



## WOMEN, DRUG POLICY AND INCARCERATION POLICY BRIEF

# PRETRIAL DETENTION IN LATIN AMERICA: THE DISPROPORTIONATE IMPACT ON WOMEN DEPRIVED OF LIBERTY FOR DRUG OFFENSES

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According to the Inter-American Commission on Human Rights (IACHR),<sup>2</sup> the non-exceptional use of pretrial detention is one of the most serious and widespread criminal justice problems affecting Latin American countries.<sup>3</sup> One out of three people awaiting trial in the Americas,<sup>4</sup> which include Canada and the United States, are held behind bars and over the last two decades, the number of pretrial detainees in the region has grown by around 60%.<sup>5</sup> One of the leading causes of this increase is the excessive use of pretrial detention for drug-related offenses in Latin America. The disproportionate and prolonged use of pretrial detention undermines the principles of the presumption of innocence, legality, necessity and proportionality. It also greatly contributes to prison overcrowding, and frequently exposes detainees to conditions of ill treatment and/or violence. In some countries, women<sup>6</sup> are more likely to be held as pretrial detainees than men, disproportionately impacting these women and their families. In recent years, some Latin American governments have introduced reforms to reduce the use of pretrial detention. While these reforms are welcome, they have only made a small dent in the problem, and much more can—and should—be done to ensure that pretrial detention is the exception, not the rule. This report provides the most recent data on the use of pretrial detention, looks specifically at its impact on women, and concludes with a series of recommendations to significantly reduce the number of women in pretrial detention in Latin America.

## Introduction

Prison populations are growing at alarming rates in Latin America and the Caribbean, mainly driven by harsh and disproportionate drug laws. Indeed, the countries of the region have the highest rates of incarceration for drug-related offenses in the world.<sup>7</sup> One of the leading causes of prison overcrowding is the obligatory use, or the overuse, of pretrial detention for these offenses.

For nearly half a century, the United States (U.S.) government has encouraged, cajoled

and strong-armed countries to wage its “war on drugs” around the world. Nowhere has this been more evident than in Latin America. The Research Consortium on Drugs and the Law (CEDD), of which WOLA and Dejusticia are members, has produced numerous reports documenting how the aggressive export of U.S. drug policies has led to the adoption of overly punitive and disproportionate drug laws across the region, with a devastating impact on the workings of national criminal justice and prison systems.<sup>8</sup> As a result, judges and prosecutors are

encouraged to treat drug defendants harshly, and are rewarded with promotions, while their professional careers may languish if they act

**"Unconvicted prisoners are presumed to be innocent and shall be treated as such."**

**The Nelson Mandela Rules, Rule 111<sup>9</sup>**

otherwise. In this context, some countries have adopted laws that mandate pretrial detention for anyone accused of a drug offense, regardless of the gravity of the alleged offense or whether the alleged offense was violent or not. Even in those countries where such practices are not enshrined in law, the “drug war” mentality means that pretrial detention for drug offenses is the norm.

Pretrial detention is not intended to be a sanction, but a measure to safeguard a criminal procedure. It should only be used when there is a reasonable suspicion that the person committed the offense, and where detention is necessary to prevent them from escaping, committing another offense, or interfering with the course of justice.<sup>10</sup> In accordance with the United Nations Standard Minimum Rules

for the Treatment of Prisoners (the Nelson Mandela Rules), pretrial detainees are presumed to be innocent and shall be treated as such.<sup>11</sup>

Moreover, pretrial detention increases the risk of a confession coerced by torture or ill-treatment, exacerbates prison overcrowding, and may expose the detainees to corruption and violence from guards and fellow prisoners.<sup>12</sup> Because of these often irreversible negative effects, international law requires pretrial detention to be the exception rather than the rule. Rule 6.1 of the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules) highlights that “pretrial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offense and for the protection of society and the victim.”<sup>13</sup>

In Latin America, there is broad recognition of the presumption of innocence and the exceptionality of pretrial detention at the constitutional level in countries like Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras,

## Principles for Applying Pretrial Detention within the Inter-American System

Pretrial detention should be used on an exceptional basis and is governed by the principles of legality, presumption of innocence, necessity and proportionality. In order for States to appeal to the deprivation of liberty only when it is essential to satisfy a pressing social need, the measures to be adopted should include:

- Legislative and institutional reforms necessary for ensuring rational use of pretrial detention;
- Observance of the maximum lawful periods of time for keeping persons in pretrial detention and;

- Promoting the use of other precautionary measures.<sup>14</sup>

The Inter-American Commission on Human Rights (IACHR), an autonomous body of the Organization of American States, urges States, in adopting these measures, as well as other actions focused on follow-up and monitoring of their use, to consider applicable human rights standards, and to include a perspective that takes account of gender, race, ethnicity, age, sexual orientation, gender identity and expression, interculturality, intersectionality, and disability, as well as the special protection owed to children and adolescents.<sup>15</sup>

Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.<sup>16</sup> In addition, states have committed to avoid inhumane conditions in prisons and to minimize the number of pretrial detainees.<sup>17</sup> And yet, as the IACHR has noted for the last two decades, the non-exceptional use of pretrial detention is one of the most serious and widespread problems in the region.<sup>18</sup>

**“The arbitrary and illegal application of pretrial detention is a chronic problem in the region.”**

**Inter-American Commission on Human Rights: Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas<sup>19</sup>**

Finally, it should be underscored that a serious lack of data on people in pretrial detention disaggregated by type of offense and by

the specific characteristics of those detained remains a fundamental challenge to analyzing this issue. In this report, we have sought to bring together the available data on women in pretrial detention for drug offenses. Across the region, there is an identified need to collect better data on pretrial detention in order to help formulate more effective policies, from an intersectional approach.<sup>20</sup>

## The Use of Pretrial Detention in Latin America

After Africa, the Americas have the greatest number of people incarcerated without a conviction, with an average of 36.3% of the prison population.<sup>21</sup> In certain countries the figure is much higher. For instance, in Bolivia, Guatemala, Honduras, Panama, Paraguay, Uruguay,

**Table 1: Pretrial Detention in Latin America**

Country (Year)	Number of People in Pretrial Detention	Percentage of People in Pretrial Detention
Paraguay (2015)	9,922	77.9%
Bolivia (2018)	12,537	69.9%
Uruguay (2017)	7,726	69.7%
Haiti (2018)	5,929	66.8%
Venezuela (2017)	35,970	63.0%
Honduras (2017)	9,660	53.1%
Panama (2018)	8,584	53.0%
Guatemala (2018)	12,636	51.8%
Argentina (2016)	36,374	47.7%
Peru (2018)	35,029	39.8%
Mexico (2018)	80,442	39.4%
Brazil (2018)	244,306	35.4%
Ecuador (2018)	13,073	34.9%
Chile (2018)	14,628	33.9%
Colombia (2018)	40,070	33.6%
El Salvador (2018)	11,434	29.5%
Nicaragua (2016)	3,140	21.4%
Costa Rica (2016)	2,543	13.3%

Source: The World Prison Brief.<sup>22</sup>

and Venezuela, more than half of the prison population has not been sentenced. In addition, Paraguay (78%), Bolivia (70%), Uruguay (70%), and Haiti (67%) are among the countries with the highest proportion of pretrial detention in the world.<sup>23</sup>

In Mexico in 2016, 21 state prison systems had percentages higher than those found in federal prisons, where 35% of detainees were in pretrial detention.<sup>24</sup> In the states of Baja California and Durango, 66% of prisoners had not been sentenced.<sup>25</sup> Table 1 shows the number of people in pretrial detention in Latin America for the latest year data is available, and the percentage that the numbers represent vis-à-vis the total prison population.

Over the past two decades, the number of people in pretrial detention has grown by around 60% in the Americas.<sup>26</sup> In the same period, the total prison population has increased by about 41% while the overall population increased by only 21.1%.<sup>27</sup> With the exception of Chile, every Latin American country

studied has experienced an increase in the number of people being held in pretrial detention. In Bolivia, Brazil, Ecuador, El Salvador, Guatemala, Nicaragua, Paraguay, Peru, and Venezuela, the pretrial detention population has more than doubled. This continuing increase demonstrates that pretrial detention is not being used as a last resort, as required by international standards, but rather is often a common practice in these countries. Table 2 shows the percentage increase in the number of people in pretrial detention since the early 2000s until the most recent year for which data is available.

Individuals in situations of economic hardship are generally more likely to be placed in pretrial detention because they cannot afford legal representation and often cannot provide proof of permanent residence, employment, and income,<sup>28</sup> which may be required when courts base their decision on whether to release an accused person on his or her “roots in the community.” These criteria are often difficult to meet for populations in situations of

**Table 2: Percentage Change in Pretrial Detention in Latin America**

Country	Years	Percentage Increase in Pretrial Detention
Venezuela	2000-2016	516.5%
Nicaragua	2004-2016	289.1%
Brazil	2000-2018	209.2%
Guatemala	2001-2018	180.8%
Bolivia	2005-2018	149.3%
Ecuador	2001-2018	139.8%
El Salvador	2002-2018	135.1%
Peru	2001-2018	121.6%
Paraguay	2004-2016	103.5%
Colombia	2000-2018	88.2%
Panama	2000-2018	63.9%
Uruguay	2007-2017	48.6%
Argentina	2002-2016	37.4%
Costa Rica	2002-2016	35.3%
Honduras	2005-2017	31.3%
Mexico	2000-2018	25.6%
Chile	2000-2018	-11.6%

Source: The World Prison Brief.<sup>29</sup>



vulnerability, including persons experiencing homelessness, foreign nationals, people who use drugs, and people in situations of unemployment.<sup>30</sup>

This is the case in Guatemala, where pretrial detention has been applied disproportionately to people experiencing lower levels of income because they cannot prove permanent residence, have inadequate legal aid, or cannot afford to pay the monetary punishment of a fine.<sup>31</sup> This means that even if they were ultimately found to be innocent of the alleged offense, they must remain in prison until a verdict is handed down. Meanwhile they are not able to work to support their families, who may rely solely on their income. For people experiencing lower levels of income, lack of access to an adequate defense is a chronic problem. In Bolivia in 2017, 42% of the women in pretrial detention used public defenders because most of them could not afford private counsel. At that time, there were only 102 public defenders in the entire country.<sup>32</sup>

A leading cause of the rise of pretrial detention rates is its mandatory use for drug offenses.<sup>33</sup> Drug laws in several countries characterize all offenses related to drugs—including possession for personal use—as grave offenses for which pretrial detention is applied automatically, therefore precluding the use of alternatives to incarceration or other benefits. The IACHR has expressed concerns about treating all drug-related offenses as “serious crimes” with no distinction whatsoever, thereby ignoring the principles on which the use of pretrial detention is based, especially proportionality.<sup>34</sup>

In Mexico, for instance, Article 19 of the Constitution establishes that pretrial detention is mandatory and automatic for crimes that the law defines as grave crimes against health, which includes drug offenses. In other words,

the judge, without analyzing the circumstances of the case, automatically imposes pretrial detention for certain offenses. Similarly, in Guatemala, the “Law against Narcoactivity” classifies all drug-related offenses as “serious,” which makes pretrial detention mandatory, including “possession for use.”<sup>35</sup> Even in countries where pretrial detention is not obligatory, it is frequently the norm for drug-related offenses. For example, according to a recent study conducted in Costa Rica, around 80% of persons convicted for drug-related offenses were in pretrial detention for 211 days (i.e., around seven months) on average.<sup>36</sup>

In testimony before the IACHR, WOLA and other NGOs presented research showing that though not mandated by law, pretrial detention is widely used for those accused of any drug offense in Argentina, Chile, Costa Rica, Ecuador, and Uruguay. In Brazil, the Supreme Federal Court (*Supremo Tribunal Federal*) declared in 2012 that obligatory pretrial detention for those accused of a drug offense is unconstitutional, but the law itself has not been changed. Hence it is left to the discretion of the judge.<sup>38</sup> In these cases, the laws fail to distinguish between different kinds of offenses, leading to the disproportionate use of pretrial detention for low-level drug offenses. Yet, according to the IACHR, pretrial detention should be justified in each specific case and should not become a form of “anticipated sentence.” Legislation that applies precautionary measures for any drug-related offense ignores the principle of proportionality enshrined in several Inter-American agreements.<sup>39</sup>

**"Pretrial detention should only be used as a means of last resort, and decisions to detain should be based on the presumption of innocence and the principles of necessity and proportionality."**

**Penal Reform International: Global Prison Trends<sup>37</sup>**

## Women in Pretrial Detention

According to the Institute for Criminal Policy Research, between 2000 and 2017, the increase in female incarceration in the Americas and Asia outpaced all other parts of the world. Indeed, since 2000, the female prison population in the Americas has grown by 57.1%.<sup>40</sup> A significant percentage of women deprived of liberty in Latin America are in pretrial detention. For instance, in Guatemala in 2017, there were more women in pretrial detention (1,112) than women who had been sentenced (966).<sup>41</sup> Similarly, in Argentina, Bolivia, Ecuador, Guatemala, Mexico, Panama, Paraguay, and Uruguay more than half of incarcerated women had not been sentenced, with many languishing in pretrial detention for several years. Table 3 shows the percentage of women and men in pretrial detention vis-à-vis the total number of people deprived of liberty, where data was available, for the latest year available.

In Mexico, there are 14 states in which more than 50% of the female prison population does not have a sentence.<sup>42</sup> According to a 2017 study conducted by the Mexican National

Institute of Statistics and Geography, 100% of the women incarcerated were in pretrial detention in the state of Michoacán, meaning that all of them were waiting behind bars without a sentence.

Similarly, in Baja California Sur, Aguascalientes and Durango, 78% of those held had not yet been to trial.<sup>43</sup>

Furthermore, in Mexico, proportionally women spend

longer periods of time in pretrial detention than men. According to the National Survey on Prison Population, 27.4% of women waited between one and two years for their sentence, while only 24.7% of men waited that long.<sup>45</sup>

As Table 3 shows, with the exception of Nicaragua, the proportion of women held as pretrial detainees is higher than for men (albeit some with a small margin of difference). For instance, in Mexico, Argentina, Chile, and

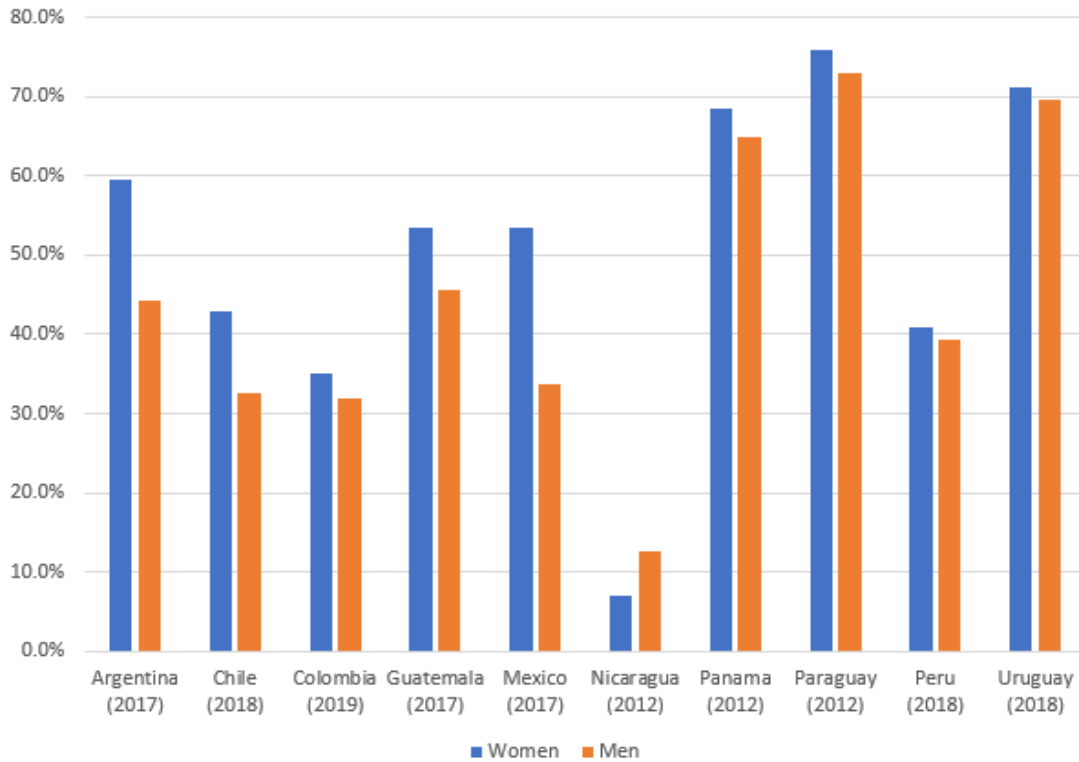
**"The particular risk of abuse that women face in pretrial detention shall be recognized by relevant authorities, which shall adopt appropriate measures in policies and practice to guarantee such women's safety at this time."**

**The Bangkok Rules, Rule 56<sup>44</sup>**

**Table 3: Population in Pretrial Detention vis-à-vis the Total Prison Population**

Country (Year)	Number of Women in Pretrial Detention	Percentage of Women in Pretrial Detention	Number of Men in Pretrial Detention	Percentage of Men in Pretrial Detention
Argentina (2017)	2,092 <sup>46</sup>	59.4%	36,131 <sup>47</sup>	44.3%
Bolivia (2018)	1,130 <sup>48</sup>	74.0%	-	-
Brazil (2016)	19,223 <sup>49</sup>	45.0%	-	-
Chile (2018)	1,507 <sup>50</sup>	42.8%	11,993 <sup>51</sup>	32.5%
Colombia (2019)	2,882 <sup>52</sup>	35.0%	35,577 <sup>53</sup>	32.0%
Ecuador (2019)	1,535 <sup>54</sup>	50.9%	-	-
Guatemala (2017)	1,112 <sup>55</sup>	53.5%	8,687 <sup>56</sup>	45.7%
Mexico <sup>57</sup> (2017)	4,142 <sup>58</sup>	53.5%	60,470 <sup>59</sup>	33.8%
Nicaragua (2012)	31 <sup>60</sup>	6.9%	1,096 <sup>61</sup>	12.6%
Panama (2012)	698 <sup>62</sup>	68.4%	8,745 <sup>63</sup>	64.8%
Paraguay (2012)	401 <sup>64</sup>	75.9%	5,379 <sup>65</sup>	72.9%
Peru (2018)	2,065 <sup>66</sup>	41.0%	33,553 <sup>67</sup>	39.3%
Uruguay (2018)	369 <sup>68</sup>	71.2%	7,393 <sup>69</sup>	69.7%

**Graph 1: Percentage of Women and Men in Pretrial Detention**



Source: Data compiled by WOLA (Table 3)

Guatemala the percentage of women in pretrial detention is around 20%, 15%, 10%, and 8% higher than men, respectively (see Graph 1).

An under-analyzed issue is the high percentage of foreign women facing pretrial detention; such analysis is impeded by the lack of disaggregated data available on this issue. However, data obtained in Chile, Colombia, and Peru show that foreign nationals in pretrial detention represent 73.3, 50.9, and 42.9% (respectively) of foreign women in prison.<sup>70</sup> In addition to the characteristics common to all women in prison, foreign women face particular challenges that may include an irregular migratory situation, lack of stable housing or job, and difficulties dealing with unfamiliar criminal justice proceedings. As they do not live in the country where they are detained, in many cases their family, social, and institu-

tional ties are all interrupted and they do not have much-needed support systems.<sup>71</sup>

### Women in Pretrial Detention for Drug Offenses

Women incarcerated for drug offenses rarely pose a threat to society. Most are arrested for low-level and non-violent offenses. Nonetheless, as noted above, harsh drug policies are driving the increase in the number of women in pretrial detention. In many Latin American countries, drug-related offenses are one of the most common among female pretrial detainees.<sup>72</sup> For instance, in Peru, Ecuador, Argentina, Bolivia, and Chile around half of the women are in pretrial detention for drug offenses (54.5%, 53.0%, 51.7%, 47.7%, and 43.8%, respectively). Moreover, among the

**Table 4: Female Population in Pretrial Detention for Drug Offenses**

Country (Year)	Number of Women in Pretrial Detention for Drug Offenses	Percentage of Women in Pretrial Detention for Drug Offenses
Peru (2016)	1,219 <sup>73</sup>	54.5%
Ecuador (2019)	813 <sup>74</sup>	53.0%
Argentina (2017)	1,081 <sup>75</sup>	51.7%
Bolivia (2018)	539 <sup>76</sup>	47.7%
Colombia (2019)	1,284 <sup>77</sup>	44.6%
Chile (2018)	1,034 <sup>78</sup>	43.8%
Mexico <sup>79</sup> (2018)	1,342 <sup>80</sup>	26.3%
Uruguay (2018)	119 <sup>81</sup>	23.0%
Costa Rica (2012)	126 <sup>82</sup>	12.5%
Nicaragua (2012)	18 <sup>83</sup>	10.5%

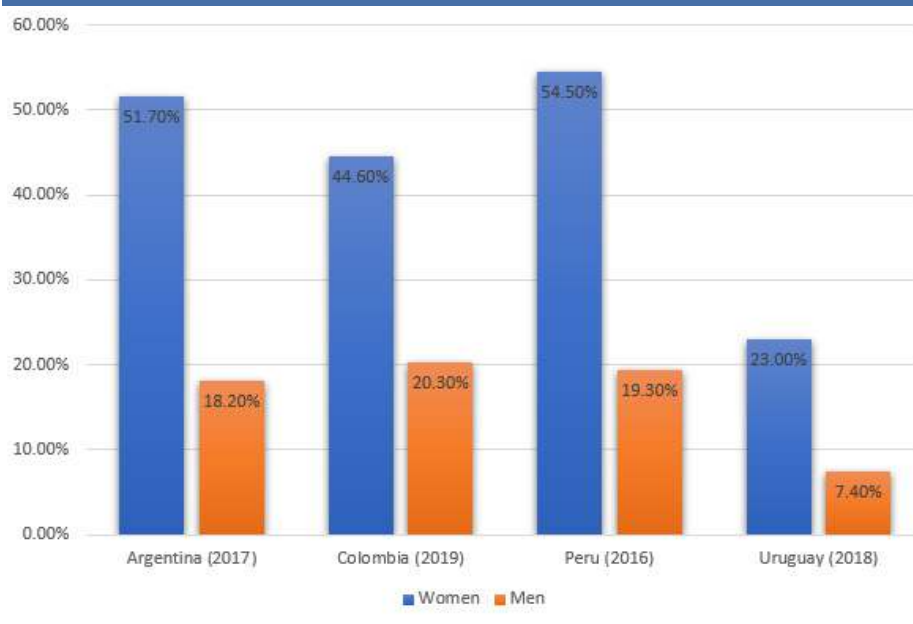
women in prison for drug-related cases, a vast portion is usually in pretrial detention. For instance, in Argentina in 2017, 70% of the women in prison for drug-related offenses were in pretrial detention.<sup>84</sup>

Table 4 shows the number and percentage of women in pretrial detention for drug offenses vis-à-vis the total female prison population in

pretrial detention, where data was available, for the latest year available.

In certain countries, women accused of having committed drug-related offenses are much more likely to be held in pretrial detention than are men accused of drug-related offenses. For instance, in Peru, Argentina, and Uruguay the percentage of women in pretrial detention

**Graph 2: Percentage of Women and Men in Pretrial Detention for Drug Offenses**



Source: Data compiled by WOLA<sup>85</sup>



## Natacha Lopvet, March 2019

I am a French citizen and until recently, was in prison for 10 years in Mexico for a drug offense. Whether I am guilty or not is not the point. Before going to prison, I never had any interaction with the criminal justice system; it was only in Mexico that I got a crash course. Upon my arrival in Mexico City, I was detained in the airport jail for about two days, accused of transporting drugs, and from there was sent to prison. Though the penalty I faced was 10 to 25 years in prison, I was not given an opportunity to speak to a public defender or lawyer, nor to my Embassy, until two days after my arrest. If I had had access to a decent lawyer, I would have been out in 15 days. But I didn't learn my rights as a foreigner until I had been incarcerated for two or three years. Instead, I was in pretrial detention until being sentenced. I finally got a lawyer through contacts provided by fellow prisoners. All of this made it so much harder to defend myself.

In addition, I didn't speak Spanish. The double disadvantage when you don't know the language is that you also don't know the laws or the culture of the country. I had to learn both in prison. I was not provided with any translation when I was arrested. How can justice be served in these conditions?



for drug-related offenses (54.5%, 51.7%, and 23.0%, respectively) is 3 times higher than that of their male counterparts (19.3%, 18.2%, and 7.4%), and in Colombia, the percentage of women (44.6%) is twice as high as for men (20.3%).<sup>86</sup>

Finally, our research underscores the importance of improving data collection and making it publicly available to researchers and

**"When we incarcerate mothers, we punish entire families."**

**Jorge Lopez, Former Director of National Prisons in Bolivia<sup>87</sup>**

advocates. As the IACHR has noted, there is widespread lack of disaggregated statistics on people in pretrial detention in the region, which constitutes a significant obstacle to the formulation and implementation of effective and appropriate policies. In addition, the lack

of adequate data gathering mechanisms may increase exposure to violence and discrimination for women and persons belonging to groups at higher risk, such as persons of African descent, indigenous persons, LGBTIQ+, older persons, and people with disabilities.<sup>88</sup>

### Negative Consequences of Pretrial Detention

Pretrial detention is a leading cause of overcrowding in Latin American prisons. Inhumane prison conditions mean that defendants concentrate on surviving their time behind bars or considering plea bargains, rather than on preparing their defense.<sup>89</sup> Access to a lawyer and information about their case is often much more limited if the defendant is detained, which affects his or her ability to prepare for trial. It is therefore not surprising that those in pretrial detention are less likely

to obtain an acquittal than those who remain at liberty before their trial, as noted by the United Nations Working Group on Arbitrary Detention.<sup>90</sup>

The excessive use of pretrial detention can be very costly to the state; direct costs include the operation of detention facilities, prison personnel and providing basic services, including

**"Ensure non-discriminatory access to health, care and social services in prevention, primary care and treatment programmes, including those offered to persons in prison or pretrial detention (...) and ensure that women, including detained women, have access to adequate health services and counselling, including those particularly needed during pregnancy."  
UNGASS Outcome Document<sup>91</sup>**

food, health-care and gender-specific services to those incarcerated. In addition, many women and men suffer the psychological and emotional impact of being deprived of liberty without having been convicted.<sup>92</sup> The incarceration of women and men has devastating consequences not

only for them, but also for their children, dependents, and the broader community. Families suffer immensely when one of their members is imprisoned.

Pretrial detention imposes serious and specific hardships and adverse consequences on women. Indeed, the Bangkok Rules have recognized the "particular risk of abuse that women face in pretrial detention."<sup>93</sup> Women suffer lack of female-only detention centers, inadequate prison infrastructure for the development of their mother-children relationships, insalubrious conditions, lack of gender-specific medical care, and subjection to various forms of violence, including sexual abuse by prison staff.<sup>94</sup> Due to limited access to facilities and services, incarcerated women are at a higher risk of contracting HIV and other

sexually transmitted infections and diseases.<sup>95</sup>

For example, a study undertaken in Colombian prisons in 2018 shows that 48.1% of women in prison did not have access to HIV testing, only 17.7% had received psychological treatment, and merely 4.4% had received treatment for drug or alcohol dependency.<sup>96</sup>

Moreover, the incarceration of women who are single heads of households is particularly harsh for those who depend upon their income and care-giving responsibilities, including their children, elderly parents or relatives, or those with disabilities under their care. In the absence of strong social protection networks, dependent persons may be exposed to situations of abandonment and further marginalization.<sup>97</sup>

## Reforms, Good Practices, and Continued Challenges

Ultimately, pretrial detention should be used only as a means of last resort, based on the presumption of innocence and the principles of necessity and proportionality. The IACHR has recommended delimiting the grounds for using pretrial detention, and increasing the threshold requirements for its use, such as prohibiting its mandatory application for particular offenses (such as drug offenses), promoting the use of alternatives to incarceration, submitting the detention to judicial review, and regularizing the procedural situation of those persons detained without any judicial order.<sup>98</sup>

In recent years, some countries have made legislative, administrative and judicial reforms intended to reduce the use of pretrial detention. According to the IACHR, Argentina, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, El Salvador, Ecuador,

Guatemala, Jamaica, Mexico, Panama, and Peru have taken some steps to reduce the use of pretrial detention.<sup>99</sup> Yet these measures continue to be woefully inadequate. As evident in the data presented in this report, the prolonged and excessive use of pretrial detention continues to be one of the most serious and widespread problems in the region.

Important legislative reforms that can be undertaken to reduce rates of pretrial detention include:

- Establishing procedures to expedite the processing of criminal cases;
- Imposing greater requirements for determining whether pretrial detention is necessary and justified; and
- Reducing the amount of time that a person can be held in pretrial detention.<sup>100</sup>

For instance, in Colombia and Mexico, with some exceptions, the maximum duration of pretrial detention is one year.<sup>101</sup> In these cases, after being in pretrial detention for one year, the person should be released immediately while the case continues.

Regarding administrative measures, countries like Bolivia have decided to issue pardons.<sup>102</sup> While Bolivia remains one of the countries with the highest percentage of pretrial detainees, from 2010 to 2018 the percentage was reduced from 77% to 69.9% of the total prison population.<sup>103</sup> To address prison overcrowding, President Evo Morales issued a series of pardons and amnesties which included persons held in pretrial detention.<sup>104</sup> It is important to note, however, that unless such efforts are followed by reforms to reduce the flow of people entering the criminal justice system, prison beds will quickly fill back up.

Bolivia also adopted Law No. 586, “Clearing

up the Backlog,” which included increasing the capacity of Criminal Investigation Courts and holding hearings in prisons.<sup>105</sup> The purpose of these prison hearings is to circumvent potential difficulties with taking persons deprived of liberty to courts, such as lack of transportation, shortage of gasoline, insufficient guards, or possible risk of escaping. According to official information, between 2015 and 2017, approximately 2,047 hearings were held, concluding in non-custodial alternatives, abbreviated procedures, early release, parole, and other measures.<sup>106</sup> The reforms adopted by Bolivia reduced the caseload for the judicial system and the number of pretrial detainees. Such abbreviated processes, however, must always ensure that the due process rights of defendants are respected and not lead to unjust convictions for the sake of expediency.

Another example of a potentially positive reform can be found in Brazil where, in February 2018, the Brazilian Federal Supreme Court ruled that pregnant women and mothers with children under the age of 12 who are accused of non-violent crimes should be placed under house arrest instead of in pretrial detention.<sup>107</sup> This reform could benefit around 15,000 women. However, there has been poor implementation of the Supreme Court ruling by judges at the federal and state levels.<sup>108</sup> Moreover, the use of house arrest can be counterproductive if the conditions are so strict that women cannot work or fulfill their care-giving responsibilities.

In the case of Peru, in 2016 the Standing Criminal Chamber of the Supreme Court of Justice established various criteria for determining the exceptional nature of pretrial detention, including the obligation to state the reasons for its application. It also ruled that a determination of no community ties and the seriousness of the offense should merely be elements to consider in determining the risk

of escaping and, accordingly, should not automatically result in pretrial detention.<sup>109</sup>

Some of the remaining challenges associated with the use of pretrial detention include the establishment of mechanisms of disciplinary control to pressure or sanction judicial authorities that apply alternative measures to incarceration. For instance, according to the IACHR, in Argentina, Costa Rica, Guatemala, and Peru, judicial authorities who apply alternatives to pretrial detention can face disciplinary proceedings, sanctions, or push-back from the media, civil society or even the Supreme Court of Justice in the case of Guatemala.<sup>111</sup> Other obstacles include inadequate public defense, lack of registries to monitor the length of judicial proceedings, and a high incidence of hearing postponements.<sup>112</sup> For instance, in Guatemala, a high number of hearings are postponed due to the parties' failure to appear, lack of means of transportation, not enough gasoline, insufficient prison guards and failures in coordination between institutions in planning for hearings.<sup>113</sup>

**"Gender-specific options for diversionary measures and pretrial and sentencing alternatives shall be developed within Member States' legal systems, taking account of the history of victimization of many women offenders and their caretaking responsibilities."**

**The Bangkok Rules, Rule 57<sup>110</sup>**

Another major concern is the implementation of criminal justice policies and legal reforms that call for more incarceration as a response to insecurity, crime, and violence.<sup>114</sup> For instance, between December 2018 and February 2019, the Mexican Congress approved a bill to modify the Constitution that would expand the use of mandatory pretrial detention. This reform expands the list of crimes warrant-

ing automatic pretrial detention—including corruption, electoral crimes, fuel theft, armed robbery, weapons possession, and others—and hence will further increase Mexico's pretrial prison population.<sup>115</sup> Mexico provides an example of how legislative trends and mechanisms that promote increased incarceration to address fears of insecurity and crime expand the grounds for the use of pretrial detention beyond what should be its exceptional nature.

## Recommendations

The overuse of pretrial detention is one of the most serious and widespread criminal justice problems affecting Latin America. It contributes to prison overcrowding and has devastating impacts on those detained, their families, and communities. Policies to ensure the restricted and appropriate use of pretrial detention should be a priority for all governments. **To reduce the use of pretrial detention to exceptional cases subject to regular review, the following measures should be adopted and effectively implemented:**<sup>116</sup>

- Put in place legal restrictions to limit the use of pretrial detention to exceptional cases and, whenever possible, promote non-custodial sanctions.
- Prohibit, in law and in practice, the use of pretrial detention in prisons that are overcrowded or that do not abide by internationally and nationally recognized standards.
- Remove the obligation to impose pretrial detention for any type of offense, including drug offenses, ensuring that pretrial detention decisions are not based on the offense that is alleged to have been committed, but are decided on a case-by-case basis.



**In those cases where pretrial detention is under consideration, the following measures should be adopted:**

- Restrict the length of time a person can be held in pretrial detention by requiring their release if their case has not appeared before the court within the allotted time (except in cases where spurious delaying actions are filed by the defense of those prosecuted in an effort to obstruct proceedings).
- Provide alternatives to the use of bail or other types of pecuniary measures, such as signing a daily logbook, receiving voluntary drug treatment, or exchanging text messages.
- Incorporate the Tokyo and Mandela Rules into domestic law and practice, particularly provisions to ensure that the application of alternatives to pretrial detention occurs at the earliest stage possible.
- Allow access to procedural benefits and opportunities for alternatives to incarceration—and ensure that a prior criminal record is not used as grounds to exclude a person from benefitting from these alternatives—which may include:
  - The commitment of the accused to submit to the proceeding and not impede the investigation.
  - The obligation to appear periodically before the judge or the authority designated by the judge.
  - The prohibition to leave a given geographic area without prior authorization by withholding travel documents.
  - House arrest in one's own home or in the home of another—of particular

relevance for foreign nationals—without surveillance or with such surveillance as ordered by the judge.

- Restorative justice programs in criminal matters.

**For all alternatives to incarceration, the basic rights of the accused and their families should be fully respected, and the alternatives should not prevent their ability to earn a living and fulfill family responsibilities.** This is particularly important with regards to house arrest, which if applied too strictly can be particularly problematic for individuals in situations of economic hardship.

- States should also institute, in their domestic legal systems, appropriate legal mechanisms to ensure effective access to reparations for the undue imposition of pretrial detention, as recommended by the IACHR.

**Our research underscores the need for accurate and reliable data on pretrial detention in order to improve public policies and ensure respect for the due process guarantees of those detained. Towards that end, the following measures should be adopted:**

- Establish mechanisms within the criminal justice system for the collection and analysis of data and statistics on the use of pretrial detention, sentencing practices, and the impact of non-custodial measures and sanctions in order to develop and implement evidence-based policies. The data should be disaggregated by types of offenses committed and the profiles of people belonging to groups at higher risk, such as, but not limited to, people of African descent, indigenous people, foreign nationals, LGBTIQ+, older people, and people with disabilities and/or mental health and drug dependency problems.



- Train prison staff to keep accurate and updated records of all relevant data relating to pretrial detainees, including the status of their cases, whether or not they have been formally charged and their access to legal counsel; to be proactive in keeping courts informed of detainees held without charge for prolonged periods of time; and to facilitate detainees' access to legal counsel.

**Given the disproportionate impact of the use of pretrial detention on women, in those cases where pretrial detention is under consideration or has occurred, the following gender-specific recommendations should be considered:**

- Employ an intersectional lens in the establishment, implementation, and monitoring of measures aimed at reducing the use of pretrial detention, including training with a gender perspective.
- Proscribe the use of pretrial detention for pregnant women or women with dependents (children, older adults, and persons with disabilities). In such cases, alternatives to incarceration should always be used. Special attention should be given to the situation of female heads of household who are the sole breadwinner for their family members so that the sanction is compatible with holding a remunerated job.
- Ensure that women in detention have access to adequate and non-discriminatory health care services and counseling, including sexual and reproductive health care that takes into consideration their specific needs; substance abuse treatment

programs; HIV prevention, treatment, care and support; and suicide and self-harm prevention—in accordance with the Bangkok Rules.

- Ensure that women have access to effective and affordable legal counsel during pretrial detention and that criminal justice officials incorporate a gender perspective in order to allow for the possibility of a suspended or reduced sentence.
- Incorporate the Bangkok Rules into domestic law and practice, in particular regarding the implementation of alternative ways of dealing with women in the criminal justice system, such as diversionary measures and pretrial and sentencing alternatives. These measures should be applied retroactively.
- Act with all due diligence and expeditiously to prevent and address all forms of violence and discrimination against women deprived of liberty.
- Provide the appropriate resources needed for women to integrate in the community including but not limited to education and training programs, support for the transition between life in prison and life post-incarceration, projects in the areas of sports, art, culture, and labor reinsertion with a criminal record.
- Provide a range of options for solving the most common causes of women coming into contact with the criminal justice system, such as educational and training programs to increase their chances of employment and reduce their socio-economic vulnerability.

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## Endnotes

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  112. IACHR, *Situation of Human Rights in Guatemala* (2017), 202.
  113. Ibid, 207.
  114. IACHR, *Report on the Use of Pretrial Detention in the Americas*, 24, 53, and 57.
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  116. All of these recommendations were elaborated based on the *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*; IACHR *Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas*; IACHR *Practical Guide to Reduce Pretrial Detention*; IACHR *Report on the Use of Pretrial Detention in the Americas*; UNODC *Handbook on strategies to reduce overcrowding in prisons and Women*; UNODC *Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem*; WOLA, IDPC, DeJusticia & OEA Women, *Drug Policies, and Incarceration: A Guide for Policy Reform in Latin America and the Caribbean*; and *Mujeres, delitos de drogas y prisión preventiva en América Latina y el Caribe, Testimonio ante la Comisión Interamericana de Derechos Humanos de la Organización de Estados Americanos*.