

**THE  
SOCIOECONOMIC IMPACT  
OF  
PRETRIAL DETENTION**

OPEN SOCIETY  
JUSTICE INITIATIVE



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## About the Global Campaign for Pretrial Justice

Excessive and arbitrary pretrial detention<sup>1</sup> is an overlooked form of human rights abuse that affects millions of persons each year, causing and deepening poverty, stunting economic development, spreading disease, and undermining the rule of law. Pretrial detainees may lose their jobs and homes; contract and spread disease; be asked to pay bribes to secure release or better conditions of detention; and suffer physical and psychological damage that last long after their detention ends. In view of the magnitude of this worldwide problem, the Open Society Justice Initiative, together with other partners, is in the process of launching a *Global Campaign for Pretrial Justice*. Its principal purpose is to reduce unnecessary pretrial detention and demonstrate how this can be accomplished effectively at little or no risk to the community.

The impact of indiscriminate and excessive use of pretrial detention is felt most sharply in the countries that are the focus of the Millennium Development Goals (MDGs). Key goals on child health, gender equality, and universal education are directly inhibited by the significant expense incurred and opportunity lost when someone is detained and damaged through pretrial detention.<sup>2</sup>

Current activities of the Global Campaign include collecting empirical evidence to document the scale and gravity of arbitrary and unnecessary pretrial detention; building communities of practice and expertise among NGOs, practitioners, researchers and policy makers; and piloting innovative practices and methodologies aimed at finding effective, low cost solutions. In addition, the campaign strives to establish linkages with associated fields such as broader rule of law and access to justice initiatives and programs.

The goal of this paper is to focus on an important and underappreciated issue and assist countries and governments to better understand it and more effectively design policy responses to it. Although this paper makes reference to specific situations and countries, it is important to note that excessive pretrial detention is a global issue affecting developing and developed countries alike.

This paper is part of a series of four papers examining the impact of excessive pretrial detention. In addition to the socioeconomic impact of pretrial detention, the papers in the series look at the intersection of pretrial detention and public health, torture, and corruption.

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<sup>1</sup> “Pretrial detention” is defined as the period during which an individual is deprived of liberty (including detention in police lock-ups) through to conclusion of the criminal trial (including appeal). Other terms commonly used for pretrial detainees include “remand prisoners,” “remandees,” “awaiting trial detainees,” “untried prisoners,” and “unsentenced prisoners.”

<sup>2</sup> Millennium Development Goals website: <http://www.un.org/millenniumgoals/bkgd.shtml>, accessed February 5, 2010.

More information about the *Global Campaign for Pretrial Justice* is available at [http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles\\_publications/publications/pretrialjustice\\_20090903](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pretrialjustice_20090903).

Summaries of the other three papers in this series are available as follows:

- Pretrial detention and torture:  
[http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles\\_publications/publications/pretrial-detention-torture-20100409](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pretrial-detention-torture-20100409);
- Pretrial detention and public health:  
[http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles\\_publications/publications/pretrial-detention-health](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pretrial-detention-health);
- Pretrial detention and corruption:  
[http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles\\_publications/publications/pretrial-detention-corruption-20100409](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pretrial-detention-corruption-20100409).

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## I. INTRODUCTION

The decision to detain a person before he is found guilty of a crime is one of the most draconian a State or individual can make. A decision made in an instant by the arresting officer can have a severe, lasting, and adverse impact. Whether or not it is justified, and regardless of whether due process is followed, the arrest is likely to have a traumatic effect on the detainee and those who love and depend on him. Pretrial detention is one of the worst things that can happen to a person: the detainee immediately loses his freedom, and can also lose his family, health, home, job, and community ties. Moreover, pretrial detention does not reduce crime or improve public security. In fact, as discussed in Section II, excessive pretrial detention is more likely to increase criminality than deter it.

Summarily locking up millions of people who are presumed innocent is not only a violation of international norms, but also unnecessary.<sup>3</sup> Most pretrial detainees pose no threat to society and should not be in detention. Many of those held in pretrial detention will have their charges withdrawn due to lack of evidence, while others will be acquitted at trial. Still others will be found guilty of minor, non-violent offenses for which jail time is inappropriate or for which the maximum sentence is less than the time spent awaiting trial.

The socioeconomic impact of excessive pretrial detention is profound, affecting not just the individuals detained, but their families, communities, and even States. As this report seeks to demonstrate, that impact is felt most keenly by the poor. The poor are more likely to come into conflict with the law, more likely to be confined pending trial, and less able to afford the “three Bs” of pretrial release: bribe, bail, or barrister.

On any given day, an estimated three million people are behind bars awaiting trial. In the course of a year, approximately 10 million people will pass through pretrial detention. Many will spend months and even years in detention—without being tried or found guilty—languishing under worse conditions than people convicted of crimes and sentenced to prison. It is important to bear in mind that pretrial detainees are presumed innocent in accordance with the most basic and universally-accepted notions of due process.

Many pretrial detainees are exposed to torture, extortion, and disease. They are subject to the arbitrary actions of police, corrupt officials, and even other detainees. Throughout their ordeal, most never see a lawyer or legal advisor and often lack information on their basic rights. When they eventually reach trial—without representation and likely beaten down by months of confinement—the odds are stacked against them: persons in pretrial

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<sup>3</sup> It is important to note that this paper focuses on *excessive* pretrial detention. The authors are not advocating for the abolition of pretrial detention, but rather for its just and appropriate application. Pretrial detention, when used properly, serves an important function. For the purposes of this paper, the term “pretrial detention,” unless otherwise noted, is meant to refer specifically to excessive pretrial detention.

detention are more likely to be found guilty than defendants from similar backgrounds, facing similar charges, who are released awaiting trial.<sup>4</sup>

The UN Working Group on Arbitrary Detention has noted that empirical research shows those in pretrial detention have a lower likelihood of obtaining an acquittal than those who remain at liberty before their trial; this “deepens further the disadvantages that the poor and marginalized face in the enjoyment of the right to a fair trial on an equal footing.”<sup>5</sup> In South Africa, for example, people held in custody before their trials were six times more likely to be sentenced to imprisonment than those released on bail.<sup>6</sup>

Pretrial detainees may lose their jobs, be forced to abandon their education, and be evicted from their homes. They are exposed to disease and suffer physical and psychological damage that lasts long after their detention ends. Their families also suffer from lost income and forfeited education opportunities, including a multi-generational effect in which the children of detainees suffer reduced educational attainment and lower lifetime income. The ripple effect does not stop there: the communities and States marked by the over-use of pretrial detention also must absorb its socioeconomic impact.

Around the world, excessive pretrial detention prods people toward poverty. It pushes working class people toward unemployment, uncertainty, and the edge of poverty. It tips those on the edge of privation into poverty and plunges the already poor into even worse destitution. It limits the development of whole communities, wastes human potential, and misdirects State resources.

These negative socioeconomic effects simply should not happen. Excessive and arbitrary pretrial detention is universally prohibited by international legal norms. In fact, though rational pretrial detention plays an important role in criminal justice systems, it should—according to international norms—ordinarily be a last resort, used only under certain, specific conditions. The human rights standards governing pretrial detention are clear (as documented in Appendix 2); this report looks at the practical impact of the violation of those standards.

In exploring the socioeconomic impact of pretrial detention, this publication first provides an overview of pretrial detention, including its global scope, the many ills attendant to it, the particularly severe impact on the poor and marginalized, and the current state of research on the topic. The report then goes on to examine the many

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<sup>4</sup> Clive Davies, “Pre-Trial Imprisonment: A Liverpool Study,” *The British Journal of Criminology* (Jan. 1971), 32-48; Marian R. Williams, “The Effect of Pretrial Detention on Imprisonment Decisions,” *Criminal Justice Review* 28, No. 2 (Autumn 2003), 299-316.

<sup>5</sup> Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention* (Geneva: UN Commission on Human Rights, E/CN.4/2006/7, 2006), para. 66.

<sup>6</sup> Vanja Karth, “*Between a Rock and a Hard Place*”: *Bail Decisions in Three South African Courts* (Johannesburg: Open Society Foundation for South Africa, 2008), 24, available at: [http://www.osf.org.za/File\\_Uploads/docs/OSF\\_Bail\\_text\\_web.pdf](http://www.osf.org.za/File_Uploads/docs/OSF_Bail_text_web.pdf), accessed February 5, 2010.

manifestations of pretrial detention's socioeconomic impact, including the effects on individuals, families, communities, and States. The report concludes by offering recommendations, an appendix illustrating one attempt to calculate the monetary costs of pretrial detention in Mexico, an appendix compiling relevant international instruments governing the use of pretrial detention, and a bibliography.

This report is presented as a nascent effort to catalogue the socioeconomic impact of excessive pretrial detention around the world. As discussed in Section II, below, precise data on pretrial detention are rare. Rarer still are rigorous cost (or cost-benefit) analyses of pretrial detention. Although there are extant studies from Mexico (summarized in Appendix 1), Chile, Argentina, and Ukraine, the literature is thin. This report, then, may be seen as both an initial foray and an appeal for additional research.

## II. OVERVIEW OF PRETRIAL DETENTION

### The Global Scope of the Problem

One way to measure the scope of pretrial detention is its *duration*—the number of days people spend in detention. According to a 2003 European Commission investigation, the average length of pretrial detention in 19 of the then 25 member states of the European Union was 167 days, or 5.5 months.<sup>7</sup> Data for other countries or regions are hard to find, but the global average is almost certain to be higher than the European figure—for example, the average length of pretrial detention in Nigeria is 3.7 years.<sup>8</sup>

A second gauge of the extent of pretrial detention around the world is the *total number* of individuals in detention. While accurate and up-to-date data are not available for all countries, it is reliably estimated that worldwide, some three million people are in pretrial detention at any given time.<sup>9</sup> That cohort would be larger than the populations of 60 countries, including Armenia, Congo-Brazzaville, and Jamaica.

Still, the three million-person snapshot of a given day's pretrial detention population does not adequately convey the real extent of pretrial detention around the world. A more dynamic measure is the flow of people into custody over time. In the course of a typical year, an estimated 10 million people will enter pretrial detention—a number greater than the populations of two-thirds of the world's countries.<sup>10</sup>

A third important measure of pretrial detention is the *percentage* of all detainees who are in the pretrial stage: globally, one out of every three detainees is awaiting trial and has not been found guilty of a crime.<sup>11</sup>

A fourth way of measuring pretrial detention is the *rate*, calculated as the number of pretrial detainees per 100,000 of the general population. Globally, an estimated 44 people per 100,000 are in pretrial detention, but this figure hides vast disparities among regions. The Nordic countries of Europe, for example, have a pretrial detention rate of 14 per 100,000, while North America's rate is 137 per 100,000.<sup>12</sup>

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<sup>7</sup> *Accompanying document to the Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union*, SEC(2006)1079 (Brussels: European Commission, August 29, 2006), 10–11.

<sup>8</sup> Anthony Nwapa, "Building and Sustaining Change: Pretrial Detention Reform in Nigeria," in *Justice Initiatives: Pretrial Detention* (New York: Open Society Institute, 2008), 86.

<sup>9</sup> *World Prison Brief Online* (ICPS), [www.kcl.ac.uk/depsta/rel/icps/worldbrief/world\\_brief.html](http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/world_brief.html), accessed February 5, 2007.

<sup>10</sup> Martin Schönsteich, "The Scale and Consequences of Pretrial Detention around the World," in *Justice Initiatives: Pretrial Detention* (New York: Open Society Institute, 2008), 11.

<sup>11</sup> Roy Walmsley, *World Prison Population List, Sixth Edition*, (London: International Centre for Prison Studies, 2007).

<sup>12</sup> Martin Schönsteich, "The Scale and Consequences of Pretrial Detention around the World," in *Justice Initiatives: Pretrial Detention* (New York: Open Society Institute, 2008), 13.

The excessive and arbitrary use of pretrial detention is a global problem, affecting developed and developing countries alike. As the data on average duration of pretrial detention indicate, there is great variance among States in their use of pretrial detention. But while the problem is nearly universal, its manifestations are manifold and diverse. Some broad patterns tend to hold and can be useful in understanding the diversity and complexity of the issue.

Developed countries tend to have more total pretrial detainees as well as a higher pretrial detention rate. The United States, for example, has the world's highest total number of pretrial detainees (approximately 476,000), and the fourth-highest rate of pretrial detention (158 per 100,000). But the average pretrial detention duration and the percentage of all prisoners who are pretrial are relatively low in the U.S. and throughout the developed world.

Conversely, in the developing world the rate of pretrial detention may be comparatively low, but the average duration and percentage of all prisoners who are pretrial are relatively high. In some countries, over three quarters of all prisoners are pretrial detainees. This includes Liberia (where 97 percent of all prisoners are awaiting trial), Mali (89 percent), Benin (80 percent), Haiti (78 percent), Niger (c.76 percent), Bolivia (74 percent), and Congo-Brazzaville (c. 70 percent).

Pretrial detention can provide a window into the effectiveness and efficiency of a particular State's criminal justice system, as well as its commitment to the rule of law. In the developed world, the lower percentage of all prisoners who are pretrial and the shorter average duration of pretrial detention indicate a relatively efficient criminal justice system: people move through the system quickly and are generally released pending trial. In developing countries, however, the great majority of all detainees are pretrial and they can languish in that situation for years. This indicates, at best, an inefficient and overwhelmed criminal justice system, and at worst a lack of commitment to the rule of law.

### **The Negative Effects of Excessive Pretrial Detention**

Many bad outcomes stem from the global over-use of pretrial detention. Excessive pretrial detention shatters individual lives, destroys families, and degrades communities. It also undermines the rule of law—by fostering corruption and encouraging criminality—and exposes people presumed innocent to torture, disease, and overcrowding in conditions worse than most sentenced prisoners experience.

#### *Arbitrary and Wasteful*

Under international standards, people awaiting trial should generally be allowed to return to their communities on condition that they respect the law and appear for trial on a set date. Only in certain circumstances should individuals be detained pending trial. There

must be reasonable grounds to believe the person committed the alleged offense and a genuine risk of the person absconding, posing a danger to the community, or interfering with the course of justice. Aside from being a recognized international requirement, allowing suspects to return to their communities reduces the scope for mistreatment and enables them to mount a more effective defense. Also, it should be noted that releasing people who are awaiting trial does not usually threaten public safety: as discussed in Section V, there are many means available to secure their compliance while at liberty, all of which are less costly than pretrial detention.

Too many countries, however, cannot or do not comply with these standards. Excessive and/or arbitrary use of pretrial detention contributes to the chronic, costly, and counterproductive overcrowding of detention facilities. A more rational use of pretrial detention would enable governments to reduce overcrowding and channel associated costs into crime prevention, legal aid, and education.

### *Undermining the Rule of Law*

The rule of law is fundamental to all open societies. It is also an important aspect of socioeconomic development.<sup>13</sup> Excessive pretrial detention undermines the rule of law by debasing the presumption of innocence, furthering corruption, and even promoting criminality.

If a defendant is ordered held in custody, or if money bail is set at an amount the defendant cannot meet, several significant consequences may result. Defendants detained prior to trial are more likely to be sentenced to prison than are defendants who are released prior to trial.<sup>14</sup> That is, the experience of pretrial detention is known to undermine—through loss of employment, accommodation, family and other community ties—defendants’ capacities to present themselves in a light favorable to receiving a noncustodial sentence.<sup>15</sup> A defendant’s appearance and demeanor in court may not inspire confidence if he has spent weeks or months in a prison cell; the detained defendant is less likely to have character witnesses to use in mitigation of sentence than the defendant released awaiting trial; and a detained defendant may have lost his job or home and consequently may not be considered as suitable for a suspended sentence, probation, or a fine.<sup>16</sup> By contrast, released suspects can be in touch with a lawyer relatively easily and can assist in developing a defense to specific charges. They can

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<sup>13</sup> United Nations Development Programme, *Making the Law Work for Everyone: Report of the Commission on Legal Empowerment of the Poor, Vol. 1*, (New York: Commission on Legal Empowerment of the Poor and United Nations Development Programme, 2008), 43.

<sup>14</sup> See, for example, Anne Rankin, “The Effect of Pretrial Detention,” *New York University Law Review* 39 (1964), 641–655; Michael R. Gottfredson and Don M. Gottfredson, *Decision Making in Criminal Justice: Toward a Rational Exercise of Discretion* (New York: Plenum Press, 1988); Williams, “The Effect of Pretrial Detention on Imprisonment Decisions,” 299–316.

<sup>15</sup> Rod Morgan, “England/Wales,” in Dünkel and Vagg (eds.), *Waiting for Trial: International Perspectives on the Use of Pretrial Detention and the Rights and Living Conditions of Prisoners Waiting for Trial*, (Freiburg: Max Planck Institute, 1994), 198.

<sup>16</sup> Michael King, *Bail or Custody* (London: Cobden Trust, 1973), 75.

continue working, paying taxes, and supporting their families. They can also take steps to reduce the severity of a sentence if they ultimately are found guilty by, for example, getting or keeping a job, maintaining or reestablishing family ties, and developing a record of complying with conditions of release.<sup>17</sup>

Around the world, millions of people are locked up in pretrial detention because of corruption.<sup>18</sup> Despite the prohibition of corruption under international law—as enshrined in the UN Convention against Corruption (UNCAC) and other treaties and laws—criminal justice systems are often warped by bribery and other forms of corruption. The pretrial stage (from arrest to trial) of the criminal justice process is particularly vulnerable to corrupt practices, and this corruption hits the poor and disenfranchised hardest.

Corruption flourishes in the pretrial phase because it receives less scrutiny and is subject to more discretion than subsequent stages of the justice process, and often involves the lower paid and most junior actors in the system. Police, prosecutors, and judges—unhindered by accountability—are able to arrest, detain, and release individuals based on their ability to pay bribes. Those caught at the nexus of pretrial detention and corruption are particularly vulnerable and suffer for it. Society as a whole also pays a high price. Corruption, of course, is itself a bad outcome. But when mixed with the power to detain, it leads to other bad outcomes: arbitrary arrests and unnecessary detention, increased public health costs, wasted resources, stunted development, and increased poverty. The justice system’s credibility suffers when the innocent are arrested and even convicted because they cannot pay and the guilty go free because they can.

“The poor need legal aid, not pressure to pay bribes. They need proof that everyone is equal before the law.”  
– Council of Europe Commissioner for Human Rights, Thomas Hammarberg

All over the world, poor people are arrested because they cannot pay a bribe to the corrupt police officer, then denied access to counsel or family because they cannot bribe the corrupt guard or prosecutor, then held indefinitely—or found guilty—because they cannot bribe the corrupt judge. The ability to put cash in the right hands often makes the difference between freedom and detention. Pretrial detention centers are populated almost entirely by poor people.

Once in custody, pretrial detainees are often at the mercy of the detaining authorities, particularly in countries where legal aid or other forms of legal representation are lacking

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<sup>17</sup> For a discussion of the financial, social, legal, and psychological costs associated with pretrial detention see Robert E. Fitzgerald and Peter Marshall, *Towards a more objective basis for bail decision making*, (Canberra: 3rd National Outlook Symposium on Crime in Australia, “Mapping the Boundaries of Australia’s Criminal Justice System,” paper, March 22–23, 1999), 5–7.

<sup>18</sup> Johann Graf Lambsdorff, “Consequences of Corruption—What Do We Know from a Cross-Section of Countries?” (Passau: Passau University, 2005), 20.

or deficient. They or their families are frequently forced to pay for access to services and treatment to which they are entitled under national and international law, including food, drinking water, medication, or contact with family members. Additionally, they are forced to pay to “prevent” torture or other mistreatment, and demands for bribes are often combined with the threat or actual use of torture.

#### **Bangladesh: One Arrest, 34 Bribes**

After a member of the Rezzak family was arrested, family members recorded the number of occasions on which they were forced to pay bribes and the amount they paid. The bribes were paid to secure basic provisions and safeguards during police custody and in hope of securing release on bail. Over the course of four months (2008-9), the Rezzak family paid a total of 159,660 Taka (US \$2,262) through a total of 34 corrupt transactions. The most significant proportion of this amount (a total of 75,000 Taka) was to detaining officers, to prevent torture and the fabrication of more charges against their relative. Other significant bribes were to lawyers and legal clerks. The remainder was for items that should have been provided by the state, including access to legal documents and food for the detained family member.<sup>19</sup>

Because it so often exposes detainees to criminogenic influences, the excessive and arbitrary use of pretrial detention may actually increase the number of potential offenders in a society. There is significant evidence to show that prisons foster criminal behavior by serving as schools or breeding grounds for crime.<sup>20</sup> In Brazil, for example, the influx of pretrial detainees, often on minor charges, is a boon to criminal gangs who recruit most of their members from inside prison.<sup>21</sup> The pressure to join gangs is immense and entering prison—even while innocent—increases the likelihood of further conflict with the law. The risk is greater in places where sentenced and unsentenced prisoners are not separated, or where pretrial detainees charged with minor offenses are incarcerated with detainees suspected of having committed serious crimes—common scenarios in many overcrowded prison systems around the world.

A U.S. study has shown that once juveniles are detained awaiting trial, they are more likely than nondetained juvenile defendants—even when controlling for differences in the

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<sup>19</sup> “Disconnected Policing and the Justice Trade in Bangladesh,” *Article 2: Special Edition: Use of Police Powers for Profit*, Vol. 8 (1), March 2009.

<sup>20</sup> For a review of the literature, see Paul Gendreau, Claire Goggin, and Francis T. Cullen, *The Effects of Prison Sentences on Recidivism* (Ottawa: Solicitor General Canada, 1999), [www.prisonpolicy.org/scans/e199912.htm](http://www.prisonpolicy.org/scans/e199912.htm), accessed February 15, 2007. See also Dorothy R. Jaman, Robert M. Dickover, and Lawrence A. Bennett, “Parole outcome as a function of time served,” *British Journal of Criminology* 12, No. 1 (January 1972), 7.

<sup>21</sup> International Bar Association, Human Rights Institute, *One in five: The crisis in Brazil’s prisons and criminal justice system*, (London: IBA Human Rights Institute, 2010), 33.

prior records between the two groups—to engage in future delinquent behavior, with the “detention experience increasing the odds that the youth will recidivate.”<sup>22</sup>

### *Worse than Prison*

Perversely, although pretrial detention centers lock up only people who are presumed innocent in the eyes of the law, conditions in these centers are often worse than prison. Compared to sentenced prisoners, pretrial detainees are at a higher risk of being tortured and contracting disease. They also have fewer opportunities for education and training than sentenced prisoners.<sup>23</sup> Because pretrial detainees are a transitory population, most prison authorities view their detention as temporary and therefore not requiring healthcare, education, or training services.

Many prisons that offer vocational, therapeutic, or other activities to sentenced prisoners do not provide the same services to pretrial detainees.<sup>24</sup> In Nigeria, according to the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pretrial prisoners “are held in overcrowded cells, lacking appropriate hygiene facilities, with insufficient places to sleep, inadequate and/or insufficient food, water, and medical care, let alone any opportunities for educational, leisure, or vocational training.”<sup>25</sup> The situation is little better in wealthier countries: a report on pretrial detainees in Scotland found “their conditions in custody are at best equivalent, but most commonly worse than, those of convicted prisoners.”<sup>26</sup>

Of the more than ten million people in detention (including both pretrial and post-conviction detainees) around the world, those held in pretrial detention are most at risk of torture.<sup>27</sup> Pretrial detainees are wholly in the power of detaining authorities, many of whom perceive torture as the fastest way to obtain information or a confession and the easiest way to exercise physical and mental control over detainees. Sadly, in most systems, this moment of maximum police incentive to torture coincides with the period when there are the fewest checks on police activity. Those from the poorest and most disadvantaged sectors of society are at particular risk.<sup>28</sup> In addition, the very conditions of

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<sup>22</sup> Barry Holman and Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (Washington, D.C.: Justice Policy Institute, 2006), 3.

<sup>23</sup> Martin Schönteich, “The Scale and Consequences of Pretrial Detention around the World,” in *Justice Initiatives: Pretrial Detention* (New York: Open Society Institute, 2008), 18.

<sup>24</sup> Prison Fellowship International website, remand prisoners page: <http://www.pfi.org/cjr/human-rights/vulnerable-populations/remand-prisoners/remand-prisoners/>, accessed February 5, 2010.

<sup>25</sup> Manfred Nowak, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: Mission to Nigeria*, (Geneva: UN Human Rights Council, 2007), 16.

<sup>26</sup> Scottish Prison Service, *Punishment First Verdict Later: A Review of Conditions for Remand Prisoners in Scotland at the End of the 20<sup>th</sup> Century*, (Edinburgh: HM Prisons Inspectorate, 2000), Annex 5.

<sup>27</sup> Roy Walmsley, *World Prison Population List*, eighth edition, ICPS, [http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wppl-8th\\_41.pdf](http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wppl-8th_41.pdf); the list states that “more than 9.8 million people are held in penal institutions throughout the world.”

<sup>28</sup> Manfred Nowak, *Interim Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment A/64/215*, August 3, 2009, available at: <http://www2.ohchr.org/english/issues/torture/rapporteur/docs/A-64-215.pdf>.

many pretrial detention centers—marked by severe overcrowding, unsanitary conditions, and lack of food—constitute torture.

The excessive use of pretrial detention leads to overcrowded, unhygienic, chaotic, and violent environments where pretrial detainees—who have not been convicted—are at risk of contracting disease. But they are not the only innocent people whose health is threatened by overreliance on pretrial detention: From tuberculosis in Russia to hepatitis C in California and HIV/AIDS in South Africa, outbreaks of disease that begin in pretrial detention centers quickly spread to the general public. In some cases, pretrial detention centers are so bad that innocent people plead guilty just to be transferred to prisons where the conditions might be better.

“It has been estimated that in a given year, about 25% of all people who have HIV disease, about 33% who have HCV infection, and more than 40% who have tuberculosis disease will pass through a correctional facility.”

– Theodore Hammett, *American Journal of Public Health*, June 2006<sup>29</sup>

In prisons and other post-conviction detention centers, incoming prisoners may be screened for disease, get health care, and even have access to methadone therapy and condom distribution. But with rare exceptions, none of this is available in pretrial detention. Instead, arrestees are brought in, locked up in a pretrial detention center where they are exposed to disease, and then released into society to spread the illnesses they have contracted. This is also a danger for prison guards and other employees. In 2001 in Tomsk, Russia, the local detention center had a TB infection rate of 7,000 cases per 100,000 inmates. In the surrounding area where most of the prison’s guards and administrators lived, the rate was better, but still shockingly high: 4,000 cases per 100,000 residents.<sup>30</sup> (By contrast, Russia’s national rate is 93 cases per 100,000.)<sup>31</sup>

The negative effects of excessive pretrial detention that are enumerated above—torture, corruption, the spread of disease, undermining the rule of law—are, in and of themselves, bad outcomes. They also contribute to the socioeconomic impact of pretrial detention, albeit in ways that are difficult to measure. What are the costs to society when the innocent languish behind bars because of corruption? How does one measure the lost potential when torture destroys a victim’s body and spirit, leaving him unable to work after release? What price does a community pay when one of its members returns from pretrial detention carrying tuberculosis? While it is difficult to put a price tag on these negative outcomes, the following section makes clear who pays: the poor and

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<sup>29</sup> Theodore M. Hammett, “HIV/AIDS and Other Infectious Diseases among Correctional Inmates: Transmission, Burden and an Appropriate Response,” in *American Journal of Public Health* 96, No. 6 (June, 2006).

<sup>30</sup> M. Goozner, “Prisons in Post-Soviet Russia Incubate a Plague,” *Scientific American*, Aug. 25, 2008, available at <http://www.scientificamerican.com/article.cfm?id=prison-plague-post-soviet-russia>.

<sup>31</sup> World Health Organization, “Tuberculosis Country Data by WHO Region,” available at: [http://www.who.int/tb/publications/global\\_report/2005/annex2/en/index4.html](http://www.who.int/tb/publications/global_report/2005/annex2/en/index4.html), accessed May 27, 2010.

marginalized. Subsequently, Sections III and IV of this report examine in greater detail the socioeconomic costs associated with excessive pretrial detention.

### **Impact on the Poor and Marginalized**

“Incarceration is not equal-opportunity.”  
– Todd Clear<sup>32</sup>

Lost human potential is one of the main results of excessive pretrial detention. If one assumes that the global average period of pretrial detention is 167 days (this is the average in Europe and hence a very conservative estimate for the global figure), then the three million persons in pretrial detention will spend a combined total of 501 million days in detention—more than half a billion days in lost productivity. By comparison, it took 21.2 million man-days to build the Channel Tunnel, one of the world’s largest construction projects.<sup>33</sup> In theory, therefore, the total time the present cohort of pretrial detainees will spend in detention equals the man-days necessary to build 23 Channel Tunnels.

Wasted human potential is clearly a result of excessive pretrial detention, whether in the developed or developing world. But it is poor people, poor communities, and poor States that are more likely to feel the impact—and can least afford the waste.

#### *Impact on the Poor*

Ineffective and corrupt penal systems are most damaging to the poorest and perpetuate inequalities in society; conversely, inequalities in society feed unfair and unequal penal systems. Reports from around the world indicate that those entering pretrial detention come from the poorest and most marginalized echelons of society, who are least equipped to deal with the criminal justice process and the experiences of detention.<sup>34</sup>

Independent research and government data consistently show that in both high income and low income economies, those who are held in pretrial detention are of comparably poor health and education status, are likely to have little formal employment, and come from fragile family backgrounds. Securing the right to pretrial release depends not only on the nature of the charges, but also on being able to argue for that option. Those with little education are less likely to understand and advocate for their rights. Those with little family or social support are more likely to lack the means to secure non-custodial

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<sup>32</sup> Todd R. Clear, “The Effects of High Imprisonment Rates on Communities,” in Michael Tonry (ed.), *Crime & Justice: A Review of Research* 37 (Chicago: 2008, University of Chicago Press), 100.

<sup>33</sup> “Channel Tunnel: The Facts,” *The Independent*, Sept. 11, 2008, available at: <http://www.independent.co.uk/travel/news-and-advice/channel-tunnel-the-facts-926599.html>.

<sup>34</sup> Fernando Salla and Paula Rodriguez Ballesteros, *Democracy, Human Rights and Prison Conditions in South America* (São Paulo: 2008, Center for the Study of Violence, University of São Paulo).

options, including bail. Those without employment or property are less likely to meet conditions for sureties.

“Many people think that torture is primarily the fate of political and other ‘high-ranking’ prisoners. In reality, most of the victims of arbitrary detention, torture, and inhuman conditions are usually ordinary people who belong to the poorest and most disadvantaged sectors of society, including those belonging to the lowest classes, children, persons with disabilities and diseases, gays, lesbians, bisexuals, transgendered persons, drug addicts, aliens, and members of ethnic and religious minorities or indigenous communities.”

– Manfred Nowak, UN Special Rapporteur on torture

The study *Prison Conditions in Africa*,<sup>35</sup> reporting on South Africa, Egypt, Cote D’Ivoire, Cape Verde, Senegal, and The Gambia, finds: “In all countries studied, the majority of those in prison come from very poor backgrounds, often having received little education. Only a fairly small proportion of prisoners had formal paid employment at the time they committed their offences, many of the offences of which the prisoners are convicted are relatively minor property offences.”<sup>36</sup> While the report focuses on sentenced prisoners, it seems likely that the pretrial detention population would be largely the same.

In Nepal, of the 3,874 detainees in police detention centers interviewed by the NGO Advocacy Forum in 2009, more than 65 percent were ethnic minorities or Dalits—the poorest of the poor.<sup>37</sup> In India, one study estimated that 80 percent of the prison population had only a primary school education or were illiterate, while 50 percent were either unemployed or employed in low-paying agricultural work.<sup>38</sup>

There are a host of reasons why the poor are more likely to come into conflict with the law, and less likely to be able to avoid pretrial detention. This is also true of members of minority groups and other marginalized populations. Pretrial detention is often applied in a discriminatory fashion, and these groups are often the victims of that discrimination. The impact of excessive pretrial detention on marginalized populations, including women, is severe and disproportionate.

### *Impact on Women, Ethnic Minorities, Non-Citizens, and Other Vulnerable Groups*

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<sup>35</sup> Penal Reform International, *Prison Conditions in Africa* (London: PRI and African Centre for Democracy and Human Rights, 1993).

<sup>36</sup> Penal Reform International, *Prison Conditions in Africa* (London: PRI and African Centre for Democracy and Human Rights, 1993).

<sup>37</sup> Advocacy Forum, Nepal, personal communication with Paul English, January 2010.

<sup>38</sup> Rani Dhavan Shankardass, *Exploration towards accessible and equitable justice in the South Asian region; problems and paradoxes of reform* (London: Penal Reform and Justice Association and Penal Reform International, 2001).

Women prisoners constitute a small minority of the pretrial detention population, and as a result their particular needs are often neglected. Yet the physical, emotional, and social consequences of incarceration on women are acute and enduring. Issues such as separation from families, mental and emotional health problems, issues related to pregnancy and childcare, violations of human rights,<sup>39</sup> and limited access to health care and other services are all faced by women prisoners.

The vast majority of female pretrial detainees are accused of petty, non-violent offenses for which they should be eligible for pretrial release. Many have also suffered physical and emotional abuse, or have mental health problems or alcohol or drug dependency—factors that should mitigate against pretrial detention. There are also factors that expose women to excessive pretrial detention but do not apply to men: in certain culturally conservative societies, women can be detained for dressing improperly or for conducting extramarital affairs—“crimes” for which men would not be punished.<sup>40</sup> In many socially conservative States, life for released women prisoners is deeply problematic, particularly if the offenses they were accused of were “moral”<sup>41</sup> crimes, in which case family links are usually irredeemably broken.

The profile of pretrial detainees is an issue about which the UN Committee on the Elimination of Racial Discrimination has raised concerns. It warns that “persons held awaiting trial include an excessively high number of non-nationals” and “persons belonging to racial or ethnic groups, in particular non-citizens—including immigrants, refugees, asylum-seekers, and stateless persons—Roma, indigenous peoples, displaced populations, persons discriminated against because of their descent, as well as other vulnerable groups which are particularly exposed to exclusion, marginalization, and non-integration in society.”<sup>42</sup>

Non-citizens are in many countries over-represented in the pretrial population. Because they lack a fixed address or residence permit, they are considered more likely to abscond and/or reoffend and are usually excluded from alternatives to detention.<sup>43</sup> Members of the most marginalized groups in society, including “people with poor health and chronic, untreated conditions, drug users, the vulnerable and those who engage in risky activities

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<sup>39</sup> UN Office on Drugs and Crime, women prisoners website: [www.unodc.org/india/woman\\_prisoners.html](http://www.unodc.org/india/woman_prisoners.html), accessed February 6, 2010.

<sup>40</sup> *Women in prison: incarcerated in a man's world* (London: Penal Reform International, 2008).

<sup>41</sup> In Afghanistan, for example, “moral” crimes include elopement, adultery, and facilitating and/or supporting adultery. See Tomris Atabay, *Afghanistan: Female Prisoners and their Social Reintegration* (Vienna: United Nations Office on Drugs and Crime, 2007), 15-27.

<sup>42</sup> Committee on the Elimination of Racial Discrimination, *General Comment 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System* preamble and paragraph 1.III.2, quoted in Laurel Townhead, *Pre-Trial Detention of Women and Its Impact on their Children* (Geneva: Quaker United Nations Office, 2007), 11.

<sup>43</sup> A. M. van Kalmthout, M. M. Knapen, and C. Morgenstern (eds.), *Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the grounds for Regular Review in the Member States of the EU* (Tilberg University: Wolf Legal Publishers, 2009).

such as injecting drugs and commercial sex work,” are all overrepresented in prison (and, one may extrapolate, in pretrial detention).<sup>44</sup>

## **The State of the Field**

Pretrial detention is difficult to measure: governments are often reluctant to divulge information about their prisons; many prison systems are closed to outside monitors; pretrial detainees can be held in a multitude of settings, from holding cells in police stations to prisons where they are mixed with convicted inmates; and the high turnover rate of pretrial detainees means the population changes every day. For these reasons, estimates of the global pretrial detention population—including those used in this report—are likely quite conservative. The real number of pretrial detainees is almost certainly much higher than the figures that are most commonly cited by experts in the field.

Even where data are available, they are often limited. Different jurisdictions may define the term differently (for example, by counting or not counting prisoners who have been found guilty but not yet sentenced), or assign to different authorities the responsibility for counting. In some countries, data are tracked by the government, but in others this task falls to NGOs that may be forced to take a snapshot of the population in a specific location and then extrapolate from there. All of this makes comparing data across jurisdictions or generating total data for a region particularly challenging.

Further compounding the problem is that most good data come from the developed world, and the best data come from countries, such as those in Northern Europe, with low pretrial detention rates. On the other hand, many countries with draconian criminal justice systems either do not divulge information about their prison populations or deliberately under-report them. Similarly, data from developing countries—which, as noted earlier, have the highest percentage of all detainees who are pretrial—are often incomplete or inaccurate. It should be noted that, due to the lack of reliable data, this report occasionally resorts to using data on sentenced prisoners as a proxy for pretrial detainees.

It should also be noted that this report does not claim a causal link between pretrial detention and poverty. But there is clearly a mutually-reinforcing relationship between the two. There is a connection between excessive pretrial detention and numerous indicators of socioeconomic development—including income, employment, and educational attainment—which is explored further in Sections III and IV of this publication.

The dearth of good data on pretrial detention and inexact relationship between excessive pretrial detention and socioeconomic development point to the desperate need for more research. Outside of a small group of penal reformers and human rights advocates,

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<sup>44</sup> *Health in prisons: Realising the right to health* (London: Penal Reform International, 2007), 6.

excessive pretrial detention and its socioeconomic impact are largely overlooked. But the global scope of the problem, its severity, and its ripple effects across communities and generations all argue for urgent attention and investigation. In particular, pretrial detention's impact on development suggests the need for research by economists and other development experts. Anyone working in the field of poverty reduction and economic development should be interested in the reform and reduction of pretrial detention.

But this is not merely an academic exercise. Without knowing the full costs of excessive pretrial detention, it is impossible for States to make rational policy choices regarding it. Policy choices are easily warped by incomplete information: when problems are poorly documented and hence poorly understood, the "solutions" are often flawed.

### III. IMPACT ON INDIVIDUALS AND FAMILIES

The excessive and arbitrary use of pretrial detention critically undermines socioeconomic development—and is especially harmful to the poor. Pretrial detention disproportionately affects individuals and families living in poverty: they are more likely to come into conflict with the criminal justice system, more likely to be detained awaiting trial, and less able to make bail or pay bribes for their release. Those living in—or at the edge of—poverty have the fewest resources to handle the socioeconomic shocks of pretrial detention and they are more easily plunged into (or further into) destitution, including hunger and homelessness.

The socioeconomic impact of pretrial detention falls not simply on the prisoner. The employment and income lost as a result of excessive pretrial detention affect the prisoner's family. The impact is especially severe in poor, developing countries where the state does not provide reliable financial assistance to the indigent and where it is not unusual for one breadwinner to financially support an extended family network. Wealthier countries have the resources to absorb a greater percentage of the costs associated with pretrial detention; poorer countries tend to spend less on criminal justice, meaning more of the costs of pretrial detention fall on the individuals, their families, and communities.

This section examines the costs to pretrial detainees and their families as measured by income and employment, education, incarceration-related expenses, and long-term effects, while the subsequent section looks at impacts on communities and States. Reliable cost analyses are difficult to find. Hence, while these sections explore the factors that must be considered in assessing the socioeconomic impact of excessive pretrial detention, they generally do not seek to assign a monetary figure to those impacts. Fortunately, the monetary impact of pretrial detention has been calculated for a handful of countries, including Argentina, Chile, Mexico, and Ukraine. The Mexico study, in particular, demonstrates what is possible in the field. Those studies are cited below and the Mexico study is summarized at greater length in Appendix 1.

#### **Income and Employment**

Persons detained awaiting trial cannot work or earn income while detained, and frequently lose their jobs—often after only a short period away from their work. If the period of detention is lengthy, detainees' future earning potential is also undermined. Those who are self-employed—common to people working in much of the developing world—are at risk of bankruptcy, losing their goods through theft, missing sowing or harvesting season, or foregoing their trading space at the local market.

In Mexico, a study estimated the amount of income lost, as a result of their detention, by the country's pretrial detainees who were employed at the time of arrest, as 1.3 billion

pesos (or about US \$100 million) in 2006.<sup>45</sup> In England and Wales, half of men and two-thirds of women employed at the time of arrest lost their jobs as a result of their pretrial detention.<sup>46</sup> In Argentina, a study published in 2009 estimated the amount of income lost by pretrial detainees at nearly 40 million pesos (or over US \$10 million) per year.<sup>47</sup>

Pretrial detainees are not only at risk of losing their employment at the time of detention, but also risk long-term unemployment or underemployment after release. The stigma of detention, combined with lost education or training opportunities, severely limits detainees' lifetime incomes. This is exacerbated by the fact that most pretrial detainees are between ages 20 and 40—their wage-earning peak. Income lost at this point in their lives almost certainly cannot be regained.

In countries that have Social Security or some other form of retirement program, the income lost today by a pretrial detainee will also hurt him later in life due to reduced contributions to the retirement plan. In Mexico, lost Social Security contributions caused by pretrial detention were estimated at 17.6 million pesos (US \$1.4 million) annually.<sup>48</sup>

For every pretrial detainee who loses his job as a result of detention, there is a family paying the price. In some cases, his spouse—and even his children—must find work to make up for the lost income. But in other cases, his spouse must quit work because of the demands imposed by incarceration, including court appearances, prison visits, and taking food and other necessities to the incarcerated spouse.

#### **Benin: Lost Income, Thwarted Ambitions**

A prisoner in Benin, who had been in pretrial detention for 30 months, reported that his family was trying to raise money to find a lawyer. As a result of his detention, his wife's plans to start a business—a hairdressing salon—had to be abandoned and she was forced to work instead in the far less lucrative trade of street hairdressing. Not only had her small enterprise been scuttled, but her working hours were reduced by fruitless visits to the prosecutor and her daily visits to take food to the prison. In addition, her expenses increased because of travel demands. Her husband's arrest pushed her from the brink of middle class stability to the edge of poverty.<sup>49</sup>

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<sup>45</sup> Guillermo Zepeda, *Costly Confinement: The Direct and Indirect Costs of Pretrial Detention in Mexico* (English-language summary), (New York: Open Society Institute), 2009.

<sup>46</sup> *Unjust Deserts: A Thematic Review by HM Chief Inspector of Prisons of the Treatment and Conditions for Unsented Prisoners in England and Wales*, (London: HM Inspectorate of Prisons for England and Wales, 2000).

<sup>47</sup> Malena Derooy et al., *The Economic and Social Costs of Preventive Detention in Argentina* (Buenos Aires: Centre for the Implementation of Public Policies Promoting Equity and Growth, 2009), 22.

<sup>48</sup> Guillermo Zepeda, *Costly Confinement: The Direct and Indirect Costs of Pretrial Detention in Mexico* (English-language summary), (New York: Open Society Institute, 2009).

<sup>49</sup> *Freedom Inside the Walls* (documentary film) (2005, Prison Reform International).

For the already-poor, the loss of income can be crippling. If, for example, the detainee and his spouse are subsistence farmers, it is likely impossible for the spouse to take on any additional work. In such a scenario, the spouse may be forced to sell the family's belongings, hastening the descent into abject poverty.

Particularly in socially conservative societies, it can be difficult for families to support themselves without a male income provider, as women have very limited opportunities for employment. In these cases, the pretrial detention of the male wage earner is practically a guarantee of dire poverty. In Afghanistan, for example, the families of detained men are commonly reduced to begging because no other options for earning income are available.<sup>50</sup>

## **Education**

Many pretrial detainees are young adults, some of whom will have their education interrupted as a result of their detention. Other detainees may have their job training interrupted, making it harder to find a job upon release and limiting their lifetime earning potential. As discussed in Section II, education and training opportunities are virtually nonexistent in pretrial detention, even if they are available to sentenced prisoners.

In addition, the education of children is often disrupted when a parent is detained. These children have to take on new roles, including providing domestic, emotional, or financial support for other family members. According to an NGO report, such children “may have to move to a new area, a new home or a new school because of imprisonment.”<sup>51</sup> A review of the literature on children whose mothers are detained found that those “children’s lives are greatly disrupted... resulting in heightened rates of school failure and eventual criminal activity.”<sup>52</sup> A study of the children of imprisoned mothers found an “increased likelihood of their becoming ‘NEET’ (Not in Education, Employment or Training).”<sup>53</sup> Particularly in developing countries, children are commonly forced out of school and into work, to replace the lost income of detained adults.

## **Prison-Related Expenses**

Entering pretrial detention not only limits one’s income and earning potential—it actually *costs* money. Wealthier detainees may have to absorb the cost of private defense counsel (although, as noted earlier, wealthier people are unlikely to find themselves in pretrial

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<sup>50</sup> Tomris Atabay and Paul English, *Afghanistan: Implementing Alternatives to Imprisonment, in line with International Standards and National Legislation* (Vienna: UNODC, 2008), xiii.

<sup>51</sup> Oliver Robertson, *The impact of parental imprisonment on children*, (Geneva: Quaker United Nations Office, 2007), 7.

<sup>52</sup> Barbara J. Myers, Tina M. Smarsh, Kristine Amlund-Hagen and Suzanne Kennon, “Children of Incarcerated Mothers,” *Journal of Child and Family Studies*, Vol. 8(1), 1999, 11.

<sup>53</sup> New Economics Foundation, *Unlocking value: How we all benefit from investing in alternatives to prison for women offenders*, (London: New Economics Foundation, 2008).

detention). In developing countries, authorities often fail to provide basic necessities, so detainees must pay for food, water, clothing, and bedding. Commonly, they must also pay bribes for “privileges” such as making a phone call, securing a place to sleep, and avoiding or lessening beatings. In Mexico, the annual cost to detainees of these extra-legal payments was estimated at 539 million pesos (US \$42.3 million),<sup>54</sup> while in Argentina it was estimated at 9 million pesos (US \$2.3 million).<sup>55</sup> It is important to bear in mind that Argentina and Mexico are not considered developing countries and that the impact of bribes paid by pretrial detainees in poorer countries may be more severe when considered as a percentage of detainees’ income or net worth.

#### **Equatorial Guinea: The Water Costs, but the Malaria Is Free**

A male detainee kept in police custody for several months was forced to pay for food and drinking water. Kept in a cell that was partially open to the sky, he had no protection against malaria-carrying mosquitoes. He was repeatedly denied a hearing before a judge, access to a lawyer, or contact with his family.<sup>56</sup> To calculate the costs to the man and his family, it would be necessary to add up—at a minimum—the man’s lost income (both immediate and lifetime), the burden on his spouse, the lost educational opportunities for his children, the direct costs of his food and water, and the costs of his contracting malaria.

In addition to lost income, the families of pretrial detainees must wrestle with legal fees, the cost of bribes to corrupt criminal justice officials, and other expenses. When an income-earner is detained, family members must adjust not only to the loss of that income but also to costs of supporting that family member in detention, including travel to visit the detainee, food and personal items for the detainee, and, often, bribes to guards.

The UN Special Rapporteur on torture observed that in Nigeria, “Pretrial detainees reported that they are forced to pay for food, bathing, or contacting family members, receiving visitors, or medication.”<sup>57</sup>

In Argentina, the total direct cost to families of pretrial detainees—including assistance to detainees (food, clothing, etc.), time and expense of visiting, private legal counsel, and bribes—was estimated at 88.7 million pesos (US \$22.5 million) per year.<sup>58</sup> In Mexico,

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<sup>54</sup> Guillermo Zepeda, *Costly Confinement: The Direct and Indirect Costs of Pretrial Detention in Mexico* (English-language summary), (New York: Open Society Institute, 2009).

<sup>55</sup> Malena Derdoy et al., *The Economic and Social Costs of Preventive Detention in Argentina* (Buenos Aires: Centre for the Implementation of Public Policies Promoting Equity and Growth, 2009), 22.

<sup>56</sup> “True Hell on Earth,” *Daily Mail*, May 18, 2007.

<sup>57</sup> Manfred Nowak, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Mission to Nigeria, (4 to 10 March 2007)* (Geneva: UN Human Rights Council, A/HRC/7/3/Add.4, 2007), para. 51.

<sup>58</sup> Malena Derdoy et al., *The Economic and Social Costs of Preventive Detention in Argentina* (Buenos Aires: Centre for the Implementation of Public Policies Promoting Equity and Growth, 2009), 22.

the total cost to families was estimated to be 1.9 billion pesos (US \$150 million) per year.<sup>59</sup>

### **Long-Term and Intergenerational Effects**

Although an individual's pretrial detention may last only a few weeks, the impact can be felt over the rest of his life—and indeed, into the next generation.

There is a body of research—focused primarily on sentenced prisoners—linking the imprisonment of parents to negative outcomes for their children, including increased propensity for violence and other antisocial behaviors, increased likelihood of suffering anxiety and depression, and decreased school attendance.<sup>60</sup> Although it is not clear that a parent's incarceration is by itself responsible for increased likelihood of criminality in the child, it is clear that children of imprisoned parents are more likely to one day be imprisoned themselves.<sup>61</sup>

#### **England: The Impact of Detention on a Family**

A 29-year-old truck driver lived with his wife, his retired-father-in-law, and his eight-year-old son in a council house in England. He was arrested in connection with a robbery and held in pretrial detention after police successfully opposed bail. When the case was scheduled for trial, the police withdrew their objection and bail was granted. After almost four weeks in pretrial detention, the defendant found he had lost his job and the rent on the house where he had lived for seven years was in arrears. He and his family were evicted. The mental strain of the situation caused the defendant's wife to suffer a nervous breakdown and so disturbed his son that he had to be given psychiatric treatment. The defendant found it difficult to get work and could not obtain unemployment benefits because he was awaiting trial and was not, according to the local labor bureau, available for work. Four months after his arrest the defendant was tried and acquitted.

In some cases, young people and children are detained when adults are put into pretrial detention. This is particularly true when women are placed in pretrial detention. With a focus on pretrial detention, the Quaker United Nations Office reports that globally “most female offenders are the sole or main carer of minor children and this should be taken into consideration in decisions about pretrial detention. Caring responsibilities may be evidence of being less likely to abscond. At the same time, the negative impact on

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<sup>59</sup> Guillermo Zepeda, *Costly Confinement: The Direct and Indirect Costs of Pretrial Detention in Mexico* (English-language summary), (New York: Open Society Institute, 2009).

<sup>60</sup> Jennifer Rosenberg, *Children Need Dads Too: Children with Fathers in Prison*, (Geneva: Quaker United Nations Office, 2009), 14.

<sup>61</sup> Herman-Stahl, Kan & McKay, *Incarceration and the Family: A Review of Research and Promising Approaches for Serving Fathers and Families* (Washington, DC: RTI International for the US Department of Health and Human Services, 2008), 1-3.

children of their mother being detained should be taken into account and be an added incentive to use non-custodial alternatives to pretrial detention.”<sup>62</sup>

For juveniles, pretrial detention interrupts their education, making it more difficult for some to return to school and find employment. Indeed, “economists have shown that the process of incarcerating youth will reduce their future earnings and their ability to remain in the workforce, and could change formerly detained youth into less stable employees.”<sup>63</sup> The failure of detained juveniles to return to school affects public safety as, according to the U.S. Department of Education, school dropouts are three and a half times more likely than high school graduates to be arrested.<sup>64</sup>

For pretrial detainees who contract disease or who are damaged physically or psychologically by torture during their detention, the long-term effects are so great as to be nearly incalculable. A man who emerges from pretrial detention having contracted HIV risks passing it to his wife. He will have a shorter lifespan and reduced earning potential, which can affect the educational attainment and hence income potential of his children. And the disease will cost his family in the form of medical bills and the wages they forfeit while caring for him. For even a wealthy family, this scenario is disastrous. For an already poor family, it is a nightmare.

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<sup>62</sup> Laurel Townhead, *Pre-Trial Detention of Women and its Impact on their Children* (Geneva: Quaker United Nations Office, 2007), 5.

<sup>63</sup> *Ibid.*, 2.

<sup>64</sup> *Ibid.*, 9.

## IV. IMPACT ON COMMUNITIES AND STATES

“The evidence of direct impacts of a lack of security and justice on poor people in many developing countries is very strong. Insecurity and injustice can be an acute source of vulnerability, tipping households into destitution”<sup>65</sup>

### Impact on Communities

As well as the consequences for individuals and their families, pretrial detention can have an impact on the wider community, helping entrench the disadvantaged characteristics of that community. This is particularly clear with regard to marginalized communities (as described in Section II) against whom pretrial detention is applied in a discriminatory manner. The over-use of pretrial detention in these communities harms not only those detained, but the community as a whole, depriving it of parents, income-earners, teachers, role models, and political leaders. The community impact of excessive pretrial detention furthers the social exclusion of marginalized groups, increases their poverty, and decreases their political power. In Chile, for example, members of the Mapuche indigenous group claim that racially-motivated, disproportionate pretrial detention is used against them to weaken their community politically and take their land.<sup>66</sup>

An additional impact on communities comes in the form of communicable diseases contracted in pretrial detention centers and spread to the community when detainees are released. Diseases such as HIV/AIDS, hepatitis C, and tuberculosis are common in many pretrial detention centers, spread quickly both within and beyond the prison walls, and impose massive costs on the communities they affect. An extensive body of literature documents the socioeconomic impact of communicable diseases on poor and disadvantaged communities.<sup>67</sup>

### Malawi: The Impact of Detention on a Community, Part I

A man was detained pretrial in Maula prison, meaning that his wife had to fix their thatched roof, chop wood, cultivate the garden, and look after their four boys. To pay for the costs associated with incarceration, the family had to sell its most precious

<sup>65</sup> Marcus Cox, *Security and justice: Measuring the development returns* (London: Agulhas Development Consultants, 2008), 48. Cox’s paper was prepared for the UK’s Department for International Development to gain a better understanding of the returns available from investments in this area in terms of economic growth, poverty reduction, and achievement of the Millennium Development Goals.

<sup>66</sup> “Mapuche Public Statement on Provocation, Harassment, and Punishment of Mapuche Political Prisoners,” press release, April 28, 2010, available at:

[http://indigenouspeoplesissues.com/index.php?option=com\\_content&view=article&id=4978:mapuche-public-statement-on-provocation-harassment-and-punishment-of-mapuche-political-prisoners&catid=53:south-america-indigenous-peoples&Itemid=75](http://indigenouspeoplesissues.com/index.php?option=com_content&view=article&id=4978:mapuche-public-statement-on-provocation-harassment-and-punishment-of-mapuche-political-prisoners&catid=53:south-america-indigenous-peoples&Itemid=75).

<sup>67</sup> D.R. Rose and T. R. Clear, “Incarceration, Re-entry, and Social Capital: Social Networks in the Balance,” in J. Travis and M. Waul (eds.) *Prisoners Once Removed: The Impact of Incarceration and Re-entry on Children, Families, and Communities* (Washington, DC: The Urban Institute, 2004).

possession, its radio—the only radio in the village. The buyer came from another village, and when he took the radio away with him, the entire community was left without a link to the outside world. People in the community now must walk to the next village just to hear the news or find out if the weather forecast favors planting.<sup>68</sup>

### **Malawi: The Impact of Detention on a Community, Part II**

When the male head of a household in rural Malawi was arrested and detained, his family had to sell its maize-milling machine to obtain cash for his legal fees, bail, and money to bribe him out of detention. The milling machine had brought steady income into the household, and its sale meant the family would have no money to hire labor or buy seeds for their beetroot plots. The beetroot production ceased and income from the crops was lost. The new owner of the milling machine moved it to a distant location. Now the community no longer has a milling machine, and women in the area have had to go back to pounding maize, which increases their workload and lowers their productivity.<sup>69</sup>

As the examples from Malawi demonstrate, in some places familial and community relationships mean that the loss of one economically active member has an impact far beyond their immediate dependents. In low income economies, the dependency ratio is around six dependents to each income earner. In some particularly impoverished rural areas of Africa, dependency ratios in excess of 1:200 have been reported.<sup>70</sup> In such instances, the impact of pretrial detention spreads far beyond the immediate family and shakes the entire community.

### **Impact on States**

For the State, every pretrial detention means increased expense (direct costs), reduced revenue (indirect costs), and fewer resources for other programs (opportunity costs).

#### *Direct Costs*

The direct costs to the State of pretrial detention include operating detention facilities (including prison guards and administrators), warehousing detainees (including food, clothing, beds, and healthcare—assuming these are provided), and pursuing cases against detainees (including the investigation and judicial process). The often massive costs of constructing prisons are not usually ascribed to pretrial detention, because sentenced prisoners—not pretrial detainees—are thought of as the primary residents.

Of course, States can attempt to reduce the costs of pretrial detention by squeezing ten detainees into a cell designed for four, supplying little or low quality food, and cutting back on security and medical care. Such practices significantly reduce the marginal cost

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<sup>68</sup> *Freedom Inside the Walls* (Penal Reform International, 2005) (documentary film).

<sup>69</sup> Martin, Schönteich, “The Scale and Consequences of Pretrial Detention around the World,” in *Justice Initiatives: Pretrial Detention* (New York: Open Society Institute, 2008), 23.

<sup>70</sup> Martin, Schönteich, “The Scale and Consequences of Pretrial Detention around the World,” in *Justice Initiatives: Pretrial Detention* (New York: Open Society Institute, 2008), 23.

of pretrial detention. And yet, by skimping on expenses for the maintenance of pretrial detention facilities and the care of inmates, governments do not reduce the overall cost of pretrial detention. Rather, such costs are transferred elsewhere, usually to detainees, their families, and the broader community.

In Mexico, the State's cost of pursuing a criminal case is usually higher for pretrial detainees than for defendants who are at liberty. Pretrial detainees have a higher number of hearings than defendants who are not detained, and the State must bear all costs associated with those hearings, including transportation for the detainee and guards to accompany him. Defendants released pending trial must pay their own transportation costs and do not travel under guard.

A 2006 study by the Institute of Applied Humanitarian Research in Ukraine found the total annual cost of pretrial detention to be US \$51 million, of which the State paid 59 percent, or US \$30 million.<sup>71</sup> In Mexico, the State bears 58 percent of the direct costs; the annual direct cost to the State of pretrial detention was estimated at 5.8 billion pesos (US \$454 million).<sup>72</sup> In Argentina, where the State carried 68 percent of the direct costs, the State's direct costs were estimated to be 294 million pesos (US \$75 million).<sup>73</sup> In all three countries, detainees and their families were forced to bear the remaining percentage of the direct costs.

#### *Indirect Costs*

It is difficult to make a rational policy decision without an accurate sense of the economic cost of the policy in comparison to alternatives.<sup>74</sup> Yet, traditionally, the cost of pretrial detention (as publicly reported by governments) is calculated solely by adding together the State's direct expenses accrued in accommodating, feeding, and caring for pretrial detainees. No effort is made to calculate the larger, indirect costs to society and the State of lost productivity, reduced tax payments, or diseases transmitted from prison to the community when detainees are eventually released, to name just a few examples. The traditional approach to calculating the costs of pretrial detention is thus both short-sighted and misleading.

The actual cost of pretrial detention is often hidden. Assessing the true costs of pretrial detention requires considering the full impact of excessive pretrial detention on not just the detainees, but their families and communities—a calculation that is both difficult to make and politically unpalatable to most governments.

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<sup>71</sup> M. V. Buromensky, O. V. Serduk and V. I. Tocheny, *Assessment of social and economic costs of pretrial detention application: Analytical Report* (Kyiv: American Bar Association Rule of Law Initiative, 2008).

<sup>72</sup> Guillermo Zepeda, *Costly Confinement: The Direct and Indirect Costs of Pretrial Detention in Mexico* (English-language summary), (New York: Open Society Institute, 2009).

<sup>73</sup> Malena Derdoy et al., *The Economic and Social Costs of Preventive Detention in Argentina* (Buenos Aires: Centre for the Implementation of Public Policies Promoting Equity and Growth, 2009), 22.

<sup>74</sup> Of course, government policies should not be judged on cost alone. Some government policies or services are considered so essential that almost any price must be borne.

The cost studies conducted in Mexico and Argentina made a limited effort to calculate indirect costs, focusing on Social Security payments lost as a result of pretrial detention, as well as some healthcare costs (in Mexico, the cost of families who lost private health insurance as a result of pretrial detention and joined the government's healthcare system; in Argentina, the costs of post-release HIV care for those who contracted it in pretrial detention). Even this modest effort illuminated the waste inherent in locking up large numbers of people who by law must be considered innocent: Argentina spent an estimated 1.4 million pesos (US \$356,000) per year on indirect costs,<sup>75</sup> while Mexico spent an estimated 6.2 million pesos (US \$486,000).<sup>76</sup>

### *Opportunity Costs*

All governments have limited resources, and all policy decisions have costs. Every dollar or peso a government spends on incarceration is a dollar or peso that cannot be spent on healthcare or policing or education. Similarly, money spent on pretrial detention by the detainee, his family, and the community could also have been used differently.

Excessive pretrial detention—especially for persons charged with minor, non-violent offenses—is costly and restricts States' ability to invest in socioeconomic development. For poor countries, where State budgets are rarely balanced and State funding to meet the basic needs of all citizens is inadequate, expenditure on incarcerating pretrial detainees represents a stark opportunity cost. Every bit of State revenue spent on detention results in potentially less money for health, housing, and education.

The various factors through which pretrial detention weakens socioeconomic development are not mutually exclusive, but overlap and reinforce one another. Thus, detaining a large group of people is not only costly for the State (and, thereby, the taxpayer), but has negative financial and social repercussions for detainees, their families, and society at large. Reducing the excessive use of pretrial detention can boost socioeconomic development at the family and community level, especially in developing countries where the difference between a stable existence and bare survival is often tenuous.

With States grappling with poverty reduction strategies and making tough decision on where to invest limited resources, the direct expenditure on unnecessary incarceration should not be ignored.

The study of pretrial detention costs in Mexico compares the total costs of pretrial detention to other government expenditures (social programs and security) to illustrate the arguable disconnect between government policies. The total spent on pretrial

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<sup>75</sup> Malena Derdoy et al., *The Economic and Social Costs of Preventive Detention in Argentina* (Buenos Aires: Centre for the Implementation of Public Policies Promoting Equity and Growth, 2009), 22.

<sup>76</sup> Guillermo Zepeda, *Costly Confinement: The Direct and Indirect Costs of Pretrial Detention in Mexico* (English-language summary), (New York: Open Society Institute, 2009).

detention was half a billion pesos more than the 2006 federal budget for public safety, and equal to just over a quarter of the budget for Mexico's social assistance program *Oportunidades*, which reaches 27 million people. Reducing expenditure on pretrial detention would allow greater investment in the vulnerable population benefiting from the *Oportunidades* program that could lead to more employment opportunities and economic development that in turn could have a preventive effect on new recruitment into criminal activities.

## V. CONCLUSIONS AND RECOMMENDATIONS

Excessive pretrial detention has a harmful—and completely avoidable—impact on individuals, families, communities, and States. That impact is most profound and most harmful for those who can least afford it. It wastes human potential, wrecks lives, and distorts government policy. As this report has sought to demonstrate, excessive pretrial detention:

- Ensnare millions of people each year and affects hundreds of millions more.
- Spreads disease, furthers corruption, and undermines the rule of law.
- Has a disproportionate impact on the poor and marginalized.
- Reduces the income of detainees, pushes their families toward poverty, and damages the education and income potential of their children.
- Impoverishes communities, misdirects States' spending, and limits their policy options.

### **Reducing and Reforming Pretrial Detention**

Most pretrial detainees should not be in detention. They pose no threat to society and are not at risk of absconding. In South Africa, the government spends R2.2 million (US \$300,000) a day jailing people who have been granted bail but are unable to afford it.<sup>77</sup> In England and Wales, 19 percent of those in pretrial detention were acquitted, and another 30 percent received non-custodial sentences.<sup>78</sup> Eighty percent of the 100,000 people passing through the Cook County jail (pretrial detention facility) in Chicago each year are not given a prison sentence.<sup>79</sup> An eventual acquittal or a non-custodial sentence does not per se mean that pretrial detention was unnecessary. It is likely, however, that in many such cases a more careful review of the circumstances of the defendant and his likely risk of absconding would have permitted his release awaiting trial within the ambit of international law and standards.

This waste is avoidable: better, cheaper alternatives to pretrial detention exist. Implementing them is not so much a question of resources as it is of political will. In Scotland, Glasgow's City Council in August 2009 launched an alternative to pretrial detention for young people.<sup>80</sup> Instead of holding them in pretrial detention, the program releases them and focuses on monitoring and offering an array of social services. The

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<sup>77</sup> Judicial Inspectorate of Prisons, *Annual Report for the period 1 April 2007 to 31 March 2008* (Cape Town: Judicial Inspectorate of Prisons, 2008), 22.

<sup>78</sup> *Bromley Briefings June 2009* (London: Prison Reform Trust, 2009).

<sup>79</sup> Figures provided by Governance and Justice Group <http://governancejustice.org/> in personal correspondence with Paul English, January 2010.

<sup>80</sup> Press release on launch of alternative to pretrial detention, available at: <http://www.glasgow.gov.uk/en/News/Archives/2009/August/ISMS.htm>, accessed February 5, 2010.

program costs only one-fifth of pretrial detention and has reduced offending rates by 50 percent.<sup>81</sup>

In many cases those in pretrial detention should be actively contributing to the growth of societies, using their potential to benefit themselves and others. Yet government policies that involve excessive or indiscriminate use of pretrial detention render this significant cohort less able to contribute to growth and stability. In essence, governments are spending money on a system that undermines their own development policies. They are preventing marginalized communities and individuals from making the most of the few opportunities they have. Indiscriminate and excessive pretrial detention deepens social exclusion.

While the ten million per year who pass through pretrial detention may seem small compared to the billions of people of concern to development frameworks such as the Millennium Development Goals, it must be remembered that those entering pretrial detention are among the most marginalized, poorest, and the hardest to reach members of society and as such must be of core interest in poverty reduction and development. It should also be remembered that the 10 million people who go through pretrial detention each year are the tip of the iceberg: there are hundreds of millions of family and community members affected by those 10 million pretrial detentions.

Pretrial detention lies at the nexus of a host of bad outcomes. If one wanted to reduce poverty, torture, corruption, or disease, one could attack those problems severally. Or, one could reduce the excessive use of pretrial detention.

## **Recommendations**

- Pretrial detention should be used only when no reasonable alternative can address genuine risks of flight or danger to the community. States would better serve their citizens by spending less on locking up people who are presumed innocent and dedicating more resources to social services.
- Particularly in communities where economic privation is widespread, the use of monetary bail should be avoided. Poor people do not have money readily available to deposit with the court. In place of bail, courts should use personal surety (a promise

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<sup>81</sup> ISMS was introduced by the Antisocial Behaviour, etc. (Scotland) Act 2004 and The Intensive Support and Monitoring (Scotland) Regulations 2005, and came into force in April 2005. ISMS is a new type of disposal within the Children's Hearings System that involves issuing a young person with a Movement Restriction Condition (MRC), which by law must be monitored via an electronic tag, for a set period of time. This must be accompanied by Intensive Support during their assessment for ISMS, while on the MRC, and in a post-MRC phase for the same length of time that the young person was on the MRC. For more information, see:

[http://antisocialbehavioursotland.org/asb/controller?p\\_service=Content.show&p\\_applic=CCC&pContentID=2249&pMenuID=9&pElementID=348](http://antisocialbehavioursotland.org/asb/controller?p_service=Content.show&p_applic=CCC&pContentID=2249&pMenuID=9&pElementID=348).

by the defendant to attend court hearings and stand trial) or reporting requirements under which the defendant reports regularly to the local police station as a condition of remaining free pending trial.

- Where monetary bail is used it should be proportionate to an accused person's income and within his means.
- Detained persons should receive basic necessities—nutritious food, clothing, toiletries, and medication—free of charge from the prison authorities.
- Independent monitoring bodies should be supported in regularly monitoring detention centers, including police lock-ups and other places of pretrial detention.
- Governments should regularly publish official statistics on their pretrial detention policies, practices, and population.
- To the extent practicable, pretrial detainees should be able to volunteer (though they should not be coerced) to perform prison-based labor for remuneration, and should be eligible for training and education programs.
- Further research should be conducted on the scope of pretrial detention and its impact on development.

This report draws on diverse and scattered sources of information. With the exception of a small number of country-specific case studies, little up-to-date research exists. Further work is urgently needed in order to better understand the socioeconomic implications of excessive pretrial detention and shape appropriate policy responses. Specific areas ripe for further research include:

- Country-specific surveys examining the over-representation of poor and marginalized communities in detention.
- Country-specific case studies that document the socioeconomic impact of pretrial detention on families and communities.
- Country-specific economic studies utilizing rigorous methodologies to count the costs of pretrial detention.
- Thematic studies that link excessive pretrial detention to other policy areas, including the Millennium Development Goals.

## Appendix 1:

### Summary of *Costly Confinement: The Direct and Indirect Costs of Pretrial Detention in Mexico*

Since 2008, the Open Society Justice Initiative has collaborated with local research experts to analyze the economic consequences of Mexico's pretrial detention laws and practices. The resulting report, *Costly Confinement*,<sup>82</sup> documents both the direct and indirect (or "hidden") costs of pretrial detention in Mexico as borne by the state, detainees and their families, and the general public. This summary presents for an English-speaking audience the principal findings and recommendations of that report.

A more accurate approach to calculating the economic consequences of pretrial detention includes costs which are not always readily apparent. An inclusive approach provides the bigger picture policymakers need to make more informed decisions about the financial sacrifices required to sustain a pretrial detention regime. It is for these reasons that the Justice Initiative commissioned a report to calculate the direct and indirect costs of pretrial detention in Mexico.

#### **The Real Cost of Pretrial Detention in Mexico**

The findings of the Justice Initiative report on the cost of pretrial detention in Mexico are summarized in Table 1. The data contained in the table use Mexico's currency, the peso, at 2006 prices (the latest year for which data was available at the time the report was compiled).<sup>83</sup>

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<sup>82</sup> Guillermo Zepeda (with contributions by Miguel La Rota), *La prisión preventiva en México: Dimensiones, características, costos, alternativas*, (New York: Open Society Institute, 2009) available at [http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles\\_publications/publications/costly-confinement-20100201](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/costly-confinement-20100201).

<sup>83</sup> In 2006, 100 pesos were roughly equivalent to US \$9.30 or €7.30.

**Table 1: Annual cost of pretrial detention in Mexico (in thousands of pesos)**

|  | <b>Median</b> | <b>Minimum</b> | <b>Maximum</b> |
|--|---------------|----------------|----------------|
| <b>1. Costs to the detainees</b>                 |               |                |                |
| a. Labor costs (absence of economic activity)    | 1,331,377     | 273,095        | 2,683,186      |
| b. Risk of death and illness                     |               |                |                |
| i. Risk of homicide                              | 80,293        | 46,582         | 113,213        |
| ii. Lack of medical attention                    | 36,727        | 35,468         | 37,008         |
| c. Employers' payments to Social Security        | 17,649        | 3,620          | 35,569         |
| d. Extra-legal payments (corruption charges)     | 538,828       | 520,367        | 542,962        |
| Total  | 2,004,873     | 879,133        | 3,411,938      |
| <b>2. Costs to the state</b>                     |               |                |                |
| a. Detainees' support                            | 4,007,530     | 3,187,250      | 4,750,920      |
| b. Criminal process                              |               |                |                |
| i. Investigation                                 | 583,839       | 557,284        | 597,088        |
| ii. Judicial process                             | 1,108,967     | 1,058,527      | 1,134,134      |
| iii. Public defense and social assistance        | 88,233        | 85,210         | 88,910         |
| c. Health care provided to detainees' relatives  | 814           | 0              | 4,704          |
| d. Employers' contributions to social security   | 5,455         | 1,119          | 10,994         |
| Total  | 5,794,839     | 4,889,390      | 6,586,751      |
| <b>3. Costs to the families of the detainees</b> |               |                |                |
| a. Assistance / support to detainees             | 480,709       | 321,968        | 732,771        |
| b. Time spent on visits to detainees             | 86,926        | 12,366         | 228,874        |
| c. Representation by private attorneys           | 1,324,237     | 361,145        | 3,869,398      |
| d. Extra-legal payments (corruption charges)     | 15,180        | 10,167         | 19,985         |
| Total  | 1,907,053     | 705,646        | 4,851,028      |
| <b>4. Costs to the community</b>                 |               |                |                |
| a. Services by social organizations              | 72,169        | 69,697         | 72,723         |
| b. Lost productivity                             | 1,331,377     | 1,285,764      | 2,386,210      |
| Total  | 1,403,546     | 1,355,460      | 2,458,933      |
| <b>Total social cost *</b>                       | 9,755,829     | 6,558,084      | 14,895,658     |

\* The total social cost excludes items 1(c), 2(d), and 4(b) to avoid double counting certain costs. This is explained further in footnote 5 below.

Table 1 categorizes the economic burdens of pretrial detention on four distinct groups: the detainees, the state, detainees' families, and the broader community. Each of these categories is further subdivided to reflect more specific costs. Because the available data does not permit a precise picture, a three-tiered range of assumptions (minimum, maximum, and median) about each cost factor are built into the calculation and reflected in three columns.

#### *Cost to detainees*

Based on the number of persons who were in pretrial detention in Mexico in mid-2006, the annual cost of detention for all pretrial detainees ranges between 0.8 billion and 3.4 billion pesos, with a median cost of 2 billion pesos (unless otherwise stated, the median cost will be used from here on). This is calculated by adding the following variables: the amount of income that pretrial detainees who were employed at the time of their arrest

would have earned had they not been detained (1.3 billion pesos);<sup>84</sup> the financial value of life lost or shortened due to the increased risk of homicide (80.3 million pesos) and illness (17.7 million pesos) pretrial detainees face; the annual value of the contribution the state and employers would have made to the social security funds of pretrial detainees who were employed at the time of their arrest (17.7 million pesos); and the amount of money pretrial detainees pay to corrupt guards and other detainees to, respectively, purchase favorable treatment and protection from prison gangs (538.8 million pesos), a widespread phenomenon in the deeply corrupt institutional culture of Mexico's custodial settings.

#### *Cost to the state*

The overall annual cost of detention to the state is 5.8 billion pesos. (This does not include the significant costs associated with the planning and construction of detention facilities, because reliable data on those costs are not available.) The largest portion of this expense is used for the management and administration of the country's detention facilities, including the cost of food, medicine, and clothes for detainees, and general prison maintenance and related expenses (4 billion pesos).

Other costs are the additional expenses incurred by the investigative and judicial authorities, and the public defender system, to deal with defendants detained awaiting trial (1.8 billion). On average, it is far more costly for the prosecutor's office to investigate a case involving a pretrial detainee than one in which the defendant is at liberty. This is because cases involving detainees must, by law, be expedited (e.g., defendants who the state wants remanded into detention have to appear before a court within 48 hours of their arrest). Once remanded, pretrial detainees face, on average, a higher number of court hearings than defendants who are not detained, and the state bears the cost of transporting these detainees between their places of detention and the courts. (Despite this, Mexican prosecutors exhibit a strong preference for pursuing cases with a suspect in detention, and judges rarely limit this tendency in their review of cases.)

The state also bears the public health care costs of detainees' dependants who lose access to private health care as a result of their relatives' pretrial detention (814,000 pesos). Finally, the state ultimately bears the cost of missed contributions to the Mexican Social Security Institute (a statutory body tasked with managing the country's public health, pension, and social security systems) which detainees' employers would have made had the former not lost their freedom (5.5 million pesos).

#### *Cost to detainees' families*

Detainees' families suffer an annual economic loss of 1.9 billion pesos as a result of their relatives' pretrial detention. This includes the cost of supporting their detained relatives with money, food, toiletries, medicines, clothes, and other miscellaneous items not

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<sup>84</sup> In many cases a portion of this cost is also borne by detainees' dependants who lose the financial support of their detained spouse, parent, or sibling.

supplied—or not adequately supplied—by the prison authorities (481 million pesos), and the economic value of the time spent visiting their detained relatives (87 million pesos).

Lawyers' fees are higher when defending pretrial detainees because the lawyers charge for the additional burden of having to arrange and undertake visits to their clients' places of detention and attending, on average, a higher number of pretrial hearings. Thus, the families of pretrial detainees incur an additional total cost of 1.3 billion pesos per year. Despite the fact that criminal defendants are overwhelmingly poor and the cost of a private attorney is a significant burden, some 40 percent of detainees make use of a private lawyer. The others either go without legal representation or are fortunate to be provided with a lawyer by the state (in the latter case the cost is borne by the state—and, by extension, the taxpayer).

Finally, pretrial detainees' families pay some 15.2 million pesos annually in bribes to corrupt prison officials. Such payments are made to facilitate the transfer of gifts and messages to detainees.

#### *Community costs*

Universities and welfare organizations spend about 72.2 million pesos a year to, respectively, provide free legal assistance, and food, clothes, medication, job training, and other services to detainees and their families. Moreover, Mexico's pretrial detention practices cost society an estimated 1.3 billion pesos worth of lost productivity. This is the value of the economic output individuals working at the time of their arrest would have generated had they not been detained.

#### *Total cost*

To arrive at the total annual cost of pretrial detention practices in Mexico it is necessary to total the various detention-related costs listed in Table 1 above, excluding three cost items which, from an accounting point of view, would otherwise be counted twice.<sup>85</sup> This

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<sup>85</sup> These three cost items are:

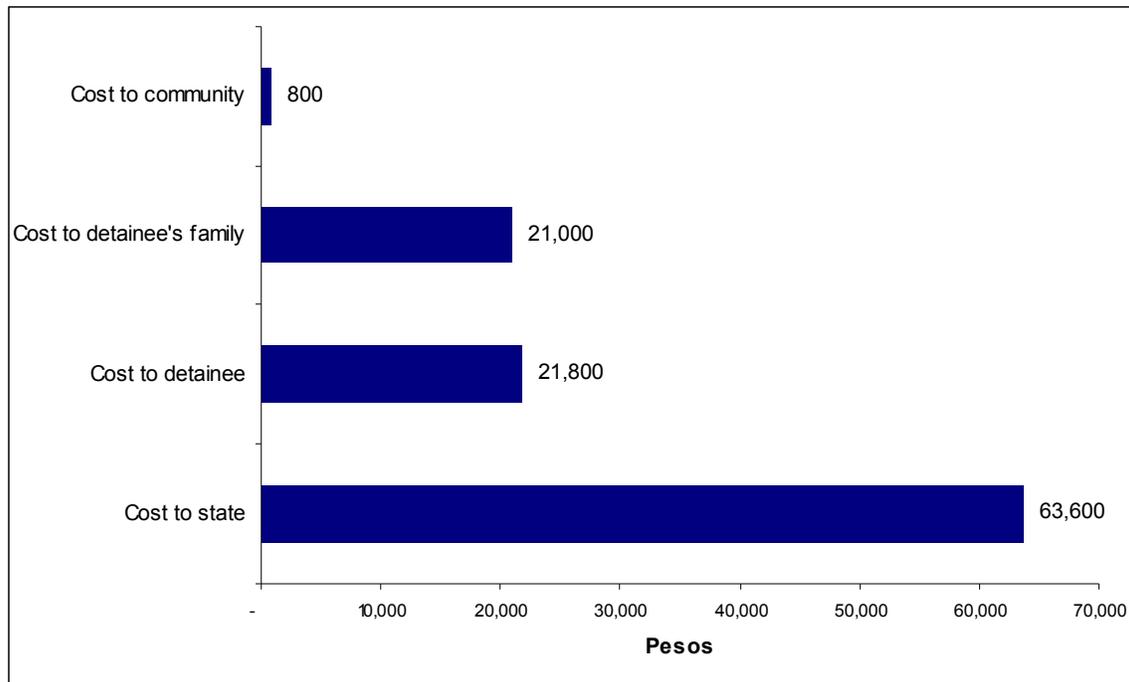
- The annual contribution the state and employers would have made to the social security funds of individuals who were employed at the time of their arrest and pretrial detention (17.7 million pesos). The fact that those contributions are not paid because a worker is detained is counteracted in equal measure by the amount of the social security fund contribution the state or employers no longer have to make. That is, while detainees who were previously employed suffer a loss or cost, the state and employers accrue a concomitant "benefit."
- The annual contribution employers would have made to the public social security fund on behalf of individuals who were formally employed at the time of their pretrial detention (5.5 million pesos). However, the state's loss is the employers' "gain" because they do not have to contribute for a detained employee.
- The annual cost to the community because of detainees' lost productivity (1.3 billion pesos). This cost is already counted under the amount of income detainees, who were employed at the time of their arrest, would have earned had they not been detained (see item 1(a), "labor costs" in Table 1). It would be deceptive to count this cost twice when calculating the overall societal cost of pretrial detention practices in Mexico.

exercise results in an annual cost of 9.8 billion pesos (with a possible range from a low of 6.6 billion pesos to a high of 14.9 billion pesos). This is a substantial amount, which in 2006 was equal to the average annual income of 91,000 Mexican families, or about half a billion pesos more than annual federal spending on public safety.<sup>86</sup>

Moreover, the median annual cost of pretrial detention is equivalent to a bit over a quarter (28 percent) of the money the state spends yearly on *Oportunidades*, Mexico’s world-renowned government social assistance program, which has been replicated in at least 30 other countries. *Oportunidades* makes education possible for children who would otherwise be kept at home to work by making cash payments to families whose children regularly attend school. Payments are also used to encourage other salutary behaviors, such as visits to health clinics. As of 2006, around one-quarter of Mexico’s population—some 27 million people—was participating in *Oportunidades*. If Mexico’s government could reduce by half the costs it incurs from pretrial detention, it would save enough to reach nearly another two million people through this program.

As seen in Table 2, the overall annual cost per average detainee is 107,200 pesos or approximately US\$11,000. This translates to a cost of 63,600 pesos to the state, 21,800 pesos to the detainee, 21,000 pesos to the detainee’s family, and 800 pesos to the community.

**Table 2: Median annual detention cost per detainee borne by the state, detainee, detainee’s family, and the community**



<sup>86</sup> During the 2006 fiscal year, federal budgeted expenditure on public safety was 9.3 billion pesos.

*Costly Confinement* excludes a number of cost variables because of a lack of reliable data, resulting in an inherently conservative cost estimate. Cost variables for which data was unavailable include the following:

- psychological costs incurred by detainees (and their families) as a result of being detained in overcrowded, violent, and abusive conditions, especially for detainees who are eventually acquitted of the charges against them
- loss of employment opportunities for detainees because of the possible interruption of on-the-job trainings and studies (some 60 percent of all prisoners in Mexico are between the ages of 16 and 30 years of age) or because of the social stigma of detention
- cost to detainees' families and communities of communicable diseases transmitted by detainees infected while in detention
- costs associated with the planning, design, and construction of detention facilities.

## Appendix 2: International Instruments Governing Pretrial Detention

For those seeking to reduce the excessive use of pretrial detention and ensure its rational and legal use when it is appropriate, a wide array of international and regional conventions, resolutions, and other guidelines offer standards and guidance. Some of these instruments establish the rights of individuals held in pretrial detention—from the right to liberty and the right to challenge the lawfulness of detention, to the rights of detainees to have access to counsel and to family members. Others articulate the obligations of States concerning pretrial detention and set forth principles for the administration of pretrial detention.

International human rights treaties emphasize the important distinction between people who have been found guilty, convicted by a court of law, and sentenced to prison, and those who have not. Persons awaiting trial or the outcome of their trial are regarded differently because the law sees them as innocent until proven guilty. Underpinning the legal considerations of the applicability of pretrial detention are the right to liberty and the presumption of innocence.

The International Covenant on Civil and Political Rights (ICCPR) states that:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial.<sup>87</sup>

International standards permit detention before trial under certain, limited circumstances only. In 1990 the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders established the following principle:

Pretrial detention may be ordered only if there are reasonable grounds to believe that the persons concerned have been involved in the commission of the alleged offences and there is a danger of their absconding or committing further serious offences, or a danger that the course of justice will be seriously interfered with if they are let free.<sup>88</sup>

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<sup>87</sup> Article 9(3), International Covenant on Civil and Political Rights (ICCPR), available at <http://www.ohchr.org/english/law/ccpr.htm>.

<sup>88</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, 27 August – 7 September 1990, chapter 1, section C, paragraph 2(b).

One of the major achievements of the Eighth UN Congress was the adoption, by consensus, of the UN Standard Minimum Rules for Non-custodial Measures (the “Tokyo Rules”). In particular, these rules provide that:<sup>89</sup>

- pretrial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim;
- alternatives to pretrial detention shall be employed at as early a stage as possible;
- pretrial detention shall last no longer than necessary and shall be administered humanely and with respect for the inherent dignity of human beings; and
- the offender shall have the right to appeal to a judicial or other competent independent authority in cases where pretrial detention is employed.

According to the United Nations Human Rights Committee, detention before trial should be used only where it is lawful, reasonable and necessary. Detention may be necessary “to prevent flight, interference with evidence or the recurrence of crime,” or “where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner.”<sup>90</sup>

The UN Human Rights Committee has also ruled that detention cannot be arbitrary: “The notion of ‘arbitrariness’ is not to be equated with ‘against the law,’ but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.”<sup>91</sup> As a result, pretrial detention “must not only be lawful but reasonable and necessary in all the circumstances.”<sup>92</sup>

Not all standards carry equal legal weight. Some legal instruments (such as conventions) create binding obligations on signatory states, while others (such as declarations and resolutions) reflect broad agreement as to applicable norms of conduct or aspirations for future measures. Still other instruments (such as codes of conduct or bodies of principles) provide non-binding but persuasive and often highly specific guidance as to how states may ensure the fair administration of justice and observance of individual rights. Whatever their weight as a matter of national or international law, these instruments and the standards they contain demonstrate a strong international consensus to protect the dignity and rights of individuals in pretrial detention.

The following resources collect and discuss international and regional standards applicable to pretrial detention, as well as related jurisprudence and commentary:

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<sup>89</sup> Rule 6, *United Nations Standard Minimum Rules for Non-custodial Measures* (The Tokyo Rules), Adopted by the General Assembly on 14 December 1990.

<sup>90</sup> *Human Rights and Pre-Trial Detention. A Handbook of International Standards relating to Pre-Trial Detention*, Professional Training Series no. 3 (New York: United Nations, 1994), 14-15.

<sup>91</sup> *Morais v. Angola*, Communication No. 1128/2002, U.N. Doc. CCPR/C/83/D/1128/2002 (2005) (para. 6.1), available at <http://www1.umn.edu/humanrts/undocs/1128-2002.html>.

<sup>92</sup> *Ibid.*

- [Centre for Human Rights, Crime Prevention and Criminal Justice Branch, \*Human Rights and Pre-trial Detention: A Handbook of International Standards Relating to Pre-trial Detention\* \(1994\).](#)
- [Amnesty International, \*Fair Trials Manual\* \(1998\).](#)
- [Organization for Security & Co-operation in Europe, \*Pre-trial Detention in the OSCE Area\* \(1999\).](#)
- [Lawyers Committee for Human Rights, \*What Is a Fair Trial? A Basic Guide to Legal Standards and Practice\* \(2000\).](#)
- [Office of the High Commissioner for Human Rights, \*Training Manual on Human Rights Monitoring\* \(2001\).](#)
- [Office of the High Commissioner for Human Rights in cooperation with the International Bar Association, \*Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers\* \(2003\).](#)
- [UN High Commissioner for Refugees, \*Selected Documents Relating to Detention\* \(2009\).](#)
- [Irish Penal Reform Trust, \*Detention of Children in Ireland: International Standards and Best Practice\* \(2009\).](#)
- [International Network to Promote the Rule of Law, \*International Standards that relate to Detentions, Corrections, and Prisons\* \(2010\).](#)

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