

Presumption of Guilt

The Global Overuse of Pretrial Detention

Executive Summary



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Executive Summary & Recommendations

The arbitrary and excessive use of pretrial detention around the world is a massive form of human rights abuse that affects in excess of 14 million people a year. The right to be presumed innocent until proven guilty is well established. Yet this right is violated widely and often—in the developed and developing world alike—and the violation goes largely unnoticed. Few rights are so broadly accepted in theory, but so commonly abused in practice. It is fair to say that the global overuse of pretrial detention is one of the most overlooked human rights crises of our time.

Given that the presumption of innocence is universal, detaining arrestees pending trial should be rare. However, many jurisdictions around the world violate the principle that pretrial detention should be used sparingly, as a last resort. Instead, it has become the default setting of criminal justice systems.

One out of three people behind bars has not been found guilty of a crime. In some parts of the globe, pretrial detainees outnumber convicted prisoners. At this moment, 3.3 million people are in pretrial detention worldwide. And that is a conservative estimate, because official data ignore the tens of thousands of people detained in police stations. Cutting the number of pretrial detainees could resolve prison overcrowding, limit the spread of disease, reduce poverty, and spur development.

During the course of an average year, approximately 15 million people are admitted into pretrial detention. Some of them are detained for a few days or weeks, but many will spend months and even years waiting for their day in court. Council of Europe countries have some of the most developed criminal justice systems in the world, yet their average period of pretrial detention is almost half a year. The present global cohort of 3.3 million pretrial detainees will collectively spend an estimated 660 million days in detention—a terrible waste of human potential that comes at a considerable cost to states, taxpayers, families, and communities.

Most pretrial detainees are poor, and economically and politically marginalized. The poor and powerless lack the money to hire a lawyer, procure bail (or bond), or pay a bribe—all tools to secure pretrial release in many jurisdictions. Poor and marginalized people also lack the social and political connections and influence that can facilitate pretrial release in many places.

Ethnic and religious minorities and foreigners are significantly overrepresented in pretrial detention systems. Dalits in South Asia, indigenous people in Australia and Canada, and ethnic minorities in Israel and the United States are grossly overrepresented in pretrial detention. Mentally ill and intellectually challenged persons also face disproportionate risk of being held in pretrial detention.

Many pretrial detainees will eventually be released without trial, or tried and acquitted. Many others will be found guilty but ultimately receive a non-custodial sentence for a minor offense, or be sentenced to less time than they have already

served. In England and Wales—a jurisdiction that uses pretrial detention relatively sparingly—over half of all pretrial detainees ultimately are acquitted or receive a non-custodial sentence. Among juvenile pretrial detainees the proportion receiving a non-custodial sentence or an acquittal is even higher. In Bolivia and Liberia, where between 80 and 90 percent of all prisoners are pretrial detainees, few detainees will ever be convicted of a crime that carries a prison sentence.

There are situations under which pretrial detention is warranted. When there is good reason to think an arrestee—if released—will commit a crime, threaten a witness, or abscond, he should be held pending trial. But these conditions do not apply to most pretrial detainees. The vast majority of pretrial detainees pose no threat to society and can be safely released pending trial. Simply put, they should not be in pretrial detention.

It is a cruel irony that many jurisdictions treat pretrial detainees worse than they treat convicted prisoners. Pretrial detainees are often held in police lockups—facilities not designed for long-term occupancy, where conditions can be particularly crowded and harsh—for extended periods of time. Prison systems treat pretrial detainees as temporary and incidental and therefore devote fewer resources to them. Compared to sentenced prisoners, pretrial detainees have less access to food, beds, health care, and exercise.

While convicted prisoners are often segregated into low-, medium-, and high-security facilities, a pretrial detainee charged with minor theft will be confined in the same facilities as someone charged with a serious violent crime. Pretrial detainees are at greater risk of not being separated according to age and gender. Many jurisdictions confine juvenile pretrial detainees with adults, especially in police lockups, and in some places women are confined with men.

Especially in resource-poor countries, pretrial detainees are likely to be confined with convicted prisoners. This exposes pretrial detainees to a hardened offender subculture, where violence, abuse, and criminal gangs dominate daily life. In such places, pretrial detainees suffer the most and are often denied food, a bed, blankets, clothing, and other necessities.

The particularly poor conditions afforded pretrial detainees serve an instrumental purpose. In numerous jurisdictions, police and prosecutors seek to use the pretrial detention period as an opportunity to obtain confessions that will lead to a conviction. Many authorities condone deplorable pretrial detention conditions as a tool to induce arrestees to incriminate themselves in order to achieve a non-custodial sentence or transfer to a prison with better conditions. In some places, pretrial detainees are routinely assaulted and tortured to get them to confess to the charges against them. Assistance from international donors, intended to enhance the capacity of law enforcement, may be accelerating global detention without addressing its excesses.

Sample Timeline of Pretrial Detention and Its Consequences



Miserable conditions, the heightened risk of torture and abuse, and uncertainty about the outcome of their impending trials all contribute to a high incidence of mental health problems among pretrial detainees. According to the World Health Organization, suicide rates among pretrial detainees are three times higher than those of convicted prisoners.

It is not only detainees who are harmed by the arbitrary and excessive use of pretrial detention—the damage spreads outward to their families, communities, and the state. The overuse of pretrial detention threatens public health, feeds corruption, undermines the rule of law, and stunts socioeconomic development.

Prisons serve as vectors for the spread of communicable diseases and aggravate existing health problems for pretrial detainees and those they come into contact with after their release. Infectious diseases, including HIV/AIDS, hepatitis, and tuberculosis, are common in pretrial detention facilities, while proper health care services are not. For this reason, pretrial detention has been described by one expert as “a death sentence.”

In addition to spreading disease, pretrial detention spreads corruption—in fact, excessive pretrial detention and corruption are mutually-reinforcing. The pretrial phase receives less scrutiny than subsequent stages of the criminal justice process, giving discretion to the lowest paid and most junior actors in the system. Unhindered by accountability, the police, prosecutors, and judges may arrest, detain, and release individuals based on their ability to pay bribes. This arbitrary abuse of power destroys the justice system’s credibility and undermines the rule of law in general, which can weaken governance overall.

Pretrial detention also critically undermines socioeconomic development, and is especially harmful to the poor. Not only does pretrial detention disproportionately affect individuals and families living in poverty, but the financial impact is greater. The detainee, of course, cannot earn income, and may lose his job. His family faces economic hardship due to lost income and the cost of visiting and maintaining the detainee, which can include medical expenses and bribes. And the state not only bears the direct costs (such as prison construction and guards) of jailing someone who should be presumed innocent, but it also loses out on the economic contributions (such as taxes paid) that the detainee could have made if he were released pending trial.

Virtually every country in the world could materially benefit from reducing its pretrial detention population. European taxpayers spend some \$18 billion annually on incarcerating and managing the pretrial detainees in their jurisdictions. In the United States, the average annual cost to the state of detaining a juvenile is higher than the annual tuition at Harvard University. A reduction in the pretrial detention population could generate significant savings which governments could use to prevent crime through investment in education and social services, or, where



needed, to combat crime directly through recruiting more police officers or improving their equipment.

The societal costs of excessive pretrial detention even extend into the future. Most prison environments are criminogenic; that is, prisons serve as breeding grounds for crime. Prisons psychologically harm incarcerated people, making it more difficult for them to live normal, productive lives, and more likely that they may take up crime. Being incarcerated once increases the chances that a person will be incarcerated again. And the harms reach into the next generation: Detention of parents is associated with negative outcomes for their children, including increased propensity for violence and other antisocial behaviors, increased likelihood of suffering anxiety and depression, decreased school attendance, and increased likelihood that they will also be incarcerated one day.

The manifold harms associated with the overuse of pretrial detention suggest the urgent need for remedy. But first it is necessary to understand the causes of the arbitrary and excessive use of pretrial detention. Why are so many theoretically-innocent people behind bars? Clearly, the gap between rights (the presumption of innocence) and reality (massive and arbitrary detention of people who have not been found guilty) is considerable. Many states have vague laws governing the application of pretrial detention, which fail to protect the presumption of innocence. Others have bad laws that directly flout it. Some jurisdictions lack the resources to operate a fair and efficient criminal justice system, while others may be warped by corruption or fears of being soft on crime.

Fortunately, positive reforms are possible. Both Finland and Singapore, for example, have shown that proactive and coherent policies can limit the unnecessary use of pretrial detention. In New Zealand and South Africa, the use of diversion and community-based conflict resolution mechanisms has limited the number of arrestees. In Malawi and Sierra Leone—among the poorest countries in the world—para-legal-based interventions have demonstrated how pretrial detainees can be released expeditiously in places with few lawyers. In Nigeria and the United Kingdom, duty solicitors at police stations are getting arrestees released pretrial. Australia and Mexico have seen results from pretrial evaluation services, which identify arrestees unlikely to abscond or commit a violent crime if released pending trial. In Chile and Germany, new laws have increased the use of alternatives to pretrial detention. In Liberia and India, “camp courts”—prison-based courts that hear bail applications—are succeeding in fast-tracking the release of defendants who have been remanded to detention by their countries’ overburdened regular courts. Measures like these can be extended to other jurisdictions, and thereby lessen the problem of arbitrary and excessive pretrial detention around the world.

The global overuse of pretrial detention is a widespread, deeply harmful, yet frequently overlooked, human rights violation. The following recommendations are offered toward redress.

Recommendations

To international and regional institutions and bodies:

- Call upon national governments to uphold and respect international and regional standards and norms regarding the use and conditions of pretrial detention—in particular, to focus their technical assistance and monitoring

efforts on effective and sustainable national-level implementation of rights-based pretrial justice practices.

- ▶ Support the gathering of accurate statistics on pretrial detention practices by jurisdictions worldwide. This should include data on the exceptionality or frequency of use of pretrial detention, the number of pretrial detainees held in police cells or lockups, the duration of pretrial detention, and accused persons' compliance with the conditions of pretrial release.
- ▶ Document and disseminate good practices that reduce the arbitrary and excessive use of pretrial detention. Such knowledge sharing should be complemented by context-specific national-level assistance, monitoring, and documentation so that country-level learning strengthens both ongoing efforts at improving pretrial justice delivery nationally and similar interventions elsewhere.
- ▶ Promote criminal justice reform models that pay due attention to the pretrial stage of the criminal justice process. This should include, at a minimum, crime prevention and diversionary schemes which reduce the number of arrestees entering the criminal justice system; mechanisms which provide legal aid or assistance for accused persons expeditiously after their arrest; legally mandated and adequately resourced alternatives to pretrial detention; full judicial discretion to release accused persons awaiting trial irrespective of the charge(s) against them; and, regular judicial review of prior pretrial detention decisions.
- ▶ United Nations Security Council resolutions should provide mandates to its field operations, thereby authorizing the latter to undertake—or support government efforts to undertake—assessments of the pretrial detention situation in their countries of operation.
- ▶ The United Nations General Assembly's Social, Humanitarian and Cultural Committee and/or Legal Committee should mandate a report and thematic debate on the global overuse of pretrial detention and remedial interventions to address the problem.
- ▶ The Office of the High Commissioner for Human Rights should ensure that reports, views, and recommendations from UN Special Procedures and Treaty Bodies relating to pretrial detention and related problems are excerpted for each country within the Universal Periodic Review process.

To donors and development agencies:

- ▶ Include pretrial justice reform in the planning of any criminal justice reform strategy supported through donor funds. This should include funding for assessments to identify the underlying drivers of the excessive and arbitrary use of pretrial detention, and to identify intervention points for improving day-to-day pretrial detention practices.
- ▶ Invest in pretrial detention reforms in a holistic and sustainable manner. Long-term interventions that address simultaneously the multiple challenges affecting pretrial justice systems have the greatest chance of success. Such investments should include monitoring and documentation efforts to improve learning from past interventions and promote the long-term and

sustainable national-level political and operational commitment to improve pretrial justice practices.

- Leverage increased funding and development aid for pretrial detention reform by linking improved pretrial justice practices to protecting not only the rights and wellbeing of detainees themselves, but also wider societal benefits such as reduced torture and corruption, improved public health, and better performance of criminal justice systems.

To national governments:

- Modernize the legal framework and associated institutional practices governing pretrial detention to bring them in line with applicable law. This may include repealing laws and practices which make pretrial detention mandatory for persons charged with certain offenses; establishing and funding the provision of quality legal aid and assistance and providing them as soon as possible after arrest; requiring prosecutors who are requesting pretrial detention to demonstrate before a court that pretrial detention is an option of last resort; and promulgating statutory alternatives to pretrial detention.
- Invest strategically in the “front end”—or pretrial phase—of the criminal justice process, in order to generate improvements and savings throughout the system. Ensure that sufficient resources are allocated to avoid delays and excessive detention—for example, by supporting mechanisms to alert courts when detainees have been held for excessively long periods. Provide support for practical alternatives to pretrial detention.
- Develop a sustained national strategy to limit the use of pretrial detention and encode it as an exceptional measure only. Such a strategy should involve the collaboration of all criminal justice agencies, including the judiciary and the legal profession, as well as relevant civil society organizations.

To criminal justice practitioners and officials:

- Develop coordinated inter-agency efforts to regularly review weaknesses and related challenges in the pretrial justice process. These should be jointly identified and then addressed collectively at the national, regional, and local level.
- Develop data collection capacities which can consistently gather information on the performance of the criminal justice system during the pretrial phase, both for day-to-day operational purposes and strategic planning and evaluation purposes.
- Collaborate with civil society organizations to improve the delivery of pretrial services—both to pretrial detainees directly and to criminal justice agencies in cases where the state is unable to do so or has elected not to provide such services.