



Report on the Use of Pretrial Detention in the Americas



Organization of
American States

Inter-American
Commission on
Human Rights **IACHR**

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

OEA/Ser.L/V/II.
Doc. 46/13
30 December 2013
Original: Spanish

REPORT ON THE USE OF PRETRIAL DETENTION IN THE AMERICAS

2013

Internet: <http://www.cidh.org>

OAS Cataloging-in-Publication Data

Inter-American Commission on Human Rights. Rapporteurship on the Rights of Persons Deprived of Liberty.

Report on the use of pretrial detention in the Americas.

p. ; cm. (OAS. Official records ; OEA/Ser.L)

ISBN 978-0-8270-6170-5

1. Preventive detention--America. 2. Prisoners--Civil rights--America. 3. Prisoners--Legal status, laws, etc.--America. 4. Criminal procedures--America.

5. Detention of persons--America. 6. Human rights--America. I. Title. II. Series: OAS. Official records ; OEA/Ser.L.

OEA/Ser.L/V/II. Doc.46/13

Document published thanks to the financial support of Spain. The positions herein expressed are those of the Inter-American Commission on Human Rights and do not reflect the views of Spain.



Approved by the Inter-American Commission on Human Rights on December 30, 2013

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Preface

Since its creation, the Inter-American Commission on Human Rights has devoted special attention to the situation of persons deprived of liberty in the Americas. From its first special country reports on Cuba and the Dominican Republic, and in the more recent ones, on Jamaica and Colombia, the Inter-American Commission has been referring consistently to the rights of persons deprived of liberty. Visits to detention centers have been a constant feature in the more than 90 on-site visits that the Commission has carried out in the last 50 years. In addition, the Inter-American Commission has adopted a large number of reports on the merits in contentious cases and has granted a large number of precautionary measures aimed at protecting persons deprived of liberty in the Americas.

The Inter-American Commission has determined that respect for the rights of persons deprived of liberty is one of the main challenges faced by the member States of the Organization of American States. It is a complex matter that requires the design and implementation of medium and long-term public policies, as well as the adoption of immediate measures necessary to address the current and urgent situations that gravely affect fundamental human rights of the inmate population.

In this context, one of the main challenges faced by the vast majority of the States in the region is the excessive use of pretrial detention. Due to the importance and complexity of this matter, the Inter-American Commission, through its Rapporteurship on the Rights of Persons Deprived of Liberty, presents this report with the objective of helping the member States of the OAS fulfill their international obligations, and to provide a useful tool for the work of those institutions and organizations committed to the promotion and defense of the rights of persons deprived of liberty.

The Inter-American Commission on Human Rights highlights and recognizes the work of Commissioner Rodrigo Escobar Gil, Rapporteur on the Rights of Persons Deprived of Liberty, in directing the efforts to produce this report. In addition, the Commission thanks the Cyrus R. Vance Center for International Justice for its contribution to this report by researching and analyzing the jurisprudence of the European Court of Human Rights on the issue of pretrial detention.

The preparation of this report was possible thanks to the valuable financial support of the Government of Spain.

TABLE OF ACRONYMS

Organization of American States:	OAS
American Convention on Human Rights:	American Convention or the Convention
American Declaration of the Rights and Duties of Man:	American Declaration or the Declaration
Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas:	Principles and Best Practices
United Nations Standard Minimum Rules for the Treatment of Prisoners:	Standard Minimum Rules
United Nations Standard Minimum Rules for Non-custodial Measures:	Tokyo Rules
Inter-American Commission on Human Rights:	IACHR, Inter-American Commission or the Commission
Inter-American Court of Human Rights:	Inter-American Court or the Court
European Court of Human Rights:	European Court
European Convention on Human Rights:	European Convention
IACHR Rapporteur on the Rights of Persons Deprived of Liberty:	Rapporteur on Persons Deprived of Liberty or Rapporteur of PDL
IACHR Rapporteurship on the Rights of Persons Deprived of Liberty:	Rapporteurship on Persons Deprived of Liberty or Rapporteurship of PDL
United Nations Human Rights Committee:	HRC
United Nations Committee Against Torture:	CAT
United Nations Subcommittee on Prevention of Torture:	SPT
United Nations Working Group on Arbitrary Detention:	WGAD

United Nations Special Rapporteur on
torture and other cruel, inhuman or
degrading treatment or punishment:

Special Rapporteur on Torture
or SRT

United Nations Latin American Institute for
the Prevention of Crime and the Treatment
of Offenders:

ILANUD

REPORT ON THE USE OF PRETRIAL DETENTION IN THE AMERICAS

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REPORT ON THE USE OF PRETRIAL DETENTION IN THE AMERICAS

I. INTRODUCTION

A. Context and purpose of this report

1. For more than a decade, the Inter-American Commission on Human Rights (hereinafter “the IACHR”, “the Inter-American Commission” or “the Commission”) has considered the arbitrary and illegal use of pretrial detention a chronic problem in many countries of the region.¹ In its recent *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, the IACHR listed the excessive use of pretrial detention among the most serious and widespread problems in the region and noted that this dysfunctionality in criminal justice systems is in turn the cause of other problems such as overcrowding and the failure to separate detainees awaiting trial from the convicted.

2. Along with other structural problems linked to the respect for and the guarantee of the rights of persons deprived of liberty, this situation has also been systematically identified in the Americas by United Nations monitoring mechanisms, whose mandate includes safeguarding the human rights of persons under criminal prosecution and/or deprived of liberty, such as: the Human Rights Committee (HRC), the Committee against Torture (CAT), the Subcommittee on Prevention of Torture (SPT), the Working Group on Arbitrary Detention (WGAD) and the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment (SRT).

3. Similarly, other qualified actors such as the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD), have deemed that “[e]specially serious within the issue of the accelerated increase of prison populations is the case of prisoners awaiting trial”; therefore, “the region must continue its efforts to maintain more prudent levels of unconvicted prisoners.”² The Report on the High Level Expert Group Meeting on the United Nations Standard Minimum Rules for the treatment of prisoners, which was held in Santo Domingo, laid out some of the common causes at the regional level for the high proportion of prisoners awaiting trial, such as delays in bringing criminal defendants to trial, the absence of adequate legal advice, the influence of public opinion and the “tendency for prosecutors and judges to order that those awaiting trial should be held in

¹ IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, OEA/Ser.L/V/II.111. Doc. 21 rev. adopted April 6, 2001 (hereinafter “*Fifth Report on the Situation of Human Rights in Guatemala*”), Ch. VII, para. 26. Already four years earlier, the IACHR had said that pretrial detention constituted “a serious problem in several OAS member countries.” IACHR, Report No. 2/97, Case 11.205, Merits, Jorge Luis Bronstein et al, Argentina, March 11, 1997, para. 8.

² United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD), *Crime, Criminal Justice and Prisons In Latin America and the Caribbean: How to Implement the United Nations’ Rights and Duties Model*, 2010, pp. 76-77.

detention, rather than making other arrangements for pre-trial supervision in the community.”³

4. The excessive use of pretrial detention in the Americas has also been acknowledged by other bodies of the Organization of American States (OAS), such as at the Third Meeting of Officials Responsible for Penitentiary and Prison Policies, where reference was made to the “excessive use of preventive detention,” and it was estimated that in the region “more than 40% of the prison population is on pretrial detention”⁴.

5. The foregoing situation exists in spite of binding international norms that are very clear in recognizing the presumption of innocence and the exceptional nature of pretrial detention; the broad recognition of these rights at the constitutional level in the region;⁵ and the political will expressed at the highest level by the States twenty years ago in the framework of the Summits of the Americas,⁶ where governments made the commitment to “[t]ake the necessary steps to remedy inhumane conditions in prisons and to minimize the number of pretrial detainees” (The Miami Plan of Action, 1994).

³ UNODC, Report on the High Level Expert Group Meeting (from Latin America and the Caribbean) on the United Nations Standard Minimum Rules for the treatment of prisoners, August 3-5, 2011, in Santo Domingo, Dominican Republic, paras. 9-14, available at http://www.unodc.org/documents/justice-and-prison-reform/Reports/Report_High_Level_EGM_Santo_Domingo_3-5_August_2011_English.pdf.

⁴ OAS, Third Meeting of Officials Responsible for Penitentiary and Prison Policies of the OAS Member States, Remarks of Ambassador Adam Blackwell, Secretary for Multidimensional Security, on behalf of the OAS Secretary General, available at: http://www.oas.org/es/ssm/docs/speeches/ab-III_PrisonMeeting_2012_09_14.pdf. Similarly, the Recommendations of the Second Meeting of Officials Responsible for Penitentiary and Prison Policies of OAS States (Valdivia, 2008), urged States to apply pretrial detention in keeping with due process standards, while respecting the principles of exceptionality and proportionality (B.ix). Also, at the First Meeting on this topic (Washington, 2003), authorities responsible for penitentiary and prison policies of the OAS States had already identified as a major challenge for the region the “high percentage of prisoners still awaiting trial.” (Meeting Report). Both documents are available at: http://www.oas.org/dsp/english/cpo_documentos_carceles.asp.

⁵ On this issue, see: Constitution of the Argentine Nation Article 18; Political Constitution of the Plurinational State of Bolivia Articles 23 and 116; Constitution of the Federative Republic of Brazil Article 5; Political Constitution of the Republic of Chile Articles 19.3 and 19.7; Political Constitution of Colombia Articles 28 and 29; Political Constitution of the Republic of Costa Rica Article 37; Constitution of the Commonwealth of Dominica Article 3.4; Constitution of the Republic of Ecuador Articles 76.2, 77.1, 77.9 and 77.11; Constitution of the Republic of El Salvador Articles 12 and 13; Political Constitution of the Republic of Guatemala Articles 13 and 14; Political Constitution of the Republic of Honduras Articles 69, 84, 89, 92 and 93; Political Constitution of the United Mexican States Articles 16, 18 and 19; Political Constitution of the Republic of Nicaragua Articles 33 and 34; Political Constitution of the Republic of Panama Articles 21 and 22; Constitution of the Republic of Paraguay Articles 12, 17 and 19; Political Constitution of Peru Articles 2.24b, 2.24e, 2.24f and 139.10; Constitution of the Eastern Republic of Uruguay Articles 7, 15 and 16; and Constitution of the Bolivarian Republic of Venezuela Articles 44.1, 44.5 and 49.2.

⁶ See also (a) Third Summit of the Americas, 2001, Quebec, Canada, Plan of Action, available at: <http://www.summit-americas.org/III%20Summit/Esp/III%20summit-esp.htm>; (b) Second Summit of the Americas, 1998, Santiago, Chile, Document on Human Rights, available at: <http://www.summit-americas.org/Human%20Rights/HUMAN-RIGHTS.htm>; and (c) First Summit of the Americas, 1994, Miami, USA, Plan of Action, available at: http://www.summit-americas.org/i_summit.html.

6. In this context, the Inter-American Commission considers that the excessive use of pretrial detention runs contrary to the very essence of the democratic rule of law,⁷ and that implementing this measure as a form of expeditious justice that results in a kind of anticipated sentence is flagrantly contrary to the provisions of the American Convention and Declaration, and the principles from which the Charter of the Organization of American States has drawn inspiration.⁸ Moreover, the use of pretrial detention is an important measure of the quality of the administration of justice and, as such, has a direct bearing on the quality of democracy.

7. The IACHR recognizes the duty of States to maintain public order and protect all persons under their jurisdiction from crime and violence. Nonetheless, the Commission reiterates the longstanding principle enshrined in the Inter-American system that “irrespective of the nature or gravity of the crime prosecuted, the investigation of the facts and the eventual trial of specific persons should be carried out within the limits and according to the procedures that permit public safety to be preserved, with full respect for the human rights.”⁹ Additionally, the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”) has held that “[t]he concept of rights and freedoms as well as that of their guarantees cannot be divorced from the system of values and principles that inspire it. In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning.”¹⁰

8. As is covered in depth in this report, excessive use of pretrial detention is a complex problem caused by a variety of factors, such as: issues of legal design, structural deficiencies in administration of justice systems, interferences with judicial independence and deeply rooted tendencies in judicial culture and practice.

⁷ IACHR, Press Release 23/13 – *IACHR Wraps Up its 147th Session*, Annex, available at: http://www.oas.org/en/iachr/media_center/PReleases/2013/023A.asp.

⁸ The IACHR has regarded it as “absolutely unacceptable for preventive detention to become, de facto, the usual form of operation of the administration of justice, without any due process, judge or verdict.” IACHR, *Report on the Situation of Human Rights in the Dominican Republic*, OEA/Ser.L/V/II.104. Doc. 49 rev. 1, adopted October 7, 1999 (hereinafter “*Report on the Situation of Human Rights in the Dominican Republic*”), Ch. VI, para. 224. In this regard, the Inter-American Democratic Charter expressly states “the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights contain the values and principles of liberty, equality, and social justice that are intrinsic to democracy.”

⁹ I/A Court H.R. *Case of Yvon Neptune v. Haiti*. Merits, Reparations and Costs. Judgment of May 6, 2008. Series C No. 180, para. 38. This fundamental principle of the Inter-American system was stated by the Court in its first judgment on the merits as follows: “regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality.” I/A Court H.R. *Case of Velásquez Rodríguez v. Honduras*. Judgment of July 29, 1988. Merits. Series C No. 4, para. 154.

¹⁰ I/A Court H.R. *Habeas Corpus in Emergency Situations* (Articles 27(2), 25(1) and 7(6) American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 26.

9. Using pretrial detention other than as an exception of last resort further exacerbates other existing problems in the region, such as high rates of prison overcrowding. This, in turn, triggers a situation in which the fundamental rights of inmates, such as the right to humane treatment, are violated. In the vast majority of the countries in the region, persons held on pretrial detention are exposed to the same conditions as convicts, and sometimes to an even worse treatment. Persons in pretrial detention are usually subjected to immense personal stress as a result of lost income and forced separation from their families and communities. In addition, they suffer the psychological and emotional impact that being deprived of liberty without having been convicted causes, and, in general, are exposed to a climate of violence, corruption, and the unsanitary and inhumane conditions prevailing in the vast majority of prisons in the region. Even suicide rates in prison are higher among pretrial detainees¹¹. All these reasons highlight the gravity of this measure and the need for its application to come with extreme precautions to respect judicial guarantees.¹²

10. The Commission has observed as well that the use of pretrial detention has a disproportionate effect on persons who belong to economically vulnerable groups. These people usually face obstacles in accessing other precautionary measures, such as bail, and cannot afford a private attorney, which means they have no choice other than a public defender, with its concomitant limitations.

11. Furthermore, because of the costs involved, holding a large number of persons awaiting trial in custody does not constitute good practice from the prison management standpoint. The non-exceptional use of this measure also means that the generally scarce resources of the prison system will fall far short of meeting the needs of the growing prison population.

12. Additionally, holding a person in pretrial detention for a prolonged period can result in a situation in which judges are much more inclined to convict in order to uphold, to a certain extent, their earlier decision to detain the accused over the course of the trial.¹³ In this sense, an eventual acquittal could be equivalent to an admission that an innocent person was incarcerated for an extended period of time. Considering all this, the protracted detention of an individual without him or her being brought to trial constitutes, to a certain extent, a presumption of guilt.

¹¹ WHO, Department of Mental Health and Substance Abuse, *Preventing Suicide in Jails and Prisons*, 2007, pp. 3 – 5, available at: http://www.who.int/mental_health/prevention/suicide/resource_jails_prisons.pdf.

¹² With regard to the negative effects of pretrial detention, see in general: Open Society/Justice Initiative, *The Socioeconomic Impact of Pretrial Detention*, 2011; Open Society/Justice Initiative, *Pretrial Detention and Torture: Why Pretrial Detainees face the Greater Risk*, 2011; Open Society/Justice Initiative, *Pretrial Detention and Health: Unintended Consequences, Deadly Results*, 2011.

¹³ See also UN, Working Group on Arbitrary Detentions, Annual Report submitted to the Human Rights Council, A/HRC/4/40, published on January 9, 2007, para. 68; and UN, Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, Interim Report, A/64/215, published on August 3, 2009, para. 42.

13. In this context, this report is premised, as was the previous *Report on the Rights of Persons Deprived of Liberty in the Americas*, on the Inter-American Commission's firmly held belief that respect for the human rights of persons deprived of liberty is one of the major challenges faced by OAS Member States, and that the excessive use of pretrial detention is one of the issues requiring closer attention.

14. Accordingly, this report is intended to aid in reducing the numbers of individuals subject to pretrial detention in OAS Member States, by helping States fulfill their international obligations using the standards and recommendations set forth herein. Additionally, this report aims to serve as a useful tool for the work of institutions or organizations engaged in the promotion and defense of the rights of persons deprived of liberty.

15. This study is also presented in the context of the request made by the OAS General Assembly to the IACHR to "continue reporting on the situation of persons under any form of detention or imprisonment in the Hemisphere and, using as a basis its work on the subject, to continue making reference to the problems and best practices it observes."¹⁴

B. Underlying principles, fundamental standards and content

16. The core underpinning of this report is the principle of the *presumption of innocence*, which as the IACHR has already established, is the starting point of any analysis regarding the rights and treatment afforded to persons held in pretrial detention.¹⁵ This fundamental right implies, among other things, that when deprivation of liberty is necessary during the course of judicial proceedings, the legal presumption is that the defendant is innocent.¹⁶ The presumption of innocence is perhaps the most elemental of all the judicial guarantees in the context of criminal proceedings, as expressly enshrined without any reservation or exception in several international human rights instruments, such as the Universal Declaration of Human Rights (Article 11.1), the International Covenant on Civil and Political Rights (Article 14.2), the American Declaration (Article XXVI) and the American Convention (Article

¹⁴ OAS, General Assembly Resolution, AG/RES. 2668 (XLI-O/11), approved on June 7, 2011, operative item 3; OAS, General Assembly Resolution, AG/RES. 2592 (XL-O/10), approved on June 8, 2010, operative item 3; OAS, General Assembly Resolution, AG/RES. 2510 (XXXIX-O/09), approved on June 4, 2009, operative item 3; OAS, General Assembly Resolution, AG/RES. 2403 (XXXVIII-O/08), approved on June 13, 2008, operative item 3; OAS, General Assembly Resolution, AG/RES. 2283 (XXXVII-O/07), approved on June 5, 2007, operative item 3; OAS, General Assembly Resolution, AG/RES. 2233 (XXXVI-O/06), approved on June 6, 2006, operative item 3; OAS, General Assembly Resolution, AG/RES. 2125 (XXXV-O/05), approved on June 7, 2005, operative item 11; OAS, General Assembly Resolution, AG/RES. 2037 (XXXIV-O/04), approved on June 8, 2004, operative item 3; and OAS, General Assembly Resolution, AG/RES. 1927 (XXXIII-O/03), approved on June 10, 2003, operative item 3.

¹⁵ IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, Ch. VII, para. 32.

¹⁶ IACHR, *Third Report on the Situation of Human Rights in Paraguay*, OEA/Ser./L/VII.110. Doc. 52, approved on March 9, 2001 (hereinafter "*Third Report on the Situation of Human Rights in Paraguay*"), Ch. IV, para. 33.

8.2).¹⁷ The right to the presumption of innocence is fleshed out more fully under Chapter III of the report.

17. Furthermore, this report is based, as is the *Report on the Rights of Persons Deprived of Liberty in the Americas*, on the following three principles:

(a) *The principle of humane treatment*, under which all persons deprived of liberty shall be treated with unconditional respect for their inherent dignity and fundamental rights.¹⁸ In other words, the imprisonment of an individual should not exceed the restrictions or suffering inherent to being locked up.¹⁹ As the SRT has asserted, “[t]he principle of humane treatment of persons deprived of liberty constitutes the starting point for any consideration of prison conditions and the design of prison regimes.”²⁰ The principle of humane treatment is related to every aspect of the treatment afforded by the State to the persons under its custody, particularly with respect to the conditions of imprisonment and security.

(b) *The principle of the State’s position of guarantor*, under which the State, in depriving persons of their liberty, assumes a position of guarantor of their fundamental rights, particularly of their right to life and to personal integrity. The exercise of the power of custody entails the special responsibility of ensuring that the deprivation of liberty serves its purpose and does not lead to the violation of other basic rights.²¹ In this sense, it is fundamental to meet the basic needs of the prison population, including providing medical services, meals, drinking water, and above all ensuring basic conditions of internal security at prison facilities. This principle is closely tied to the principle of humane treatment.

(c) *The principle of compatibility between respect for the fundamental rights of persons deprived of liberty and the attainment of the aims of citizen security*,²²

¹⁷ IACHR, Report No. 50/00, Case 11.298, Merits, Reinaldo Figueredo Planchart, Venezuela, April 13, 2000, para. 118.

¹⁸ IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, approved by the IACHR under Resolution 1/08 at its 131st regular period of sessions, March 3-14, 2008 (hereinafter “*Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*”), Principle I.

¹⁹ IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, OEA/Ser.L/V/II, adopted on December 31, 2011 (hereinafter “*Report on the Human Rights of Persons Deprived of Liberty in the Americas*”), paras. 66 et seq.

²⁰ UN, Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, Interim Report, A/68/295, published on August 9, 2013, para. 35.

²¹ IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, paras. 8, 46 – 65; IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, Ch. VIII, para. 1.

²² On this topic, the Declaration of Salvador reaffirms “the necessity of respecting and protecting human rights and fundamental freedoms in the prevention of crime and the administration of, and access to, justice, including criminal justice. [...]” and recognizes that “an effective, fair and humane criminal justice system is based on the commitment to uphold the protection of human rights in the administration of justice and the prevention and control of crime.” UN, *Salvador Declaration on Comprehensive Strategies for Global*
Continues...

which means that respect for the human rights of persons deprived of liberty is not at odds with the aims of citizen security, but is instead an essential element for the realization thereof. Citizen security is one dimension of human security and therefore of human development and is linked to the interrelated presence of multiple actors, conditions and factors.²³

18. The IACHR reiterates that the public policies that the Member States of the region put into practice for citizen security should prioritize measures to prevent violence and crime in three categories: (1) *primary prevention*: programs in public health, education, employment and instruction in respect for human rights and building a democratic citizenry; (2) *secondary prevention*: measures focusing on individuals or groups who are more vulnerable to violence and crime; and (3) *tertiary prevention*: individualized measures and programs directed at persons already engaged in criminal conduct.²⁴

19. These measures are especially relevant in light of one of the findings of this report, that increased use of pretrial detention and deprivation of liberty in general is not the right way to realize the aims of citizen security. The Inter-American Commission has found no empirical evidence showing that increased use of pretrial detention leads to decreased rates of crime or violence.

20. The exceptional nature of the use of pretrial detention, based on the criteria of necessity and proportionality, is one element that must be included in any criminal policy that takes into consideration the standards of the Inter-American system. Accordingly, the American Convention establishes a legal order under which “[n]o one shall be subject to arbitrary arrest or imprisonment” (Article 7.3); and any person “shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial” (Article 7.5). The American Declaration also provides that “[e]very individual who has been deprived of his liberty has the right to [...] be tried without undue delay or, otherwise, to be released” (Article XXV). In other words, it is a right of the accused to be on release during the criminal proceeding and therefore this right can only be restricted as an exception and with strict adherence to the provisions of international instruments that provide for such a restriction. This is not a prerogative or a benefit, but instead an established right designed to protect legal interests as fundamental as liberty and even personal integrity.

...continuation

Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World, approved at the Twelfth United Nations Congress on Crime Prevention and Criminal Justice, in Salvador (Brazil), April 12-19, 2010.

²³ IACHR, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II. Doc. 57, adopted December 31 (hereinafter “*Report on Citizen Security and Human Rights*”), 2009, para. 2.

²⁴ IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, para. 10; IACHR, *Report on Citizen Security and Human Rights*, para. 155.

21. For more than two decades, the bodies of the Inter-American system have interpreted and applied the principles discussed above, establishing the following standards:

(i) pretrial detention should be the exception, not the rule; (ii) the legitimate and permissible purposes of pretrial detention should be of a procedural nature, such as to avoid risk of flight or hampering of the course of proceedings; (iii) consequently, the existence of probable cause of criminal acts is insufficient grounds to order the pretrial detention of a person; (iv) even when there are procedural purposes for it, pretrial detention must be absolutely necessary and proportional, meaning that there should not be any other less restrictive means available to achieve the procedural purpose that is being pursued and that personal liberty should not be disproportionately affected; (v) all of the aforementioned aspects must be grounded in particular facts and not be supported by presumption; (vi) pretrial detention must be issued for the length of time strictly necessary to fulfill the procedural purpose and, therefore, requires periodic review of the elements that supported its application; (vii) holding a defendant in pretrial detention for an unreasonable length of time is tantamount to an anticipated prison sentence; and, (viii) in the case of children and adolescents, the criteria for ordering pretrial detention should be applied with greater rigor, with preference given to the use of other precautionary measures or prosecuting while the accused is at liberty, and, when it is applicable, it must be ordered for the shortest time possible.

22. In the Principles and Best Practices on the Protection of Persons Deprived of Liberty, the Commission reaffirms these fundamental standards concretely as follows:

Preventive deprivation of liberty is a precautionary measure, not a punitive one, which shall additionally comply with the principles of legality, the presumption of innocence, need, and proportionality, to the extent strictly necessary in a democratic society. It shall only be applied within the strictly necessary limits to ensure that the person will not impede the efficient development of the investigations nor will evade justice, provided that the competent authority examines the facts and demonstrates that the aforesaid requirements have been met in the concrete case.

(Principle III.2).

23. As for the contents of this report, Chapter II offers an analysis of pretrial detention in the region, paying particular attention to the reasons why this measure is not used solely on an exceptional basis. It presents a summary of the main determinations issued by the Inter-American Commission and monitoring mechanisms of the universal system, it cites official statistics provided by States on the use of pretrial

detention in their jurisdictions, and it highlights a number of relevant aspects of the situation in several OAS member states.

24. In discussing the reasons for the non-exceptional use of pretrial detention, emphasis is given to criminal justice policies that propose increasing incarceration as a way to solve citizen security problems and which have led to a series of legal reforms that have resulted in a greater use of pretrial detention. On this issue, the report provides examples of specific situations that have arisen in some countries. Reference is also made to threats to the independence of those judicial authorities charged with ordering pretrial detention. These tensions, as is explained, come mostly from high-level public officials in other agencies of the state and in the judicial systems, as well as from the media and public opinion. Chapter II also offers a series of considerations about the high cost that the use of pretrial detention poses for the State, detainees and their families, and society as a whole.

25. Chapter III addresses the international standards applicable to the use of pretrial detention and deals in depth with the right to the presumption of innocence and its practical implications, the principle of exceptionality that should govern the use of this measure, and the criteria of necessity, proportionality, and reasonable duration to which it must be subjected. The only legitimate purposes of pretrial detention are to prevent the accused from fleeing justice or from interfering with the proper course of the proceedings. Chapter III therefore sets out how the bodies of the Inter-American system have referred to certain grounds that are invalid or insufficient, which are in breach of the American Convention even if they are provided for in domestic law. Chapter III also sets forth relevant standards for judicial proceedings in which this measure is ordered, for the right of defense, for the State's duty to provide redress for harm inflicted on detainees in violation of Article 7 of the American Convention, and for the use of pretrial detention in cases involving children and adolescents.

26. Chapter IV covers the State's duty to establish and encourage the use of precautionary measures other than pretrial detention, which means that judges are required to consider ordering those measures and, when relevant, to explain why they would be inadequate in mitigating the potential procedural risks. Chapter IV also explains that the use of non-custodial precautionary measures does not undermine victims' rights and, moreover, is not a synonym of impunity and that, on the contrary, their development and increased use are important elements in modernizing the administration of justice and prison management, in that they would help stabilize the growth of prison populations.

27. Chapter V examines the distinct rights of people in pretrial detention compared to the rest of the prison population. The first one is the right to be kept separate from convicted prisoners and to receive treatment in accordance with the principle of the presumption of innocence. The chapter examines the conditions in which people should be held during their proceedings, particularly those conditions related to guaranteeing the right of defense, contact with family members, the right to vote, and the enforcement of disciplinary measures. Chapter V also analyzes the impact of pretrial detention on prison systems, mainly by increasing inmate numbers, and it

notes that the construction of new detention facilities alone is not an ideal or sustainable solution to this problem.

28. Chapter VI offers observations about managing information related to pretrial detention, in light of the State's duty to keep records of detainees and to ensure transparency in prison operations. The chapter states that the compilation of useful data for analyzing the main issues related to the use of pretrial detention is a strategic element in executing public policies aimed at ensuring a more rational use of this measure. The absence of information translates into an inability to carry out evaluations or to make decisions based on objective parameters.

29. The conclusions in Chapter VII lists the most important issues, in the Commission's view, related to the use of pretrial detention in the region, based on the information analyzed in this report. Emphasis is also placed on the State's duty to adopt comprehensive public policies for prison management, and the elements those policies should include are explored. Finally, the Chapter offers a catalogue of recommendations covering seven basic areas, intended to provide States with tools for ensuring more rational use of pretrial detention and for bringing its application into line with the international obligations States have assumed.

C. Legal framework and methodology

30. This report is to a great extent a continuation or extension of the *Report on the Rights of Persons Deprived of Liberty in the Americas*, in which the IACHR referred to the excessive use of pretrial detention as one of the most serious and widespread problems in the region pertaining to the situation of persons deprived of liberty. In that report, the Commission indicated that this topic, as well as other equally important and complex ones, would be fleshed out further in subsequent studies.²⁵

31. Accordingly, this report is based on the same legal framework as the *Report on the Rights of Persons Deprived of Liberty in the Americas*.²⁶ That framework is rooted in the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"),²⁷ the American Declaration of the Rights and Duties of Man (hereinafter "the American Declaration"),²⁸ and all the other treaties comprising the Inter-American human rights protection body of law. Additionally, analogous treaties of the United Nations system (hereinafter "the Universal System"), to which most of the OAS Member States are parties as well, are taken into consideration.

²⁵ IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, paras. 627-629.

²⁶ IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, paras. 27-37.

²⁷ OAS, *American Convention on Human Rights*, signed in San José, Costa Rica on November 22, 1969, at the Inter-American Specialized Conference on Human Rights.

²⁸ OAS, *American Declaration of the Rights and Duties of Man*, adopted by the Ninth International Conference of American States, in Bogota, Colombia, 1948.

Furthermore, where pertinent, several sources of domestic law of OAS Member States were also considered.

32. Likewise, other relevant international instruments are taken into account, such as the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (hereinafter “the Principles and Best Practices”),²⁹ adopted by the Inter-American Commission in March 2008 in the context of its 131st regular period of sessions; the Standard Minimum Rules for the Treatment of Prisoners (hereinafter “the Standard Minimum Rules”);³⁰ the Basic Principles for the Treatment of Prisoners;³¹ the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;³² and the United Nations Standard Minimum Rules on Non-custodial Measures (Tokyo Rules).³³ Both the Inter-American Commission and the Court have consistently used these instruments as guidelines for the interpretation of the content and scope of the provisions of the American Convention in cases of persons deprived of liberty.

33. As part of the specific methodology used by the IACHR in the process of preparing this report, a questionnaire was developed and sent out to the OAS Member States and to other relevant actors.³⁴ The questionnaire was answered by a total of sixteen OAS Member States:³⁵ Bolivia, Brazil, Chile, Colombia, Costa Rica,

²⁹ IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*.

³⁰ UN, Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, in Geneva in 1955, and approved by the Economic and Social Council in its resolutions 663C (XXIV) of June 31, 1957 and 2076 (LXII) of May 13, 1977.

³¹ UN, Basic Principles for the Treatment of Prisoners, adopted and proclaimed by the General Assembly in its Resolution 45/111, of December 14, 1990.

³² UN, Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, adopted by the UN General Assembly in its Resolution 43/173, of December 9, 1988.

³³ UN, United Nations Standard Minimum Rules on Non Custodial Measures (Tokyo rules), Adopted by the General Assembly in Resolution 45/110, of December 14, 1990.

³⁴ This questionnaire was sent to the OAS Member States between August 24 and 28, 2012, and resent between October 12 and 15 to those States that had not submitted their responses. This questionnaire was also posted on the Web page of the Inter-American Commission in the four official OAS languages. This information is available at: <http://www.oas.org/en/iachr/pdl/reports/questionnaires.asp>.

³⁵ Note of the Permanent Mission of Bolivia to the OAS, No. OEA-CIDH-190-12 of December 6, 2012, sending communication GM-DGAJ-UAJI-3052/12 of November 27, 2012, from the General Directorate of Legal Affairs of the Ministry of Foreign Relations. Note of the Permanent Mission of Brazil to the OAS, No. 15 of January 31, 2013. Note of the Permanent Mission of Chile to the OAS, No. 273 of November 14, 2012, conveying the communication of the Human Rights Directorate of the Ministry of Foreign Relations, dated November 12, 2012. Note of the Permanent Mission of Colombia to the OAS, MPC/OEA No. 1525/2012 of October 2, 2012, forwarding the communication of the Foreign Ministry No. DIDHD/GAPDH No. 1304/633/2012 dated October 1, 2012. Additionally, official information received in the course of the *in loco* visit of the Inter-American Commission from December 3-7, 2012. Note of the Permanent Mission of Costa Rica to the OAS, CROEA No. 12-176 dated November 2, 2012. Note of the Permanent Mission of Ecuador to the OAS, No. 4-2-385/2012 of September 28, 2012, forwarding the “Report on the Status of Preventive Detention in Ecuador,” written by the Ministry of Justice Human Rights and Worship. Note of the Permanent Mission of El Salvador to the OAS, No. 250/2012 of November 21, 2012; and information submitted via e-mail

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Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela, as well as by a significant number of civil society organizations, experts and academic entities.

34. A day-and-a-half-long Regional Meeting of Experts on Pretrial Detention was held, which was attended by fourteen specialists representing the main geographic areas of the region.³⁶ The main objective of this event was to receive specific feedback on the *Recommendations* chapter. The materials presented by the experts were also used as input for this report.

35. Two thematic hearings were held on the topics addressed in the report, one of a general nature on the “Use of pretrial detention in the Americas,” during the course of the IACHR’s 146th session;³⁷ and the other one on “Judicial independence and preventive prison in the Americas,” during the 147th session.³⁸ The information received at these hearings also provided important input in this work.

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to the Rapporteurship on October 10, 2013. Memorandum from the Ministry of Foreign Relations of Guatemala No. 350-000709-12, classification DDHH/Sub-CCPP of November 8, 2012, conveying note of the Presidential Commission on Human Rights (COPREDEH), No. DE-999-2012/COMC/MR/hc of November 5, 2012. Official Letter from the General Directorate of Special Affairs of the Secretariat of Foreign Relations No. 1219-DGAE-12 of November 6, 2012, forwarding official letter of the Office of the Attorney General of the Republic No. SPA-A-161-2012 of November 6, 2012. Additionally, official information received by the Rapporteurship on Persons Deprived of Liberty on its visit to Honduras from August 1 to 2, 2013. Note of the Permanent Mission of Nicaragua to the OAS, of February 12, 2013, conveying the report titled “Situation of Information with Regard to the Application of Preventive Detention” drafted by the Office of the Attorney General of the Republic. Note of the Permanent Mission of Panama to the OAS, PANA-OEA-9-842 of November 15, 2012, forwarding note of the Ministry of Foreign Relations A.J.D.H. No. 363 of November 15, 2012. Note of the Permanent Mission of Paraguay to the OAS, No. 583-12/MPP/OEA. Note of the Office of the Permanent Representative of Peru to the OAS No. 7-5-M/451 of September 28, 2012, forwarding official letter of the Office of the Special Supranational Prosecutor of the Ministry of Justice and Human Rights No. 213-2012-JUS/PPEP of September 28, 2012; and supplementary information submitted by means of note of the Office of the Permanent Representative of Peru to the OAS No. 7-5-M/462 of October 10, 2012, submitting report of the Executive Secretariat of the National Council of Human Rights No. 2012-JUS-DGDH-DVC. Note of the Permanent Mission of Suriname to the OAS, No. PVOAS/942/12/NB/CE of November 28, 2012. Note of the Permanent Mission of the Eastern Republic of Uruguay to the OAS No. 119/2012 of October 23, 2012, forwarding the report of the Directorate for Human Rights and Humanitarian Rights of the Ministry of Foreign Relations, drafted on the basis of input from the Prison Advisory Office of the Ministry of the interior and the Office of the Clerk of the Supreme Court of Justice. Note of the Agent of the State for Human Rights before the Inter-American and International Human Rights System dated October 2, 2012.

³⁶ Summary of the meeting, the audio of the discussion panels, the submissions of the guest experts and other materials are available at: <http://www.oas.org/es/cidh/ppl/actividades/prisionpreventiva.asp>.

³⁷ IACHR, Thematic Hearing: *Use of pretrial detention in the Americas*, 146th Regular Period of Sessions, organized by the Due Process of Law Foundation, DeJusticia, Legal Defense Institute and others. November 1, 2012, available at: <http://www.oas.org/es/cidh/audiencias/Hearings.aspx?Lang=en&Session=129>.

³⁸ IACHR, Thematic Hearing: *Judicial independence and preventive prison in the Americas*, 147th Regular Period of Sessions, organized by the Due Process of Law Foundation, the Institute of Law and Society (CIDES), the Institute of Legal Defense (IDL) and DeJusticia, on March 16, 2013, available in Spanish at: <http://www.youtube.com/watch?v=VlBgytTVoNo&list=PLkh9EPeUx2st1-lW6cr0o3oH9DxBSDc&index=1>.

36. In addition to these specific activities, any and all information received or obtained by the IACHR and its Rapporteurship on the Rights of Persons Deprived of Liberty (hereinafter “the Rapporteurship on Persons Deprived of Liberty” or “the Rapporteurship of PDL”) was taken into consideration for the drafting of this report. Information obtained through the different United Nations mechanisms, whose mandate is related to the subject matter of this study was also considered relevant, particularly the reports on the visits to the countries of the region.

D. Scope of the concept of pretrial detention and terminology

37. The Inter-American Commission understands by “pretrial or preventive detention,” the whole period of deprivation of liberty of a suspected offender ordered by a judicial authority and prior to a final judgment.

38. Additionally, in this report, the following terms are used:

- (a) “Detained person or detainee” refers to any person deprived of liberty under criminal charges, except as a result of a conviction.
- (b) “Imprisoned person or prisoner” refers to any person deprived of liberty as the result of a conviction.
- (c) “Person deprived of liberty,” “person in custody” or “inmate” refers generically to any person deprived of liberty in either of the aforementioned situations; these terms broadly refer to persons subject to any form of confinement or imprisonment.

II. ANALYSIS OF THE USE OF PRETRIAL DETENTION IN THE REGION

A. Recent monitoring by the IACHR and by Universal System mechanisms

39. Historically, and particularly in performing its monitoring mandate, the Inter-American Commission has consistently referred to the excessive use of pretrial detention as one of the main problems affecting the respect for the human rights of persons deprived of their liberty in the Americas.

40. Over the past fifteen years, the IACHR has addressed this problem in special country reports related to: Honduras, where it noted that in June 2012 there were a total of 11,727 persons deprived of their liberty, of whom 47.98% were still being tried;³⁹ Venezuela, where it discovered, through a range of sources including official data, that of the approximately 21,877 people deprived of their liberty in 2009, more than 65% had not been convicted;⁴⁰ Haiti, where it observed that in April 2007, the prison population totaled 5,480 inmates, of whom 85% were awaiting trial,⁴¹ with a similar percentage also observed in November 2004;⁴² Bolivia, where it reported that 74% of a total of 6,864 inmates in 2006 were being held in pretrial detention,⁴³ a figure that by 2008 had risen to 75%, as recorded in the follow-up report;⁴⁴ Guatemala, where it noted that between 1999 and 2000, two-thirds of the total prison population, at that time numbering slightly more than 8,200 people, were awaiting trial;⁴⁵ Paraguay, which in 1998 had a total of 2,266 inmates, of whom 93% were being held without a final judgment;⁴⁶ Peru, where according to official figures for February 2000, pretrial detainees accounted for 52% of a total of more than 27,500 people deprived of their liberty;⁴⁷ the Dominican Republic, where a proportion of 85% prisoners without

³⁹ IACHR, *Report of the Inter-American Commission on Human Rights on the Situation of Persons Deprived of Liberty in Honduras*, OEA/Ser.L/V/II.147, adopted March 18, 2013 (hereinafter "*Report of the Inter-American Commission on Human Rights on the Situation of Persons Deprived of Liberty in Honduras*"), para. 19.

⁴⁰ IACHR, *Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II Doc. 54, adopted December 30, 2009, paras. 859 and 860.

⁴¹ IACHR, *Observations of the Inter-American Commission on Human Rights upon Conclusion of its April 2007 Visit to Haiti*, OEA/Ser.L/V/II.131, adopted March 2, 2008, para. 36.

⁴² IACHR, *Haiti: Failed Justice or the Rule of Law? Challenges Ahead for Haiti and the International Community*, OEA/Ser.L/II.123, Doc. 6 rev. 1, adopted October 26, 2005, Ch. III, para. 165.

⁴³ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*, OEA/Ser.L/V/II Doc. 34, adopted June 28, 2007, Ch. III, para. 190.

⁴⁴ IACHR, *Follow-up Report: Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*, OEA/Ser.L/V/II.135 Doc. 40, adopted August 7, 2009, Ch. V, para. 104.

⁴⁵ IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, Ch. VII, para. 26 and Ch. VIII, para. 10.

⁴⁶ IACHR, *Third Report on the Situation of Human Rights in Paraguay*, Ch. IV, para. 38.

⁴⁷ IACHR, *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106 Doc. 59 rev., adopted June 2, 2000, Ch. IX, para. 13.

convictions was recorded in June 1997, which, according to the State,, had decreased to 70% in January 1998;⁴⁸ Colombia, where, in late 1997, 45.85% inmates of a prison population of 43,221 had not received convictions;⁴⁹ Mexico, where in mid-1996, of a prison population of approximately 116,000, more than half were being held in pretrial detention;⁵⁰ and Ecuador, which in early 1994 had a prison population of some 9,280 inmates, of whom 70% were awaiting trial or sentencing.⁵¹

41. The excessive use of pretrial detention has also been one of the issues addressed by the IACHR in its analyses of serious human rights situations in the region and, by means of its annual reports, the Commission follows up on the recommendations issued in its country reports (Chapters IV and V). In this context, the IACHR has followed up on this situation in countries such as Venezuela, Haiti, Cuba, Ecuador and Guatemala.⁵² Additionally, the excessive use of pretrial detention in the region has also been addressed on many occasions at the thematic hearings held by the IACHR,⁵³ and it has been a recurring factor in a large number of individual petitions involving claims related to persons deprived of liberty and/or due process.

⁴⁸ IACHR, *Report on the Situation of Human Rights in the Dominican Republic*, OEA/Ser.L/V/II.104 Doc. 49 rev. 1, adopted October 7, 1999, Ch. VI, para. 216.

⁴⁹ IACHR, *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V/II.102 Doc. 9 rev. 1, adopted February 26, 1999, Ch. XIV, para. 15.

⁵⁰ IACHR, *Report on the Situation of Human Rights in Mexico*, OEA/Ser.L/V/II.100 Doc. 7 rev. 1, adopted September 24, 1998, Ch. III, paras. 222 and 229.

⁵¹ IACHR, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96 Doc. 10 rev. 1, adopted April 24, 1997, Ch. VI.

⁵² IACHR, *Annual Report 2011*, OEA/Ser.L/V/II Doc. 69, adopted December 30, 2011, Ch. IV: Venezuela, para. 519; IACHR, *Annual Report 2010*, OEA/Ser.L/V/II Doc. 5 corr. 1, adopted March 7, 2011, Ch. IV: Venezuela, paras. 706 and 836(11); IACHR, *Annual Report 2009*, OEA/Ser.L/II Doc. 51 corr. 1, adopted December 30, 2009, Ch. IV: Haiti, para. 407, and Venezuela, para. 512; IACHR, *Annual Report 2008*, OEA/Ser.L/II.134 Doc. 5 rev. 1, adopted February 25, 2009, Ch. IV: Haiti, paras. 285 and 317(3); IACHR, *Annual Report 2007*, OEA/Ser.L/II.130 Doc. 22 rev. 1, adopted December 29, 2007, Ch. IV: Haiti, paras. 193-197 and 220(2); IACHR, *Annual Report 2006*, OEA/Ser.L/V/II.127 Doc. 4 rev. 1, adopted March 3, 2007, Ch. IV: Haiti, paras. 118 and 220(3) and Venezuela, para. 202; and IACHR, *Annual Report 2002*, OEA/Ser.L/II.117 Doc. 1 rev. 1, adopted March 7, 2003, Ch. IV: Cuba, paras. 34 and 37, Ch. V: Guatemala, paras. 161-164; IACHR, *Annual Report 2001*, OEA/Ser.L/V/II.114 Doc. 5 rev., adopted April 16, 2002, Ch. V: Paraguay, paras. 50-54, Peru, paras. 113 and 114, and Dominican Republic, paras. 56-58; IACHR, *Annual Report 2000*, OEA/Ser.L/V/II.114 Doc. 5 rev., adopted April 16, 2001, Ch. IV: Cuba, para. 54(b); IACHR, *Annual Report 1998*, OEA/Ser.L/V/II.102 Doc. 6 rev., adopted April 16, 1999, Ch. IV: Cuba, paras. 54 and 55, Haiti, paras. 27 and 30, Ch. V: Ecuador, paras. 97-104 and 146; IACHR, *Annual Report 1997*, OEA/Ser.L/V/II.98 Doc. 5, adopted February 17, 1998, Ch. V: Guatemala, para. 31, and Haiti, paras. 16-18.

⁵³ In addition to the two specific hearings organized by the IACHR in connection with this report, the use of pretrial detention was also addressed at other hearings, including: *Situation of Human Rights of Women Deprived of Liberty in Bolivia*, 147th regular period of sessions, organized by the Legal Office for Women (OJM), Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM), Center for Justice and International Law (CEJIL), March 15, 2013; *Situation of Human Rights of Persons Deprived of Liberty in Venezuela*, 147th regular period of sessions, organized by the Venezuelan Prisons Observatory (OVP), March 16, 2013; *Human Rights Situation of Persons Deprived of Liberty in Uruguay*, 144th regular period of sessions, organized by Legal and Social Studies Institute of Uruguay (IELSUR), March 27, 2012; *Human Rights Situation of Persons Deprived of Liberty in Honduras*, 144th regular period of sessions, organized ex officio by the IACHR, State of Honduras appearing, March 26, 2012; *Situation of the Rights of Persons Deprived of Liberty in Mexico*, Continues...

42. Similarly, during its most recent working visits, the Rapporteurship on Persons Deprived of Liberty has paid particular attention to the situation of people held in pretrial detention. For example, in Colombia, it noted that of the total number of 113,884 people deprived of liberty as of December 31, 2012, 30% had not been convicted;⁵⁴ in Uruguay, it reported that of a prison population of 9,067 inmates in June 2011, 65% were still undergoing prosecution;⁵⁵ and in Argentina, it observed that official statistics reported that 61% of the 30,132 people deprived of their liberty in the province of Buenos Aires in March 2010 had not yet received a final sentence, while civil society organizations claimed, on their part, that the real figure was 70%.⁵⁶

43. Based on its direct experience in the field and on its monitoring of the region's human rights situation in recent years, the Inter-American Commission has identified the following causes for the high rates of detainees being held without a conviction: judicial delays and backlog, which in turn arise from a series of deeper dysfunctions and structural shortcomings within judicial systems; the lack of operational and technical capacity of police forces and investigation services; the lack of operational capacity, independence, and resources among public defense offices; shortcomings in access to those public defense services; a lack of judicial independence, with judges in some cases refraining from ordering other precautionary measures out of fear of sanctions or removal from their positions, and with others giving in to the pressure of the media; legislation that favors the use of pretrial detention and restricts the access to

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144th regular period of sessions, organized by Document, Analysis, and Action for Social Justice (Documenta), Legal Assistance for Human Rights (ASILEGAL), and the Institute of Human Rights Ignacio Ellacuría, S.J., of the Ibero-American University of Puebla, March 23, 2012; *Situation of the Judiciary in Haiti*, 143rd regular period of sessions, organized by Citizen Action for Respect for Human Rights (ACREDH), October 28, 2011; *Situation of Persons Deprived of Liberty in Venezuela*, 141st regular period of sessions, organized by the Venezuelan Prisons Observatory (OVP), the Human Rights Commission of the Venezuela Lawyers' Federation, and the Center for Justice and International Law (CEJIL), March 29, 2011; *Human Rights Situation of Persons Deprived of Liberty in the Province of Buenos Aires*, 141st regular period of sessions, organized by CELS and the Memory Commission of the Province of Buenos Aires, March 28, 2011; *Human Rights Situation of Persons Deprived of Liberty in the Province of Buenos Aires*, 134th regular period of sessions, organized by the Legal and Social Studies Center (CELS), March 24, 2009; *Prison Situation in Buenos Aires*, 124th regular period of sessions, organized by the Legal and Social Studies Center (CELS) and the Provincial Commission for Memory, March 6, 2006; *Situation of People Deprived of Liberty in El Salvador*, 124th regular period of sessions, organized by FESPAD, CEJIL, and Judges' Forum, March 3, 2006; *Situation of the Prison System in Guatemala*, 124th regular session, organized by the Guatemalan Institute of Comparative Criminal Science Studies, March 6, 2006; *Situation of People in Preventive Detention in Terrorism Cases*, 122nd regular period of sessions, organized by CEAS, APRODEH, and Carolina Loayza, February 28, 2005. Audio and/or video recordings of the hearings held by the IACHR since 2007 are available at: <http://www.oas.org/es/cidh/audiencias/default.aspx?lang=en>.

⁵⁴ IACHR, *Truth, Justice and Reparation: Fourth Report on the Situation of Human Rights in Colombia*, 2013, Ch. VI(G).

⁵⁵ IACHR, Press Release 76/11 – IACHR Recommends Adoption of a Comprehensive Public Policy on Prisons in Uruguay. Washington, D.C., July 25, 2011, Annex, available at http://www.oas.org/en/iachr/media_center/PReleases/2011/076.asp, para. 39.

⁵⁶ IACHR, Press Release 64/10 – IACHR Rapporteurship Confirms Grave Detention Conditions in Buenos Aires Province, Washington, D.C., June 21, 2010, available at: <http://www.cidh.oas.org/Comunicados/English/2010/64-10eng.htm>.

alternative measures; the absence of mechanisms for implementing alternative measures; the inversion of the burden of proof, with which it falls to the accused to provide that pretrial detention should not be ordered; deep-rooted judicial paradigms and practices that favor pretrial detention over other measures; corruption; the widespread use of this exceptional measure in cases of minor offenses; and extreme difficulties in revoking it once it has been ordered.

44. Consequently, the Inter-American Commission has presented States with the following concrete recommendations: take the necessary steps to correct procedural delays and strengthen justice systems; adopt precautionary measures other than imprisonment in the pretrial phase; ensure that judicial authorities duly ground their orders for pretrial detention, in strict compliance with the maximum legal duration and in accordance with international standards, and to review those decisions periodically, ensuring that the reasons on which the pretrial detention was based continue to exist; ensure that people facing prosecution have effective judicial remedies to challenge pretrial detention orders; establish effective and accessible public defense systems; introduce the statutory amendments necessary to limit the use of such measures, particularly when nonviolent and less serious offenses are involved; promote an authentic change of paradigm and attitudes to the applicability of and need for pretrial detention; and take the necessary steps to ensure the independence of the judiciary, and the independence and autonomy of public defense services.

45. The Inter-American Commission has observed that measures intended to reduce the high numbers of people held in pretrial detention should address the implementation of controls over its use and seek to expedite criminal cases. It has also held that notwithstanding such circumstantial or creative actions that States may adopt, resolving this problem demands the adoption of serious legal and institutional reforms, arising from public policies that are geared toward that goal. Moreover, the IACHR has considered it essential that convicts and pretrial detainees be held separately, and that the latter group receive a treatment that is in line with the presumption of innocence.

46. Likewise, those United Nations mechanisms that monitor the situation of people deprived of liberty and, in particular, conduct oversight visits, have also addressed the high numbers of persons in pretrial detention in the OAS member States and the conditions in which they are held.

47. During its March 2013 visit to Brazil, the Working Group on Arbitrary Detention noted that of a total prison population of some 550,000 people – one of the highest in the world – approximately 217,000 inmates were being held pending trial;⁵⁷ in El Salvador, in January 2012, it reported that of a total of more than 25,400 people deprived of liberty, 7,376 were in pretrial detention, and 970 of them had been there

⁵⁷ UN, Working Group on Arbitrary Detention, *Statement upon Conclusion of its Visit to Brazil (18 to 28 March 2013)*, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13197&LangID=E>.

longer than the maximum duration allowed for by law;⁵⁸ in Colombia, in October 2008, it found that 35% of the 69,600 people deprived of liberty were awaiting trial;⁵⁹ in Honduras, in late 2005 and early 2006, it noted that approximately 62% of a total of more than 12,000 prison inmates had not been sentenced;⁶⁰ and in Ecuador, in early 2006, it observed a total prison population of 12,693, of whom more than 64% were awaiting trial.⁶¹ In previous years, the WGAD had already spoken of the excessive use of pretrial detention following visits to Canada, Argentina, and Peru.⁶²

48. Similarly, the Committee Against Torture, the Subcommittee on the Prevention of Torture, and the Special Rapporteur on torture have spoken of other problems related to the treatment given to people in pretrial detention, including lengthy periods of detention at police stations or precincts, the failure to keep them separate from convicts, and the causal effect that exists between the non-exceptional use of pretrial detention and overcrowding.

49. Furthermore, over the past decade, in the context of its regular examination of compliance with the rights enshrined in the International Covenant on Civil and Political Rights (pursuant to Art. 40 of the Covenant), the Human Rights Committee has expressed concern regarding the excessive and prolonged use of pretrial detention and the failure to separate pretrial detainees from convicts in the following countries: Paraguay (2013 and 2006), El Salvador (2010), Colombia (2010), Argentina (2010), Panama (2008), Costa Rica (2007), Honduras (2006), Brazil (2005), Suriname (2004), and El Salvador (2003).⁶³

⁵⁸ UN, Working Group on Arbitrary Detention, *Report on Mission to El Salvador*, A/HRC/22/44/Add.2, published January 11, 2013, paras. 68 and 97.

⁵⁹ UN, Working Group on Arbitrary Detention, *Report on Mission to Colombia*, A/HRC/10/21/Add.3, published January 16, 2009, para. 79.

⁶⁰ UN, Working Group on Arbitrary Detention, *Report on Mission to Honduras*, A/HRC/4/40/Add.4, published December 1, 2006, para. 54.

⁶¹ UN, Working Group on Arbitrary Detention, *Report on Mission to Ecuador*, A/HRC/4/40/Add.2, published October 26, 2006, paras. 67 and 69.

⁶² UN, Working Group on Arbitrary Detention, *Report on Missions to: Canada*, E/CN.4/2006/7/Add.2, published December 5, 2005; *Argentina*, E/CN.4/2004/3/Add.3, published December 23, 2003 (during that visit, conducted in September and October 2003, it reported that in the province of Buenos Aires there were 2,380 convicted inmates and 21,449 in pretrial detention, para. 40); and *Peru*, E/CN.4/1999/63/Add.2, published January 11, 1999.

⁶³ UN, Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Conclusions and Recommendations of the Human Rights Committee: Paraguay, CCPR/C/PRY/CO/3, published April 29, 2013, para. 20 (indicating that almost 70% of Paraguay's prison inmates have not been sentenced or convicted); El Salvador, CCPR/C/SLV/CO/6, published November 18, 2010, paras. 15 and 16; Colombia, CCPR/C/COL/CO/6, published August 6, 2010, paras. 20 and 21; Argentina, CCPR/C/ARG/CO/4, published March 31, 2010, para. 16; Panama, CCPR/C/PAN/CO/3, published April 17, 2008, para. 12; Costa Rica, CCPR/C/CRI/CO/5, published November 16, 2007, para. 8; Honduras, CCPR/C/HND/CO/1, published December 13, 2006, para. 14; Paraguay, CCPR/C/PRY/CO/2, published April 24, 2006, paras. 15 and 16; Brazil, CCPR/C/BRA/CO/2, published December 1, 2005, para. 16; Suriname, CCPR/CO/80/SUR, published May 4, 2004, paras. 14 and 15; and El Salvador, CCPR/CO/78/SLV, published August 22, 2003, para. 17.

50. Over the past fifteen years, the Universal System mechanisms have also noted that the high rates of pretrial detention are the result of factors such as the trend to use it as the first alternative; legal restrictions on precautionary measures other than pretrial detention for certain offenses; judges' reluctance to order alternative measures, even when provided by law; the institutional weaknesses of public defense services, and their lack of independence; barriers to access public defense services; shortcomings in the decision process prior to which pretrial detention is applied, particularly with respect to the right to be heard with due guarantees; the absence of effective judicial remedies to challenge illegal or arbitrary pretrial detention orders; the widespread use of the measure in cases involving minor offenses; pressure on judges from the media and from other State agencies; structural shortcomings in judicial systems, particularly judicial delays; and "hard line" criminal justice policies.

51. UN mechanisms have also regularly issued the following recommendations to the region's States: use pretrial detention only when there are no other means to ensure the appearance of the accused at trial or to prevent tampering with evidence; interpret restrictively the circumstances in which pretrial detention can legally be ordered; review the laws and judicial practices to ensure that the measure is used only in exceptional cases and for the shortest time possible; implement other precautionary measures, such as bail, house arrests, or electronic bracelets; review laws restricting judges' power to order measures other than pretrial detention; ensure that decisions ordering pretrial detention are taken after a substantive analysis of the case and not merely a formal review; ensure that the conditions in which pretrial detainees are held are in line with international standards; ensure that detainees enjoy the possibility to prepare their defense at trial, as well as the necessary conditions to do so; and strengthen the operational capacities of the authorities responsible for criminal investigations (public prosecutors).

B. Statistics submitted by the States

52. As noted in the introduction, in the context of this report, a questionnaire was sent to the OAS member States asking them for information on several issues related to the use of pretrial detention in their jurisdictions, including data on the percentage of the total prison population held in pretrial detention, disaggregated by sex and by type of crime (Question No. 2). The information furnished by the States that responded the questionnaires is the following:⁶⁴

⁶⁴ Sources: Bolivia (not specified), Brazil (Infopen statistics, National Penitentiary Department of the Ministry of Justice – Depen/MJ), Chile (daily reports of prison population, Gendarmerie of Chile), Colombia (consolidated statistics, National Penitentiary Institute of Colombia, INPEC), Costa Rica (SIAP, Penitentiary Administration Information System), Ecuador (Ministry of Justice, Human Rights, and Worship), Guatemala (Penitentiary System Directorate, MINGOB), Honduras (Directorate of Special Preventive Services of the Secretariat of Security), Panama (Department of Statistics of the Interior Ministry's Directorate of Administration and Finance), Paraguay (General Directorate of Penitentiary Establishments and Execution of Criminal Penalties), Peru (statistical reports of the National Penitentiary Institute, INPE), Uruguay (Directorate of Statistics and Strategic Analysis of the Interior Ministry), Venezuela (Coordination Unit for Public Defense Procedural Actions).

Table 1: General proportion of people in pretrial detention

State	Number of people deprived of liberty	Number / percentage of pretrial detainees	Number / percentage of convicts	Date of information
Bolivia ⁶⁵	13,654	11,410 (84%)	2,244 (16%)	October 2012
Brazil ⁶⁶	549,577 (508,357 in the custody of the Penitentiary System and 41,220 held by states judicial police forces (Public Security Secretariats))	191,024 (37.6%) (Of the 508,357 held by the Penitentiary System)	317,333 (62.4%) (Of the 508,357 held by the Penitentiary System)	June 2012
Chile	53,171	10,823 (20.4%)	42,348 (79.6%)	July 31, 2012
Colombia	113,884	34,571 (30.35%)	79,313 (69.65%)	December 31, 2012
Costa Rica	13,017	3,248 (25%)	9,769 (75%)	October 2012
El Salvador	26,883	6,459 (24%)	20,424 (76%)	October 8, 2013
Ecuador	19,177 (At penal facilities managed by the Ministry of Justice and Human Rights ⁶⁷)	9,409 (49%) (8,630 awaiting trial, 377 misdemeanor offenders, 402 with constraining measures)	9,768 (51%) (4,732 with enforceable judgments (25%), and 5,036 in appeals or modification)	August 1, 2012
Guatemala	14,635	7,357 (50.3%)	7,278 (49.7%)	October 2012
Honduras	12,407	6,064 (48.9%)	6,343 (51.1%)	April 2013
Nicaragua	9,168	1,127 (12.3%)	8,041 (87.7%)	December 31, 2012

⁶⁵ The Bolivian State presented a departmental breakdown of this information, with the following numbers for “pretrial detention” and “convicted”: Santa Cruz (pretrial detainees 4,418 / convicted 658: total 5,076), Beni (557/197:754), Oruro (369/125:494), Potosí (420/91:511), Pando (166/79:245), Sucre (238/109:347), La Paz (2,784/359:3,143), Cochabamba (1921/354:2,275), and Tarija (205/310:515).

⁶⁶ The Brazilian State also reported that, according to the Department of Monitoring and Oversight of the National Justice Council (CNJ), as of January 1, 2013, the country had a total of 502,067 prison inmates, of whom 193,073 (38%) were in pretrial detention.

⁶⁷ The Ecuadorian State also indicated that there was a total of 1,310 pretrial detainees housed at temporary detention centers under the administration of the National Police.

State	Number of people deprived of liberty	Number / percentage of pretrial detainees	Number / percentage of convicts	Date of information
Panama	14,521	9,443 (65%) (In proceedings under the Public Prosecution Ministry: 5,592; in proceedings under the Judiciary: 3,135; Other: 716)	5,078 (35%) (Convicted of Crimes: 4,421 Convicted of Misdemeanors: 339)	October 2012
Paraguay	7,901	5,780 (73.1%)	2,126 (26.9%)	September 23, 2012
Peru	58,681	34,508 (58.8%)	24,173 (41.2%)	July 31, 2012
Uruguay	9,330	6,065 (65%)	3,265 (35%) Judgment 1 st instance: 535 Judgment 2 nd instance: 2,924	July 31, 2012
Venezuela ⁶⁸	36,236	18,735 (52%)	17,501 (48%)	End of first half of 2012. These figures specifically cover those inmates assisted by the public defense system.

Table 2: Information disaggregated by sex and by type of crime

State	Information by sex and type of crime
Bolivia	Of a total 13,654 people deprived of liberty: 11,930 were men (87%) and 1,724 were women (13%). The most common crimes among men were theft (25%), drug offenses (24%), and rape (19%); among the women, the most common crimes were drug offenses (48%) and theft (15%).

⁶⁸ The statistical information provided by the Venezuelan State in this section specifically covers those inmates assisted by the public defense system.

State	Information by sex and type of crime
Brazil ⁶⁹	<p>Of the 549,577 total people deprived of liberty in the country, 513,538 (93.4%) were men and 36,039 (6.6%) were women, and of the 191,024 total people in pretrial detention within the Penitentiary System, 180,038 (94.25%) were men and 10,986 (5.75%) were women. The following were the most common crimes among the general prison population in terms of the number of convictions:</p> <ul style="list-style-type: none"> ▪ Narcotic trafficking (not international): 127,149 (110,965 men / 16,184 women) ▪ Aggravated robbery: 94,447 (92,602 men / 1,845 women) ▪ Simple robbery: 48,216 (47,216 men / 1,000 women) ▪ Simple theft: 35,769 (34,526 men / 1,243 women) ▪ Aggravated theft: 36,671 (35,608 men / 1,063 women) ▪ Aggravated homicide: 34,463 (33,536 men / 927 women).
Chile	<p>Of the 10,781 people in pretrial detention as of July 31, 2012, 9,464 (87.8%) were men and 1,317 (12.2%) were women. According to the data as of June 30, 2012, the main crimes for which people were held in pretrial detention were theft (35.4%) and drug offenses (31.4%). Among men, these crimes broke down as 38% theft / 26.7% drugs, while among women the ratio was 14.5% theft / 68.8% drugs. The State also indicated that the average duration of pretrial detention was 145.3 days: 120 days among women, and 170.5 days among men.</p>
Colombia	<p>Of a total 113,884 people deprived of their liberty as of December 31, 2012, 105,387 (92.54%) were men and 8,497 (7.46%) were women. Of the total 34,571 people awaiting trial, 32,114 (92.9%) were men and 2,457 (7.1%) were women. The most common crimes among prison inmates awaiting trial were:</p> <ul style="list-style-type: none"> ▪ Theft: men 8,397 (95%) / women 445 (5%), total 8,842. ▪ Trafficking or bearing firearms or ammunition: men 7,114 (96%) / women 271 (4%), total 7,385. ▪ Homicide: men 6,140 (96%) / women 253 (4%), total 6,393. ▪ Trafficking, manufacturing, or possession of narcotics: men 4,961 (82%) / women 1,046 (18%), total 6,027.
Costa Rica	<p>In October 2012, of a total 3,248 pretrial detainees, 3,087 (93.5%) were men and 211 (6.5%) women. This total number of people facing criminal prosecution breaks down as follows regarding the four most common kinds of crime:</p> <ul style="list-style-type: none"> ▪ Crimes against property: men 1,191 (96.8%) / women 39 (3.2%), total 1,230 ▪ Drug-related offenses: men 884 (87.5%) / women 126 (12.5%), total 1,010 ▪ Crimes against life: men 435 (95%) / women 23 (5%), total 458 ▪ Sex offenses: men 250 (98.4%) / women 4 (1.6%), total 254.
Ecuador	<p>Of the total 19,177 people deprived of liberty under the authority of the Ministry of Justice and Human Rights as of August 1, 2012, men accounted for 17,615 (91.8%) and women for 1,562 (8.2%).</p>

⁶⁹ The Brazilian State also provided information on the age ranges of its prison system inmates. Of the total 508,357 inmates, the age breakdown is as follows: 18-24 years (131,333 men / 7,030 women); 25-29 years (115,409 men / 6,382 women); 30-34 years (85,487 men / 5,295 women); 35-45 years (76,999 men / 6,207 women); 46-60 years (28,014 / 2,728); over 60 (4,520 men / 294 women); not specified (6,584 men / 568 women). In addition, of this total population in the custody of the Penitentiary System, 5.5% are illiterate, 13% are literate, and 45% began but did not complete primary education.

State	Information by sex and type of crime
Guatemala	Of the total 14,635 people deprived of liberty at Guatemala's 22 detention centers in October 2012, 13,415 (91.7%) were men and 1,220 (8.3%) were women.
Honduras	Of the total 12,407 people deprived of liberty in April 2013, 11,950 (96%) were men and 457 (4%) were women.
Nicaragua ⁷⁰	Of the total 9,186 people deprived of liberty as of December 31, 2012, 8,718 (95%) were men and 450 (5%) were women. Similarly, of the total 1,127 in pretrial detention, 1,096 (97.2%) were men and 31 (2.8%) were women. This total number of people facing criminal prosecution breaks down as follows regarding the four most common kinds of crime: <ul style="list-style-type: none"> ▪ Crimes against property and the socio-economic order: men 267 (99%) / women 2 (1%), total 269. ▪ Crimes against physical integrity: men 200 (99.5%) / women 1 (0.5%), total 201. ▪ Drug-related offenses: men 154 (89.5%) / women 18 (10.5%), total 172. ▪ Crimes against sexual integrity: men 117 (98.3%) / women 2 (1.7%), total 119.
Panama	Of the total 14,521 people deprived of their liberty in October 2012, 13,500 (93%) were men and 1,021 (7%) were women; and, of the total of 9,443 pretrial detainees, 8,745 (93%) were men and 698 (7%) were women.
Paraguay	Of a total 7,901 people deprived of liberty as of September 23, 2012, men accounted for 7,374 (93.3%) and women for 528 (6.7%). Similarly, of the 5,780 total pretrial detainees, 5,379 (93.1%) were men and 401 (6.9%) were women.
Peru	Of a total of 58,681 people deprived of liberty as of July 31, 2012, 54,962 (93.7%) were men and 3,719 (6.3%) were women. Similarly, of the 34,508 total pretrial detainees, 32,190 (93.3%) were men and 2,318 (6.7%) were women. The most common crimes among the general prison population (pretrial detainees and convicts) were: <ul style="list-style-type: none"> ▪ Aggravated robbery: 16,391 (27.9%) ▪ Illegal drug trafficking: 8,818 (15%) ▪ Rape: 5,049 (8.6%) (These offenses account for more than half of the prison population: 51.5%)
Uruguay	Of a total 6,065 people in pretrial detention as of July 31, 2012, men accounted for 5,588 (92.1%) and women for 477 (7.86%). Uruguay also reported that 1,120 people throughout the country had been in pretrial detention for 24 months or more as of that date.
Venezuela	Of a total 18,735 people in pretrial detention and assisted by the Public Defense Service, 95% were male and 5% were female. Among those people, the most common criminal offenses were: <ul style="list-style-type: none"> ▪ Crimes against property: 40% (with "theft" accounting for 28% of that percentage) ▪ Drug-related offenses: 27% ▪ Crimes against people: 26%

⁷⁰ The Nicaraguan State also provided information on the age breakdown of pretrial detainees. Thus, of a total of 1,127 awaiting trial, the age groups were as follows: 15-18 years (2 men / 0 women); 18-21 years (259 men / 3 women); 21-35 years (357 men / 19 women); 35-50 years (271 men / 4 women); 50-70 years (203 men / 5 women); and 70 and over (4, all men). In addition, it is noteworthy that of the 419 women convicts, 264 were found guilty of drug-related offenses.

C. Significant general issues within the regional overview

53. In addition to the official information provided by the States in response to the questionnaire referred to above, the Inter-American Commission also received a wealth of information from other stakeholders relevant to this topic, either in response to the questionnaire or as part of the other activities carried out in preparing this report. Accordingly, the following are highlighted as issues of relevance in connection with the situation of persons deprived of liberty in the region:

54. In the case of Argentina, at the national level, the most recent statistics available date from 2010. According to those figures, of a total of 59,227 people deprived of their liberty, 31,142 (53%) were being held in pretrial detention.⁷¹ In addition, and given that the Argentine State did not submit a response to the questionnaire, the most recent official information on the province of Buenos Aires available to the IACHR was received directly during the visit by the Rapporteur's office. That information stated that of a total of 30,132 persons deprived of liberty in the province of Buenos Aires in March 2010, official figures indicated that 61% had not received a final judgment. Civil society organizations claimed that the correct figure was 70%.⁷²

55. Within the Federal Penitentiary System (persons deprived of liberty under the Code of Criminal Procedure of the Nation), as of October 19, 2012, there were a total of 9,800 inmates, of whom 45% were convicted and 55% were still awaiting trial. Of those people in pretrial detention, 91% were men and 9% were women. However, of the total of slightly more than 800 women inmates in the federal system on that date, 62% were in pretrial detention. Of the total pretrial detainees in the federal prison system in 2011, 39% were being held for crimes against property, 39% for drug offenses (Law 23.373), 7% for crimes against people, and the remainder for other offenses.⁷³

56. In general terms, of the 24 jurisdictions in Argentina, only the provinces of Chubut, Río Negro, Entre Ríos, Neuquén, and Tierra del Fuego have ratios

⁷¹ Response to the questionnaire for the IACHR's *Thematic Report on Pretrial Detention in the Americas*, November 2, 2012, National Prison Ombudsman's Office (PPN). Figures from: the National System on Sentence Execution Statistics (SNEEP), produced by the National Directorate of Criminal Policy for Justice and Criminal Law of the federal Ministry of Justice and Human Rights.

⁷² IACHR, Press Release 64/10 – IACHR Rapporteurship Confirms Grave Detention Conditions in Buenos Aires Province. Washington, D.C., June 21, 2010, available in Spanish at: <http://www.cidh.oas.org/Comunicados/Spanish/2010/64-10sp.htm>. With respect to this, the Argentine State indicated in its response to the questionnaire for the *Report on the Human Rights of Persons Deprived of Liberty in the Americas* that of the 26,000 inmates housed in the prison system of the province of Buenos Aires, 10,000 had received final sentences (38%) and that, of those still at trial (16,000), 30% (around 5,000) had received a first-instance judgment. Response received by means of notes Nos. 203 and 258 of 2010 from the Permanent Mission of Argentina to the OAS. Report of May 11, 2010, presented by the Minister of Justice of the Province of Buenos Aires.

⁷³ Response to the questionnaire for the IACHR's thematic *Report on Pretrial Detention in the Americas*, Public Defenders Office, November 1, 2012. The statistics for October 19, 2012, are from the "Weekly Summary of General Prison Population Housed in the Federal Penitentiary Service."

of approximately between 70% and 80% of convicted prison inmates compared to 20% to 30% of inmates in pretrial detention.⁷⁴ It is worth noting that the province of Chubut succeeded in turning around its ratio of pretrial detainees to convicts: it currently has 20% of its inmates in pretrial detention compared to 78% of convicts, with a similar breakdown of offenses to that reported by other provinces (murders accounting for 45% of the cases, theft for 27.5%, and sex crimes for 20.5%). This specific situation in Chubut can be attributed to the following factors: (a) laws that make pretrial detention the remedy of last resort and offer an array of different measures that are actually used as alternatives to incarceration; (b) the use of oral presentations in proceedings to decide on the applicability of pretrial detention, where the Public Prosecution Service must show that the legal requirements have been met; (c) the public defender conducts an analysis of the personal conditions of the accused, confirms the information obtained, and presents it to the judge at the hearing, and the decision is based on that information, not on the criminal record, recidivism, or applicable punishment; and (d) the periodic reviews of measures that have been applied. Clearly, this set of elements indicates a cultural shift in the application of pretrial detention.⁷⁵

57. Bolivia is one of the countries in the region with the highest proportion of pretrial detainees,⁷⁶ as the State itself acknowledged in its reply to the questionnaire: “[i]n accordance with international standards, Bolivian criminal law treats pretrial detention as an ‘exceptional’ measure; however, in practice it continues to be the rule and the basis for criminal prosecution.”⁷⁷ Bolivia’s total prison population – and, consequently, the number of people held in pretrial detention – has grown constantly over recent years and has almost trebled since the start of the millennium. In 2001, the

⁷⁴ Institute of Comparative Criminal and Social Science Studies (INECIP), *The State of Pretrial Detention in Argentina – Current situation and proposals for reform (El Estado de la Prisión Preventiva en la Argentina – Situación actual y propuestas de cambio)*, Buenos Aires, 2012, p. 48.

⁷⁵ Institute of Comparative Criminal and Social Science Studies (INECIP), *The State of Pretrial Detention in Argentina – Current situation and proposals for reform (El Estado de la Prisión Preventiva en la Argentina – Situación actual y propuestas de cambio)*, Buenos Aires, 2012, pp. 66 and 67.

⁷⁶ More than a mere statistic, that is a reality that affects thousands of people in a direct and concrete way – occasionally, in a patently abhorrent manner, such as the case of Mr. Luis Córdoba Marca, who was held in prison for more than 21 years without being sentenced. See *El Deber, Luis was in prison for 21 years without knowing why (Luis pasó 21 años de su vida en la cárcel sin saber por qué)*, July 18, 2013, available in Spanish at: <http://www.eldeber.com.bo/luis-paso-21-anos-de-su-vida-en-la-carcel-sin-saber-por-que/130717221729>. On August 23, 2013, a serious violent incident occurred at the Palmasola Prison, in which 33 inmates died. Of the fatalities, only two had been sentenced, while the other 31 were in pretrial detention. Moreover, of the 5,200 total inmates held at the Palmasola facility, only 400 have received final sentences: in other words, 92% of the prisoners had not been convicted. This information was given to the Rapporteur’s office by the Construir Foundation. The IACHR also addressed this alarming incident in its press release No. 62/13: *IACHR Deplores Violent Deaths in Bolivian Prison*, August 29, 2013.

⁷⁷ The source is the State’s official reply to the questionnaire sent out in preparation for this report. In addition, following the grave violence that occurred at Palmasola Prison on August 23, the President of the Republic publicly acknowledged the current crisis within the Bolivian prison system and stated that the main problems were shortcomings in the justice system and the high proportion of prisoners who had not yet been sentenced. *La Razón, Pardon and Amnesty are Proposed in Response to the Prison Crisis (Proponen indulto y amnistía ante la crisis en las cárceles)*, September 3, 2013, available in Spanish at: http://www.la-razon.com/nacional/seguridad_nacional/Proponen-indulto-amnistia-crisis-carceles_0_1900010020.html.

national prison population was 5,577 inmates, of whom 3,747 (67%) were in pretrial detention,⁷⁸ whereas by 2012 the total had risen to 13,654, of whom 11,410 had not been sentenced. This growth is essentially due to criminal-law reforms that have had a direct impact on incarceration rates, and on serious structural shortcomings within the judicial branch, defense public services, and the prison system itself.⁷⁹

58. One of these structural shortcomings is the rate of hearings that are suspended, and the lack of coordination among the parties involved at trial (absences on the part of judges, prosecutors, defendants, defense attorneys, interpreters, among others). A recent study conducted in the country's four main cities, which together account for 67% of all judicial activity, revealed that "only 30% of planned hearings took place normally on the official days and schedules for court operations; 12% were held on weekends and holidays; 57% were suspended and 1% [...] were held but were not open to the public." This study found that the party at trial with the most absences was the Public Prosecution Ministry, which failed to attend 58% of the suspended hearings. In addition, 11% of all the hearings were held in the absence of the prosecutor, who sent the case files to be read out by the clerk of the court. At the same time, in 22% of the cases, the parties did not attend because they were not notified.⁸⁰ In general, a detainee can wait up to six months for a hearing to try to obtain another precautionary measure, and hearings can be suspended more than seven times.⁸¹

59. Brazil comes second only to the United States among the region's countries with the most people in prison. It had 549,577 in mid-2012, of whom 508,357 were in the penitentiary system and 41,220 were in the custody of state police forces; and, of the total number held by the penitentiary system, 191,024 were in pretrial detention. Between June 2009 and June 2012, the total number of people deprived of liberty increased by 17.04%, the prison population within the penitentiary system by 24.21%, and the number of inmates in pretrial detention by 27.76%. It is also noteworthy that 27.2% of the inmates held in the prison system are between 18 and 24 years old.⁸²

⁷⁸ Construir Foundation, *Criminal Procedure Reform and Pretrial Detention in Bolivia (Reforma Procesal Penal y Detención Preventiva en Bolivia)*, 2012, p. 67.

⁷⁹ In connection with this, see, in general: Construir Foundation, *Criminal Procedure Reform and Pretrial Detention in Bolivia (Reforma Procesal Penal y Detención Preventiva en Bolivia)*, 2012, Chs. 2 and 3. This report concludes, unequivocally, that "a vast number of [criminal] cases are brought to trial, and they outstrip the human capacities of both the Public Prosecution Ministry and the courts system. [...] In 2010 alone, 20,670 formal charges were brought, while the courts across the nation issued only 874 judgments: a proportion equal to 4%" (p. 119).

⁸⁰ Construir Foundation, La Paz Foundation, Capacitación y Derechos Humanos, Progettomondo MLAL, and DNI Internacional, *The Impact of Pretrial Detention in Bolivia (El Impacto de la Prisión Preventiva en Bolivia)*, 2013, pp. 16 and 17. The figures cited cover a total of 591 hearings for precautionary measures monitored by Construir Foundation's observer team in 2012-2013 in the cities of La Paz, El Alto, Cochabamba, and Santa Cruz.

⁸¹ Information presented during the hearing on *Situation of Women Deprived of Liberty in Bolivia*, 147th regular period of sessions, organized by Legal Office for Women (OJM), Committee for Latin America and the Caribbean (CLADEM), Center for Justice and International Law (CEJIL), March 15, 2013.

⁸² Note from the Permanent Mission of Brazil to the OAS No. 15, January 31, 2013.

60. As of December 2012, the city of São Paulo had a prison population of 195,695, of whom 190,828 were in the custody of the penitentiary system; of this number, 62,843 (33%) were in pretrial detention and, of that number, 1,613 (2.6%) were women. In addition, there were another 500 people or so in pretrial detention at state police facilities.⁸³

61. According to the Rio de Janeiro State Mechanism for the Prevention and Combat of Torture, that state's proportion of pretrial detainees is 36% out of a total prison population of some 33,000 people, and the rate with which pretrial detention is used among adolescents stands at 38%. One of the characteristics of the arbitrary use of pretrial detention in that state is the large number of people held for minor offenses ("with a low danger potential"), who can remain awaiting trial for months or even years.⁸⁴ The state of Pará, in the Amazon region, had a total 10,989 inmates in the custody of the prison system at the end of 2012, of whom 5,092 (46.33%) were awaiting trial (4,638 men and 454 women) and 5,897 (53.66%) had already been sentenced.⁸⁵

62. In turn, Chile has one of the comparatively lower percentages of people in pretrial detention (approximately 25%), but has a significantly high rate of incarcerations, with 305 prisoners per 100,000 inhabitants.⁸⁶

63. Regarding Colombia, the Commission has received information indicating that pretrial detention is also used to "coerce people facing trial to cooperate by admitting charges or presenting evidence against other suspects" and that, for that reason, "prosecutors request pretrial detention, even when they do not have sufficient evidence." In other words, incarceration is sometimes used as tool for the investigations.⁸⁷ There is strong pressure from society, the media, and even public

⁸³ Infopen Statistics, National Penitentiary Department of the Ministry of Justice (Depen/MJ), available in Portuguese at: <http://portal.mj.gov.br/main.asp?View=%7BD574E9CE-3C7D-437A-A5B6-22166AD2E896%7D&Team=¶ms=itemID=%7BC37B2AE9-4C68-4006-8B16-24D28407509C%7D;&UIPartUID=%7B2868BA3C-1C72-4347-BE11-A26F70F4CB26%7D>. For a more detailed analysis of the breakdown of pretrial detainees in the city of São Paulo, see: Tecer Justiça: presas e presos provisórios na cidade de São Paulo / Instituto Terra, Trabalho e Cidadania e Pastoral Carcerária Nacional; Heidi Ann Cerneka, José de Jesus Filho, Fernanda Emy Matsuda, Michael Mary Nolan, and Denise Blanes (eds.), São Paulo: ITTC, 2012.

⁸⁴ Response to the questionnaire for the IACHR's thematic *Report on Pretrial Detention in the Americas*, Rio de Janeiro State Mechanism for the Prevention and Combat of Torture, November 2, 2012. Figures from: National Penitentiary Department (DEPEN).

⁸⁵ IACHR Regional Meeting of Experts on Pretrial Detention, May 9 and 10, 2013, presentation by Dr. Ana Claudia Bastos de Pinho, available in Spanish at: <http://www.oas.org/es/cidh/ppl/actividades/prisionpreventiva.asp>. Dr. Bastos de Pinho stated that "Possibly the most serious problem facing the Brazilian prison system is the indiscriminate use of pretrial detention."

⁸⁶ Based on the total figure for people deprived of liberty presented by the State and Chile's estimated total population of 17,402,630 inhabitants as of June 30, 2012. National Statistics Institute of Chile, *Demographic Statistics 1.2*.

⁸⁷ DPLF, *Insufficient Judicial Independence, Distorted Pretrial Detention: The Cases of Argentina, Colombia, Ecuador and Peru*, 2013, p. 98.

authorities regarding the effectiveness of criminal prosecutions in combating crime and impunity.⁸⁸

64. Similarly, the Inter-American Commission has received information indicating that in Costa Rica, over the 2008-2012 period, the occupancy rate within the prison system rose from 101% to 130.1% (in 2008, the system had an installed capacity for 8,140 inmates and the prison population totaled 8,225 people; in 2012, with an installed capacity for 9,803 inmates, the system was housing 12,916 people), with truly alarming levels of overcrowding reported at facilities such as CPI La Reforma (159%) and CPI San José (182%). One of the reasons offered for this increase in inmate numbers in recent years is the rising trend in the use of pretrial detention. Thus, Costa Rica's numbers of pretrial detainees have grown at the following rate: 1,844 in 2007; 1,964 in 2008; 2,413 in 2009; 2,635 in 2010; 3,036 in 2011; and 3,264 in 2012, representing 24.78% of the total prison population that year.⁸⁹

65. In Ecuador, a total of 19,177 persons deprived of liberty was reported as of August 2012: 9,409 (49.1%) facing trial and 9,768 (50.1%) with a sentence, of the latter group, around 4,732 (48.4%) with an enforceable final judgment, accounting for 24.7% of the total prison population. Of the 17,615 male inmates, 25% were deprived of liberty for crimes against property, 21% for drug offenses, and 20% for crimes against persons; and, of the 1,562 women inmates, 61.3% were being held for drug offenses, 16% for crimes against property, and 10% for crimes against persons.⁹⁰ According to the General Public Defender of Ecuador, reducing the frequency with which pretrial detention is used requires paying attention to the following lines of action: (a) giving priority to the use of alternative solutions and measures other than pretrial detention, (b) making proper use of precautionary measures, (c) pursuing strategic criminal prosecutions (of complex crimes), (d) ensuring the autonomy and institutional strengthening of the Public Defense Office, (e) introducing oral proceedings, and (f) codifying as a crime the persecution of innocent people. In the General Public Defender's view, promoting criminal policy with all due guarantees requires greater sagacity at the political and institutional levels.⁹¹

⁸⁸ On this point, see, in general: DPLF, *Insufficient Judicial Independence, Distorted Pretrial Detention: The Cases of Argentina, Colombia, Ecuador and Peru*, 2013, pp. 65-113.

⁸⁹ Office of the People's Defender of Costa Rica, *Annual Report 2012-2013*, Report of the National Torture Prevention Mechanism, pp. 369-374 (statistics as of December 31, 2012). In addition, see alert bulletin titled: The Office of the People's Defender of Costa Rica, the National Torture Prevention Mechanism and Public Defenders make a call of national alert due to the current situation of the national penitentiary system, October 3, 2012, addressed to Her Excellency the President of the Republic of Costa Rica. As early as 2008, the Committee against Torture had noted its concern regarding the prolonged duration of pretrial detention and the high number of pretrial detainees in Costa Rica. UN, Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture*, Costa Rica, CAT/C/CRI/CO/2, published July 7, 2008, para. 5.

⁹⁰ Response to the questionnaire for the IACHR's thematic *Report on Pretrial Detention in the Americas*, Regional Foundation of Human Rights Advising (INREDH), November 1, 2012. Figures from: General Planning Coordination Office – Statistics, Ministry of Justice, Human Rights, and Worship.

⁹¹ IACHR Regional Meeting of Experts on Pretrial Detention, May 9 and 10, 2013, Presentation by Dr. Ernesto Pazmiño Granizo, available at: <http://www.oas.org/es/cidh/ppl/actividades/prisionpreventiva.asp>.

66. The United States of America is indisputably the country with the largest prison population in the world, with approximately 2,239,751 prisoners; and even though the rate of persons in pretrial detention is nearly 20%, its prison population rate is of 716 inmates per 100,000 inhabitants.⁹²

67. In Haiti, as of December 2012, there were 8,860 persons deprived of liberty at the country's 17 prison facilities (compared to 1,935 inmates in 2004). The levels of prison overcrowding are still alarming, with an average area of living space, for both pretrial detainees and convicts, equal to 0.6 m² per person. This overcrowding is primarily due to the excessive use of prolonged pretrial detention, which in Port-au-Prince reaches a level of 90%.⁹³ In 2011, the general proportion of people in pretrial detention at the national level was 89.2% and, in 2010, the general occupancy rate of the prison system stood at 430%.⁹⁴

68. In Guatemala, according to information provided by the Ombudsman's Office (*PDH*), people in pretrial detention account for 56% of the prison population, with women representing approximately 7%. That office blames the high proportion of prison inmates awaiting trial on the lack of appropriate infrastructure, the irrational use of pretrial detention, and mass arrests. It also speaks of the "lack of decisiveness" on the part of the judiciary in applying alternative measures other than pretrial detention and states that "the current alternatives available to judges for substitute measures are limited." The high number of pretrial detainees exacerbates the serious levels of overcrowding within the prison system, as a result of which the authorities have even set up detention facilities at military barracks, which has been criticized as being unconstitutional.⁹⁵

69. In Honduras, the Inter-American Commission notes with concern the recent adoption of Decree No. 56-2013,⁹⁶ which came into force on May 17, 2013, and which amends the Code of Criminal Procedure to disallow alternative measures to pretrial detention in an array of twenty-one offenses as well as to recidivists. This is sure to have a significant impact on the already collapsed prison system.⁹⁷

⁹² International Center for Prisons Studies, World Prison Brief: <http://www.prisonstudies.org/info/worldbrief/>.

⁹³ UN, *Report of the independent expert on the situation of human rights in Haiti*, Michel Forst, A/HRC/22/65, published February 7, 2013.

⁹⁴ Response to the questionnaire for the IACHR's thematic *Report on Pretrial Detention in the Americas*, Lawyers Without Borders Canada, November 2, 2012, citing other United Nations sources.

⁹⁵ Response to the questionnaire for the IACHR's thematic *Report on Pretrial Detention in the Americas*, Office of the Attorney for Human Rights of Guatemala, November 2, 2012, pp. 6-8 and 21.

⁹⁶ Republic of Honduras, Decree No. 56-2013, April 25, 2013.

⁹⁷ Regarding the grave structural shortcomings within the Honduran prison system, see, in general: IACHR, *Report of the Inter-American Commission on Human Rights on the Situation of Persons Deprived of Liberty in Honduras*, OEA/Ser.L/V/II.147, adopted March 18, 2013.

70. The situation in Panama is also a cause for great concern, not only because of the extremely high proportion of pretrial detainees – 65%, with an overcrowding rate of 97%⁹⁸ – but also because of its extraordinarily high rates of persons deprived of liberty, with 411 inmates per 100,000 inhabitants. The number of people in pretrial detention per 100,000 inhabitants is 267. The main solution offered by the Panamanian State to deal with the situation of overpopulation and overcrowding is the planned construction of a vast prison complex with the capacity to hold more than 5,000 inmates. However, if the necessary penal system reforms are not adopted, including a more rational use of pretrial detention, Panama will have to build one detention facility with a capacity for 1,000 inmates every year simply to keep up with the current growth rate of the prison population.⁹⁹

71. Uruguay also has a high proportion of detainees in pretrial detention: 65% and a rate of 180 pretrial detainees for each 100,000 inhabitants.¹⁰⁰ During its visit to Uruguay, the office of the Rapporteur for Persons Deprived of Liberty noted the existence of a deep-rooted culture among justice operators of favoring the use of pretrial detention as a precautionary measure. Accordingly, the IACHR urged the State “to promote a change in the established judicial culture and practice, one that produces a real paradigm shift in thinking about the appropriateness and need for pretrial detention.”¹⁰¹ That recommendation also applies to most of the region’s countries, where the exceptional nature of this measure as the guiding principle for its use has not been entirely embraced by justice operators.

72. According to information received by the IACHR, Mexico’s 419 detention centers currently house a prison population of some 242,000 people, of whom 95% are men and 5% are women and, of the total population, 79% are being held for local-jurisdiction crimes and 21% for federal offenses. The country ranks third in the region, after the United States and Brazil, in its total number of people deprived of liberty. Since the overall capacity of its prison system is of 188,000 slots, Mexico has a

⁹⁸ According to information furnished by the State, the Panamanian prison system has an installed capacity of 7,342 and, as noted in Table No. 1, a prison population of 14,521 inmates: this means an overcrowding rate of 97%; in other words, a general deficit of 7,179 places. This increase in overcrowding is extremely troubling, particularly since the prison occupancy rate stood at 163% in September 2010 (11,578 inmates housed in facilities with the capacity for 7,088). IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, para. 450.

⁹⁹ Stanford Law School International Human Rights and Conflict Resolution Center, *The Crisis in Panama Continues: Towards a Penitentiary System that Respects Human Rights?* (*La crisis en Panamá continúa: ¿Hacia un sistema penitenciario que respete los derechos humanos?*), pp. 7, 38, 39, and 57, presented at: IACHR, Thematic Hearing on the *Situation of Individuals Deprived of Liberty in Panama*, 149th regular period of sessions, organized by Alianza Ciudadana, Stanford Law School International Human Rights and Conflict Resolution Center, and Harvard University International Human Rights Clinic, October 31, 2013.

¹⁰⁰ Richard M. Aborn and Ashley D. Cannon, *Prisons: In Jail, But Not Sentenced*, *Americas Quarterly*, Winter 2013, available at: <http://www.americasquarterly.org/aborn-prisons>.

¹⁰¹ IACHR, Press Release 76/11 – IACHR Recommends Adoption of a Comprehensive Public Policy on Prisons in Uruguay. Washington, D.C., July 25, 2011, Annex, available at: http://www.oas.org/en/iachr/media_center/PReleases/2011/076.asp, para. 46.

general level of overcrowding of 26%. In that context, more than 40% of its prison inmates – in other words, slightly over 100,000 people – have not yet been convicted. These people are held in the same conditions and are exposed to the riots, jailbreaks, violence, drug use, murders, and systems of self-government that prevail inside those prisons. During the past five years, more than a thousand inmates have escaped from Mexican prisons, and around six hundred have lost their lives.¹⁰² The causes given for this high percentage of unconvicted prisoners include delays in judicial proceedings and zeal in prosecuting minor offenses, particularly crimes against property involving negligible amounts of money.¹⁰³ In addition, between December 2006 and September 2012, the office of the Attorney General of the Republic (*PGR*) detained 9,233 individuals for alleged ties with organized crime, of whom, during that period, only 1,059 were charged and 377 were released.¹⁰⁴ Moreover, during 2013 the IACHR continued receiving concerning information about authorities practice of exposing persons under investigation in the media.¹⁰⁵

73. Paraguay is one of the States in the region with the highest levels of pretrial detention, as can be seen in Table 1. According to official government figures, more than 73% of the country's prison inmates are in pretrial detention. Over the past decade, this situation has been addressed repeatedly and consistently by different international human rights agencies, including the IACHR, which, in its 2001 Special Country Report, recommended that Paraguay ensure that its criminal proceedings are carried out within a reasonable time and to guarantee "full observance of the principle regarding the presumption of innocence such that the general rule is that no individuals

¹⁰² IACHR Regional Meeting of Experts on Pretrial Detention, May 9 and 10, 2013, presentation by Dr. Elena Azaola, available in Spanish at: <http://www.oas.org/es/cidh/pp/actividades/prisionpreventiva.asp>. Similarly, one recent study indicated that between 1994 and 2004, Mexico's total number of people in pretrial detention doubled from 41,400 to 81,900; by January 2013, it had risen to 100,304, of whom 75% were being held for local-jurisdiction offenses. México Evalúa: Centro de Análisis de Políticas Públicas, *Prison in Mexico: For What? (La Cárcel en México: ¿Para qué?)*, p. 23 et seq. Source for figures: Secretariat of the Interior (SEGOB).

¹⁰³ Information presented at the hearing on the *Situation of the Rights of Persons Deprived of Liberty in Mexico*, 144th regular period of regular sessions, organized by Documenta, Asilegal, and Institute of Human Rights Ignacio Ellacuría, S.J., March 23, 2012.

¹⁰⁴ Office of the Deputy Prosecutor for Juridical and International Affairs, General Directorate of Juridical Affairs, document SJA/DGAJ/0638/2013, Re: electronic presentation of information, January 17, 2013, No. 0001700217712. Given to the Animal Político collective in response to a request for public information, document available in Spanish at: <http://www.animalpolitico.com/2013/02/de-9-mil-detenidos-por-crimen-organizado-en-6-anos-682-purgan-condena/#axz2dgGIYM91>.

¹⁰⁵ IACHR, Thematic Hearing: *Right to Privacy, Crime Victims and Persons under the Public Prosecutor Ministry*, 147th period of regular sessions, organized by: FUNDAR, Center for Analysis and Investigation, Human Rights Commission of the Federal District (CDHDF), among others, March 14, 2013.

are detained during proceedings.”¹⁰⁶ Over the ensuing years, similar statements have been made by the HRC,¹⁰⁷ the CAT,¹⁰⁸ the SPT,¹⁰⁹ and the SRT.¹¹⁰

74. In Venezuela, the total prison population as of March 2013 was 48,262 inmates, of whom 62.73% were awaiting trial and 30.9% had been sentenced (the remainder were on work permit and “*depósito*”^{*}). This situation has contributed to the increase of overcrowding levels to more than 190%. The prison system is currently suffering from a shortfall of 30,000 spaces. In addition, Venezuela has the prison system with the highest levels of violence in the hemisphere (inside Venezuelan prisons, during 2012, 591 people died and 1,132 were injured).¹¹¹ According to information received by the IACHR, procedural delays are the main reason for protests within Venezuela’s prisons,¹¹² which also serves to exacerbate the climate of violence.

75. As for the situation in the Caribbean States, the Commission notes that in The Bahamas, as of November 1, 2011, of 1,348 prison inmates, 708 (54%) had been sentenced and 611 (46%) were being held pending trial. In addition, The Bahamas has the Caribbean’s highest incarceration rate, with 435 people in prison for each 100,000 inhabitants: in other words, there is one prison inmate for every 270

¹⁰⁶ IACHR, *Third Report on the Situation of Human Rights in Paraguay*, Ch. IV, paras. 45 (4) and (5).

¹⁰⁷ UN, Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Conclusions and Recommendations of the Human Rights Committee, Paraguay*, CCPR/C/PRY/CO/3, published April 29, 2013, para. 20; and CCPR/C/PRY/CO/2, published April 24, 2006, paras. 15 and 16.

¹⁰⁸ UN, Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Concluding observations of the Committee against Torture, Paraguay*, CAT/C/PRY/CO/4-6, published December 14, 2011, para. 19.

¹⁰⁹ UN, Subcommittee on the Prevention of Torture, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Republic of Paraguay*, CAT/OP/PRY/1, published June 7, 2010, paras. 151 and 152.

¹¹⁰ UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on Mission to Paraguay*, A/HRC/7/3/Add.3, published October 1, 2007, paras. 65, 71, 80, 83(o) and (s).

* “*Depósito*” in Venezuela refers to being detained in police stations or annexes to detention centers.

¹¹¹ Information presented at the hearing *Situation of People Deprived of Liberty in Venezuela*, 147th regular period of sessions, organized by the Venezuelan Prisons Observatory (OVP), March 16, 2013.

¹¹² Information presented at the hearing *Situation of People Deprived of Liberty in Venezuela*, 146th regular period of sessions, organized by the Venezuelan Prisons Observatory (OVP), November 1, 2012. According to figures presented by the OVP at that hearing, 31% of the protests during 2012 were against procedural delays, and this has also been a constant theme in the IACHR’s statements regarding Venezuela. The comments made by the inmates in the following video (in Spanish) are stunningly eloquent: http://www.youtube.com/watch?v=cyC_NQzIJ00 (skip forward to minute 5:00).

inhabitants.¹¹³ In February 2011, Suriname had a prison population of 1,010, of whom approximately 50% were in pretrial detention.¹¹⁴

76. For the other English-speaking Caribbean OAS member States, from which no direct information has been received, the International Centre for Prison Studies at the University of Essex offers the following figures:¹¹⁵

State	Total prison population / Date of information	Percentage of inmates in pretrial detention / Date of information
Antigua and Barbuda	361 / December 2012	54.8% / December 2012
Barbados	1054 / December 12, 2012	37.2% / August 31, 2009
Belize	1562 / December 31, 2012	34% / December 31, 2012
Dominica	275 / December 31, 2012	25.5% / December 31, 2012
Grenada	441 / 2012	52.3% / February 13, 2012
Guyana	1962 / October 31, 2011	39% / October 31, 2011
Jamaica	4500 / December 2011	11.4% / 2009
Saint Kitts and Nevis	330 / August 26, 2013	29.7% / August 26, 2013
Saint Vincent and the Grenadines	410 / 2012	29.4% / December 2012
Saint Lucia	568 / November 2012	40.8% / November 2012
Trinidad and Tobago	3800 / 2012	55.3% / 2012

D. Reasons for the excessive use of pretrial detention

77. As already stated, over recent years the IACHR has identified the following factors among the reasons for the high rates of people held in pretrial detention in the region: judicial delays and backlog; the lack of operational and technical capacity of police forces and investigation services; the lack of operational capacity, independence, and resources among public defense offices; shortcomings in access to public defense services; legislation that encourages the use of pretrial detention; the absence of mechanisms for implementing other kinds of precautionary measures; the inversion of the burden of proof for establishing that pretrial detention is necessary; corruption; the widespread use of this measure in cases involving minor offenses; and extreme difficulties in revoking it.

¹¹³ IACHR, *Presentations from the Second Regional Seminar on Best Prison Practices*, Jamaica, December 2011, Presentation by Dr. Elliston Rahming, Superintendent of Prison, *Rehabilitation of Inmates: A National Imperative*, pp. 5 and 6.

¹¹⁴ IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, para. 450. Also: Response received through Note No. WASH/073/11/SM/jm from the Permanent Mission of Suriname to the OAS, received February 23, 2011 (to the questionnaire sent out for the *Report on the Human Rights of Persons Deprived of Liberty in the Americas*).

¹¹⁵ International Centre for Prison Studies, World Prison Brief: <http://www.prisonstudies.org/info/worldbrief/>.

78. The Commission has also identified the following factors that contribute to the non-exceptional use of pretrial detention: criminal justice policies that, using different names and mechanisms, promote greater flexibility and increased use of incarceration as a way to combat crime rates, as well as challenges related to the actions of the judiciary, regarding both respect for the independence of the authorities responsible for ordering pretrial detention and other aspects of judicial practice. Given the importance of these factors, they will be dealt with in greater detail in this section.

1. Criminal justice policies that promote increased incarceration as a solution to citizen security problems

79. The Inter-American Commission has observed a trend in the region whereby many States, in response to the challenges of citizen security or to the demands of society, have proposed legislative and institutional measures consisting basically of the increased use of incarceration to resolve those problems. Such legal reforms, which have been adopted in various countries around the region over the past decade, are intended to restrict or curtail the legal guarantees that apply to the denial of people's liberty; to promote the use of pretrial detention; to increase prison terms and expand the list of offenses punishable by custodial sentences; to refrain from offering alternatives to prison; and to restrict access to or the granting of some rights that convicts gradually receive during the execution of the sentence (e.g., works permits or parole).

80. In general, these reforms have not been adopted as a result of scientific reflection and a serious and inclusive debate about their relevance, viability, and consequences. Instead, in many instances, they have arisen as an immediate reaction to specific momentums in which social and media pressure has been brought to bear in connection with general concerns about law and order, or in response to specific incidents; as part of populist discourse intended to gain political advantage from subjective perceptions of crime; and, in some cases, as a response to the specific interests of given economic sectors.¹¹⁶ Those initiatives often revert progresses made

¹¹⁶ The Twelfth United Nations Congress on Crime Prevention and Criminal Justice found that community pressure was another of the causes that fuel high levels of overcrowding in prisons. Thus: "within communities concerned with safety and security, there may be *de facto* support for legislation and policies that contribute to prison overcrowding, including the extensive use of pretrial detention. The pressure that citizens exert on Governments, often through the media, to penalize offenders is one of the reasons why prisons remain the primary instruments of punishment." UN, Twelfth Congress on Crime Prevention and Criminal Justice, held in Salvador, Brazil, April 12-19, 2010. See: Background paper on *the Workshop on Strategies and Best Practices against Overcrowding in Correctional Facilities*, A/CONF.213/16, published January 25, 2010, para. 15. This situation has also been observed by other United Nations mechanisms, in countries such as Brazil and Uruguay. See: UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on Mission to Uruguay*, A/HRC/13/39/Add.2, published December 21, 2009, para. 82; and UN, Working Group on Arbitrary Detention, *Statement upon Conclusion of its Visit to Brazil (18 to 28 March 2013)*. In this regard, the SRT, after observing the situation in several countries, has stated that some politicians and political parties have exploited the fear created by general perceptions of inadequate citizen security for electoral purposes. UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on Mission to Brazil*, E/CN.4/2001/66/Add.2, published March 30, 2001, para. 159.

through earlier reforms, which strengthened the system of guarantees at trial and rationalized the use of pretrial detention. In addition, criminal justice policies of this kind have had a major impact on prison systems.

81. For example, the IACHR notes that since 2004, when the adversarial system was introduced into Colombian criminal law, a series of legislative amendments have been adopted. Regardless of their compatibility or incompatibility with the American Convention, they have had, to a greater or lesser extent, a real impact on increased prisoner numbers.

82. The most relevant of such amendments are: (a) Law 890 of 2004, amending the Criminal Code and creating new offenses,¹¹⁷ increasing the minimum and maximum penalties for all crimes,¹¹⁸ and amending the rules for granting conditional suspensions of sentences – it is now only admissible once two-thirds of the sentence have been served, compared to three-fifths previously, and is conditional on the payment of any fines imposed and victim redress ordered;¹¹⁹ (b) Law 1142 of 2007, allowing pretrial detention for 12 new offenses, increasing the penalties for others, and imposing restrictions on the use of alternative measures to pretrial detention in detention facilities;¹²⁰ (c) Law 1453 of 2011, the “Citizen Security Law,” increasing the penalties for a number of offenses, creating new crimes, facilitating the imposition of preventive measures, expanding the duration of pretrial detention,¹²¹ and imposing

¹¹⁷ For example, crimes against computer security, to criminalize espionage, sabotage, and the usurpation of intellectual property; crimes of seizing and trafficking in fossil fuels; crimes against archeological heritage; and specific crimes and other offenses against evidence, intended to protect witnesses and to prevent the destruction of evidence and other elements involved in crimes of that kind.

¹¹⁸ All custodial sentences had their minimum durations increased by a third and their maximums by one half.

¹¹⁹ In Judgment C-823 of August 10, 2005, the Constitutional Court ruled this provision enforceable on a conditional basis, “in the understanding that should the convict’s current insolvency be established to the satisfaction of the judge overseeing the sentence, and subject to challenges by the victim and the Public Prosecution Ministry, the failure to pay redress to the victim shall not prevent the exceptional granting of conditional liberty.” In addition, these provisions restricting conditional releases, and others contained in the laws enacted during this period and identified above, represent a step backwards from the letter and spirit of Law 415 of 1997, which was enacted with the aim of reducing prison overcrowding.

¹²⁰ The Justice Studies Center of the Americas (CEJA) said that as a direct result of the entry into force of Law 1142, “between the second and third quarters of 2007, the number of pretrial detainees rose from 2,255 to 7,786, even though the number of cases opened fell to less than a half.” It further noted that “with the entry into force of the law, the percentage of arrests rose ten-fold (from 4.74% to 38.65%) in the cases opened,” although these figures later tended to stabilize. CEJA, *Prisión Preventiva y Reforma Procesal en América Latina. Evaluación y Perspectivas*, Santiago, Chile, 2008, pp. 248-250. Similarly, the Excellence in Justice Corporation has stated that: “one of the reasons for the growth in the level of overcrowding during the past year was the implementation of Law 1142 of 2007. This statute, *inter alia*, disallows benefits or alternatives to incarceration for those convicted of willful or premeditated crimes within the previous five years and also increases the penalties applicable to some of the offenses set down in the Criminal Code”. Extract from: <http://www.cej.org.co/index.php/todos-los-justiciometros/824-evolucion-de-la-situacion-carcelaria-en-colombia>.

¹²¹ According to a report submitted to the IACHR by the Public Interest Law Group of the University of the Andes Law School, “between the entry into force of this law in June 2011 and April 2012, there was an increase of 12.9% in offenses committed by the inmate population, from 139,560 to 157,522. It must be borne

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restrictions on benefits and sentencing alternatives. According to the National Penitentiary Institute of Colombia (INPEC), Law 1453 of 2011 has led to the admission of a monthly average of 3,000 new inmates to the prison system.¹²² In addition, there have been other similar provisions that, as a whole, have meant a pronounced trend toward the increased use of incarceration as a means of social control.¹²³

83. Similarly, in Bolivia,¹²⁴ over the twelve years since the enactment of the new Code of Criminal Procedure (March 2001),¹²⁵ a series of amendments have been made to criminal justice provisions, mainly involving the creation of new offenses, harsher sentencing, expanding the powers of judges and prosecutors to request and order pretrial detention, and expanding the legal time frames for preliminary investigations, police proceedings, and pretrial detention.

84. Essentially, this counter reform process has been implemented by means of: (a) the National Citizen Security System Law,¹²⁶ which made significant changes to the precautionary measures regime, such as including recidivism as grounds for procedural risk, expanding the powers of judges and prosecutors in determining the

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in mind that a single inmate may be involved in one or more offenses. According to the INPEC, the offense with the largest increase was theft, with 3,695 new offenders, followed by narcotic trafficking, production, or possession, with 3,502. In general terms, this law has substantially changed the 2011 trend in the growth of the prison, which explains the increase of 16,000 new inmates compared to the 2010 figure.”

¹²² See Caracol Radio, *Inpec challenges ruling that prevents new transfers of prisoners to La Modelo (Inpec impugna fallo de tutela que impide nuevos traslados de reclusos a La Modelo)*, February 1, 2013, available in Spanish at: <http://www.caracol.com.co/noticias/judicial/director-del-inpec-lanza-ultimatum-a-directores-por-irregularidades-en-carceles/20130206/nota/1837810.aspx>.

¹²³ For example, Law 1121 of 2006, which eliminated sentence reductions in crimes of extortion, terrorism, and kidnapping; Law 1181 of 2007, which increased the penalties for the crime of failing to provide alimony; Law 1220 of 2008, which increased the penalties for crimes against public health; Law 1236 of 2008, which created new offenses and increased the penalties for sex crimes; Law 1257 of 2008, which increased the penalties for crimes of violence and discrimination against women; Law 1273 of 2009, which defined new crimes against intellectual property; Law 1329 of 2009, which created new crimes involving the sexual exploitation of minors; Law 1356 of 2009, which established aggravating factors for crimes committed in sporting venues; Law 1357 of 2009, which increased the penalties for several offenses, including the illegal collection of money; Law 1426 of 2010, which established a new aggravating factor for homicides involving journalists, human rights defenders, or public servants; and Law 1474 of 2011, which introduced such new offenses as private corruption, administrative disloyalty, control failures in the health sector, embezzlement for different official use of social security funds, willful embezzlement of social security funds, subsidy fraud, agreements restricting competition, and influence peddling by private citizens, and also extended the terms of statutory limitations and disallows benefits in cases of corruption-related crimes against the public administration.

¹²⁴ Construir Foundation, *Criminal Procedure Reform and Pretrial Detention in Bolivia (Reforma Procesal Penal y Detención Preventiva en Bolivia)*, 2012, pp. 26-37, 123. This study concludes that the implementation of the new Code of Criminal Procedure failed to achieve the goals set “largely on account of the amendments to the punitive provisions of criminal law, since the discussion on criminal prosecution failed to explore essential aspects related to the functioning of the criminal justice system, and the absence of prevention policies from the state” (p. 37).

¹²⁵ Plurinational State of Bolivia, Law 1970 of March 25, 1999.

¹²⁶ Plurinational State of Bolivia, Law 2494 of August 4, 2003.

risk of flight and procedural hindrance, and increasing applicable penalties; (b) the Law on Fighting Corruption, Illicit Enrichment, and Investigations of Wealth (“Marcelo Quiroga Santa Cruz Law”),¹²⁷ introduced as part of the State policy for combating corruption, and which establishes a direct relationship between Criminal Code offenses and corruption and illicit enrichment and creates eight new offenses with sentences to which measures other than pretrial detention seldom apply, allows for the retroactive enforcement of criminal law in corruption cases, and introduces other provisions;¹²⁸ and (c) the Law Amending the Criminal Justice System,¹²⁹ which adds an additional five factors for determining flight risk, expands the waiting period for requesting the termination of pretrial detention, and creates a regime for the immediate treatment of *in flagrante* offenses that includes a definition of those offenses that is too broad and unspecific in its temporal scope. In addition to these three laws, other amendments have recently been made to the criminal justice system, involving the creation and modification of offenses and the stiffening of penalties.¹³⁰

85. Similarly, the Venezuelan Prisons Observatory (*OVP*) reported that Venezuela’s Organic Code of Criminal Procedure was amended on six occasions in the years 2000, 2001, 2006, 2008, 2009 and 2012, and that instead of resolving the problems in the administration of criminal justice, those reforms have increased the incarceration rate, which rose from 58.4 per 100,000 inhabitants in 2000 to 170 in 2011.¹³¹

86. One of the key elements in this regional trend toward the heightened use of incarceration as a social control mechanism is the increased harshness of pretrial detention and its different mechanisms. The reforms have been largely justified by the perception among certain sectors that restricting this measure to exceptional cases implies impunity; or, as is often said in the discourse of penal populism, “creates a revolving door” through which criminals emerge only a short time after their arrest, or because it is believed that certain crimes, by reason of their seriousness or frequency, should immediately lead to the incarceration of the accused. The main factor is, however, a perception of public insecurity and mistrust of the justice system. As a

¹²⁷ Plurinational State of Bolivia, Law 004 of March 4, 2010.

¹²⁸ This statute also provides for the nonapplicability of statutory limitations in corruption offenses, aggravating factors for the penalties imposed in corruption-related offenses, the suspension of the statutory limitation deadline in criminal actions following a declaration of contempt, and the inadmissibility of conditional suspensions of sentence and judicial pardons in corruption cases (Art. 34).

¹²⁹ Plurinational State of Bolivia, Law 007 of May 18, 2010.

¹³⁰ Law against Racism and All Forms of Discrimination (Law 045 of October 8, 2010), Law for the Legal Protection of Children and Adolescents (Law 054 of November 8, 2010), Pensions Law (Law 065 of December 10, 2010), Law of Development and Border Security (Law 100 of April 4, 2011), Law against the Funding of Terrorism and Separatism (Law 170 of September 9, 2011), the Constitutional Procedural Code (Law 254 of July 5, 2012), Law on the Regime for Freezing the Funds and Other Assets of Persons with Ties to Terrorism and its Funding (Law 262 of July 31, 2012), Law on Trafficking in Human Lives (Law 263 of July 31, 2012), and Law on the National Citizen Security System (Law 264 of July 31, 2012).

¹³¹ Response to the questionnaire for the IACHR’s thematic *Report on Pretrial Detention in the Americas*, Venezuelan Prisons Observatory, October 2, 2012.

consequence, pretrial detention is on occasions used as a form of anticipated sentence or swift justice, completely ignoring its precautionary role in proceedings –a survey conducted in Chile found that 70% of the judges interviewed agreed that pretrial detention is sometimes used as a form of anticipated sentence.¹³² And what is clear, as noted by the Justice Studies Center of the Americas (CEJA), is that challenges to the full enjoyment of the principles of presumption of innocence and the exceptional nature of pretrial detention “do not arise from legal debate but from outside it, from places where arguing based on principles seems to have either little or no effect.”¹³³

87. According to a study published by CEJA, over the nine years from 1999 to 2008, eleven of the region’s countries adopted sixteen legal reforms (in addition to other more recent ones referred to in this chapter) basically seeking to promote or expand the admissibility of pretrial detention, ignoring or stripping it of its precautionary nature.¹³⁴ In this context, three general trends or legislative mechanisms have been identified:¹³⁵

(a) The establishment of offenses for which release from prison is not allowed or is made significantly more difficult to obtain. The legislature establishes *a priori* that people charged with certain crimes must necessarily remain incarcerated until a judgment is issued. In general terms, this restriction can be made by expressly identifying the list of offenses in which pretrial detention is obligatory, or by stating, in law, the assumption that some of the requirements for the admissibility of pretrial detention are met in accordance with criteria previously set by the legislature (e.g., establishing the legal presumption of the accused’s flight risk in crimes with a given minimum sentence, with which the imposition of pretrial detention in such cases is, *de facto*, mandatory).

¹³² Paz Ciudadana Foundation, *Judges’ Opinion Poll: Evaluation of personal precautionary measures and other related topics (Encuesta de opinión de jueces: Evaluación de las medidas cautelares personales y otros temas relacionados)*, 2010, p. 11.

¹³³ CEJA, *Judicial Systems – Pretrial Detention (Sistemas Judiciales – Prisión Preventiva)*, Year 7, No. 14: Cristian Riego, *A New Agenda for Pretrial Detention in Latin America (Una nueva agenda para la prisión preventiva en América Latina)*, p. 7.

¹³⁴ These were: Argentina (Province of Buenos Aires): Law 13.449 of 2006; Bolivia: Law 2.494 of 2003; Chile: Law 20.074 of 2005 and Law 20.253 of 2008; Colombia: Law 1.142 of 2007; Costa Rica: Law 8.589 of 2007; Ecuador: Law 23-101 of 2003; El Salvador: Decree No. 752 of 1999, Legislative Decree No. 487 of 2001, Legislative Decree No. 458 of 2004, and Legislative Decree No. 386 of 2007; Guatemala: Decree No. 30 of 2001 and Decree No. 51 of 2002; Honduras: Decree No. 223 of 2005; Paraguay: Law 2.493 of 2004; and Venezuela: Official Gazette No. 5.558 of 2001. CEJA, *Judicial Systems – Pretrial Detention (Sistemas Judiciales – Prisión Preventiva)*, Year 7, No. 14: Claudio Fuentes Maureira, *Pretrial Regime in Latin America: Anticipated Punishment, Precautionary Nature and Counterreform (Régimen de prisión preventiva en América Latina: la pena anticipada, la lógica cautelar y la contrarreforma)*, p. 37.

¹³⁵ From the report *Counterreform and the Inter-American System of Human Rights (Contrarreforma y el Sistema Interamericano de Derechos Humanos)*, presented by representatives of the CEJA and Open Society at an information session with the members of the IACHR, held on November 1, 2010, during the 140th period of regular sessions. IACHR, Press Release 109/10 – IACHR Concludes its 140th Period of Sessions, Annex, available at: <http://www.cidh.org/Comunicados/English/2010/109a-10eng.htm>.

88. Some legal systems have chosen to include provisions that, while not completely disallowing every defendant facing trial from remaining at liberty, do make it significantly more difficult to secure that possibility, through the establishment of special procedures or requirements, or of assumptions under which, in given circumstances, the judge can or must determine that procedural risk exists (which, in principle, would be grounds for ordering custodial measures). In general, on this point, different legal systems tend to preserve minimal margins for judicial discretion or appraisal, in order to avoid becoming notably illegitimate (or contrary to the constitutional and/or Conventional order).

(b) Prohibition of other personal precautionary measures that are less onerous to the accused than pretrial detention. In this situation, which is similar to that of offenses in which release from prison is not allowed, pretrial detention is required for as long as the proceedings go on, and the courts are prohibited from ordering other less restrictive alternatives measures. This leads to the *de facto* standard that the only admissible precautionary measure in such cases is detention, with no consideration given to other less severe restrictions that might be appropriate.

(c) Expansion of the grounds for pretrial detention beyond mere precautionary considerations. By means of legal formulas: (1) that tend to expand the grounds of flight risk to a hypothesis that goes beyond the precautionary purpose by, for example, emphasizing such considerations as the seriousness of the offense and the sentence expected in the event of a conviction; or (2) that establish grounds for the admissibility of pretrial detention other than traditional or precautionary ones, which respond to punitive criteria or to perceptions of risk, such as the danger of recidivism.

89. To return to the examples of Colombia and Bolivia, whose criminal justice reform processes have already been described above, the following specific reforms were adopted in connection with the use of pretrial detention:

90. Colombia's Law 1142 of 2007 adds a fourth justification for the ordering of pretrial detention, by establishing that it is allowed when the accused was arrested for a crime or misdemeanor in the previous 12 months, provided that the earlier case did not conclude with a finding of inadmissibility or with an acquittal (Art. 26). Law 1453 of 2011 stiffened this provision by extending the timescale from one to three years (Art. 60).

91. In addition, Law 1142 of 2007 states that to determine whether the accused's liberty would pose a danger to the safety of the community, it is enough to consider the seriousness and nature of the punishable act (Art. 24). The Constitutional Court ruled this article enforceable in the understanding that the judge, in reaching such a determination, must invariably assess the other circumstances provided for in law (Art. 310 of the Code of Criminal Procedure).¹³⁶ However, Law 1453 of 2011 reintroduced the provision that in determining whether the accused's liberty would

¹³⁶ Constitutional Court, Judgment C-1198/08, December 4, 2008, Justice Nilson Pinilla Pinilla.

endanger the community's security, an appraisal of the seriousness and nature of the punishable act was sufficient, in addition to "the constitutional purposes of pretrial detention" (Art. 65). In practice, this amendment contributed nothing in terms of guaranteeing the right to personal liberty; instead, it reaffirmed the discretion of the court's authority to keep a person in custody by considering only the "seriousness and nature of the punishable act."

92. Similarly, Law 1142 of 2007 stipulated that in order to award an alternative to pretrial detention, in addition to meeting one of the circumstances already established in the Code of Criminal Procedure, a second condition had to be met: namely, that the accused was not charged with any of the more than eighteen offenses listed in a new paragraph added by that law (Art. 27). Later, under Law 1474 of 2011, five more offenses were added to that list (Art. 39).¹³⁷

93. Similarly, in Bolivia,¹³⁸ the National Citizen Security System Law (No. 2494 of 2003) introduces the *danger of recidivism* as an official criterion for determining the procedural risk on which an order for pretrial detention (or other precautionary measures) is to be based, provided that fewer than five years have passed since the conclusion of the previous sentence (Art. 16). In addition, it uses open-ended language in the criteria for determining the risk of procedural hindrance, stipulating that any other duly accredited circumstance that indicates that the accused will obstruct the determination of the truth is valid for establishing the danger of procedural hindrance (Art. 15). In addition, this provision empowers the judge to order more severe precautionary measures than those requested by the prosecutor and/or plaintiff (Art. 16).

94. Later, the Law Amending the Criminal Justice System (No. 007 of 2010) added an additional five factors for determining flight risk: (1) existence of prior criminal activity; (2) issuance of formal charges or judgment at the first instance; (3) accused had been offered an alternative measure for willful crime; (4) belonging to criminal organizations or conspiracies; and (5) representing a danger to society, to the victim, or to the complainant (Art. 1). It extended the waiting period for requesting the

¹³⁷ Following that last amendment, the offenses in which alternatives are not allowed are the following: those under the jurisdiction of specialized circuit criminal judges; migrant smuggling; carnal knowledge or sexual acts with a person incapable of resistance; domestic violence; qualified theft; aggravated theft; aggravated fraud; use of false documents related to stolen vehicles; manufacture, trafficking, and possession of firearms or ammunition for personal use when in conjunction with the crime of conspiracy or when the accused have a prior conviction for the same offenses; manufacture, trafficking, and possession of firearms or ammunition that are restricted to armed forces use; manufacture, import, trafficking, possession, and use of chemical, biological, and nuclear weapons; embezzlement through misappropriation in an amount exceeding fifty times the minimum legal monthly wage; extortion; active bribery; passive bribery; illicit enrichment; transnational bribery; undue interest in contracting; contracting without meeting legal requirements; influence peddling; continuous, repeated handling of stolen goods; handling of stolen goods to hide or conceal qualified theft in conjunction with conspiracy; handling of stolen motor vehicles or the essential parts thereof, or of merchandise or fuel carried thereby.

¹³⁸ Construir Foundation, *Criminal Procedure Reform and Pretrial Detention in Bolivia (Reforma Procesal Penal y Detención Preventiva en Bolivia)*, 2012, pp. 26 and 27.

termination of pretrial detention: 18 months if no charges have been filed and/or 36 months if judgment has not been given, if the delay cannot be attributed to the procedural activity of the accused. It also expands the powers of the victim to request pretrial detention, even when the victim has no standing as a complainant.

95. Similarly, as noted above, Decree No. 56-2013 in Honduras prohibits the use of alternatives to pretrial detention in an array of 21 offenses.¹³⁹ This amendment means that the Public Prosecution Ministry, simply by classifying the offense as one of those listed above, will obtain the pretrial detention of the accused automatically and without having to establish its rational need, thereby relieving the prosecutor of the obligation of justifying incarceration. It also formalizes recidivism as obligatory grounds for the imposition of pretrial detention.¹⁴⁰

96. During its August 2013 visit to Honduras, the Rapporteurship on Persons Deprived of Liberty noted that prior to the enactment of this law by Congress, no study or analysis was conducted into the impact it would be sure to have on the – already collapsed – prison system, nor into the actual future contribution it would make to reducing crime rates in the country.¹⁴¹

97. To summarize, within the broad range of modifications that have been made to the legal frameworks for pretrial detention in the region, there are some that directly and clearly contravene the rules and standards of the Inter-American system; indeed, some have been addressed in decisions by the Commission and the Court in individual cases (involving, for example, the mandatory imposition of pretrial detention in drug related cases without an individualized analysis). There are also others that, while less blatant, can also be considered to be in violation of those rules and standards. Finally, there have been other reform processes that have striven, at least formally, to abide by those parameters, but compliance with them is not always clear, particularly as

¹³⁹ Namely: homicide (absent mitigating circumstances), murder, parricide, rape, human trafficking, child pornography, kidnapping, falsification of coins and banknotes, vehicle theft, assassinations of heads of state, genocide, conspiracy, extortion, offenses related to weapons of war, terrorism, contraband (in certain cases), fiscal fraud (in certain cases), crimes related to illegal drug trafficking, money laundering, perverting the course of justice, and femicide.

¹⁴⁰ Alternatives to pretrial detention may not be ordered if there is a serious risk of not obtaining the goal sought or if recidivism is involved. A person may only benefit from those measures in a single active trial and, if a formal indictment is issued in a new action, the precautionary measure of pretrial detention must be ordered in both sets of proceedings.

¹⁴¹ The Inter-American Commission applauds the technical opinion issued by the Ministry of Justice and Human Rights on July 4, 2013, in which it concluded that “Legislative Decree No. 56-2013 subverts the precautionary measure of pretrial detention, disregards its nature and purpose, contradicts the constitutional presumption of innocence, and turns pretrial detention into a form of advance punishment; in addition, it worsens the precarious situation of the national prison system.” It therefore concluded that Congress should “proceed to appoint a special committee, in conjunction with the justice sector, to evaluate the impact that the reform is having on increased prison overcrowding and enact a new reform to reinstate the procedural status of pretrial detention as a precautionary measure, in accordance with the applicable international standards” (emphasis added).

regards implementation. These issues will be addressed extensively in the chapter of this report focusing on the Inter-American standards.

98. In any case, all these processes share the common denominator of tending to reduce the margins for the judge's individualized assessment regarding the need for and applicability of pretrial detention in a specific case. This situation leads to the automatic imposition of pretrial detention and may be incompatible with the American Convention.

99. Moreover, as will be seen in the following section, these reform processes are generally accompanied by loud media, political, and institutional messages, originating from the highest spheres of government and which receive great popular backing. Thus, in a broad sense, justice operators "are highly pressured by the legislative changes but, above all, by the social control brought to bear on them by the media, and most of them ultimately act in accordance with those pressures, regardless of their juridical convictions."¹⁴²

100. At the same time, and regardless of the possible incompatibilities between these criminal justice policies, which are based on increased restrictions of the right to personal liberty, and the international obligations assumed by States vis-à-vis their citizens, the IACHR notes that there is no empirical evidence to show that they have any genuine impact on reducing crime and violence, nor that they serve to resolve, in any broader sense, the problems of citizen security.¹⁴³

101. This has been repeatedly noted by international human rights mechanisms. For example, during his visit to El Salvador in 2010, the Rapporteur for Persons Deprived of their Liberty noted that the country's prison population was in excess of 24,000 people (with an installed capacity for 8,110) and that the levels of criminal activity and violence continued to rise in spite of the massive use of incarceration.¹⁴⁴ Similarly, following its recent visit to El Salvador in 2012, the WGAD ratified the failure of the policies known as "Plan Mano Dura" (2003) and "Plan Mano Súper-Dura" (2005), which have chiefly focused on police repression and the generalized use of pretrial detention. In that context, the WGAD emphasized that the need to address the problem of public security was "a legitimate State concern," but that this

¹⁴² CEJA, *Judicial Systems – Pretrial Detention (Sistemas Judiciales – Prisión Preventiva)*, Year 7, No. 14: Cristian Riego, *A New Agenda for Pretrial Detention in Latin America (Una nueva agenda para la prisión preventiva en América Latina)*, p. 8.

¹⁴³ Similar comments have been made at various United Nations forums, including the Twelfth Congress on Crime Prevention and Criminal Justice, which was held in Salvador, Brazil, on April 12 to 19, 2010. See Background paper on *the Workshop on Strategies and Best Practices against Overcrowding in Correctional Facilities*, A/CONF.213/16, published January 25, 2010, para. 14

¹⁴⁴ IACHR, Press Release 104/10 – IACHR Office of the Rapporteur Attests to Structural Deficiencies in Prison System of El Salvador, Washington, D.C., October 20, 2010, Annex, available at: <https://www.cidh.oas.org/Comunicados/English/2010/104-10eng.htm>.

“cannot be achieved without due consideration and respect for the right to liberty and the right to be free from arbitrary arrest or detention.”¹⁴⁵

102. In Bolivia, for example, in spite of the amendments to criminal law of recent years, criminal activity continues to increase. According to official figures gleaned from police reports: (a) reports of crimes rose by 24% between 2005 and 2007; by 52% between 2005 and 2009; and by 70% between 2005 and 2010 (from 34,201 in 2005 to 57,982 in 2010). Those figures do not include crimes that were not reported.¹⁴⁶

103. Accordingly, echoing the words of the UN Rapporteur on Torture, the IACHR reiterates that in general the use of imprisonment as a habitual measure and not as a last resort has not curbed crime rates or prevented recidivism. On the contrary, it has had a negative impact on the prison system. Consequently, instead of a punitive penal and penitentiary system that focuses on locking people up, the highest priority should be afforded to a comprehensive reform of the whole justice administration system, introducing a new approach aimed at the rehabilitation and reintegration of offenders in society.¹⁴⁷ On a similar note, the *Salvador Declaration* states that achieving sustainable and long-lasting results in the prevention, prosecution, and punishment of crime requires building, modernizing, and strengthening criminal justice systems and promoting the rule of law.¹⁴⁸

104. Citizen security is a complex matter that involves a wide array of factors, stakeholders and conditions, including the history and structure of the State and its society, government policies and programs, the level of enjoyment of economic, social, and cultural rights, and the regional and international situation. Accordingly, the Commission reiterates that public policies for citizen security must first of all provide for the functioning of an efficient institutional structure, capable of ensuring the population the effective enjoyment of the human rights related to the prevention and control of violence and crime. Specifically, these public policies on citizen security must establish, on a priority basis, three dimensions of actions to prevent violence and crime:

(1) primary prevention, which are measures directed at the entire population, and have to do with programs in **public health, education,**

¹⁴⁵ UN, Working Group on Arbitrary Detention, *Report on Mission to El Salvador*, A/HRC/22/44/Add.2, published January 11, 2013, summary and paras. 123 and 124.

¹⁴⁶ Construir Foundation, *Criminal Procedure Reform and Pretrial Detention in Bolivia (Reforma Procesal Penal y Detención Preventiva en Bolivia)*, 2012, p. 36. Citing, as its source, the report *State of Citizen Insecurity Situation in Bolivia (Estado de Situación de la Inseguridad Ciudadana en Bolivia) 2005-2010* from the Interior Ministry’s National Citizen Security Observatory.

¹⁴⁷ IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, para. 454; UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on Mission to Uruguay*, A/HRC/13/39/Add.2, published December 21, 2009, paras. 100 and 101.

¹⁴⁸ UN, *Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World*, adopted by the Twelfth United Nations Congress on Crime Prevention and Criminal Justice, held in Salvador, Brazil, April 12 to 19, 2010, para. 8.

employment and instruction in observance of human rights and building a democratic citizenry; (2) secondary prevention, which involves measures that focus on individuals or groups who are more vulnerable to violence and crime, using **targeted programs to reduce the risk factors and open up social opportunities**; and (3) tertiary prevention, which involves individualized measures directed at persons already engaged in criminal conduct, who are serving a sentence or have recently completed their sentence. Particularly important here are the **programs that target persons serving prison sentences**¹⁴⁹ (emphasis added).

105. Moreover, as has been clearly acknowledged for more than thirty years,¹⁵⁰ violence and crime are phenomena rooted in complex social problems that go beyond the purview of criminal law and involve much broader and deeper issues, such as justice and social inclusion and the equitable distribution of economic resources. Specifically, factors involved include poverty, unemployment, the lack of opportunities for social advancement, and the lack of access to education and health. Thus, reducing crime and violence requires comprehensive public policies that address the real causes. In this regard, the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (*ILANUD*) notes that:

United Nations studies on criminality and the operation of criminal justice systems, and victimisation surveys indicate that those countries that strengthen their criminal justice systems but do not succeed in developing equitable societies build violent societies and do not see a reduction of their crime rates. In addition, their increasing use of criminal justice becomes illegitimate because of lack of a good technical defence for the large number of persons with little means; because of the excessive number of inmates and the large number among them waiting trial; because of prison overcrowding; and because of other innumerable basic rights violations.¹⁵¹

106. To summarize, the Inter-American Commission reiterates that considerations regarding the regulation, need, or imposition of pretrial detention must

¹⁴⁹ IACHR, *Report on Citizen Security and Human Rights*, paras. 2, 61, and 155.

¹⁵⁰ The Sixth United Nations Congress on Crime Prevention and Criminal Justice, held in 1980, recognized that crime prevention had to be based on a country's social, cultural, political, and economic circumstances. Thus, the first paragraph of the Caracas Declaration states that "the success of criminal justice systems and strategies for crime prevention [...] depends above all on the progress achieved throughout the world in improving social conditions and enhancing the quality of life; it is thus essential to review traditional crime prevention strategies based exclusively on legal criteria." Document available in Spanish at: <http://www.ilanud.or.cr/1.1%20Declaracion%20de%20Caracas.pdf>.

¹⁵¹ *ILANUD, Crime, Criminal Justice and Prisons In Latin America and the Caribbean: How to Implement the United Nations' Rights and Duties Model*, 2010, Elías Carranza, *Crime, Criminal Justice, and Prisons in Latin America and the Caribbean: The United Nations Model, Based on Rights and Obligations, and the Need for Comprehensive Social and Criminal Justice Policies*, p. 120.

be based on respect for the right to the presumption of innocence, and it must take into account the exceptional nature of this measure and its legitimate purposes, as established in international human rights law and, in many cases, by States' own constitutions. The excessive use of this measure runs contrary to the very essence of democratic rule of law,¹⁵² and the design and implementation of criminal justice policies aimed at legalizing the use of pretrial detention as a form of expedite justice, on the margins of due criminal procedure, is also openly in contravention of the regime established by the American Convention and Declaration and of the principles underlying the Charter of the Organization of American States. In addition, it is politically irresponsible for States to elude their duty of adopting comprehensive public policies for citizen security, adopting instead populist short-term measures that, in addition, are fiscally unsustainable.

2. Threats to judicial independence

107. Another relevant factor that prevents pretrial detention from being used on an exceptional basis and in accordance with its precautionary nature is the interference with the judicial authorities directly responsible for deciding its imposition. This situation is aggravated by the significant structural shortcomings and weaknesses in the judicial systems of many of the region's countries.¹⁵³ In practice, this pressure and interference come essentially from three sectors: (a) senior public officials of other branches or agencies of the State,¹⁵⁴ who, facing social demands or for other reasons, emphasize punishment in their pronouncements and, on occasions, accompany them by bringing specific forms of pressure to bear on justice operators, (b) high-ranking authorities within the judicial branch itself, who often echo the messages put out by the political leadership, and (c) the media and public opinion.¹⁵⁵

¹⁵² IACHR, Press Release 23/13 – IACHR Concludes its 147th Period of Sessions, Annex, available at: http://www.oas.org/en/iachr/media_center/PReleases/2013/023A.asp.

¹⁵³ Among the obstacles faced by justice operators in the region, the IACHR has noted, regarding institutional shortcomings in ensuring correct judicial functioning, that “the fragility of the judicial branch in some States is manifest both in executive branch interferences in the judicial branch as well as the indefinite provisional status of numerous judges and the legal possibility that their appointment will be subject to later confirmation or reelection to the position.” IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II Doc. 66, adopted December 31, 2011 (hereinafter “*Second Report on the Situation of Human Rights Defenders in the Americas*”), para. 391.

¹⁵⁴ Thus, as a part of its monitoring of the situation of justice operators in the region, the IACHR has identified “clear interferences by executive branch officials in the judicial branch through control of the administration of justice.” IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, , para. 392.

¹⁵⁵ Regarding this point, the Rapporteur on people deprived of liberty has stated “the causes (for such pressure are numerous) ... there are cultural, sociological and political causes. There is an undertone of absolutism in media pressure and in the excessive use of pretrial detention. Even though the states of the Americas are committed to the Democratic Charter and to the democratic regime, they still need to make progress in strengthening democracy and the rule of law, and one of the main factors holding them back is the excessive use of pretrial detention [...]. Behind the pressure, whether it comes from authorities or from the media, [...] there are political interests from the highest level – which encourage the media to direct judicial decisions in one direction or another – or interests of another kind. [...] The judges are afraid of the media. When a judge has to adopt a decision about a person's liberty and the case has come to the media's attention, Continues...

108. This kind of pressure generally arises in a context or atmosphere defined by: (a) a social tendency to associate the condition of a person facing charges with that of a detainee, which, in many cases means that it is enough for the police to identify a person as being guilty for that person to be treated as such and consequently, for detention to be demanded, with public insecurity (perceived rather than real) being a factor that contributes to the consolidation of such attitudes; (b) the lack of institutional policies that protect judicial independence and support justice operators; and (c) a judicial culture where, in spite of a degree of progress at the regulatory level, human rights, and particularly the presumption of innocence, are of limited importance. In that context, the media play a dual role: on the one hand, they propagate the discourse of those authorities that call for a stricter use of pretrial detention and, on the other, they themselves generate the elements that fuel that position.¹⁵⁶

109. Regarding this issue, as part of its monitoring of the human rights situation in Venezuela, the IACHR noted that “one of the principal reasons for the high rate of persons held in preventive detention is the lack of judicial independence since in practice criminal judges refrain from ordering measures other than preventive detention for fear of being sanctioned or removed from the bench.”¹⁵⁷ Similarly, during its visit to the Argentine province of Buenos Aires, the Rapporteurship for PPL noted

...continuation

the judge is fearful of the media and prefers to do whatever the media are demanding at that time [...]. It is clear that judges are afraid of the media, and they prefer for their judicial decisions to be in line with what the media are saying, and not the result of evidence assessment.” IACHR, Thematic Hearing on *Judicial Independence and Preventive Prison in the Americas*, 147th regular period of sessions, organized by Due Process of Law Foundation (DPLF), Institute of Law and Society (CIDES), Institute of Legal Defense (IDL), and DeJusticia, March 16, 2013, available at: <http://www.oas.org/es/cidh/audiencias/hearings.aspx?lang=en&session=131&page=3>. Because of its importance in analyzing the statements made in this section, the Commission draws attention to the audio recording of the participation of the Special Rapporteur on Freedom of Expression at the Regional Meeting of Experts on Pretrial Detention, in which she spoke of the role of the press in judicial proceedings; it is available in Spanish at: <http://www.oas.org/es/cidh/ppl/actividades/prisionpreventiva.asp> (audio from panel 2).

¹⁵⁶ Information received by the IACHR at the Thematic Hearing on *Judicial Independence and Preventive Prison in the Americas*, 147th regular period of sessions, organized by Due Process of Law Foundation (DPLF), Institute of Law and Society (CIDES), Institute of Legal Defense (IDL), and DeJusticia, March 16, 2013. See also: IACHR Regional Meeting of Experts on Pretrial Detention, May 9 and 10, 2013, presentation by Luis Pásara, available in Spanish at: <http://www.oas.org/es/cidh/ppl/actividades/prisionpreventiva.asp>. In his address, Pásara said that one factor warranting particular attention was the kind of ties that have arisen between the police and certain media outlets. He went on to describe those ties as lacking transparency and two-way, in that the police provide journalists with certain details, almost always in exchange for a favorable treatment of their actions in the media, and, in return, the media embrace the police force’s version about the facts and those who are guilty. This relationship gives rise to what is known as the phenomenon of the “revolving door,” whereby people arrested by the police are then released by the judges, suggesting negligence or corruption on the part of judicial operators. For a specific analysis of the main characteristics of relations between the judiciary and the media, see: DPLF, *Insufficient Judicial Independence, Distorted Pretrial Detention: The Cases of Argentina, Colombia, Ecuador and Peru*, 2013, pp. 10-13, available in Spanish at: <http://www.idl.org.pe/sites/default/files/publicaciones/pdfs/Estudio%20independencia%20judicial%20insuficiente,%20prision%20preventiva%20deformada.pdf>.

¹⁵⁷ IACHR, Annual Report 2011, OEA/Ser.L/V/II Doc. 69, adopted December 30, 2011, Ch. IV: Venezuela, para. 519.

that “judges opt for the precautionary measure that places the heaviest burden on the right to liberty during prosecution, in order to demonstrate efficiency and avoid complaints from society, the news media, and the political sector itself.”¹⁵⁸ On a similar note, after meeting with judges from several different levels of the judiciary during its 2006 visit to Ecuador, the WGAD reached the conclusion that:

[T]hey apparently do not enjoy the required independence to ensure the protection of detainees’ rights and to resist pressure, in particular pressure brought to bear by political parties and the media. Some even expressed fear that they would be transferred, overruled, dismissed or even subject to criminal prosecution if politicians, reporters, the police authorities or prosecutors disagreed with their decisions.¹⁵⁹

Also under the umbrella of the United Nations, the Report of the Latin American and Caribbean High Level Expert Group Meeting on the Standard Minimum Rules for the Treatment of Prisoners acknowledged the intense influence that public opinion has in bringing pressure to bear on judicial authorities for “imposing pre-trial detention in anticipation of conviction.”¹⁶⁰ Similarly, the Special Rapporteur on Torture noted how media pressure can be a factor that influences the securing of confessions by the police.¹⁶¹

110. As an example of this kind of pressure on the Judiciary from senior public officials in other branches of the government, in Mexico, the previous President had the habit of publicly criticizing the judges in certain high-profile cases. In his declarations, the President equated the action of state and federal judges of releasing people arrested by federal authorities with “impunity,” deliberately ignoring the fact that those judicial orders did not represent the final decisions in the proceedings. The head of the executive branch went as far as to say publicly: “I have nothing against judges; I respect them, but one gets tired... There is a problem there with impunity; they

¹⁵⁸ IACHR, Press Release 64/10 – IACHR Rapporteurship Confirms Grave Detention Conditions in Buenos Aires Province, Washington, D.C., June 21, 2010, available at: <http://www.cidh.oas.org/Comunicados/English/2010/64-10eng.htm>. In connection with this, speaking of the pressure brought to bear on criminal judges, Argentine Supreme Court Justice Eugenio Raúl Zaffaroni made the following public statement: “Today, any judge who releases a person from prison is afraid. There is a bureaucratic preference that can lead to the idea that these matters are better handed by the Chamber” (court of criminal cassation). He also underscored the risk posed by “the media and irresponsible politicians attempting to stigmatize judges.” Interview available in Spanish at: http://www.puntojus.com/index.php?option=com_content&view=article&id=2678:zaffaroni-hoy-en-dia-cualquier-juez-que-excarcela-a-una-persona-tiene-miedo&catid=236:seccion-justicia.

¹⁵⁹ UN, Working Group on Arbitrary Detention, *Report on Mission to Ecuador*, A/HRC/4/40/Add.2, published October 26, 2006, para. 80.

¹⁶⁰ UNODC, *Report on the High Level Expert Group Meeting on the United Nations Standard Minimum Rules for the treatment of prisoners*, held August 3 to 5, 2011, in Santo Domingo, Dominican Republic, para. 14.

¹⁶¹ UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report*, A/64/215, published August 3, 2009, para. 41.

say perhaps within our agencies (the office of the Attorney General of the Republic or the Federal Police), but I believe the local and federal judiciaries have much room for improvement in this regard.” This is a clear example of the type of political message that helps create a public perception of impunity through the “revolving door” argument (the police arrest criminals and the judges let them go), and it sends a political message that attempts to transfer the responsibility for crime levels to the judicial branch. In this context, it is also public knowledge that in Mexico the office of the Attorney General of the Republic (PGR), as a mechanism to exert pressure, persecutes judges who adopt decisions against its interests in cases involving organized crime.¹⁶²

111. The IACHR has also received information indicating that in Ecuador there have been instances in which senior public officials from the executive branch have coerced guarantee judges into ordering pretrial detention in certain cases “under the threat of disciplinary penalties or of public scorn and denunciation.” One cited example of this was the following:

In his Saturday address of July 7, 2012, President Correa said that “in the past, more than half of those detained *in flagrante delicto* were released and only a fraction were sent to prison. The current situation, with the transformation of the justice sector, means better citizen security, because if a criminal is let go, he will break the law again.” See: Hoy.com.ec (July 9, 2012). Similarly, during public address No. 271 of May 12, 2012, President Correa gave a list of eight judges (three responsible for *in flagrante* crimes) and denounced them for awarding alternative measures instead of ordering pretrial detention.

¹⁶² This matter was addressed in the report presented by the participating organizations at the hearing on *Use of Pretrial Detention in the Americas*, 146th regular period of sessions, organized by Due Process of Law Foundation (DPLF), DeJusticia, Institute of Legal Defense (IDL), et al., November 1, 2012. See, as specific sources: CNN México, *Calderón to judges: “Impunity severely damages stability” (Calderón a los jueces: “La impunidad daña severamente la estabilidad”)*, September 7, 2011, available in Spanish at: <http://mexico.cnn.com/nacional/2011/09/07/calderon-a-los-jueces-la-impunidad-dana-severamente-la-estabilidad>; CNN México, *Judges defend the release of people detained by the federal government (Jueces defienden liberación de detenidos por el gobierno federal)*, September 6, 2011, available in Spanish at: <http://mexico.cnn.com/nacional/2011/09/06/jueces-defienden-liberacion-de-detenidos-por-el-gobierno-federal>; CNN México, *Calderón uses web forum to criticize judges for releasing detainees (Calderón utiliza foro en web para criticar a jueces por liberar detenidos)*, September 5, 2011, available in Spanish at: <http://mexico.cnn.com/nacional/2011/09/05/calderon-utiliza-foro-en-web-para-criticar-a-jueces-por-liberar-detenidos>; CNN México, *Calderón asks judges to reconsider the evidence in the Hank Rhon case (Calderón pide a los jueces reconsiderar la evidencia del caso Hank Rhon)*, July 1, 2011, available in Spanish at: <http://mexico.cnn.com/nacional/2011/07/01/calderon-pide-a-los-jueces-reconsiderar-la-evidencia-del-caso-hank-rhon>; CNN México, *Felipe Calderón criticized that Catholic bishops supported Hank Rhon (Felipe Calderón criticó que obispos católicos apoyaran a Hank Rhon)*, June 23, 2011, available in Spanish at: <http://mexico.cnn.com/nacional/2011/06/23/felipe-calderon-critico-que-obispos-catolicos-apoyaran-a-hank-rhon>; La Jornada, *Mexican tribunal denies to PGR the arrest of judge in “michoacanazo” (Juzgado mexicano negó a la PGR la aprehensión del juez del “michoacanazo”)*, September 18, 2012, available in Spanish at: <http://www.jornada.unam.mx/2012/09/18/politica/007n1pol>.

Local authorities make similar kinds of statements. For example, the Mayor of Guayaquil has been reported as requesting the dismissal of several judges in that city for failing to order pretrial detention.¹⁶³

112. As a further example of this same phenomenon, Chile's Diego Portales University noted in its most recent Annual Report that:

In late 2011, the Minister of Justice [...] stated that the work of judges who were "excessively focused on guarantees" (referring to decisions on precautionary measures made by guarantee judges in hearings held in the aftermath of student demonstrations) would not be endorsed and that the executive branch had the power to take such rulings into account in deciding on promotions within the judiciary. Later, the judicial branch published statistical data to refute the ministry's claims, indicating that 89% of the prosecution service's requests for pretrial detention had been admitted by the guarantee judges.¹⁶⁴

113. As for the pressure from the judiciary itself, on occasions, judicial disciplinary oversight agencies are used to punish those judges deemed to have been insufficiently strict in their decisions regarding the liberty of persons facing criminal charges. Although few judges are sanctioned – through either disciplinary or criminal proceedings or impeachments – the existence of pending charges against judges or prosecutors for having failed to order pretrial detention has a chilling effect among judicial officers. For those directly affected, it constitutes a major burden, since they must prepare their own defense, generally from a state of solitude and isolation within the institution. The counterbalance to this is that it is highly unusual for a judge to be punished for having issued a pretrial detention order of questionable legal admissibility or need. In addition to this, senior public officials within judicial agencies acting outside their functions have occasionally been seen to issue systematic opinions in the media regarding specific matters related to the administration of justice. This sets clear guidelines and criteria for lower ranking judges to follow. These elements help create a climate where prosecutors and judges may find that what best serves their own

¹⁶³ DPLF, *Insufficient Judicial Independence, Distorted Pretrial Detention: The Cases of Argentina, Colombia, Ecuador and Peru*, 2013, pp. 126, 128, and 131. These Saturday addresses are weekly presentations to the public that President Correa makes to report on different activities.

¹⁶⁴ Diego Portales University, Law School Human Rights Center, *Annual Report on Human Rights in Chile (Informe Anual sobre Derechos Humanos en Chile) 2012*, p. 212. Declarations of this kind, which belong to the trend known as "criminal populism," are a direct response to authoritarian urges within the societies at which they are directed. In Chile, according to the First Human Rights National Survey, conducted by the INDH in 2001, "58.6% of respondents said they completely agreed with all criminals being incarcerated, irrespective of whatever crime they may have committed," and "47% of the population said they were in complete disagreement with the notion that only the most serious crimes should be punished by custodial sentences." National Human Rights Institute (INDH), *Human Rights Situation in Chile – Annual Report (Situación de los Derechos Humanos en Chile – Informe Anual) 2011*, p. 21.

interests is to do what is expected of them, even when no one has directly or expressly asked them to do so.¹⁶⁵

114. In Peru, for example, it has been documented that the Internal Control Office of the Magistrature (OCMA), headed by a member of the Supreme Court, set about issuing public announcements of disciplinary proceedings opened against judges who failed to order pretrial detention or who granted bail.¹⁶⁶ Information has also been received indicating that Ecuador's Judicature Council "has maintained high levels of influence over judges' decisions, thanks to the number of administrative proceedings opened in recent times." Notably, in one of those proceedings, one of the members of the Magistrature Council spoke publicly about "the regulatory interpretation that should be used to decide on pretrial detention."¹⁶⁷

115. The IACHR acknowledges the importance of judges' participation in discussions of general legal matters and of more specific topics. However, it reiterates the comments made by the United Nations Special Rapporteur on the Independence of Judges and Lawyers: "As such, judges need to preserve the dignity of their office and the impartiality and independence of the judiciary."¹⁶⁸

116. The IACHR notes that the official position of many States is to downplay the phenomenon of inappropriate pressure on judges' work to equate it with the commission of a crime or misdemeanor, when they are not necessarily comparable concepts. Clearly, threats and other kinds of criminally punishable acts are the most serious manifestations of this interference, but there are also other types of pressure that, while they do not constitute offenses, do serve to undermine the rule of law and judicial independence. Public officials and authorities have the same right of free expression as other citizens. However, their public statements must not affect the normal operations of public institutions. There can be no pressure from the agencies of the State: any form of pressure is interference in the work of judges that affects the quality of the rule of law. For that reason, the Commission conducts broad analyses of

¹⁶⁵ Information received by the IACHR at the Thematic Hearing on *Judicial Independence and Preventive Prison in the Americas*, 147th regular period of sessions, organized by Due Process of Law Foundation (DPLF), Institute of Law and Society (CIDES), Institute of Legal Defense (IDL), and DeJusticia, March 16, 2013. See also IACHR Regional Meeting of Experts on Pretrial Detention, May 9 and 10, 2013, presentation by Luis Pásara, available in Spanish at: <http://www.oas.org/es/cidh/pp/actividades/prisionpreventiva.asp>.

¹⁶⁶ This matter was raised at the Thematic Hearing on *Judicial Independence and Preventive Prison in the Americas*, 147th regular session, organized by Due Process of Law Foundation (DPLF), Institute of Law and Society (CIDES), Institute of Legal Defense (IDL), and DeJusticia, March 16, 2013; at the IACHR Regional Meeting of Experts on Pretrial Detention, May 9 and 10, 2013, presentation by Luis Pásara; and in DPLF, *Insufficient Judicial Independence, Distorted Pretrial Detention: The Cases of Argentina, Colombia, Ecuador and Peru*, 2013, pp. 170 and 171.

¹⁶⁷ DPLF, *Insufficient Judicial Independence, Distorted Pretrial Detention: The Cases of Argentina, Colombia, Ecuador and Peru*, 2013, p. 133.

¹⁶⁸ UN, Special Rapporteur on the Independence of Judges and Lawyers, *Report on the Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, A/HRC/11/41, published March 24, 2009, para. 45.

pressure on judicial authorities that are not merely restricted to those actions defined as crimes or misdemeanors.

117. On this point, the Commission reiterates the fundamental principle that the “effective observance of human rights requires a juridical and institutional order in which the law takes precedence over the will of those who govern, and in which there is a proper balance between all branches of government.”¹⁶⁹

118. Judicial independence is an essential guarantee for upholding the rights of the victims and the accused in any criminal trial. The United Nations Special Rapporteur on the Independence of Judges and Lawyers has emphasized that “[i]t is the principle of the separation of powers, together with the rule of law, that opens the way to an administration of justice that provides guarantees of independence, impartiality and transparency.”¹⁷⁰

119. The IACHR has said that “from the institutional perspective, judges who are part of the State’s jurisdictional function must perform their functions without being subject to undue interference from the executive and legislative branches, the parties in the proceeding, social agents, and others organs connected to the administration of justice.”¹⁷¹ In addition, judicial independence must be understood in a positive sense, as the duty of the State to ensure, *de jure* and *de facto*, that justice operators can perform their functions in an independent manner. Specifically, in the case of judges and magistrates, the bodies of the Inter-American system have identified the following guarantees: (a) establishment of an appropriate process for their appointment and removal, (b) tenure in their positions for the duration of the established mandate, and (c) freedom from external pressure. Guaranteeing judges freedom from external pressures is understood broadly to mean that “they are able to rule on the matters they hear on the basis of the facts and in accordance with the law, without any restriction and without being subject to influences, inducements, pressures, threats, or improper interferences, be they direct or indirect, from whatever sector, or for whatever reason.”¹⁷²

120. In this regard, in addition to the guarantees identified in items (a) and (b), which were dealt with by the IACHR in its *Second Report on the Situation of Human*

¹⁶⁹ IACHR, *Report on the Situation of Human Rights in Venezuela*, OEA/Ser.L/V/II.118 Doc. 4 rev. 1, adopted October 24, 2003, para. 528; IACHR, Resolution No. 01/90, Cases 9768, 9780, and 9828, Mexico, May 17, 1990, para. 42.

¹⁷⁰ UN, Special Rapporteur on the Independence of Judges and Lawyers, *Report on the Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, A/HRC/11/41, published March 24, 2009, para. 18.

¹⁷¹ IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, para. 357; and IACHR, *Application to the Inter-American Court of Human Rights in the Case of Ana María Ruggeri Cova, Perkins Rocha Contreras, and Juan Carlos Apitz (First Court of Administrative Disputes) v. Venezuela*, Case 12.489, November 29, 2006, para. 83.

¹⁷² IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, paras. 359 and 383.

Rights Defenders in the Americas, the Inter-American Commission deems it is necessary for States to adopt the following as additional guarantees against external pressure on the work of justice operators (item c above):

121. As measures of institutional assistance, the IACHR recommends providing prosecutors and judges with specific training in the handling of highly controversial situations in which they may be pressured in their work. Instead of being limited to theoretical considerations, this training should cover practical issues in the real-life situations within which those officials operate. Forums for consultations, exchanges and support for the officials who deal with cases with this kind of high societal impact should also be designed and implemented.

122. In addition, judicial institutions must design and implement policies, strategies, and methodologies for communicating with the public and the media, so that public institutions can develop their own lines of communication to provide the citizenry with transparent, accessible, and understandable information. The establishment of spokespersons and press officers would ensure the professionalization of this function and, in addition, help free justice operators from tasks not related to their duties. These institutional changes can create the conditions for better and more efficient relations between the media and judicial authorities, and they can help eradicate certain inappropriate practices.

123. The IACHR notes that the Council of Europe recommendations regarding the provision of information to the press in connection with criminal proceedings offers a valuable set of guidelines that could be used as a framework to establish communications policies in the OAS member States. Those rules are designed to ensure a balance between respecting and upholding the rights of freedom of expression, due process, respect for privacy and family life, and ensuring the right of rectification and response, which are also enshrined in the Inter-American system's instruments.¹⁷³ Those guidelines are also based on the premise that the provision of information on judicial proceedings – and, particularly, on criminal cases – is covered by the right of the citizenry to be informed about matters of public concern, including justice, and that restrictions on the press in this area must be in accordance with a limited interpretation of those restrictions of the right of free expression and information contained in the European Convention on Human Rights itself (Art. 10). On that basis, these recommendations offer a series of principles that on substance are also applicable to the regional context of the Americas.¹⁷⁴

¹⁷³ Council of Europe / Committee of Ministers, *Recommendation Rec(2003)13 on the provision of information through the media in relation to criminal proceedings*, adopted July 10, 2003.

¹⁷⁴ Council of Europe / Committee of Ministers, *Explanatory Memorandum to Recommendation Rec(2003)13*.

E. Financial cost of pretrial detention

124. In addition to its specific impact on individuals, the generalized use of pretrial detention implies a major financial cost for states. For example, it has been calculated that the average total cost of pretrial detention to the State of Mexico, using the year 2006 as the parameter (prison population of more than 92,000 pretrial detainees) was more than 5,794 million pesos (US\$446 million), which includes upkeep of detainees (prison infrastructure and current operating expenses), costs of criminal trials (investigation, judicial proceedings, and public defense and social assistance), health care for detainees' families, and employers' contributions to social security. But the total average social cost of all this stood at more than 9,755 million pesos (US\$750 million), including the cost to the State detailed above, the costs to detainees and their families, and the costs to the community.¹⁷⁵

125. A study conducted in Peru¹⁷⁶ using 2011 figures estimated that the daily cost to the State of keeping an inmate in pretrial detention was 22 sols. Maintaining the population of 34,508 people in pretrial detention would represent a daily cost of 759,176 sols (US\$271,134) or an annual outlay of 277,099,240 sols (US\$98,964,014). That said, the average daily *total social cost* of pretrial detention would be 51.4 sols which, for a total population of 34,508 prison inmates, represents a daily outlay of 1,773,711 sols (US\$633,468); that daily *social cost* over the space of one year would reach 647,404,515 sols (US\$231,215,898). That total social cost includes the cost to the State provided above, and the costs to the detainees and their families (without including the cost to the community).

126. Chile calculated that the direct costs of pretrial detention in 2007, with a total population of inmates awaiting or facing trial of 9,385 (22.1% of the total population of the closed prison regime), amounted to 33,390,803,398 pesos (US\$63,905,842), including the criminal justice system and the gendarmerie. The indirect costs were calculated at 14,930,665,426 pesos (US\$28,575,436), which include admission, visits, private attorneys, and costs incurred as a result of death in custody. With this, the total cost of pretrial detention in Chile in 2007 was around 48,321,467,824 pesos (US\$92,481,278).¹⁷⁷ As can be seen from these figures, although

¹⁷⁵ Open Society / Justice Initiative, *¿How much does pretrial detention cost? Economic and Social costs of pretrial detention in Mexico (¿Cuánto cuesta la prisión sin condena? Costos económicos y sociales de la prisión preventiva en México)*, Guillermo Zepeta Lecuona, 2009, pp. 17, 53-60. According to this study, "the daily cost [to the State] of its pretrial detainees could cover annual support for 1,930 families under the *Oportunidades* antipoverty program, or an additional 21,062 children could be included in the school breakfasts program for one year. The annual national spending on pretrial detention could cover the national social milk supply program for eleven and a half years, or almost two years of the national school breakfasts program or of the antipoverty program in Oaxaca" (p. 54).

¹⁷⁶ Ministry of Justice and Human Rights and the Peruvian Center for the Development of Justice and Citizen Security (CERJUSC), *Baseline study for the implementation of an office for pretrial services in the context of the Criminal Procedure Code (Estudio de línea de base para la implementación de una oficina de servicios previos al juicio en el marco del Código Procesal Penal)*, 2013, pp. 120-124.

¹⁷⁷ Paz Ciudadana Foundation, *The Costs of Pretrial Detention in Chile (Los Costos de la Prisión Preventiva en Chile)*, 2008, pp. 2, 15 y 21.

the total cost to the Chilean treasury was lower than the amounts recorded in Peru and Mexico, keeping people in pretrial detention is much more costly, in relative terms, to Chile than to the other two States.

127. A study conducted in Argentina's Federal Prisons Service, which in June 2007 held 5,424 inmates in pretrial detention, revealed that the total estimated cost to the State of pretrial custody was 295 million pesos a year (US\$98 million). This figure includes maintaining the detainees, prosecution costs (investigation, trial, and public defense), annual spending on HIV monitoring following arrest, and lost contributions to social security. But the average total social cost that this entailed stood at more than 435 million pesos (US\$145 million), which included the cost to the State identified above, and the costs to the detainees and their families (without taking into account the costs to the community).¹⁷⁸

128. As already noted, people in pretrial detention suffer direct harm in terms of the quality of their family relations and their ability to earn an income, and they are also at a procedural disadvantage compared to individuals who face criminal prosecution from a position of liberty. This array of negative consequences arising from pretrial detention has a much greater impact on people who belong to groups historically discriminated, and this is even more serious when they belong to economically vulnerable groups, since they are also victims of other forms of social exclusion.

129. In addition to the monetary costs that pretrial detention represents to the State and society as a whole, there is another indirect cost when the State is found legally liable for damages due to the harm caused to citizens by the imposition of pretrial detention. This is clearly a very important element to be taken into consideration in countries such as Colombia, where domestic law offers mechanisms for citizens to bring this kind of legal action against the State.

130. This type of estimates about the monetary and human costs of pretrial detention should be used as the basis for a serious and objective discussion about the need and suitability of its use compared to other precautionary measures that could achieve the same procedural goals but with fewer restrictions of rights and at a lower cost, to both the State and the public. In addition, cost analyses are useful in identifying shortcomings, suboptimal practices, and even anomalies in justice and prison system public services.

¹⁷⁸ Center for the Implementation of Public Policies for Equity and Growth (CIPPEC), *The Social and Economic Cost of Pretrial Detention in Argentina (El costo social y económico de la prisión preventiva en la Argentina)*, Working Document No. 29, 2009, pp. 23 *et seq.* This study also suggests that calculations of the costs incurred by the state should also include the indirect costs of prison overcrowding (p. 34).

III. RELEVANT INTERNATIONAL STANDARDS ON THE USE OF PRETRIAL DETENTION

A. The right to the presumption of innocence and the principle of exceptionality

131. Of all the judicial guarantees that pertain to criminal justice, perhaps the most basic is the right to be presumed innocent, which is expressly recognized, without any reservations or exceptions, by several international human rights instruments, including the Universal Declaration of Human Rights (Art. 11.1), the International Covenant on Civil and Political Rights (Art. 14.2), the American Declaration (Art. XXVI), and the American Convention (Art. 8.2).¹⁷⁹

132. This standard provides that the accused must be assumed innocent and be treated as such until his criminal responsibility has been established by means of a final judgment. The principle of presumption of innocence demands that a conviction – and, consequently, the application of a penalty – may only be founded upon the court’s certainty regarding the existence of a punishable act attributable to the accused. The judge responsible for hearing the case is under the obligation to approach it without prejudice and must on no account assume *a priori* that the accused is guilty. This presumption of innocence has led modern criminal law to impose the general rule that all persons indicted in criminal proceedings must be tried at liberty and that only by exception may suspects be deprived of their freedom¹⁸⁰ (principle of exceptionality). If it is necessary to detain a person during a trial, the legal status of the accused continues to be that of an innocent person.¹⁸¹ Accordingly, and as consistently noted in this report, the right to the presumption of innocence is the point of departure for any analysis of the rights and treatment of persons in pretrial detention.¹⁸²

133. The IACHR again notes that the American Convention must be interpreted in such a way that its provisions have a useful effect: in other words, they must effectively serve the protective purpose for which they were created.¹⁸³ Substantively, this means that its terms must be interpreted in such a way as to guarantee that the rights it establishes are practical and effective and not theoretical or

¹⁷⁹ IACHR, Report No. 50/00, Case 11.298, Merits, Reinaldo Figueredo Planchart, Venezuela, April 13, 2000, para. 118. Not only is this principle contained in treaty law, it is also set forth in other international instruments dealing with people deprived of freedom, such as Principle 36 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

¹⁸⁰ IACHR, Report No. 50/00, Case 11.298, Merits, Reinaldo Figueredo Planchart, Venezuela, April 13, 2000, para. 119. Similarly: IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, paras. 69 and 70.

¹⁸¹ IACHR, *Third Report on the Situation of Human Rights in Paraguay*, Ch. IV, para. 33.

¹⁸² IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, Ch. VII, para. 32.

¹⁸³ I/A Court H.R., *Case of Ivcher Bronstein v. Peru*. Competence. Judgment of September 24, 1999. Series C No. 54, para. 37; and I/A Court H.R., *Case of the Constitutional Court v. Peru*. Competence. Judgment of September 24, 1999. Series C No. 55, para. 36.

illusory, and this also applies to the right to the presumption of innocence (Art. 8.2).¹⁸⁴ Consequently, respecting and upholding the right to the presumption of innocence has very specific consequences for the way in which the State exercises its punitive power (*ius puniendi*).

134. In practical terms, upholding the right to the presumption of innocence first implies that, as a general rule, the accused should remain at liberty during criminal proceedings.¹⁸⁵ This means that pretrial detention must be used as a truly exceptional measure and that, in all cases in which it is ordered, the right to the presumption of innocence should be considered when establishing the legitimate reasons that could justify its use. As with any restriction affecting human rights, deprivation of freedom prior to sentencing shall be interpreted restrictively in accordance with the *pro homine* principle whereby, when recognizing rights, the interpretation most beneficial to the person must be followed and, when restricting or denying rights, the most restrictive interpretation is to be adopted.¹⁸⁶

135. As the Inter-American Court has ruled, the principle of presumption of innocence also gives rise to “the obligation of the State not to restrict the liberty of a detained person beyond the limits strictly necessary to ensure that he will not impede the efficient development of an investigation and that he will not evade justice. Preventive detention is, therefore, a precautionary rather than a punitive measure.”¹⁸⁷ Therein lies the importance of the criterion of reasonableness in the enforcement of this measure. Keeping a person incarcerated for longer than is reasonable for meeting the goals sought with detention would equate, in practice, to anticipating the sentence.¹⁸⁸ In addition, Art. 7.5 of the Convention itself “imposes temporal limits on the duration of

¹⁸⁴ See also ECHR, *Case of Allenet de Ribemont v. France (Application 15175/89)*, Judgment of February 10, 1995 (Grand Chamber), para. 35.

¹⁸⁵ IACHR, Application from the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights against the Bolivarian Republic of Venezuela in Case 12.554, Francisco Usón Ramírez, July 25, 2008, para. 168.

¹⁸⁶ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, paras. 71 and 75.

¹⁸⁷ I/A Court H.R., *Case of Barreto Leiva v. Venezuela*. Merits, Reparations, and Costs. Judgment of November 17, 2009. Series C No. 206, para. 121; I/A Court H.R., *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 180; I/A Court H.R., *Case of Suárez Rosero v. Ecuador*. Judgment of November 12, 1997. Series C No. 35, para. 77.

¹⁸⁸ I/A Court H.R., *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 69; I/A Court H.R., *Case of Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, para. 111; I/A Court H.R., *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 180; I/A Court H.R., *Case of the “Juvenile Reeducation Institute” v. Paraguay*. Judgment of September 2, 2004, Series C No. 112, para. 229; I/A Court H.R., *Case of Suárez Rosero v. Ecuador*. Judgment of November 12, 1997. Series C No. 35, para. 77. See also IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, para. 133; IACHR, Report No. 2/97, Case 11.205, Merits, Jorge Luis Bronstein and others, Argentina, March 11, 1997, para. 12; IACHR, *Third Report on the Situation of Human Rights in Paraguay*, Ch. IV, para. 34.

pre-trial detention and, consequently, on the State's power to protect the purpose of the proceedings by using this type of precautionary measure."¹⁸⁹

136. With excessively prolonged pretrial incarceration, the risk of undermining the essence of the right to the presumption of innocence rises because it becomes increasingly empty and ultimately a mockery. In spite of its existence as a right, an innocent person is being deprived of his freedom, which is a severe punishment that is legitimately imposed on those who have been convicted.¹⁹⁰

137. Respecting the right to the presumption of innocence requires the State to establish the existence of the applicable requirements for pretrial detention, clearly and duly grounded, in each specific case.¹⁹¹ Accordingly, the principle of presumption of innocence is also violated when pretrial detention is imposed arbitrarily, or when its application is essentially determined by such factors as the nature of the crime, the expected punishment, or the mere existence of reasonable indications associating the accused to the offense. Such cases to a large extent entail the application of an anticipated sentence prior to the conclusion of the proceedings. This is due to several factors, including the fact that pretrial detention, with respect to the deprivation of liberty, is in no way different from incarceration ordered as the result of a conviction. A more serious situation arises when the ordering of pretrial detention for reasons such as those given is required by law: in such cases, judicial debate is "codified" through legislation and, as a result, the judges' ability to assess the need and applicability of the measure according to the specific nature of the matter at hand is curtailed.

138. As will be discussed in Chapter V of this Report, the right to the presumption of innocence also triggers the State's duty to ensure the effective separation of convicts and pretrial detainees at its detention centers, as well as to ensure that the latter receive treatment in line with their status as innocent people who are only being held in custody for precautionary reasons. Likewise, detainees who are acquitted at trial in the first instance must be released immediately.¹⁹²

¹⁸⁹ I/A Court H.R., *Case of Barreto Leiva v. Venezuela*. Merits, Reparations, and Costs. Judgment of November 17, 2009. Series C No. 206, para. 119.

¹⁹⁰ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, para. 125; IACHR, Report No. 12/96, Case 11.245, Merits, Jorge A. Giménez, Argentina, March 1, 1996, para. 80.

¹⁹¹ I/A Court H.R., *Case of Usón Ramírez v. Venezuela*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 20, 2009. Series C No. 207, para. 144.

¹⁹² Similarly, UN, Working Group on Arbitrary Detention, *Annual Report to the Human Rights Council*, A/HRC/4/40, published January 3, 2007, para. 78(b).

139. In connection with the right to the presumption of innocence, the European Court has established, among its standards, that: (a) the right is impaired if, prior to being found guilty in a court of law, any judicial resolution involving the accused reflects an indication of his guilt;¹⁹³ (b) the presumption of innocence may be infringed not only by a judge or court but also by other public authorities – e.g., the police or senior public officials of the government – when they present before the media people who are still under investigation or who have not yet been convicted;¹⁹⁴ (c) the reasonableness of the time an accused person is held in pretrial detention must be assessed in conjunction with the fact that he is being detained. Until judgment is issued, his innocence must be assumed. The purpose of Art. 5(3) of the European Convention (the equivalent of Art. 7.5 of the American Convention) is essentially to require that the accused be released once the length of his detention is no longer reasonable;¹⁹⁵ and the domestic courts must examine all the facts arguing for or against the existence of grounds justifying pretrial detention, with due regard to the principle of the presumption of innocence, and set them out in their decisions on applications for release filed by the accused. Arguments for and against release must not be general and abstract.¹⁹⁶

140. The criterion of the exceptional use of pretrial detention is directly related to the right to the presumption of innocence. The reason for the exceptional nature of this precautionary measure is, precisely, the fact that it is the most severe measure than can be imposed on a suspect, in that it necessarily entails incarceration, with all the related implications for him and his family. The following opinion, expressed by Judge Sergio García Ramírez, is relevant to this point:

Preventive detention [is] of the most severe of the precautionary measures still used in criminal trials, since it implies a profound restriction to freedom, with very important consequences. We normally state that the preventive detention is not a real sanction; it is not a punitive measure, but instead simply a precautionary and ephemeral one. Technically, this is true. However, considering this phenomena in the light of reality –even when it comes up against the technicality – preventive detention does not differ at all, except in its

¹⁹³ ECHR, *Case of Allenet de Ribemont v. France* (Application No. 15175/89), Judgment of February 10, 1995 (Second Section of the Court), para. 33; ECHR, *Case of Barberá, Messegue, and Jabardo v. Spain* (Application No. 10590/83), Judgment of December 6, 1988 (Grand Chamber), para. 91.

¹⁹⁴ ECHR, *Case of Allenet de Ribemont v. France* (Application No. 15175/89), Judgment of February 10, 1995 (Second Section of the Court), paras. 36 and 37. See also: HRC, Communication No. 770/1997, Dimitry L. Gridin v. Russian Federation, decision July 18, 2000, CCPR/C/69/D/770/1997, para. 8.3.

¹⁹⁵ ECHR, *Case of X.Y. v. Hungary* (Application No. 43888/08), Judgment of March 19, 2013 (Second Section of the Court), para. 40; ECHR, *Case of McKay v. the United Kingdom* (Application No. 543/03), Judgment of October 3, 2006 (Grand Chamber), para. 41; ECHR, *Case of Neumeister v. Austria* (Application No. 1936/63), Judgment of June 27, 1968 (Grand Chamber), para. 4.

¹⁹⁶ ECHR, *Case of Piruzyan v. Armenia* (Application No. 33376/07), Judgment of June 26, 2012 (Third Section of the Court), para. 92; ECHR, *Case of Letellier v. France* (Application 12369/86), Judgment of June 26, 1991 (Grand Chamber), para. 35.

name, of the punitive detention: both are a deprivation of freedom, they (normally) occur in terrible conditions, they cause the subject and those that surround him a serious material and mental damage, and they normally have long-term repercussions, sometimes devastating. [...] Therefore, among other things, it is necessary to seriously weigh in the justification, the characteristics, duration, and alternatives of the preventive detention.¹⁹⁷

141. In addition, the non-exceptional use of pretrial detention poses a risk to the enjoyment of the right to the presumption of innocence and the guarantees of legal due process, including the right of defense.¹⁹⁸ Hence, given the nature of pretrial detention as the most severe measure that can be imposed on a suspect, for more than a decade the Inter-American Court has consistently ruled that “its use should be exceptional, limited by the principle of lawfulness, the presumption of innocence, and the need and proportionality, in keeping with what is strictly necessary in a democratic society.”¹⁹⁹ This principle has also been recognized in instruments that are universally accepted by the international community, such as the Standard Minimum Rules for Non-custodial Measures, which stipulate that “[p]re-trial detention shall be used as a means of last resort in criminal proceedings” (Rule 6.1).

142. In practical terms, the principle of exceptionality means that pretrial detention shall be admissible when it is the only way to ensure the goals of the proceedings, because it can be shown that less restrictive measures would be fruitless in securing those goals. For this reason, efforts should always be made to replace it with a less severe measure when the circumstances allow.²⁰⁰

¹⁹⁷ I/A Court H.R., *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, Concurring Opinion of Judge Sergio García Ramírez, para. 18.

¹⁹⁸ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, para. 94; IACHR, Report No. 12/96, Case 11.245, Merits, Jorge A. Giménez, Argentina, March 1, 1996, para. 84.

¹⁹⁹ I/A Court H.R., *Case of Bayarri v. Argentina*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of October 30, 2008. Series C No. 187, para. 69; I/A Court H.R., *Case of Barreto Leiva v. Venezuela*. Merits, Reparations, and Costs. Judgment of November 17, 2009. Series C No. 206, para. 121; I/A Court H.R., *Case of Yvon Neptune v. Haiti*. Merits, Reparations, and Costs. Judgment of May 6, 2008. Series C No. 180, para. 107; I/A Court H.R., *Case of Servellón García et al. v. Honduras*. Judgment of September 21, 2006. Series C No. 152, para. 88; I/A Court H.R., *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 67; I/A Court H.R., *Case of García Asto and Ramírez Rojas v. Peru*. Judgment of November 25, 2005. Series C No. 137, para. 106; I/A Court H.R., *Case of Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, para. 74; I/A Court H.R., *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 106.

²⁰⁰ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, para. 100.

B. Conditions for use

1. Legitimate reasons or grounds for applicability

143. First of all, according to the regime established by the American Convention, pretrial detention may only be ordered in criminal proceedings.²⁰¹ Similarly, the Inter-American Court has consistently held that the provisions of the American Convention – and, in the Commission’s view, the provisions of the American Declaration as well – give rise to “the obligation of the State not to restrict the liberty of a detained person beyond the limits strictly necessary to ensure that he **will not impede the efficient development of an investigation and that he will not evade justice**; preventive detention is, therefore, a precautionary rather than a punitive measure” (emphasis added).²⁰² This criterion, whereby pretrial detention should only be used for procedural purposes to protect the results of the proceedings, was subsequently reiterated by the Court in the following terms:

[E]ven in these circumstances [sufficient evidence to allow reasonable supposition that the accused took part in the offense under investigation], the deprivation of liberty of the accused cannot be based on general preventive or special preventive purposes, which could be attributed to the punishment, but [...] 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.²⁰³

The personal characteristics of the supposed author and the gravity of the offense he is charged with are not, in themselves, sufficient justification for preventive detention.²⁰⁴

²⁰¹ The European Court has ruled in a similar way regarding the equivalent provisions contained in the European Convention on Human Rights. See, in this regard, ECHR, *Case of Ostendorf v. Germany* (Application No. 15598/08), Judgment of March 7, 2013 (Fifth Section of the Court), para. 68.

²⁰² I/A Court H.R., *Case of Suárez Rosero v. Ecuador*. Judgment of November 12, 1997. Series C No. 35, para. 77. It reiterated that same position later, in cases including: I/A Court H.R., *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. 93; I/A Court H.R., *Case of Servellón García et al. v. Honduras*. Judgment of September 21, 2006. Series C No. 152, para. 90; I/A Court H.R., *Case of Palamara Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135, para. 198; I/A Court H.R., *Case of Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, para. 111; I/A Court H.R., *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 180.

²⁰³ I/A Court H.R., *Case of Barreto Leiva v. Venezuela*. Merits, Reparations, and Costs, Judgment of November 17, 2009. Series C No. 206, para. 111; I/A Court H.R., *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.

²⁰⁴ I/A Court H.R., *Case of Bayarri v. Argentina*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of October 30, 2008. Series C No. 187, para. 74; I/A Court H.R., *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 69.

144. In line with this, the Inter-American Commission understands that the terms of Article 7.5 of the Convention establish, as the sole legitimate grounds for pretrial detention, the risk of the accused attempting to escape justice or hindering the judicial investigation. Thus, the specific purpose of using this precautionary measure is to ensure that the proceedings are conducted successfully by neutralizing the procedural risks that could thwart that goal. Consequently, the justification of pretrial detention for preventive reasons – such as the dangerousness of the accused, the possibility of his committing crimes in the future, or the social repercussions of such acts – runs contrary to this provision and to the right to the presumption of innocence and is inconsistent with the principle of *pro homine* interpretation. This is true not only for the reasons given, but because such stances are based on criteria of substantive, not procedural, criminal law, which are characteristic of the punitive response.²⁰⁵

145. It falls to the competent judicial authorities – in particular, to prosecutors – and not to the accused or his defense counsel, to establish the existence of the elements necessary to determine a flight risk or the risk of the investigation being hindered.²⁰⁶ In addition, pursuant to the right to the presumption of innocence and the exceptionality criterion, even when a possible legitimate justification exists, the use of pretrial detention must be considered and carried out in accordance with the criteria of necessity, proportionality, and reasonableness.

146. Moreover, as this report makes clear, the legitimacy of the grounds for admitting pretrial detention derives from their compatibility with the American Convention and not from the mere fact that they are included in statutes: it is possible for legal provisions to establish criteria or grounds for its use that run contrary to the regime created by the Convention. Thus, the Inter-American Court has stated that “the legislation that establishes the grounds for a restriction to personal liberty must be issued pursuant to the principles that govern the Convention, and be conducive to the effective observation of the guarantees established thereto.”²⁰⁷

2. Invalid or inadequate grounds

147. In line with the foregoing, the bodies of the Inter-American system have addressed several grounds for the imposition of pretrial detention that, even when provided for by statute, are incompatible with the regime established by the American Convention.

²⁰⁵ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, paras. 81 and 84; IACHR, Report No. 77/02, Case 11.506, Merits, Waldemar Gerónimo Pinheiro and José Víctor Dos Santos, Paraguay, December 27, 2000, para. 66.

²⁰⁶ IACHR, Application from the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights against the Bolivarian Republic of Venezuela in Case 12.554, Francisco Usón Ramírez, July 25, 2008, para. 172.

²⁰⁷ I/A Court H.R., *Case of Servellón García et al. v. Honduras*. Judgment of September 21, 2006. Series C No. 152, para. 89.

148. In the case of *Suárez Rosero v. Ecuador*, the Inter-American Court addressed a provision excluding people accused of drug-related crimes from the legal limits set for the duration of pretrial detention. The Court considered that “this exception deprives a part of the prison population of a fundamental right, on the basis of the crime of which it is accused and, hence, intrinsically injures everyone in that category.” The Court further observed that the law violated Article 2 of the American Convention, whether or not it was enforced in the specific case.²⁰⁸ Those findings were repeated in the *Acosta Calderón v. Ecuador* judgment.²⁰⁹

149. In the case of *López Álvarez v. Honduras*, the Court analyzed the legal disposition that allowed the exclusion of precautionary measures other than pretrial detention based on the sentence applicable to the offense charged. The Court found that the deprivation of liberty suffered by the victim was the result of legislation that “ignored the need, enshrined in the American Convention, that the preventive detention be justified in each specific case, through the weighing of the elements that concurred in the same, and that in no case shall the application of said precautionary measure [pretrial detention] be determined by the crime with which the individual is being charged.”²¹⁰

150. Later, in the case of *Barreto Leiva v. Venezuela*, the Court addressed the enforcement of a provision that allowed the accused to be detained merely by establishing the existence of “indications of guilt,” without requiring the determination of a legitimate goal. In that case, the Court said that “the arrest warrant, in none of the 454 pages, mentions the need to order the preventive detention of Mr. Barreto Leiva based on sufficient circumstantial evidence, which would persuade the objective observer that the accused would impede the conduct of the proceedings or elude justice.” Consequently, since the State had not provided “sufficient reasons regarding the achievement of a legitimate purpose in line with the Convention upon the issuance of the arrest warrant,” the pretrial detention was arbitrary.²¹¹

151. Likewise, in the case of *Peirano Basso v. Uruguay*, the Inter-American Commission found that (a) the type of crime and the severity of the punishment can be taken into account when the flight risk is examined (albeit not as the sole elements), but not as a rationale for the excessive protraction of pretrial detention, since a denial of

²⁰⁸ I/A Court H.R., *Case of Suárez Rosero v. Ecuador*. Judgment of November 12, 1997. Series C No. 35, para. 98. Similar to the Inter-American system, the European Court has ruled that “[a]ny system of mandatory detention on remand is *per se* incompatible with Article 5(3) of the Convention.” ECHR, *Case of Ilijkov v. Bulgaria (Application No. 33977/96)*, Judgment of July 26, 2001 (Fourth Section of the Court), para. 84.

²⁰⁹ I/A Court H.R., *Case of Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, para. 135.

²¹⁰ I/A Court H.R., *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 81.

²¹¹ I/A Court H.R., *Case of Barreto Leiva v. Venezuela*. Merits, Reparations, and Costs. Judgment of November 17, 2009. Series C No. 206, paras. 115 and 116.

freedom during proceedings may only serve a precautionary purpose, not punitive goals; (b) in no instance may the release of the accused during the proceedings be denied on the basis of such concepts as “social alarm,” “social repercussion,” or “dangerousness,”²¹² since these are judgments based on material criteria that convert pretrial detention into an anticipated sanction; and (c) legal restrictions on the granting of release during proceedings or the legal imposition of pretrial detention may not be considered *juris et de jure* conditions that do not need to be proved in the specific case and that only need to be claimed. The Convention does not allow for a whole category of suspects, merely on the basis of that condition, to be excluded from the right of remaining free during their trials.²¹³

152. In the case of *Díaz Peña v. Venezuela*, the IACHR addressed the legal presumption of flight risk in cases involving crimes punishable by prison terms of ten years or more. The Commission found that applying the flight risk presumption without a detailed examination of the specific circumstances of the case constituted a form of arbitrary arrest, even when such presumption was provided for in law. The Commission further found that the use of that presumption on the basis of the expected punishment constituted a violation of the right to the presumption of innocence.²¹⁴

153. Similarly, in the case of *Usón Ramírez v. Venezuela*, which also dealt with flight risk as grounds for pretrial detention, the Commission stressed that courts were required to establish the component elements of flight risk by means of “reasonable arguments,” and that they could not merely invoke it or cite the statutes that provided for such a justification. In that case, although there was no legal presumption regarding flight risk, the trial court found that the possible applicable sentence indicated that the accused would attempt to abscond from justice, without providing any proof of that supposition or of the need or proportion of pretrial detention. In light of that, the IACHR found that the victim’s incarceration was arbitrary and violated the right to the presumption of innocence.²¹⁵

154. The European Court has also ruled that flight risk cannot be based solely on the severity of the possible punishment but that instead it must be considered in conjunction with another series of relevant factors. The expectation of a lengthy sentence and the weight of the evidence can be of relevance, but they are not in

²¹² See, for example, the analysis offered by Diego Portales University in the *Annual Report on the Human Rights Situation in Chile 2012 (Informe Anual sobre Derechos Humanos en Chile) 2012* (pp. 211 *et seq.*) regarding the treatment given to the criterion of “risk to society” in Law 20.253 of 2008, the “anticrime agenda.”

²¹³ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, paras. 89, 140, 141, and 144.

²¹⁴ IACHR, Report No. 84/10, Case 12.703, Merits, Raúl José Díaz Peña, Venezuela, July 13, 2010, paras. 150, 152, 153, and 172.

²¹⁵ IACHR, Application from the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights against the Bolivarian Republic of Venezuela in Case 12.554, Francisco Usón Ramírez, July 25, 2008, paras. 172, 176, 178, 179, 180, and 184.

themselves decisive. In the absence of other elements, the potential risk could be mitigated through other guarantees. A simple reference to the nature of the crime cannot be considered an adequate rationale for flight risk.²¹⁶ Likewise, the gravity of the charges brought against a person cannot be the only element taken into consideration to justify the subsequent protraction of pretrial detention.²¹⁷

155. The Commission has noted that the ordering of pretrial detention on the basis of the seriousness of the offense is not always a matter of legal design. During the Rapporteurship for PDL's visit to Uruguay, for example, the representatives of the judiciary expressed their firm conviction that the seriousness of the offense itself leads to the assumption that the accused will incur in some form of action justifying the need to order pretrial detention. On account of that situation, the IACHR urged the State, in particular, to promote "a real paradigm shift in thinking about the appropriateness and need for pretrial detention."²¹⁸

156. In its report *Insufficient Judicial Independence, Distorted Pretrial Detention*, the Due Process of Law Foundation stated that in some of the region's countries, the social climate created by the different players in the public debate about citizen security – to which reference has been made in Chapter II of this report – have led not only to changes in legislation, but also to guidelines for judicial interpretation about the admissibility of pretrial detention. The simplest and most common of these guidelines is to reduce the decision on the use of pretrial detention to the severity of the punishment, which in law is normally listed as one of several elements that must necessarily be taken into account. As a result, in many cases, hearings to discuss the admissibility of pretrial detention are turned into "advance trials," with flight risk being assessed in light of the expected penalty, which constitutes prejudging the guilt of the accused.²¹⁹

157. Finally, regarding the recidivism criterion, the Commission is of the view that it can be considered an additional element in analyzing the applicability of

²¹⁶ ECHR, *Case of Piruzyan v. Armenia* (Application No. 33376/07), Judgment of June 26, 2012 (Third Section of the Court), paras. 95 and 96; ECHR, *Case of Panchenko v. Russia* (Application No. 45100/98), Judgment of February 8, 2006 (Fourth Section of the Court), para. 105; ECHR, *Case of Becciev v. Moldova* (Application No. 9190/03), Judgment of October 4, 2005 (Fourth Section of the Court), para. 58; ECHR, *Case of Muller v. France* (Application No. 2180/93), Judgment of March 17, 1997 (Grand Chamber), para. 43; ECHR, *Case of Letellier v. France* (Application 12369/86), Judgment of June 26, 1991 (Grand Chamber), para. 43.

²¹⁷ ECHR, *Case of Idalov v. Russia* (Application No. 5826/03), Judgment of 22 May 2012 (Grand Chamber), para. 145; ECHR, *Case of Chraidí v. Germany* (Application No. 65655/01), Judgment of October 26, 2006 (Fifth Section of the Court), para. 40; ECHR, *Case of Wemhoff v. Germany* (Application 2122/64), Judgment of June 27, 1968 (Grand Chamber), *As to the Law*, para. 14.

²¹⁸ IACHR, Press Release 76/11 – IACHR Recommends Adoption of a Comprehensive Public Policy on Prisons in Uruguay, Washington, D.C., July 25, 2011, Annex, available at http://www.oas.org/en/iachr/media_center/PReleases/2011/076A.asp, paras. 42 and 46.

²¹⁹ DPLF, *Insufficient Judicial Independence, Distorted Pretrial Detention – The Cases of Argentina, Colombia, Ecuador, and Peru*, 2013, pp. 16 and 17. See also: IACHR Regional Meeting of Experts on Pretrial Detention, May 9 and 10, 2013, presentation by Luis Pásara, available in Spanish at: <http://www.oas.org/es/cidh/ppl/actividades/prisionpreventiva.asp>.

pretrial detention in a specific case, but in no instance should it be used as the guiding criterion for ordering pretrial detention. For example, legally assuming that that circumstance alone constitutes procedural risk would be contrary to the principle of the presumption of innocence. In addition, in no instance should recidivism be examined on the basis of police records or any other documents other than final judgments enacted by the competent courts.

3. The criteria of necessity, proportionality and reasonableness

158. In addition to it being limited to cases in which there are reasonable indications linking the accused to the offense and a legitimate goal to justify its use, pretrial detention must be constrained by principles that should prevail in any democratic society: legality, necessity, proportionality, and reasonableness. Respecting and guaranteeing the right to the presumption of innocence and the exceptional nature of pretrial detention as the most severe measure that can be imposed on a suspect require that it be ordered in accordance with the aforesaid standards.²²⁰

Necessity

159. According to the *necessity* criterion, pretrial detention, like all other precautionary measures, should be ordered when it is essential for attaining the goals sought. In other words, it should only be admissible when it is the only way to ensure the purposes of the proceedings, after demonstrating that other less restrictive precautionary measures would be unsuccessful in securing those goals. Accordingly, efforts should be made to replace it with a less severe precautionary measure when the circumstances so allow. Thus, it falls to the court under whose authority the detainee is being held to order his liberty, even on an *ex officio* basis, when the reasons on which the detention was originally based no longer exist. This is because of the precautionary nature of the measure, whereby it can only remain in effect for the duration that is strictly necessary to ensure the procedural goal sought.²²¹ A person must not be held in pretrial detention for longer than the state can appropriately justify its need; otherwise, the denial of liberty becomes arbitrary.²²² Consequently, the criterion of necessity is not

²²⁰ See, using similar language: I/A Court H.R., *Case of Yvon Neptune v. Haiti*. Merits, Reparations, and Costs. Judgment of May 6, 2008. Series C No. 180, para. 107; I/A Court H.R., *Case of Servellón García et al. v. Honduras*. Judgment of September 21, 2006. Series C No. 152, para. 88; I/A Court H.R., *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 67; I/A Court H.R., *Case of García Asto and Ramírez Rojas v. Peru*. Judgment of November 25, 2005. Series C No. 137, para. 106; I/A Court H.R., *Case of Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, para. 74; I/A Court H.R., *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 106.

²²¹ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, paras. 100, 102, and 105.

²²² UN, HRC, Communication No. 1547/2007, Munarbek Torobekov v. Kyrgyzstan, decision of October 27, 2011, CCPR/C/103/D/1547/2007, para. 6.3; UN, HRC, Communication No. 1369/2005, Felix Kulov, decision of July 26, 2010, CCPR/C/99/D/1369/2005, para. 8.3. Similarly, I/A Court H.R., *Case of Bayarri v. Argentina*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of October 30, 2008. Series C No. 187, para. 74.

only relevant when deciding whether to order pretrial detention, but also when assessing the usefulness of extending its duration.

Proportionality

160. In ordering pretrial detention, particular attention must be paid to the criterion of *proportionality*. This means that there is a need to examine whether the goal sought with this measure, which affects the individual's right to freedom, truly offsets the sacrifices it represents for the person and for society.

161. This proportionality criterion can be applied in two dimensions. The first is related to the inherent difference that should exist between the nature of a denial of freedom as a precautionary measure applied to an individual whose juridical status is still that of an innocent person (these practical implications are explored in Chapter V of this report) and a denial of liberty as a result of a conviction. The second dimension relates to the interplay between pretrial detention as the severest precautionary measure available in criminal law and the goals it is used to pursue in a specific case. The Inter-American Court has addressed these two aspects of proportion in the following very specific terms:

[A] person that is presumed innocent cannot be treated equal to or worse than a convicted person. The State must avoid that the measure of procedural coercion be equal to or more harmful for the defendant than the punishment in case of conviction. This means that it should not be appropriate to authorize the preventive detention in cases where it is not possible to impose a prison term, and that such prison term must cease when the detention period has exceeded a reasonable time. The principle of proportionality implies, also, 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.²²³

162. In connection with the second of these aspects, the Court has also determined that ordering pretrial detention "requires a judgment of proportionality between said measure, the evidence to issue it, and the facts under investigation. If the proportionality does not exist, the measure will be arbitrary."²²⁴ When courts order pretrial detention without considering the use of other less onerous precautionary

²²³ I/A Court H.R., *Case of Barreto Leiva v. Venezuela*. Merits, Reparations, and Costs. Judgment of November 17, 2009. Series C No. 206, para. 122.

²²⁴ I/A Court H.R., *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 67.

measures in light of the facts under investigation, pretrial detention is rendered disproportionate.²²⁵

163. Because of the proportionality criterion, pretrial detention may not be used when the sanction applicable to the crime does not involve incarceration, nor when the circumstances of the case allow for the possible suspension of a future sentence. Consideration must also be given to whether, were a conviction to be issued, the timing of events would allow some form of conditional or advance release.²²⁶ Likewise, any deprivation of liberty for the expression of an opinion, even as a precautionary measure, is disproportionate and incompatible with the Convention.²²⁷

164. The proportionality criterion is of particular relevance in light of the situation that exists in many of the States in the region, where there are pronounced patterns of pretrial detention being used to detain people accused of minor offenses²²⁸ (including nonviolent crimes against property and small-scale drug dealing). On this situation, the WGAD has noted that such people “are kept in custody only to ensure that

²²⁵ ECHR, *Case of Ladent v. Poland* (Application No. 11036/03), Judgment of March 18, 2008 (Fourth Section of the Court), paras. 55 and 56.

²²⁶ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, para. 110.

²²⁷ IACHR, Application from the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights against the Bolivarian Republic of Venezuela in Case 12.554, Francisco Usón Ramírez, July 25, 2008, para. 179.

²²⁸ Regarding this point, see, for example: IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, Ch. VII, paras. 4, 7, 29, 34, 35, and 36; UN, Working Group on Arbitrary Detention, *Statement upon conclusion of its visit to Brazil (18 to 28 March 2013)*, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13197&LangID=E>; UN, Subcommittee for the Prevention of Torture, *Report on the Visit of the SPT to Mexico*, CAT/OP/MEX/1, published May 27, 2009, paras. 101 to 104 (“The criminalization of poverty”); IACHR Regional Meeting of Experts on Pretrial Detention, May 9 and 10, 2013, presentation by Dr. Elena Azaola, available in Spanish at: <http://www.oas.org/es/cidh/pp/actividades/prisionpreventiva.asp> (citing the studies of Guillermo Zepeda); Report on the situation of people deprived of freedom in Mexico, pp. 19 to 22, presented at the hearing on the *Situation of the Rights of Persons Deprived of Liberty in Mexico*, 144th regular session, organized by Document, Analysis, and Action for Social Justice (Documenta), Legal Assistance for Human Rights (ASILEGAL), and the Institute of Human Rights Ignacio Ellacuría, S.J. of the Ibero-American University of Puebla, March 23, 2012, available in Spanish at: <http://www.redtdt.org.mx/media/descargables/INFORMECIDH.PRIVADOS.LIBERTAD.pdf>; Diego Portales University, Law School Human Rights Center, *Annual Report on the Human Rights Situation in Chile 2012 (Informe Anual sobre Derechos Humanos en Chile 2012)*, pp. 204 to 214; Paz Ciudadana Foundation and Open Society Foundations, *Characterization of the Population in Pretrial Detention in Chile (Caracterización de la Población en Prisión Preventiva en Chile)*, 2011, available in Spanish at: http://www.pazciudadana.cl/wp-content/uploads/2013/07/2011-03-2011_Caracterizaci%C3%83%C2%B3n-de-la-poblaci%C3%83%C2%B3n-en-prisi%C3%83%C2%B3n-preventiva.pdf; and, with particular reference to drug policies, see, for example: Transitional Institute and Whola, *Systems Overload: Drug Laws and Prisons in Latin America*, 2010, available at: <http://www.druglawreform.info/en/publications/systems-overload>. With reference to drug policies, the Commission notes that the Declaration of Antigua Guatemala, “For a Comprehensive Policy against the World Drug Problem in the Americas,” states that “drug policies must have a crosscutting human rights perspective consistent with the obligations of parties under international law, including the American Convention on Human Rights and other applicable human rights instruments.” OEA/Ser.P AG/DEC.73 (XLIII-O/13), adopted June 6, 2013, para. 10.

they will appear before the judge [...] because States are simply not capable of guaranteeing that they will appear in court.”²²⁹ The WGAD has also stated that, deprivation of liberty must not merely be formally ordered in accordance with the law. The right to personal liberty also requires that States make use of incarceration “only insofar as it is necessary to meet a pressing societal need, and in a manner **proportionate** to that need” (emphasis added).²³⁰ Thus, the Commission reiterates that deprivation of liberty for minor offenses is inconsistent with the principle of proportion.²³¹

Reasonableness

165. In connection with the criterion of *reasonableness*, the Inter-American Court has ruled that Article 7.5 of the Convention “imposes temporal limits on the duration of pre-trial detention and, consequently, on the State’s power to protect the purpose of the proceedings by using this type of precautionary measure.”²³² As has been discussed, keeping a person incarcerated for longer than is reasonable would equate, in practice, to a form of anticipated sentence.²³³ However, “even when there are reasons for keeping a person in preventive detention, Article 7(5) guarantees that he will be released if the detention period has exceeded a reasonable time.”²³⁴

²²⁹ UN, Working Group on Arbitrary Detention, *Annual Report presented to the Human Rights Council*, A/HRC/4/40, published January 3, 2007, para. 69.

²³⁰ UN, Working Group on Arbitrary Detention, *Annual Report presented to the Human Rights Council*, E/CN.4/2006/7, published December 12, 2005, para. 63.

²³¹ IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, OEA/Ser.L/V/II.111 Doc. 21 rev., adopted April 6, 2001, Ch. VII, para. 11. See also IACHR, Press Release 76/11 – IACHR Recommends Adoption of a Comprehensive Public Policy on Prisons in Uruguay, Washington, D.C., July 25, 2011, Annex, available at http://www.oas.org/en/iachr/media_center/PReleases/2011/076A.asp, para. 46. Similarly: ECHR, *Case of Ladent v. Poland (Application No. 11036/03)*, Judgment of March 18, 2008 (Fourth Section of the Court), para. 56.

²³² I/A Court H.R., *Case of Barreto Leiva v. Venezuela*. Merits, Reparations, and Costs. Judgment of November 17, 2009. Series C No. 206, para. 119; I/A Court H.R., *Case of Bayarri v. Argentina*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of October 30, 2008. Series C No. 187, para. 70. Similarly, the European Court has stated that the purpose of Art. 5(3) of the European Convention is essentially to allow the provisional release of the accused once his incarceration is no longer reasonable. ECHR, *Case of X.Y. v. Hungary (Application No. 43888/08)*, Judgment of March 19, 2013 (Second Section of the Court), para. 40; ECHR, *Case of McKay v. the United Kingdom (Application No. 543/03)*, Judgment of October 3, 2006 (Grand Chamber), para. 41; ECHR, *Case of Neumeister v. Austria (Application No. 1936/63)*, Judgment of June 27, 1968 (Grand Chamber), para. 4.

²³³ I/A Court H.R., *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 69; I/A Court H.R., *Case of Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, para. 111; I/A Court H.R., *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 180; I/A Court H.R., *Case of the “Juvenile Reeducation Institute” v. Paraguay*. Judgment of September 2, 2004, Series C No. 112, para. 229; I/A Court H.R., *Case of Suárez Rosero v. Ecuador*. Judgment of November 12, 1997. Series C No. 35, para. 77. Similarly, IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, para. 133; IACHR, Report No. 2/97, Case 11.205, Merits, Jorge Luis Bronstein and others, Argentina, March 11, 1997, para. 12; IACHR, *Third Report on the Situation of Human Rights in Paraguay*, Ch. IV, para. 34.

²³⁴ I/A Court H.R., *Case of Bayarri v. Argentina*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of October 30, 2008. Series C No. 187, para. 74.

166. Consequently, it is primarily the responsibility of the national judicial authorities to ensure that the duration of the pretrial detention does not exceed a reasonable time.²³⁵ That time cannot be established in abstract terms because it responds to criteria whose impact should be determined in each individual case.²³⁶ Thus, it falls to the State to present elements to justify extending the duration of the measure.²³⁷

167. The European Court has ruled that an extension of pretrial detention should be based on relevant and sufficient reasons to justify its prolongation,²³⁸ and that in cases in which it is extended significantly, that justification should be “particularly convincing” and demonstrate the continued existence of the grounds that originally justified its enforcement.²³⁹

168. In determining the reasonableness of that duration, although attention can be paid to such elements as the complexity of the case and the diligence of the judicial authorities in pursuing the investigations – elements that should also be used to analyze the total duration of the proceedings (within the scope of Article 8.1 of the Convention) – in examining the duration of pretrial detention, the evaluation of those factors should be much stricter and more constrained on account of the denial of liberty it entails.²⁴⁰

169. In particular, the complexity of the case should be analyzed based on the facts and the difficulty entailed in proving them. As a counterpart, the diligence of

²³⁵ ECHR, *Case of Sardinias Albo v. Italy (Application No. 56271/00)*, Judgment of February 17, 2005 (First Section of the Court), para. 85; ECHR, *Case of Labita v. Italy (Application No. 26772/95)*, Judgment of April 6, 2000 (Grand Chamber), para. 152; ECHR, *Case of Letellier v. France (Application 12369/86)*, Judgment of June 26, 1991 (Plenary of the Court), para. 35.

²³⁶ IACHR, Application from the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights against the Bolivarian Republic of Venezuela in Case 11.663, Oscar Barreto Leiva, October 31, 2008, para. 136; IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, para. 135 (in accordance with the constant jurisprudence of the European Court). See also ECHR, *Case of Lukovic v. Serbia (Application No. 43808/07)*, Judgment of March 26, 2013 (Second Section of the Court), para. 46; ECHR, *Case of Piruzyan v. Armenia (Application No. 33376/07)*, Judgment of June 26, 2012 (Third Section of the Court), para. 94; ECHR, *Case of Sardinias Albo v. Italy (Application No. 56271/00)*, Judgment of February 17, 2005 (First Section of the Court), para. 84; ECHR, *Case of Labita v. Italy (Application No. 26772/95)*, Judgment of April 6, 2000 (Grand Chamber), para. 152; ECHR, *Case of W v. Switzerland (Application No. 14379/88)*, Judgment of January 26, 1993 (Grand Chamber), para. 30.

²³⁷ IACHR, Report No. 66/01, Case 11.992, Merits, Dayra María Levoyer Jiménez, Ecuador, June 14, 2001, para. 48.

²³⁸ ECHR, *Case of Melnikova v. Russia (Application No. 24552/02)*, Judgment of January 30, 2008 (First Section of the Court), paras. 83 and 84.

²³⁹ ECHR, *Case of I.A. v. France (Application 28213/95)*, Judgment of September 23, 1998 (Grand Chamber), para. 111.

²⁴⁰ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, paras. 127 and 128; IACHR, Report No. 12/96, Case 11.245, Merits, Jorge A. Giménez, Argentina, March 1, 1996, para. 111.

the court authorities should be examined in light of the complexity of the case and of the investigation. In this respect, pretrial detention cannot be justified because the accused invokes legally established procedural resources. Those resources are provided to ensure due process and have been designed for maximum use.²⁴¹ However, the need to keep the accused in pretrial detention can be based on his actions if he deliberately hindered the course of justice or acted recklessly by, for example, introducing false evidence, threatening witnesses, destroying documents, absconding from justice, or failing to appear without good reason.

170. The rationality of Article 7.5 of the Convention is that a person held in pretrial detention should be released as soon as the deprivation of liberty goes beyond the limits of the sacrifice that can reasonably be required from a person presumed innocent.²⁴² Once the period considered reasonable has ended, the State has lost its opportunity to continue ensuring the goals of the proceedings through the deprivation of liberty of the accused. In other words, pretrial detention may or may not be replaced by other less restrictive precautionary measures, but, in any event, the accused should be released. This is independent of whether there is still a procedural risk to the proceedings. Even when the circumstances of the case indicate that once released, the accused may attempt to evade justice or disrupt the investigation, the precautionary measure should no longer be used to deprive him or her of liberty.²⁴³

171. The Commission also notes that, as the European Court has ruled, although the existence of a reasonable or relevant suspicion that the accused has committed a crime is a *sine qua non* requirement for the ordering of pretrial detention, that factor cannot in and of itself justify either the imposition of the measure or its extension over a protracted period.²⁴⁴ That would, in practice, equate to punishment prior to sentencing and even a possible violation of the principle of legality.

172. The specificity of Article 7.5 of the Convention, in contrast to Article 8.1, stems from the fact that accused individuals held in custody have the right to have their cases resolved on a priority basis and diligently. The possibility that the State has to use detention to ensure the goals of the proceedings is one of the decisive reasons

²⁴¹ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, paras. 129-131.

²⁴² IACHR, Report 35/96, Case 10.832, Merits, Luis Lizardo Cabrera, Dominican Republic, April 7, 1998, para. 71.

²⁴³ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, para. 127; IACHR, Report No. 12/96, Case 11.245, Merits, Jorge A. Giménez, Argentina, March 1, 1996, para. 134.

²⁴⁴ ECHR, *Case of Labita v. Italy (Application No. 26772/95)*, Judgment of April 6, 2000 (Grand Chamber), para. 15; ECHR, *Case of Scott v. Spain (Application No. 21335/93)*, Judgment of December 18, 1996 (Grand Chamber), para. 78; ECHR, *Case of Vander Tang v. Spain (Application No. 19382)*, Judgment of July 13, 1995 (Grand Chamber), para. 63; ECHR, *Case of Kemmache v. France (Application No. 12325/86 14992/89)*, Judgment of November 2, 1993, para. 50; ECHR, *Case of Tomasi v. France (Application No. 12850/87)*, Judgment of August 27, 1992, para. 89; ECHR, *Case of Letellier v. France (Application 12369/86)*, Judgment of June 26, 1991 (Plenary of the Court), para. 35.

that justify that priority treatment. Articles 7.5 and 8.1 of the Convention differ as to their concepts of ‘reasonable time,’ in that Article 7 allows for an individual to be released without prejudice to the continuation of proceedings. The time established for detention is necessarily much shorter than the period allotted for the entire trial.²⁴⁵ For that reason, any time that a custodial sentence is imposed that is shorter than the time a person was held in pretrial detention, that detention must be considered unreasonable.²⁴⁶ A subsequent release or conviction does not exclude the possibility of a violation of the reasonable length of time contemplated in the Convention.²⁴⁷

Maximum duration allowed by law

173. The reasonableness of the duration of pretrial detention is directly related to the establishment of maximum legal durations for this measure. On this point, the bodies of the Inter-American system have established that: (a) when the law sets a maximum duration for the detention of a suspect, it is clear that such limit may not be exceeded;²⁴⁸ (b) when pretrial detention is prolonged beyond the maximum allowed by domestic law, it must be considered *prima facie* illegal (under the terms of Art. 7.2 of the Convention), regardless of the nature of the offense in question or the complexity of the case; in these circumstances, the State has the burden of proof in justifying the extended period;²⁴⁹ and (c) establishing maximum durations in law does not guarantee that they are in line with the Convention, nor does it provide the State with broad authority to deprive a suspect of his liberty for that entire period; in each case, the continued existence of the grounds initially used to justify the detention must be analyzed, without prejudice to what is provided by law.²⁵⁰

174. In addition, judicial trends towards denying suspects release as a result of the expiration of the sentences underlying their charges that are based on

²⁴⁵ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, para. 127; IACHR, Report No. 12/96, Case 11.245, Merits, Jorge A. Giménez, Argentina, March 1, 1996, para. 110.

²⁴⁶ IACHR, Application from the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights against the Bolivarian Republic of Venezuela in Case 11.663, Oscar Barreto Leiva, October 31, 2008, para. 136. Similarly, ECHR, *Case of Liuiza v. Lithuania (Application No. 13472/06)*, Judgment of July 31, 2012 (Second Section of the Court), Dissenting Opinion of Judges Pinto de Albuquerque and Keller, para. 24.

²⁴⁷ IACHR, Report No. 12/96, Case 11.245, Merits, Jorge A. Giménez, Argentina, March 1, 1996, para. 55.

²⁴⁸ I/A Court H.R., *Case of Bayarri v. Argentina*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of October 30, 2008. Series C No. 187, para. 74.

²⁴⁹ IACHR, Report No. 135/11, Case 12.167, Merits, Hugo Oscar Argüelles and others, Argentina, October 31, 2011, para. 124.

²⁵⁰ IACHR, Report No. 84/10, Case 12.703, Merits, Raúl José Díaz Peña, Venezuela, July 13, 2010, para. 159; IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, para. 139; IACHR, Application from the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights against the Bolivarian Republic of Venezuela in Case 11.663, Oscar Barreto Leiva, October 31, 2008, para. 136.

loose interpretations of what could be delaying tactics by defense counsel should be avoided.

4. Competent authority, decision process, grounding and evidence

Competent authority

175. The Commission understands that according to Article 7.5 of the Convention the decision to impose pretrial detention must necessarily fall to a judicial authority,²⁵¹ given that only a judge can be responsible for making a judgment on the procedural risk. In addition, as with the immediate judicial oversight of the detention (arrest or apprehension), that authority must meet the requirements set forth in the first paragraph of Article 8 of the Convention.²⁵² The nature of the authority that orders the detention is determined essentially by the powers and authorities assigned by the constitutional order.²⁵³

176. Similarly, the United Nations Human Rights Committee has consistently held that prosecutors are not suitable authorities for ordering pretrial detention, in that, unless the State proves otherwise, they cannot be considered to have the necessary objectivity and impartiality to be deemed “officer[s] authorized by law to exercise judicial power” in the terms of Article 9.3 of the International Covenant on Civil and Political Rights.²⁵⁴ Consequently, the responsibility of imposing pretrial detention, ordering its continuation, and implementing alternative measures must rest with judicial authorities.

177. In addition, in requesting the imposition of pretrial detention, prosecutors should indicate the proposed duration and give grounds for their request pursuant to the goals and criteria examined in this report. It is a breach of the rules and standards of international human rights law for prosecutors to repeatedly and automatically request the maximum duration of pretrial detention permissible by law, without indicating the grounds and without considering the specific characteristics of

²⁵¹ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, paras. 115 and 116.

²⁵² I/A Court H.R., *Case of Cantoral Benavides v. Peru*. Judgment of August 18, 2000. Series C No. 69, paras. 74-75.

²⁵³ I/A Court H.R., *Case of Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, para. 80; I/A Court H.R., *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 119.

²⁵⁴ UN, HRC, Communication No. 1547/2007, Munarbek Torobekov v. Kyrgyzstan, decision of October 27, 2011, CCPR/C/103/D/1547/2007, para. 6.2; UN, HRC, Communication No. 1369/2005, Felix Kulov, decision of July 26, 2010, CCPR/C/99/D/1369/2005, para. 8.4. The European Court has issued similar rulings. See, for example, ECHR, *Case of Moulin v. France (Application No. 37104/06)*, Judgment of November 23, 2010, paras. 57 to 59; ECHR, *Case of Assenov and Others v. Bulgaria (Application No. 24760/94)*, Judgment of October 28, 1998 (Grand Chamber), paras. 146 to 148; ECHR, *Case of Huber v. Switzerland (Application No. 12794/879)*, Judgment of October 23, 1990 (Grand Chamber), para. 41.

the case. In turn, judges should clearly indicate the maximum duration of detention in their resolutions ordering pretrial detention.²⁵⁵

Decision process

178. Regarding the juncture in the proceedings when the admissibility of pretrial detention is assessed, it must be noted that in accordance with the right to the presumption of innocence, the court must examine all the facts and arguments in favor of or against the existence of procedural risks that could justify the imposition or continuation of this measure, as applicable.²⁵⁶ Judges should issue decisions ordering pretrial detention after a substantive, not merely formal, analysis of each case.²⁵⁷ It is for this reason that it is important that the stakeholders involved in this decision-making process have sufficient evidence about the procedural risks and legal assumptions that are to be assessed. To this end, systems with information and for verifying that information prior to the trial must be established. In this regard, the mechanisms known as *pretrial evaluation and supervision services* and *offices for alternative and replacement measures* have proven to be a good practice.

179. The accused person shall have the possibility to appear at the proceedings where the application of pretrial detention will be decided. Under certain conditions, this requirement may be satisfied through the use of appropriate video links,²⁵⁸ provided that the right of defense is guaranteed. All accused persons have the right to be heard by the judge and to personally argue against their detention; pretrial detention should not be decided exclusively on the reading of the case file.²⁵⁹ Moreover, the decision adopting this measure “should be taken by the judge himself after hearing the detainee in person, not by investigating judges or clerks of the court.”²⁶⁰

180. In addition to upholding the principle of immediacy, a prior hearing on the admissibility of pretrial detention allows, *inter alia*, the accused and the defense team 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

²⁵⁵ UN, Working Group on Arbitrary Detention, *Annual Report presented to the Human Rights Council*, A/HRC/7/4, published January 10, 2008, para. 72.

²⁵⁶ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, paras. 86 and 87.

²⁵⁷ UN, Working Group on Arbitrary Detention, *Report on Mission to Argentina*, E/CN.4/2004/3/Add.3, published December 23, 2003, para. 65.

²⁵⁸ Council of Europe / Committee of Ministers, *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. 28.

²⁵⁹ UN, Working Group on Arbitrary Detention, *Report on Mission to Ecuador*, A/HRC/4/40/Add.2, published October 26, 2006, paras. 70 and 71.

²⁶⁰ UN, Working Group on Arbitrary Detention, *Report on Mission to Argentina*, E/CN.4/2004/3/Add.3, published December 23, 2003, para. 65.

ordering of pretrial detention or, if applicable, of other less restrictive measures. Clearly, oral proceedings guarantee that all matters related to the enforcement of the precautionary measure can be discussed.

181. At this juncture, mention should again be made of the need for suitable systems to schedule and hold hearings, so that scheduled hearings are actually carried out, thereby reducing the number of cancelled and rescheduled hearings. In addition, the judicial authority responsible for imposing or continuing the imposition of pretrial detention should hear and decide on the matter without delay.

Grounds and sufficient evidence

182. One fundamental principle, firmly established in the Inter-American Court's jurisprudence, is that "decisions adopted by domestic bodies that could affect human rights must be duly justified; otherwise, they are arbitrary."²⁶¹ Similarly, with respect to the right to personal liberty, the WGAD has stated that "the legal basis justifying the detention must be accessible, understandable, non-retroactive and applied in a consistent and predictable way to everyone equally."²⁶²

183. In the case of *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, the Inter-American Court specifically ruled that any decision restricting the right to personal liberty through the imposition of pretrial detention must have adequate grounding in order to assess whether the detention is in compliance with the conditions required (reasonable indications linking the accused, legitimate end, exceptional application, and criteria of necessity, reasonableness, and proportionality).²⁶³ That duty of providing adequate grounds also applies to later judicial resolutions deciding whether to continue with the detention or not, regardless of whether the review thereof is conducted on an *ex officio* basis or at the request of an interested party. In general terms, the Court has ruled that "[t]he grounds are the exteriorization of the reasoned justification that allows a conclusion to be reached," and that they "must be provided to be able to guarantee the right to defense. [...] [T]he reasoning offered by the judge must show clearly that the arguments of the parties have been duly taken into account and the body of evidence examined rigorously."²⁶⁴

²⁶¹ I/A Court H.R., *Case of Yvon Neptune v. Haiti*. Merits, Reparations, and Costs. Judgment of May 6, 2008. Series C No. 180, para. 108; I/A Court H.R., *Case of Yatama v. Nicaragua*. Judgment of June 23, 2005. Series C No. 127, para. 152.

²⁶² UN, Working Group on Arbitrary Detention, *Annual Report presented to the Human Rights Council*, A/HRC/22/44, published December 24, 2012, para. 62.

²⁶³ I/A Court H.R., *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. 93.

²⁶⁴ I/A Court H.R., *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, paras. 107 and 118.

184. Regarding the first situation, that of the initial imposition of the precautionary measure, the Court considered the following facts:

The court order that required the remand in custody of the victims did not include a description, however brief, of the circumstances as regards the time, means and place in which Mr. Lapo supposedly committed the criminal offense, or any indication of the act or omission attributed to him, specifying the elements on which the accusation was based. In Mr. Chaparro's case, the judicial authority did not provide grounds for why she believed preventive detention was essential to 'guarantee the presence' of the accused or to allow the proceedings to be conducted. Furthermore, she did not indicate the offense committed by the two victims. Consequently, the order for remand in custody issued against Messrs. Chaparro and Lapo was arbitrary.²⁶⁵

185. Once a relationship has been established between the facts under investigation and the accused, the next step is to determine the existence of the procedural risk that is to be mitigated with detention during the proceedings – the risk of flight or of hampering the investigation –, which must be grounded on objective circumstances. Merely referring to or listing the grounds for admissibility, without examining and analyzing the circumstances of the case, does not satisfy this requirement.²⁶⁶ As the European Court has stated, the arguments presented by the court should not be general and abstract, but contain references to the specific facts and to the applicant's personal circumstances justifying his detention.²⁶⁷

186. In other words, justice cannot function "automatically," following patterns, stereotypes or preset formulas in which only certain conditions of the accused are checked without furnishing grounded reasons to justify the necessity and proportionality of holding him in custody during the proceedings.²⁶⁸ It falls to the court,

²⁶⁵ I/A Court H.R., *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. 105.

²⁶⁶ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, paras. 80 and 85.

²⁶⁷ ECHR, *Case of Aleksanyan v. Russia* (Application No. 46468/08), Judgment of December 22, 2008 (First Section of the Court), para. 179; ECHR, *Case of Panchenko v. Russia* (Application No. 45100/98), Judgment of February 8, 2006 (Fourth Section of the Court), para. 107; ECHR, *Case of Piruzyan v. Armenia* (Application No. 33376/07), Judgment of June 26, 2012 (Third Section of the Court), para. 96; ECHR, *Case of Becciev v. Moldova* (Application No. 9190/03), Judgment of October 4, 2005 (Fourth Section of the Court), para. 59. In the last two of these cases, the European Court specifically spoke of the risk of the accused interfering with the due course of the proceedings, indicating that it must be based on "factual evidence."

²⁶⁸ See, for example, ECHR, *Case of Sulaoja v. Estonia* (Application No. 55939/00), Judgment of February 12, 2005 (Fourth Section of the Court), para. 64; ECHR, *Case of Piruzyan v. Armenia* (Application No. 33376/07), Judgment of June 26, 2012 (Third Section of the Court), para. 99.

and not to the accused or the defense team, to establish the elements to justify the admissibility of pretrial detention.²⁶⁹

187. When it is shown that a detention was arbitrary – for example, because it was ungrounded – it is pointless to examine any other circumstances, such as the duration for which it was ordered,²⁷⁰ since “arbitrary deprivation of liberty can never be a necessary or proportionate measure.”²⁷¹

188. Regarding the quality of the evidence required to place a person in pretrial detention, the Inter-American Court has ruled that “there must be sufficient evidence to allow reasonable supposition that the person committed to trial has taken part in the criminal offense under investigation.” And, based on the criterion set by the European Court regarding the existence of “reasonable suspicion” grounded on facts or information “which would satisfy an objective observer that the person concerned may have committed the offence,” the Inter-American Court has ruled that such suspicions “must be based on specific facts, expressed in words; that is, not on mere conjectures or abstract intuitions.”²⁷²

189. Regarding the allowable margins in considering suspicions, the Rapporteur on Torture has stressed that “the exigencies of dealing with terrorist criminal activities cannot justify interpreting the notion of the ‘reasonableness’ of the suspicion on which an arrest and then a detention may be based, to the point of impairing its very meaning.”²⁷³

190. Similarly, in the case of *López Álvarez v. Honduras*, the Court ruled that “[t]he judicial authority did not take into account new evidentiary elements that could justify the detention, instead it only considered the same elements that supported the

²⁶⁹ IACHR, Application from the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights against the Bolivarian Republic of Venezuela in Case 12.554, Francisco Usón Ramírez, July 25, 2008, para. 172. Similarly, ECHR, *Case of Aleksanyan v. Russia (Application No. 46468/08)*, Judgment of December 22, 2008 (First Section of the Court), para. 179; ECHR, *Case of Ilijkov v. Bulgaria (Application No. 33977/96)*, Judgment of July 26, 2001 (Fourth Section of the Court), paras. 84 to 85.

²⁷⁰ I/A Court H.R., *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. 142; I/A Court H.R., *Case of Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, para. 82; I/A Court H.R., *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 120.

²⁷¹ UN, Working Group on Arbitrary Detention, *Annual Report presented to the Human Rights Council, A/HRC/22/44*, published December 24, 2012, para. 48.

²⁷² I/A Court H.R., *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, paras. 101-103. In addition to the case of *Fox, Campbell and Hartley*, referred to by the Inter-American Court in this footnote’s citation, this definition of reasonable suspicion was also followed by the European Court in, for example, ECHR, *Case of Grinenko v. Ukraine (Application No. 33627/06)*, Judgment of November 15, 2012 (Fifth Section of the Court), para. 82, and ECHR, *Case of K.-F. v. Germany (Application No. 25629/94)*, Judgment of November 27, 1997, para. 57.

²⁷³ UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report, A/57/173*, published August 2, 2002, para. 21.

arrest in flagrante” – in other words, the elements contained in the police report created at the time of the incident under investigation. This, in the context of the circumstances of the case, led the Court to conclude that it represented a violation of the principles and norms applicable to pretrial detention.²⁷⁴ This criterion developed by the Inter-American Court regarding the lack of suitability of police evidence as the sole grounds for pretrial detention is particularly relevant given that using this type of evidence to justify pretrial detention is a deep-rooted practice in some of the region’s countries.²⁷⁵

5. Effective legal assistance (public defense)

191. According to Article 8.2 of the American Convention, every person charged with a crime has the right to a series of minimum guarantees during the proceedings, including the following: prior notification in detail of the charges; adequate time and means for preparing a defense; and the inalienable right to be assisted by counsel provided by the State, if the accused does not defend himself personally or engage his own counsel within the time period established by law.

192. The bodies of the Inter-American system have established the following fundamental standards regarding those guarantees: (a) the State’s duty to provide prior and detailed information about the charges means informing the accused not only of the charge, but also of the reasons for it, the evidence on which it is based, and the legal definition given to the offense; this information should be explicit, clear, comprehensive, and sufficiently detailed to allow the defendant to fully exercise his right of defense;²⁷⁶ (b) the right of defense is activated when a person is identified as the possible perpetrator of or accomplice in a punishable action, and it concludes only when the proceedings conclude, including, if applicable, the sentence execution phase;²⁷⁷ (c) in consideration whereof, a person under investigation should have access to technical defense from that very moment, particularly during the proceeding at which his statement is taken;²⁷⁸ (d) the legal assistance provided by the State should be

²⁷⁴ I/A Court H.R., *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, paras. 78 and 79.

²⁷⁵ See, for example, IACHR Regional Meeting of Experts on Pretrial Detention, May 9 and 10, 2013, Presentation by Dr. Ernesto Pazmiño Granizo, available in Spanish at: <http://www.oas.org/es/cidh/ppl/actividades/prisionpreventiva.asp>.

²⁷⁶ I/A Court H.R., *Case of Barreto Leiva v. Venezuela*. Merits, Reparations, and Costs. Judgment of November 17, 2009. Series C No. 206, para. 28.

²⁷⁷ I/A Court H.R., *Case of Barreto Leiva v. Venezuela*. Merits, Reparations, and Costs. Judgment of November 17, 2009. Series C No. 206, para. 29. In other cases, the Court has also spoken of the “the moment that an investigation of the person is ordered, or the authority orders or executes actions that entail an infringement of rights” in establishing the time when the right of defense is activated. See, for example, I/A Court H.R., *Case of Vélez Loo v. Panama*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010. Series C No. 218, para. 132.

²⁷⁸ 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. 155; I/A Court H.R., *Case of Barreto Leiva v. Venezuela*. Merits, Reparations, and Costs. Judgment of November 17, 2009. Series C No. 206, para. 62. On this point, the United Nations Human Rights Committee has said that “it is axiomatic
Continues...

given by legal practitioners²⁷⁹ who are appropriately qualified and trained and whose actions are properly supervised;²⁸⁰ (e) public defense services should preserve their independence (functional and budgetary) from other agencies of the state as well as from judges and prosecutors;²⁸¹ and, in particular, (f) the State should adopt all appropriate measures so that the defense provided is *effective*, for which it is necessary that defenders act *diligently*. The appointment of public defense counsel for the sole purpose of complying with a procedural formality would be tantamount to not having technical legal representation.²⁸²

193. Similarly, the Commission recently stated that:

The guarantee [...] established in Article 8.2(e) of the American Convention, implies that the defense counsel should act to ensure the

...continuation

that legal assistance be available at all stages of criminal proceedings.” UN, HRC, *Communication No. 775/1997, Christopher Brown v. Jamaica*, decision of May 11, 1999, para. 6.6.

²⁷⁹ I/A Court H.R., *Case of Vélez Loor v. Panama*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010. Series C No. 218, para. 132.

²⁸⁰ IACHR, Report No. 28/09, Merits, Dexter Lendore, Trinidad and Tobago, March 20, 2009, para. 46. See also IACHR, Report No. 1/05, Merits, Roberto Moreno Ramos, United States, January 28, 2005, paras. 56 and 57.

²⁸¹ IACHR, *Guarantees for the Independence of Justice Operators: Toward 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 to 48; IACHR, Press Release 76/11 – IACHR Recommends Adoption of a Comprehensive Public Policy on Prisons in Uruguay, Washington, D.C., July 25, 2011, Annex, available at http://www.oas.org/en/iachr/media_center/PReleases/2011/076A.asp, para. 53. This topic has been developed in particular as regards the Argentine State, where several provinces’ criminal defense and public prosecution services are both subordinate to a single higher authority under the office of the Attorney General or Prosecutor. On this point, see, for example: IACHR, Press Release 64/10 – IACHR Rapporteurship Confirms Grave Detention Conditions in Buenos Aires Province, Washington, D.C., June 21, 2010, available at: <http://www.cidh.oas.org/Comunicados/English/2010/64-10eng.htm>; UN, Subcommittee on Prevention of Torture, *Report of the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Argentina*, CAT/OP/ARG/1, para. 105; UN, Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Conclusions and Recommendations of the Human Rights Committee: Argentina*, CCPR/C/ARG/CO/4, published April 31, 2010, para. 20. See also, UN, Subcommittee on Prevention of Torture, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Republic of Paraguay*, CAT/OP/PRY/1, published June 7, 2010, paras. 89 and 90; and IACHR Regional Meeting of Experts in Pretrial Detention, May 9 and 10, 2013, Presentation by Dr. Ernesto Pazmiño Granizo, available in Spanish at: <http://www.oas.org/es/cidh/ppl/actividades/prisionpreventiva.asp>

²⁸² 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. 155; I/A Court H.R., *Case of Chaparro Álvarez and Lapo Iñiguez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, para. 159; IACHR, Report No. 28/09, Merits, Dexter Lendore, Trinidad and Tobago, March 20, 2009, para. 45; IACHR, Report No. 41/04, Case 12.417, Merits, Whitley Myrie, Jamaica, October 12, 2004, para. 62. In this last case, the Commission stated that the effectiveness of public defense services requires defenders to be “competent” in representing the defendant. Similarly, UN, HRC, Communication No. 913/2000, *Lawrence Chan v. Guyana*, decision of October 31, 2005, para. 6.2; UN, HRC, Communication No. 594/1992, *Phillip v. Trinidad and Tobago*, decision of October 20, 1998, para. 5.10.

rights the law provides the accused, which basically amount to the possibility of seeking and providing evidence, disputing evidence connected with the case, and challenging decisions that are made. These elements of a defense, along with any others provided under domestic law, should be used properly by the defense, which should act diligently and effectively in the proceedings in order to ensure not only that the rights of the accused are respected, but also that the decisions handed down in the case are in line with the law and with justice.^{283, 284}

194. Regarding the imposition of pretrial detention, as will be seen below, the simple fact that a person facing a criminal trial is under the custody of the State and is not at liberty, places him at a procedural disadvantage. The problems faced by the accused in organizing his defense increase when pretrial detention is prolonged excessively.

195. During the preliminary stages leading up to the possible imposition of pretrial detention, it is vital for the defense team to have timely access to all the relevant documents on which the decision is to be based. In addition, as already noted, it is essential that resolutions ordering or extending pretrial detention be duly grounded, so that the defense team can clearly and precisely assess the reasons and appraisals on which those decisions are based.

196. Regarding the quality of defenders' work, it is essential that their arguments comply with the principles and criteria governing the ordering of pretrial detention that apply in the specific case. Thus, as with judges, they may not merely invoke provisions or pre-established legal formulas mechanically. Instead, they must be able to provide specific information and arguments to offer the judge reliable reasons for preserving the accused's liberty. They would also have to provide specific arguments regarding the factual conditions making inapplicable those precautionary measures that are not necessary or proportional in the given case, as well as arguments regarding the legal duration of pretrial detention in those cases in which it is admissible.

6. Judicial oversight and resources

197. One fundamental principle established in the Inter-American system is that for a remedy to be effective, "it must be truly effective in establishing whether

²⁸³ IACHR, Press Release 76/11 – IACHR Recommends Adoption of a Comprehensive Public Policy on Prisons in Uruguay, Washington, D.C., July 25, 2011, Annex, available at http://www.oas.org/en/iachr/media_center/PReleases/2011/076A.asp, para. 53.

²⁸⁴ In this regard, the United Nations Basic Principles on the Role of Lawyers are relevant, particularly Principle 14, which provides as follows: "Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession."

there has been a violation of human rights and in providing redress.”²⁸⁵ When the protection of the right to personal liberty is sought through a judicial remedy, “[t]he analysis by the competent authority [...] can not be reduced to a mere formality, instead it must examine the reasons invoked by the claimant and make express statements regarding the same, according to the parameters established by the American Convention.”²⁸⁶ Those parameters are, naturally, those set by Articles 8 and 25 of the Convention, particularly, the guarantee of an impartial tribunal, and the right to be heard as basic precepts of due legal process.²⁸⁷

198. In this regard, the Tokyo Rules stipulate that the accused “shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed” (Rule 6.3). Accordingly, that judicial oversight does not refer exclusively to the circumstances of the detention, but also to its continuation.²⁸⁸

199. The European Court has ruled that the right of arrested or detained persons to a review of the legality of their arrest requires the competent court 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.²⁸⁹ 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.²⁹⁰

200. In addition, as already noted, pretrial detention may never, in any circumstance, be justified by the use of judicial remedies provided for in law. Those resources are provided to ensure the parties due process and, in this regard, have been designed for maximum use.

²⁸⁵ I/A Court H.R., *Judicial Guarantees in States of Emergency* (Arts. 27.2, 25, and 8 of the American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987, Series A No. 9, para. 24.

²⁸⁶ I/A Court H.R., *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 96.

²⁸⁷ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, para. 119.

²⁸⁸ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, paras. 118 and 121.

²⁸⁹ 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), para. 65.

²⁹⁰ ECHR, *Case of Piruzyan v. Armenia* (Application No. 33376/07), Judgment of June 26, 2012 (Third Section of the Court), para. 116; ECHR, *Case of Nikolova v. Bulgaria* (Application No. 31195/96), Judgment of March 25, 1999, para. 58.

201. Furthermore, the Commission notes that in the context of Article 46.1.a of the Convention, claims related to possible human rights violations arising from the imposition of pretrial detention have their own dynamics for the exhaustion of domestic remedies that are independent from those that apply to the criminal proceeding as a whole. Thus, in the case of *Jorge Alberto Giménez v. Argentina*, the Commission considered that “in the context of pre-trial detention, the presentation of the request for conditional release followed by the denial thereof suffices to substantiate the exhaustion of remedies.”²⁹¹ The request for release will depend, according to the specific case, on the relevant remedy available in the State in question.

7. Periodic review, due diligence and priority of processing

Periodic review

202. As has already been established, it first falls to the domestic judicial authorities to ensure that the duration of the pretrial detention does not exceed a reasonable time.²⁹² Thus, the right to the presumption of innocence and the exceptional nature of pretrial detention give rise to the State’s duty to periodically review that the circumstances on which its initial imposition was based still exist. This process of subsequent appraisal is characterized by the fact that, in the absence of evidence to the contrary, procedural risks tend to decrease with the passage of time. As a result, the State’s explanations of the need to keep a person in pretrial detention should be more convincing and better grounded as time progresses.

203. The Inter-American Court has established that “national authorities are responsible for assessing the pertinence of maintaining the precautionary measures they issue pursuant to their own body of laws,” including, in particular, pretrial detention. For this reason, the judge does not have to wait for an acquittal or the expiration of the maximum period allowed by law to order the termination of the measure. Whenever it appears that the pretrial detention no longer meets the initial conditions on which it was based, “the release of the person detained should be ordered, without detriment to the continuation of the respective proceedings.”²⁹³

204. In its judgment in the case of *Yvon Neptune v. Haiti*, in which it was established that the victim’s protracted and unjustified detention was not subject to

²⁹¹ IACHR, Report No. 12/96, Case 11.245, Merits, Jorge A. Giménez, Argentina, March 1, 1996, para. 57.

²⁹² ECHR, *Case of McKay v. the United Kingdom (Application No. 543/03)*, Judgment of October 3, 2006 (Plenary of the Court), para. 45; ECHR, *Case of Sardinias Albo v. Italy (Application No. 56271/00)*, Judgment of February 17, 2005 (First Section of the Court), para. 85; ECHR, *Case of Labita v. Italy (Application No. 26772/95)*, Judgment of April 6, 2000 (Grand Chamber), para. 152; ECHR, *Case of Letellier v. France (Application 12369/86)*, Judgment of June 26, 1991 (Plenary of the Court), para. 35.

²⁹³ I/A Court H.R., *Case of Bayarri v. Argentina*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of October 30, 2008. Series C No. 187, paras. 74 and 76; I/A Court H.R., *Case of Yvon Neptune v. Haiti*, Merits. Reparations, and Costs. Judgment of May 6, 2008. Series C No. 180, para. 108.

proper judicial review, the Inter-American Court applied those standards in the following terms:

Mr. Neptune was released two years and one month after his arrest on “humanitarian grounds” and not based on a judicial decision that assessed whether the reasons and purposes that justified depriving him of his liberty subsisted, whether the preventive measure continued to be absolutely necessary to achieve these purposes, and whether it was proportionate. In other words, there is no evidence that the decision to release him was a motivated and prompt response of the authorities that sought to provide a real safeguard for the rights of the accused; in particular, a substantive guarantee of his right to defense.²⁹⁴

205. Regarding the specific grounds for judicial rulings reviewing the continuation of pretrial detention, the Court has indicated that the judicial authorities must guarantee “not only the formal possibility of submitting arguments, but the form in which the right to defense was effectively manifested as a real safeguard of the rights of the accused. This implies a prompt and justified response by the authorities to the arguments in answer to the charges.” Hence, “the reasoning offered by the judge must show clearly that the arguments of the parties have been duly taken into account and the body of evidence examined rigorously.”²⁹⁵

206. The judge must specify the concrete circumstances in the proceedings that lead to the reasonable conclusion that there is still a real risk of flight, or identify the evidence that still needs to be gathered and explain why it would be impossible to do so with the accused at large. This obligation is based on the need for current circumstances to determine the State’s interest in maintaining the pretrial detention.²⁹⁶ This requirement is not met when the judicial authorities systematically reject review requests by, for example, merely invoking legal assumptions related to flight risk²⁹⁷ or any other provisions that, in one way or another, require that the measure be maintained. If the State fails to show that the pretrial detention is still reasonable and necessary for achieving legitimate aims, that detention, even when ordered in accordance with the law, becomes arbitrary.²⁹⁸

²⁹⁴ I/A Court H.R., *Case of Yvon Neptune v. Haiti*. Merits, Reparations, and Costs. Judgment of May 6, 2008. Series C No. 180, para. 110.

²⁹⁵ I/A Court H.R., *Case of Chaparro Álvarez and Lapo Ñiquez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, paras. 107, 117, and 118.

²⁹⁶ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, para. 104.

²⁹⁷ IACHR, Report No. 84/10, Case 12.703, Merits, Raúl José Díaz Peña, Venezuela, July 13, 2010, paras. 167 and 172.

²⁹⁸ UN, HRC, Communication No. 305/1988, *Hugo van Alphen v. The Netherlands*, decision of July 23, 1990, para. 5.8.

207. The exceptional and temporary nature of pretrial detention requires that reviews as to its pertinence be conducted periodically. This is necessary given that the purpose of pretrial detention is to preserve the correct flow of the investigation and of the criminal trial, which are supposed to be conducted with speed and due diligence.²⁹⁹ The responsibility for ensuring that these periodic reviews are carried out lies with the competent judicial authorities and the prosecution service. Thus, the IACHR considers that the innovative practices that States could implement to rationalize the use of pretrial detention include the creation of special programs for monitoring its duration and improving the scheduling systems for hearings.

Due diligence and priority of processing

208. The right of all detainees to be judged within a reasonable time or to be released, without prejudice to the continuation of the proceedings (Articles 7.5 of the Convention and XXV of the Declaration), implies the correlative obligation for the State to “process criminal proceedings in which the accused is deprived of his liberty with greater diligence and promptness.”³⁰⁰ The specificity of Article 7.5, compared to Article 8.1, stems from the fact that an individual who is accused and held in custody is entitled to have his or her case resolved on a *priority* basis and conducted with *diligence*.³⁰¹ In other words, the State has a particular obligation to speed up the prosecution and avoid delays.³⁰² This temporal limitation was not established in the interest of justice, but in the interest of the accused. When delays are the norm while prompt and swift prosecutions the exception, situations of basic injustice arise.³⁰³ Consequently:

It is important that States place all the human and material resources at the disposal of such proceedings so that, in situations of danger that justify pre-trial detention, the investigation is carried out as quickly as possible, thus preventing the restrictions placed on a person who has not been declared guilty from becoming a punishment before trial, violating the right to defense and the principle of innocence.³⁰⁴

²⁹⁹ See, *mutatis mutandis*: ECHR, *Case of Bezicheri v. Italy* (Application No. 11400/85), Judgment of October 25, 1989 (Grand Chamber), para. 21.

³⁰⁰ I/A Court H.R., *Case of Barreto Leiva v. Venezuela*. Merits, Reparations, and Costs. Judgment of November 17, 2009. Series C No. 206, para. 120; I/A Court H.R., *Case of Bayarri v. Argentina*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of October 30, 2008. Series C No. 187, para. 70.

³⁰¹ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, paras. 76 and 127; IACHR, Report No. 12/96, Case 11.245, Merits, Jorge A. Giménez, Argentina, March 1, 1996, para. 110.

³⁰² IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, OEA/Ser.L/V/II.111 Doc. 21 rev., adopted April 6, 2001, Ch. VII, para. 32.

³⁰³ IACHR, Report 35/96, Case 10.832, Luis Lizardo Cabrera, Dominican Republic, April 7, 1998, para. 70.

³⁰⁴ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, para. 132.

209. At the same time, as noted by the European Court, that right of detainees for particular swiftness in the processing of their cases should not be an obstacle for the courts to discharge their duties with the appropriate care.³⁰⁵

8. Imposition of pretrial detention a second time and release following acquittal

210. Once a pretrial detainee has been released, pretrial detention may only be ordered anew if the reasonable period of the previous detention has not expired, provided that the conditions for its admissibility are again met. In such cases, determining the reasonable period shall take into account the deprivation of liberty already served by the offender, and therefore the calculation should not be reset.³⁰⁶

211. In addition, as already noted, in accordance with the principle of presumption of innocence, detainees who are acquitted by the first-instance court should be released immediately.³⁰⁷

9. Children and adolescents

212. The Inter-American Commission, in its thematic report *Juvenile Justice and Human Rights in the Americas*,³⁰⁸ spoke extensively about the objectives, general principles, and minimum guarantees that should govern juvenile criminal justice systems. The Commission stresses that the goals of these juvenile systems include working for the reintegration of young offenders by providing them with the opportunities necessary for them to assume a constructive role in society.³⁰⁹ In pursuit of this goal, States should contemplate alternatives to the prosecution of criminal offenses and to the deprivation of liberty.³¹⁰

213. The decision to use custodial measures should be made once it has been shown and proven that non-custodial measures are inadvisable in a given case and

³⁰⁵ ECHR, *Case of Tomasi v. France (Application 12850/87)*, Judgment of August 27, 1992 (Grand Chamber), para. 102.

³⁰⁶ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, paras. 145 and 146.

³⁰⁷ Similarly, UN, Working Group on Arbitrary Detention, *Annual Report presented to the Human Rights Council*, A/HRC/4/40, published January 3, 2007, para. 78.b.

³⁰⁸ IACHR, *Juvenile Justice and Human Rights*, OEA/Ser.L/V/II Doc. 78, adopted July 13, 2011 (hereinafter “*Juvenile Justice and Human Rights*”), available at: <http://www.oas.org/en/iachr/children/docs/pdf/JuvenileJustice.pdf>.

³⁰⁹ Article 40 of the Convention on the Rights of the Child; IACHR, *Juvenile Justice and Human Rights*, paras. 30 and 34; IACHR, Report No. 62/02, Case 12.285, Merits, Michael Domingues, United States, October 22, 2002, para. 83; I/A Court H.R., *The Street Children Case (Villagrán Morales et al.) v. Guatemala*. Judgment of November 19, 1999. Series C No. 63, para. 194.

³¹⁰ IACHR, *Juvenile Justice and Human Rights*, Recommendations, paras. 15 and 16.

after a careful review, taking into account the right of juveniles to be heard, the principles of legality, exceptionality, and proportionality of the sentence, among other relevant considerations.³¹¹ Accordingly, the principles and admissibility criteria governing pretrial detention should be observed with more rigor, and a greater use of other precautionary measures or of prosecution at liberty should be sought.³¹² In those cases in which the incarceration of minors is applicable, the measure should be used as the last resort and for as short a time as possible.³¹³ According to Universal System standards, “[p]retrial detention should be reviewed regularly, preferably every two weeks,” and the necessary steps should be taken “to ensure that the court/juvenile judge or other competent body makes a final decision on the charges not later than six months after they have been presented.”³¹⁴

214. The Commission also reaffirms that States must guarantee the human rights of all children deprived of liberty and that they have the obligation to take actions to neutralize or reduce the desocializing effects of incarceration. To this end, it is essential that custodial measures avoid, to the extent possible, violations of rights other than freedom of movement, such as the rights to education and to health, and that they enable the strengthening of ties with families and with the community.³¹⁵

215. The IACHR’s Rapporteurship on the Rights of the Child has noted that in the region, the main challenges with applying the relevant standards discussed above are related to the following issues: (a) the judges responsible for deciding cases involving juvenile offenders are not properly trained; (b) they do not have a catalogue of precautionary measures other than pretrial detention to enable them to make exceptional use of this measure and ensure the goals of the proceedings; (c) social pressure on judges plays an important role; (d) judges are not required to take into consideration reports prepared by multidisciplinary teams and the detainees’ good conduct; and (e) there are no public defense services specializing in cases of juvenile offenders.

³¹¹ IACHR, *Juvenile Justice and Human Rights*.

³¹² I/A Court H.R., *Case of the “Juvenile Reeducation Institute” v. Paraguay*. Judgment of September 2, 2004. Series C No. 112.

³¹³ Convention on the Rights of the Child, Article 37.b; Beijing Rules, Rule 19; and Havana Rules, Rules 1 and 2; UN, Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World, adopted by the Twelfth United Nations Congress on Crime Prevention and Criminal Justice, held in Salvador, Brazil, April 2 to 19, 2010, para. 27.

³¹⁴ UN, *Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system*, A/HRC/21/25, published June 27, 2012, para 75.

³¹⁵ IACHR, *Juvenile Justice and Human Rights*, paras. 405, 491, and 510. United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Nos. 12 and 87.f.

216. In addition, and in accordance with children’s best interests, the competent 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. In such cases, the use of precautionary measures other than pretrial detention should be favored. For example, the Commission has observed that a high percentage of the women deprived of freedom who are responsible for children were arrested for nonviolent crimes, such as small-scale drug dealing.

C. Right to reparation for the undue imposition of pretrial detention

217. Article 9.5 of the International Covenant on Civil and Political Rights, to which thirty OAS member States are parties,³¹⁶ expressly states that “[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”³¹⁷ Although there is no equivalent provision in the American Convention, the obligation of providing reparation for violations of the right to personal liberty arises from the States’ general obligation of making adequate amends for any impairment of the rights and freedoms the Convention protects.

218. Article 1.1 of the Convention establishes the duty of States to *ensure* the free and full exercise of the rights and freedoms it recognizes with respect to all persons subject to their jurisdiction. From this duty arises the obligation of restoring the infringed right and repairing the harm produced.³¹⁸ Making reparations for the effects of human rights violations is the logical consequence of fully ensuring those rights. Thus, according to the legal regime established by the American Convention, States are required to make amends for violations within their jurisdictions of the right to personal liberty under Article 7, which of course includes those related to the imposition of pretrial detention. Consequently, States should institute, in their domestic legal systems, appropriate legal mechanisms to ensure effective access to this type of reparation.

219. The United Nations Working Group on Arbitrary Detentions has recommended that States “remedy arbitrary detention mainly by immediate release and compensation as required by international human rights conventions and customary international law.” The Commission shares this position and emphasizes that, in fact, merely releasing a person who has been illegally or arbitrarily deprived of liberty

³¹⁶ Namely: Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States of America, Uruguay, and Venezuela.

³¹⁷ This provision is not the only one of its kind in international law. Article 5.5 of the European Convention also enshrines this right.

³¹⁸ I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*. Judgment of July 29, 1988. Series C No. 4, para. 166.

is not an adequate measure of reparation when specific harm has resulted from that circumstance.

220. It should be clarified that the later acquittal or dismissal of the charges against a detainee does not necessarily mean that the pretrial detention was imposed in violation of the provisions of the American Convention. Moreover, the right to reparation referred to in this section is distinct from the standard set in Article 10 of the American Convention regarding the right to compensation arising from a final conviction based on a miscarriage of justice.

IV. USE OF ALTERNATIVE MEASURES OTHER THAN PRETRIAL DETENTION

221. The Inter-American Commission has said that respecting and upholding the right to personal liberty requires States to resort to depriving people of liberty only insofar as it is necessary to meet a pressing social need, and in a manner proportionate to that need.³¹⁹ Indeed, as stated by the United Nations Rapporteur on Torture, “[a]ny deprivation of personal liberty, even if justified for certain reasons, such as the investigation of crime and the punishment of convicts, carries the risk of directly interfering with human dignity, as it severely restricts individual autonomy and makes detainees powerless.”³²⁰

222. The Principles and Good Practices stipulate that States shall, in consideration of the content and scope of the right to personal liberty, “establish by law a series of alternative or substitute measures for deprivation of liberty, duly taking into account the international human rights standards on the topic” (Principle III.4). These alternative measures to incarceration are to apply to the three basic stages of criminal proceedings: the pretrial phase, the trial itself, and the execution of the sentence.

223. The exceptional nature of pretrial detention implies that States shall use other precautionary measures that do not entail depriving the accused of liberty for the duration of the criminal proceedings. In addition, both the Inter-American Commission and other international human rights bodies have consistently recommended that the region’s States make more frequent use of precautionary measures other than incarceration as part of a strategy to reduce the number of people in pretrial detention and, consequently, their levels of prison overcrowding.

224. The Commission therefore proposes, *inter alia*, the following catalogue of alternative measures: (a) the accused’s commitment to submit to the proceedings and not to hinder the investigation; (b) the accused’s submission to the care or oversight of a given person or institution, in accordance with whatever conditions the court may set; (c) the obligation of periodically reporting to the judge or such other authority designated by the judge; (d) prohibition on leaving a given territorial jurisdiction without prior authorization; (e) surrendering of travel documents; (f) prohibition on attending specific meetings or visiting certain places, or on approaching or communicating with given persons, provided that the right of defense is not affected; (g) immediate departure from the domicile in cases of domestic violence in which the victim lives with the accused; (h) the provision, by the accused or a third party, of a suitable amount of bail; (i) monitoring of the accused by means of an electronic device that tracks or identifies his physical location; and (j) house arrest, in

³¹⁹ IACHR, Country Report on Colombia: *Truth, Justice, and Reparation: Fourth Report on the Situation of Human Rights in Colombia*, 2013, Ch. VI(G); Working Group on Arbitrary Detention, *Annual Report to the Human Rights Council*, E/CN.4/2006/7, adopted December 12, 2005, paras. 61-63.

³²⁰ UN, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/64/215, adopted August 3, 2009, para. 47.

the accused's own home or that of another person, either without oversight or with such oversight as the judge may order.

225. The Commission considers that one fundamental standard is that so long as the flight risk or the danger of hindrance to the investigation can reasonably be avoided by subjecting the accused to a less onerous measure than the one requested by the prosecutor, the court should invariably prefer the former, imposing it either individually or in conjunction with others.

226. According to the European Court, under Article 5.3 of the European Convention on Human Rights (similar to Article 7.5 of the American Convention), "the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures to ensure his appearance at trial."³²¹ Similarly, in the case of *Jablonski v. Poland*, the ECHR found that Article 5.3 of the European Convention had been violated because the competent domestic courts:

[D]id not take into account any other guarantees that [the victim] would appear for trial. They did not mention why those alternative measures would not have warranted his presence before the court or why, had the applicant been released, his trial would not have followed its proper course. Nor did they point to any factor indicating that there was a risk of his absconding, going into hiding, or otherwise evading justice.³²²

227. In addition, as already noted, once the reasonable period for the duration of pretrial detention has expired, the State loses the opportunity to continue ensuring the purpose of the proceedings by denying the accused his liberty.³²³ In other words, the State can limit the accused's freedom with other measures that are less onerous than incarceration but that still ensure his appearance at trial.³²⁴ In this regard, the Commission has established that:

[P]reventive detention may or may not be replaced by other less restrictive precautionary measures, but, in any case, the accused

³²¹ ECHR, *Case of Piruzyan v. Armenia* (Application 33376/07), Third Section of the Court, Judgment of June 26, 2012, para. 103. See also, ECHR, *Case of Kowrygo v. Poland* (Application No. 6200/07), Fourth Section of the Court, Judgment of February 26, 2013, para. 70; ECHR, *Case of Richet v. France* (Application No. 3947/97), Fourth Section of the Court, Judgment of November 18, 2010, para. 64; and, ECHR, *Case of Nevmerzhitsky v. Ukraine* (Application No. 54825/00), Second Section of the Court, Judgment of April 5, 2005, para. 137.

³²² ECHR, *Case of Jablonski v. Poland* (Application 33492/96), Fourth Section of the Court, Judgment of December 21, 2000, para. 84.

³²³ I/A Court H.R., *Case of Barreto Leiva v. Venezuela*. Merits, Reparations, and Costs. Judgment of November 17, 2009. Series C No. 206, para. 120.

³²⁴ I/A Court H.R., *Case of Bayarri v. Argentina*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of October 30, 2008. Series C No. 187, para. 70.

should be released.³²⁵ This is independent of whether there is still a risk to the proceedings. That is, even when the circumstances of the case indicate that, once released, the accused will attempt to evade justice or disrupt the investigation, he or she should no longer be deprived of his or her liberty under the precautionary measure.³²⁶

228. The fact that many criminal codes refer first to pretrial detention and then provide what they call “alternatives to pretrial detention” suggests and fosters an interpretation whereby pretrial detention is the first measure deemed applicable. On the contrary, according to international human rights law, pretrial detention should be the *ultima ratio*. In other words, it should be the measure of last resort, to be invoked when other less restrictive measures are inadequate to ensure the purpose of the proceedings.

229. Consequently, in practice, it should be the prosecutor who argues and demonstrates why, in a given case, other precautionary measures of a non-custodial nature would not be appropriate or adequate. In turn, the judge must assess the possibility of the risk of the proceedings being neutralized through non-custodial measures and, if he chooses to impose pretrial detention, he is required to specify sufficient grounds and reasons for its necessity and proportionality. 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.

230. In addition, as with pretrial detention, the existence of sufficient evidence linking the accused to the facts under investigation is a *sine qua non* requirement or condition for the application of other precautionary measures.³²⁷ Moreover, since some of those measures also restrict the enjoyment of other rights, such as the right to freedom of movement,³²⁸ they should also be imposed in accordance with the principles of legality, necessity and proportionality³²⁹ that govern restrictions of rights in a democratic society. Thus, pursuant to the guarantees established in Articles 8 and 25 of the American Convention and XVIII and XXVI of the American Declaration, decisions whereby non-custodial measures are imposed must

³²⁵ IACHR, *Third Report on the Situation of Human Rights in Paraguay*, Ch. IV, para. 33.

³²⁶ IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José, and Dante Peirano Basso, Uruguay, August 6, 2009, para. 134.

³²⁷ IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle III(2).

³²⁸ The right to freedom of movement and residence (Art. 22 of the American Convention), understood as the right of all persons to move freely from one place to another and to establish themselves in the place of their choice, is an essential condition for individuals to be able to live their lives freely. I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, para. 115.

³²⁹ See, *mutatis mutandis*, I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, paras. 123 *et seq.*

abide by due process principles and defendants shall be able to pursue judicial remedies when they believe the imposition of such measures affects their basic rights.³³⁰

231. Noncompliance with alternative measures may be subject to a sanction but shall not automatically justify subjecting someone to pretrial detention. The replacement of alternative measures by pretrial detention shall require specific motivation.³³¹ In any event, people accused of breaching a precautionary measure must be given the opportunity to be heard and to present evidence and arguments to explain or justify that noncompliance.

232. In practice, release on bail as a way to ensure appearance at trial can be discriminatory when bail is not accessible to people by reason of economic vulnerability or to people who are unable to meet other conditions, such as proving their roots in the community (which is usually done by showing the existence of a stable job, owned property, formal family ties, etc.). In fact, these “roots in the community” are difficult to prove by large sectors, or even a majority, of the populations of OAS member States,³³² particularly economically underprivileged groups and groups that have historically faced discrimination. To a large extent, this problem often arises when those community roots are interpreted on a uniform basis in different cases, instead of with consideration for the specific possibilities of the accused.

233. For example, according to a study carried out by Human Rights Watch (HRW), thousands of people are in pretrial detention in New York City because they are unable to make bail. The study found that of the total number of people arrested in 2008 for nonfelony charges with bail set at US\$1,000 or less, 87% (16,649) were kept in custody because they were unable to pay the requested amount. According to HRW’s calculations, the city would have saved at least US\$42 million if it had not incarcerated those persons. During 2009, New York admitted a total of 98,980 people to its city prisons, of whom slightly more than half (51%) were pretrial detainees unable to make bail. Pretrial detainees on nonfelony charges who were unable to post bail (a total of 22,846) accounted for almost a quarter (23%) of the total entries.³³³

³³⁰ Similar provisions are found in the United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules), Nos. 3.5 and 3.6.

³³¹ Similarly, see Council of Europe / Committee of Ministers, *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. 12.

³³² See, for example, UN, Working Group on Arbitrary Detention, *Statement upon conclusion of its visit to Brazil (18 to 28 March 2013)*; UN, Working Group on Arbitrary Detention, *Report on Mission to Canada*, E/CN.4/2006/7/Add.2, published December 5, 2005, para. 63. This situation was also highlighted by several organizations at the hearing on *Use of Pretrial Detention in the Americas*, 146th regular period of sessions, organized by Due Process of Law Foundation (DPLF), DeJusticia, Institute of Legal Defense (IDL), and others, November 1, 2012.

³³³ HRW, *The Price of Freedom: Bail and Pretrial Detention on Low Income Nonfelony Defendants in New York City*, December 3, 2010, pp. 2, 6, and 21.

234. Moreover, in the report on its visit to Mexico, the SPT described the use in some States of the so called “*flagrancia equiparada*”, used to justify mass arrests of people not caught *in flagrante* and without ties or objects related to the offense, as a strategy to criminalize social protest. The use of such arrests is made worse by the fact that many of the detainees are unable to pay the high bail amounts demanded of them.³³⁴ This provides an example of how the inability to make bail can be used as a tool to repress certain groups.

235. The Commission considers that States must ensure that bail mechanisms observe principles of material equality and that they do not constitute a form of discrimination against people unable to come up with the amounts set. In cases in which the inability of the accused to pay has been established, courts must use other methods to ensure appearance at trial that do not entail deprivation of liberty. In accordance with the principle of presumption of innocence, in no instance may bail constitute or include reparation for the harm caused by the offense with which the accused is charged.

236. With respect to the amount of bail, the European Court has established that it should be determined in light of the accused’s situation, his financial capacity (possessions), and his relationship to the person or entity acting as guarantor; and that in all events, the nature of such bail should be such that it will act as a sufficient deterrent to dispel any intent on his part to abscond.³³⁵ All these are subjective factors that will depend on the specific situation and capacities of the person facing trial. The European Court has also stated that the mere absence of a fixed residence does not give rise to a danger of flight.³³⁶

237. House arrest is another measure that requires appropriate regulation and supervision. At the hearing on the *Situation of Human Rights of Women Deprived of Liberty in Bolivia*, it was noted that house arrest prevents low-income women from pursuing economic activities outside the home to provide for their sustenance and that of their families. Moreover, when women are placed under the oversight of a police officer, they have to provide the officer with a place to sleep, food, and transportation to their homes from the location he indicates.³³⁷ Challenges of this kind in the implementation of this measure have also been observed in other countries of the region.

³³⁴ UN, Subcommittee for the Prevention of Torture, *Report on the Visit of the SPT to Mexico*, CAT/OP/MEX/1, published May 27, 2009, para. 208.

³³⁵ ECHR, *Case of Neumeister v. Austria (Application No. 1936/63)*, Plenary of the Court, Judgment of June 27, 1968, para. 14.

³³⁶ ECHR, *Case of Sulaoja v. Estonia (Application No. 55939/00)*, Fourth Section of the Court, Judgment of February 12, 2005, para. 64.

³³⁷ IACHR, *Situation of Human Rights of Women Deprived of Liberty in Bolivia*, 147th regular period of sessions, organized by the Legal Office for Women (OJM), Latin American and Caribbean Committee for the Defense of Women’s Rights (CLADEM), Center for Justice and International Law (CEJIL), March 15, 2013.

238. As for non-custodial precautionary measures, the Commission considers that States should first adequately regulate their use and enforcement; ensure the allocation of the financial resources necessary to make them operational and available to the largest number of people possible; implement training programs for the officials involved in the different stages of their use; and establish mechanisms for supervising their compliance and results. It is also important to produce statistics and reliable and systematic information on the results obtained with the use of those measures in order to identify possible obstacles in their application and implementation, as well as to adopt the pertinent measures to ensure their increased and more efficient use.

239. According to Ecuador's General Public Defender, it is necessary to operationalize alternatives to pretrial detention, since the absence of monitoring structures for their real effectiveness leads to their political and judicial "demonization", mistrust among prosecutors and victims, the "codification" of judicial debate that reduces the possibilities of trials being conducted while the accused is free, and the judicial disuse of non-custodial precautionary measures.³³⁸

240. The Commission considers it is essential that States set appropriate mechanisms for assessing procedural risks and for supervising the application of non-custodial precautionary measures, such as those known as *pretrial evaluation and supervision services or offices for alternative measures*. In general, such agencies serve two functions: first, they gather and verify information from different sources about the accused, which they present to the court as elements to be taken into consideration in assessing the applicability of and need for a given precautionary measure; and, second, they conduct oversight of compliance with non-custodial precautionary measures. The use of this mechanism fosters confidence, both within the judiciary, whose officers feel they have greater support when ordering measures, and within society, which receives the message that pretrial liberty is not a synonym for impunity. In addition, studies have documented the economic benefits to the public administration of establishing this kind of pretrial services.³³⁹

241. To summarize, the Commission considers that promoting greater use of precautionary measures other than pretrial detention is not only consistent with the principle of the exceptionality of pretrial detention and the right to presumption of innocence, but also that alternative measures tend by their very nature to be sustainable and effective as part of a comprehensive strategy to prison overcrowding. From a broader perspective, modernization of the administration of justice must take

³³⁸ IACHR Regional Meeting of Experts on Pretrial Detention, May 9 and 10, 2013, Presentation by Dr. Ernesto Pazmiño Granizo, available in Spanish at: <http://www.oas.org/es/cidh/ppl/actividades/prisionpreventiva.asp>.

³³⁹ See, for example, Ministry of Justice and Human Rights of Peru and Center for the Development of Justice and Citizen Security (CERJUSC), *Baseline study for the implementation of an office for pretrial services in the context of the Criminal Procedure Code ("Estudio de línea de base para la implementación de una oficina de servicios previos al juicio en el marco del Código Procesal Penal")*, 2013, pp. 120-124.

into account the use of non-custodial measures as a means of optimizing the social utility of the criminal justice system and available resources.³⁴⁰

242. The rational use of non-custodial precautionary measures, in accordance with the criteria of legality, necessity, and proportionality, in no way conflicts with the rights of victims, nor does it represent a form of impunity. To hold otherwise would be to ignore the nature and purposes of pretrial detention in a democratic society. It is therefore important for the different branches of government to give their institutional support to the use of non-custodial precautionary measures, instead of discouraging their use or undermining the public's trust in them. Without confidence in the use of alternative non-custodial measures, there is a risk of their falling into disuse, which would be seriously detrimental to the dignity of the individual, personal liberty, and the presumption of innocence, all of which are basic pillars in a democratic society.

243. Finally, the Commission again notes that the human rights system of the United Nations has adopted specialized instruments and documents dealing with the issues addressed in this chapter, including the *Standard Minimum Rules for Non-custodial Measures* (Tokyo Rules) referred to above, and the *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment*.³⁴¹

³⁴⁰ IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, Ch. VII, para. 36.

³⁴¹ Available at: <http://www.unodc.org/ropan/en/PrisonReform/ToolsandPublications/tools-and-publications.html>.

V. HUMAN RIGHTS OF PERSONS DEPRIVED OF LIBERTY IN PRETRIAL DETENTION

A. Separation and treatment in accordance with the right to the presumption of innocence

244. As has been noted throughout this report, the principle of the presumption of innocence is the point of departure for any analysis of the rights and treatment accorded to persons in pretrial detention.³⁴² This right is not only the guiding principle in deciding on the application of this measure, but also has concrete implications on the conditions of detention to which the pretrial detainee is subjected.³⁴³ In this regard, international law provides first and foremost for the segregation of convicted and accused persons, and for the detention regime of the accused to be qualitatively different in some ways to that of the convicted.

245. With regard to the difference in nature between pretrial detention and the deprivation of liberty resulting from a conviction, the Commission has held that in light of the principle of proportionality, an innocent person shall not receive an equal or worse treatment than a convicted one. The relationship between pretrial detention period and the length of a sentence for purposes of computing relevant detention periods should not taken to mean that they are equivalent in nature.³⁴⁴

246. Accordingly, as provided for under Article 5.4 of the American Convention, which is analogous to Article 10.2(a) of the International Covenant on Civil and Political Rights, States should establish as a general rule, except in emergency situations, the separation between the accused and the convicted.³⁴⁵ This provision is not merely a recommendation or simply a best practice, but rather a binding obligation arising from a treaty. In fact, the Inter-American Court has consistently found a violation of Article 5.4 of the Convention in cases where it has been proven that victims were held in detention together with convicted persons.³⁴⁶

³⁴² IACHR, *Fifth Report on the Human Rights Situation in Guatemala*, Ch. VII, para. 32.

³⁴³ Similarly, the Inter-American Court has recognized that “[t]hese guarantees can be understood as a corollary of the right of the accused person to be presumed innocent,” and the United Nations Human Rights Committee has held that segregation of the convicted from the accused is “required in order to emphasize their status as unconvicted persons; who at the same time enjoy the right to be presumed innocent.” I/A Court HR., *Case of Yvon Neptune v. Haiti*. Merits, Reparations and Costs. Judgment of May 6, 2008. Series C No. 180, para. 146; and UN, Human Rights Committee, *General Comment No. 21: Humane Treatment of Persons Deprived of Liberty*, approved at the 44th Session (1992), para. 9. In *Compilation of General comments and General Recommendations Adopted by Human Rights Treaty Bodies Volume I*, HRI/GEN/1/Rev.9 (Vol.I) approved on May 27, 2008, p. 243.

³⁴⁴ IACHR, Report No. 86/09, case 12.553, Merits. Jorge, José and Dante Peirano Basso, Uruguay, August 6, 2009, para. 109.

³⁴⁵ This provision also appears in the Standard Minimum Rules for the Treatment of Prisoners (Rules 8.8 and 85.1); and the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (Principle 8).

³⁴⁶ I/A Court HR., *Case of Pacheco Teruel et al v. Honduras*. Merits, Reparations and Costs. Judgment April 27, 2012. Series C No. 241, para. 60; I/A Court HR., *Case of Yvon Neptune v. Haiti*. Merits, Continues...

247. In the case of *Yvon Neptune*, the Court reaffirmed the standard that this provision “imposes on the States the obligation to establish a classification system for prisoners in penitentiary centers, in order to guarantee that accused persons are separated from convicted persons, and receive treatment adapted to their status as unconvicted persons.” The Court also considered, in keeping with the IACHR’s *Principles and Best Practices*, that the separation between both categories of inmates “requires not only keeping them in different cells, but also that these cells be located in different sections within a detention center, or in different institutions if this is possible.”³⁴⁷

248. The HRC has also explicitly recognized the importance of this provision in terms of respect for the principle of the presumption of innocence, and has established that the States Parties to the International Covenant on Civil and Political Rights should “indicate how the separation of accused persons from convicted persons is effected and explain how the treatment of accused persons differs from that of convicted persons.”³⁴⁸ In so doing, the HRC emphasizes that Article 10.2 of this treaty requires concrete measures to be taken for its implementation.

249. In addressing the separation of inmates by category, such as segregating the accused from the convicted, the IACHR’s *Principles and Best Practices* also establish that these two categories of persons deprived of liberty should “be kept in separate places of deprivation of liberty or in different sections within the same institution;” and provide that “[u]nder no circumstances shall the separation of persons deprived of liberty based on categories should be used to justify discrimination, the use of torture, cruel, inhuman, or degrading treatment or punishment, or the imposition of harsher or less adequate conditions on a particular group [...]” (Principle XIX).

250. In this regard, the Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment also establishes as a general rule that “[t]he imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or

...continuation

Reparations and Costs. Judgment May 6, 2008. Series C No. 180, para. 150; I/A Court HR., *Case of Montero Aranguren et al (Retén de Catia) v. Venezuela*. Judgment of July 5, 2006. Series C No. 150, para. 104; I/A Court HR., *Case of López Álvarez v. Honduras*. Judgment February 1, 2006. Series C No. 14, paras. 111 and 112; I/A Court HR. *Case of Tibi v. Ecuador*. Judgment September 7, 2004. Series C No. 114, para. 158. Likewise, the United Nations Human Rights Committee has found the concrete violation of Article 10.2 of the International Covenant on Civil and Political Rights in cases where the victim was held in pretrial detention together with convicted persons. See, for example, UN, HRC, Communication No. 1813/2008, *Ebenezer Derek Mbongo Akwanga v. Cameroon*, decision of March 22, 2011, CCPR/C/101/D/1813/2008, para. 7.3.

³⁴⁷ I/A Court HR., *Case of Yvon Neptune v. Haiti*. Merits, Reparations and Costs. Judgment May 6, 2008. Series C No. 180, paras. 146 and 147.

³⁴⁸ UN, Human Rights Committee, *General Comment No. 21: Humane Treatment of Persons Deprived of Liberty*, approved at the 44th session (1992), para. 9. In *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies Volume I*, HRI/GEN/1/Rev.9 (Vol.I) published on May 27, 2008, p. 243.

the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden” (Principle 36.2).

251. Accordingly, in keeping with the principle of the presumption of innocence, Articles 84 to 93 of the Standard Minimum Rules for the Treatment of Prisoners extensively flesh out how persons held in pretrial detention should be treated, establishing, among other things, that (a) untried prisoners may, if they so desire, have their food procured at their own expense from the outside; (b) they shall be allowed to wear their own clothing, or if they wear prison dress, it shall be different from that supplied to convicted prisoners; (c) they shall always be offered the opportunity to work, but shall not be required to work. If they choose to work, they shall be paid for it; (d) they shall be allowed to procure books, newspapers, writing materials and other means of occupation; (e) they shall be allowed to be visited and treated by their own doctor or dentist;³⁴⁹ and (f) untried prisoners shall be given all reasonable facilities for communicating with their families and friends, and for receiving visits from them and for the preparation of their defense. In light of their importance, these last two requirements shall be examined further in the next section.

252. With respect to the applicable regime for persons in pretrial detention, and emphasizing their participation in productive activities, the SRT noted in his recent report on the content of the Standard Minimum Rules for the Treatment of Prisoners that:

Given the excessive use of pretrial detention for long periods of time, it is absolutely necessary to ensure that all persons deprived of liberty have access to activities and can benefit from other privileges to which the general prison population is entitled. The Special Rapporteur acknowledges that it may be difficult to implement this principle, given the fairly rapid turnover of persons awaiting trial and the fact that police stations and other detention facilities may not be adapted for this purpose. As the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has noted, however, prisoners cannot simply be left to languish for weeks, possibly months, locked up in their cells.³⁵⁰

253. The principle of the physical separation of the accused from the convicted is not only mandatory under international law, but is also recognized as a provision of constitutional rank in Ecuador, Guatemala, Haiti, Honduras, Mexico,

³⁴⁹ In this regard, 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* provides that “[a]rrangements shall be made to enable remand prisoners to continue with necessary medical or dental treatment that they were receiving before they were detained, if so decided by the remand institution’s doctor or dentist where possible in consultation with the remand prisoner’s doctor or dentist.” (Paragraph 37).

³⁵⁰ UN, Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Interim Report, A/68/295, published on August 9, 2013, para. 38.

Nicaragua and Paraguay.³⁵¹ For the most part, the relevant constitutional provisions establish that people in pretrial detention should be placed in different centers from those holding convicted prisoners.

254. However, despite the legal framework establishing and regulating the obligation of States to keep persons in pretrial detention separate from convicted persons and in conditions consistent with their status of innocent, the reality observed in most countries of the region is completely different. As a general rule, pretrial detainees are kept in the same facilities as those already convicted and serving sentence and, as such, are subjected to the same overcrowded, unsanitary and violent conditions, to lack of access to the most basic means of subsistence and to other restrictions to which the general population is also exposed.³⁵² In fact, in many instances, persons in pretrial detention have even more restricted access to certain activities, such as work or education, than what convicted persons have, because of the very fact that convicted individuals are in the process of serving their sentence.

255. In practice, the classification criteria for the adult prison population of the same sex is actually predicated on factors such as whether or not the person is a gang or organized crime member, the socioeconomic status of the detainee (whether or not the person is able to pay for accommodations in a nicer part of the prison facility), whether or not the person is a former public official or member of the public security forces, whether or not the inmate poses a serious threat to peaceful interaction among the general population, whether or not the prisoner has mental or contagious diseases, or if they are elderly. The legal status of the defendant, however, is usually not a classification criterion that is applied consistently.

256. This situation is exacerbated in penitentiary contexts characterized by overcrowding and the lack of adequate resources and infrastructure to properly operate. These factors cause a ripple effect saturating prisons one by one, including provisional detention facilities, until authorities begin to hold convicted persons in police stations or headquarters and other makeshift holding facilities,³⁵³ which are not

³⁵¹ Constitution of Ecuador Art. 77.2; Political Constitution of the Republic of Guatemala Art. 10; Constitution of Haiti Art. 44; Political Constitution of the Republic of Honduras Art. 86; Political Constitution of the United Mexican States Art. 18; Political Constitution of Nicaragua Art. 33(5); and National Constitution of Paraguay Art. 21.

³⁵² Even in instances when persons in pretrial detention are in separate facilities, it is common for them to suffer the structural deficiencies of prison systems, at times, with dramatic consequences, as was the case in Chile on December 8, 2010, when 81 inmates in tower 5 of the Pretrial detention Center (*Centro de Detención Preventiva or CDP*) of San Miguel, died as a result of a fire on the fourth floor of the tower. It was, in fact, the worst prison tragedy in the history of that country. National Human Rights Institute (INDH), *Human Rights Situation in Chile – 2011 Annual Report*, p. 25.

³⁵³ For example, the IACHR has received reports that prison facilities in Guatemala have even been set up on military bases. Response to the survey questionnaire in conjunction with the “*Thematic Report on Pretrial Detention in the Americas*” of the IACHR, Office of the Special Prosecutor for Human Rights of Guatemala, November 2, 2012, p. 6. This issue was examined in greater detail at the Thematic Hearing: *Human Rights Situation of Persons Deprived of Liberty in Guatemala*, 141st regular period of sessions, requested by the human rights organizations ICCPG, UDEFEGUA and CEJIL, March 29, 2011.

designed for this purpose and whose staff are not trained to perform those duties.³⁵⁴ As a consequence of saturation in these facilities, an extremely serious situation has arisen in some countries.

257. On this issue, the IACHR has established that “the necessary legislative measures and structural reforms should be adopted so that detention at police facilities is used as little as possible, only until a judicial authority determines the legal situation of the person under arrest.”³⁵⁵

B. Other considerations relevant to the conditions of detention of pretrial detainees

258. The conditions to which persons held in pretrial detention are subjected are not only related to the right to the presumption of innocence, but also have a direct bearing on the enjoyment of other fundamental human rights, such as the right to a defense in trial and to maintain contact with next-of-kin. In addition to these two aspects, this section addresses the right of persons in pretrial detention to vote and the use of solitary confinement and high-security modules.

1. Right to a defense in trial

259. Article 8.2 of the American Convention establishes that every person accused of a criminal offense is entitled during the proceedings to the following minimum guarantees, among other ones: “(c) adequate time and means for the preparation of his defense;” and “(d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel.” With regard to persons in pretrial detention, the States are required to ensure these conditions in order for them to effectively exercise their right to a defense in trial while being held in custody.

³⁵⁴ IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, para. 458. Also, the WGAD (Working Group on Arbitrary Detention) established that in El Salvador “[m]ore than 2,300 persons awaiting trial are held in police cells, whose combined capacity nationwide is no more than 600. These cells were not designed to hold people for more than 72 hours, but are being used to hold persons who are awaiting trial, as well as persons remanded in custody during their trials.” UN, Working Group on Arbitrary Detention, *Report on the Mission to El Salvador, A/HRC/22/44/Add.2*, published on January 11, 2013, para. 100. Also, in Argentina it is reported that around 10,000 persons out of the approximately 63,000 persons deprived of liberty in the country are held in police stations. Response to survey questionnaire in conjunction with the “*Thematic Report on pretrial detention in the Americas*” of the IACHR. October 6, 2012, International Prison Observatory of Argentina.

³⁵⁵ IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, para. 459; IACHR, Press Release 56/11 – Office of the Rapporteur on the Rights of Persons Deprived of Liberty Concludes Visit to Surinam. Washington, D.C., June 9, 2011, Annex, para. 23.

260. In fact, pretrial detention lessens a suspect's possibilities of defense, particularly when the person is poor and cannot rely on a defense counsel.³⁵⁶ It has also been established that keeping pretrial detainees in police stations can undermine the right to a defense.³⁵⁷ Similarly, subjecting persons in pretrial detention to conditions of imprisonment so poor that they harm their health, safety or wellbeing, means that these detainees will be taking part in criminal proceedings at a disadvantage to the prosecution. In this regard, the WGAD has also held that "[w]here conditions of detention are so inadequate as to seriously weaken the pre-trial detainee and thereby impair equality, a fair trial is no longer ensured, even if procedural fair-trial guarantees are otherwise scrupulously observed."³⁵⁸

261. Under the latest international standards,³⁵⁹ every person deprived of liberty must have adequate opportunities, infrastructure and time to receive visits, communicate and consult with his attorney with total confidentiality and without delay, interception or censure. These interviews may be subject to visual surveillance, but third parties may not be privy to the content. These conditions of confidentiality and non-interference apply to all forms of communication used by the inmates (telephone, mail or message correspondence, as well). This means that officials at prison facilities must not open letters or tap the phone calls made by inmates to their attorneys. Additionally, communications between a person deprived of liberty and his attorney are not admissible as evidence against him unless they are connected to an ongoing crime or a plan to commit a crime in the future. This right of every person deprived of liberty to communicate freely and privately with his attorney, may not be suspended or restricted, except in emergency circumstances that shall be determined by law or regulations issued in accordance with the law, when a judge or other authority so deems it essential in order to maintain security and order.

262. The Commission also notes that other *de facto* situations may arise that infringe the right of persons in detention to have access to a means of defense, such as the use of disproportionate (or even denigrating) search methods of the attorneys who visit them in prison facilities,³⁶⁰ or of the inmates who go to meet with

³⁵⁶ UN, Subcommittee for the Prevention of Torture, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Republic of Paraguay*, , CAT/OP/PRY/1, published on June 7, 2010, para. 64.

³⁵⁷ UN, Working Group on Arbitrary Detention, *Report on the Mission to El Salvador*, A/HRC/22/44/Add.2, published on January 11, 2013, para. 129.

³⁵⁸ UN, Working Group on Arbitrary Detentions, Annual Report submitted to the Human Rights Council, E/CN.4/2005/6, published on December 1, 2004, para. 69; UN, Working Group on Arbitrary Detentions, Annual Report submitted to the Human Rights Council, A/HRC/4/40, published on January 9, 2007, para. 66.

³⁵⁹ Standard Minimum Rules for the Treatment of Prisoners, Rule 93; Body of Principles for the Protection of All Persons Subject to Any Form of Detention or Imprisonment, Principle 18; and UN, Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, in Havana, Cuba, August 27, 1990, UN Doc. A/CONF.144/28/Rev.1 p. 118 (1990), Principle 8.

³⁶⁰ Thus, for example, on the visit to El Salvador of the WGAD, it "received numerous reports that, both in detention centers and prisons facilities, lawyers and public defenders are also subjected to rigorous
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them;³⁶¹ not allowing or seizing copies during the searches of case files or other legal documents in the possession of the inmate; and the transferring of prisoners to locations far away from the judges or courts conducting their proceedings or from their attorneys.³⁶²

263. With regard to procedural infringements arising during transfers of detainees to prison facilities located at a considerable distance from the site of judicial proceedings, the IACHR notes recent Recommendation No. 35/2013 issued by the National Human Rights Commission of Mexico (CNDH),³⁶³ in which this institution asserted that “prison transfers represent one of the most common forms of violation of inmates’ legal certainty.” This is so because, among other reasons, they are far away from the judges or courts hearing their cases and from the scene of the alleged crime, which hampers the ability of the prisoners to follow their cases and be present at the hearings, thereby limiting access to an adequate defense. Consequently, the CNDH recommended that the competent authorities, “issue the respective instructions so that prior to conducting a transfer, it is guaranteed that the person under pretrial detention has the real and effective opportunity to defend himself in the case that has been brought against him, in light of his right to due process of the law and, particularly, to a defense.”

264. Also, at a hearing on the human rights situation of persons deprived of liberty at the Islas Marias Prison Complex—a federal facility located 112 kilometers from the coast of the state of Nayarit, Mexico- the participant organizations stated that the location of this prison facility is a considerable infringement of the right to defense of the inmates being held there. The facility can only be reached by a vessel of the Secretariat of the Mexican Navy once a week and heavy restrictions have been placed on means of communication. This situation is particularly serious for inmates held for

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inspection, both on the way in and out. The inspection is conducted by members of the military, who even control the notes taken by the lawyers during their interviews with their clients. [...] This is even more serious when it involves lawyers, because they are also subjected to searches, which are sometimes improper, intrusive and humiliating.” UN, Working Group on Arbitrary Detentions, *Report on the Mission to El Salvador, A/HRC/22/44/Add.2*, published on January 11, 2013, paras. 74 and 75.

³⁶¹ The Commission has received information that authorities in charge of the detention facility of Guantanamo naval base have recently implemented the practice, among other ones, of patting down or searching in the genital area of the detainees as a mandatory procedure prior to and after they hold interviews with their lawyers.

³⁶² In this regard, the IACHR has said that “when transfers are executed arbitrarily or in circumstances that are contrary to respect for the human rights of inmates, they could amount to visible spaces or gray areas for the commission of abuses by authorities;” and it set standards for judicial control over such transfers. IACHR, Report on the Human Rights of Persons Deprived of Liberty in the Americas, OEA/Ser.L/V/II, approved on December 31, 2011, paras. 485 and 500.

³⁶³ CNDH, Recommendation No. 35/2013, *Regarding the case of inmates of Federal Social Re-adaptation Center No. 11 “CPS Sonora”, in Hermosillo, Sonora*. México, D.F., September 25, 2013, paras. 56, 58, 66, 68 and 145. Even though this recommendation was given in response to the ongoing complaints received at the “CPS Sonora,” the considerations and findings contained therein are applicable to every Mexican federal penitentiary system.

violations of state and local laws, inasmuch as the only public defender working on the premises is a federal public defender.³⁶⁴

265. In this context, it is unacceptable from any standpoint that persons in pretrial detention are compelled to be absent from their hearings or other procedural events for reasons such as the State's failure to provide a means of transportation or custodial officers. It is also unacceptable for the prosecutors to be absent or for any other reason attributable to the State to interfere with the detainee's presence at the hearing. The reason for this is that the decision to hold a person in custody under the principle of ensuring his appearance for trial resides with the State and, therefore, the fact that it is unable to provide transportation or custodial measures for the 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. Similarly, it is totally unacceptable to collect "bribes" from inmates to be transported to the courthouses. This type of practice should be properly investigated and punished when it takes place.

266. In addition to the typical procedural purposes of a defense, legal assistance may be required for other purposes, such as ensuring judicial protection for the conditions of detention or for other personal or family-related reasons of the inmate that are not connected to confinement. For this purpose, inmates in general should have the means to gain effective access to their legal representation.

267. Accordingly, in keeping with the standards set by the Council of Europe, the Commission considers that no disciplinary punishment imposed on a remand prisoner shall have the effect of extending the length of the remand in custody or interfering with the preparation of his or her defense.³⁶⁵

268. In addition to the foregoing considerations, the Commission underscores that under no circumstances should the practice of using pretrial detention be tolerated as a mechanism to force confessions or the naming of other suspects, or to prod the detainee to self-incriminate and opt for a summary proceeding or plea bargain as a way to obtain prompt release.³⁶⁶ Just as with the non-exceptional use of pretrial

³⁶⁴ IACHR, Thematic Hearing: *Situation of Persons Deprived of Liberty at the Prison Complex of the Marias Islands, Mexico*, 149th regular period of sessions, requested by: ASILEGAL, Documenta, Renace, Institute of Human Rights Ignacio Ellacuría, S.J., Ibero-American University of Puebla and others and held on November 1, 2013. See also CNDH, Recommendation No. 90/2011, *Regarding the case of the inmates of the "Islas Marias" Prison Complex, Mexico, D.F.*, December 16, 2001, item (g).

³⁶⁵ Council of Europe/Committee of Ministers, 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*, approved on September 27, 2006, para. 41.

³⁶⁶ In this regard, in addition to the pronouncement on Colombia in paragraph 63 of this report and according to a study conducted in four jurisdictions of the Republic of Argentina (the federal jurisdiction and the provinces of Santa Fe, Cordoba and Chubut), the Commission found a common denominator to be that "when persons deprived of liberty in those jurisdictions are asked whether pretrial detention was used as a bargaining chip to sign a plea bargain agreement for an expedited proceeding, everyone responded that it was [used in this way], since it would give them certainty about their legal situation or because they felt compelled [to do so] because of insecurity inside prisons." Said study also concluded: "pretrial detention directly affects

detention, such practices are contrary to the very essence of the rule of law and the values that inspire a democratic society.

2. Family contact

269. In its *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, the IACHR reiterated that States have the obligation to ensure the right of persons deprived of liberty to maintain and develop family relationships. Also, in light of Article 17.1 of the Convention, States must create the necessary structural conditions to make this right effective by correcting all structural deficiencies that prevent contact and communication between inmates and their family members from taking place on a sufficiently regular basis under secure conditions that respect their dignity. Additionally, based on first hand observation in different countries of the region, the Commission observed that:

For persons deprived of liberty, family support is essential in many areas and ranges from the emotional support to material assistance. In the majority of prisons in the region, the items that prisoners need to meet their most basic needs are not provided by the State, as they should be, but by their own families or third parties. Furthermore, at the emotional and psychological level, maintaining family contact is so important for inmates that its absence is considered an objective factor contributing to a heightened risk of their resorting to suicide.³⁶⁷

270. With respect to persons in pretrial detention, the Commission considers that the State's duty to adopt the measures necessary to ensure family contact is even greater in function of the right to the presumption of innocence, and taking into account that this measure is only intended to achieve the procedural aim of guaranteeing the appearance of the defendant in the proceedings. In this regard, the Standard Minimum Rules for the Treatment of Prisoners provides that any untried prisoner "shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution" (Rule 92). This communication must be facilitated through the three major and generally accepted means: visits, mail and telephone calls.

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persons whose release is contingent upon their freedom of choice and their ability to mount an effective defense. In that context, it functions as a factor of extortion in those systems providing for a broad plea bargain agreement for expedited proceedings, where in most cases they end up accepting the punishment, which is often a similar length of time to the time they have been held in custody in that modality [of pretrial detention]." Institute of Comparative Studies in Criminal and Social Sciences (INECIP), *The status of pretrial detention in Argentina-current situation and proposals for change (El Estado de la Prisión Preventiva en la Argentina-Situación actual y propuestas de cambio)*, ['] Buenos Aires, 2012, p. 67.

³⁶⁷ IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, paras. 576-578.

3. Right to vote

271. Article 23 of the American Convention provides that: “(1) Every citizen shall enjoy the following rights and opportunities: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot [...].” With regard to operationalizing the exercise of these rights, it provides that: “(2) The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.”

272. As for the content and scope of this provision, the Inter-American Court has established as a fundamental principle that the rights set forth therein “must be guaranteed by the State under conditions of equality.” For this purpose, the Court deems it indispensable for the State to “generate the optimum conditions and mechanisms to ensure that these political rights can be exercised effectively, respecting the principles of equality and non-discrimination.” The Court has further noted that this obligation “is not fulfilled merely by issuing laws and regulations that formally recognize these rights, but requires the State to adopt the necessary measures to guarantee their full exercise considering the weakness or helplessness of the members of certain social groups or sectors.” Accordingly, the Court considers that the right to vote is “an essential element for the existence of democracy.”³⁶⁸

273. The Inter-American Commission notes that while inmates’ right to vote in general is a complex issue and calls for a much broader examination taking into account the latest developments in international law and the legislative progress achieved by some States on this matter, it is clear to the Commission that with respect to persons deprived of liberty in pretrial detention, the exercise of this right is effectively guaranteed under Articles 23 and 8.2 of the American Convention. In other words, the Commission finds that there is no valid legal basis under the American Convention to support any restriction on this right for persons held in State custody as a precautionary measure.³⁶⁹

274. The reason for this is that the exercise of the rights set forth under subsection 1 of Article 23 of the Convention may only be restricted for the reasons expressly listed under subsection 2 of that Article, which evidently are not applicable to persons who have not been convicted. Furthermore, such a restriction is clearly incompatible with the right to the presumption of innocence, which as has been noted,

³⁶⁸ I/A Court HR., *Case of Yatama v. Nicaragua*. Judgment June 23, 2005. Series C No. 127, paras. 194, 195, 198 and 201.

³⁶⁹ Similarly, the SRT has stated that “[i]n principle, detainees shall also be enabled to exercise their right to vote and other forms of participation in the conduct of public affairs, in accordance with Article 25 of the International Covenant [on Civil and Political Rights].” UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Interim Report A/64/215, published on August 3, 2009, para. 54.

is the point of departure for any analysis of the rights and treatment accorded to persons in pretrial detention. Therefore, taking into account that the natural purpose of this measure is to ensure appearance of defendants in criminal proceedings, it makes no sense not to allow persons in pretrial detention to exercise their right to vote.

275. In the same vein, the United Nations Human Rights Committee has been emphatic in establishing that “[p]ersons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.”^{370 371}

276. Consequently, in accordance with Article 23 of the American Convention and XX of the American Declaration, States must adopt the necessary legislative, administrative and judicial measures to ensure in practice that persons held in pretrial detention are able to exercise their right to vote under equal conditions to the rest of the electorate.

277. The Commission notes that OAS States are able to provide, without much difficulty, measures to ensure the effective enjoyment of the right to vote of all persons in pretrial detention. For example, in Ecuador, Article 62 of the 2008 Constitution expressly recognizes this right of unconvicted persons deprived of liberty and, since that provision went into effect, through the National Electoral Council and the Ministry of Justice, the State has made the exercise of that right possible in the elections of 2009 and 2013. In the 2013 elections, the number of votes cast by persons in pretrial detention surpassed 8,900.³⁷²

4. Solitary confinement and high security modules

278. With respect to solitary confinement, defined as the physical and social isolation of individuals confined to their cells from 22 to 24 hours a day, the Inter-American Commission has established as a general criterion that it “shall only be permitted as a disposition of last resort and for a strictly limited time, when it is evident that it is necessary to ensure legitimate interests relating to the institution’s internal

³⁷⁰ UN, Human Rights Committee, *General Comment No. 25: Participation in public affairs and the right to vote*, approved at the 47th Session (1999), para. 14. In *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies Volume I*, HRI/GEN/1/Rev.9 (Vol.I) published on May 27, 2008, p. 262.

³⁷¹ See also Council of Europe/Committee of Ministers 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*, approved on September 27, 2006, para. 39.

³⁷² See, among other media stories, Hoy.Com.Ec, *Unconvicted prisoners exercised their right to vote (Presos sin sentencia ejercieron su derecho al voto)*, February 15, 2013, available in Spanish at: <http://www.hoy.com.ec/noticias-ecuador/presos-sin-sentencia-ejercieron-su-derecho-al-voto-574316.html>; and América Economía, *Non sentenced prisoners will vote early in Ecuador (Presos sin sentencia votarán por anticipado en Ecuador)*, February 14, 2013, available in Spanish at: <http://www.americaeconomia.com/politica-sociedad/politica/presos-sin-sentencia-votaran-por-anticipado-en-comicios-en-ecuador>

security, and to protect fundamental rights, such as the right to life and integrity of persons deprived of liberty or the personnel.”³⁷³

279. Based on the Istanbul Statement on the Use and Effects of Solitary Confinement and specialized literature on the topic, imprisonment in solitary confinement may cause serious psychological and at times physical harm to the person, with symptoms ranging from insomnia and confused thought processes to hallucinations and psychosis. These negative health effects can begin to manifest themselves after only a few days of confinement and progressively become worse.³⁷⁴ In this regard, the SRT “concludes that 15 days is the limit between ‘solitary confinement’ and ‘prolonged solitary confinement’ because at that point, according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible.”³⁷⁵ Accordingly, it is fundamental that solitary confinement should be kept to a minimum, used in very exceptional cases, for as short a time as possible –as a matter of days, not weeks or months–, and only as a last resort.³⁷⁶

280. Solitary confinement of unconvicted individuals is particularly troubling, inasmuch as it constitutes an infringement of the conditions of punishment and is potentially harmful to persons who are innocent until proven guilty. Additionally, it can be used to coerce the detainees and force them to self-incriminate or to provide any type of information. In this regard, the SRT has stated:

While physical and social segregation may be necessary in some circumstances during criminal investigations, the practice of solitary confinement during pretrial detention creates a de facto situation of psychological pressure which can influence detainees to make confessions or statements against others and undermines the integrity of the investigation. When solitary confinement is used intentionally during pretrial detention as a technique for the purpose of obtaining information or a confession, it amounts to torture as defined in article

³⁷³ IACHR, Principles and Best Practices for the Protection of Persons Deprived of Liberty in the Americas, Principle XXII(3). A whole body of standards has been developed on the topic of solitary confinement in the field of international human rights law setting the grounds, placing limits and providing for guarantees and ways to use this measure. In this regard see in general, IACHR, *Report on Human Rights Situation of Persons Deprived of Liberty in the Americas*, paras. 397 – 418.

³⁷⁴ The most widely reported effects of solitary confinement are of a psychological nature. Symptoms occur in the following areas and range from acute to chronic: anxiety, depression, anger, cognitive disturbances, perceptual distortions, paranoia and psychosis. Physiological effects, such as gastro-intestinal, cardiovascular and genital-urinary problems, as well as migraine headaches and intense fatigue, are also widely reported. See: Shalev, Sharon, *A sourcebook on solitary confinement*, Mannheim Centre for Criminology, LSE, 2008, pp. 15 and 16. Available at: http://solitaryconfinement.org/uploads/sourcebook_web.pdf.

³⁷⁵ UN, Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Interim Report, A/66/268, published on August 5, 2011, paras. 26 and 61.

³⁷⁶ UN, Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report submitted in compliance with Resolution No. 62/148 of the General Assembly*, A/63/175, approved on, July 28, 2008, para. 83.

1 or to cruel, inhuman or degrading treatment or punishment under article 16 of the Convention against Torture, and to a breach of article 7 of the International Covenant on Civil and Political Rights.³⁷⁷

281. According to the doctrine of the Committee for the Prevention of Torture of the Council of Europe, solitary confinement of pretrial detainees must be governed by the following standards: (a) it should only be resorted to in exceptional circumstances, be strictly limited to the requirements of the case, and be proportional to the needs of the investigation; (b) restrictions should be authorized by a court; (c) detainees should have an effective right of appeal to a court or another independent body; (d) detainees should have access to a doctor whose written report should be forwarded to the competent authorities; and (e) detainees should be offered purposeful activities in addition to outside exercise and guaranteed appropriate human contact.³⁷⁸

282. Additionally, “[t]he punishment of solitary confinement shall not affect the access to a lawyer and shall allow minimum contact with family outside. It should not affect the conditions of [...] detention in respect of bedding, physical exercise, hygiene, access to reading material and approved religious representatives.”³⁷⁹

283. In fulfilling the different duties assigned to it under its mandate, the IACHR has observed over the past years that as a general rule solitary confinement is used mostly in the countries of the region that do not adhere to the norms and standards of international human rights law, and that it is generally applied to both convicted persons and pretrial detainees alike.

284. Thus, in the context of this report, the Commission received information that in the United States there are approximately 60,000 persons in pretrial detention each year under the federal jurisdiction and another 700,000 persons in pretrial detention at the state level. Based on these figures and on the fact that solitary confinement is consistently used in the United States, one could infer that there may be hundreds of thousands of individuals awaiting trial in solitary confinement each year in the country. Additionally, there have been documented instances of the practice of holding juveniles in conflict with the law in solitary confinement over the course of the entire proceedings as a protection measure when they are in custody in adult prisons, and of the frequent use of solitary confinement of juveniles as a disciplinary measure. As an example, the New York City Department of Prisons estimates that more than 14% of

³⁷⁷ UN, Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Interim Report, A/66/268, published on August 5, 2011, para. 73.

³⁷⁸ Shalev, Sharon, *A sourcebook on solitary confinement*, Mannheim Centre for Criminology, LSE, 2008, pag. 30.

³⁷⁹ Council of Europe/Committee of Ministers 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*, approved on September 27, 2006, para. 42.

adolescent detainees between 16 and 18 years of age are subjected to solitary confinement as a disciplinary measure during their period of pretrial detention.³⁸⁰

285. In this regard, the Commission emphatically reiterates that under international human rights law, including Inter-American system standards, solitary confinement must not be used on children and adolescents deprived of liberty.³⁸¹

286. As for confining detainees in high-security modules, the Commission has established that there is no reason for such modules, regardless of the conditions of such modules, to be located in pretrial detention centers, where detainees should be treated with respect to the right to the presumption of innocence.³⁸²

C. Impact of the excessive use of pretrial detention on prison systems

287. For several years, along with other international human rights bodies and the political bodies of the OAS, the Inter-American Commission has been noting that the most serious and widespread problem faced by the Member States with respect to prison management is overcrowding and that overcrowding is the predictable consequence of the excessive use of pretrial detention, among other factors.³⁸³ This is illustrated in *Table 1* of this report (*supra* para. 52), which shows the proportion of pretrial detainees to the prison population in several States of the region based on official information provided by the States.

288. Overcrowding increases levels of violence among inmates; it prevents them from having a minimum of privacy; it hinders access to basic services, some as essential as water; it spreads diseases; it creates an environment in which sanitary and hygienic conditions are deplorable; it constitutes, in and of itself, a risk factor for

³⁸⁰ American Civil Liberties Union (ACLU), Informational note submitted to the IACHR Rapporteur on Persons Deprived of Liberty, on May 23, 2013. In this communication, the ACLU also noted that there is no comprehensive examination of the nature and extent of the use of solitary confinement on persons in pretrial detention in the United States. With regard to the use of solitary confinement in the United States, also see, IACHR, Thematic Hearing: *Human Rights and Solitary Confinement in the Americas*, 147th regular period of sessions, requested by the American Civil Liberties Union (ACLU), with the participation of the SRT Juan Mendez, March 12, 2013.

³⁸¹ IACHR, *Principles and Best Practices for the Protection of Persons Deprived of Liberty in the Americas*, Principle XXII(3); IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, paras. 409 and 410.

³⁸² IACHR, *Report on the Human Rights Situation in Mexico*, OEA/Ser.L/V/II.100. Doc. 7 rev. 1, approved on September 24, 1998, Ch. III, para. 250.

³⁸³ IACHR, *Truth, Justice and Reparation: Fourth Report on the Human Rights Situation in Colombia*, 2013, Ch. VI(G); IACHR, *Report of the Inter-American Commission on the Human Rights Situation of Persons Deprived of Liberty in Honduras*, para. 65; IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, paras. 447 – 451. In this regard, also see, ILANUD, *Crime, Criminal Justice and Prison in Latin America and the Caribbean: How to Implement the United Nations' Rights and Duties Model*, 2010, Elías Carranza, *Crime, Criminal Justice, and Prisons in Latin America and the Caribbean: The United Nations Model, Based on Rights and Obligations, and the Need for Comprehensive Social and Criminal Justice Policies*, pp. 76 and 77.

emergency situations; it restricts inmates' access to productive activities; it fuels corruption; it affects inmates' contact with their families;³⁸⁴ and, in short, it generates serious problems in the actual management of prison facilities.³⁸⁵

289. Another serious consequence of overcrowding is that it makes it impossible to classify inmates by categories, such as, pretrial detainees and convicted persons, which is a breach of Article 5.4 of the American Convention and of the duty of the State to treat pretrial detainees differently, in accordance with the presumption of innocence.³⁸⁶ Additionally, as has been noted above, saturation of prisons and detention centers can lead to holding people in custody at police stations or other facilities that are not designed, nor are suitably staffed, for housing people for an extended period of time.

290. Moreover, under international human rights law, overcrowding of persons deprived of liberty in itself could constitute a form of cruel, inhuman or degrading treatment, violating the right to personal integrity and other internationally recognized human rights.³⁸⁷ Therefore, when the collapse of a prison system or of a particular detention center makes it materially impossible to provide inmates with dignified living conditions, the State can no longer continue to place individuals in those facilities, because in so doing, it is deliberately subjecting them to a situation that violates their fundamental rights.³⁸⁸ In particular, international human rights law imposes an absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

291. With respect to the space to which persons deprived of liberty are entitled, the European Court of Human Rights established in the case of *Ananyev and others v. Russia* that four square meters is the minimum amount of space that each

³⁸⁴ IACHR, *Truth, Justice and Reparation: Fourth Report on the Human Rights Situation in Colombia*, 2013, Ch. VI(G).

³⁸⁵ IACHR, *Truth, Justice and Reparation: Fourth Report on the Human Rights Situation in Colombia*, 2013, Ch. VI(G); IACHR, *Report of the Inter-American Commission on the Human Rights Situation of Persons Deprived of Liberty in Honduras*, para. 66; IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, paras. 455-456.

³⁸⁶ IACHR, *Truth, Justice and Reparation: Fourth Report on the Human Rights Situation in Colombia*, 2013, Ch. VI(G); IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, para. 457.

³⁸⁷ IACHR, *Truth, Justice and Reparation: Fourth Report on the Human Rights Situation in Colombia*, 2013, Ch. VI(G); IACHR, *Report of the Inter-American Commission on the Human Rights Situation of Persons Deprived of Liberty in Honduras*, para. 67; IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, para. 460. See also I/A Court HR., *Case of Pacheco Teruel et al v. Honduras*. Merits, Reparations and Costs. Judgment April 27, 2012. Series C No. 241, para. 67(a); European Court of Human Rights, *Case of Ananyev and Others v. Russia*, Judgment January 10, 2012 (First Section of the Court), paras. 144-148; UN, Committee against Torture, Report on Brazil prepared by the Committee in the framework of Article 20 of the Convention, and response from Brazil, CAT/C/39/2, published on March 3, 2009, para. 189; UN, Working Group on Arbitrary Detentions, *Report on the Mission to El Salvador*, A/HRC/22/44/Add.2, published on January 11, 2013, para. 96.

³⁸⁸ IACHR, *Truth, Justice and Reparation: Fourth Report on the Human Rights Situation in Colombia*, 2013, Ch. VI(G).

inmate must have in shared cells; this ruling was later reiterated in the case of *Torreggiani and others v. Italy*. In both decisions, the European Court described overcrowding as a structural deficiency, and considered that the use of alternative measures to imprisonment was a viable way to confront the problem.³⁸⁹

292. The Commission reiterates that effective attention to overcrowding requires States to adopt policies and strategies including, among other things, the legislative and institutional reforms required to ensure a more rational use of pretrial detention, and for this measure to be only used as a last resort and an as exception to the rule; enforcement of the maximum time limits established by law for detainees to remain in pretrial detention; and promotion of the use of alternative measures.³⁹⁰

293. The solution to this problem, as has been raised in this report, is not just to build new prison facilities. Investment projects to build new prisons should be part of a broader public policy that includes specific strategies aimed at reducing overcrowding from the standpoint of a technical understanding of the crime problem, effective operation of the criminal justice system and general crime prevention strategies. With respect to the pretrial stage of criminal proceedings, these strategies should include, as has been noted above, measures designed to reduce the use and duration of pretrial detention, and promote the use of alternative precautionary measures.

294. This approach to the problem of overcrowding has been shared as well by courts in some member States, such as the Colombian Constitutional Court, which ruled as follows in its historic judgment T-153/98:

The Court is conscious that the problem of prisons cannot be solved solely with money and construction. Everything seems to indicate that in the country a prison-centered view of criminal law continues to reign supreme. As long as this view continues to prevail, there will never be enough space in prisons.

Consequently, the Court deems it important to bring attention to the fact that the principle of the presumption of innocence requires that pretrial detention be used only as a measure of last resort [...].

[...] The view expressed about pretrial detention and of imprisonment does not deny citizens' right to have the State make sure they are safe.

³⁸⁹ European Court of Human Rights, *Case of Torreggiani and Others v. Italy*, Judgment January 8, 2013 (Second Section), paras. 76 and 95; European Court of Human Rights, *Case of Ananyev and Others v. Russia*, Judgment January 10, 2012 (First Section of the Court), paras. 144 – 145 and 197 et seq.

³⁹⁰ IACHR, *Report of the Inter-American Commission on Human Rights on the Situation of Persons Deprived of Liberty in Honduras*, para. 68; IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, para. 462.

Excesses must be avoided; the use of these two criminal law institutions must be reduced to instances in which it is necessary.³⁹¹

295. In short, the Commission considers that the non-exceptional and prolonged use of pretrial detention has a direct impact on the increase of the prison population and therefore also in overcrowding and prison facility management. Accordingly, it is a symptomatic and troubling fact that a significant percentage, sometimes a majority, of the prison population is made up of persons in pretrial detention, which should be addressed with the greatest attention and seriousness by the respective States. In this regard, it is important to document and examine the impact of excessive use of pretrial detention on the prison system, and to adopt the necessary measures to rationalize the increase of inmates in detention facilities. All planning and implementation of prison management policies should take into account the steady increase in the number of persons deprived of liberty.³⁹²

³⁹¹ Constitutional Court of Colombia, Judgment T-153/98 of April 28, 1998 (MP. Eduardo Cifuentes Muñoz), paras. 60 and 61.

³⁹² IACHR, *Truth, Justice and Reparation: Fourth Report on the Human Rights Situation in Colombia*, 2013, Ch. VI(G).

VI. RECORDS OF DETAINEES, TRANSPARENCY IN PRISON OPERATIONS, AND MANAGEMENT OF INFORMATION ON THE USE OF PRETRIAL DETENTION

A. Records of detainees

296. One of the basic tenets of international human rights law regarding the treatment of persons deprived of liberty is the State's duty to keep records of the individuals held in its custody. This duty, which was originally circumscribed in a very specific manner to the protection of such rights as the right to life and personal integrity has evolved to the point to be considered a necessary element for ensuring the right to personal liberty and the right to due process, and has even become an indispensable component in the design of criminal and prison policies.

297. Treaty law contains two binding provisions that are of relevance to the OAS member States in connection with keeping records of arrests: Article 17.3 of the International Convention for the Protection of All Persons from Enforced Disappearance,³⁹³ and Article XI of the Inter-American Convention on Forced Disappearance of Persons.³⁹⁴ In addition, there are specific provisions in other international instruments that have been broadly acknowledged and accepted as valid by the international community, such as the Minimum Rules for the Treatment of Prisoners (Rule 7.1),³⁹⁵ the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 12), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Rule 21), and, most particularly, the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (Principle IX).³⁹⁶

³⁹³ UN, *International Convention for the Protection of All Persons from Enforced Disappearance*, adopted and opened for signature, ratification, and accession by the General Assembly by means of resolution A/RES/61/177, December 20, 2006. Eighteen OAS member states are parties to this instrument: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, Guatemala, Haiti, Honduras, Mexico, Panama, Paraguay, Peru, Saint Vincent and the Grenadines, Uruguay, and Venezuela.

³⁹⁴ OAS, *Inter-American Convention on Forced Disappearance of Persons*, adopted in Belém do Pará, Brazil, June 9, 1994, at the twenty-fourth regular period of sessions of the General Assembly. This has been ratified by fourteen member states: Argentina, Bolivia, Chile, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela.

³⁹⁵ In his recent report on the Minimum Rules review process, the Special Rapporteur on Torture reiterated the importance of an official registry as one of the fundamental safeguards against torture or other ill-treatment and outlined a series of elements that any new version of this international instrument should include to address the matter. UN, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/68/295, published August 9, 2013, para. 43.

³⁹⁶ This provision states that: "The personal data of persons admitted to places of deprivation of liberty shall be recorded into an official register, which shall be made available to the person deprived of liberty, his or her representative, and the competent authorities. The register shall include, as a minimum the following information: a. Personal information including, at least, the following: name, age, sex, nationality, address and name of parents, family members, legal representatives or defense counsel if applicable, or other relevant data of the persons deprived of liberty; b. Information concerning the personal integrity and the state of health of the persons deprived of liberty; c. Reason or grounds for the deprivation of liberty; d. The authority that ordered or authorized the deprivation of liberty; e. The authority that conducted the person

Continues...

298. The Inter-American Commission considers that the existence of a centralized, technically organized, efficient, and accessible register is not only an essential safeguard for protecting the lives and physical integrity of people deprived of liberty, but is also one of the basic components of an adequately operating criminal justice system. Such systems, when they are efficient, provide valuable information that can be used to design and implement policies and to secure accountability within the criminal justice system.³⁹⁷

299. Further analyzing the content and scope of this international obligation, in its *Report on the Human Rights of Persons Deprived of Liberty in the Americas* the Commission stated that proper management of inmates' records and case files requires that information be dealt with in an organized and efficient manner at each detention center, and that it is available through centralized information systems; that all the authorities involved in those processes are properly trained and provided with the appropriate instruments and technological tools for discharging their functions; and that suitable oversight and monitoring mechanisms be established to ensure that these admission and registration procedures are effectively observed. In addition, States have the duty of acting with due diligence in transferring and archiving documents sent to detention centers from courts and tribunals.³⁹⁸

300. Similarly, following the cases of *Paniagua Morales and others* and *Juan Humberto Sánchez*, the Inter-American Court established the duty of States to guarantee the accuracy and accessibility of records of detainees on the basis of the general obligation enshrined in Article 2 of the American Convention.³⁹⁹ Later, in the case of *Cabrera García and Montiel Flores*, the Court ruled that a proper records system should have the following characteristics: (a) continuous updating; (b) interconnection

...continuation

deprived of liberty to the institution; f. The authority legally responsible for supervising the deprivation of liberty; g. Time and date of admission and release; h. Time and date of transfers to another place and the destination; i. Identity of the authority who ordered the transfer and of the one who is responsible for it; j. Inventory of personal effects; and k. Signature of the persons deprived of liberty, or where this is impossible, an explanation about the reasons thereof."

³⁹⁷ IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, paras. 153 and 155; IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, Ch. VII, para. 18; IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., adopted October 22, 2002, para. 122. Similarly, in its recent *Report on the Situation of Human Rights in Jamaica*, the IACHR highlighted the lack of public statistics on arrests, stating that this prevented the government from controlling or regulating them and, at the same time, that it prevented civil society from monitoring detention practices and reporting possible abuses committed by public authorities. IACHR, *Report on the Situation of Human Rights in Jamaica*, OEA/Ser.L/V/II.144 Doc 12, adopted August 10, 2012, para. 179.

³⁹⁸ IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, paras. 157-161.

³⁹⁹ I/A Court H.R., *The "Panel Blanca" Case (Paniagua Morales et al.) v. Guatemala. Reparations (Art. 63.1 American Convention on Human Rights)*. Judgment of May 25, 2001. Series C No. 76, paras. 195 and 203; and I/A Court H.R., *Case of Juan Humberto Sánchez v. Honduras*. Judgment of June 7, 2003. Series C No. 99, para. 189.

between the database of the register and any other relevant databases; (c) guarantee that the register respects the requirements of access to information and privacy; and (d) an oversight mechanism to ensure that authorities comply with those processes.⁴⁰⁰

301. To summarize, the Commission considers that keeping an adequate register of people deprived of liberty is not only a guarantee against forced disappearance and violations of other basic rights but is, in addition, a basic tool for upholding other procedural rights and also an essential requirement for the correct management of prison systems. 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. 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.⁴⁰¹

B. Transparency in prison operations

302. After conducting a general analysis of the prison situation in the region, the Inter-American Commission concluded that one of the most serious and widespread problems is corruption and the lack of transparency in prison management. Traditionally, prisons have been isolated places largely kept away from public scrutiny and State monitoring and oversight.⁴⁰²

303. In light of this reality, and given the fundamental nature of the human rights at play when incarceration is ordered, the Commission underscores that prison management in general must be governed by strict criteria of transparency, openness, and independent monitoring.⁴⁰³ The Inter-American Court has established, as a fundamental principle, that “[t]he way a detainee is treated must be subject to the closest scrutiny, bearing in mind the detainee’s special vulnerability.”⁴⁰⁴ Similarly, the

⁴⁰⁰ 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. 243 and operative paragraph 16.

⁴⁰¹ UN, Twelfth Congress on Crime Prevention and Criminal Justice, held in Salvador, Brazil, April 12 to 19, 2010. See Background paper on the *Workshop on Strategies and Best Practices against Overcrowding in Correctional Facilities*, A/CONF.213/16, published January 25, 2010, para. 13.

⁴⁰² IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, paras. 2, 4 and 182.

⁴⁰³ IACHR, *Truth, Justice and Reparation: Fourth Report on the Situation of Human Rights in Colombia*, 2013, Ch. VI(G).

⁴⁰⁴ I/A Court H.R., *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 262; and I/A Court H.R., *Case of Bulacio v. Argentina*. Judgment of September 18, 2003, Series C No. 100, para. 126.

SRT has underscored the need for “replacing the paradigm of opacity surrounding the places of deprivation of liberty by one of transparency.”⁴⁰⁵

304. The essential condition for effective scrutiny of prison management is precisely the independent monitoring of its operations and of detention facilities (in the broadest sense). This function falls first to those public authorities required by law to monitor the situation of people deprived of liberty or to protect their basic rights (e.g., people’s defense offices or ombudsmen, judicial authorities, public prosecution services, public attorneys, etc.) and, then, to other independent entities whose functions include supervising and monitoring the situation of persons in custody, such as civil society organizations⁴⁰⁶ and academic institutions that conduct research in prison settings.

305. A particularly important role is played in this context by the monitoring mechanisms created under treaties, such as the national preventive mechanisms provided for in the optional protocol to the UN Convention against Torture.⁴⁰⁷ The Inter-American Commission therefore renews its call for the OAS member States to ratify this treaty and for those that have already done so to create and implement the national preventive mechanisms that the treaty provides for.⁴⁰⁸ These mechanisms should be given sufficient resources and the necessary institutional support to operate effectively and with the autonomy and independence that the nature of their monitoring functions demands.⁴⁰⁹

306. At the same time, it is also important that no arbitrary restrictions be placed on the admission of those outside parties or organizations that visit detention centers to conduct human rights work, academic studies, charity work, or monitoring efforts in accordance with the applicable legal provisions and regulations.

⁴⁰⁵ UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/57/173, adopted July 2, 2002, para. 36. See also, UN, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/56/156, adopted July 3, 2001, para. 34.

⁴⁰⁶ In this regard, after its visit to El Salvador, the WGAD recommended the State to “[e]ncourage visits by NGOs to prisons and detention centers.” UN, Working Group on Arbitrary Detention, *Report on Mission to El Salvador*, A/HRC/22/44/Add.2, published January 11, 2013, para. 132(q).

⁴⁰⁷ UN, *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, adopted by the General Assembly by means of resolution 57/199, December 18, 2002. To date this treaty has been ratified by fourteen OAS member states: Argentina, Bolivia, Brazil, Chile, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, and Uruguay.

⁴⁰⁸ According to the provisions of international law, when States ratify an international pact they are required to make the necessary amendments to their domestic laws to ensure the execution of the obligations assumed, and to do so within a reasonable time. Of course, the treaty in question may set specific time frames for the implementation of its provisions, in which case states are required to abide thereby.

⁴⁰⁹ IACHR, Press Release 151/12 – *IACHR Welcomes Law Creating the National Mechanism for the Prevention of Torture in Argentina*, Washington, D.C., December 30, 2012. This message has been consistently reiterated by the IACHR in its brief reports issued after the working visits of its Rapporteurship on the Rights of Persons Deprived of Liberty, available at: <http://www.oas.org/en/iachr/pdl/activities/countries.asp>.

307. The need for the actions of prison administrations to be brought into line with the principle of transparency was also acknowledged by the OAS member States at the Second Meeting of Officials Responsible for the Penitentiary and Prison Policies, in the following terms:

Transparency and openness will be promoted in prison management, taking all stakeholders into account and paying special attention to persons deprived of liberty and their family members, the judges enforcing or overseeing execution of sentences, civil society, and prison officers. In calling for transparency in correctional policies, mechanisms will be developed in these institutions to facilitate access to justice. To that end, and within the established framework of responsibilities, the prison warden will provide the opportunity for oversight of his/her actions by the competent entity with jurisdiction in this area. The behavior of all correctional system officers shall also be geared to preventing corruption.⁴¹⁰

C. Management of information on the use of pretrial detention

308. In line with the foregoing and with the State's duty to adopt public policies to ensure rational use is made of incarceration, the Commission considers that one strategic element in those policies is the compilation of useful data for analyzing the main aspects of the use of pretrial detention.⁴¹¹

309. States should therefore establish indicators for setting measurable goals related to the rational use of pretrial detention, in accordance with international law; and, to reduce the related financial and human costs. The absence of indicators translates into an inability to carry out evaluations and make decisions based on objective parameters.

310. Those indicators should be suitable for allowing aspects such as the following to be analyzed: (a) *the level of exposure to incarceration* (generally expressed as the number of detainees per 100,000 inhabitants in the country, which can then be further broken down by age, gender and ethnicity); (b) *the exceptionality* of the use of pretrial detention, which is observable, for example, by looking at the number and percent of pretrial decisions and the number and percent of each alternative to pretrial detention dictated in a particular jurisdiction in a particular period of time, disaggregated by type of offences; (c) *the level of compliance with or effectiveness of*

⁴¹⁰ OAS, Second Meeting of Officials Responsible for Penitentiary and Prison Policies in OAS Member States, Valdivia, Chile, August 26 to 28, 2008, OEA/Ser.K/XXXIV GAPECA/doc.8/08 rev. 2, December 16, 2008, section E, Oversight and Transparency.

⁴¹¹ The OAS member States' prison authorities have also recommended the preparation of indicators, stating that "[i]mportance will be attached to developing instruments for periodically measuring the major factors or specific indicators of prison management." OAS, Second Meeting of Officials Responsible for Penitentiary and Prison Policies in the OAS Member States, Valdivia, Chile, August 26 to 28, 2008, OEA/Ser.K/XXXIV GAPECA/doc.8/08 rev. 2, December 16, 2008, section E, Oversight and Transparency.

those precautionary measures other than pretrial detention, which can be seen in the numbers and percentages of cases where defendants awaiting trial in liberty respected the conditions imposed by the judge; (d) *the duration of pretrial detention*, including the number of people who are held on pretrial detention for longer than allowed (maximum period permissible under law, maximum duration for investigations, duration preset by the judge); and, (e) the numbers and percentages of *people held in custody during their trials who are ultimately not sentenced to prison* (e.g., dismissed cases, acquitted defendants, or suspended sentences).⁴¹² This last indicator would be useful in identifying patterns of irresponsible requests for pretrial detention.

311. To consider the foregoing aspects, it is important to conduct an analysis of the legal provisions that establish the parameters under which pretrial detention is ordered. In addition, these factors should be analyzed with respect to different types of crimes and the profile of the persons held in pretrial detention. Another essential element that should be assessed is the quality of the resolutions whereby pretrial detention is requested (by prosecutors) and imposed (by judges), and whether they are duly grounded. Similarly, it would be useful to examine the quality of the interventions of public defenders at this stage in the proceedings.

312. Generally, the most common indicator used by States (in some cases, the only one) is the percentage of people in pretrial detention compared to the total number of people deprived of their freedom (or sometimes, only those held by the penitentiary system) at a given moment in time. However, while useful for certain purposes, that indicator alone is not enough for adequately assessing whether pretrial detention is used in accordance with the applicable legal, constitutional, and international provisions. There are also other factors subsequent to the imposition of this measure relating, for example, to procedural considerations in the processing of criminal proceedings that have a direct impact on the handing down of first-instance judgments and that clearly contribute to the total number of persons held in pretrial custody remaining stable. As a result, the simple fact that the total percentage of people in pretrial detention at a given moment is not perceived as high does not necessarily mean that the use of the measure is actually exceptional.⁴¹³

313. It is also important to prepare statistical studies on the costs of pretrial detention, which, along with all the information referred to in this chapter, should be freely available to the public. Attention should be paid to the costs of keeping people in custody while awaiting trial, to the payment of damages for the harm caused by the illegal or arbitrary use of this measure, and the cost in human terms arising from personal, family, and other harm, regardless of whether the detention was imposed in accordance with the law.

⁴¹² For a more detailed explanation of these topics, see, for example: IACHR Regional Meeting of Experts on Pretrial Detention, May 9 and 10, 2013, Presentation by Ina Zoon, audio of panel 2 of the meeting, available in Spanish at: <http://www.oas.org/es/cidh/ppl/actividades/prisionpreventiva.asp>.

⁴¹³ IACHR, *Truth, Justice and Reparation: Fourth Report on the Situation of Human Rights in Colombia*, 2013, Ch. VI(G).

314. Estimates of the costs of pretrial detention are useful in conducting future analyses of the measure's costs and effectiveness, bearing in mind that other properly implemented supervisory measures or systems can attain the same goals that, in principle, are sought through pretrial detention, but with a lesser restriction of rights and, possibly, at a lower financial cost to the State and to detainees, their families, and society.⁴¹⁴ Moreover, a cost analysis would be useful in identifying poor practices within public policies and in determining the priorities of the criminal justice apparatus vis-à-vis the official political discourse and the real needs of the challenges of citizen security.⁴¹⁵

315. The Inter-American Commission considers that it is possible to reconcile cost-related approaches to the application of pretrial detention with compliance with applicable international obligations. With appropriate information on the costs of the different criminal justice mechanisms available, and on those of implementing other primary and secondary preventive measures (see paras. 18 and 104, *supra*), the public spending can be planned in a way that is both efficient and compatible with the international obligations States have assumed.

316. Clearly, all this information generated about the use of pretrial detention should be deployed to analyze the real impact that this measure has on crime. This information gathered according to methodological criteria, should serve as the basis for the design, adoption, and implementation of States' criminal policies, and they must be taken into account with full seriousness by governments and organs of popular representation when legislating on this matter.

⁴¹⁴ Paz Ciudadana Foundation, *The Costs of Pretrial Detention in Chile (Los Costos de la Prisión Preventiva en Chile)*, 2008, p. 45.

⁴¹⁵ Center for the Implementation of Public Policies for Equity and Growth (CIPPEC), *The social and economic cost of pretrial detention in Argentina (El costo social y económico de la prisión preventiva en la Argentina)*, Working document No. 29, 2009, pp. 9 and 10.

VII. CONCLUSIONS

317. The non-exceptional use of pretrial detention is one of the most serious and widespread problems faced by OAS member States in respecting and guaranteeing the rights of persons deprived of liberty. The excessive use or abuse of this measure is one of the clearest signs of failure in the justice administration system, and it constitutes an unacceptable situation in democratic societies that strive to uphold the right of all citizens to be presumed innocent.

318. In a democratic society, the criminal justice system is founded on the primacy of human dignity and fundamental rights. These include the guarantee of personal liberty, the right to due process and the presumption of innocence, which translate into the right of every person to remain free throughout criminal proceedings.

319. Pretrial detention is a strictly extraordinary measure, and its application should comply with the principles of legality, presumption of innocence, reasonableness, necessity, and proportionality. This measure can only be ordered in the cases expressly provided by law and in accordance with the requirements thereby established. It is permissible only when directed at accomplishing its legitimate aims, which according to Article 7.5 of the American Convention are: (a) preventing the accused from evading justice, for which the degree of attachment of the accused to the community, its conduct during the proceedings and the severity of the charges and the foreseen sentence may be taken into account; and (b) avoiding obstruction of the investigation and the trial by the accused, which could be assessed by looking at the capacity of the accused to alter the evidence, influence witnesses or induce other persons to commit these acts.

320. One of the fundamental guarantees flowing from due process and the presumption of innocence is access to an effective recourse before an independent judge to challenge the order of pretrial detention. This recourse should work to fully guarantee the right to defense of the accused and to enable the competent judicial authority to go beyond a mere formal revision and conduct a comprehensive analysis of all the procedural and substantive issues that served as grounds for the challenged decision.

321. Similarly, given that the period of pretrial detention should not exceed a reasonable period, the State has the duty to periodically review the existence of the circumstances that led to the application of the measure in the first place. In this regard, the judge has a duty to periodically review whether the pretrial detention remains reasonable and necessary to fulfill its legitimate purposes.

322. According to international human rights law, detaining a person prior to the enactment of a final judgment should be the exception and not the rule, precisely because of the right to the presumption of innocence. It is therefore a distortion of the rule of law and of the criminal justice system for pretrial detention to be used as an anticipated sentence or as a way to mete out swift justice prior to adopting a judgment issued in compliance with the standards of due process. Making it seem like an

increased use of pretrial detention is a solution to crime and violence is a common fallacy frequently invoked by public authorities, but there is no empirical evidence whatsoever to support it. It is also a politically irresponsible attitude, which shirks the responsibility for adopting other deeper and broader social and preventive measures.

323. The non-exceptional use of pretrial detention as a strategy of criminal policy constitutes not only a serious violation of human rights under the Convention and other international instruments, but is also a major cause of the severe crisis affecting many prison systems in the region.

324. Accordingly, the IACHR reiterates that the region's States should adopt comprehensive public policies for their criminal justice and prison management systems, including both immediate measures and long-term plans, programs, and projects. These should be undertaken by the States as a priority and a commitment of all branches of government, not dependent on the varying interest that the government in turn may place in them or on the ups and downs of public opinion.

325. Such public policies should reveal the following essential characteristics: (i) *continuity*: be considered as affairs of State, and executed regardless of successive changes of government, (ii) *adequate legal framework*: be based in an appropriate legal framework and sufficient regulations, (iii) *adequate budget*: be supported by sufficient and relevant budgetary allocations, to be increased gradually and progressively, and (iv) *institutional integration*: which requires a serious and coordinated effort of all the branches of government, in both the formulation and implementation of these policies. Moreover, and as an essential precondition for the implementation of these policies, steps should be taken to stabilize the increase of the prison population.

VIII. RECOMMENDATIONS

326. In light of the analysis and the conclusions set forth in this report, the Inter-American Commission on Human Rights delivers the following recommendations to the States members of the OAS:

A. General recommendations pertaining to State policy

1. 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, thereby avoiding the arbitrary, unnecessary and disproportionate use of this practice. These principles shall always guide the conduct of judicial authorities, regardless of the criminal system model adopted by the State.
2. 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. In this regard, it is fundamental to send an institutional message of support from the highest levels of the State and the judiciary for the rational use of pretrial detention and for the respect of the right to the presumption of innocence.
3. The IACHR urges authorities to use pretrial detention as an eminently exceptional measure and to opt instead for alternative measures whenever possible. In this regard, the IACHR calls upon the States to implement strategic plans to train and raise awareness among judicial authorities and those in charge of criminal investigations, about the exceptional nature of pretrial detention, the use of alternative measures to guarantee appearance for trial, and other international and constitutional standards on this subject. Above all, it urges the States to foster a change in the judicial culture and practice so as to bring a shift in thinking concerning the applicability and need for pretrial detention.
4. Analyze the real impact that the excessive use of pretrial detention has on crime. Based on that information, redirect public policy to make the exceptional nature of pretrial detention one of the centerpieces of policies on crime and citizen security, and avoid hard-line criminal justice systems that end up imprisoning individuals during criminal proceedings in response to demands for citizen security.
5. Urgently adopt the measures needed to correct the procedural backlog 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.

6. Strengthen and reinforce the skills and expertise of the authorities charged with investigating criminal acts so as to expedite the processes and shorten the time that the suspect spends in pretrial detention.
7. Ensure that there are sufficient judicial authorities to review the legality of a pretrial detention.
8. Adopt comprehensive public policies regarding the management of prison facilities. These policies should factor in the four elements cited in the conclusions of this report: continuity, a proper legal framework, an adequate budget and institutional integration. The core of these public policies should include, as a core element, the design and effective implementation of a model of criminal policy oriented by the norms of international human rights law; based on technical information, assessments and scientific data; and geared towards stabilizing and reducing the growth of the prison population. These public policies should also take into account the rights of the victims of violence and crime.
9. The following lines of action are recommended as concrete strategies to reduce prison overcrowding: (a) ensure that the criminal process and related programs are addressed through an integrated, sustained approach that encompasses the entire system; (b) ensure that criminal cases are processed within a reasonable period; (c) opt for a criminal policy design that safeguards fundamental rights; (d) take concrete steps to guarantee that pretrial detention is an exceptional and reasonable measure; (e) increase the use of alternatives to detention and imprisonment, using imprisonment only as a measure of last resort while observing the principle of proportionality; (f) improve access to justice and public defense mechanisms; (g) strengthen the applications of available mechanisms for early release prior to completion of the sentence; (h) strengthen measures to prevent recidivism, such as the productive activities (education and labor); (i) guarantee the principle of humane treatment of persons deprived of liberty and applicable international standards; (j) increase prison capacity only if it is absolutely necessary; (k) establish efficient management systems and judicial and prison data analysis systems; and (l) implement training programs for judicial and law enforcement authorities on the exceptional use of pretrial detention.
10. Establish by law that the competent authority shall have the duty to determine the maximum capacity of each place of deprivation of liberty according to the relevant standards. The assessment of that

capacity must be made according to technical criteria and procedures. Furthermore, the law shall establish the procedures through which the maximum capacity or the occupation ratio could be disputed. The law shall prohibit the practice of establishments to maintain more inmates than the maximum capacity allows. It shall also establish the mechanisms to immediately remedy any circumstances of overcrowding. In cases of overcrowding and in the absence of an effective legal regulation, the competent judicial authorities shall adopt adequate measures to stop and revert this situation.

B. Application of other precautionary measures different from pretrial detention

1. Due to the exceptional nature of pretrial detention, it is recommended that States take measures to ensure that their domestic laws provide for less restrictive alternatives to incarceration.
2. Moreover, the IACHR calls upon the Member States to properly 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.
3. The IACHR recommends, that in order to ensure the defendant's appearance in court or avoid any obstruction of the investigation, the application of the following measures should be considered: (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 of 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 put up 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. The judge should privilege the less restrictive measure adequate to prevent the flight risk or the hampering of the proceedings.
4. Ensure that bail is applied according to material equality criteria, and does not discriminate against those who do not have the economic

means to make bail. In cases where the accused's lack of capacity of payment has been established, another precautionary measure should be used that does not involve deprivation of liberty. In accordance with the principle of presumption of innocence, bail shall in no case constitute or include reparation of damages caused by the crime imputed to the accused.

5. While failure to abide by the alternative measures may carry penalties, this failure should not constitute automatic justification to impose pretrial detention. In such cases, specific grounds shall support the application of pretrial detention in lieu of less restrictive alternatives. When a person is accused of breaching the terms of a non-custodial measure, the competent authority shall grant the person the opportunity to be heard and to present elements to explain or justify that infringement.
6. Develop training, oversight, and enforcement measures to ensure the use of non-custodial measures in accordance with domestic and international norms.

C. Legal framework and application of pretrial detention

1. Take the necessary measures to guarantee that pretrial detention is applied as an exceptional measure, justified only when the legal requirements applicable in each individual case are present, which should comply with international human rights law, as explained in this report.
2. 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.
3. In those cases in which the law limits the length of time a person may be held in pretrial detention, such a provision shall not be interpreted or applied to mean that the pretrial detainee may always be held for that period; instead, the law shall be interpreted to mean that the person may be held in custody only for the time period necessary to achieve the ends for which the measure was ordered, in accordance with the principles of necessity and proportionality. Further, the fact that the law sets a maximum period for pretrial detention shall not obviate the need for periodic reviews to ascertain whether pretrial detention is still necessary, as indicated in these recommendations.
4. In those cases in which the criminal code allows the maximum period established for pretrial detention to be extended under certain

circumstances, those extensions shall be interpreted in the narrow sense to ensure that pretrial detention is used only exceptionally. When deciding whether pretrial detention should be prolonged, an important factor to consider is whether specific evidence, which may have initially made the application of such a measure seem appropriate, may have become less compelling with the passage of time.

5. Study the possibility of increasing the crimes or offenses for which pretrial detention cannot be legally applied, as well as the possibility of not 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.
6. In the context of criminal proceedings, there shall be sufficient evidentiary elements that associate the accused with the facts of the case, in order to justify an order of preventive deprivation of liberty. Pretrial detention should not be decided based solely on the reports produced by police authorities. In any case, the request for the order of pretrial detention must be duly grounded.
7. When seeking one or several precautionary measures, the prosecutors or agents of the Public Prosecutor's Office shall: (a) make the case that there is sufficient evidence to show that a crime was likely committed and that the defendant was involved; (b) based on the circumstances of the case and the suspect's subjective characteristics, make a sufficient case for the fact that the suspect will not stand trial voluntarily or will obstruct the investigation or any specific measure taken in the case; and (c) specify the period of time the suspect should be held in pretrial detention. In cases in which the prosecutor requests the application of the precautionary measure of pretrial detention, he or she shall provide grounds as to why the application of a less restrictive alternative measure would not be viable.
8. Decisions by competent judicial authorities ordering pretrial detention should be the result of a thorough and not merely formal examination of each case, done in accordance with the applicable international standards set out in this report. The corresponding resolution ordering pretrial detention must name the individual whose pretrial detention is being ordered, spell out the facts attributed to him or her, specify the crimes that those facts constitute, explain the circumstances that necessitate pretrial detention, and set the time period that the individual is to be held in pretrial detention and the date on which it will expire.

9. 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 through the use of appropriate video technology.
10. The following are among the factors that may be considered when deciding the question of flight risk: (a) attachment, as determined by the defendant's domicile, habitual residence, family home or place of business or work, and his or her ability to leave the country (or the state in the case of federal States) or remain hidden, as well as other factors that would influence the defendant's attachment; (b) the defendant's behavior during those proceedings to the extent that it is indicative of his or her willingness to undergo criminal prosecution, and in particular whether he or she was in contempt of court or concealed information concerning his/her identity or domicile, or provided a false one; or (c) the type of crime the accused is charged with and the severity of the foreseen sentence.
11. In determining whether a suspected offender threatens to obstruct the inquiry into the facts, consideration may be given to any indicia that give cause for a serious suspicion that the defendant: (a) will destroy, alter, conceal, suppress or falsify evidence; (b) will exert pressure on witnesses or experts to give false testimony or behave in a disloyal or reticent manner, or (c) induce others to engage in such conduct.
12. Pretrial detention shall not be ordered for minor criminal offenses, when there is only a mere suspicion that the suspect is criminally liable, when other alternative measures are available that can guarantee that the accused will appear for trial, for reasons of "public concern" or any other abstract legal concept, or in view of a possible long-term conviction.
13. Any provision requiring pretrial detention based on the type of the crime should be repealed.
14. 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 period of time are released until the proceedings come to their conclusion. 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.

15. Ensure the existence of adequate and effective judicial remedies accessible to persons under pretrial detention, enabling them to secure judicial protection of rights affected when pretrial detention is unlawfully or arbitrarily applied or extended.
16. Ensure in the law that detained persons acquitted by a judicial decision at the first instance are released immediately, without prejudice to the continuation of the proceedings.
17. Establish, by a provision in the criminal code, that the time that a person has spent in pretrial detention shall be counted as time served and discounted from the sentence he or she receives.
18. Ensure the reparation of the damage caused by the application of pretrial detention that is unlawful, arbitrary or in violation of other human rights established in binding treaties to which the State is party. This reparation should be integral and take into account the standards set forth by the Inter-American System on the restitution of damages caused by human rights violations. Merely releasing the person from pretrial detention is not by itself a form of full reparation of the damage caused by the improper application of pretrial detention.
19. Pretrial detention in the case of minors must be the exception and used only as a last resort.

D. Detention conditions

1. Establish effective systems to ensure that pretrial detainees are segregated from convicted persons, and create systems for classifying prisoners by sex, age, reason for detention, special needs and the kind of treatment they should receive.
2. Under no circumstances shall the separation of inmates based on categories be used to justify discrimination, the use of torture, cruel, inhuman, or degrading treatment or punishment, or the imposition of harsher or less adequate conditions on a particular group. The same criteria shall be observed during transfers of persons deprived of liberty.
3. Endow the prison system with the resources necessary to ensure that pretrial detainees are effectively segregated from convicted inmates, and ensure that the conditions under which persons awaiting or standing trial are held are appropriate in accordance with the principle of presumption of innocence and in keeping with the standards established in the United Nations' Standard Minimum Rules for the Treatment of Prisoners.

4. Seek to ensure that persons being held in pretrial detention have full access to work, cultural and recreational activities that prisons offer.
5. Guarantee that the competent judicial authorities appropriately monitor the detention conditions.
6. Eradicate the practice of holding pretrial detainees in police stations. Instead, these detainees should be transferred to penal institutions to await trial. There, they are to be segregated from convicted inmates. Accordingly, the OAS Member States should adopt the measures necessary to be able to house detainees in conditions consistent with the dignity of the human person. In case Member States are not able to guarantee conditions that are compatible with the human dignity of processed persons, they shall provide for the application of a precautionary measure other than pretrial detention or provide for their release during trial.
7. Ensure that any person held in pretrial detention has adequate sanitary and safety conditions, and the time and facilities to receive visitors and the legal advice of a defense counsel of his or her choosing in complete confidence, without needless delays, interception of communications, or any form of censorship. Defense attorneys' visits shall not be heard by prison authorities. Any undue restriction or obstruction of the detainees' access to their defense attorneys shall be subject to an immediate review by an independent authority. Any detained person shall have access to and be authorized to be in possession of the legal documents pertaining to his or her case; prison authorities may not arbitrarily take those documents away.
8. Ensure that, by law, the authority charged with the criminal investigation is distinct from the authorities charged with the detention and with controlling the conditions of pretrial detention. This separation is essential to avoid the conditions of incarceration being used to obstruct effective exercise of the right of defense. It also prevents self-incrimination or pretrial detention being used as a kind of anticipated sentence.
9. Adopt the legislative, regulatory and administrative measures necessary to ensure the persons in pretrial detention the exercise of the political rights compatible with their legal situation, particularly the right to vote.
10. Disciplinary measures administered to persons in pretrial detention shall not have the effect of prolonging that detention or interfering with the preparation of the accused's defense and regular access to his or her legal representatives. Disciplinary measures shall not affect the minimum contacts necessary with the detainee's family.

E. Legal defense

1. 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, in order to be able to prepare his or her defense adequately. To that end, the detainee shall be notified with sufficient time of the elements that will be used to request the precautionary measure. In the case of a foreign person, he or she shall have the right to have the consul of his or her country notified so that the consul may provide advice and assistance.
2. 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 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.
3. 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.
4. Guarantee the procedural principle of equality of arms between the public defender (or legal defense that is tendered, when such is the case) and the prosecutor. Particularly, with regards to aspects such as the capacity to act, present and produce evidence, States shall guarantee access to the files and to the information contained in the investigation.

F. Independence of the justice authorities (or "justice operators")

1. Adopt the legislative, administrative and institutional measures needed to guarantee the maximum possible independence and impartiality of the court authorities charged with making decisions pertaining to the use of pretrial detention, so that they are able to perform their functions without any type of interference.
2. Officials of other branches of government should refrain from issuing public opinions critical of prosecutors, judges and public defenders for decisions taken regarding the application of pretrial detention, even when those opinions do not amount to a crime or violation under

domestic law. Likewise, they shall refrain from promoting the widespread or selective use (in specific cases) of pretrial detention.

3. In order to provide support and to strengthen institutionality for the the judicial authorities charged with ordering pretrial detention, the IACHR recommends, among other measures, to train officers of the court in how to perform in matters that are the subject of highly-charged public controversy and in which they can expect to face pressure from various quarters before reaching their decision, as well as criticism and questioning once their decision is made.
4. Guarantee the fundamental principle of the tenure of judges and magistrates. Judges and magistrates may only be removed from their functions (i) when the term or condition of their appointment is met or when they reach the mandatory retirement age, which are situations that constitute effective compliance with the guarantee of irremovability during the period of exercise of their position, or (ii) when the separation from their position is the result of a sanction issued by the competent authority, after a process that complies with due process guarantees and the principle of legality.
5. Disciplinary control mechanisms shall aim to assess the conduct and performance of the judge as a public official. Member States shall establish clearly and in detail the conduct subject to disciplinary sanctions, which should be proportional to the violation committed. Likewise, the decisions that order the enforcement of disciplinary sanctions should be public, based on solid grounds, susceptible to review and comply with due process. The information concerning the disciplinary proceedings shall be accessible and subject to the principle of transparency.
6. These disciplinary control mechanisms shall never be used as a means to exert pressure on or punish court authorities who have made pretrial detention decisions in which they were acting within their sphere of competence and in accordance with the law.
7. The following is recommended regarding the relationship between the justice system and the media: (a) devise a communication policy in each institution of the judiciary that includes the adoption of measures to make information accessible to the public; (b) create or reconfigure liaison mechanisms (press offices, for example) between the judicial branch and the media to provide objective, non-confidential information concerning the progress or outcome of judicial proceedings; (c) arrange public spaces in which to provide instruction in how the institutions within the justice system function, the manner in which the most frequent judicial proceedings unfold, and the significance of the most important phases of those

proceedings. These spaces should include anything from the school system to the mass media.

8. Design and implement clear rules for the management of information in criminal matters to guarantee the presumption of innocence of detainees and suspects and preserve the dignity of victims. Member States shall not publicly exhibit in mass media persons deprived of liberty who have not yet been presented before a judge, and in no case shall they be presented as guilty before a conviction.

G. Records and Statistics

1. The data on persons admitted to detention facilities shall be entered into an official record, which shall be accessible to the individual deprived of liberty, his or her attorney and the competent authorities. The record shall contain at least the following data: (a) information on the person's identity, which shall include, as a minimum, the following: the person's name, age, sex, nationality, ethnicity, address and names of parents, family members, legal representatives or defense counsel if applicable, and any other relevant information pertaining to the person deprived of liberty; (b) information concerning the personal integrity and state of health of the person deprived of liberty; (c) reasons or grounds for the person's incarceration; (d) the authority who ordered or authorized the person's detention; (e) the authority who conducted the individual to the facility; (f) the authority legally responsible for supervising the detention; (g) date and time of admission and release; (h) dates and times of any transfers and the destinations; (i) the identity of the authority who ordered and is responsible for the transfer; (j) an inventory of the detainee's personal effects, and (k) the signature of the person incarcerated and, in the event of refusal or inability to sign, an explanation about the reasons thereof.
2. Implement court and prison data management systems that provide up-to-date, easily accessible information on cases and the situation of persons awaiting trial. This is also applicable to those convicted. In this regard, there should be a good level of institutional coordination and consensus among the different authorities involved. Those authorities should have the capacity and expertise to ensure the quality and good management of the information. Maintain efficient systems containing records of the orders of pretrial detention and records of any communication with the court(s) having jurisdiction over persons in pretrial detention.
3. Establish indicators that fix measurable benchmarks related to the reasonable use of pretrial detention to be met by the State.

4. In this regard, the IACHR recommends that member States produce and publish periodically statistical information about persons deprived of liberty, including (a) the number of people detained by the police, the number of accused, and the number of people in pretrial detention; (b) the number of people in pretrial detention broken down by type of crime, sex and age; (c) the number of people in pretrial detention per 100,000 inhabitants; (d) the number of decisions of pretrial detention out of the total of precautionary measure decisions; (e) the number of requests for the application of pretrial detention made by prosecutors, compared to the cases in which they request the application of an alternative measure or no measure at all, and the number of requests for the application of pretrial detention made by prosecutors compared to the pretrial detention orders granted by judges; (f) the rate of effectiveness (compliance) of precautionary measures other than pretrial detention and the number of persons processed while they are not detained; (g) the duration of pretrial detention (including the number of persons in pretrial detention beyond legally-established terms); (h) the number of pretrial detainees who were acquitted or freed before the process in the first instance due to insufficient evidence or statute of limitations. Moreover, create and disseminate detailed guidelines for the construction of these indicators in an institutionally uniform and coordinated manner.
5. Ensure that this information is used to implement public policies aimed at guaranteeing the application of international standards pertaining to the use of pretrial detention, as well as reducing the financial and human costs related to its use.
6. Document and analyze the impact that the excessive use of pretrial detention has on the prison system.
7. Prepare statistical studies on the cost of pretrial detention, in accordance to the standards laid down in the present report, which should be made available to the public.