions taken by the provincial executive to counter the jurisprudential effects attained by the decision on habeas corpus, consisting of filing an appeal to the Supreme Court of Justice and the entry into force of Law No. 8,869, which replaces or amends the articles of the Code of Criminal Procedure of Mendoza related to ordering pretrial detention. First, the IACHR was informed of the presentation, by the chief of the Office of the Attorney General (Ministerio Público Fiscal) of Mendoza, of a federal extraordinary appeal (recurso federal extraordinario) before the Supreme Court of Justice of that province, to block the implementation of this decision considering it to be a “usurpation of the legislative function.”¹⁰⁴ As of this writing, the habeas corpus ruling has been suspended until such time as the Supreme Court of Justice of the Nation rules on the appeal. In the wake of the decision in question, in June 2016 Law No. 8,869 came into force in the province of Mendoza which, according to civil society organizations, establishes pretrial detention as a

According to the federal public defender service of Argentina, in the case of “F, CP” the Chamber of Cassation granted the cassation based on the failure of court that ordered the accused’s detention to provide sufficient reasons for revoking the release granted. Chamber of Cassation, Argentina, Case No. 35/2015. Record No. 206/15. Judgment of June 30, 2015. Information provided by the federal public defender service (Defensoría General de la Nación), Argentina. Response to the Questionnaire, sent June 22, 2016. Annex I “Pretrial Detention: Analysis of case-law and statistical information,” pp. 12 and 15.

¹⁰² IACHR, Press Release 151/16, [Rapporteurship on the Rights of Persons Deprived of Liberty Visits Argentina](#). Washington, D.C., October 19, 2016.

¹⁰³ Supreme Court of Justice of the province of Mendoza, “[Habeas Corpus Correctivo y Colectivo \(Penitenciaría de Mendoza\)](#)”, Case: 13-03815694-7, December 23, 2015; CELS, Argentina. Response to the Questionnaire, sent July 13, 2016.

¹⁰⁴ IACHR, Press Release 151/16, [Rapporteurship on the Rights of Persons Deprived of Liberty Visits Argentina](#). Washington, D.C., October 19, 2016.

“rule” and reflects a punitive approach by the government.¹⁰⁵ In particular, and as will be developed further, the IACHR notes that Law No. 8,869 sets forth standards at odds with the exceptional nature of pretrial detention, on establishing as grounds for finding it in order, inter alia, offenses committed in flagrante delicto, offenses with sentences greater than three years, and recidivism; it also determines a term of 10 days for holding the hearing on pretrial detention, which can be extended for 10 more days at the request of the Office of the Attorney General.¹⁰⁶

b. Main Challenges to Judicial Officers

78. The information compiled to draw up this report shows the persistence of shortcomings and weaknesses in the situation of independence of judicial officers as one of the main challenges for applying alternatives to pretrial detention, and, accordingly, for reducing its use. This is due to state policies that propose higher levels of incarceration as the solution to problems of citizen security, and which have entailed a series of legal reforms resulting in the greater use of pretrial detention.¹⁰⁷
79. The IACHR notes that these reform processes have been accompanied by a strong media and political-institutional message that enjoys the backing of public opinion, and even of the justice institutions themselves, which calls for confronting the problems of citizen insecurity by applying measures for the deprivation of liberty. In particular, the IACHR received information in this respect on Argentina¹⁰⁸, Costa Rica¹⁰⁹, Colombia¹¹⁰, Guatemala¹¹¹, Paraguay¹¹² and Peru.¹¹³ The IACHR observes

¹⁰⁵ IACHR, Press Release 151/16, [Rapporteurship on the Rights of Persons Deprived of Liberty Visits Argentina](#). Washington, D.C., October 19, 2016.

¹⁰⁶ [Law No. 8,869, Modifying Law 6,730 – Code of Criminal Procedure of Mendoza](#), Argentina, in force as of June 1, 2016, Article 1(a), to replace Article 293 of the Code of Criminal Procedure, and Article 3, amending Article 348 of the Code of Criminal Procedure.

¹⁰⁷ These challenges were noted by the IACHR in its 2013 report. IACHR, [Report on the Use of Pretrial Detention in the Americas](#), para. 24.

¹⁰⁸ CELS, Argentina. Response to the Questionnaire, sent to the IACHR July 13, 2016, and Observatorio Internacional de Prisiones, Argentina. Response to the Questionnaire, sent to the IACHR May 25, 2016.

¹⁰⁹ IACHR, Press Release 33/16, [Rapporteurship on the Rights of Persons Deprived of Liberty Makes Visit to Costa Rica](#). Washington, D.C., March 11, 2016.

¹¹⁰ National Council on Economic and Social Policy, Colombia, [Documento CONPES 3828](#), May 19, 2015, p. 65, and Corporación Defensoría Militar, Colombia. Response to the Questionnaire, sent to the IACHR May 22, 2016.

¹¹¹ National Mechanism Office for the Prevention of Torture, Guatemala. Response to the Questionnaire, sent to the IACHR May 16, 2016.

¹¹² IACHR, Press Release 97/14,- [Rapporteurship on the Rights of Persons Deprived of Liberty Wraps up Visit to Paraguay](#). Asunción, Paraguay, September 15, 2014.

¹¹³ Information referred by the Judicial Branch, Judicial Academy, Office of the Human Rights Ombudsperson, as well as by members of civil society and academia, during the colloquium on measures aimed at reducing

that pressures of this type on the judicial authorities not to grant alternative measures – and even on prosecutors not to ask for them– increase citizen discontent over the situation of insecurity that persists in several countries of the region, and block the initiatives aimed at rationalizing the use of pretrial detention. In this respect, the IACHR recalls that the States should adopt the legislative, administrative, and institutional measures needed to ensure the greatest possible level of independence, autonomy, and impartiality of the authorities of the justice system who take charge of making decisions on the request for and application of pretrial detention, so that they perform their functions free of any type of interference.¹¹⁴

80. The IACHR has also been informed of the obstacles to judicial independence faced by judicial officers who are responsible for requesting and applying pretrial detention.¹¹⁵ Information available to the Commission indicates that the pressures on the judicial authorities come not only from public opinion, but also from the judiciary itself. According to reports received, some judges refrain from decreeing precautionary measures other than pretrial detention for fear of sanctions or that they could be removed from their positions in disciplinary proceedings aimed at reducing the discretion of the trier to assess and determine, in the individual case, the need for and the exceptional circumstances required to decree pretrial detention.
81. In the case of Costa Rica, civil society representatives indicated that the judicial authorities who had given impetus to the application of alternatives to pretrial detention are facing disciplinary proceedings brought against them.¹¹⁶ With respect to Guatemala, the National Mechanism Office for the Prevention of Torture told the Commission that the main challenge to implementing measures other than pretrial detention is the fear on the part of the judicial authority of the attack by civil society, the media, and even the Supreme Court of Justice.¹¹⁷ For its part, in the Peruvian State, members of the judicial branch report that its disciplinary organs accord priority to the use of pretrial detention, and have sanctioned and replaced judges “who do not put the persons who have been accused in

pretrial detention in Peru. IACHR, Visit to Peru, February 2017; Instituto de Defensa Legal (IDL), Peru. Response to the Questionnaire, sent to the IACHR May 18, 2016.

¹¹⁴ In this regard, IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendation F “Independence of the justice authorities.”

¹¹⁵ The IACHR has been informed that difficulties of this nature have also been faced by prosecutors on seeking the application of alternatives to pretrial detention. IACHR, Expert Consultation “Measures to Reduce Pretrial Detention in the Americas,” Washington DC, March 20, 2017. Information provided by Úrsula Indacochea, DPLF.

¹¹⁶ IACHR, Press Release 33/16, *Rapporteurship on the Rights of Persons Deprived of Liberty Makes Visit to Costa Rica*, Washington, D.C., March 11, 2016.

¹¹⁷ National Mechanism Office of the Prevention of Torture, Guatemala. Response to the Questionnaire, sent to the IACHR May 16, 2016.

jail.”¹¹⁸ According to information sent to the Commission, in Argentina disciplinary proceedings have also been brought against judicial authorities who ordered non-custodial measures for persons who were being held in pretrial detention who subsequently became recidivists.¹¹⁹

82. On this aspect of concern, the IACHR has noted that in no case should disciplinary oversight mechanisms be used to pressure or punish those judicial authorities who have made decisions related to pretrial detention within the scope of their authority and in keeping with the law.¹²⁰ Disciplinary oversight proceedings have as their objective weighing the conduct and performance of the judge as a public servant, thus they must establish, clearly and in detail, the conduct susceptible to disciplinary sanctions, which should be proportional to the infraction committed. In addition, the decision by which disciplinary sanctions are imposed must be reasoned, public, subject to review, and in keeping with due process. The information on disciplinary proceedings must be accessible and subject to the principle of transparency.¹²¹
83. Finally, the Commission warns that in recent years more than half of the countries of the region have introduced structural reforms to their systems of criminal procedure so as to move from inquisitorial models to accusatory or adversarial ones.¹²² In this context, the Commission has received information about the importance of ensuring and strengthening the autonomy of the prosecutorial authority as a relevant factor for the adequate implementation and operation of the new criminal justice system.¹²³ These changes reinforce the value of liberty and guarantee the presumption of innocence, and, accordingly, introduce mechanisms that seek to rationalize the use of pretrial detention. Nonetheless, these procedural reforms are not very effective for reducing the use of this measure if not accompanied by a change in the institutional culture of

¹¹⁸ Information referred by the Judicial Branch, Judicial Academy, Office of the Human Rights Ombudsperson, as well as by members of civil society and academia, during the colloquium on measures aimed at reducing pretrial detention in Peru. IACHR, Visit to Peru, February 2017; Instituto de Defensa Legal (IDL), Peru. Response to the Questionnaire, sent to the IACHR May 18, 2016.

¹¹⁹ CELS, Argentina. Response to the Questionnaire, sent July 13, 2016.

¹²⁰ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendation F “Independence of the justice authorities.”

¹²¹ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendation F “Independence of the justice authorities.”

¹²² To check in detail the date of the reforms to the procedural legislation by country, CEJA - JSCA, *Prisión Preventiva y Reforma Procesal Penal en América Latina, Evaluación y Perspectivas*. Chile, Vol. 1, 2008.

¹²³ IACHR, *Public hearing “Situation of independence and autonomy of the system for the administration of justice in Mexico,”* 161st Regular Period of Sessions, March 17, 2017. Information submitted by those who requested the hearing.

judicial officers that fosters their independence and autonomy when making and ruling on the requests for pretrial detention, considering it an eminently exceptional measure.¹²⁴ Accordingly, the IACHR urges the States to promote a genuine change in paradigm in the thinking regarding the lawfulness and necessity of pretrial detention in the judicial culture and practice.¹²⁵ In particular, it calls on the States to create institutional incentives and to draw up strategic plans for training and awareness-raising of judicial officers as regards the importance of independence and autonomy of their actions, so as to apply pretrial detention on an exceptional basis and, accordingly, to promote the use of non-custodial alternatives.

B. Eradicating Pretrial Detention as Anticipated Punishment

84. In its Report on the Use of Pretrial Detention in the Americas the IACHR urged the States to step up their efforts and to assume the political will necessary for eradicating the use of pretrial detention as a form of anticipated punishment and as a tool of social control. Accordingly, it is essential that an institutional message be sent from the highest levels of the state and the administration of justice in support of making rational use of pretrial detention and on respect for the right to the presumption of innocence. The States should adopt the measures necessary for ensuring that pretrial detention is applied as an exceptional measure and justified only when the applicable legal standards are met in each individual case; and these standards must be compatible with the requirements of international human rights law.¹²⁶
85. The IACHR observes in this connection – as it did in its 2013 report – that the implementation of criminal justice policies and legal reforms that call for more incarceration as the solution to citizen security problems is actually one of the main factors contributing to the non-exceptional use of pretrial detention.¹²⁷ This situation is reflected, for example, in the high

¹²⁴ DPLF, [Pena sin delito: percepciones acerca de la finalidad de la prisión preventiva en México](#), 2016.

¹²⁵ IACHR, [Report on the Use of Pretrial Detention in the Americas](#), para.326. Recommendation A “General recommendations pertaining to State policy.”

¹²⁶ IACHR, [Report on the Use of Pretrial Detention in the Americas](#), para. 326. Recommendation A “General recommendations pertaining to State policy,” and Recommendation C “Legal framework and application of pretrial detention.”

¹²⁷ IACHR, [Report on the Use of Pretrial Detention in the Americas](#), paras. 24, 78, and 86. This situation was reported to the IACHR consistently through all the mechanisms used to compile the information for this report: working visits, hearing held at the initiative of the IACHR on the matter, and responses to the questionnaire.

levels of incarceration for offenses related to drug use, or promoting the use of abbreviated trials in the case of offenses committed in flagrante delicto, which include a presumption of flagrancy that is broad and indefinite in time.

86. In particular, the legislative trends or mechanisms that promote greater incarceration in order to tackle citizen insecurity, and in general seek to make more use of pretrial detention, translate mainly into expanding the grounds for finding pretrial detention beyond its mere precautionary logic¹²⁸ through legal formulas that: (a) extend the meaning of risk of flight to hypotheses that remove it from its precautionary logic, for example, on according preeminence to considerations such as the seriousness of the act and the expected sentence if convicted; or (b) establish grounds for finding pretrial detention to be in order that are different from the traditional or precautionary ones, and that answer to punitive or dangerousness considerations, such as “danger of recidivism.”¹²⁹ In addition, the mechanisms that strengthen the use of pretrial detention translate into the establishment of offenses for which the accused must be held pending trial and greater restrictions on the procedural mechanisms for release from detention.¹³⁰ In this regard, the IACHR reiterates that there is no empirical evidence that shows that policies based on greater restrictions on the right to personal liberty have a real impact on reducing crime and violence, or resolve more broadly the problems of citizen security.¹³¹

1. Expanding the Grounds for Imposing Pretrial Detention

87. The organs of the inter-American system have ruled that the deprivation of liberty of the accused person “cannot be based on general preventive or special preventive purposes, which could be attributed to the punishment, but ... can only be based on a legitimate purpose, which is: to ensure that the accused does not prevent the proceedings from being conducted or elude the system of justice.”¹³² Pretrial detention cannot constitute an

¹²⁸ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 88.

¹²⁹ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 88.

¹³⁰ These trends were analyzed by the IACHR in its 2013 report. IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 88.

¹³¹ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 100.

¹³² IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 135. See also: I/A Court HR. Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs. Judgment of November 17, 2009. Series C No. 206, para. 111. Citing: Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 103; and Case of Servellón

anticipated punishment or a way to prevent other crimes from being committed.¹³³ In this regard, the IACHR expresses its special concern over recent legislative reforms that have expanded the grounds for finding pretrial detention in order that go beyond its precautionary logic, establishing more punitive criteria, or criteria based on notions of dangerousness. The Commission notes that the Code of Criminal Procedure of the province of Mendoza, Argentina, considers as grounds for its use flagrancy, the sentence set for the offense of which the person is accused (three years or more), and recidivism.¹³⁴ The Comprehensive Organic Criminal Code of Ecuador establishes as grounds for applying this regime the sentence for the crime of which the person is accused (five years or more)¹³⁵; and the Federal Code of Criminal Procedure of Mexico provides for its use in the case of recidivism.¹³⁶

88. The IACHR recalls that any consideration regarding the regulation, need for, or application of pretrial detention should be based on the consideration of the right to the presumption of innocence, and should take into account the exceptional nature of this measure and its legitimate aims. The IACHR reiterates that the provision that rules out the possibility of non-custodial measures because of the sentence the imputed offense carries ignores the principle that requires justifying pretrial detention each specific case by weighing the specific circumstances. According to that test, pretrial detention will only be in order when it is the only means of ensuring the purpose of the proceeding, after showing that other precautionary measures less harmful to liberty would be to no avail.¹³⁷ With respect to the criterion of recidivism, the Commission recalls that this can only be considered one more element in the analysis of whether the measure is in order in a specific case, but can never be used as a criterion determinative of whether to impose pretrial detention.¹³⁸

García et al. v. Honduras. Merits, Reparations and Costs. Judgment of September 21, 2006. Series C No. 152, para. 90.

¹³³ I/A Court HR, Case of Suárez Rosero v. Ecuador, Judgment of November 12, 1997, Series C, No. 35, para.77; I/A Court HR, Case of Chaparro Álvarez y Lapo Iñiguez v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 21, 2007, Series C, No. 170, para. 103; I/A Court HR, Case of Barreto Leiva v. Venezuela, Merits, Reparations and Costs, Judgment of November 17, 2009, Series C, No. 206, para. 111; I/A Court HR, Case of J. v. Peru, Preliminary Objection, Merits, Reparations and Costs, Judgment of November 27, 2013, para.159; I/A Court HR, Case of Norín Catrimán et al. v. Chile, Merits, Reparations and Costs, Judgment of May 29, 2014, Series C, No. 279, para. 311a.

¹³⁴ Code of Criminal Procedure of Mendoza, Argentina, in force as of June 1, 2016, Article 1(1); 1(a), and 1(b) to replace Article 293 of the Code of Criminal Procedure, "Applicability of pretrial detention."

¹³⁵ Comprehensive Organic Criminal Code, Ecuador, in force as of August 10, 2014, Article 536.

¹³⁶ Federal Code of Criminal Procedure, Mexico, published March 5, 2014, in force as of June 18, 2016, Article 167.

¹³⁷ IACHR, *Report on the Use of Pretrial Detention in the Americas*, paras. 149 and 159.

¹³⁸ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 157.

89. The Commission also welcomes the legislative gains embodied in Law 1760 of 2015 of the Colombian State, which does away with the possibility of determining pretrial detention based on the expected penalty for the imputed crime.¹³⁹ In particular, according to Article 2, which modifies Article 308 of the Code of Criminal Procedure, the punishable conduct is not per se determinative of the decision on whether to order pretrial detention, but rather the judicial authority must “sufficiently weigh whether in the future the requirements will be met for decreeing that measure.”¹⁴⁰
90. In particular, the Commission expresses its special concern over the adoption of state policies that seek to punish drug-related conduct – specifically such conduct as related to minor offenses, such as consumption and possession of drugs for personal use¹⁴¹ – and that this has likely resulted in an increase in the number of persons deprived of liberty for drug-related criminal acts, mainly women.¹⁴² In this context, offenses related to drug use are characterized as “grave offenses” (“delitos graves”) and, therefore, pretrial detention is applied automatically, without the accused being able to benefit from alternatives to incarceration.¹⁴³ In this

¹³⁹ Prisons Group of the Law School, Universidad de los Andes, Colombia. Response to the Questionnaire sent August 2, 2016.

¹⁴⁰ Law No. 1760, Colombia, in force as of July 6, 2015, Article 2, which amends Article 308 of Law 906 of 2004.

¹⁴¹ IACHR, Press Release 33/16 - Rapporteurship on the Rights of Persons Deprived of Liberty Makes Visit to Costa Rica. Washington, D.C., March 11, 2016, and CELS, Argentina, Response to the Questionnaire, sent July 13, 2016. See also: Inter-American Drug Abuse Control Commission (CICAD/OAS), Technical Report on Alternatives to Incarceration for Drug-related Offenses, 2015, p. 5; Giacomello, Corina, Proposals for Alternatives to Criminal Prosecution and Incarceration for Drug Related Offenses in Latin America, Informational document of the International Drug Policy Consortium, June 2014; Report of the International Drug Policy Consortium, Las Cortes de Drogas. Los alcances y retos de una alternativa a la prisión preventiva, May 2012, p. 2; Giacomello, Corina, Informational document “Women, Drug Offenses and Penitentiary Systems in Latin America,” International Drug Policy Consortium, 2013; CELS, Mujeres en prisión. Los alcances del castigo, Buenos Aires: Siglo XXI Editores, 2011.

¹⁴² According to CICAD/OAS, at present drug-related crimes are the first or second leading cause of the incarceration of women, and in men it is the second, third, or fourth leading cause. CICAD/OAS, Technical Report on Alternatives to Incarceration for Drug-related Offenses, 2015, p. 14. For example, in the case of Argentina accusations for crimes commonly known as violations of Law No. 23,737 account for 33.7% of prisoners in pretrial detention at the federal level, as well as one of the leading causes of deprivation of liberty. Office of the Federal Ombudsperson for the Rights of Prisoners, Informe Estadístico de la Procuración Penitenciaria de la Nación, information provided in the colloquium on “Measures aimed at reducing pretrial detention in Argentina.” IACHR, Visit to Argentina, September 2016; and National System of Statistics on Enforcement of Sentences, Informe Anual, Republic of Argentina, SNEEP, 2015. For more information, see also, para. 200.

¹⁴³ IACHR, Expert Consultation “Measures to Reduce Pretrial Detention in the Americas,” Washington D.C., May 20, 2016; WOLA, IDPC, Dejusticia, CIM, and OAS, Women, Drug Policies, and Incarceration: A Guide for Policy Reform in Latin America and the Caribbean, 2016, pp. 20 and 22; IACHR, Public hearing “Measures to reduce pretrial detention in the Americas,” 157th Regular Period of Sessions, April 5, 2016; Giacomello, Corina, Informational document “Proposals for Alternatives to Criminal Prosecution and Incarceration for Drug Related Offenses in Latin America,” International Drug Policy Consortium, June 2014. See also International Drug Policy Consortium, Las Cortes de Drogas. Los alcances y retos de una alternativa a la

respect, the IACHR reiterates that pretrial detention should be justified in the specific case, and that legislation that considers applying precautionary measures based on the type of offense – in this case, any drug-related criminal act – ignores the principle of proportionality enshrined in the American Convention.¹⁴⁴ The Commission recalls that the principle of proportionality implies “a rational relationship between the precautionary measure and the purpose sought, so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or excessive compared to the advantages obtained from this restriction and the achievement of the purpose sought.”¹⁴⁵

2. Establishing Offenses Requiring Pretrial Detention and Offenses with Greater Restrictions on the Use of Non-Custodial Measures

91. In its 2013 report the IACHR recommended to the States that they repeal all provisions ordering the compulsory application of pretrial detention based on the type of offense.¹⁴⁶ In this regard, the number of criminal acts with respect to which there is no possibility of applying pretrial detention should be expanded; greater restrictions should not be established on the procedural mechanisms and possibilities of remaining free when facing criminal charges.¹⁴⁷ In particular, the IACHR indicated that in no case may the law provide that any type of offense is excluded from the regime established for ending pretrial detention, nor that certain offenses receive different treatment with respect to others when it comes to pretrial release, without any basis in objective and legitimate criteria for discriminating, merely because they answer to standards such as “social alarm” (“*alarma social*”), “social repercussion” (“*repercusión social*”), “dangerousness” (“*peligrosidad*”), or any others.¹⁴⁸

prisión preventiva,” May 2012, p. 2. For example, in the area of legislation, the Federal Code of Criminal Procedure of Mexico provides for automatic application of pretrial detention for the crimes against health provided for in Articles 194 and 195 of the Federal Criminal Code “On the production, possession, trafficking, proselytizing, and other acts related to narcotics.” *Federal Code of Criminal Procedure*, Mexico, published on March 5, 2014, in force as of June 18, 2016, Article 167.

¹⁴⁴ See, in this regard, I/A Court HR. Case of López Álvarez v. Honduras. Judgment of February 1, 2006. Series C No. 141, para. 81.

¹⁴⁵ I/A Court HR. Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs. Judgment of November 17, 2009. Series C No. 206, para. 122.

¹⁴⁶ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendation C “Legal framework and application of pretrial detention.”

¹⁴⁷ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendation C “Legal framework and application of pretrial detention.”

¹⁴⁸ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 151; IACHR, Report on the Merits 86/09, Case 12,553. Merits. Jorge, Jose and Dante Peirano Basso. Uruguay. August 6, 2009, para. 141.

92. Even so, the IACHR observes that both Law No. 586 on Clearing up the Backlog and Making Effective the System of Criminal Procedure in Bolivia and the Federal Code of Criminal Procedure of Mexico include a long list of offenses that automatically merit pretrial detention.¹⁴⁹ Standing in contrast to these precepts, the Commission views in a positive light that the new Code of Criminal Procedure of Argentina, adopted in 2015 and which has not yet come into force – unlike the Code of Procedure still in force¹⁵⁰ – does not provide for the so-called “delitos inexcusables,” i.e. offenses for which no non-custodial measure may be granted.¹⁵¹
93. The IACHR also expresses its concern over the adoption, in the Colombian State, of Law No. 1786 of 2016, which amends Law No. 1760 of 2015, and establishes different treatment in respect of liberty for certain offenses, on amending the grounds for ending pretrial detention based on the duration of the criminal proceeding. In particular, that legislation doubles the duration of the initial term for requesting a hearing on release on grounds of the running of limitations periods in the following cases: procedures related to specialized justice, when there are three or more accused; crimes of corruption; and crimes against liberty integrity, and the “sexual

¹⁴⁹ Law No. 586 sets out the following list of offenses for which non-custodial measures are not available: crimes of corruption, crimes against state security; femicide; child rape; and infanticide. [Law No. 586 on Clearing up Backlog](#), Bolivia, promulgated October 30, 2014, Article 8, which amends Article 239 of the Code of Criminal Procedure.

The Federal Code of Criminal Procedure establishes that the following offenses automatically call for pretrial detention: willful homicide, genocide, rape, treason, espionage, terrorism, sabotage, corruption of persons under 18 years of age or “persons who do not have capacity,” trafficking in minors, and crimes against health. [Federal Code of Criminal Procedure](#), Mexico, published March 5, 2014, in force as of June 18, 2016, Article 167.

¹⁵⁰ Non-custodial offenses are regulated by Articles 139, 139 *bis*, and 146 of the Criminal Code, which sanctions the suppression and/or assumption of civil status and of the identity and removal, holding, or hiding of children under 10 years of age. Defensoría General de la Nación, Argentina. Response to the Questionnaire, sent June 22, 2016.

¹⁵¹ [Federal Code of Criminal Procedure, Law 27,063](#) (not in force), Argentina, adopted December 4, 2015 and published in the Official Bulletin on December 10, 2014. In this respect, the IACHR observes that even though a new Federal Code of Criminal Procedure of Argentina was adopted in December 2015 – which applies in the country’s federal jurisdiction and in the “national” jurisdiction of the Federal Capital – its implementation was originally anticipated for the national justice of the Autonomous City of Buenos Aires as of March 1, 2016, and to expand gradually to the country’s federal jurisdiction, yet was deferred by presidential decree 257/2015. With respect to the uncertainty as to the force of the new Criminal Code, the federal public defender service (Defensoría General de Nación) and Argentine civil society have stated their concern on considering that this new code would overcome several problems, such as including grounds for applying pretrial detention due to “the circumstances and nature of the act or the expected penalty”; omitting periodic checks of the subsistence of procedural dangers and circumstances for ending pretrial detention; inclusion of offenses for which no pretrial release is allowed, and the mere regulation of bond in the form of a pledge or real or personal property, or a promise, as the only alternatives to pretrial detention. Defensoría General de la Nación, Argentina. Response to the Questionnaire, sent June 22, 2016.

formation of the child.”¹⁵² This is at odds with the previous provision (Law No. 1760 of 2015), which provided that any person in pretrial detention could request a hearing on release due to the running of the limitations periods.¹⁵³

94. In addition, the IACHR notes that the adoption of Law No. 1786 delayed the application of the provision that called for ending pretrial detention based on the running of limitations periods, with respect to the proceedings related to specialized justice; cases that involve three or more accused; and crimes of corruption against the liberty, integrity, and “sexual formation of the child.” In these situations, the term for the duration of pretrial detention comes into force as of July 1, 2017.¹⁵⁴ In this respect, the IACHR has noted that this new provision represents backsliding in relation to what is provided for by Article 5 of Law No. 1760 of 2015, which provided that in all cases the ending of pretrial detention would begin to come into force by July 2016.¹⁵⁵
95. In relation to the United States, the IACHR notes that in November 2016 a constitutional amendment was adopted to Article 12(13) of the Constitution of New Mexico that makes it possible, only in the circumstance of “dangerousness,” to accord different treatment regarding release pending the trial. The IACHR notes that judges are authorized to deny bond based exclusively on the “dangerousness” of the person accused. Moreover, the right to provisional release during the trial vests only in those accused who are “not dangerous.”¹⁵⁶ In this respect, the IACHR recalls that the justification of the preliminary detention for preventive purposes such as dangerousness is based on criteria of substantive, not procedural, criminal law, and principles of punitive response; accordingly, it is at odds with

¹⁵² Law No. 1786 “modifying some provisions of Law No. 1760 of 2015,” Colombia, in force as of July 1, 2016, Article 2. According to the information available to this Commission, the Ministry of Justice and the Office of the Attorney General introduced the bill that sought to delay the entry into force of Law 1760 of 2015 due to the possible “massive release of persons deprived of liberty.” Prisons Group of the Law School, Universidad de los Andes, Colombia. Response to the Questionnaire sent August 2, 2016, and Corporación Defensoría Militar, Colombia. Response to the Questionnaire, sent May 22, 2016.

¹⁵³ In particular, the running of limitations periods applies to the following cases: (a) when, 60 days having elapsed since the date of the allegation no bill of charges has been filed nor preclusion applied for; (b) when, 120 days after the date the bill of charges were filed, the trial hearing has not begun; and (c) when, 150 days after the start date of the trial hearing, the hearing for reading the judgment or its equivalent has not been held. Law No. 1786 “modifying some provisions of Law 1760 of 2015”, Colombia, in force as of July 1, 2016, Article 2.

¹⁵⁴ Law No. 1786 “modifying some provisions of Law 1760 of 2015,” Colombia, in force as of July 1, 2016, Article 2.

¹⁵⁵ IACHR, 2016 Annual Report, Chapter V: Colombia, para. 337.

¹⁵⁶ American University Washington College of Law - Center for Human Rights and Humanitarian Law’s Impact Litigation Project, “Pretrial detention in the United States of America, Canada and the Caribbean.” Information sent to the IACHR April 26, 2017. See also: Ballotpedia, New Mexico Changes in Regulations Governing Bail, Constitutional Amendment 1 (2016), November 2016.

Article 7(5) of the American Convention and the right to the presumption of innocence, in addition to being inconsistent with the principle of pro homine interpretation of the law.¹⁵⁷

C. *Public Defender Service*

1. General Considerations

96. In its Report on the Use of Pretrial Detention in the Americas the IACHR recommended to the States “Strengthen the systems of public defenders ...] by devoting priority attention to the quality and coverage of the service, so that defenders are able to render prompt and effective service, from the moment of police apprehension, aimed at protecting the fundamental rights of every person suspected of or formally charged with the commission of a crime.”¹⁵⁸ The Inter-American Court has indicated in its recent case-law that “the provision of public legal aid services free of charge makes it possible ... to adequately offset the procedural inequality that affects persons who are facing the punitive power of the state, as well as the situation of vulnerability of persons deprived of liberty, and ensure them effective access to justice on equal terms.”¹⁵⁹
97. More than three years after the release of that report, the IACHR observes that inadequate public defender services continue to be one of the main causes of the prolongation of the pretrial detention regime.¹⁶⁰ The shortcomings in the defense stem mainly from insufficient resources to carry out their mandate; lack of diligence in their work; late access to the provision of such services; and lack of independence of the public defenders’ offices.¹⁶¹

¹⁵⁷ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 144. In particular, Article 7(5) of the Convention provides that the liberty of every person detained or held “may be subject to guarantees to assure his appearance for trial.”

¹⁵⁸ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendation E “Legal Defense.”

¹⁵⁹ I/A Court HR. Case of Ruano Torres et al. v. El Salvador. Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 303, para. 156.

¹⁶⁰ Along the same lines, the United Nations Office on Drugs and Crime (UNODC), *Reforma penitenciaria y medidas alternativas al encarcelamiento en el contexto Latinoamericano*, ex officio Technical Consultative Opinion No. 006/2013, directed to the States of the Latin American region, 2013, p. 14.

¹⁶¹ The IACHR addressed some of these issues in its 2013 report. IACHR, *Report on the Use of Pretrial Detention in the Americas*, paras. 44 and 50.

98. The IACHR received information from Argentina, Guatemala, Jamaica, and Peru about the insufficient resources in relation to what they need to exercise their mandate, which is characteristic of the public defender services.¹⁶² On Peru, the information available to the IACHR indicates that despite the increase in the number of public defenders in recent years and the improvement of the institution in aspects such as salaries and training, public defender services in Peru are insufficient to cover the demands of the criminal justice system, for at present there are only 1,000 public defenders for the whole country.¹⁶³ The insufficiency of public defenders worsened with the progressive implementation of the New Code of Criminal Procedure, and with the application of Legislative Decree 1194, which provides for abbreviated procedures.¹⁶⁴ Similarly, in the context of those proceedings public defense services in Argentina also appear to be insufficient.¹⁶⁵ The IACHR has received information about the small number of public defenders in Jamaica. In particular, the state indicated that as of March 2014, there were only 400, and that measures were being taken to increase their numbers.¹⁶⁶ In this regard, the IACHR reminds the States of their obligation to endow public defender services with “sufficient guarantees for their efficient action and equality of arms with the prosecuting authority”¹⁶⁷ in particular on aspects such as the capacity to act, present and produce evidence, and to have access to the records, and to what has been done in the investigations.¹⁶⁸
99. With respect to the lack of diligence in the action of the public defender services, the IACHR received information that indicates that countries such as Jamaica, México y Peru face challenges when it comes to having efficient public defender services. For example, in the case of Jamaica, the IACHR was informed by civil society representatives of the failure of the state to guarantee the right to defense, stemming mainly from the insufficient number of defense lawyers, and from their difficulties getting paid for their services, and they are only paid “for their initial representation.”¹⁶⁹ As

¹⁶² IACHR, Public hearing “Measures to reduce pretrial detention in the Americas,” 157th Regular Period of Sessions, April 5, 2016. Information provided by the Instituto de Estudios Comparados en Ciencias Penales de Guatemala (ICCPG).

¹⁶³ Instituto de Defensa Legal (IDL), Peru. Response to the Questionnaire, sent May 18, 2016.

¹⁶⁴ Response to the Questionnaire, Instituto de Defensa Legal (IDL), Peru, sent May 18, 2016.

¹⁶⁵ CELS. Information provided in the context of the visit by the Rapporteurship to Argentina, September 2016.

¹⁶⁶ IACHR, 2014 Annual Report, Chapter V: Jamaica, paras. 89 and 92. IACHR, Hearing “Follow-up to the IACHR Report on the Situation of Human Rights in Jamaica,” 150th Regular Period of Sessions, March 27, 2014.

¹⁶⁷ I/A Court HR. Case of Ruano Torres et al. v. El Salvador. Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 303, para. 157.

¹⁶⁸ IACHR, Report on the Use of Pretrial Detention in the Americas, para. 326. Recommendation E “Legal Defense.”

¹⁶⁹ IACHR, 2014 Annual Report, Chapter V: Jamaica, paras. 91 and 93. IACHR, Hearing “Follow-up to the IACHR Report on the Situation of Human Rights in Jamaica,” 150th Regular Period of Sessions, March 27, 2014.

regards Peru, the Commission was informed that in general public defenders do not have enough time to mount a defense, since they have no contact with the person detained until minutes before the hearing on whether pretrial detention is in order.¹⁷⁰ In this respect, the IACHR has indicated that in the proceeding for evaluating the application of any precautionary measure the personal attorney or official public defender must be present, who, with due lead time, should have the elements that are going to be used to request the precautionary measure.¹⁷¹ As regards Mexico, the Commission States its concern about what has been indicated by civil society organizations to the effect that in practice, the right of the person detained to have access to an adequate defense begins from the moment he or she is brought before the prosecutorial authorities, and not from the moment of the detention, as established in Mexican law.¹⁷² In this respect, and in order to protect the rights of every person accused of committing a crime, the IACHR reiterates the obligation of the States to provide a public defender from the moment of the police apprehension, considering mainly that the immediate involvement of the defense in the process – in addition to guaranteeing a more effective defense and preventing ill-treatment and torture during the detention – reduces the duration of pretrial detention.

100. As regards the operation of the public defender service in Argentina, the IACHR received information that indicates that both at the federal level and in the province of Buenos Aires, the weakness of that institution is directly related to its lack of independence and the absence of specific policies to improve its role and performance in the system. In particular, civil society representatives indicate that the failure to implement a public defender service (Ministerio Público de la Defensa) that guarantees its autonomy erodes the adequate performance of the public defenders, since they “are vulnerable to the pressures brought to bear by the Office of the Attorney General (Procuración General) and the Executive branch.”¹⁷³ Moreover, in 2016 the Human Rights Committee stated its concern over the lack of functional and budgetary autonomy of the public defender services, as well as the insufficient resources allocated to the federal public defenders and

¹⁷⁰ IACHR, Expert Consultation “Measures to Reduce Pretrial Detention in the Americas,” Washington, D.C., May 20, 2016. Information provided by Ernesto de la Jara, IDL.

¹⁷¹ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendation E “Legal Defense.”

¹⁷² See in this regard, *Constitution of Mexico*, Article 16. Response to the Questionnaire by the Instituto de Justicia Procesal Penal and Documenta, Mexico, sent May 23, 2016.

¹⁷³ CELS, Argentina. Response to the Questionnaire, sent to the IACHR July 13, 2016. Information also provided by civil society organization during the Rapporteurship’s visit to Argentina, September 2016.

the correlate provincial services to carry out their mandate.¹⁷⁴ In this respect, the organs of the inter-American system have established that one of the fundamental standards in developing the minimal judicial guarantees during the proceeding is preserving the functional and budgetary autonomy of the public defender service vis-à-vis other organs of the State and of the judicial authorities and prosecutors.¹⁷⁵ The IACHR reminds the States that for the public defender service to have the same institutional capacity to be engaged in proceedings as the prosecutors, the domestic legislation should provide that the public defender services enjoy functional, administrative, and financial autonomy, striving for functional equality with the prosecutorial function and stable employment for public defenders.¹⁷⁶

2. Policy of Addressing the Situation of Persons Held in Pretrial Detention as a Good Practice

101. The IACHR highlights the efforts made by the Office of the Public Defender of São Paulo to give more attention to persons held in pretrial detention, and thereby guarantee a better defense during their trials. In this regard, by Decision No. 297 (Deliberação No. 297) of May 2014, the Superior Council of the Public Defender Service of São Paulo created a special policy for addressing the situation of persons held in pretrial detention.¹⁷⁷ In the context of this decision, a practice was implemented that entailed visiting detention centers to interview persons held in pretrial detention, and to be able to offer the persons represented better legal assistance to ensure their right to due process and also to safeguard their rights to life and integrity.¹⁷⁸ According to official figures, in 2015 a total of 12,253 men and 1,588 women in the prisons of São Paulo had their situations reviewed. On

¹⁷⁴ Human Rights Committee (United Nations), Concluding observations on the fifth periodic report of Argentina, 117th session, June 20 to July 15, 2016, para. 33.

¹⁷⁵ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 192. See also, IACHR, *Guarantees for the independence of justice operators : Towards strengthening access to justice and the rule of law in the Americas*, OEA/Ser.L/V/II. Doc. 44, adopted December 5, 2013, paras. 45-48.

¹⁷⁶ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendation E “Legal Defense.”

¹⁷⁷ Superior Council of the Public Defender Service of the State of São Paulo, Brazil, *Decision CSDP No. 297*, May 8, 2014.

¹⁷⁸ Superior Council of the Public Defender Service of the State of São Paulo, Brazil, *Decision CSDP No. 297*, May 8, 2014, Article 1.

average, 20.7 percent of the persons served by the Office of the Public Defender secured release within 90 days after the visits.¹⁷⁹

102. The IACHR was informed of various advantages of implementing the program for specialized attention. In particular, thanks to the information gathered during the interviews, the public defender service has done a better job preparing the case within a relatively short time after the detention. These visits also make it possible to collect relevant information for giving direction to public policies, such as those related to preventing torture and ill-treatment during the detention. In this respect, according to the instrument that establishes this policy public defenders are obligated to inquire into the existence of any type of threat, torture, and ill-treatment.¹⁸⁰ According to the information compiled in the visits made in 2015, 43.2 percent of the men and 30.5 percent of the women who received assistance reported having suffered violence at the moment of their detention.¹⁸¹ Finally, the constant presence of public defenders in the detention centers, and the consequent quick response to possible police abuses, could constitute an important factor for preventing torture and ill-treatment.¹⁸²
103. With respect to the operation of this initiative in practice, the information available to the Commission¹⁸³ indicates that in the first instance, the Division of Services for Prisoners facing Charges (DAP, the acronym based on the name in Portuguese¹⁸⁴) supports the defenders in preparing the visits to the detention centers. Days before the visit that agency provides them a list that pulls together information sent by the courts and that contains the following data: name of the person in pretrial detention, motive and date of the detention, and place held. In addition, the DAP provides support by sending additional documentation that the public

¹⁷⁹ Information from the Public Defender Service of São Paulo, “Atendimento às pessoas presas provisoriamente na Cidade de São Paulo,” November 2016. Information sent by the Stanford Human Rights Center, Stanford University, March 30, 2017.

¹⁸⁰ Superior Council of the Public Defender Service of the State of São Paulo, Decision CSDP No. 297, May 8, 2014, Article 1.

¹⁸¹ Information from the Public Defender Service of São Paulo, “Atendimento às pessoas presas provisoriamente na Cidade de São Paulo,” November 2016. Information sent to the Stanford Human Rights Center, Stanford University, March 30, 2017.

¹⁸² Stanford Human Rights Center, Best practices to reduce the excessive use of pretrial detention and create more rehabilitative prisons in the Americas (internal document), October 2016 (primary researcher: Mirte Postema).

¹⁸³ Information on the functioning of the measure is based mainly on the documentation done by the Stanford Human Rights Center (Stanford University), compiled through interviews with staff of the Public Defender Service of the state of São Paulo, Brazil, in February 2016 and March 2017. Stanford Human Rights Center, Best practices to reduce the excessive use of pretrial detention and create more rehabilitative prisons in the Americas (internal document), October 2016 (primary researcher: Mirte Postema).

¹⁸⁴ *Divisão de Apoio ao Atendimento do Preso Provisório.*

defenders may need with respect to the persons detained, or by making special requests, such as changing the date of a judicial hearing if the defenders have programmed a hearing on the date of the visit.¹⁸⁵

104. Twice monthly each of the 719 public defenders of São Paulo visits a jail, chosen in coordination with the DAP. In general, the visits to prisons are scheduled for the mornings, to ensure there is no conflict with the judicial hearings, which are normally held in the afternoons.¹⁸⁶ The visit to the person detained is held at a private setting and without the presence of guards. During the interview the following objectives are pursued: (a) to provide preliminary information to the person facing charges on the reasons for his or her detention, indictment, possibilities of release pending trial, procedural steps, and role of the defense counsel; (b) to obtain information on how to contact family members and other persons close to the accused; (c) to inquire about the elements that may facilitate the request for release or the application of house arrest; (d) to have relevant information to strengthen the technical defense; (e) to oversee the conditions of detention and to identify possible violations of the rights of the persons detained; (f) to establish continuing contact with the person after the initial contact; and (g) to identify and refer cases that require actions related to the economic needs of the family.¹⁸⁷ In particular, to ensure that the interview focuses on the particular situation of the person detained, two pre-established data sheets are used, for men and women; nonetheless, in both documents there is a space for “other relevant information,” where one spells out particular conditions, such as gender identity and expression, or health issues.¹⁸⁸
105. After the visit, the defense counsel systematizes the information collected and places it in a server to which the DAP has access. The DAP then transmits the respective information to the defender assigned to the case. Should this defense counsel require more information on a given issue, that information can be requested of the DAP, which will schedule another visit

¹⁸⁵ Information from the Public Defender Service of São Paulo, sent to the Stanford Human Rights Center, August 17, 2016.

¹⁸⁶ Defense counsel receives a per diem for these visits in keeping with Law No. 988/2006 to cover the costs to travel to the jail or prison. Supplemental State Law No. 988/2006, Brazil, published January 9, 2006.

¹⁸⁷ Superior Council of the Public Defender Service of the State of São Paulo, Decision CSDP No. 297, May 8, 2014, Article 1.

¹⁸⁸ Information from the Public Defender Service of São Paulo, “Atendimento às pessoas presas provisoriamente na Cidade de São Paulo,” November 2016. Information sent to the Stanford Human Rights Center, March 30, 2017. In addition, having a gender perspective in the interviews is also provided for in: Superior Council of the Public Defender Service of the State of São Paulo, Decision CSDP No. 297, May 8, 2014, Article 4.

with the person facing charges and report on the request for additional information to the next defense counsel who visits the respective prison.¹⁸⁹

¹⁸⁹ Stanford Human Rights Center, Best practices to reduce the excessive use of pretrial detention and create more rehabilitative prisons in the Americas (internal document), October 2016 (primary researcher: Mirte Postema).

CHAPTER 3
ALTERNATIVES TO PRETRIAL
DETENTION

ALTERNATIVES TO PRETRIAL DETENTION

106. In this chapter, the Commission analyzes in greater depth the standards related to the general obligations for applying non-custodial measures, such as the determination of the measures, supervision of implementation, and breach of obligations imposed in the context of applying them, and it analyzes the advantages of applying these measures compared to imposing pretrial detention. In addition, the IACHR monitors the legislative and administrative progress in applying these measures, and with respect to the efforts made to supervise their application, and to regulate the actions to be taken in case they are violated. In particular, the IACHR addresses the question of electronic monitoring, restorative justice in criminal matters, and drug courts. This is considering that based on the research done for this study, the IACHR found that these are the measures which the States of the region have done the most to implement.

A. *General Considerations*

107. In its Report on the Use of Pretrial Detention in the Americas, IACHR urged the States to apply alternative measures rationally, mindful of their purpose and efficacy, and the characteristics of each case¹⁹⁰, and observing the principles of legality, necessity, and proportionality.¹⁹¹ Considering the fundamental standards regarding the use of pretrial detention, alternatives to it should only be applied so long as the danger of flight or of thwarting the investigation cannot be reasonably avoided. The judicial authority should opt to apply the least cumbersome measure, always considering a gender perspective or, as the case may be, the paramount interest of the child or the impairment that could be caused to other persons belonging to groups at special risk. The judicial authority has the obligation to determine such measures without delay.¹⁹² In those cases in which the

¹⁹⁰ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendation B “Application of other precautionary measures different from pretrial detention.”

¹⁹¹ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 230.

¹⁹² The United Nations and the Committee of Ministers of the Council of Europe have both adopted this position. United Nations, *Tokyo Rules*, adopted by the General Assembly in Resolution 45/110, of December 14, 1990, Rule 6.2; United Nations Office against Drugs and Crime (UNODC), *Handbook of basic principles and promising practices on Alternatives to Imprisonment*, 2010, p. 22, and Committee of Ministers,

prosecutor seeks to apply the precautionary measure of pretrial detention, the unfeasibility of alternative measures must be shown.¹⁹³

108. In particular, the use of measures other than pretrial detention was one of the main recommendations made by the IACHR in its 2013 report on pretrial detention, to rationalize the use of pretrial detention – and consequently to address overcrowding.¹⁹⁴ In this regard, and to ensure the appearance of the accused and avoid any thwarting of the investigation, the IACHR recommended that the States consider applying the following measures: (a) the promise of the accused to submit to the procedure and not obstruct the investigation; (b) the obligation to submit to the care or surveillance of a given person or institution, in the conditions that are set for that purpose; (c) the obligation to appear periodically before the judge or the authority he or she may designate; (d) the prohibition on leaving a given geographic area without prior authorization; (e) withholding travel documents; (f) immediate abandonment of the domicile, in the case of domestic violence where the victim and the accused live together; (g) posting, by oneself or by a third person, of a bond in a sufficient amount; (h) surveillance of the accused by some electronic device for tracking or determining his or her physical location; and (i) house arrest, in one’s own home or in the home of another person, without surveillance or with such surveillance as ordered by the judge.¹⁹⁵ The United Nations Tokyo Rules stipulate that in order to guarantee the effective use of these measures States should put in place a wide array of options so that the adequate measure can be determined, considering the particularities of each case.¹⁹⁶
109. In addition to the detailed analysis of the serious effects of overcrowding analyzed in its 2013 report, the IACHR has addressed this issue through all its mechanisms. Matters in the system of cases and precautionary measures have illustrated the situation of tension and violence brought on by overcrowding, as well as the risks such situations pose to the life and integrity of persons deprived of liberty, due, among other factors, to the

Recommendation REC(2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, September 27, 2006.

¹⁹³ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendation C “Legal framework and application of pretrial detention.”

¹⁹⁴ IACHR, *Report on the Use of Pretrial Detention in the Americas*, paras. 241 and 291. In this regard, see United Nations, Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), E/CN.15/2015/L.6/Rev.1, ECtHR, *Case of Torreggiani and Others v. Italy*, Judgment of January 8, 2013 (Second Section), paras. 76 and 95, and *Case of Ananyev and Others v. Russia*, Judgment of January 10, 2012 (First Section of the Court), paras. 144-145 and 197 ff.

¹⁹⁵ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendation A “General recommendations pertaining to State policy.”

¹⁹⁶ In this respect, the Tokyo Rules indicate: “The number and types of noncustodial measures available should be determined in such a way so that consistent sentencing remains possible” United Nations, Tokyo Rules, adopted by the General Assembly by Resolution 45/110, of December 14, 1990, Rule 2.3.

fact that it: (a) impedes classifying the prisoners by categories; (b) makes difficult access to basic services; (c) facilitates the propagation of disease; (d) generates an environment in which the conditions of health and hygiene are deplorable; (e) restricts access of the prisoners to productive activities; (f) fosters corruption, (g) hinders the prisoners' contact with their families; and (h) causes serious problems in prison management.

110. The IACHR also highlights that in addition to reducing overcrowding, the use of alternatives to pretrial detention has various major benefits. First, applying such measures is one of the most effective ways to: (a) prevent the disintegration and stigmatization of communities stemming from the personal, family, and social consequences of pretrial detention; (b) reduce recidivism; and (c) more effectively use public resources.¹⁹⁷ On this last point, the Commission has noted that pretrial detention is an economically costly precautionary measure compared to those measures that do not entail deprivation of liberty, and so modernization of the administration of justice should take into account the use of alternative measures as a way to optimize the social utility of the criminal justice system and available resources.¹⁹⁸ In addition, as the IACHR has indicated, persons held in pretrial detention are at a procedural disadvantage compared to those who are free before and during their trial.¹⁹⁹ According to the Working Group on Arbitrary Detention of the United Nations, persons held in pretrial detention are less likely to be acquitted than persons who are free pending trial.²⁰⁰

B. Gains and Challenges Applying Alternative Measures

1. Legislative, Administrative and Judicial Measures

111. The IACHR observes that States such as Argentina, Mexico, and Peru have amended their legislations to expand the list of alternatives to pretrial detention. In Mexico, the 2016 Federal Code of Criminal Procedure provides for a wide variety of alternative measures.²⁰¹ In the State of Peru,

¹⁹⁷ For more detail, see para. 21.

¹⁹⁸ IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, Cap. VII, OEA/Ser.L/V/II.111, April 6, 2011, para. 36, IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 241.

¹⁹⁹ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 158.

²⁰⁰ Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, E/CN.4/2006/7, December 12, 2005, para. 66.

²⁰¹ Of these measures, special mention should be made of the following: periodic presentation before a judicial authority or a designated authority, bond, attachment of property, subjection to the care or supervision of a given person or institution, institutionalization, prohibition on approaching certain persons or places,

by Legislative Decree No. 1229 of September 25, 2015 – which amends the new 2004 Code of Criminal Procedure – alternative measures are provided for in addition to those considered by that law²⁰², which only regulated simple and restrictive appearance, and house arrest.²⁰³ The Comprehensive Organic Criminal Code of Ecuador, at Article 522, provides for the application of four types of alternative measures: prohibition on leaving the country; periodic appearance before a designated authority or institution, house arrest, and electronic monitoring mechanisms for criminal matters.²⁰⁴ The IACHR also observes that the new code of Argentina – in contrast with the law in force, which provides only for bond based on real or personal property, or a promise (caución real, personal o juratoria)²⁰⁵ – introduces a wide array of alternatives to pretrial detention.²⁰⁶ The IACHR has been informed by the Federal Public Defender Service (Defensoría General de la Nación) of Argentina that even though the new Argentine code has not come into force, the provision that incorporates the alternative measures has led the justice authorities to apply them.²⁰⁷

112. As for administrative measures, the IACHR welcomes relevant initiatives adopted by the Brazil, Canada, and Colombia. The Commission notes the establishment in May 2016 of the National Police for Alternatives to Prison in Brazil, by the National Penitentiary Department (DEPEN: Departamento Penitenciário Nacional), whose aim is to reduce mass incarceration by applying alternatives to deprivation of liberty for punishment in criminal cases.²⁰⁸ In the context of this policy a group of specialists was established

immediate separation from the domicile, temporary suspension of work activity, electronic locators, and house arrest. Federal Code of Criminal Procedure, Mexico, in force as of June 18, 2016, Article 155.

²⁰² In this regard, the following measures are included in Peruvian law: subjection to the care and supervision of a given person or institution; prohibition on being absent from the place where one resides, going to certain places, communicating with or approaching the victim or certain persons; bond; and personal electronic surveillance. Legislative Decree No. 1229, declaring as a matter of public interest and national priority the strengthening the infrastructure of prison services, Peru, in force as of September 25, 2015, Article 288.

²⁰³ Code of Criminal Procedure, Peru, in force as of July 29, 2004, Articles 287 (restrictive appearance); Article 290 (house arrest), and Article 291 (simple appearance).

²⁰⁴ Comprehensive Organic Criminal Code, Ecuador, in force as of August 10, 2014.

²⁰⁵ Defensoría General de la Nación, Argentina. Response to the Questionnaire, sent June 22, 2016. Annex I, “Pretrial Detention: Analysis of case-law and statistical information,” p. 15.

²⁰⁶ Of these measures, the following merit special mention: promise to submit to the procedure and not obstruct the investigation; obligation to submit to the care or supervision of a given person or institution; periodic presentation before a judge or designated authority; prohibition on leaving a given territorial jurisdiction; withholding travel documents; prohibition on going to certain meetings, visiting certain places, or communicating with or about certain persons; immediate abandonment of the domicile; bond based on real or personal property; electronic surveillance; and house arrest. Federal Code of Criminal Procedure, Law 27,063 (not in force), Argentina, adopted December 4, 2015 and published in the Official Bulletin on December 10, 2014, Article 177.

²⁰⁷ Defensoría General de la Nación, Argentina. Response to the Questionnaire, sent to the IACHR June 22, 2016.

²⁰⁸ Its main goal is to reduce the country’s prison population by 10% by 2019. Portal Brasil, article “Governo institui a Política Nacional de Alternativas Penais,” May 3, 2016.

to design management models focused on five main areas: (a) promoting non-custodial measures and minimal police intervention; (b) fighting the culture of incarceration; (c) expanding and improving the network supporting alternative criminal justice measures; (d) promoting community participation and supervision in applying these measures; and (e) managing information.²⁰⁹ The IACHR also notes that also in 2016 the Ministry of Justice of Brazil issued the “Postulates, Principles, and Guidelines for the Policy of Alternative Measures,” which set forth the bases for applying and managing such measures.²¹⁰ In particular, the IACHR notes guideline 18, which provides for joint efforts on the part of the justice system and civil society to establish extensive care and assistance networks for inclusion in the community of the persons who benefit from the measures. Such care networks have organized in many areas, such as: mental health, employment, professional training, legal and social assistance, cultural training and dissemination, security networks for women, and networks of protection for persons belonging to groups at special risk.²¹¹

113. The Commission notes that in Canada, in August 2015, the Ministry of Justice of the province of Saskatchewan established a steering committee to analyze the situation of pretrial detention in that province.²¹² The main areas of work included applying alternative measures.²¹³ The IACHR notes that in Colombia, Document 3828 of the National Council on Economic and Social Policy of Colombia (2015)²¹⁴ establishes that the measures aimed at overcoming the problems in the prison system include those aimed at creating alternatives to incarceration, and rationalizing the use of pretrial detention.²¹⁵
114. In terms of judicial measures, the IACHR welcomes the efforts made by the United States to strengthen the use of alternatives to pretrial detention. In the context of the initiative launched in July 2015 by the mayor of New York City – to reduce pretrial detention by increasing the number of persons processed in the community – the local judiciary promoted mainly

²⁰⁹ Ministry of Justice, Brazil, “[Administrative Act \(Portaria\) No. 495, of April 28, 2016](#),” published May 2, 2016.

²¹⁰ Ministry of Justice, National Prison Department and National Justice Council, Brazil, “[Postulados, Princípios e Diretrizes para a Política de Alternativas Penais](#),” April 2016.

²¹¹ Ministry of Justice, National Prison Department and National Justice Council, Brazil, “[Postulados, Princípios e Diretrizes para a Política de Alternativas Penais](#),” April 2016. See also: National Justice Council, Brazil, “[CNJ e MJ disponibilizam publicação sobre a política de alternativas penais](#),” April 28, 2017.

²¹² That committee was made up of representatives of the Ministry of Justice, the police of Prince Albert and Saskatoon, and the public defender service of Saskatchewan. Ministry of Justice, Saskatchewan, Canada, [Annual Report for 2015-16](#), p. 10.

²¹³ Ministry of Justice, Saskatchewan, Canada, [Annual Report for 2015-16](#), p. 10.

²¹⁴ For more information, see para. 67.

²¹⁵ National Council on Economic and Social Policy, Colombia, [Documento CONPES 3828](#), May 19, 2015, p. 63.

the adoption and use of alternatives to pretrial detention such as: (a) “release on personal recognizance,” i.e. the obligation to report in person periodically to the judicial authority; (b) determination of bond subject to the appearance of the accused, and not to monetary conditions; and (c) strengthening the use of supervised release programs, by which the person appears in a certain place or is monitored by telephone.²¹⁶ The IACHR also observes that in May 2015 the Chief Justice of the Supreme Court of Maine established a task force group made up of representatives of the government and specialists to review the situation of pretrial detention in the state and to make recommendations.²¹⁷ One of the lines of work was focused on the use of alternative measures, and in this regard guidelines were established specifically for creating and supervising community service programs and to develop and improve the procedures related to imposing fines and other alternative measures.²¹⁸

115. In general, the IACHR notes that in the period of analysis covered by this study, the types of measures whose implementation involved greater efforts by the States in the region consisted of: (a) electronic monitoring mechanisms, (b) restorative justice programs in criminal matters, and (c) drug treatment programs under judicial supervision.

2. Supervision of the Application of Alternative Measures

116. Based on information available to it, the IACHR understands that one of the main challenges related to implementing measures not entailing deprivation of liberty is the lack of information available on the monitoring and supervision of such measures. In this regard, the lack of clear and reliable records on the degree of compliance with the obligations imposed in the context of the alternative measure ordered may mean ineffective mechanisms for overseeing and monitoring such measures, as well as inadequate coordination among the authorities involved. Considering this, the Commission reiterates that in order for the States to be able to effectively supervise the application of alternative measures, they should

²¹⁶ American University Washington College of Law, Center for Human Rights and Humanitarian Law’s Impact Litigation Project, “Pretrial detention in the United States of America, Canada and the Caribbean.” Information sent to the IACHR April 26, 2017. See also: Government of New York City, Press Release, “[Mayor de Blasio Announces \\$17.8 Million to Reduce Unnecessary Jail Time for People Waiting for Trial](#),” July 8, 2015.

²¹⁷ Intergovernmental Pretrial Justice Reform Task Force, State of Maine, USA, [Report on the Intergovernmental Pretrial Justice Reform Task Force](#), December 2015.

²¹⁸ Intergovernmental Pretrial Justice Reform Task Force, State of Maine, USA, [Report on the Intergovernmental Pretrial Justice Reform Task Force](#), December 2015.

generate statistics and produce reliable and systematic information on the results obtained with the application of those measures, so as to identify the possible obstacles to their implementation.²¹⁹ In addition, in order to strengthen the mechanisms for supervising alternatives to pretrial detention, the IACHR recommends that the states perform periodic evaluations that make it possible to analyze and verify their objectives, operations, and efficacy, and to promote and supervise their implementation by establishing monitoring mechanisms with a gender perspective and differentiated approaches.

117. In recent years the IACHR observes that Argentina, Brazil, Mexico, and the United States have made major gains related to monitoring and supervising alternatives to pretrial detention. Accordingly, the new Code of Argentina, which has yet to come into force, provides at its Article 177 for the establishment of the Office of Alternative and Substitute Measures, to monitor the implementation of such measures.²²⁰ In addition, in Maine, United States of America, the working group that formed to analyze the situation of pretrial detention focused primarily on the recommendations related to the supervision of such alternative measures.²²¹ The Federal Code of Criminal Procedure of Mexico regulates the main obligations of the authorities in charge of evaluating and supervising such measures²²², which have been implemented through the Precautionary Measures Unit (“UMECA”).²²³ Based on requests for access to public information, civil society organizations in Mexico report that as of September 2015, several States in Mexico had high percentages of effectiveness in implementing alternatives to pretrial detention. They indicate that the States of Baja

²¹⁹ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 238. On this aspect the Tokyo Rules stipulate that within the criminal justice system mechanisms of investigation and information should be established to gather and analyze data and statistics on the application of non-custodial regimes. United Nations, *Tokyo Rules*, adopted by the General Assembly by Resolution 45/110, of December 14, 1990, Rule 20.3.

²²⁰ *Federal Code of Criminal Procedure, Law 27,063* (not in force), Argentina, adopted December 4, 2015 and published in the Official Bulletin on December 10, 2014, Article 177.

²²¹ Intergovernmental Pretrial Justice Reform Task Force, State of Maine, USA, *Report on the Intergovernmental Pretrial Justice Reform Task Force*, December 2015.

²²² *Federal Code of Criminal Procedure*, Mexico, in force as of June 18, 2016, Article 164.

²²³ The first antecedent of the UMECAS arose in the state of Morelos in 2011, and was focused on adolescents. In 2012, the first program for adults was inaugurated in the same state. Instituto para la Seguridad y Democracia (INSYDEM), Press Release “Morelos: UMECA para adultos, en marcha; promoverá alternativas a la prisión preventiva,” August 16, 2012.

Among the main functions of that supervisory unit are: (a) to keep up-to-date the data base on precautionary measures and obligations imposed, their monitoring and conclusion; (b) requesting and providing information to the offices with similar functions; and (c) executing the requests for support to obtain information needed by other offices. *Federal Code of Criminal Procedure*, Mexico, in force as of June 18, 2016, Article 177.

California, Guerrero, Morelos, Puebla, and Mexico City, have rates of effectiveness of approximately 95 percent.²²⁴

118. The IACHR also notes that the authority that supervises the implementation of alternative measures in Mexico includes the participation of civil society organizations, who assist in supervising precautionary measures. Representatives of Mexican civil society reported that a network of approximately 14 organizations “that assist in the Supervision of Precautionary Measures for adults and adolescents in Mexico City” is being formed, and that it has programs in the areas of education, treatment, job service, and community service.²²⁵ In Brazil, as part of its “Postulates, Principles, and Guidelines for the Policy on Alternative Measures,” the establishment and implementation of training continues for the community networks that are involved in applying and supervising alternative measures.²²⁶
119. In this respect, the IACHR welcomes the efforts of the States of the region to include civil society in the mechanisms for supervising and monitoring the alternative measures, and notes that in the context of implementing those measures the States should make the efforts required to ensure not only efficient coordination between the criminal justice authorities and other support agencies that provide various types of assistance, but also of these agencies with civil society organizations. The involvement of civil society and of community mechanisms in these initiatives is essential for the following purposes: (a) to guarantee full community integration; (b) to ensure a more solid structure in carrying out the alternative measures; (c) to have greater support in the task of raising awareness as to the advantages of alternative measures; and (d) to build greater confidence in the beneficiaries regarding their use.

3. Violation of the Terms of Non-Custodial Measures

120. In one of the recommendations made in its 2013 Report on the Use of Pretrial Detention in the Americas, the IACHR noted that breach of the precautionary measures not entailing deprivation of liberty may be subject

²²⁴ Baja California, Guerrero, Morelos, Puebla, and Mexico City, respectively, have percentages of effectiveness of 98%, 97%, 94%, 91%, and 96%. Instituto de Justicia Procesal Penal and Documenta, Mexico. Response to the Questionnaire, sent to the IACHR May 23, 2016.

²²⁵ Instituto de Justicia Procesal Penal and Documenta, Mexico. Response to the Questionnaire, sent May 23, 2016.

²²⁶ Ministry of Justice, National Prison Department and National Justice Council, Brazil “[Postulados, Princípios e Diretrizes para a Política de Alternativas Penais](#),” April 2016. See also: National Justice Council, Brazil, “[CNJ e MJ disponibilizam publicação sobre a política de alternativas penais](#),” April 28, 2017.

to a sanction, but does not automatically justify the imposition of pretrial detention.²²⁷ In this respect, according to the Tokyo Rules any determination made by the authority with respect to a modification or revocation of the non-custodial measures should be based on a careful examination of the arguments presented by both the supervising officer and authorities the offender.²²⁸

121. The IACHR observes that during the period subject to this analysis Mexico and Ecuador have incorporated provisions in the Federal Code of Criminal Procedure and in the Comprehensive Organic Criminal Code, respectively, aimed at how to respond to a violation of the non-custodial measures and that take account of the relevant international standards.²²⁹ In addition, the IACHR states its concern over the information received that indicates that in Argentina – at the federal level – in response to the violation of alternative measures, the judicial authority automatically imposes a custodial measure immediately and without any prior analysis.²³⁰

C. *Types of Alternative Measures*

1. **Electronic Monitoring Mechanisms in Criminal Matters**

122. In its report on pretrial detention, among the alternative measures that the IACHR recommended that the States apply instead of pretrial detention is “surveillance of the defendant by means of an electronic tracking device or a positioning device that determines his or her physical location.”²³¹ In general, such surveillance has the aim of determining the movements of persons facing criminal charges – and also convicts – within a given radius, taking as the point of reference the domicile or place established for the beneficiaries.

²²⁷ IACHR, *Report on the Use of Pretrial Detention in the Americas*, paras. 231 and 326. Recommendation B “Application of other precautionary measures different from pretrial detention.” In this regard, see United Nations, *Tokyo Rules*, Adopted by the General Assembly in Resolution 45/110, of December 14, 1990.

²²⁸ United Nations, *Tokyo Rules*, Adopted by the General Assembly in Resolution 45/110, of December 14, 1990. Rule 14.2.

²²⁹ *Federal Code of Criminal Procedure*, Mexico, in force as of June 18, 2016, Article 174. *Comprehensive Organic Criminal Code*, Ecuador, in force as of August 10, 2014, Article 542.

²³⁰ Office of the Federal Ombudsperson for the Rights of Prisoners, Argentina. Response to the Questionnaire, sent May 22, 2016.

²³¹ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendation B “Application of other precautionary measures different from pretrial detention.”

a. Legislative and Administrative Measures

123. The IACHR observes that since its 2013 report the use of electronic monitoring mechanisms in criminal matters has been one of the most widely implemented alternatives in the region. Countries such as Argentina, Brazil, Costa Rica, the Dominican Republic, Ecuador, Guatemala, and Peru have taken various legislative and administrative actions to implement them.
124. In terms of legislative measures, on September 30, 2014, Law No. 9271 “Electronic monitoring mechanisms in criminal matters,” was published in Costa Rica.²³² In Ecuador, the Comprehensive Organic Criminal Code of 2014²³³ established the use of an electronic surveillance device as an alternative to pretrial detention. In Guatemala, the Law on Implementation of Telematic Monitoring in Criminal Proceedings, in force as of December 2016, regulates the application of “telematic monitoring to criminal proceedings ... under the modality of permanently locating persons.”²³⁴ In Peru, personal electronic surveillance was introduced by Law No. 29499 of 2010²³⁵, and in 2015 two legislative reforms were introduced that established significant changes in its application.²³⁶ In this respect, and as will be developed below, the States of Costa Rica, Ecuador, and Peru have included, in their legislations, a special approach for women and other persons belonging to groups at special risk in relation to the application of this particular measure.²³⁷ The IACHR notes that one of the recommendations made by the Standing Senate Committee on Legal and Constitutional Affairs of the Canadian Senate – to address the issue of procedural delays in the justice system – consisted of implementing electronic monitoring mechanisms in criminal matters “as soon as possible.”²³⁸ That Committee recommended to the Government of Canada that it assume a leadership role and invest the resources needed to collaborate with the provincial and territorial governments to develop and

²³² [Law No. 9271 “Electronic surveillance mechanisms in criminal matters,”](#) Costa Rica, in force as of September 30, 2014.

²³³ [Comprehensive Organic Criminal Code,](#) Ecuador, in force as of August 10, 2014, final provision.

²³⁴ [Law on Implementation of Telematic Monitoring in Criminal Procedure \(Decree 49-2016\),](#) Guatemala, in force as of December 22, 2016.

²³⁵ [Law No. 29499, which establishes personal electronic surveillance,](#) published January 16, 2010.

²³⁶ [Supreme Decree No. 002-2015-JUS, which modifies and incorporates articles to the Regulation for Implementation of Personal Electronic Surveillance established by Law No. 29499,](#) Peru, May 13, 2015; and [Legislative Decree No. 1229, which declares as a matter of public interest and national priority the strengthening the prison infrastructure and services,](#) Peru, September 25, 2015.

²³⁷ See para. 212.

²³⁸ Standing Senate Committee on Legal and Constitutional Affairs, [Delaying Justice is Denying Justice, An Urgent Need to Address Lengthy Court Delays in Canada,](#) August 2016, p. 15.

make available to them technology and IT systems that are adequate for modernizing the relevant judicial procedures and judicial infrastructure.²³⁹

125. In terms of administrative initiatives, the IACHR notes the efforts made by Argentina and Brazil to implement such mechanisms. At the federal level of the Argentine State, by Resolution No. 1379 of June 16, 2015 of the Ministry of Justice and Human Rights, the Program of Assistance to Persons under Electronic Surveillance was established. In March 2016, by Resolution 86/2016, the scope of application of this program was expanded to include persons tried or convicted by the federal or provincial courts whose domicile is in any part of the territory of the Argentine State.²⁴⁰ The IACHR was informed that work is under way in several provinces to replicate these efforts, including Mendoza, Jujuy, San Juan, Tucumán, and Buenos Aires. In addition, the National Bureau for Social Re-adaptation reported that the additional advantage of this program is the psychosocial support offered to all beneficiaries.²⁴¹ As of October 2016 a total of 192 persons, at the federal level, were wearing the electronic bracelets; most are in pretrial detention (79 percent); 63 percent of the beneficiaries are women; and 37 percent are males.²⁴² The provinces of Buenos Aires and Mendoza had, respectively, 1,245 and 68 persons who were beneficiaries of this measure.²⁴³
126. By issuing administrative act [portaria] No. 42 of 2015, the Ministry of Justice of Brazil developed a management model for electronic monitoring in criminal matters.²⁴⁴ To this end, the National Prison Department (Departamento Penitenciário Nacional) adopted the following strategies: (a) establishing an interdisciplinary working group with experience in the matter; (b) cooperation agreement with the National Justice Council to design and structure the guidelines and promote the electronic supervision policy; and (c) hiring a specialized consultancy with the United Nations

²³⁹ Standing Senate Committee on Legal and Constitutional Affairs, Delaying Justice is Denying Justice, An Urgent Need to Address Lengthy Court Delays in Canada, August 2016, p. 15.

²⁴⁰ Ministry of Justice and Human Rights, Argentina, Resolution 86/2016, March 23, 2016. In an initial phase, its scope of application was geared to persons on trial or convicted by the national or federal criminal courts in conditions such that they could accede to house arrest, and with domicile in the Autonomous City of Buenos Aires or in various areas of the province of Buenos Aires. Ministry of Justice and Human Rights, Argentina, Resolution 1379/2015, June 26, 2015.

²⁴¹ National Bureau of Social Re-adaptation. Information provided in the context of the Rapporteurship's visit to Argentina, September 2016.

²⁴² Office of the Undersecretary for Relations with the Judicial Branch and Prison Matters, Program of Assistance to Persons under Electronic Surveillance. Information provided in the context of the Rapporteurship's visit to Argentina, September 2016.

²⁴³ Secretariat of Human Rights of the province of Buenos Aires and General Bureau of the Prison Service of Mendoza. Information provided in the context of the Rapporteurship's visit to Argentina, September 2016.

²⁴⁴ Ministry of Justice, Brazil, "Administrative Act (Portaria) No. 42 of February 10, 2015," February 10, 2015.

Development Program (UNDP) to analyze electronic monitoring services and experiences in Brazil.²⁴⁵ In addition, as of the establishment of this measure the IACHR notes the issuance, by the Ministry of Justice, of several documents to establish guidelines for applying these mechanisms.²⁴⁶

b. Main Challenges

127. In general, the Commission observes that in recent years challenges have arisen to implementing electric surveillance mechanisms, such as:

- (a) limited application of electronic surveillance;
- (b) delays in implementing the measure; and
- (c) obstacles to accessing this measure by persons living in poverty or with low incomes.

The IACHR has also received information that indicates that such mechanisms may stigmatize the beneficiaries because of the notable visibility of such devices²⁴⁷; accordingly, it calls on the States to guarantee the necessary technological development with respect to their use so that they not stigmatize the beneficiaries.²⁴⁸

i. Limited Application of Electronic Surveillance

128. The IACHR has been informed that one of the main challenges to the implementation of these mechanisms consists of their limited application, and in the prioritization of this measure for persons already convicted over those in pretrial detention.

129. Accordingly, in Peru, the IACHR observes that even though Legislative Decree No. 1229 expands the situations in which electronic surveillance in criminal matters is considered appropriate with respect to conduct for

²⁴⁵ Ministry of Justice and National Prison Department, Brazil [“A implementação da política de monitoração eletrônica de pessoas no Brasil,”](#) 2015.

²⁴⁶ In this vein, the following guidelines have been issued: Ministry of Justice, National Prison Department, Brazil, [“Planos educacionais para monitoração eletrônica de pessoas,”](#) 2017; [“Diretrizes para tratamento e proteção de dados na monitoração eletrônica de pessoas,”](#) 2016; [“A implementação da política de monitoração eletrônica de pessoas no Brasil,”](#) 2015.

²⁴⁷ IACHR, Expert Consultation on “Measures to Reduce Pretrial Detention in the Americas,” Washington, D.C., May 20, 2016. Information provided by Javier Carrasco, Instituto de Justicia Procesal Penal, and by Coletta Youngers, WOLA.

²⁴⁸ The United Nations Office against Drugs and Crime (UNODC) has noted that this measure may be “relatively intrusive,” thus it requires considerable technological development. UNODC, [Handbook of basic principles and promising practices on Alternatives to Imprisonment](#), 2010, p. 27.

which charges or a conviction call for up to eight years, it also limited its scope of application. In particular, that law regulates the application of electronic surveillance – in addition to persons previously convicted of a willful offense – to those persons who despite being indicted or convicted for offense whose penalties are less than eight years, have committed or been convicted of crimes against life, the body, and health in their aggravated forms; crimes of organized crime; or crimes against sexual intimacy and sexual freedom.²⁴⁹ In this respect, the IACHR has received information to the effect that the authorities of the National Prison Institute (Instituto Nacional Penitenciario) consider that due to the fact that the penalties are high for practically all crimes in Peru, applying this measure to indictments or penalties less than eight years would benefit very few persons.²⁵⁰

130. The IACHR was informed that in Brazil, there are a limited number of accused who are beneficiaries of this measure, compared to persons convicted who benefit from it.²⁵¹ According to official information, in July 2015 a total of 18,172 persons were subject to electronic monitoring²⁵², more than 86.18 percent of whom were persons who had been convicted.²⁵³ The situation is similar in Peru, where of the 468 inmates identified by the National Prison Institute as possible candidates for the use of this measure, only 15 are in pretrial detention.²⁵⁴

²⁴⁹ [Legislative Decree No. 1229, declaring a matter of public interest and national priority the strengthening of the prison services infrastructure](#), Peru, in force since September 25, 2015.

²⁵⁰ IACHR, [Public hearing “Measures to reduce pretrial detention in the Americas,”](#) 157th Regular Period of Sessions, April 5, 2016. Information provided by the Instituto de Defensa Legal (IDL). See also: Instituto de Defensa Legal (IDL), Peru. Response to the Questionnaire sent to the IACHR May 18, 2016.

²⁵¹ IACHR, [Public hearing “Measures to reduce pretrial detention in the Americas,”](#) 157th Regular Period of Sessions, April 5, 2016. Information provided by Judicial Assistance Division of the Universidade Federal de Minas Gerais (DAJ/UFMG), and the Human Rights Clinic of the Universidade Federal de Minas Gerais (CDH/UFMG).

²⁵² National Prison Department of the Ministry of Justice, Report [“A implementação da política de monitoração eletrônica de pessoas no Brasil - Análise crítica do uso da monitoração eletrônica de pessoas no cumprimento da pena e na aplicação de medidas cautelares diversas da prisão e medidas protetivas de urgência,”](#) 2015, p. 39, table 2.

Electronic monitoring in Brazil was established as an alternative to pretrial detention by Article 319(IX) of [Law 12,403 which amends provisions of Decree-Law No. 3,689 – Code of Criminal Procedure, with respect to pretrial detention, bond, provisional release, other precautionary measures, and adopting other measures,](#) May 4, 2011.

²⁵³ National Prison Department of the Ministry of Justice, Report [“A implementação da política de monitoração eletrônica de pessoas no Brasil - Análise crítica do uso da monitoração eletrônica de pessoas no cumprimento da pena e na aplicação de medidas cautelares diversas da prisão e medidas protetivas de urgência,”](#) 2015, p. 37.

²⁵⁴ Of the 486 candidates, 442 are convicts and 11 are in priority situations. Ministry of Justice and Human Rights. Information provided in the context of the Rapporteurship’s visit to Peru, February 2017.

ii. Obstacles to Accessing this Measure by Persons Living in Poverty or with Low Incomes

131. The IACHR has received information that indicates that the application of electronic monitoring devices may pose serious challenges for persons who do not have the economic resources to finance their use; this practice makes the beneficiaries themselves fully responsible for their application, except in those cases determined by the judicial authority based on a socioeconomic study. In particular, the IACHR has information in this regard with respect to the States of the Dominican Republic, Guatemala, and Peru. The Law on Implementation of Telematic Monitoring in Criminal Proceedings, of Guatemala, establishes that the use of electronic mechanisms must be financed by the beneficiary, unless the competent judge finds otherwise after a socioeconomic study of the subject.²⁵⁵ In this respect, the Office of the Human Rights Ombudsperson of Guatemala (Procuraduría de Derechos Humanos) has expressed its concern that this provision could be a “limitation for persons deprived of liberty who, otherwise able to access a substitute measure ... do not get it due to their inability to cover the cost.”²⁵⁶
132. The IACHR observes that in the Peruvian State, it was determined by Decree No. 1322 of January 2017 that the beneficiary of personal electronic surveillance had to cover its full cost²⁵⁷, except that when it is economically impossible, and based on the socioeconomic reports of the INPE, the judge fully or partially exempts the person from its cost.²⁵⁸ The same decree provides that failure to pay results in “the revocation of the measure and definitive incarceration” of the person facing charges.²⁵⁹ Similarly, the IACHR was informed by the National Prison Council that the monthly cost to the State for using electronic surveillance is equivalent to 650 sols (196 dollars), while incarceration could cost 1,200 sols (365 dollars).²⁶⁰ Civil

²⁵⁵ [Law on Implementation of Telematic Monitoring in Criminal Procedure \(Decree 49-2016\)](#), Guatemala, in force as of December 22, 2016, Article 7.

²⁵⁶ Office of the Human Rights Ombudsperson, Guatemala, [Informe Anual Circunstanciado 2016](#), p. 179.

²⁵⁷ [Legislative Decree No. 1322, which regulates personal electronic surveillance](#), Peru approved January 6, 2017, Article 14(2). In this regard, it was also regulated by [Supreme Decree No. 002-2015-JUS, which modifies and incorporates articles to the Regulation for implementing Personal Electronic Surveillance](#), published May 13, 2015, Article 3.

²⁵⁸ [Legislative Decree No. 1322, which regulates personal electronic surveillance](#), Peru approved January 6, 2017, Article 14(3). In this regard, it was also regulated by [Supreme Decree No. 002-2015-JUS, which modifies and incorporates articles to the Regulation for implementing Personal Electronic Surveillance](#), published May 13, 2015, Article 4.

²⁵⁹ [Legislative Decree No. 1322, which regulates personal electronic surveillance](#), Peru approved January 6, 2017, Article 14(5).

²⁶⁰ Information referred by the National Prison Council, during the colloquium on measures aimed at reducing pretrial detention in Peru. IACHR, Visit to Peru, February 2017.

society organizations report that charging for these electronic devices is a serious obstacle to their use, and that it is also discriminatory to the detriment of persons of modest means.²⁶¹

133. The situation is similar in the Dominican Republic, where the use of electronic devices has a cost equivalent to 450 dollars monthly, with a requirement to make an advance payment for six months.²⁶² In this respect, civil society organizations and public opinion generally have stated their concern over the high cost of such devices, since most of the population deprived of liberty lives in poverty.²⁶³
134. The IACHR, taking into account the use of bond – a measure whose implementation has clear similarities to electronic surveillance devices – considers that the judicial authority should determine the use of electronic devices mindful of the economic situation of the person facing charges. This recommendation considers that the nature of this guarantee is that its loss or the failure to pay may deter the accused from acting on any intention he or she may have not to appear at trial.²⁶⁴ In particular, the states should take the measures needed to ensure that its application is in keeping with criteria of material equality, and that it does not constitute a measure that discriminates against persons who do not have the economic capacity to pay such amounts.²⁶⁵

iii. Delays in the Implementation of the Measure

135. The IACHR has information that indicates that despite the existence of regulations on the use of electronic devices, in countries such as Costa Rica, the Dominican Republic, and Peru the implementation of this measure is not carried out or its general application has been delayed for years, mainly due to the cost of the system that would make them operational. The IACHR was informed that in Costa Rica, even though there has been a

²⁶¹ Instituto de Defensa Legal (IDL), Peru. Response to the Questionnaire, sent May 18, 2016.

²⁶² Informational note from the services delivery enterprise “Monitoreos,” [“Grilletes electrónicos, listos para monitorear a imputados,”](#) March 3, 2016.

²⁶³ Metro República Dominicana, [“Brazalete electrónico: Apuesta de RD para la seguridad ciudadana,”](#) June 6, 2016; Diario el Caribe, [“Abogados resaltan uso de brazaletes electrónicos en reos, pero critican costo,”](#) March 21, 2016. According to the Observatorio Judicial Dominicano, the situation of poverty affecting persons deprived of liberty is reflected in the fact that public defenders represent the accused in 80% of criminal proceedings. Fundación Global Democracia y Desarrollo, Press Release, [“Director Observatorio Judicial Dominicano considera localizadores electrónicos deben ser regulados por ley,”](#) March 4, 2016.

²⁶⁴ In this regard, and in relation to bond, see: IACHR, [Report on the Use of Pretrial Detention in the Americas](#), para. 236; and ECtHR, Case of Neumeister v. Austria (Application no. 1936/63), Plenary of the Court, Judgment of June 27, 1968, para. 14.

²⁶⁵ IACHR, [Report on the Use of Pretrial Detention in the Americas](#), para. 326. Recommendation B “Application of precautionary measures other than pretrial detention.”

regulation regarding electronic surveillance as an alternative to pretrial detention since 2014, mechanisms have yet to be put in place to implement it.²⁶⁶ Even though personal electronic surveillance was introduced by 2010 legislation²⁶⁷ in the Peruvian state, as of January 2017 the Special Commission for Implementation of the Code of Criminal Procedure determined that Lima Centro (Central Lima) would be the judicial district where the first pilot electronic surveillance plan would be implemented as of April 2017, with 100 devices.²⁶⁸

136. The Commission also observes that in the Dominican Republic, even though the regulation on the “placement of electronic locators” was introduced in the Code of Criminal Procedure in 2004²⁶⁹, it was only in March 2016 that they began to be used.²⁷⁰ The implementation of this measure is entrusted to the Office of the Attorney General (Ministerio Público) the company Monitoreos Dominicanos; it has sparked criticism by Dominican civil society since there is no regulation establishing the procedure for imposing electronic monitoring devices in lieu of the custodial measure.²⁷¹
137. Considering the limited reach of electronic monitoring mechanisms due to the cost associated with their use, the IACHR urges the States to ensure the allocation of the resources needed so that this alternative measure can be operative, and, accordingly, so that it could be used by the largest possible number of persons.²⁷² Similarly, the IACHR calls on the States to have information in the public domain that makes it possible for the potential beneficiaries, their defense counsel, and other interested persons to have relevant data on the criteria and rules that govern the operation of electronic devices in criminal matters. In particular, the States should report on the following aspects: (a) start of implementation; (b) criteria for application; (c) procedure; (d) general obligation imposed during the

²⁶⁶ IACHR, Press Release 33/16, [Rapporteurship on the Rights of Persons Deprived of Liberty Makes Visit to Costa Rica](#), Washington, D.C., March 11, 2016.

²⁶⁷ This concept was introduced in Peru by [Law No. 29499, which establishes personal electronic surveillance](#), Peru, published on January 16, 2010.

²⁶⁸ The choice of the district in question was based on the following: (a) connectivity; (b) total prison population per judicial district that meets the requirements for being able to apply alternative measures; (c) prison population that resides in the judicial district to which their criminal process belongs; and (d) prison population in priority situations. Ministry of Justice and Human Rights, Peru. Information provided in the context of the Rapporteurship’s visit to Peru, February 2017.

²⁶⁹ [Code of Criminal Procedure](#), Dominican Republic, 2004, Article 226(5).

²⁷⁰ Monitoreos, [“Zona 5 Llegaron los brazaletes electrónicos,”](#) March 17, 2016; CND Noticias, [Brazaletes electrónico costará a imputados US\\$500 mensuales](#), February 29, 2016.

²⁷¹ Fundación Global Democracia y Desarrollo, Press Release, [“Director Observatorio Judicial Dominicano considera localizadores electrónicos deben ser regulados por ley,”](#) March 4, 2016.

²⁷² IACHR, [Report on the Use of Pretrial Detention in the Americas](#), para. 326. Recommendation B “Application of other precautionary measures different from pretrial detention.”

application of the alternative measure; and (e) statistics on its application, broken down by age group, sexual orientation, and gender identity and expression.

2. Restorative Justice Programs in Criminal Matters

138. Using restorative justice programs in criminal matters, the victim, the person accused and, where appropriate, other persons impacted by a crime participate together and generally with the help of a facilitator to resolve the issues stemming from a criminal act.²⁷³ Restorative processes in criminal matters may include mediation, conciliation, conferencing and sentencing circles²⁷⁴; their use should be limited to minor offenses,²⁷⁵ and to cases that not involve violence.
139. According to the Basic principles on the use of restorative justice programs in criminal matters of the United Nations, restorative justice programs should be used only where there is sufficient evidence to charge the offender, and with the free and voluntary consent of both the victim and the offender²⁷⁶, in addition to both parties being in agreement as to the fundamental facts of the case.²⁷⁷ Similarly, and in order to have basic procedural safeguards that guarantee “fairness to the offender and the victim,” the parties should have legal representatives and, if necessary, translation or interpretation services.²⁷⁸ In general, the accused must acknowledge responsibility for their actions and agree to make reparation for the offense committed, for example through community service or monetary compensation to the victim.²⁷⁹ In the context of these processes agreements should be reached voluntarily, and contain reasonable and proportional obligations²⁸⁰; in addition, they should be supervised by the courts and be included in judicial decisions so that they can attain their

²⁷³ United Nations, [Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters](#), Resolution 2002/12 of the Economic and Social Council, 7 January 2002, annex, Principle 2.

²⁷⁴ United Nations, [Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters](#), Resolution 2002/12 of the Economic and Social Council, 7 January 2002, annex, Principle 2.

²⁷⁵ UNODC, [Handbook on Restorative Justice Programmes](#), New York, 2006, pp. 17 and 45.

²⁷⁶ United Nations, [Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters](#), Resolution 2002/12 of the Economic and Social Council, 7 January 2002, annex, Principles 7 and 13.

²⁷⁷ United Nations, [Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters](#), Resolution 2002/12 of the Economic and Social Council, 7 January 2002, annex, Principle 8.

²⁷⁸ United Nations, [Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters](#), Resolution 2002/12 of the Economic and Social Council, 7 January 2002, annex, Principle 13(a).

²⁷⁹ Open Society Justice Initiative, [The Global Overuse of Pretrial Detention](#), 2014, p. 146.

²⁸⁰ United Nations, [Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters](#), Resolution 2002/12 of the Economic and Social Council, 7 January 2002, annex, Principle 7.

same legal status and thereby exclude the possibility of prosecution on the same facts.²⁸¹

140. In recent years the IACHR observes that countries such as Brazil, Bolivia, Costa Rica, Guatemala, Jamaica, and Mexico have made gains to apply alternatives for dispute settlement by diverting cases from the criminal justice system to the restorative justice option. Some of these States, in the context of these processes, have also adopted programs aimed at providing treatment to those persons who committed crimes due to problematic drug use.²⁸²
141. As regards the Brazilian State, the IACHR notes that restorative justice has been part of its justice agenda since August 2014, with the signing of a cooperation agreement by the National Justice Council, the Association of Judges of Brazil (AMB), and other institutions to promote the use of this type of justice for settling disputes nationwide.²⁸³ These programs have taken on greater importance with the issuance by the National Justice Council of Resolution 225 of May 2016, which establishes restorative justice as a national policy within the national judiciary.²⁸⁴ In particular, that resolution provides for aspects such as: (a) procedure; (b) functions of the courts of justice that will carry out the programs; (c) training that the facilitators will need; and (d) principles and conditions necessary for applying restorative justice programs in criminal matters.²⁸⁵
142. The IACHR has learned that in Costa Rica the “Program for Restorative Justice in Criminal Matters involving Adults” began to operate in 2013²⁸⁶; it seeks to apply restorative justice in those cases that meet the following requirements: that the offense not be considered violent²⁸⁷, that it make

²⁸¹ United Nations, Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, Resolution 2002/12 of the Economic and Social Council, 7 January 2002, annex, Principle 15.

²⁸² This issue will be developed in the next section, “Drug treatment programs under judicial supervision,” paras. 146-161.

²⁸³ Association of Judges of Brazil, “Cooperação Interinstitucional para difusão da Justiça Restaurativa,” August 14, 2014. The Brazilian State also informed the IACHR of the collaboration with the UNDP to create a model for management and operational procedures for implementing restorative justice in criminal matters. Brazil. Note from the Permanent Mission of Brazil to the OAS of July 28, 2016. Response to the Questionnaire.

²⁸⁴ National Justice Council, Brazil, “Resolution 225,” May 31, 2016.

²⁸⁵ The principles established in the resolution to guide restorative justice are: co-responsibility; reparation of the harm; addressing the needs of all involved; informality; participation; empowerment; using consensus; confidentiality; speedy process; and civility. At the same time, according to that resolution the fundamental condition for being able to use the restorative justice approach is prior, free, and spontaneous consent of all the participants, who can withdraw at any moment. National Justice Council, Brazil, “Resolution 225, of May 31, 2016,” May 31, 2016.

²⁸⁶ Office of the Attorney General (*Ministerio Público*) of Costa Rica Circular 08-ADM 2012 “Procedure for Referring Cases to the Restorative Justice Program in Criminal Matters involving Adults,” May 2012.

²⁸⁷ To see the list of offenses to which this program may be applied, see: Office of the Attorney General (*Ministerio Público*), Circular 01-ADM, Addition to Circulars 06-ADM-2012, and 12-ADM-2012, on the

possible the benefit of conditional enforcement of the penalty, that the accused be a first-time offender, and that the victim be willing to participate.²⁸⁸ As of February 2016 a total of 1,044 persons had participated in that program; and as of July 2015, approximately 620 nongovernmental organizations had supported its use.²⁸⁹ According to the Costa Rican public defender service, thanks to the donations received by the program's beneficiaries, several therapeutic and socio-educational services were provided that benefited the community.²⁹⁰ The IACHR also points to the economic advantages of this program. The cost of resolving a case by means of restorative justice mechanisms is approximately 630 dollars, whereas the amount spent for a regular criminal proceeding comes to 12,342 dollars, plus the daily cost of incarceration – estimated by the Ministry of Justice of Costa Rica to be 48 dollars a day.²⁹¹

143. In Guatemala, with the Regulations for the Control of Impositions handed down in the Evidentiary Regime of Conditional Suspension, approved by the Supreme Court of Justice in 2013²⁹², this regime is coming into force. Under it, efforts are made to have the person held in pretrial detention and the persons affected participate in resolving the dispute through non-punitive measures that make reparation for the harm and reintegrate the person accused.²⁹³ The IACHR has been informed by civil society

[Program and Referral of Cases to the Office of Restorative Justice of the Office of the Attorney General](#) and Circular 02-ADM2016, which refers to the Implementation of Law 9161, “which reduces the sentences of women in vulnerable conditions for bringing drugs into prisons,” January 2016; Office of the Attorney General (*Ministerio Público*), [Circular 09-ADM 2015](#), Guidelines for applying the model of restorative justice to sex crimes, domestic violence, and offenses contained in the Law Criminalizing Violence against Women and the Comprehensive Law on Older Persons, June 2014.

²⁸⁸ Office of Public Defense, Costa Rica, Executive Summary on persons assisted in the Office of Public Defense in the Program of Restorative Justice in Criminal Matters involving Adults, February 29, 2016, p. 2. Information provided in the context of the visit by the Rapporteurship, February 2016.

²⁸⁹ Office of Public Defense, Costa Rica, Executive Summary on persons assisted in the Office of Public Defense in the Program of Restorative Justice in Criminal Matters involving Adults, February 29, 2016, p. 4. Information provided in the context of the visit by the Rapporteurship, February 2016.

²⁹⁰ Office of Public Defense, Costa Rica, Executive Summary on persons assisted in the Office of Public Defense in the Program of Restorative Justice in Criminal Matters involving Adults, February 29, 2016, p. 4. Information provided in the context of the visit by the Rapporteurship, February 2016.

²⁹¹ Office of Public Defense, Costa Rica, Executive Summary on persons assisted in the Office of Public Defense in the Program of Restorative Justice in Criminal Matters involving Adults, February 29, 2016, p. 3. Information provided in the context of the visit by the Rapporteurship.

²⁹² Regulation for Monitoring Impositions and Instructions Handed Down in the Probative Regime of the Conditional Suspension of Criminal Prosecution, adopted by Decision 4-2013 of the Supreme Court of Justice of Guatemala, published August 6, 2013.

²⁹³ Regulation for Monitoring Impositions and Instructions Handed Down in the Probative Regime of the Conditional Suspension of Criminal Prosecution, adopted by Decision 4-2013 of the Supreme Court of Justice of Guatemala, published August 6, 2013 (Article 4(d)).

organizations that in practice this measure is hardly used and is not monitored by the authorities of the criminal justice system.²⁹⁴

144. In the legislative area the IACHR notes that in Mexico, the Federal Dispute Settlement Mechanisms in Criminal Matters Act of December 2014 introduces mediation, conciliation, and restorative justice procedures as alternative dispute settlement mechanisms.²⁹⁵ In Bolivia, the Law on Clearing up Backlog provides for conciliation as a dispute settlement mechanism in criminal matters.²⁹⁶ In addition, the IACHR observes that as of 2014, Jamaica expanded the National Restorative Justice Policy²⁹⁷, now operating in eight communities.²⁹⁸
145. In keeping with the terms of the Basic principles on restorative justice, the IACHR reminds the States that in order to implement restorative justice programs they must design strategies and policies aimed at promoting a culture that fosters their use by the respective authorities and the local communities.²⁹⁹ In addition, the States have the obligation to establish guidelines and rules that govern the use of restorative justice programs that contain, among others, the following elements: (a) conditions for the referral of cases to a restorative process; (b) the handling of cases following a restorative process; (c) the qualifications, training, and evaluation of facilitators; (d) the administration of the restorative justice

²⁹⁴ IACHR, [Public hearing “Measures for reducing pretrial detention in the Americas,”](#) 157th Regular Period of Sessions, April 5, 2016. Information provided by the Instituto de Estudios Comparados en Ciencias Penales de Guatemala (ICCPG).

²⁹⁵ These mechanisms are aimed at fostering the settlement of disputes that may arise between or among members of society as the result of a criminal act through procedures based on oral process, procedural economy, and confidentiality. [National Law on Alternative Dispute Settlement Mechanisms in Criminal Matters](#), Mexico, published December 29, 2014.

According to what is reported by the Mexican State, this legislative instrument contributes significantly in the process of implementing the new criminal justice system, which accords priority to alternative dispute resolution mechanisms. Mexico. Response to the Questionnaire. Note from the Permanent Mission of Mexico to the OAS, No. Oea-01285 of June 1, 2016.

²⁹⁶ [Law No. 586 on Clearing up Backlog](#), Bolivia, October 30, 2014, Article 327.

²⁹⁷ Ministry of Justice, Jamaica, website [What is Restorative Justice?](#) On August 13, 2012, the Jamaican Ministry of Justice published the [National Restorative Justice Policy](#), which delineated the protocols that govern the Ministry in respect of restorative justice.

²⁹⁸ Jamaica. Note from the Permanent Mission of Jamaica to the OAS, No. 6/50/84, June 3, 2016. Response to the Questionnaire. According to the procedures established by that program, for a person to avail himself of its benefits he must accept responsibility for his acts; he must have been informed and in a free and informed manner have consented to participate in the program, and be advised of his rights without delay by his defense counsel, in addition to having had a reasonable opportunity to contact his lawyer. Ministry of Justice, Jamaica, [National Restorative Justice Policy](#), August 13, 2012, Chapter six, Section one.

²⁹⁹ United Nations, [Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters](#), Resolution 2002/12 of the Economic and Social Council, 7 January 2002, annex, Principle 20.

programs; and (e) standards of competence and rules of conduct governing the operation of restorative justice programs.³⁰⁰

3. Drug treatment Programs under Judicial Supervision

146. In recent years several countries of the region have promoted the application of drug treatment programs under judicial supervision, commonly known as “drug courts” (“tribunales o cortes de drogas”), as a non-custodial measure for minor crimes committed by problematic or dependent use, or for drug consumption or possession for personal use. In so doing they are picking up on initiatives developed in the United States in the late 1980s. Under this type of model offenders and drug addicts are diverted to other institutions to receive treatment and rehabilitation in a process directed by the judge.³⁰¹

147. The Commission observes that those countries that have implemented these programs have several modalities, mainly with respect to the criteria for eligibility, type of treatment, duration, beneficiary population, and existence of other social services as a complement to treatment. However, according to the Inter-American Drug Abuse Control Commission of the OAS (CICAD), they generally include the following elements:

- (a) they involve a conditional stay in the proceeding³⁰²;
- (b) they require the consent of the person participating;
- (c) they offer medical treatment and on occasion other social services;
- (d) the judicial authority supervises treatment with the assistance of the prosecutor, social workers, treatment providers, and supervisory officers³⁰³; and

³⁰⁰ United Nations, Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, Resolution 2002/12 of the Economic and Social Council, 7 January 2002, annex, Principle 12.

³⁰¹ CICAD/OAS, Technical Report on Alternatives to Incarceration for Drug-related offenses, 2015, p. 30, and UNODC, Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment, 2010, p. 94.

³⁰² With respect to persons convicted, these programs generally operate under supervised release when the person is already serving the sentence. CICAD/OAS, Technical Report on Alternatives to Incarceration for Drug-related offenses, 2015, p. 31. In the case of the United States, most courts require a guilty plea as a condition for participating in such programs. Information provided by Coletta Youngers, Senior Fellow, WOLA, sent April 4, 2017.

³⁰³ Judicial supervision may include: (a) holding continuous hearings before a judge informing him of progress in treatment; (b) the individualized interaction between the judge and the participant; (c) provisional sanctions and incentives to encourage compliance; (d) tests for use of substances; and (e) community supervision.

(e) the prosecution is normally dismissed upon conclusion of the treatment program.³⁰⁴

a. Advantages and Aspects of Concern

148. The use of what are commonly known as drug courts has sparked a wide-ranging debate on their advantages and disadvantages. On the one hand, the Commission has received information that indicated that the main advantages of these models include keeping the beneficiaries from going to prison, and reducing recidivism and the economic costs of criminal prosecutions. Moreover, such programs, in contrast to incarceration, have been associated with reductions in drug use and drug sales, as well as a reduction in the criminal activity associated with the suppliers of these substances.³⁰⁵
149. In particular, a study by the Justice Policy Institute concludes that in the United States, drug treatment in prison yields benefits of approximately two dollars for every dollar invested, whereas treatment out of prison yields benefits of nine dollars per dollar invested.³⁰⁶ Moreover, the IACHR has information that indicates that the use of drug courts has reduced recidivism in Chile and the United States.³⁰⁷ Nonetheless, in contrast with

Inter-American Drug Abuse Control Commission (CICAD/OAS), Technical Report on Alternatives to Incarceration for Drug-related offenses, 2015, p. 31.

³⁰⁴ Inter-American Drug Abuse Control Commission (CICAD/OAS), Technical Report on Alternatives to Incarceration for Drug-related offenses, 2015, p. 31; and International Drug Policy Consortium, Las Cortes de Drogas. Los alcances y retos de una alternativa a la prisión preventiva, May 2012, p. 1.

³⁰⁵ Along these lines, see Kathryn E. McCollister and Michael T. French, "The Relative Contribution of Outcome Domains in the Total Economic Benefit of Addiction Interventions: A Review of First Findings," *Addiction* 98, no. 12 (2003): 1647–59, doi:10.1111/j.1360-0443.2003.00541.x; Susan L. Ettner et al., "Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment 'pay for Itself'?", *Health Services Research* 41, No. 1 (2006): 192–213, doi:10.1111/j.1475-6773.2005.00466.x., McCollister and French, "The Relative Contribution of Outcome Domains in the Total Economic Benefit of Addiction Interventions: A Review of First Findings"; Ettner et al., "Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment 'pay for Itself'?"; L. Marsch, "The Efficacy of Methadone Maintenance Interventions in Reducing Illicit Opiate Use, HIV Risk Behavior and Criminality: A Meta-Analysis," *Addiction* 93, no. January 1997 (1998): 515–32, doi:0965-2140/98/0400515-18.

³⁰⁶ McVay, Doug et al. *Treatment or incarceration? National and State Findings of the Efficacy and Cost Savings of Drug Treatment versus Imprisonment*. Justice Policy Institute, Washington, 2004. Cited in: Inter-American Drug Abuse Control Commission (CICAD/OAS), Technical Report on Alternatives to Incarceration for Drug-related offenses, 2015, p. 17.

³⁰⁷ According to a joint study by the Ministry of Justice, the Office of the Attorney General and the Fundación Paz Ciudadana, the degree of recidivism of the users who emerge from the drug courts was only 14%, compared with 68% of persons involved in the regular justice system. Fundación Paz Ciudadana, Drug Courts Coordinating Unit of the Ministry of Justice, Unit Specialized in the Illegal Trafficking of Narcotics and Psychotropic Substances of the Office of the Attorney General of Chile, Tribunales de Tratamiento de Drogas: compendio estadístico 2010, 2011 y 2012, p. 49, graph 20. Analysis of recidivism in December 2013.

the data based on the information available in both countries, the IACHR was informed that the operation of drug courts in other Latin American states is characterized by the lack of availability of data on their use, as well as the lack of any monitoring of their implementation.³⁰⁸

150. Despite the advantages indicated, the IACHR expresses its profound concern over the existence of severe criticisms concerning the use of drug courts, among which special mention can be made of the following: (a) these models answer mainly to a judicial approach, not a public health approach, and (b) human rights violations are common at treatment centers.
151. First, with respect to the idea that the application of these programs answers to a judicial and not a public health approach, the IACHR has been informed that the drug court model entrusts primary supervision of treatment to the criminal justice system rather than directly to health personnel; in addition, these programs fail to distinguish among the different types of use or among substances and users, and therefore fail to distinguish between those persons who need treatment and those who do not.³⁰⁹ The IACHR has information that indicates that in general a large number of people enter these programs who have been arrested only for drug possession and consumption that is not problematic or addictive, which indicates that the approach and workings of such programs are determined by policies that criminalize the use of certain substances and that stigmatize users.³¹⁰ In this respect, the Commission has stated previously its concern about the fact that drug users are treated with a repressive and criminalizing approach, rather than from a public health perspective.³¹¹

In the United States, the recidivism rate for the participants in these models varies from 8% to 26%, whereas in the cases for which regular proceedings are conducted, the rate is 46%. National Association of Drug Court Professionals. "[The Facts on Drug Courts and Crime in America](#)"; Langan & Cunniff, 1992. *Recidivism of felons on probation*. Washington, D.C.: Bureau of Justice Statistics; Gottfredson et al. 2005. The Baltimore City Drug Treatment Court: 3-year outcome study. *Evaluation Review*, 29, 42-64; Finigan et al., 2007. *The impact of a mature drug court over 10 years of operation: Recidivism and costs*. Portland, OR: NPC Research, Inc. See also: Inter-American Drug Abuse Control Commission (CICAD/OAS), [Technical Report on Alternatives to Incarceration for Drug-related offenses](#), 2015, p. 32.

³⁰⁸ Information provided by Coletta Youngers, Senior Fellow, WOLA, sent April 4, 2017.

³⁰⁹ Amanda B. Cissner et al., "A Statewide Evaluation of New York's Adult Drug Courts. Identifying Which Policies Work Best," New York: Center for Court Innovation, 2013.

³¹⁰ International Drug Policy Consortium, [Las Cortes de Drogas. Los alcances y retos de una alternativa a la prisión preventiva](#)," May 2012, pp. 12 and 18. See also: Colectivo de Estudios Drogas y Derechos (CEDD), [En busca de los derechos: Usuarios de drogas y las respuestas estatales en América Latina](#), 2014, pp. 8, 10, 34 and 35; Justice Policy Institute, [Addicted to courts: How a growing dependence on drug courts impacts people and communities](#), USA, 2011; and CELS, Argentina. Response to the Questionnaire, sent to the IACHR July 13, 2016.

³¹¹ IACHR, [Violence, Children and Organized Crime](#), OEA/Ser.L/V/II. Doc. 40/15, November 11, 2015, para. 466.

152. In addition, since the States prioritize the criminal justice system over the health system, most of the time the private sector is the main provider of rehabilitation and treatment programs. In this context, the respective treatment centers are not regulated or subject to oversight, and they often operate without any scientific basis.³¹² In particular, according to information available to this Commission, human rights violations are often committed in such centers, including: (a) the use of techniques that cause severe physical and mental impairment, on not having access to a gradual process of detoxification; (b) the use of regimes entailing isolation for prolonged periods; (c) abusive treatment; and (d) forced labor without any economic remuneration.³¹³ In this respect, the then-United Nations Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez, stated that illicit drug users confined in such centers face various abuses, such as suffering, without any medical assistance, a painful syndrome of abstinence, due to their drug addiction; the administration of “unknown or experimental medications”; abusive treatment; forced labor; and sexual abuse.³¹⁴ In this regard, and also considering that the persons “under health treatment” find themselves in a situation of particular vulnerability, the IACHR reminds the States of their obligation to regulate and oversee all health assistance provided to those persons under its jurisdiction as part of its special duty to protect life and integrity, independent of whether the agency that provides such services is public or private.³¹⁵ In addition, in the health sector the states should step up the use of resources that make it possible to receive treatment based on scientific evidence.
153. In view of the foregoing considerations, the IACHR urges the States to establish a drug policy with an approach that is comprehensive and focused on social reinsertion, that ensures that treatment for persons who have been arrested for drug use or possession or who have committed minor offenses because of their problematic or dependent use not be repressive and criminalizing, but rather from a public health approach.

³¹² Colectivo de Estudios Drogas y Derechos (CEDD), En busca de los derechos: Usuarios de drogas y las respuestas estatales en América Latina, 2014, p. 7.

³¹³ IACHR, Hearing held at the initiative of the Commission, “Measures to reduce pretrial detention in the Americas,” 157th Regular Period of Sessions, April 5, 2016. Information submitted by Intercambios Puerto Rico; Intercambios Puerto Rico. Response to the Questionnaire, sent to the IACHR May 23, 2016. See also: Open Society Foundations, Ni Socorro, No Health, No Help: Abuse as Drug Rehabilitation in Latin America & the Caribbean, 2016; Open Society Foundations and Intercambios Puerto Rico, Humiliation and Abuses in Drug “Treatment” Centers in Puerto Rico, May 2015; Colectivo por una Política Integral hacia las Drogas, Abusos en centros de tratamiento con internamiento para usuarios de drogas en México, Cuadernos CUIPHD No. 8, February 2015.

³¹⁴ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/22/53, February 1, 2013, para. 41.

³¹⁵ In this regard, I/A Court HR, Case of Ximenes Lopes v. Brazil. Merits, Reparations and Costs. Judgment of July 4, 2006. Serie C No. 149, paras. 86 and 89.

Accordingly, in case of drug use or possession for personal use, the States should keep the persons who have engaged in such conduct from being subjected to custodial measures and entering the criminal justice system. For this reason, the IACHR calls on the States of the region to study less restrictive approaches by decriminalizing drug use and possession for personal use. The Office of the United Nations High Commissioner for Human Rights, the Working Group on Arbitrary Detention, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on torture; the Special Rapporteur on the right to health; the Committee on the Rights of the Child³¹⁶; and the Joint United Nations Program on HIV/AIDS (UNAIDS) have all made similar pronouncements.³¹⁷

154. Several United Nations agencies, in a joint statement in the context of the 2016 United Nations Special Session on Drugs, have indicated that criminalization of consumption and drug possession for personal use has increased rates of incarceration, thereby contributing to the overpopulation of the prisons and excessive use of the criminal justice system; in addition to placing the persons at a high risk of arbitrary detention and of being subjected to torture and other abusive treatment during detention.³¹⁸ The Commission, based on the information available to it, notes that there is no clear relationship between a harsher criminal justice policy and lower levels of drug use; nor is there evidence that indicates that greater efforts to decriminalize drug use are accompanied by

³¹⁶ [Joint Open Letter by the UN Working Group on Arbitrary Detention; the Special Rapporteurs on extrajudicial, summary or arbitrary executions; torture and other cruel, inhuman or degrading treatment or punishment; the right of everyone to the highest attainable standard of mental and physical health; and the Committee on the Rights of the Child, on the occasion of the United Nation General Assembly Special Session on Drugs](#), New York, April 15 2016, para. 3. In addition, the United Nations Special Rapporteur on the right to health has appealed to the states to decriminalize. [Open Letter by the Special Rapporteur on the right of everyone to the highest attainable standard of mental and physical health, Dainius Pūras, in the context of the preparations for the UN General Assembly Special Session on the Drug Problem \(UNGASS\)](#), December 7, 2015, p. 3; Special Rapporteur on the right to health, Anand Grover, [Right of everyone to the enjoyment of the highest attainable standard of physical and mental health](#), A/65/255, August 6, 2010, para. 62. The Office of the United Nations High Commissioner for Human Rights urges the states to decriminalize consumption and possession for personal use. OHCHR, [Study on the impact of the world drug problem on the enjoyment of human rights](#), A/HRC/30/65, September 4, 2015, para. 61.

³¹⁷ UNAIDS, Joint United Nations Program on HIV/AIDS, [“A Public Health and Rights Approach to Drugs,”](#) p. 7, 2015, and [The Gap Report](#), July 10, 2014, pp. 183-184.

³¹⁸ They also stated that considering drug possession for personal use as a crime causes greater conflict with the law and intensifies the discrimination faced by persons with greater needs and who because of that have entered prison, with the attendant negative impact on their opportunities for employment, education, and other opportunities for social inclusion. [Joint Open Letter by the UN Working Group on Arbitrary Detention; the Special Rapporteurs on extrajudicial, summary or arbitrary executions; torture and other cruel, inhuman or degrading treatment or punishment; the right of everyone to the highest attainable standard of mental and physical health; and the Committee on the Rights of the Child, on the occasion of the United Nation General Assembly Special Session on Drugs](#), New York, April 2016.

greater drug use.³¹⁹ In addition, as was indicated in this report, the IACHR reiterates its concern about the fact that the adoption of state measures that seek to punish drug-related conduct as a way of solving the problem of citizen insecurity has led all drug-related offenses to be considered “serious” or “grave” and so pretrial detention is automatically applied; plus these state policies have resulted in a considerable increase in the number of persons deprived of liberty in the region.³²⁰

155. With respect to those persons who have committed a minor offense due to their problematic or dependent drug use, the states should promote alternatives to the deprivation of liberty that include outpatient treatment, avoiding the institutionalization of persons and making it possible to address this issue from a public health and human rights perspective. For these programs to be effective, the States must allocate scientific resources to ensure that the treatment provided is based on scientific evidence, and is developed within the realm of public health. In particular, it is essential for health specialists to make clinical evaluations to identify those persons with problematic or dependent drug use, all for the purpose of avoiding diversion to treatment as an alternative to pretrial detention for those persons who are occasional users. To ensure that these programs are sustainable and can contribute to avoiding the recidivism of those who enter them, the states should have a social and community support network that includes education, employment, housing, and health programs. Therefore, these models should have the assistance of various institutions and a multidisciplinary team with an integral view of the beneficiaries’ psychosocial health.

b. Practices of States

156. During the period analyzed in this report, the IACHR observes that countries such as Costa Rica, the Dominican Republic, Guatemala, and Panama have implemented court programs that divert persons addicted to illicit drugs to health services or treatment. Chile and Jamaica have seen significant expansions of such programs, and Mexico and Peru have adopted legislative reforms that regulate these models.
157. In Costa Rica, the restorative justice mechanisms include the “Program of Drug Treatment under Judicial Supervision,” which began in 2013, and by which the beneficiaries are sent to the Institute of Alcoholism and Drug

³¹⁹ United Nations Development Program (UNDP), *Perspectives on the Development Dimensions of Drug Control Policy*, p. 6, March 2015. See also: European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) (2011) *Threshold quantities for drug offences*. Lisbon.

³²⁰ See paras. 90 & 200.

Dependence (Instituto de Alcoholismo y Farmacodependencia) for a recommendation on entry and to indicate a specific treatment in each particular case.³²¹ The judiciary, with the support of the Department of Psychology and Social Work, holds hearings to monitor and verify that the persons participating in this program are actually carrying out the conditions and phases of the treatment.³²² This treatment program includes the participation of the Office of Public Defense, the Office of the Attorney General (Ministerio Público), the Department of Psychology and Social Work, and the judiciary, as well as civil society organizations.³²³

158. In Guatemala, as part of the restorative justice implemented through the “evidentiary regime of conditional stay of criminal prosecution,” and with the aim of making reparation for the harm and reintegrating the person facing charges³²⁴, the judicial authority is authorized to refer the person to various institutions, such as: (a) rehabilitation centers specialized in treating addictions; (b) institutions specialized in psychological or psychiatric programs; (c) institutions that provide job training or employment; and (d) academic institutions.³²⁵
159. In addition, in February 2014 the Panamanian State started up the Judicial Drug Treatment Program (Programa Judicial de Tratamiento de Drogas); it was designed with the participation of several authorities³²⁶, with the technical support of international organizations.³²⁷ This program includes drug treatment and rehabilitation services and makes use of an alternative dispute resolution method, conditioned on the offender receiving

³²¹ Judicial Branch, Costa Rica, Programa Tratamiento de Drogas bajo Supervisión Judicial (PTDJ).

³²² Judicial Branch, Costa Rica, Programa Tratamiento de Drogas bajo Supervisión Judicial (PTDJ).

³²³ Defensa Pública, Resumen Ejecutivo sobre personas atendidas en la Defensa Pública en el Programa de Justicia Restaurativa en Materia Penal de Adultos, February 29, 2016, pp. 1 and 4. Information provided in the context of the visit by the Rapporteurship.

³²⁴ Regulation for the Control of Impositions and Instructions Issued within the Evidentiary Regime on Conditional Stay of Criminal Prosecution, approved by Decision 4-2013 of the Supreme Court of Justice of Guatemala, published August 2013, Article 4(d).

³²⁵ Regulation for the Control of Impositions and Instructions Issued within the Evidentiary Regime on Conditional Stay of Criminal Prosecution, approved by Decision 4-2013 of the Supreme Court of Justice of Guatemala, published August 2013, Article 12; IACHR, Hearing “Measures to reduce pretrial detention in the Americas,” 157th Regular Period of Sessions, April 5, 2016. Information provided by the ICCPG (Instituto de Estudios Comparados en Ciencias Penales de Guatemala).

³²⁶ Among the participating authorities are the Ministry of Health, the Social Security Fund (Caja de Seguro Social), the Institute of Legal Medicine and Forensic Science, the National Commission for the Study and Prevention of Drug-related Offenses (CONAPREND), and criminal justice institutions. Presentation by Jose Ayú Prado Canals, President of the Supreme Court of Panama. Inter-American Drug Abuse Control Commission, High-level Dialogue on Alternatives to Incarceration for Drug-related Offenses, December 1, 2015, Washington, D.C.

³²⁷ The support was given by the OAS and CICAD, UNODC and the Pan American Health Organization (PAHO). Panama, Note from the Ministry of Foreign Affairs, A. J.D.H. MIRE-2016-26215 of May 20, 2016. Response to the Questionnaire.

treatment for the drug use that led him or her to commit the offense.³²⁸ Nonetheless, the use of this program is still limited and as of December 1, 2015, only 11 persons had entered it.³²⁹ In addition, the Commission takes note that in the Dominican Republic, according to information from the judiciary, on March 27, 2015, the first follow-up hearing of the Court for Treatment under Judicial Supervision (Tribunal de Tratamiento bajo Supervisión Judicial) was held.³³⁰ In 2016, according to the national press, 28 persons had participated in the Court for Treatment under Judicial Supervision; 10 persons were about to complete treatment; two were receiving residential therapy; and 16 were benefitting from outpatient services.³³¹

160. On the legislative front, the IACHR observes that by the entry into force of the Federal Code of Criminal Procedure of Mexico, and Legislative Decree No. 1206 in Peru, care or surveillance by a health care institution is introduced as a non-custodial measure.³³² In particular, the IACHR was informed that at present such courts are active in five states of Mexico, Durango, Chihuahua, Morelos, the state of México, and Nuevo León; and that the model is beginning to be implemented in Chiapas.³³³
161. The IACHR also observes that Chile and Jamaica expanded the use of such models. Since 2014, the Chilean State has expanded the drug courts program (Programa de Tribunales de Tratamiento de Drogas),³³⁴ which is focused on adults, to extend it to 10 regions of the country, including the metropolitan region. In addition, in 2017, the State proposed to continue implementing drug courts, under this program, in the rest of the country.³³⁵

³²⁸ Panama, Note from the Ministry of Foreign Affairs, A. J.D.H. MIRE-2016-26215 of May 20, 2016. Response to the Questionnaire.

³²⁹ CICAD website, High-level Dialogue on Alternatives to Incarceration for Drug-related Offenses, [Presentation by Jose Ayú Prado Canals](#), President of the Supreme Court of Justice of Panama, December 1, 2015, Washington, D.C.

³³⁰ Judicial Branch, Dominican Republic, "[Poder Judicial realiza primera audiencia de seguimiento del Programa de Tratamiento bajo Supervisión Judicial](#)," March 27, 2015.

³³¹ Hoy Digital, Dominican Republic, "[Jueza aboga porque adicción se considere problema salud](#)," January 21, 2016.

³³² [Federal Code of Criminal Procedure](#), Mexico, in force for the entire national territory as of June 18, 2016, Article 155 fraction VI, and [Legislative Decree No. 1206](#), Peru, in force since November 23, 2015, Article 288.

³³³ Information provided by Corina Giacomello, Instituto Nacional de Ciencias Penales, and Equis, sent March 26, 2017.

³³⁴ This program began in 2004 for offenders under judicial supervision, as a pilot project in the jurisdiction of Valparaíso, under the Office of the Attorney General (*Ministerio Público*), and consisting of providing judicially supervised treatment and rehabilitation to drug users who are first-time offenders. Ministry of Interior and Public Security, National Service for Prevention and Rehabilitation of Drug and Alcohol Consumption, press release "[Buscan potenciar tribunales de tratamiento de drogas](#)," October 9, 2014; Ministry of Interior and Public Security, Informational Note "[Tribunales de Tratamiento de Drogas](#)."

³³⁵ Ministry of Interior and Public Security, National Service for Prevention and Rehabilitation of Drug and Alcohol Consumption, press release "[Gobierno anuncia ampliación de Tribunales de Tratamiento de Drogas a la población adolescente](#)," May 6, 2016.

That model is applied through what is called a conditional stay of the criminal procedure for those offenses for which the penalty is no greater than three years and for those who have no prior convictions.³³⁶ The State of Jamaica – one of the pioneers in the region in this area – in 2014 started up two new drug courts in the parishes of St. Catherine and St. Thomas.³³⁷ In November 2015, the program was also expanded after the signing of the memorandum of understanding among the Ministry of Justice, the Ministry of National Security, the Ministry of Health, and the National Council on Drug Abuse.³³⁸

³³⁶ The conditional stay of prosecution is regulated by Articles 237-240 and 245-246 of the Code of Criminal Procedure of Chile, [Law No. 19,696](#), September 29, 2000, Article 237(a) and (b).

³³⁷ The Drug Treatment Courts Program was established with the adoption of the Drug Court (Treatment and Offenders) Act. Under that statute the accused who appear before a court and are accused as dependent users are referred to a probation officer for a report after an investigation into each person's social situation. Subsequently, a psychiatric evaluation is performed. The treatment begins once the person is considered to qualify for the program and has given his or her consent. The duration is six months to two years. [Drug Court \(Treatment and Offenders\) Act](#), Jamaica, January 15, 2001. See also Government of Jamaica, [MOU Signed for Effective Operation of Drug Treatment Programme](#), November 5, 2015.

³³⁸ In particular, in that agreement the Ministry of Justice undertook to provide orientation and support for implementing these models. Government of Jamaica, [MOU Signed for Effective Operation of Drug Treatment Programme](#), November 25, 2015.

CHAPTER 4
OTHER MEASURES AIMED AT
REDUCING THE USE OF
PRETRIAL DETENTION

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162. In this chapter, the IACHR follows up on its recommendations as regards holding preliminary hearings to determine whether pretrial detention is in order and adopting measures to speed up judicial procedures and to correct the procedural delay. In that regard, the IACHR presents an analysis of the main challenges faced by states and practices that they have adopted to implement those measures, in addition to developing standards of application. Considering the importance of two practices adopted, the IACHR delves further into the workings of the custody hearings (*audiências de custódia*) in Brazil and of the special “judicial days” (*jornadas judiciais*) in Bolivia.
163. Through its different mechanisms, the IACHR has noted that a persistent problem in the region is the lengthy waits faced by detainees before being sentenced. In light of that situation, in its 2013 report on pretrial detention, the IACHR recommended that States adopt the necessary measures to ensure that detainees are prosecuted and brought to trial without undue delay.³³⁹ In that connection, the IACHR urged States to give priority to such proceedings; ensure that the periods of pretrial detention are strictly within the limits allowed by law; and urgently adopt the measures necessary to correct the procedural delays and the high percentage of persons deprived of liberty without a final verdict”.³⁴⁰

164. During the period covered by this report, the IACHR finds that states have adopted a variety measures to accelerate the processes for correcting procedural delay, including, notably:
- (a) periodic review of the situation of people in pretrial detention,
 - (b) measures to ensure the holding of hearings, and
 - (c) holding hearings in prisons.

³³⁹ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendation C “Legal framework and application of pretrial detention.”

³⁴⁰ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendation A “General recommendations pertaining to State policy,” and Recommendation C “Legal framework and application of pretrial detention.”

A. *Periodic Review of the Situation of Persons in Pretrial Detention*

165. Considering the exceptional and transitory nature of pretrial detention and that its purpose is to preserve the correct flow of the investigation and of the criminal trial, so that they are conducted with speed and due diligence, the organs of the inter-American system have established that states have a duty to ensure that all detention is justified under international standards and to verify periodically that the circumstances that led to its application in the first place still exist, and whether the duration of detention has exceeded the legal and reasonable limits set.³⁴¹ The IACHR has stated that the responsibility for ensuring such periodic reviews lies with the competent judicial authorities and the prosecution service.³⁴²
166. Specifically, in its 2013 report, the Commission considered that the innovative practices that States could implement to periodically review the situation of persons in pretrial detention included the creation of special programs for monitoring its duration and keeping an adequate register of persons on trial.³⁴³ In relation to the latter point, the IACHR considered that the existence of a complete, exact, and accessible system of case files is a prerequisite for effective decision-making and good management within the prison service.³⁴⁴ Among people held in detention while awaiting trial, a lack of precise records, including hearing dates, can lead to considerable delays. Maintaining efficient systems for recording pretrial detention orders and for communicating with the relevant courts is important to duly monitor compliance with the maximum allowable durations of pretrial detention.³⁴⁵

³⁴¹ IACHR, *Report on the Use of Pretrial Detention in the Americas*, paras. 202, 207, and 321. See also I/A Court H.R. *Case of Argüelles et al. v. Argentina*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 20, 2014. Series C No. 288, para. 121. Cf. *Case of Bayarri v. Argentina*, Preliminary Objection, Merits, Reparations and Costs, Judgment of May 6, 2008. Series C No. 180, para. 74; and *Case of Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile*, para. 311.

³⁴² IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 326. Recommendation C “Legal framework and application of pretrial detention.” The UNODC and the Committee of Ministers of the Council of Europe have pronounced in like fashion. See also UNODC, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment*, 2010, p. 22, and Committee of Ministers to member states Recommendation Rec(2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse (Adopted on 27 September 2006 at the 974th meeting of the Ministers’ Deputies), Rule II, 17.1

³⁴³ IACHR, *Report on the Use of Pretrial Detention in the Americas*, paras. 207 & 301.

³⁴⁴ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 301. See, in that regard, UN, Twelfth Congress on Crime Prevention and Criminal Justice, held in Salvador, Brazil, April 12-19, 2010. See background paper *Workshop on Strategies and Best Practices against Overcrowding in Correctional Facilities*, A/CONF.213/16, published January 25, 2010, para. 13.

³⁴⁵ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 301.

167. As regards the review of pretrial detention systems, the IACHR notes that one of the principal actions adopted by the Ministry of Justice in Saskatchewan Province, Canada, in the 2015-2016 period was a case management review in the prosecution service, with a focus on early preparation for trial.³⁴⁶ The Commission also welcomes recent laws adopted in Alaska, USA, in July 2016, which include the obligation for judicial authorities to review the pretrial detention situation in the state, with an emphasis on factors that prevent a defendant from being released.³⁴⁷ Likewise, the IACHR values the efforts of the Ministry of Justice and Public Security of Haiti, which in March 2015 established a commission of officials to review the situation of pretrial detention in the country. As a result of its work, by end-July 2015 a total of 427 cases had reportedly been examined, leading to 119 sentences, 52 of which were acquittals.³⁴⁸ One year later, on that ministry's initiative, a mobile ad hoc committee was set up to visit the country's 18 tribunals in order to put together a database and identify all cases of prolonged pretrial detention.³⁴⁹
168. The IACHR also highlights the efforts of the Bolivian State in this area. For instance, as part of the National Plan to Clear Up the Backlog in the System of Criminal Procedure (Plan Nacional de Descongestionamiento del Sistema Penal),³⁵⁰ the Supreme Court of Justice of Bolivia, in partnership with all nine departmental courts of justice in the country, set up backlog clearance teams of criminal judges and implemented measures to expedite the judicial process. The plans had four phases: phase 1 was a review of pretrial detention that involved making an inventory of cases in which the *audiencia conclusiva* (final hearing in the preliminary stage) had been held and the court had ordered the application of alternative measures.³⁵¹ The three phases that followed concerned implementation of the backlog clearance teams; a lottery for case redistribution and assign backlog clearance work; and results-based management follow-up and

³⁴⁶ The main aim of such measures is a 50% reduction in the total number of people in pretrial detention by 2020. Ministry of Justice, Saskatchewan, Canada, Annual Report for 2015-16, p. 8.

³⁴⁷ The law also authorizes one additional bail review hearing for consideration of a defendant's inability to post the required bond, which under previous law was not sufficient to justify a subsequent hearing. The PEW Charitable Trusts, Brief "Alaska's Criminal Justice Reforms", December 2016. See also SB91, Alaska, published July 11, 2016.

³⁴⁸ United Nations Stabilization Mission in Haiti (MINUSTAH), Rapport annuel sur la situation des droits de l'homme en Haïti, February 2016, p. 20 ; Avocats sans frontières, Canada. Response to the Questionnaire, sent to the IACHR on May 31, 2016.

³⁴⁹ Avocats sans frontières, Canada. Response to the Questionnaire, sent to the IACHR on May 31, 2016.

³⁵⁰ For more information, see para. 65.

³⁵¹ Supreme Court of Justice, Plan Nacional de Descongestionamiento del Sistema Penal, Bolivia, Boletín institucional No. 1, Bolivia, January 2015, p. 3.

evaluation.³⁵² Specifically, based on the inventory of pending cases, it was determined that the cases involving pretrial detention were pending mainly because of a shortage of judges to deal with the relevant procedures. In response, the IACHR finds that the Supreme Court and the departmental courts optimized their allocation of material and human resources to increase the case clearance capacity through backlog clearance teams comprising criminal judges with lighter caseloads.³⁵³

169. According to data from the Supreme Court of Justice of Bolivia, a total of 3,492 cases were cleared between November and December 2014. In 1,464 of those cases alternative measures were applied; pretrial detention was ordered in 1,279; and final hearings (audiencias conclusivas) in preparation for oral proceedings were held in 1,056; 759 cases ended in convictions in guilty pleas or abbreviated trials, while other procedures were applied in 212 that resulted in final decisions.³⁵⁴ The IACHR also welcomes the fact that in the framework of the interinstitutional working groups set up to promote measures aimed at remedying problems of access to justice and to adopt decisions to deal with the crisis in the criminal justice and correctional systems,³⁵⁵ the Ministry of Justice and the courts issued directives to ensure compliance with procedural deadlines in the pretrial stage of criminal proceedings in the Departments of La Paz and Santa Cruz.³⁵⁶

B. Measures to Ensure the Holding of Hearings

170. One of the factors that contribute to prolong pretrial detention is the high incidence of suspended hearings, principally because of a lack of coordination and cooperation among criminal justice institutions in the region, which results in non-attendance by the parties concerned and problems with notification.³⁵⁷ The IACHR also addressed the situation in its

³⁵² Supreme Court of Justice, Plan Nacional de Descongestionamiento del Sistema Penal, Bolivia, Boletín institucional No. 1, Bolivia, January 2015, p. 3.

³⁵³ Supreme Court of Justice, Plan Nacional de Descongestionamiento del Sistema Penal, Bolivia, Boletín institucional No. 1, Bolivia, January 2015, p. 3.

³⁵⁴ Supreme Court of Justice, Plan Nacional de Descongestionamiento del Sistema Penal, Bolivia, Boletín institucional No. 1, Bolivia, January 2015, p. 6.

³⁵⁵ See paras. 65 & 171.

³⁵⁶ DPLF, Fundación CONSTRUIR, ASUNCAMI, Pastoral Penitenciaria *et al*, Situación de los Derechos Humanos y el acceso a la justicia de población vulnerable privada de libertad en Bolivia, in the context of the hearing “Human Rights and Penal and Prison Reform in Bolivia,” 159th Regular Period of Session, December 5, 2016.

³⁵⁷ In the case of Guatemala, for example, that country’s Institute of Comparative Criminal and Social Science Studies (INECIP) reported that according to the judiciary’s criminal hearings agenda, over a period of five business days from March 25 to 31, 2016, at the Second Lower Court in and for Guatemala City, of a total of 36 scheduled hearings, 50% were suspended. IACHR, Public hearing “Measures to reduce pretrial detention in the Americas”, 157th Regular Session, April 5, 2016. Information provided by ICCPG. In Bolivia, for its part,

2013 report, saying that the high incidence of suspended hearings and lack of coordination among the parties involved at trial amounted to a structural shortcoming that affects the situation of people in pretrial detention.³⁵⁸

171. Taking into consideration this problem, the IACHR values the recent progress made by Bolivia and Paraguay to have more efficient interinstitutional cooperation to ensure that hearings are held. Thus, with respect to the Bolivian State, the IACHR notes that in late 2014, reducing the incidence of suspended hearings was one of the measures for improving access to justice advocated by the interinstitutional working groups promoted by the Ministry of Justice and the Supreme Court of Justice.³⁵⁹ Bolivian civil society has spoken out about the positive results achieved by interinstitutional working groups, especially in the District of Cochabamba where, in addition to representatives of the Supreme Court, the Attorney General's Office, the Public Defender Office, and the correctional system, various civil society organizations are also involved. Those working groups prepare special “judicial days” and discuss practical obstacles encountered in judicial proceedings.³⁶⁰
172. In Paraguay, for its part, the Interinstitutional Office (Oficina interinstitucional) was created in May 2016 to serve as a linkage point between all criminal justice system operators, for the purpose of coordination and supervision of hearings at the preparatory and intermediate stages.³⁶¹ According to the Ministry of Justice, the initiative resulted in an increase in the number of hearings held.³⁶²

in November and December 2015, 75% of the 427 precautionary measures hearings registered in the country's central axis were suspended; La Paz registered a suspension rate of 84%, followed by Santa Cruz with 67% and, finally, Cochabamba with 41%. DPLF, Fundación CONSTRUIR, ASUNCAMI, Pastoral Penitenciaria *et al.*, Situación de los Derechos Humanos y el acceso a la justicia de población vulnerable privada de libertad en Bolivia, in the context of the hearing “Human Rights and Penal and Prison Reform in Bolivia,” 159th Regular Session, December 5, 2016, pp. 18 and 19. In Paraguay, that problem area was also mentioned by that country's Ministry of Justice. Ministry of Justice, Paraguay. Information submitted on July 14, 2016.

³⁵⁸ IACHR, Report on the Use of Pretrial Detention in the Americas, para. 58. See in that regard, with respect to Haiti, *Avocats sans frontières*, Canada. Response to the Questionnaire, sent to the IACHR on May 31, 2016.

³⁵⁹ The interinstitutional working groups comprise representatives of the departmental courts of justice, district prosecutors' offices, departmental directorates of the Plurinational Public Defender Service, departmental directorates of the penitentiary system, and departmental social policy services.

³⁶⁰ IACHR, Public hearing “Measures to reduce pretrial detention in the Americas”, 157th Regular Session, April 5, 2016. Information provided by Fundación CONSTRUIR. See also DPLF, Fundación CONSTRUIR, ASUNCAMI, Pastoral Penitenciaria *et al.*, Situación de los Derechos Humanos y el acceso a la justicia de población vulnerable privada de libertad en Bolivia, in the context of the hearing “Human Rights and Penal and Prison Reform in Bolivia,” 159th Regular Session, December 5, 2016.

³⁶¹ The office comprises representatives of the Supreme Court of Justice, Ministry of Justice, Office of the Attorney General, and Ministry of Defense. Its functions are set out in the Interinstitutional Agreement on Implementation of the Interinstitutional Office (Agreement No. 1057/16, Paraguay, May 17, 2016). See also,

C. *Prison Hearings*

173. The IACHR notes that since 2014, various countries have adopted measures to implement so-called “prison hearings. On this issue, in its 2013 report, the IACHR mentioned that, considering that the decision to hold a person in custody in order to ensure their appearance for trial resides with the State, the fact that it is unable to provide transportation or custodial measures for detainees to be able go to the courthouse for the respective hearings on the date and at the time scheduled amounts to a situation of fundamental injustice.³⁶³
174. In particular, so-called “prison hearings” are held at detention facilities by judicial officials to conduct certain proceedings. Their purpose is to circumvent various potential difficulties with taking persons deprived of liberty to court, such as lack of transportation, shortage of gasoline, insufficient guards, or possible flight risk. The IACHR has also been informed about hearings being canceled because the defendant was unable to pay the necessary bribe to be taken to court.³⁶⁴ The IACHR considers that in addition to ensuring that a greater number of cases are heard, holding hearings in prisons brings persons involved in the administration of justice into direct contact with the reality of the region's prisons, which could increase sensitivity to the importance of applying non-custodial measures.
175. In order to hold prison hearings, the prison authorities have to provide a setting inside the facility that offers suitable conditions in terms of space, lighting, electricity, and hygiene. Furthermore, prison authorities have an obligation to allocate additional guards to ensure the security of all the parties in the proceedings and the appearance of the defendant at the hearings. In addition, to ensure that the holding of hearings in prisons is efficient, it is essential that States establish clear cooperation mechanisms among the judiciary, prosecution, defense, and prison authorities. Also, judicial officials have to establish criteria for prioritizing cases to be

Supreme Court of Justice of Paraguay, press release “Acuerdo entre Corte, Fiscalía, Defensoría y Ministerio de Justicia firman convenio para mejorar sistema de justicia”, May 17, 2016.

³⁶² In particular, the Ministry of Justice of Paraguay reported that at the time of the project’s launch, between May 23 and 27, 2016, 51% of preliminary hearings were held. Between June 27 and July 1 that year, 54% of hearings were held, indicating an improvement over the earlier week. Ministry of Justice, Paraguay. Information submitted on July 14, 2016.

³⁶³ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 265.

³⁶⁴ In this regard, with respect to the city of Santa Cruz, Bolivia, see Stanford Human Rights Center, *Best practices to reduce the excessive use of pretrial detention and create more rehabilitative prisons in the Americas* (internal document), October 2016 (Primary researcher: Mirte Postema). Information in this respect was also referred to the Rapporteurship during its visit to Panama from June 17 to 19, 2015.

discussed and take the necessary steps to adequately prepare the cases to be heard.

176. The IACHR notes that countries such as Bolivia, Colombia, Panama, and Paraguay have been holding prison hearings since 2014 to adopt decisions in cases of people held in pretrial detention, thereby ensuring swifter handling of cases. Thus, in Colombia, Presidential Decree 204 of February 10, 2016, enacted rules governing the obligations of prison authorities with respect to setting up physical spaces for holding hearings inside detention centers.³⁶⁵ As regards Panama, the IACHR salutes the fact that in April 2016, 10 hearing rooms were inaugurated on the perimeters of La Joya and La Joyita prisons,³⁶⁶ which, according to publicly available information, house approximately 60 percent of Panama's total prison population. In early 2016, the Paraguayan State launched the Pilot Plan to Expedite and Decide Judicial Proceedings (Plan Piloto de Agilización y Definición de los Procesos Judiciales), whose purpose is to dispose of cases by holding hearings at prisons.³⁶⁷ As at July 2016, three day-long sessions had been staged at which 36 hearings were held, resulting in the disposal of half the cases heard.³⁶⁸

1. Bolivia's "Judicial Days"

177. The IACHR particularly draws attention to the measures adopted by the Bolivian State to implement Law No. 586 on Clearing up the Backlog, which included putting into operation hearings in prisons. This has had the positive effect of increasing the number of judicial hearings held, especially through the holding of so-called Judicial Days for Clearing up the Backlog in the Criminal Justice System.³⁶⁹ According to official information, in 2015, judicial days were first introduced in the Departments of Santa Cruz, La Paz, and Cochabamba, and based on the results achieved were then

³⁶⁵ The Corrections Services Unit (USPEC) will be in charge of building and preparing those spaces. Corrections systems entities will provide technical support in their preparation. Presidential Decree 204 amending Decree 1069 of 2015, February 10, 2004, Article 2.2.1.12.2.3.

³⁶⁶ Panama, Note from the Ministry of Foreign Affairs, A.J.D.H. MIRE-2016-26215 of May 20, 2016. Response to the Questionnaire. See also Judiciary of the Republic of Panama, press release Órgano Judicial pone en funcionamiento salones de audiencias en "La Joya y La Joyita," April 2016.

³⁶⁷ This plan was backed by the Administration Council of the Central Judicial District and Enforcement Judges of the Central Department. Ministry of Justice, Paraguay. Information submitted on July 14, 2016.

³⁶⁸ Ministry of Justice, Paraguay. Information submitted on July 14, 2016.

³⁶⁹ Fundación CONSTRUIR, Cáritas Boliviana, and others, Prisión Preventiva y Derechos Humanos, Informe Bolivia, October 2014; and Bolivia Report, October 2014; and Stanford Human Rights Center, *Best practices to reduce the excessive use of pretrial detention and create more rehabilitative prisons in the Americas* (internal document), October 2016.

replicated in the country's other departments.³⁷⁰ In the period with which this report is concerned, judicial days resulted in a total of 2,047 hearings concluding in non-custodial alternatives, abbreviated procedures, early release, parole, and other measures.³⁷¹

178. As regards how the hearings operate, according to information available to the ACHR, hearings in prisons are attended by the parties in the proceeding and the judge, in addition to administrative officials to perform the relevant procedures.³⁷² Specifically, officials in Cochabamba reported that hearings are prioritized in line with the amount of time that a person has been confined. When organizing judicial days, the president of each departmental court issues directives that contain the venue, schedule, and instructions to judges, court clerks, prosecutors, and public defenders, so that they may present the necessary motions and carry out the relevant procedures for the cases that will be considered.³⁷³
179. For example, Directive No. 17/2016 issued by the President of the Departmental Court of Cochabamba in March 2016 established that judicial days would be held in that Department from May 3 to 10, 2016.³⁷⁴ To that end, the President of the Court gave the Departmental Prosecutor's Office (fiscalía departamental) and the Public Defender Service (Defensoría) from March 21 to April 11 to identify cases that would be heard in connection with the Comprehensive Law to Guarantee Women a Life Free from Violence. The president then established that prosecutors and public defenders had from April 15 to 22, 2016, to file the necessary motions with the lower courts (juzgados de instrucción); the criminal courts were then given from April 25 to 29 to schedule hearings. Directive No. 17/2016 also reiterated to judges their obligation to inform the President about the schedules of hearings so that the latter could "coordinate with the Prosecutor's Office, the Public Defender Service, and the correctional

³⁷⁰ Plurinational Public Defender Service, *Informe de Gestión 2015*, p. 9.

³⁷¹ Plurinational Public Defender Service, *Informe de Gestión 2015*, p. 9. 10.

³⁷² This information is based on the documentation done by Stanford Human Rights Center, which visited Bolivia from May 2 to 11, 2016, where it observed judicial days held in the city of Cochabamba at San Sebastián Women's Prison and San Sebastián Prison. Stanford Human Rights Center, *Best practices to reduce the excessive use of pretrial detention and create more rehabilitative prisons in the Americas* (internal document), October 2016 (Primary researcher: Mirte Postema).

³⁷³ Stanford Human Rights Center, *Best practices to reduce the excessive use of pretrial detention and create more rehabilitative prisons in the Americas* (internal document), October 2016 (Primary researcher: Mirte Postema).

³⁷⁴ Departmental Court of Justice of Cochabamba, Bolivia, Directive No. 17/2016, March 23, 2016. Printed publication.

system,” in order to see to it that the judicial dates were successfully organized.³⁷⁵

180. The IACHR was also informed about challenges in holding hearings of this type, such as, for example, failure to notify victims. Specifically, according to available information, in June 2016 the notification system in the city of Santa Cruz failed almost completely because the central notification office was unable to cope with the number of procedures that had to be processed, denoting a structural problem for staging such proceedings.³⁷⁶
181. In addition, the IACHR notes with concern that, according to official figures, a large number of hearings held during judicial days were dealt with by means of the guilty pleas or abbreviated trials. Thus, for example, from January to September 2017 in Cochabamba, of a total of 1,398 cases, 804 (57.5 percent) were disposed of through the application of abbreviated trials.³⁷⁷ At Palmasola prison in Santa Cruz, of the 317 hearings held in May 2015, abbreviated procedures were used to handle almost 94 percent.³⁷⁸ Considering the significant challenges described above with respect to abbreviated procedures being used as a means to reduce pretrial detention,³⁷⁹ the IACHR is concerned by the high percentage of guilty pleas or abbreviated trials that are held in the framework of judicial days at Bolivian prisons.

D. Preliminary Hearings to Determine whether Pretrial Detention is in Order

182. In its Report on the Use of Pretrial Detention in the Americas, the IACHR recommended that, in order to guarantee the principles of audi alteram partem, procedural immediacy, and the right to a public and rapid proceeding, the decision to order pretrial detention be made in an oral hearing in which all parties participate. In particular, in order to ensure the right of defense, the Commission determined that the accused must be

³⁷⁵ Departmental Court of Justice of Cochabamba, Bolivia, Directive No. 17/2016, March 23, 2016. Printed publication.

³⁷⁶ Interviews with judges and civil society representatives in Santa Cruz, Bolivia, May 5 and 6, 2016. Stanford Human Rights Center, *Best practices to reduce the excessive use of pretrial detention and create more rehabilitative prisons in the Americas* (internal document), October 2016 (Primary researcher: Mirte Postema).

³⁷⁷ Departmental Court of Justice of Cochabamba, *Informe Plan de Descongestionamiento Penal de detenidos preventivos* (undated), p. 5. Printed publication.

³⁷⁸ Supreme Court of Justice, Bolivia, Plan Nacional de Descongestionamiento del Sistema Penal – Segunda Fase, Boletín institucional, No. 2, May 2015, p. 5.

³⁷⁹ See paras. 56-59.

present and accorded a hearing by the judge.³⁸⁰ In that connection, the Commission established that pretrial detention should not be decided exclusively on the reading of the case file,³⁸¹ and that in addition to guaranteeing the aforementioned principles, during such hearings the judge is required to examine not only compliance with the procedural requirements set forth in domestic law, but also the reasonableness of the suspicion on which the arrest is grounded and the legitimacy of the purpose pursued.³⁸² This procedure should offer the possibility of confrontation of positions (adversarial) and always ensure equality of arms between the parties, the prosecutor and the detained person. To ensure this equality of arms, it is essential that defense attorneys be given access to those documents in the investigation that are necessary to effectively challenge the lawfulness of their clients' detention.³⁸³

183. A prior hearing on the admissibility of pretrial detention allows the parties to be apprised ahead of time of the arguments used to infer flight risk or the risk of interference with the investigation. It also provides a better forum, for both the defense and the prosecution, to present their arguments in favor of or against the ordering of pretrial detention or, if applicable, of other less restrictive measures.³⁸⁴ In particular, the IACHR considers that such hearings should mainly examine the application of alternatives to pretrial detention. The Commission has indicated in that regard that this approach would also guarantee the effective exercise of the right of defense, in that a step-by-step, gradual analysis (from the least to the most restrictive measure) would allow the defense team to focus the discussion on concrete matters related to the necessity and proportionality of the measures under consideration.³⁸⁵

1. Legislative Reform

184. In terms of legislation, the IACHR observes that during the period covered by this report, countries such as Argentina, Mexico, and Peru have

³⁸⁰ IACHR, *Report on the Use of Pretrial Detention in the Americas*, paras. 179 and 326. Recommendation C “Legal framework and application of pretrial detention.”

³⁸¹ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 179.

³⁸² IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, OEA/Ser.L/V/II., Doc. 46/13, December 30, 2013, para. 199. ECHR, Case of Brogan and Others v. The United Kingdom (Applications No. 11209/84, 11234/84, and 11386/85), Judgment of November 29, 1988 (Grand Chamber), § 65.

³⁸³ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 199. ECHR, Case of Piruzyan v. Armenia (Application No. 33376/07), Judgment of June 26, 2012 (Third Section of the Court), § 11.

³⁸⁴ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 180.

³⁸⁵ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 229.

amended their legislation to include regulations governing pretrial detention hearings. Thus, Argentina's new criminal code, which is not yet in force, provides that, in order to ensure the principles of *audi alteram partem* (*contradicción*), procedural immediacy, and the right to a public and rapid proceeding, motions for pretrial detention must be presented and decided in an oral hearing.³⁸⁶ According to the Public Defender's Office, the above represents an improvement on the current law, under which a judge may order pretrial detention *ex officio* without first holding a hearing.³⁸⁷

185. In the case of Mexico, the Federal Code of Criminal Procedure provides that applications for precautionary measures shall be decided by the supervisory judge in an oral hearing with the presence of the judicial authority; the Office of the Attorney General (*Ministerio Público*); the victim, as appropriate, accompanied by their legal counsel; and the defendant and their counsel.³⁸⁸ For its part, the Peruvian State promulgated two legislative decrees (1206 and 1229) in September 2015,³⁸⁹ correcting an omission from the 2004 Code of Criminal Procedure, which failed to provide for public hearings at second instance to determine the admissibility of pretrial detention.³⁹⁰

2. Custody hearings (*audiencias de custodia*) in Brazil

a. General Considerations

186. In a March 2016 press release, the IACHR marked the first anniversary of the introduction of custody hearings in Brazil,³⁹¹ a mechanism adopted by the State to avoid unnecessary deprivation of liberty by encouraging the use of non-custodial measures, which has resulted in a decline in the use of

³⁸⁶ Federal Code of Criminal Procedure, Law 27,063 (not in force), Argentina, adopted on December 4, 2015 and published in the Official Gazette on December 10, 2014, Article 190.

³⁸⁷ Response of the Office of the Public Defender of the Nation, Argentina, submitted June 22, 2016.

³⁸⁸ Federal Code of Criminal Procedure, Mexico, published on March 5, 2014, in force as of June 18, 2016, Article 157. Response of Mexico to the Questionnaire, Note from the Permanent Mission of Mexico to the OAS, No. Oea-01285 of June 1, 2016.

³⁸⁹ Legislative Decree 1206, published September 22, 2015, in force from November 23, 2015, bringing into effect Articles 272 to 285 of the Code of Criminal Procedure nationwide. Legislative Decree 1229, published September 25, 2015, amends Articles 283, 287, 288, and 290 of the Code of Criminal Procedure and brings into effect Articles 273 to 277, 283, 287, 288, and 290 nationwide.

³⁹⁰ Instituto de Defensa Legal (IDL), Peru. Response to the Questionnaire sent May 18, 2016.

³⁹¹ IACHR, Press Release 29/16, [IACHR Celebrates the Anniversary of the Implementation of the Custody Hearings in Brazil](#), March 7, 2016.

pretrial detention.³⁹² Specifically, pursuant to Resolution 213 adopted by Brazil's National Justice Council on December 15, 2015, these hearings require that any individual detained in flagrante delicto, irrespective of the motive or nature of the offense, be brought before a judge within 24 hours of their arrest for a hearing in the presence of the Office of the Attorney General and Office of the Public Defender.³⁹³ The purpose of custody hearings is to ensure the rights of detainees, determine whether it is necessary to keep them in custody, allow the court to decide on the admissibility of any punitive measure, make a determination on pretrial detention, apply non-custodial measures, or adopt other measures necessary to preserve the rights of the accused.³⁹⁴ The mechanism started out as a pilot project in the state of São Paulo on February 24, 2015.³⁹⁵ Custody hearings are now in operation in all the capitals of the country's 26 states and the Federal District.³⁹⁶

187. According to figures provided by the judiciary, 186,455 custody hearings have been held nationwide between the program's initial implementation and January 2017, with pretrial detention ordered in 54.11 percent of them (100,887 cases). Pretrial detention is ordered in approximately 50 percent of cases in 22 states and the Federal District. In the state of Rio Grande do Sul that rate is 84.56 percent, while in the states of Rondônia, Mato Grosso do Sul, Tocantins, Pernambuco, and Sergipe the rate at which pretrial detention is ordered is 60 percent. The states with levels below 50 percent are Bahía (38.31 percent), Amapá (41.53 percent), and Mato Grosso (44.71 percent). The above figures constitute progress, particularly considering that, according to information available to the Commission, following the entry into force of the Precautionary Measures Law in 2011³⁹⁷ the percentage of cases in which pretrial detention was ordered in flagrante delicto cases was higher.³⁹⁸ For example, in the case of Rio de Janeiro and

³⁹² IACHR, Press Release 29/16, [IACHR Celebrates the Anniversary of the Implementation of the Custody Hearings in Brazil](#), March 7, 2016.

³⁹³ National Justice Council of Brazil, [Resolution 213 of December 15, 2015](#), Article 1.

³⁹⁴ National Justice Council of Brazil, [Resolution 213 of December 15, 2015](#), Article 1.

³⁹⁵ IACHR, Press Release 29/16, [IACHR Celebrates the Anniversary of the Implementation of the Custody Hearings in Brazil](#), March 7, 2016.

³⁹⁶ National Justice Council of Brazil, “[Dados Estatísticos / Mapa de Implantação de audiências de custódia](#)”, [Statistics / Custody hearing implementation map] (available in Portuguese only), January 2017.

³⁹⁷ This law amended Brazil's Code of Criminal Procedure in a bid to ensure the principle that pretrial detention should be used as the exception, by increasing the array of non-custodial measures available, such as bail, electronic monitoring mechanisms, house arrest, and others. [Law No. 12.403](#) (Precautionary Measures Law) (available in Portuguese only), in force since May 4, 2011.

³⁹⁸ The IACHR has information indicating that when the decision on precautionary measures was based solely on written proceedings, judges ordered pretrial detention in more than 60% of cases. Instituto Sou da Paz y Associação pela Reforma Prisional (ARP), *Monitorando a Aplicação da Lei das Cautelares e o uso da prisão provisória nas cidades do Rio de Janeiro e São Paulo*, 2013. The data presented are for 2012. Information provided by Stanford Human Rights Center, *Best practices to reduce the excessive use of pretrial detention and create more rehabilitative prisons in the Americas* (internal document), October 2016 (Primary

São Paulo, respectively, the pretrial detention confirmation rates were 72.3 percent and 61.3 percent.³⁹⁹ Since the introduction of custody hearings those percentages have dropped to 57 percent in Rio de Janeiro and 53 percent in São Paulo.⁴⁰⁰ Despite the progress that the implementation of the mechanism has brought, the IACHR finds that the imposition of pretrial detention in approximately 54 percent of cases denotes that the measure continues not to be used on the exceptional basis that its nature requires. Indeed, the IACHR has information that at custody hearings judges decide on the admissibility of pretrial detention based on "the seriousness of the offense, public order, or the criminal record of the accused," rather than the procedural aims envisaged in the applicable international standards.⁴⁰¹

b. Operation in Practice

188. According to the documentation done by the Stanford Human Rights Center, which analyzed the workings of custody hearings in the city of São Paulo,⁴⁰² cases are distributed randomly among the judges present, who then decide in what order to hold hearings. Because persons accused of the serious crimes are more likely to be released, which, therefore, allows more time to finalize the minister to procedures for their release, courts tend to schedule hearings for such offenses at the beginning of the day.⁴⁰³

researchers: Mirte Postema and Thiago Nascimento dos Reis). For more information in this regard: Thiago Nascimento dos Reis, *Detainees on Stage: Achievements and Challenges of the Newly-Implemented Custody Hearings in São Paulo State*, Stanford Program in International Legal Studies (SPILS) JSM Thesis, May 2016.

³⁹⁹ Ministry of Justice and National Penitentiary Department, Brazil, "[Implementação das Audiências de Custódia no Brasil: Análise de experiências e recomendações de aprimoramento](#)" [Application of Custody Hearings in Brazil: Analysis of Experiences and Recommended Improvements (available in Portuguese only)], p. 25, 2016.

⁴⁰⁰ Ministry of Justice and National Penitentiary Department, Brazil, "[Implementação das Audiências de Custódia no Brasil: Análise de experiências e recomendações de aprimoramento](#)" [Application of Custody Hearings in Brazil: Analysis of Experiences and Recommended Improvements (available in Portuguese only)], p. 25, 2016.

⁴⁰¹ Stanford Human Rights Center, *Best practices to reduce the excessive use of pretrial detention and create more rehabilitative prisons in the Americas* (internal document), October 2016 (Primary researchers: Mirte Postema and Thiago Nascimento dos Reis).

⁴⁰² The observation included a practical analysis of custody hearings, as well as interviews with judges and other relevant officials. The observation was conducted between October 2015 and May 2016 by Mirte Postema, researcher with Stanford Human Rights Center; and Thiago Nascimento dos Reis, a Stanford University student. Information from: Thiago Nascimento dos Reis, *Detainees on Stage: Achievements and Challenges of the Newly-Implemented Custody Hearings in São Paulo State*, JSM thesis (unpublished), May 2016; and Stanford Human Rights Center, *Best practices to reduce the excessive use of pretrial detention and create more rehabilitative prisons in the Americas* (internal document), October 2016 (Primary researchers: Mirte Postema and Thiago Nascimento dos Reis).

⁴⁰³ Stanford Human Rights Center, *Best practices to reduce the excessive use of pretrial detention and create more rehabilitative prisons in the Americas* (internal document), October 2016 (Primary researchers: Mirte Postema and Thiago Nascimento dos Reis).

189. Custody hearings are held in rooms specially equipped for that purpose. Present at them are the judge, a prosecutor, a public defender or private defense counsel, and the defendant.⁴⁰⁴ Before the hearing starts, the defendant has the right to consult with their attorney in private.⁴⁰⁵ The custody hearing begins with a short explanation by the court of the hearing's purpose. Among other things, the court is required to interview the defendant to ensure that they have had access to an adequate defense, communication with family members, and medical attention; judges are also required to inquire about possible acts of torture or ill-treatment during detention.⁴⁰⁶ The defendant having been heard, the court then asks the Office of the Attorney General (Ministerio Público) and the defense questions regarding the nature of the offense in order to determine the facts on which the potential criminal charges are based.⁴⁰⁷ The custody hearing concludes with a reasoned decision by the court as to lawfulness and the legal situation of the accused; a record is also made of any interlocutory orders issued in the event of evidence of torture or mistreatment.⁴⁰⁸ Finally, the court fills out a template detailing the specifics of the case, and court staff performs the necessary administrative processing to enforce the court's decision. The defense counsel usually explains the effects of the court's decision to the defendant. Each hearing lasts around 40 minutes.⁴⁰⁹
190. The IACHR has received information about certain shortcomings in custody hearings, such as (a) limited time and lack of privacy for communication between the defendant and their counsel, (b) failure of the court to provide a clear explanation of the proceeding at the start of the hearing, (c) inadequate coordination among judicial agencies, and (d) lack of translation and interpretation services.⁴¹⁰ In addition, several concerns have been expressed about the passive role that the judge often plays in such hearings. In that connection, for example, the Stanford Human Rights

⁴⁰⁴ National Justice Council of Brazil, [Resolution 213 of December 15, 2015](#), Articles 4 and 5.

⁴⁰⁵ National Justice Council of Brazil, [Resolution 213 of December 15, 2015](#), Article 6.

⁴⁰⁶ National Justice Council of Brazil, [Resolution 213 of December 15, 2015](#), Article 15.

⁴⁰⁷ National Justice Council of Brazil, [Resolution 213 of December 15, 2015](#), Article 8 (X) (1§).

⁴⁰⁸ National Justice Council of Brazil, [Resolution 213 of December 15, 2015](#), Article 8(3).

⁴⁰⁹ As regards the duration of hearings, the IACHR notes that according to the Institute for Defense of the Right of Defense (IDDD), in some cases hearings take four minutes, while in others they last roughly 10 minutes. The observation covered custody hearings held in the city of São Paulo between February and December 2015; the data of 588 people in pretrial detention was systematized. Instituto de Defesa do Direito de Defesa (IDDD), [Monitoramento das Audiências de Custódia em São Paulo](#), May 2016, pp. 10 and 11.

⁴¹⁰ Stanford Human Rights Center, *Best practices to reduce the excessive use of pretrial detention and create more rehabilitative prisons in the Americas* (internal document), October 2016 (Primary researchers: Mirte Postema and Thiago Nascimento dos Reis). See also Instituto de Defesa do Direito de Defesa (IDDD), [Monitoramento das Audiências de Custódia em São Paulo](#), May 2016; and [Associação dos Advogados Criminalistas critica aplicação das Audiências de Custódia no ES](#), Eshoje, February 19, 2016.

Center says that despite the fact that the court has an obligation to request information about the defendant's financial situation in order to set the amount of bail,⁴¹¹ as appropriate, judges are not always sufficiently thorough in such questioning.⁴¹² In addition, as is analyzed below, courts do not actively inquire about possible torture or mistreatment.

c. Allegations of Torture or Ill-Treatment

191. The Commission has stated that custody hearings allow detainees to report possible acts of torture or ill-treatment to the judicial authorities.⁴¹³ According to figures provided by the judiciary, as of January 2017 –almost two years after the rollout of these mechanisms in São Paulo – in the 186,455 hearings held across the country there have been 8,279 complaints of acts of torture or other cruel, inhuman, or degrading treatment, equivalent to approximately 4.68 percent of cases.⁴¹⁴ However, the commission notes clear indications of inconsistency between official figures on alleged torture and ill-treatment reported at those hearings when compared with complaints recorded by other entities. For example, in the state of Rio de Janeiro, the IACHR finds that, according to official figures, 110 cases of violence during detention were reported between September 2015 and February 2017, equivalent to just 1 percent of the 7,846 cases examined in custody hearings.⁴¹⁵ By contrast, the IACHR is concerned by the substantially different figures provided by other entities, which report higher percentages of allegations of torture and mistreatment. In particular, the IACHR observes that the state's Public Defender Office reported that in the 5,302 hearings monitored a total of 1,573 detainees (29.67 percent) claimed to have suffered some form of violence at the hands of police.⁴¹⁶ For its part, the Rio de Janeiro-based Mechanism to Prevent and Combat Torture indicated that of the 238

⁴¹¹ [Code of Criminal Procedure](#), Brazil, in force since October 13, 1941, Article 325.1.

⁴¹² Stanford Human Rights Center, *Best practices to reduce the excessive use of pretrial detention and create more rehabilitative prisons in the Americas* (internal document), October 2016 (Primary researchers: Mirte Postema and Thiago Nascimento dos Reis).

⁴¹³ IACHR, Press Release 29/16, [IACHR Celebrates the Anniversary of the Implementation of the Custody Hearings in Brazil](#), March 7, 2016.

⁴¹⁴ National Justice Council of Brazil, "[Dados Estatísticos / Mapa de Implantação de audiências de custódia](#)", [Statistics / Custody hearing implementation map] (available in Portuguese only), January 2017.

⁴¹⁵ Data provided by the National Justice Council of Brazil, "[Dados Estatísticos / Mapa de Implantação de audiências de custódia](#)", [Statistics / Custody hearing implementation map] (available in Portuguese only), January 2017.

⁴¹⁶ Office of the Public Defender of the State of Rio De Janeiro, Brazil, "[Un ano de audiência de custódia no Rio de Janeiro](#)" [A year of custody hearings in Rio de Janeiro] (available in Portuguese only), October 2016. These data were obtained from one year of monitoring custody hearings, from September 2015.

hearings observed in which the court inquired about possible torture or mistreatment, violence was reported in 93 cases (39 percent).⁴¹⁷

192. The IACHR notes with concern the numbers that suggest a lack of investigation and follow-up of complaints of ill-treatment and torture during detention presented at custody hearings. In that regard, the Commission notes that despite the large number of complaints of ill-treatment and torture, and that an investigation was reportedly opened in 74 percent of the 1,152 complaints filed with the São Paulo Court of Justice, as of February 2016 no law enforcement personnel had been found responsible in any of the cases.⁴¹⁸ The IACHR notes according to data supplied by the organization Conectas,⁴¹⁹ in the 358 documented cases in which allegations were made about torture or ill-treatment during detention, the court inquired about the acts of violence suffered in 88 of them (24.5 percent),⁴²⁰ and in just 43 cases (12.01 percent) did prosecutors actively intervene to make inquiries.⁴²¹ The Office of the Attorney General only requested a formal investigation in two cases.⁴²²
193. In consideration of the foregoing, the IACHR reiterates that the investigation of cases of torture and cruel, inhuman and degrading treatment must be conducted ex officio and be governed by the principles of independence, impartiality, competence, diligence, and promptness.⁴²³ This investigation should be undertaken utilizing all the legal means available, be oriented toward the determination of the truth, and be conducted within a reasonable time, which should be ensured by the intervening judiciary bodies. Likewise, the States should ensure the independence of the medical and health care personnel in charge of examining and providing assistance to persons deprived of liberty so they are able to freely perform the required medical evaluations, and adhere to

⁴¹⁷ Justicia Global y Mecanismo Estadual de Prevenção y Combate a la Tortura de Rio de Janeiro, Brazil, “Quando a liberdade é exceção, a situação das pessoas presas sem condenação no Rio de Janeiro” [When Liberty Is the Exception: The Situation of Pretrial Detainees in Rio De Janeiro] (available in Portuguese only), 2016. 314 hearings were monitored in the State of Rio de Janeiro from March to June 2016; however, as is noted in the main text, the court only inquired about possible acts of police violence in 238 cases.

⁴¹⁸ Conectas, press release “Audiências de custódia fazem um ano: o que mudou?”, February 25, 2016.

⁴¹⁹ Conectas’ research originally encompassed 393 cases of ill-treatment and torture. However, in monitoring the cases in which the judge, prosecutor, and defense counsel inquired about the attacks, the study left aside so-called “ghost hearings” (in which the detainee did not appear at the hearing) and cases for which information was not available. As a result, the final number of cases was 358. Conectas, Shielded Torture. How the institutions of the justice system perpetuate violence in custody hearings, February 14, 2017.

⁴²⁰ Conectas, Brazil, Tortura Blindada, relatório completo, February 14, 2017, p. 57.

⁴²¹ Conectas, Brazil, Tortura Blindada, relatório completo, February 14, 2017, p. 69.

⁴²² Conectas, Brazil, Tortura Blindada, relatório completo, February 14, 2017, p. 66.

⁴²³ IACHR, Report on the Human Rights of Persons Deprived of Liberty in the Americas, OEA/Ser.L/V/II., Doc. Doc. 64, December 31, 2011, para. 345; I/A Court H.R., Case of Bueno-Alves v. Argentina, Judgment of May 11, 2007, Series C. No. 164, para. 108.

established standards in the practice of their profession.⁴²⁴ Finally, the IACHR reiterates that in cases involving persons deprived of liberty, the State's duty to investigate has to meet a higher standard, considering that in such instances the victims are in an enclosed space.⁴²⁵

⁴²⁴ IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, OEA/Ser.L/V/II., Doc. 64, December 31, 2011, para. 346; and I/A Court H.R., *Case of Cabrera García and Montiel Flores v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment of November 26, 2010. Series C No. 220, para. 135. In this regard the Inter-American Court based its findings on paragraphs 56, 60, 65, 66, and 76 of the Istanbul Protocol.

⁴²⁵ IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, OEA/Ser.L/V/II., Doc. Doc. 64, December 31, 2011, para. 347.

CHAPTER 5
WOMEN AND OTHER PERSONS
BELONGING TO GROUPS AT
SPECIAL RISK

WOMEN AND OTHER PERSONS BELONGING TO GROUPS AT SPECIAL RISK

194. In this chapter, the IACHR analyzes the special dimension of the incarceration of women and other persons belonging to groups at special risk. With respect to women deprived of liberty, the IACHR examines the disproportionate negative impacts they face, as well as the severe consequences of their incarceration when these women are responsible for raising their children, are heads of their families, and have persons under their care. The Commission also develops, considering a gender perspective and with a differentiated approach, the measures adopted by the states related to women and other persons belonging to groups at special risk who are deprived of liberty. Such measures have mainly centered on the enactment of legislative reforms that adopt a gender perspective and differentiated treatment in the context of deprivation of liberty, and on the use of non-custodial measures, particularly house arrest and electronic tracking mechanisms in criminal matters.

A. *Women*

1. General Considerations

195. The IACHR reiterates that States have a special duty to act with due diligence to prevent and eradicate all forms of violence and discrimination against women.⁴²⁶ Women have historically suffered discrimination and stereotypes that systematically put them at a disadvantage in a variety of ways and increase the vulnerability of more than half the population to acts of physical, sexual, and psychological violence as well as other types of abuse. Such risks are accentuated when women are deprived of their

⁴²⁶ IACHR, *Access to Justice for Women Victims of Sexual Violence: Education and Health*, OEA/Ser.L/V/II. Doc. 65, December 28, 2011, pars. 31-39; IACHR, *Legal Standards related to Gender Equality and Women's Rights in the Inter-American Human Rights System: Development and Application*, OEA/Ser.L/V/II.143. Doc. 60, November 3, 2011, pars. 22-24, and IACHR, *Access to Justice for Women Victims of Sexual Violence in Mesoamerica*, OEA/Ser.L/V/II. Doc. 63, December 9, 2011, [pars. 37-43](#).

liberty and in the custody of state authorities.⁴²⁷ The Inter-American Court has analyzed the differentiated impact of imprisonment on women and noted that when deprived of their liberty women are subject to the “complete control and power” of State agents and absolutely defenseless.⁴²⁸

196. Through its various mechanisms, the IACHR has received a steady flow of information that suggests that the disproportionately serious hardships and adverse consequences that affect women who are deprived of liberty include (a) lack of female-only detention centers, (b) inadequate prison infrastructure bearing in mind their gender and the development of their mother-child relationships, (c) lack of gender-appropriate medical treatment, (d) greater difficulties with social reintegration, (e) absence of a gender perspective in data-gathering on their deprivation of liberty, and (f) subjection to forms of violence, including sexual abuse by prison staff.⁴²⁹

197. The Inter-American Court has acknowledged that the physical, emotional, and psychological consequences of sexual violence are exacerbated in the case of women who are imprisoned.⁴³⁰ In keeping with international case-law and the provisions of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, the Inter-American Court has stated that “sexual violence involves acts of a sexual nature, committed against a person without their consent, and that in addition to the physical invasion of the human body, they may include acts which do not involve penetration or even any physical contact.”⁴³¹ Regarding the situation of women in pretrial detention, the Bangkok rules have recognized the “particular risk of abuse that women face in [such

⁴²⁷ Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belem do Pará), adopted on June 9, 1994, Article 9; and I/A Court H.R., *Case of the Miguel Castro-Castro Prison v. Peru*, Merits, Reparations and Costs, Judgment of November 25, 2006. Series C No. 160, para. 303.

⁴²⁸ See I/A Court H.R., *Case of the Miguel Castro-Castro Prison v. Peru*, Merits, Reparations and Costs, Judgment of November 25, 2006. Series C No. 160, para. 313.

⁴²⁹ Apart from the information it receives via its various mechanisms, the IACHR also gathered information in this regard as part of the various activities carried out in drafting this report: a public hearing, regional consultations with experts, and working visits to Costa Rica, Argentina, and Peru.

⁴³⁰ I/A Court H.R., *Case of the Miguel Castro-Castro Prison v. Peru*, Merits, Reparations and Costs, Judgment of November 25, 2006. Series C No. 160, para. 313.

⁴³¹ I/A Court H.R., *Case of Rosendo Cantú et al. v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 31, 2010, Series C No. 216, para. 109; I/A Court H.R., *Case of Fernández Ortega et al. v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 30, 2010, Series C No. 215, para. 199; I/A Court H.R., *Case of the Miguel Castro-Castro Prison v. Peru*, Merits, Reparations and Costs, Judgment of November 25, 2006. Series C No. 160, para. 306.

situations],” and, therefore, calls on States to adopt appropriate measures in policies and practice to guarantee such women’s safety.⁴³²

198. Considering that the incarceration of women acquires its own dimensions that leads to specific violations of their rights arising from their gender, states should adopt all necessary comprehensive measures to ensure that their rights are effectively observed and guaranteed, so that they are not the object of discrimination and are protected from all forms of violence or exploitation.⁴³³ The IACHR also underscores the duty of states to act with the utmost diligence in adopting timely measures to prevent and eliminate all forms of violence and discrimination against women deprived of their liberty.
199. In addressing the situation of women deprived of liberty, the IACHR urges the states to adopt diligent measures with a gender perspective that take into consideration the historical discrimination and gender stereotypes that have had a negative effect on women and adolescent females, and which have severely limited the exercise of their civil, political, economic, social, and cultural rights in contexts of deprivation of liberty. A gender perspective also means taking account of the special risk of violence in all its manifestations, including physical, psychological, sexual, economic, obstetric, and spiritual, among others, as well as the fact that most such incidents end in impunity. That perspective also implies considering the specific risks to persons who have diverse or non-normative sexual orientations and gender identities and expressions, or whose bodies vary from the standard female or male body types. States should also include an intersectional and intercultural perspective that takes into consideration the possible aggravation and frequency of human rights violations due to factors such as race, ethnicity, age, or economic position.
200. The IACHR observes that, in spite of the fact that incarcerated women continue to represent a small proportion of the total number of people deprived of liberty (approximately 4.95 percent),⁴³⁴ incarceration rates for this population have risen in recent years.⁴³⁵ According to the Institute for

⁴³² [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#), Resolution adopted by the General Assembly, A/RES/65/229, 21 December 2010, Rule 56.

⁴³³ See I/A Court H.R., *Case of the Miguel Castro-Castro Prison v. Peru*, Merits, Reparations and Costs, Judgment of November 25, 2006. Series C No. 160, para. 303.

⁴³⁴ This datum was reached based on the latest available figures from the States of the Americas for the 2012–2017 period, with the exception of Cuba, which does not have the relevant statistics available. Institute for Criminal Policy Research and Birkbeck, University of London, [World Prison Brief data](#).

⁴³⁵ This situation is reflected, for example, in information provided to the IACHR on Colombia, Argentina, and Mexico. In Colombia, according to INPEC, there were 2,745 women deprived of liberty in 2013; by 2015 that number had risen to 3,563. Note from the Permanent Mission of Colombia to the OAS, S-GAIID-16-056191 of

Criminal Policy Research, since 2000, the increase in female incarceration in the Americas has outpaced, together with Asia, all the other world's regions;⁴³⁶ indeed, over the last 15 years, the region's female prison population has grown by 51.6 percent.⁴³⁷ The rise in the number of women deprived of liberty in the region and, therefore, in the use of pretrial detention with respect to that population is mainly the result of tougher criminal policies in relation to drugs and the lack of a gender perspective in addressing the issue by failing to consider such factors as (a) the low level of participation in the business chain and trafficking in such substances; (b) the absence of violence in the commission of such offenses; (c) the disproportionate impact of their incarceration on the persons under their care; (d) the absence of a focus on social reintegration in corrections policies; and (e) the violence and social and labor exclusion faced by this population in the region.⁴³⁸ The IACHR has indicated that a high percentage of these women in the Americas have been imprisoned for non-violent drug-related offenses and a large number of them are in pre-trial detention.⁴³⁹ The absence of a gender perspective in drug policies has made

June 15, 2016. Response to the Questionnaire. In Argentina the number of women imprisoned in the country as a whole rose by 26% between 2002 and 2014; the province of Buenos Aires saw a 90% increase. CELS, Argentina. Response to the questionnaire, submitted to the IACHR on July 13, 2016. In Mexico, between 2013 and 2016, there was a 13% increase in the number of women deprived of liberty; in the case of men, the increase was less than 1%. Instituto de Justicia Procesal Penal and Documenta, Mexico. Response to the Questionnaire submitted on May 23, 2016.

⁴³⁶ Institute for Criminal Policy Research and Birkbeck, University of London, [World Female Imprisonment List](#), October 2015, pp. 2 and 13.

⁴³⁷ Institute for Criminal Policy Research and Birkbeck, University of London, [World Female Imprisonment List](#), October 2015, p. 13.

⁴³⁸ IACHR, [Public hearing "Measures to reduce pretrial detention in the Americas"](#), 157th Regular Session, April 5, 2016. For statistics on the percentage of women incarcerated for drug offenses, the percentage in relation to the total number of women deprived of liberty, and the percentage increase in the population imprisoned for drug offenses in 10 countries in the region in recent years, see: Colectivo de Estudios Drogas y Derechos (CEDD), [Mujeres y encarcelamiento por delitos de drogas](#), 2015. See also: UNODC, [Handbook for Prison Managers and Policymakers on Women and Imprisonment](#), New York, 2008.

In relation to the high level of incarceration for drug offenses in Argentina, according to the director of the Prison Service Institute for the Rehabilitation of Women (*Servicio Penitenciario Instituto de Recuperación de Mujeres*), in the Province of Santa Fe the majority of women in pretrial detention in that prison are accused of some offense recognized in the Narcotics law. Information gathered by the Rapporteurship during the visit to Argentina in September 2016. In Brazil, approximately 68% of incarcerated women have been deprived of their liberty for drug-related offenses. The majority of such women only occupy an "auxiliary" position as mules and small-scale dealers. National Penitentiary Department, Brazil, [Levantamento Nacional de Informações Penitenciárias, "Infopen Mulheres"](#) (available in Portuguese only), November 5, 2015. In Peru, most crimes committed by women fall into the category of nonviolent offenses, as they are termed (the majority drug-related). Instituto de Defensa Legal (IDL), Peru. Response to the Questionnaire submitted on May 18, 2016.

⁴³⁹ IACHR, [Violence, Children and Organized Crime](#), OEA/Ser.L/V/II. Doc. 40/15, November 11, 2015, pars. 478 and 479; CIM, [Women and Drugs in the Americas. A Policy Working Paper](#), 2014, p. 32; IACHR, [Report on the Use of Pretrial Detention in the Americas](#), para. 216; and International Drug Policy Consortium, Women, [Drug Offenses and Penitentiary Systems in Latin America](#), 2013, pp. 11-14. For example, in the case of Panama, 70% of women deprived of liberty have committed drug-related offenses; and 62% of the female prison population are in pretrial detention. Ministry of the Interior of Panama, UNICEF, and United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD), [Diagnóstico de la](#)

it harder to tackle the differential impacts and disproportionate consequences that deprivation of liberty has on women and the persons under their care.

201. The IACHR also notes that a gender perspective also takes into account the impact and specific burdens that women have historically shouldered by reason of their sex and traditional social roles. Many women still bear the main responsibility for bringing up their children, act as family heads, and have persons under their care. According to information provided by civil society organizations, approximately 10 percent of children with incarcerated mothers are left in the care of their fathers. By contrast, when the father is deprived of liberty, the majority of children remain in their mother's care.⁴⁴⁰ Accordingly, it is more common for women to be single-parent heads of household and, consequently, their children's only caregivers.⁴⁴¹ The IACHR observes that for women in such circumstances incarceration spells severe consequences for their children and others persons under their care, including people with disabilities and older persons. The Commission has previously stated that depriving women of liberty has serious repercussions for children because the closest relative then becomes responsible for looking after them, which can lead to the separation of siblings. In most instances, social services are needed to support the children's welfare and sometimes they are placed in institutions.⁴⁴² Accordingly, the rupture of protective ties caused by women's incarceration leaves the persons under their care vulnerable to poverty, marginalization, and neglect, which can, in turn, have long-term consequences, such as involvement in criminal organizations or even institutionalization.
202. Considering the gender-differentiated faced by women deprived of liberty, the advantages of applying alternatives to pretrial detention, and the harm that their incarceration causes to the persons under their care, the IACHR

situación de los hijos e hijas de las mujeres privadas de libertad en Panamá, Resumen Ejecutivo, November 2016, pp. 4 and 5. In Bolivia, the majority of women deprived of liberty are either in pretrial detention or serving sentences for offenses covered by the "controlled substances regime." DPLF, Fundación CONSTRUIR, ASUNCAMI, Pastoral Penitenciaria *et al*, Situación de los Derechos Humanos y el acceso a la justicia de población vulnerable privada de libertad en Bolivia, in the context of the IACHR public hearing "Human Rights and Penal and Prison Reform in Bolivia," 159th Regular Session, December 5, 2016, p. 39.

⁴⁴⁰ Church World Service y Gurises Unidos, Invisibles, ¿hasta cuándo?: una primera aproximación a la vida y derechos de niños, niñas y adolescentes con referentes adultos encarcelados en América Latina y el Caribe, July 2014, p. 34; WOLA, IDPC, Dejusticia, CIM and OAS, Women, Drug Policies, and Incarceration: A Guide for Policy Reform in Latin America and the Caribbean, 2016, pp. 3 and 35. See also: Stella, C., "Aprisionamento materno e escolarização dos filhos", Revista Semestral da Associação Brasileira de Psicologia Escolar e Educacional (abrapee) V. 13, No. 1. Brazil, January-June 2009.

⁴⁴¹ Laurel Townhead, Pre-trial Detention of Women and its Impact on their Children, Quaker United Nations Office, Geneva, 2007.

⁴⁴² IACHR, Violence, Children and Organized Crime, OEA/Ser.L/V/II. Doc. 40/15, November 11, 2015, para. 479.

urges States to adopt a gender perspective in the design, implementation, and follow-up on legislative and political reforms to reduce the use of pretrial detention. The IACHR particularly urges States to take the necessary steps to encourage the use of non-custodial measures and to prioritize funding and the establishment of mechanisms for their implementation and follow-up.

203. As regards the ordering of non-custodial measures for women, States should encourage the comprehensive adoption of a gender perspective and, where appropriate, an approach that takes into account the best interests of the child and the special protection required by persons belonging to groups at special risk, such as people with disabilities and older persons. In particular, in ordering alternative measures, judicial authorities should take a variety of elements into account, including (a) women's unique and historically disadvantaged position in society,⁴⁴³ (b) their history of victimization,⁴⁴⁴ (c) the absence of aggravating factors in the commission of the offense, and (d) the differentiated and incremental impact of custodial measures on persons under their care.⁴⁴⁵ In this respect, the Commission has indicated that, in accordance with the best interests of the child, the judicial authorities should apply the criteria of necessity, proportionality, and reasonableness more strictly when they consider ordering the pretrial detention of people who are responsible for children and adolescents.⁴⁴⁶ Accordingly, the incarceration of women who are mothers, pregnant, or have persons at special risk under their care – such as people with disabilities or older persons – should be considered a measure of last resort, and priority should be given to non-custodial measures that would allow them to provide for their dependents.⁴⁴⁷
204. As part of the application of alternative measures, States should provide appropriate and necessary resources to enable women benefiting from them to integrate with the community. Thus, States should make available different options to address the most common problems leading to women's contact with the criminal justice system, such as psychological treatment and educational and

⁴⁴³ See UNODC, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment*, 2010, p. 82.

⁴⁴⁴ UN, *The Bangkok Rules*, Resolution adopted by the General Assembly, A/RES/65/229, 21 December 2010, Rule 57.

⁴⁴⁵ UN, *The Bangkok Rules*, Resolution adopted by the General Assembly, A/RES/65/229, 21 December 2010, Rule 58.

⁴⁴⁶ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 216.

⁴⁴⁷ IACHR, *Report on the Use of Pretrial Detention in the Americas*, para. 216; IACHR, *Violence, Children and Organized Crime*, OEA/Ser.L/V/II. Doc. 40/15, November 11, 2015, para. 481. See UN, *The Bangkok Rules*, Resolution adopted by the General Assembly, A/RES/65/229, 21 December 2010, Rule 67; and Committee on the Rights of the Child, Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents," 30 September 2011, recommendation 2.

training programs to improve employment prospects.⁴⁴⁸ In the context of criminal policies on drugs, the IACHR calls on States to adopt comprehensive measures that include a gender perspective and take into account the harm to the ties of care and protection resulting from their incarceration. In particular, in the application of alternative measures to pretrial detention arising from charges that involve substance abuse, women should have access to community-based gender-sensitive services that include psychological counseling.⁴⁴⁹

2. Practices of States

205. In general, the IACHR finds that in the period covered by this report, efforts made to incorporate a gender perspective in measures in the area of pretrial detention have mainly include (a) steps to ensure observance of the rights of women who are deprived of liberty and (b) prioritization of non-custodial measures. In spite of the various efforts to implement alternative measures, the IACHR is concerned that the information that it has mainly received in the responses to the questionnaire suggests that measures to supervise or monitor the use of alternative measures do not include a gender perspective

a. Respect and Guarantee of the Rights of Women Deprived of Liberty

206. In terms of legislation, the IACHR finds that recently enacted laws in Colombia and Mexico incorporate a gender perspective during deprivation of liberty. Thus, in Law 1709 of 2014, Colombia adopts an approach that guarantees special protection for women and other persons belonging to different groups in vulnerable circumstances.⁴⁵⁰ In Mexico, Article 6 of the Federal Judgment Enforcement Law of 2016 —which also addresses pretrial detention⁴⁵¹ – governs the specific rights of women deprived of liberty and grants special protection to pregnant women and mothers.⁴⁵²

⁴⁴⁸ [UN, The Bangkok Rules](#), Resolution adopted by the General Assembly, A/RES/65/229, 21 December 2010, Rule 60.

⁴⁴⁹ See UN, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#), Resolution adopted by the General Assembly, A/RES/65/229, 21 December 2010, Rule 62.

⁴⁵⁰ Law 1709 “amending a number of articles contained in Law 65 of 1993, Law 599 of 2000, and Law 50 of 1985, as well as introducing other provisions,” Colombia, in force as of January 20, 2014.

⁴⁵¹ [Federal Criminal Justice Enforcement Law](#), Mexico, published on June 16, 2016, Article 1.

⁴⁵² [Federal Criminal Justice Enforcement Law](#), Mexico, published on June 16, 2016, Article 6.

207. At the administrative level, the Brazilian State reported the introduction in 2016 of its National Policy of Assistance to Women Deprived of Liberty and Released from Prison, which seeks to prevent all forms of violence against women deprived of their liberty and to humanize their conditions of detention.⁴⁵³ The Commission notes that in the framework of that policy, in November 2015, the Brazilian Government published a national female prison inmate survey, which aims to provide relevant information on the female prison population, in order to enable the appropriate authorities to develop and implement policies for incarcerated women.⁴⁵⁴
208. In addition, as part of the policy of assistance for people in pretrial detention implemented by the São Paulo Public Defender's Office in Brazil, the IACHR observes that there is a data sheet form for women to obtain more information about people in custody pending trial. The IACHR notes that the data sheet adopts a gender perspective by including questions on such aspects (a) if the woman is pregnant or nursing, (b) their conditions of detention, (c) if her children are housed in the prison, (d) if the woman interviewed is exclusively responsible for her children, (e) if the children are in the prison, the length of time that the mother wishes them to stay with her, (f) preferences with respect to the situation of children who are outside the prison in terms of the person who should be there caregiver and specifications for visits to the detention facility.⁴⁵⁵

b. Gender Perspective in the Application of Alternatives to Pretrial Detention

209. The IACHR notes that in terms of administrative and legislative measures, States such as Brazil, Costa Rica, Ecuador, Mexico, and Peru have made significant efforts to incorporate a gender perspective in the use of alternatives to pretrial detention by prioritizing their use with women defendants and taking into account both the situation of special risk in

⁴⁵³ Brazil. Note from the Permanent Mission of Brazil to the OAS of July 28, 2016. Response to the Questionnaire.

The policy aims to achieve the following goals: (a) encourage development of State public assistance to women deprived of their liberty and those who have been released; (b) humanize the women's corrections system, especially with respect to prison architecture and the conduct of routine prison activities; and (c) promote and carry out research and studies on female incarceration. [Interministerial Decree No. 210 of January 16, 2014](#) (available in Portuguese only), published in the Official Gazette of January 17, 2014.

⁴⁵⁴ National Penitentiary Department, Brazil, [Levantamento Nacional de Informações Penitenciárias, "Infopen Mulheres"](#) (available in Portuguese only), November 5, 2015.

⁴⁵⁵ Information from the Public Defender Service of São Paulo, "Atendimento às pessoas presas provisoriamente na Cidade de São Paulo," November 2016. Information sent to the Stanford Human Rights Center, March 30, 2017. The Superior Council of the Office of the Public Defender of the State of São Paulo also provided that a gender perspective should be adopted in conducting interviews. [CSDP Resolution No. 297](#), May 8, 2014, Article 4.

which they would be placed if they were deprived of their liberty, and the consequences that their incarceration would have on their children and persons under their care, such as people with disabilities and older persons.

210. At the administrative level, the IACHR was informed that Brazil's National Criminal Policy Plan (2015–2019) includes a gender perspective aimed at reversing the upward trend in female incarceration. The Plan's main lines of action include (a) the use of noncustodial alternatives measures for women, particularly those who are pregnant, have newborn children, or are in the postpartum stage, and older women; and (b) promotion of house arrest for mothers, including those with newborn children.⁴⁵⁶
211. In terms of legislation, the Inter-American Commission highlights the promulgation of Law 9161 in Costa Rica, which amends Article 77 of Law 8204 and seeks to introduce new rules on criminal conduct relating to unauthorized drug use.⁴⁵⁷ The reform envisages the use of alternative measures for women who introduce drugs into prisons and who meet any of the following requirements: live in conditions of poverty, are heads of household, or have persons in situation of vulnerability under their care. The alternative measures available for consideration include house arrest, supervised release, work release facilities known as centros de confianza, and the use of monitoring electronic devices. The reform also reduces the penalties for such offenses.⁴⁵⁸ The Comprehensive Organic Criminal Code of Ecuador envisages a differentiated treatment for women by establishing that in the event of violation of a noncustodial arrangement, women who are pregnant will be held in detention pending trial in separate sections of detention facilities.⁴⁵⁹
212. Two of the main noncustodial measures whose implementation in recent years has entailed the adoption of a gender perspective are house arrest and the use of electronic monitoring mechanisms. In that regard, in Costa Rica, Law No. 9271 (Law on Electronic Monitoring Mechanisms in Criminal Matters), adopted in September 2014, provides for "house arrest with electronic monitoring" for women at an advanced stage of pregnancy and mothers household heads with children under the age of 12 and people

⁴⁵⁶ Brazil. Note from the Permanent Mission of Brazil to the OAS of July 28, 2016. Response to the Questionnaire. The Plan includes, *inter alia*, the following lines of action: (a) amendment of Law 11.343/2006 (Drug Law) in order to make provision for women's unique characteristics, (b) compilation of data on the female inmate population in order to strengthen the relevant policies, and (c) creation of social programs for women.

⁴⁵⁷ Legislative Decree No. 9161 amending Article 77, File No. 17.980, Costa Rica, July 30, 2016.

⁴⁵⁸ Legislative Decree No. 9161 amending Article 77, File No. 17.980, Costa Rica, July 30, 2016.

⁴⁵⁹ Comprehensive Organic Criminal Code, Ecuador, in force as of August 10, 2014.

with a disability or a serious illness under their care.⁴⁶⁰ In Peru, Legislative Decree 1322 incorporates a gender perspective by prioritizing the use of noncustodial measures for (a) pregnant women, (b) women with children under three years old, and (c) women family heads with minor children or spouses or children with a permanent disability.⁴⁶¹ The Comprehensive Organic Criminal Code of Ecuador provides that pretrial detention may be substituted with house arrest or the use of an electronic tracking device for women who are pregnant and during the first 90 days after childbirth. In the event that the child is born with an illness that requires the mother to provide special care, that period may be extended by an additional 90 days.⁴⁶²

213. In March 2016, the Brazilian State published Law No. 13.257/2016 which amended Article 318 of the Code of Criminal Procedure in order to increase the number of instances in which pretrial detention may be substituted with house arrest.⁴⁶³ In contrast to the earlier provision, which only allowed house arrest for women from the seventh month of pregnancy onward or when the pregnancy posed a high risk to the mother, the current norm does not delimit a certain period of time and provides for the measure's application to all pregnant women. The new rule also envisages house arrest for women with children under 12 years old.⁴⁶⁴ Article 166 of Mexico's Federal Code of Criminal Procedure includes a gender perspective by prioritizing the application of house arrest to pregnant women, nursing mothers, older persons, or people with a "serious or terminal illness." Despite this special focus, the IACHR notes that the same provision excludes this prerogative from persons who, in the opinion of the judge, "display behavior such as to presume that they pose a social risk."⁴⁶⁵ In this regard, the Commission considers it a fundamental standard in ordering pretrial detention and, therefore, alternative measures, that it should be used only when the flight risk or of thwarting the investigation cannot be reasonably avoided. Therefore, in accordance with inter-American standards, there is no justification to refrain from applying noncustodial measures based on the "social risk" of the alleged behavior of the defendant.

⁴⁶⁰ Law No. 9271 "Electronic Monitoring Mechanisms in Criminal Matters," Costa Rica, in force as of September 30, 2014.

⁴⁶¹ Legislative Decree No. 1322, which regulates personal electronic surveillance, Peru, approved January 6, 2017, Article 5(2).

⁴⁶² Comprehensive Organic Criminal Code, Ecuador, in force as of August 10, 2014, Article 522.

⁴⁶³ Office of the President of the Republic, Brazil, Law No. 13.257 of March 8, 2016 (available in Portuguese only), in force as of March 8, 2016.

⁴⁶⁴ Law 13.257/2016 amending Article 318 of the Code of Criminal Procedure (Early Childhood Statute), Brazil, in force as of March 18, 2016, Article 318, paragraphs IV and V.

⁴⁶⁵ Federal Code of Criminal Procedure, Mexico, published on June 18, 2016, in force as of June 18, 2016, Article 166, third paragraph.

214. As regards the imposition of house arrest with a gender perspective in Argentina, the IACHR notes that there are challenges with the implementation of Law 24.660, which, having been reformed in 2009, provides that house arrest should be used in the case of pregnant women, mothers with children less than five years old, and women with persons with disabilities under their care.⁴⁶⁶ The IACHR has received information that suggests that the main challenges for effectively implementing the law are (a) lack of follow-up on the application of the measure, with the result that a large number of women are re-incarcerated,⁴⁶⁷ (b) consideration of socioeconomic status as the primary factor in ordering house arrest,⁴⁶⁸ and (c) the requirement of electronic mechanisms for its application.⁴⁶⁹ The IACHR notes with concern that, rather than being used to benefit a larger number of people, electronic monitoring devices are used as an added control mechanism for persons released from pretrial detention under a noncustodial measure.⁴⁷⁰

B. Special Content of the Differentiated Approach of Respect and Assurance of the Rights of Persons Belonging to Groups at Special Risk

215. The Inter-American Commission has stated that the array of negative consequences arising from pretrial detention has a much greater impact on people who belong to groups in vulnerable circumstances and that the impact is even more severe when they belong to economically at-risk groups, since they are also victims of other forms of social exclusion.⁴⁷¹ In this regard, considering that pretrial detention has a differential and disproportionate effect on persons belonging to groups at special risk,

⁴⁶⁶ [Law 24.660 \(Prison Sentence Enforcement Law\)](#), Argentina, Article 32.

⁴⁶⁷ NGO “Yo no fui,” Information provided in the context of the Rapporteurship’s visit to Argentina, September 2016.

⁴⁶⁸ The Office of the Public Defender of the Nation has stated that applications for house arrest for women are frequently refused on the grounds that there is no home, the home proposed does not satisfy suitability requirements in terms of its infrastructure and location, for example, or because of a lack of financial resources to cover subsistence costs. Office of the Public Defender of the Nation, Argentina, [Punición y Maternidad. Acceso al arresto domiciliario](#), 2015, p. 158. See IACHR, Expert Consultation on “Measures to Reduce Pretrial Detention in the Americas,” Washington, D.C., May 20, 2016. Information provide by Corina Giacomello, Instituto Nacional de Ciencias Penales, and Equis: Justicia para las Mujeres, A.C. See also: Giacomello, Corina, [Proposals for alternatives to criminal prosecution and incarceration for drug-related offenses in Latin America](#), IDPC Briefing Paper, June 2014, p. 12.

⁴⁶⁹ Observatorio de Violencia de Género, Report for the Rapporteur on the Rights of Persons Deprived of Liberty. Visit to Argentina, September 2016.

⁴⁷⁰ See IACHR, Press Release, [33/16, “Rapporteurship on the Rights of Persons Deprived of Liberty Makes Visit to Costa Rica.”](#) Washington, D.C., March 11, 2016.

⁴⁷¹ IACHR, [Report on the Use of Pretrial Detention in the Americas](#), para. 128.

States should adopt special measures that include a differentiated approach with respect to persons of African descent, indigenous persons, LGBTI and older persons, people with disabilities, and children and adolescents. A differentiated approach entails considering the particular vulnerabilities and factors that may increase the risk of acts of violence and discrimination in pretrial detention contexts, such as race, ethnicity, age, sexual orientation, gender identity and expression, and disability. It is also important to bear in mind the frequent intersectionality of the factors mentioned, which may heighten the situation of risk to which persons in pretrial detention are exposed.

216. Policies on pretrial detention with respect to persons belonging to groups at special risk should be geared to ensuring fully their safety when under this regime, and to reducing subjection to pretrial detention by making priority use of alternative measures. In particular, considering the special risk trans persons face when they are kept in prisons designed for a population whose gender is not that with which the trans person identifies – for example, trans women housed in prisons for the male population, or men housed in prisons for the female population – the IACHR reiterates that the States should take the measures needed to ensure that the decision on assignment of trans persons to centers of detention be made on a case-by-case basis and, whenever possible, trans persons should be able to have input to the respective decision.⁴⁷² The IACHR also reiterates that in designing and implementing such measures, States should ensure the participation of civil society and beneficiaries of those measures. That is so that policies in this area can incorporate a human rights perspective under which beneficiaries are viewed as persons with rights and not simply as recipients of the measures.
217. The IACHR notes that one characteristic of the region is a widespread lack of disaggregated statistics on people in pretrial detention, which may increase the exposure to violence and discrimination of persons belonging to groups at special risk, such as persons of African descent, indigenous persons, LGBTI and older persons, and people with disabilities. This situation concerns the IACHR, given the critical importance of adequate data gathering mechanisms to produce the information needed to evaluate the effective adoption of the various measures, as well as for the design and analysis of effective public policies against violence and discrimination that may be enacted to protect, using a differentiated approach, persons belonging to groups at special risk. Therefore, the IACHR calls on States to make efforts and to allocate sufficient resources in order to systematically and comprehensively collect and analyze statistics that take into account

⁴⁷² IACHR, *Violence against Lesbian, Gay, Bisexual, Trans e Intersex Persons in the Americas*, OAS/Ser.L/V/II.rev.2. Doc. 36, 12 November 2015, paras. 155-157.

such factors as race, ethnicity, age, sexual orientation, gender identity and expression, interculturality, intersectionality, and disability. Such data should be readily accessible to the public, regularly updated, and serve as an effective tool to provide the necessary information and insight for designing and formulating any necessary changes to state policies in favor of persons belonging to groups at special risk.

218. In the period covered by this report, the IACHR notes that the measures adopted by States in relation to persons belonging to groups at special risk who are deprived of liberty have principally entailed the adoption of legislative reforms that envisage a differentiated approach in the context of deprivation of liberty as well as in the application of alternatives to pretrial detention, particularly –as in the case of women– house arrest and electronic monitoring mechanisms. However, in general, the Commission is concerned BY the lack of information about measures with a differentiated approach that States have adopted to reduce the use of pretrial detention with respect to such persons. Based on information mainly obtained from the responses to the questionnaire, the IACHR has learned that, in general, measures to reduce pretrial detention are governed by the same provisions as apply to the rest of the population in pretrial detention and lack a special treatment approach, which prevents addressing the specific needs of persons belonging to groups at special risk.
219. As regards legislative measures adopted, the IACHR finds that in 2016, the Brazilian State issued "Postulates, Principles, and Guidelines for the Policy on Alternative Measures," which envision, in particular, cooperation between justice system officials and civil society to create networks of care and social assistance for older persons and children and adolescents.⁴⁷³ With respect to recent legislative measures that adopt a differentiated approach in the context of deprivation of liberty, as was mentioned, Colombia's Law 1709 recognizes that detention should be ordered taking into account the particular characteristics of specific population groups, including age, gender, gender identity, sexual orientation, race, ethnicity, and disability.⁴⁷⁴ The Federal Code of Criminal Procedure of Mexico

⁴⁷³ Ministry of Justice, National Prison Department and National Justice Council, Brazil, "[Postulados, Princípios e Diretrizes para a Política de Alternativas Penais](#)" (available in Portuguese only) April 2016. See also: National Justice Council, Brazil, "[CJNJ e MJ disponibilizam publicação sobre a política de alternativas penais](#)" (available in Portuguese only), April 28, 2017.

⁴⁷⁴ Law 1709 "amending a number of articles contained in Law 65 of 1993, Law 599 of 2000, and Law 50 of 1985, as well as introducing other provisions," Colombia, in force as of January 20, 2014.

provides special protection for older persons and persons with a “serious or terminal illness, by prioritizing house arrest.”⁴⁷⁵

220. In relation to the use of noncustodial measures for certain persons belonging to groups at special risk, Costa Rica's Law No. 9271 (on Electronic Monitoring Mechanisms in Criminal Matters), Ecuador's criminal code, and Peru's Legislative Decree No. 1322 recognize that the use of electronic monitoring mechanisms should be prioritized in the case of people with disabilities and older persons.⁴⁷⁶ The IACHR notes that the Peruvian law establishes the priority use of such mechanisms in favor of persons with a “permanent physical disability that impairs ... their movement.” Considering that the corpus iuris of rights of persons with disabilities regards this condition not only from a physical perspective but also from an intellectual, sensory, and mental one, the IACHR urges the Peruvian State to consider adopting that priority application to all types of disability where detention centers lack the reasonable accommodations that persons with disabilities need to exercise their rights on an equal basis with others.
221. Finally, with respect to children and adolescents in pretrial detention, the IACHR reiterates the concern that it expressed in its report *Violence, Children and Organized Crime* regarding the extended use of custody pending trial for that population group. In that regard, the IACHR observes that the strategies adopted by various countries in the region to combat organized crime have led them to include exceptions to the maximum time limits allowed by law for pretrial detention in relation to certain crimes – such as drug offenses, for example– and to make pretrial detention mandatory for certain criminal behaviors, such as unlawful association. The tendency for excessive use of pretrial detention in the context of policies to combat organized crime has helped to exacerbate the figures for adolescents in detention in the region and contravenes the generally accepted principle that deprivation of liberty for children and adolescents should be used only as a last resort, not to mention that it violates the

⁴⁷⁵ Federal Code of Criminal Procedure, Mexico, published on June 18, 2016, in force as of June 18, 2016, Article 166, third paragraph.

⁴⁷⁶ In that regard, the Costa Rican law guarantees the use of this measure for older persons, people with disabilities, and persons addicted to illicit drugs “in order to ensure their recovery.” Law No. 9271 “Electronic Monitoring Mechanisms in Criminal Matters,” Costa Rica, in force as of September 30, 2014, Article 481 *bis*. Under Ecuadorian law, for its parts, pretrial detention is required to be substituted for persons over 65 years old, persons with a “catastrophic” or incurable illness at a late stage, persons with severe disabilities, and persons without parents who are unable to look after themselves.” Comprehensive Organic Criminal Code, Ecuador, in force as of August 10, 2014, Article 522. In Peru, Legislative Decree No. 1322 provides that such measures should be applied as a matter of priority to persons over 65 years old and anyone with a serious illness or a permanent physical disability that impairs their movement. Legislative Decree No. 1322, which regulates personal electronic surveillance, Peru, approved January 6, 2017, Article 5(2).

rights to personal liberty and a due process.⁴⁷⁷ The IACHR also expressed concern about the fact that in certain countries, adolescents in pretrial detention are housed with – not separate from – those who are serving prison sentences,⁴⁷⁸ a practice that violates the applicable standards.

222. As regards States' obligations with respect to children and adolescents in pretrial detention, the IACHR recalls that that the rule according to which pretrial detention should be treated as an exception should apply more forcefully, and therefore the prevalent norm calls for ordering non-custodial measures.⁴⁷⁹ Considering the foregoing, the Commission recommends to the states that the juvenile justice systems guarantee effective observation of the principle according to which deprivation of liberty is exceptional by establishing limits in both the determination of pretrial detention and in its duration.⁴⁸⁰ In that regard, they should limit the use of pretrial detention to the shortest time possible,⁴⁸¹ ensure that its use arises strictly from a legitimate procedural need and is determined ahead of time, by law,⁴⁸² as well as with respect to those cases in which it is appropriate to apply a sanction of deprivation of liberty.⁴⁸³ Any decision on pretrial detention for children and adolescents must be taken by a judicial authority and be subject to periodic review by that authority so as to keep it from becoming drawn out for a period longer than what is allowed by law.⁴⁸⁴
223. With a view to using deprivation of liberty only as a measure of last recourse, States should adopt an array of alternatives to pretrial

⁴⁷⁷ IACHR, *Violence, Children and Organized Crime*, OEA/Ser.L/V/II. 40/15, November 11, 2015, pars. 441 to 443.

⁴⁷⁸ IACHR, *Violence, Children and Organized Crime*, OEA/Ser.L/V/II. 40/15, November 11, 2015, para. 442.

⁴⁷⁹ IACHR, *Violence, Children and Organized Crime*, OEA/Ser.L/V/II. 40/15, November 11, 2015, para. 442; and IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II. Doc. 78, July 13, 2011, para. 77. See, in this regard, I/A Court HR. *Case of the "Juvenile Reeducation Institute" v. Paraguay*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of September 2, 2004, Series C No. 112, pars. 228 and 230.

⁴⁸⁰ IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II. Doc. 78, July 13, 2011, para. 277.

⁴⁸¹ IACHR, *Violence, Children and Organized Crime*, OEA/Ser.L/V/II. 40/15, November 11, 2015, para. 444; and IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II. Doc. 78, July 13, 2011, para. 291. See, in this regard, I/A Court HR. *Case of the "Juvenile Reeducation Institute" v. Paraguay*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of September 2, 2004, Series C No. 112, para. 231.

⁴⁸² IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II. Doc. 78, July 13, 2011, Specific recommendations, No. 17(i), p. 174.

⁴⁸³ IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II. Doc. 78, July 13, 2011, Specific recommendations, No. 17(j), p. 174. For more recommendations on this topic, see IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II. Doc. 78, July 13, 2011, Specific recommendations, No. 17, p. 174.

⁴⁸⁴ IACHR, *Violence, Children and Organized Crime*, OEA/Ser.L/V/II. 40/15, November 11, 2015, para. 442.

detention.⁴⁸⁵ Such measures may include, among others, strict supervision, permanent custody, placement with a family, transfer to a home or to an educational institution, supervised release, training and professional education programs, and other options in place of institutionalization.⁴⁸⁶ The Commission also underscores that pretrial detention must conform to the minimum standards for all persons deprived of their liberty and ensure special protection for the rights of children and adolescents.⁴⁸⁷ Accordingly, States should ensure that facilities at pretrial detention centers are adequate for housing them and that they have staff properly trained in providing the special treatment that they require.⁴⁸⁸ Furthermore, children and adolescents should be situated in places where they can remain in contact with their families and where their separation from adults and sentenced inmates is assured.⁴⁸⁹ While they are in custody, they should receive the care and protection required by their age and other individual conditions, as well as the objective of their rehabilitation and reintegration with society.⁴⁹⁰

⁴⁸⁵ IACHR, *Juvenile Justice and Human Rights in the Americas*, paras. 247 to 306. Similarly, see Committee on the Rights of the Child, General Comment No. Children’s Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007, 44th session, paras. 78 & 81.

⁴⁸⁶ I/A Court H.R., *Case of the “Juvenile Reeducation Institute” v. Paraguay*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of September 2, 2004, Series C No. 112, paras. 228 and 230. See also IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II. Doc. 78, July 13, 2011, para. 77.

⁴⁸⁷ IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II. Doc. 78, July 13, 2011, para. 277.

⁴⁸⁸ IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II. Doc. 78, July 13, 2011, Specific recommendations, No. 17, p. 174.

⁴⁸⁹ I/A Court H.R., *Case of the “Juvenile Reeducation Institute” v. Paraguay*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of September 2, 2004, Series C No. 112, para. 169. See also: IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II. Doc. 78, July 13, 2011, para. 305.

⁴⁹⁰ IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II. Doc. 78, July 13, 2011, para. 446.

CHAPTER 6
CONCLUSIONS AND
RECOMMENDATIONS

CONCLUSIONS AND RECOMMENDATIONS

224. More than three years after the issuance of the Report on the Use of Pretrial Detention in the Americas, the Inter-American Commission acknowledges and values the variety and number of efforts made by the States – at all three levels of government – with the aim of reducing the use of pretrial detention in the region, and recognizes that they reflect the commitment and understanding of the importance of using this regime in keeping with the relevant international standards. Even so – and in view of the considerations presented throughout this report – the Commission concludes, as it did in its 2013 report, that the non-exceptional use of pretrial detention continues to constitute one of the most serious and widespread problems faced by the States of the OAS when it comes to respecting and ensuring the rights of persons deprived of liberty. This situation constitutes a structural problem in the Americas and has also been identified by the various United Nations monitoring mechanisms whose mandate is related to the deprivation of liberty.
225. The Commission notes that the prevalence of the use of pretrial detention, at odds with the applicable standards, has to do mainly with the following policy approaches and challenges: (a) criminal justice policies that propose more incarceration as a solution to citizen security problems, which translate into the existence of legislation that accords priority to pretrial detention and restricts the possibility of ordering non-custodial measures; (b) preponderance of tough policies in the discourse of the high-level authorities to put an end to citizen insecurity through custodial measures, and in the consequent pressure from the media and public opinion in this regard; (c) the use of disciplinary oversight mechanisms to pressure or punish judicial authorities who order non-custodial measures; (d) inadequate public defense; and (e) lack of inter-institutional coordination among actors in the system for the administration of justice.
226. Statutory reforms proposing more incarceration as a solution to citizen security problems are accompanied by a strong media and political message, and strong support from public opinion, thereby hindering initiatives to make rational use of pretrial detention. These reforms translate mainly into increased duration of pretrial detention and of the times required for the procedures to end it; expanding the admissibility of pretrial detention beyond its precautionary logic; and including a list of

crimes for which custodial measures are required. In particular, the Commission states its concern over the adoption of state measures that seek to punish drug-related conduct – specifically such conduct tied to use and possession, or to minor offenses committed due to problematic or dependent use – and that appear to have resulted in a considerable increase in the number of persons deprived of liberty for drug-related criminal acts. In this context, offenses related to the use of these substances are frequently characterized as “grave” or “serious” offenses, and consequently pretrial detention is applied automatically, without the accused being able to benefit from non-custodial measures.

227. The IACHR also values the efforts made by several States to address the excessive use of pretrial detention through abbreviated or immediate trials characterized by reduced procedural times, confirmation of verdicts in less time, and the offer of oral procedure. Nonetheless, the IACHR states its concern over the various impairments on due process that they entail, and which could result in persons being convicted arbitrarily based on summary procedures, without sufficient guarantees, and in violation of the right to mount an adequate defense, all in the name of reducing the excessive use of pretrial detention.
228. Based on the analysis set forth in this report, the Commission emphasizes the importance of the states regulating, implementing, supervising, and promoting the use of alternatives to pretrial detention to make rational use of pretrial detention, and consequently to address overcrowding. The Commission argues that the application of these measures is one of the most effective actions States can take to: (a) avoid the disintegration and stigmatization of the community stemming from the consequences of pretrial detention; (b) reduce recidivism rates; and (c) make more efficient use of public resources. Moreover, the IACHR notes that the application of these measures is essential for ensuring the rights of persons deprived of liberty, considering mainly that those persons held in pretrial detention are less likely to be acquitted with respect to those who are in the pretrial period.
229. The Commission also notes with concern the special situation of vulnerability faced in pretrial detention by women and other persons who belong to groups at special risk, such as persons of African descent, indigenous persons, LGTBI and older persons, and persons with disabilities. In addressing the situation of women deprived of liberty in particular, the IACHR calls on the States to adopt all necessary and comprehensive measures, with a gender perspective, to see to it that all their rights are effectively respected and ensured so that they not suffer discrimination and are protected from all forms of violence and exploitation. With respect to other persons who belong to groups at special

risk, the States must consider the particular conditions of vulnerability and the factors that may increase risk to acts of violence and discrimination in contexts of pretrial detention, such as race, ethnicity, sexual orientation, gender identity and expression, and disability. In addition, it is important to take into account the frequent intersectionality of the factors mentioned, which may accentuate the risk to persons in pretrial detention. Pretrial detention policies with respect to women and other persons who belong to groups at special risk should be geared to fully ensuring their security when they are under this regime, and at reducing subjection to pretrial detention by making priority use of non-custodial measures.

230. In sum, the Commission reiterates that the States of the region should adopt the judicial, legislative, administrative, and other measures required to correct the excessive use of pretrial detention, giving special attention to the possibility of ordering alternative measures. In this connection, the States are under an obligation to ensure that pretrial detention is used on an exceptional basis limited by the principles of legality, presumption of innocence, necessity, and proportionality. In addition, in designing the respective policies the IACHR recommends to the States that they involve civil society and the very beneficiaries of such state policies to ensure that their implementation is comprehensive, participatory, and inclusive.
231. In view of the analysis and conclusions reached in this report, the Inter-American Commission on Human Rights makes the following recommendations to the member States of the OAS:

A. General Measures Related to Matters of State Policy

1. Adopt the judicial, legislative, administrative, and other measures required to correct the excessive use of pretrial attention, guaranteeing that this measure is exceptional and limited by the principles of legality, presumption of innocence, necessity, and proportionality.
2. In order to ensure that the States make use of custodial measures only when it is essential to satisfy a pressing social necessity, and in a manner proportionate thereto, the IACHR recommends that the measures to be adopted include, among others: (a) the legislative, judicial, and institutional reforms needed to ensure more rational use of deprivation of liberty, and that it truly be an exceptional measure; (b) observance of the maximum time legally established for keeping persons in pretrial detention; and (c) promoting the use of other precautionary measures. The IACHR urges the States, in adopting

these measures, as well as other actions focused on follow-up and monitoring of their use, to consider the applicable human rights standards, and to include a perspective that takes account of gender, race, ethnicity, age, sexual orientation, gender identity and expression, interculturality, intersectionality, and disability, and the special protection owed to children and adolescents.

3. The policies aimed at the rational use of incarceration, and accordingly of pretrial detention, should be taken on by the States as a priority that entails a commitment on the part of all branches of government, and they should have an adequate legal framework, a sufficient budget, and integration of the relevant institutions.
4. Promote an inter-institutional dialogue and debate within the States for the effective implementation and evaluation of the measures aimed at reducing pretrial detention, based on the applicable international standards and on different approaches with respect to the persons who belong to different groups at special risk, and that seeks mainly to establish clear strategies of collaboration.
5. The IACHR recommends that the States, when designing those policies, involve civil society to ensure that their implementation is comprehensive, participatory, and inclusive. In addition, the States should put in place mechanisms that enable persons deprived of liberty and those who have been released to participate actively in the design, implementation, and evaluation of such measures. The Commission notes the importance of the persons the state policies are designed to benefit being considered holders of rights who can participate actively in making decisions on issues that involve them, with a capacity and opportunity to claim and protect their rights, and accountability on the part of the respective public officials.
6. With respect to the monitoring of any measure adopted, the IACHR recommends that the States establish measurable objectives, as well as monitoring mechanisms that incorporate differentiated approaches, with a view to assessing the effectiveness of the implementation of these measures, as well as the suitability of the response given to persons who belong to groups at special risk, considering their specific condition. As regards the measurable objectives, the IACHR recommends that the States have reliable data collection systems that make it possible to identify whether, through the implementation of such measures, there have been changes in the statistics related mainly to determinations of pretrial detention and the application of alternative measures. Similarly, information collection systems in the context of these measures should be

designed to identify aspects that need to be improved in order to overcome challenges that arise in implementing them.

7. In the context of the use of guilty pleas or abbreviated trials, the IACHR calls on the States to adopt the measures needed to keep persons facing criminal charges from being subjected to procedures justified primarily by the motivation of reducing the use of pretrial detention, and that do not fully ensure due process guarantees. In particular, the States should see to it that the persons subject to such proceedings can voluntarily accept, with full consent, the scope of their application; accordingly, they must verify the absence of any type of coercion in this regard. The States are also obligated to ensure that the participants in such proceedings have proper judicial guarantees, including respect for the right to an adequate defense. And despite the expeditious nature of the proceeding, the verdict and sentence imposed should be based on an exhaustive analysis of the case, and not only on the agreement presented to the judicial authority by the prosecutor. The States, in order to have adequate and comprehensive information that makes it possible to determine the efficacy of these proceedings, should make public the data related to the number of proceedings, which should include at least the following statistics: (a) use of non-custodial measures; (b) early terminations; (c) determination of pretrial detention; and (d) the handing down of the verdict and sentence. In addition, that information should reflect statistics broken down by type of offense and grounds for applying the measure; as well as by age, gender, sexual orientation, gender identity and expression, race, ethnicity, and type of disability.
8. Eradicate the practice of keeping persons held in pretrial detention in police stations or police posts. The States should transfer them to facilities for holding persons awaiting trial, separated from convicts. To this end, the IACHR reminds the States of their obligation to adopt the measures necessary for being able to hold persons detained in conditions compatible with their dignity. If the States are not capable of guaranteeing conditions compatible with the human dignity of the persons being tried, a precautionary measure should be ordered other than pretrial detention, or the persons charged should be released during the trial.

B. Eradicating Pretrial Detention as Anticipated Punishment

1. Step up efforts and assume the political will needed to eradicate the use of pretrial detention as a tool of social control or as a form of anticipated punishment. In this regard, it is essential that an institutional message be sent from the highest levels of the state and the administration of justice supporting the rational use of pretrial detention and respect for the right to the presumption of innocence.
2. Adopt the measures needed to ensure that pretrial detention is used as an exceptional measure, justified only when the applicable legal parameters are met in each individual case, which should be in keeping with international human rights law. In this regard, any consideration of the regulation, need, or application of pretrial detention should be based on considering the right to the presumption of innocence, and should take account of the exceptional nature of this measure and its legitimate aims, i.e. to ensure that the accused will not impede the development of the procedure or elude the action of justice.
3. The IACHR reiterates to the States that any provision that rules out the possibility of ordering non-custodial measures based on the penalty that applies to the offense of which a person is accused ignores the principle of necessity, which requires justifying pretrial detention in the specific case by weighing the relevant elements. Pretrial detention must be justified in the specific case, and legislation that considers the application of precautionary measures based on type of offense is at odds with the principle of proportionality enshrined in the American Convention. With respect to the criterion of recidivism, the Commission recalls that it may only be considered one more element in the analysis of whether pretrial detention is admissible in the specific case, but it should never be used as the principal criterion for determining whether to apply pretrial detention.
4. Any provision that orders the compulsory application of pretrial detention based on the type of offense should be repealed. In this regard, the States should increase the number of offenses with respect to which it is not possible to apply pretrial detention, and not establish greater restrictions on mechanisms and procedural possibilities of non-custodial measures. In no case may the law provide that any type of offense is excluded from the regime established for ending pretrial detention, or provide for certain types

of offense to receive a different treatment from others in relation to being free during the trial, without any basis in objective and legitimate criteria, only because they answer to standards such as “social alarm” (“*alarma social*”), “social repercussions” (“*repercusión social*”), “dangerousness” (“*peligrosidad*”), or any other.

5. As part of the policies in the pretrial stage aimed at reducing pretrial detention, the States should adopt measures aimed at reducing its duration. Those measures are part of a technical understanding of the nature of the criminal problem, the effective operation of the criminal justice system, and general crime prevention strategies.
6. The competent judicial authorities should make decisions ordering the application of pretrial detention after an exhaustive and not merely formal analysis of each case, and in keeping with the applicable international standards. The order imposing pretrial detention should individually identify the person accused, set forth the facts attributed to him or her, offer a legal characterization of those facts, state the circumstances that are the basis for the measure, and set the period for which it is established, with a clear determination of the date on which that period ends.

C. Public Defense

1. Strengthen the systems of public defense, giving priority attention to coverage and quality of service, such that they can provide, from the moment of arrest by the police, a timely, effective service aimed at protecting the fundamental rights of any person accused of having committed a crime.
2. Grant sufficient guarantees to the public defense to ensure it can act efficiently and in equality of arms with the prosecution. In particular, as regards aspects such as capacity to request, present, and produce evidence, and have access to the records and to what has been done in the investigations.
3. Provide a public defender from the moment the person is arrested by the police, considering primarily that the immediate involvement of defense counsel in the proceeding, in addition to guaranteeing a more effective defense and preventing mistreatment and torture during detention, reduces the duration of pretrial detention.

4. Provide, in their domestic legislation, for the functional, administrative, and financial autonomy of the systems of public defense, seeking functional equality with the prosecution and job stability for public defenders. In this way, the public defense can have the same institutional capacity for case management as the prosecution.

D. Independence of Judicial Officers

1. Adopt the legislative, administrative, and institutional measures needed to ensure the greatest possible level of independence, autonomy, and impartiality of the judicial and prosecutorial authorities in charge of making decisions on requests for and application of pretrial detention, such that they perform their functions free from any type of meddling.
2. Public servants from any branch of government should refrain from publicly issuing opinions that directly question the performance or character of prosecutors, judges, or public defenders for a decision on whether to order pretrial detention, even if such statements do not constitute offenses or misdemeanors under the domestic law. Moreover, they should refrain from promoting the generalized use or selective application of pretrial detention (to certain specific cases).
3. Establish in clear and detailed terms the conduct susceptible to disciplinary sanctions, which should be proportional to the infraction committed. Disciplinary oversight proceedings shall have the aim of assessing the conduct and performance of the judicial authority or the prosecutorial authority as public servants. The decision by which disciplinary sanctions are imposed must be reasoned, public, subject to review, and respectful of due process. The information on disciplinary proceedings should be accessible and subject to the principle of transparency.
4. Promote a clear change in paradigm in the conception of the admissibility and necessity of pretrial detention and the judicial practice. In this regard, the IACHR urges the States to establish institutional incentives and draw up and strategic plans for training and raising the awareness of judicial officers with respect to the importance of their independence and autonomy, so as to apply pretrial detention on an exceptional basis, and, accordingly, to promote the use of non-custodial measures.

E. Alternatives to Pretrial Detention

1. Regulate adequately and in timely fashion the use and application of alternatives to pretrial detention. In order to ensure the appearance of the accused and prevent the accused from thwarting the investigation, the IACHR recommends to the States that they consider applying the following measures: (a) the promise of the accused to submit to the proceeding and not thwart the investigation; (b) the obligation to submit to the care or surveillance of a given person or institution, in the conditions set in each case; (c) the obligation to appear periodically before the judge or the authority designated by the judge; (d) the prohibition on leaving a given geographic area without prior authorization; (e) withholding travel documents; (f) immediate abandonment of the domicile, in cases involving acts of domestic violence where the victim lives with the accused; (g) posting, on one's own or by a third person, a bond in an adequate amount; (h) surveillance of the accused by some electric device for tracking or positioning the accused's physical location; (i) house arrest in one's own home or in the home of another, without surveillance or with such surveillance as ordered by the judge; and (j) restorative justice programs in criminal matters. The IACHR, to ensure the effectiveness of these measures, urges the States to make available a wide variety of options so that a determination can be made of the measure best suited to the particularities of each case.
2. Considering the fundamental standards for applying pretrial detention, the IACHR recommends that alternatives to it be applied so long as the danger of flight or of thwarting the investigation can reasonably be avoided. In particular, the judge must opt to apply the least cumbersome measure, at all times considering a gender perspective, and, as the case may be, the paramount interest of the child, or the particular impact it could have on persons who belong to groups at special risk. The judicial authority is obligated to determine those measures without delay. In cases in which the prosecution seeks application of the precautionary measure of pretrial detention, it is obligated to explain why it is not feasible to order a non-custodial measure.
3. In the context of implementing the alternative measures the States should take the necessary actions that guarantee efficient coordination between the criminal justice authorities and other support agencies that provide assistance of various sorts, and between these agencies and civil society organizations. The

involvement of civil society and of community mechanisms in these initiatives is essential for the following purposes: (a) ensure full community integration; (b) ensure a more solid structure of follow-up in carrying out non-custodial measures; (c) have greater support in the task of raising awareness as to the advantages of its use; and (d) foster greater trust of the beneficiaries with respect to their use.

4. Guarantee the allocation of the financial resources needed for non-custodial measures to be operative, and so that they can be used by the largest possible number of persons.
5. Have information in the public domain that makes it possible for the beneficiaries, their defense counsel, and others interested to have the relevant information about the criteria and rules that govern non-custodial measures. In particular, the States should report on the following aspects: (a) beginning of implementation; (b) criteria for application; (c) procedure; (d) general obligations imposed while the non-custodial measure is in force; and (e) statistics on application broken down by age, gender, sexual orientation, and gender identity and expression.
6. Promote and supervise the implementation of the non-custodial measures by establishing mechanisms for supervision and monitoring, with differentiated approaches, and with periodic evaluations that make it possible to analyze and verify their objectives and efficacy. In this regard, the States should generate statistics and produce reliable and systematic information on the results obtained with the application of such measures to identify the possible obstacles and good practices in their application and use.
7. If the obligations imposed in the context of applying non-custodial measures are not carried out, any determination to modify or revoke them should be based on a careful analysis of the allegations made by the supervisory authorities and by the person subject to the measure. The IACHR has indicated in this regard that the failure to carry out the terms of non-custodial measures may be subject to sanction, but does not automatically justify imposing pretrial detention.

F. Electronic Monitoring Mechanisms in Criminal Matters

1. Guarantee the technical development needed with respect to the use of electronic monitoring mechanisms in criminal matters so that the

use of these devices not prove stigmatizing to the detriment of the beneficiaries.

2. Adopt the measures necessary to ensure that the use of these mechanisms is determined mindful of the economic situation of the person against whom charges are brought and in line with criteria of substantial equality, and that it not constitute a discriminatory measure against those persons who do not have the economic capacity to pay such sums. The nature of this guarantee is that its possible loss serves as a deterrent to any thought the accused may have of not appearing at trial.
3. When it has been shown that the accused is not able to pay, the States must necessarily use a means of ensuring appearance at trial other than pretrial detention, or not charge for the use of such mechanisms. The conditions imposed for applying this measure should take account of the economic situation of the person on trial, and if their inability to pay has been shown, the States must use another non-custodial means of assuring appearance at trial, or not charge for the use of such mechanisms.

G. Restorative Justice Programs in the Context of Criminal Matters

1. Restorative justice programs should be used only with respect to minor offenses that do not entail violence, when there is sufficient evidence to incriminate the person, and with the free and voluntary consent of both the victim and the offender. In addition, both parties should agree about the fundamental facts of the case, and have legal representation and, if necessary, translation and interpretation services. The agreements in the context of these proceedings must be reached voluntarily, and contain reasonable and proportional obligations; moreover, they should be under court supervision and be included in judicial decisions, so that they have the same legal weight as a court decision, and thereby rule out the possibility of the accused being prosecuted on the same facts.
2. Establish guidelines and rules governing the use of restorative justice programs that contain, among others, the following elements: (a) conditions and guidelines for referring cases to restorative justice programs; (b) case monitoring and management after a restorative justice intervention; (c) qualifications, training, and evaluation of

facilitators; (d) administration of restorative justice programs; and (e) provisions on competence and rules of conduct with respect to the operation of these programs.

3. To ensure the efficient implementation of restorative justice programs the States should design strategies and policies aimed at promoting a culture propitious for their use among the respective authorities, civil society, and local communities.

H. Drug Treatment Programs under Judicial Supervision

1. Establish a drug policy with a comprehensive approach and one based on social reinsertion that ensures that treatment for persons arrested for drug use or possession, or who have committed minor offenses due to their problematic or dependent drug use, not be based on a repressive and criminalizing approach, but instead on a public health approach. In the case of drug use or possession for personal use the States should forestall having persons who have engaged in such conduct from being deprived of liberty and entering the criminal justice system; accordingly, the IACHR calls on the States to study less restrictive approaches by decriminalizing drug consumption and possession for personal use.
2. With respect to persons who committed a minor offense due to problematic or dependent use of drugs, the States should promote alternatives to the deprivation of liberty including outpatient treatment that avoid institutionalizing persons and which make it possible to address this issue from a health and human rights perspective. To ensure that these programs are effective the States should allocate sufficient resources to guarantee that the treatment provided is evidence-based, and developed within the public health sphere. It is essential for health specialists to make clinical evaluations to identify those persons with problematic or dependent drug use; this is to avoid diversion to treatment as an alternative to pretrial detention for those persons who are occasional users. To make these programs sustainable and help avoid the recidivism of those who participate in them, the states should have a social and community support network that includes education, employment, housing, and health programs. Accordingly, these models should have the support of various institutions and a multidisciplinary team with a comprehensive outlook on the psychosocial health of the program's beneficiaries.

3. With respect to centers of detention that offer treatment in the context of drug treatment programs under judicial supervision, the IACHR reiterates to the States their obligation to regulate and oversee all health care provided to those persons under their jurisdiction as part of their special duty to protect life and integrity independent of whether the agency that provides those services is public or private.

I. Measures Related to Speedy Process and Correcting the Procedural Delay

1. Adopt the measures necessary for ensuring that persons in pretrial detention are brought to trial without delay. In that regard, the IACHR recommends that the States accord priority to the speedy processing of these matters, fully observing due process; guarantee that the periods of pretrial detention are strictly in line with the limits established by law; urgently adopt the measures needed to correct the procedural delay; and sharply reduce the high percentage of persons deprived of liberty without a final conviction.
2. Guarantee that any pretrial detention be justified by the procedural purposes of the specific case, and from the beginning of the deprivation of liberty. Accordingly, the States are under an obligation to periodically review whether the circumstances that motivated the initial application of pretrial detention subsist, and whether the time of detention has surpassed the limits imposed by law and reason. The responsibility of ensuring said periodic reviews rests with the competent judicial authorities and the prosecutorial authority.
3. Establish special programs to monitor the duration of pretrial detention and maintain adequate records of the persons facing charges. The States should maintain efficient systems for keeping records on pretrial detention orders and communication with the courts under whose disposition these persons find themselves, so as to have adequate control of compliance with the maximum periods of pretrial detention. The existence of a complete, accurate, and accessible system of records is essential for effective decision-making and sound prison management.
4. To hold what are known as jailhouse hearings the prison authorities provide a site within the prison or jail that has adequate conditions in

terms of space, light, electricity, and hygiene. In addition, those authorities are under an obligation to designate additional guards to guarantee the security of the different players in the proceeding during the hearings and to ensure the presence of the accused. In addition, for the holding of hearings in the prisons to be efficient, it is essential that the States establish clear mechanisms of collaboration among the judicial branch, the prosecutorial authorities, defense counsel, and the prison authorities. The judicial authorities should also establish criteria concerning the prioritization of cases to be taken up, and take the actions needed to adequately prepare the cases that will be analyzed.

J. Pretrial Detention Hearings

1. In order to guarantee the principles of adversarial process, immediacy, publicity, and speedy process, the States should decide on pretrial detention in an oral hearing, with the intervention of all the parties. The Commission has determined that to ensure the right to defense the persons accused must be present and must be heard by the judicial authority.
2. During such hearings, the judicial authority should examine not only the procedural requirements established in the domestic legislation but also the reasonableness of the suspicion on which the detention is based, and the legitimacy of its aims. In addition, the judges should analyze the applicability of non-custodial measures. This procedure should offer the possibility of adversarial confrontation and always ensure equality of arms as between the parties, i.e. the prosecutor and the person detained. To ensure this equality of arms it is essential that the defense counsel have access to those documents introduced into the investigation that are essential for effectively controverting the legality of the detention of his or her client.
3. With respect to the allegations of torture or other abusive treatment presented in hearings about the admissibility of pretrial detention, the IACHR reiterates to the States that the investigation and documentation of such cases must be governed by the principles of independence, impartiality, competence, diligence, and promptness. The investigation should be carried out by all legal means available, be aimed at determining the truth, and be conducted within a reasonable time, which should be guaranteed by the judicial bodies hearing the matter. In addition, the States should ensure the independence of the medical and health personnel in charge of

examining and providing assistance to the persons deprived of liberty such that they can freely perform the medical evaluations needed, respecting the rules established in the practice of their profession.

K. *Women and Other Persons Belonging to Groups at Special Risk*

1. Adopt all necessary and comprehensive measures to effectively respect and guarantee all the rights of women deprived of liberty, and so that they not suffer discrimination and are protected from all forms of violence and exploitation. In this regard, the States should adopt measures with strict diligence and in timely fashion to prevent and eradicate the forms of violence and discrimination against women in contexts of deprivation of liberty.
2. Incorporate a gender perspective in the establishment, implementation, and follow-up to legislative and policy reforms aimed at reducing the use of pretrial detention. This perspective should take into consideration the historical discrimination and gender stereotypes that have affected women and adolescent females, and that have severely limited the exercise of their civil, political, economic, social, and cultural rights in contexts of being deprived of their liberty. Account should also be taken of the special situation of risk of violence in all its manifestations, including physical, psychological, sexual, economic, obstetric, and spiritual, among others, as well as the fact that the vast majority of these incidents end in impunity. The perspective also implies considering the specific risks of persons who have diverse or non-normative sexual orientations and gender identities and expressions, or whose bodies vary from the standard female and male body types. Similarly, the States should incorporate an intersectional and intercultural perspective that takes into consideration the possible aggravation and frequency of human rights violations due to factors such as race, ethnicity, age, or economic position.
3. The measures aimed at respecting and ensuring the rights of women deprived of liberty should ensure autonomy and empowerment, and not include in their design, implementation, or supervision stereotypical concepts of women's functions and roles, which only perpetuate *de facto* discrimination against them, and that generate obstacles to the full exercise of their rights.

4. With respect to the determination of non-custodial measures for women, the States should promote incorporation in all its dimensions of a gender perspective and, when appropriate, the focus on the paramount interest of the child and special protection for other persons who belong to groups at special risk, such as persons with disabilities and older persons. In imposing non-custodial measures, the judicial authorities should take account of various elements, such as: (a) the particular position and historical disadvantage of women in society; (b) history of prior victimization; (c) absence of aggravating circumstances in the commission of a crime; and (d) differential and incremental impact of the application of deprivation of liberty with respect to the persons under their care.
5. In light of the paramount interest of the child, the judicial authorities should more rigorously apply the criteria of necessity, proportionality, and reasonableness when it comes to considering the application of pretrial detention to persons who have the primary responsibility for the children and adolescents in their charge. Considering the foregoing, the incarceration of women who are mothers or who are pregnant, and of those who have persons at special risk under their care – such as persons with disabilities or older persons – should be considered a measure of last recourse; non-custodial measures that enable them to take care of the persons who depend on them should be prioritized.
6. Adopt the measures necessary for fostering the application of non-custodial measures, and prioritize the financing and establishment of mechanisms for their implementation and follow-up. In the context of applying them, the States should provide appropriate and necessary resources so that the women beneficiaries can become integrated into the community. The States should provide different options for resolving the most common problems that led these women to come into contact with the criminal justice system, such as psychological treatment and education and training programs to increase their chances of employment.
7. In the context of criminal justice policies with respect to drugs, the IACHR calls on the States to adopt comprehensive measures that include a gender perspective and that take into account at least the following aspects: (a) lower level of participation in the chain of the commercial activity and trafficking of these substances; (b) lack of violence in this conduct; (c) the impairment of bonds of caring and protection as a consequence of incarceration; (d) inclusion of a focus on social reinsertion; and (e) situation of violence and social and

labor exclusion this population faces in the region. In addition, in applying non-custodial measures stemming from charges related to problematic drug use, women should have access to community services that address gender issues and provide psychological support.

8. In order to have adequate mechanisms for data collection that make it possible to design and analyze effective public policies aimed at fighting the different forms of violence and discrimination against persons who belong to groups at special risk, the States must make the necessary efforts and allocate sufficient resources to collect and analyze, systematically and comprehensively, statistical data that consider factors such as race, ethnicity, age, sexual orientation, gender identity and expression, interculturality, intersectionality, as well as disability. These data should be easy to access, accessible to the public, updated periodically, and provide an effective tool that enables the States to have the information and understanding needed for designing any change necessary in state policies in favor of persons with disabilities, African descent and LGBTBI persons, members of indigenous groups, and older persons.
9. As regards persons who belong to groups at special risk, the States should adopt special measures that consider a differentiated approach with respect to persons of African descent; members of indigenous groups; LGBTBI and older persons; persons with disabilities, and children and adolescents. A differentiated approach means considering the particular conditions of vulnerability and the factors that may increase the risk of violent acts and discrimination in contexts of pretrial detention, such as race, ethnicity, age, sexual orientation, gender identity and expression, and disability. It is also important to consider the frequent intersectionality of the factors mentioned, which may accentuate the risk to persons in pretrial detention.
10. The States should give guidance regarding pretrial detention policies in relation to persons who belong to groups at special risk to fully ensure their security when they are under this regime, and to reduce pretrial detention by making priority use of non-custodial measures.
11. In designing and implementing policies and services that seek to reduce the use of pretrial detention in the case of persons and groups at special risk, the States should ensure the participation of civil society, and of the beneficiaries of those actions. This is so that the relevant policies have a human rights perspective, making it possible

to consider the beneficiaries as the holders of rights, and not only recipients of the actions.

12. As regards persons with disabilities, in the event that the prisons do not have the reasonable accommodations they require to exercise their rights on an equal basis with others, the States should determine the priority application of alternative measures in favor of persons with any type of disability, and not only physical.
13. As regards children and adolescents, the IACHR reiterates that the rule according to which pretrial detention should be treated as an exception should apply more forcefully, and therefore the prevalent norm calls for ordering non-custodial measures. The Commission recommends to the States that the juvenile justice systems guarantee effective observation of the principle according to which deprivation of liberty is exceptional by establishing limits in both the determination of pretrial detention and in its duration. Accordingly, its use should be limited to the shortest possible time, when pretrial detention answers strictly to a legitimate procedural aim and is determined ahead of time, by law, as well as with respect to those cases in which it is appropriate to apply a sanction of deprivation of liberty. Any decision on the deprivation of liberty of a person under 18 years of age must be made by a judicial authority and be subject to periodic review by said authority so as to keep it from becoming drawn out for a period longer than what is allowed by law.
14. With a view to using deprivation of liberty only as a measure of last recourse, the States should consider an array of alternatives to pretrial detention. Such non-custodial measures could include, among others, strict supervision, full-time custody, assignment to a family, transfer to a home or to an educational institution, supervised release, education and job training programs, and other options in place of institutionalization.
15. Pretrial detention must be brought into line with the minimum standards for all persons deprived of liberty and ensure special protection for the rights of children and adolescents. The States should ensure that the facilities of pretrial detention centers are adequate to house them, and that they have properly trained personnel for the special treatment they require. In addition, children and adolescents must be situated in places that enable them to maintain contact with their families and that ensure separation from adults and from convicts; while under custody, they should receive the care and protection required, based on their age and other individual conditions, and with a view to rehabilitation and social

integration, which should be the objective of any measure entailing deprivation of liberty in relation to adolescents.