

Pretrial Detention

Overview

According to global standards, pretrial detention – the practice of detaining individuals before the start or conclusion of a criminal trial – can be used as a tool of last resort to ensure public safety or when a criminal defendant is deemed a flight risk. However, international law makes it clear that pretrial detention should only be used once all other options have been exhausted and enshrines the right to a fair trial and the presumption of innocence until proven guilty.¹ Still, roughly 3 million people worldwide are held in pretrial detention at any given time, often in conditions and subject to treatment that is far worse than that experienced by sentenced prisoners.²

Transparency and accountability around jail (both remand and pretrial) populations is key to ensuring that pretrial detention is used proportionally, effectively, and fairly. Publishing information about detained individuals – such as criminal charges (or that none exist, when that is the case), the status of cases, disaggregated demographic data, the average lengths of pretrial detention, the reasons individuals are held pretrial, and whether they are ultimately convicted – can help government reformers and watchdog organizations identify inconsistencies in the application of pretrial detention. Transparency around the trends in detention and conditions of detention are also important to ensure the public health and safety of individuals being held.

In addition, detainees, civil society, and members of the public should have access to mechanisms through which they can hold courts and jails accountable if they detect irregularities in public information. These mechanisms include accessible complaint mechanisms for detainees, multistakeholder advisory panels that can identify and monitor information for disclosure, and independent bodies (such as human rights commissions or ombudsman offices) that can monitor and inspect detention facilities.

Recommendations and Sample Reforms

The following are actions governments can take to improve transparency of their use of pretrial detention:

- **Create multistakeholder advisory panels.** Convene prison institutions, civil society organizations, and members of the public to identify priority information for collection and disclosure. Importantly, these institutions should include directly affected individuals (former pretrial detainees and their family members) as members.
- **Disclose information about pretrial prison populations.** Provide regularly updated information on the number of and reasons for arrests; the number of people charged and the nature of their charges; the number of people in pretrial detention (both in absolute terms and as a percentage of the overall prison population); the duration of pretrial detention, disaggregated by offense; and the number of pretrial detainees receiving legal advice and representation.³ In addition, disclose the ratio of charged individuals held pretrial as compared to the number released.
- **Disclose information about the status of detainees' cases.** Provide a public record of the charges for which individuals are detained – broken down by type of offense such as petty and nonviolent offenses, violent offenses, and drug-related crime – and the justification for their detention pretrial (e.g., flight risk, risk of tampering with evidence). Allow exceptions for juvenile detainees and individuals who have received expungements. All information that may lead to the identification of individuals should be withheld from documentation.
- **Disclose demographic information about pretrial detainees.** This includes information about prisoners' gender, age, race, ethnicity, disabilities, and any mental and physical health-care needs. Information such as prisoners' family, economic, and employment status; education level; and criminal record can also help determine whether they can be safely supervised in the community, rather than detained. This information should be anonymized appropriately to protect personal information.
- **Standardize the release of prisoner information across jurisdictions.** Centralize data, and align definitions across jurisdictions and levels of government to provide a full picture of the country's prison population, trends, and analysis of system-wide gaps and needs.
- **Require judicial officials/magistrates to publicly justify detaining individuals pretrial.** Judicial officials should publish a timely and public justification specifying the characteristics of the individual that merit detention. The state has the burden of showing why a less restrictive means will not protect the community and ensure appearance at trial.

Photo by: Thomas



The following are actions governments can take to improve public oversight of the use of pretrial detention:

- **Monitor use of pretrial detention.** Publish clear limits on the duration of pretrial detention and allow oversight institutions, including detention-monitoring bodies, such as national preventive mechanisms, and watchdogs to identify cases of discrimination in the use of pretrial detention and to evaluate prison conditions. Pretrial detainees should not be incarcerated with convicted prisoners, in overcrowded facilities, or under conditions that do not comply with international standards. Men, women, and children should be separated.
- **Set up independent oversight.** Ensure that an independent body – such as a human rights commission, an ombudsman, a national preventive mechanism, or a dedicated prison inspection office – can inspect facilities on demand and unannounced, access prison information and data, and interview detainees privately. This body should publish its findings and recommendations, which are to serve as the basis for constructive dialogue.
- **Establish complaint mechanisms.** Clear mechanisms for lodging complaints should be accessible to all detainees, their families, and legal representatives.
- **Conduct regular [reviews](#) of pretrial detainees.** Court authorities should evaluate alleged offenders regularly throughout the course of their case to determine whether continued detention is necessary. The detained and their counsel have the right to be at these reviews.

LESSONS FROM REFORMERS

Afghanistan releases pretrial detainees to reduce COVID-19 risks.

In many countries, the onset of the COVID-19 pandemic posed particular risks to detention and prison populations due to prison conditions and overcrowding that could accelerate the spread of the virus and inhibit adequate responses in the case of outbreaks. Following [recommendations from the International Legal Foundation \(ILF\)](#),⁴ Afghanistan took swift action to reduce these risks by reducing the number of people in detention centers and prisons. In March 2020, President Ghani decreed that up to 10,000 prisoners – including women, children, older prisoners, and prisoners with disabilities who do not pose a risk to national security – would be released from prisons and jails within 10 days. A subsequent decree issued in April and August called for the release of an additional 12,000 prisoners. Importantly, the President's Office also directed the [attorney general to issue guidance](#) on the release of pretrial detainees (with exceptions for individuals accused of certain violent crimes) and the Attorney General's Office consulted with legal aid providers to improve accountability.⁵ The attorney general's guidance emphasizes that prosecutors should avoid detaining suspects and accused individuals pretrial where the law provides for their release. Shortly thereafter, the Supreme Court issued a circular advising Afghanistan's courts to ensure the implementation of the attorney general's guidance – thereby creating oversight and ensuring additional accountability – and use their discretion in granting bail and release on parole.

LESSONS FROM REFORMERS

Mexico created a register of detainees and missing persons.

To increase accountability in the prison system and better ensure that officials adhere to the presumption of innocence in detaining individuals, Mexico used its 2013 action plan to create an electronic registration system for all detainees. The publicly accessible system – called the [Detainee Consultation System](#)⁶ – allows Mexican citizens to view statistical data on the date individuals were arrested, the reason they are being detained, and the locations where they are being held. The use of the Detainee Consultation System allowed Mexico to improve efficient access to information about detainees. In 2015, when the system was first implemented, information concerning arrests was not available within 48 hours for nearly 90 percent of all cases. By January 2016, a year after the system was fully implemented, the Office of the Presidency of the Republic reported a 12.5 percent decrease – meaning that information for more cases is now made available within 48 hours of an individual's arrest.

Other OGP Commitments

Paraguay: Publish up-to-date data and information on prisons to help address, among other problems, the high number of pretrial detainees on the Penitentiary Management Information System ([2018–2020](#)).

United Nations Standard Minimum Rules for the Treatment of Prisoners

The 2015 [United Nations Standard Minimum Rules for the Treatment of Prisoners](#),⁷ known as the Nelson Mandela Rules, provide minimum standards for the treatment of prisoners, including pretrial detainees. Transparency reforms could focus on key areas identified in the rules, such as the following:

- Characteristics (and trends) of the prison population
- Reasons for detainees' arrest and detention
- Living conditions, including accommodation and health-care services
- Occupancy rates
- Conditions of confinement

The rules also include minimum standards for ensuring accountability in detention facilities:

- Detainees should be able to file anonymous complaints, such as to the prison director, an inspector, the central prison administration, or a judicial body.
- Complaints should be addressed in a timely fashion and without retaliation, intimidation, or other negative consequences for the prisoner.
- There should be both internal and external systems for prison inspection. External inspection teams should be made up of independent inspectors – including health-care professionals – and may include international or regional bodies, ideally with balanced gender representation.
- Inspectors should be able to access all information on the number of pretrial detainees and their treatment,

including their records and conditions of detention. They should be able to make unannounced visits to prisons of their choosing and interview any prisoners privately and confidentially. Written reports with recommendations should follow inspections and ideally be publically available.

United Nations Sustainable Development Goals

[UN Sustainable Development Goal 16's Indicator 16.3.2](#) concerns “unsentenced detainees as a proportion of overall prison population.” Countries should consider the methods they use to collect data and report on pretrial detention to ensure that the data they provide to the United Nations is recorded. This will involve enhancing the interface between national statistical agencies and the sometimes decentralized institutions responsible for pretrial detention.

See also:

- [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#) adopted by the UN General Assembly in 2010⁸
- [United Nations Standard Minimum Rules for the Administration of Juvenile Justice \(the Beijing Rules\)](#) adopted by the UN General Assembly in 1985⁹
- [United Nations Standard Minimum Rules for Non-Custodial Measures \(The Tokyo Rules\)](#) adopted by the UN General Assembly in 1990¹⁰

Endnotes

- ¹ The Global Judicial Integrity Network, “Topic three - Pretrial alternatives,” United Nations Office on Drugs and Crime, accessed September 1, 2020, <https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-7/key-issues/3--pretrial-alternatives.html>.
- ² Open Society Justice Initiative, *Improving Pretrial Justice: The Roles of Lawyers and Paralegals* (New York: Open Society Foundations, 2012), https://www.unodc.org/documents/congress/background-information/NGO/Open_society_foundation/Paralegals_and_Lawyers-_improving-pretrial-justice.pdf.
- ³ Open Society Justice Initiative, *Improving Pretrial Justice: The Roles of Lawyers and Paralegals* (New York: Open Society Foundations, 2012), https://www.unodc.org/documents/congress/background-information/NGO/Open_society_foundation/Paralegals_and_Lawyers-_improving-pretrial-justice.pdf.
- ⁴ The International Legal Foundation, “Justice in Crisis: COVID-19,” accessed September 1, 2020, <https://www.theilf.org/covid-19>.
- ⁵ The Islamic Republic of Afghanistan Attorney General's Office, “Primer's Summary for Supporting the Suspects, Accused, and the Convicted during Investigation, Prosecution, and Suspension of Order for Averting the Outbreak of COVID-19 (Coronavirus),” accessed October 15, 2020, https://ee69066d-6f35-44c9-ae54-6d0a2fbf5e5d.filesusr.com/ugd/5213de_6af2d4b4599f4d13926857b-a27926c8a.pdf.
- ⁶ Gobierno de México, “Query,” accessed November 10, 2020, <https://consultasdetenciones.sspc.gob.mx/>.
- ⁷ *United Nations Standard Minimum Rules for the Treatment of Prisoners*, General Assembly Resolution 70/175, December 17, 2015, <https://undocs.org/A/RES/70/175>.
- ⁸ *United Nations Bangkok Rules on Women Offenders and Prisoners*, General Assembly Resolution 65/229, December 21, 2020, https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf.
- ⁹ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”)*, General Assembly Resolution 40/33, November 29, 1985, <http://ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>.
- ¹⁰ *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)*, General Assembly Resolution 45/110, December 14, 1990, <https://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf>.

Resources and Partners

Resources

- Fair Trials' [A Measure of Last Resort?: The Practice of Pretrial Detention Decision-Making in the EU](#) finds instances of misuse of pretrial detention in the EU and provides recommendations to reduce pretrial populations.
- A [report on incarceration during the pandemic](#) by Measures for Justice finds that mass incarceration makes communities more vulnerable to public health crises.
- Penal Reform International's [Coronavirus: Preventing Harm and Human Rights Violations in Criminal Justice Systems](#) presents recommendations for protecting human rights in the context of the pandemic.
- The UNODC [Handbook on Women and Imprisonment](#)
- The UNODC [Handbook on Prisoners with Special Needs](#)

Organizations

- [Center for Court Innovation](#)
- [Fair Trials](#)
- [The International Legal Foundation \(ILF\)](#)
- [Measures for Justice](#)
- [Penal Reform International](#)
- [Pretrial Justice Institute](#)
- [United Nations Office on Drugs and Crime \(UNODC\)](#)
- [Vera Institute of Justice](#) (United States)
- [World Prison Brief](#)

This module is part of the Justice Policy Series Part II, Open Justice paper which can be found [here](#).

