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”We Are Left to Rot”: Arbitrary and Excessive Pretrial Detention in Bolivia

Aya Fujimura-Fanselow* Elisabeth Wickeri†

*Fordham University School of Law

†Fordham University School of Law

SPECIAL REPORT

"WE ARE LEFT TO ROT": ARBITRARY AND EXCESSIVE PRETRIAL DETENTION IN BOLIVIA

Aya Fujimura-Fanselow[*] *& Elisabeth Wickeri*[**]

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* Fellow, Joseph R. Crowley Program in International Human Rights, Leitner Center for International Law and Justice; J.D., Fordham University School of Law, 2004.

** Executive Director, Leitner Center for International Law and Justice, Fordham University School of Law; J.D., New York University. The authors would like to thank the editors and staff of the *Fordham International Law Journal* for their editorial work on this piece.

INTRODUCTION

"The incarcerated are basically abandoned."[1]

"We're dealing with people deprived of liberty; it's one of the last problems in terms of priorities for the government. There isn't attention to it..."[2]

"Pretrial detention is not always wrong; it can be necessary to prevent the flight of a criminal suspect and/or illegal tampering with evidence or the process itself. Pretrial detention is legal if it meets carefully defined conditions in human rights law, particularly the right to liberty and security of the person, and the principle of presumption of innocence."[3]

The excessive and arbitrary use of pretrial detention in Bolivia and worldwide is a grave human rights violation with serious and lasting consequences not only for detained individuals, but for their families, communities, and the State.[4]

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1. Interview with Ramiro Llanos, Director General, Bolivian Prison System [Regimen Penitenciario], in La Paz, Bolivia (May 23, 2012). Interviews were conducted in English by the Fordham delegation, assisted by interpreters fluent in both Spanish and English, where needed. In many cases, interviews with detainees were conducted in the presence of individuals associated with nongovernmental organizations, primarily the Pastoral Penitenciaria, that have established ties with detainees. The delegation ensured that all interviewees were informed of the interview's purpose, its voluntary nature, and how the information provided would be used. All named individuals consented verbally or, subsequently, in writing, to be interviewed and quoted. Because of the sensitive nature of the issues examined, the full names of certain interviewees who contributed to this Report have been withheld.

2. Interview with Ramiro Leonardo Iquise Pally, National Program Manager of People Deprived of Liberty and the Program of Disabilities, Office of the Ombudsman, in La Paz, Bolivia (May 24, 2012).

3. OPEN SOC'Y FOUNDS., PRETRIAL DETENTION AND TORTURE: WHY PRETRIAL DETAINEES FACE THE GREATEST RISK 18 (2011).

4. *See* Martin Schönteich, *The Scale and Consequences of Pretrial Detention Around the World*, *in* JUSTICE INITIATIVES: PRETRIAL DETENTION 13–17 (2008), *available at* http://www.opensocietyfoundations.org/sites/default/files/Justice_Initiati.pdf; ROY WALMSLEY, INT'L CENTRE FOR PRISON STUDIES, WORLD PRE-TRIAL/REMAND IMPRISONMENT LIST (2008), http://www.prisonstudies.org/info/downloads/WPTRIL.pdf (discussing the different definitions for and ways to measure pretrial detention). For purposes of this Report, "[p]risoners in pre-trial detention, or on remand, are those who have been detained without a sentence and are awaiting legal proceedings. They are also known as untried or unconvicted prisoners." *Pre-trial Detention*, PENAL REFORM

On any given day, approximately three million people worldwide are in prison awaiting trial, and during the course of an average year, ten million people are admitted into pretrial detention.[5] Out of the worldwide incarcerated population, one out of every three people in detention is awaiting trial and has not been found guilty of a crime.[6]

In Bolivia, of the 11,516 persons deprived of liberty throughout the country as of December 2011,[7] 9,626, or 84% percent of these prisoners, have not been sentenced.[8] This number has increased in recent years, almost tripling between 2001 and 2011 from 3,747 to 9,626.[9] At the same time, the number of sentenced prisoners has remained relatively constant at approximately 2,000 persons per year.[10] In Bolivia, as in other countries, many of these individuals spend months and even years imprisoned, without being tried or convicted, much less sentenced.

Despite national and international human rights legal protections that ensure fair trial rights, pretrial detention is ordered excessively and arbitrarily both in Bolivia and worldwide. The Director of the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD) has classified the practice as "prison genocide."[11] The Inter-American Commission on Human Rights, at the conclusion of the 147th Period of Sessions in March 2013, made the powerful statement that "the excessive

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INT'L, http://www.penalreform.org/themes/pre-trial-detention (last visited Apr. 26, 2013).

5. Schönteich, *supra* note 4, at 11.

6. *Id.* at 13.

7. FUNDACIÓN CONSTRUIR, REFORMA PROCESAL PENAL Y DETENCIÓN PREVENTIVA EN BOLIVIA [CRIMINAL PROCEDURE REFORM AND PRETRIAL DETENTION IN BOLIVIA] 65 (2012) [hereinafter FUNDACIÓN CONSTRUIR REPORT], *available at* http://www.fundacionconstruir.org/index.php/documento/descargar/archivo/ReformaProcesalB_62.pdf.

8. *Id.* at 67.

9. *Id.*

10. *Id.*

11. *See* GUILLERMO ZEPEDA LECUONA, OPEN SOC'Y JUSTICE INITIATIVE, MYTHS OF PRETRIAL DETENTION IN MEXICO 7 (1st ed. 2005), *available at* http://www.opensocietyfoundations.org/sites/default/files/myths-pretrial-detention-mexico-20100825-en_0.pdf (reporting the statement of Elías Carranza).

use of pretrial detention is contrary to the very essence of democratic rule of law."[12]

International human rights law contains extensive protections for individuals who are brought into the criminal justice system, including the right to the following: due process, the presumption of innocence, liberty, protection against arbitrary or unlawful detention, presumption of release pending trial, the assistance of competent and effective legal counsel, and trial within a reasonable time or release pending trial.

Similarly, Bolivian law, through both its Constitution and its Criminal Procedure Code (the "CPC"), contains human rights protections that relate to pretrial detention. Both the Constitution and the CPC guarantee the right to freedom and articulate the narrow circumstances under which personal liberty can be restricted, as well as the purpose that such restrictions should serve. This right of liberty is protected through a presumption of innocence. Until it is proven that an individual has violated the rule of law through due process, that individual must be treated as innocent and must therefore be accorded all the rights granted to an innocent person.

As this Report describes, these rights are routinely violated in the Bolivian criminal justice system: Individuals are detained in contravention of the law and not only are they detained illegally, they are then held in pretrial detention beyond the legal time limits. Judges forgo their independence by allowing citizen security concerns to influence their decisions to impose pretrial detention. Given the gross insufficiency of human resources, particularly the dearth of public defense attorneys, most accused individuals never see a lawyer and lack even basic information about their rights. They are thus effectively denied a meaningful defense. Widespread corruption, including bribery, also impacts pretrial detention decisions. The problem disproportionately affects the poor, both in terms of the likelihood that they will be placed in pretrial detention and the consequences they face upon release, as they sink even more deeply into poverty.

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12. Annex to Press Release Issued at the Conclusion of the 147th Period of Sessions (Apr. 5, 2013), http://www.oas.org/es/cidh/prensa/comunicados/2013/023A.asp

This Report represents the culmination of a yearlong interdisciplinary project undertaken by the Leitner Center for International Law and Justice at Fordham Law School. A delegation from Fordham visited Bolivia in May 2012 to conduct research and interviews. The Fordham delegation was led by the 2011–12 Crowley Fellow in International Human Rights, Aya Fujimura-Fanselow. The delegation included Fordham Law School Professor James Kainen, Leitner Center Executive Director Elisabeth Wickeri, Fellow Daniel McLaughlin, and eight second-year law students: Zohra Ahmed, Jennifer Chiang, Gerald Dickinson, Stephanie DiFazio, Zachary Hudson, Leila Mokhtarzadeh, Jonathan Park, and Jeffrey Severson. Members of the Fordham delegation also returned to Bolivia in January 2013 to carry out follow-up research and interviews as well as to conduct advocacy and present findings.

Prior to conducting field work in Bolivia, the delegation participated in an intense program of study throughout the academic year, including a seminar led by Ms. Fujimura-Fanselow and Ms. Wickeri focusing on the intersection of pretrial detention and human rights in Bolivia. During the visit to Bolivia, the delegation conducted individual and group interviews with individuals in pretrial detention, nongovernmental organizations, lawyers, members of the judiciary, academics, donor agencies, members of the government, and the United Nations. Members of the Crowley delegation traveled to nine cities in the departments (or administrative regions) of Beni, Chuquisaca, Cochabamba, La Paz, Potosí and Santa Cruz.

This Report presents the findings of this research effort. Part I sets out the legal framework governing pretrial detention in Bolivia, including an analysis of the transition that Bolivia underwent from an inquisitorial to an adversarial system of law, and considering the legal reforms that resulted in the current law which governs the practice of pretrial detention. Part II then explores the immense gap between law and practice with respect to pretrial detention and the numerous violations that result from this gap. Part III examines the impact of citizen security concerns on judicial decisions to order pretrial detention. Part IV discusses the human resource limitations that affect pretrial detention, as well as the disproportionate impact of pretrial

decisions and the particularly severe effect of pretrial detention on the poor as well as the role of corruption. The Report then concludes with a series of recommendations aimed at ensuring that pretrial detention is applied in a way that conforms with both Bolivian and international human rights protections.

ACKNOWLEDGEMENTS

The Leitner Center benefited from the contributions and assistance of many individuals and organizations in Bolivia and the United States to whom we are deeply indebted. We would like to express our deep gratitude to all of them.

Several individuals and NGOs graciously facilitated our work in Bolivia. In particular, we are grateful to Yerko Ilijic Crosa for being a steadfast, enthusiastic and committed partner throughout the duration of the project and for his humor. We are also grateful to Ramiro Orías Arredondo and Susana Saavedra Badani at Fundación Construir for their partnership and for generously opening up their offices to us during our visits as well as for organizing a roundtable discussion during the Crowley delegation's follow-up trip which provided us with the opportunity to share and obtain valuable feedback on our work. We thank Pastoral Penitenciaria in cities throughout Bolivia for meeting with us and especially for facilitating our access to and interviews with prisoners. We thank "Training and Citizen Rights" ("CDC") and especially Vladimir Nilo Medina Choque for accompanying us on our visit to San Pedro Prison in La Paz.

We are grateful to the Global Campaign for Pretrial Justice at the Open Society Justice Initiative, Open Society Foundations for providing inspiration for this project through a conference with civil society leaders and experts in the field of pretrial justice from throughout Latin America that the author attended (*Encuentro Latinoamericano sobre Justicia Previa al Juicio*) [Latin American Meeting on Pretrial Justice] held in November-December 2011 in Cocoyoc, Morelos, Mexico). Additionally, the authors are grateful to Denise Tomasini-Joshi and Ina Zoon for their continued support and advice as well as Rob Varenik and Martin Schönteich who shared their expertise in the Crowley Seminar.

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We thank interpreters Noah Friedman-Rudovsky, Nicki Greenlee, Sara Shahriari and Alex St.-Louis for their excellent and dedicated interpretation services and for the interest that they took in our work and Adrian Althoff and Susana Medina Day for their translation of key materials and documents.

We would also like to thank the numerous other NGO representatives, lawyers, judges, scholars, and others who took the time to meet with us, and especially those who we continued to work with during our follow-up trip to Bolivia.

Finally, and most importantly, we thank the detainees who we met in prisons throughout Bolivia for trusting us enough to share their experiences and insights. We genuinely hope that this report will contribute to efforts to ensure increased respect for human rights and reduce the arbitrary and excessive use of pretrial detention in Bolivia.

I. *BACKGROUND: THE LEGAL FRAMEWORK AND BOLIVIA'S TRANSITION FROM THE INQUISITORIAL SYSTEM TO THE ADVERSARIAL SYSTEM*

Bolivian law includes numerous protections for individuals who are arrested, detained, or charged with a crime.[13] Many of these protections were codified when Bolivia undertook the fundamental transition from the inquisitorial to adversarial

13. *See infra* Part I.B.

system of law.[14] This section will provide an overview of that transition and demonstrate that failure on the part of the government to adequately institute key elements of the adversarial system, as well as the fact that judges, prosecutors, and defense attorneys continue to retain vestiges of the inquisitorial system in their practices, has meant that the transition remains incomplete. Additionally, as this transformation took place, public dissatisfaction with what was perceived to be a system that was overly sympathetic to the defendant resulted in subsequent backsliding and led to additional changes in the law. The result, which will be discussed in Part II, contributes to the overuse and increased time lengths of pretrial detention.

A. *Legal Background and Transition: Inquisitorial to Adversarial System*

1. Criminal Proceedings Under the Inquisitorial System

Bolivia's legal protections in the area of criminal justice have only a thirty-year history. After Bolivia's institutionalization of democracy in 1982, the State still faced challenges in the administration of criminal justice.[15] While other democratic institutions were rebuilt,[16] the judiciary continued to operate under the authoritarian "Banzer Codes,"[17] a holdover from the military period that prioritized public order during previous military regimes.[18]

The criminal justice system in place at the time was based on the inquisitorial model[19] and was characterized by excessive formalism, the concentration of power in the judge, and lengthy proceedings.

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14. Please note that at times, the terms "adversarial" and "accusatorial" are used interchangeably throughout this Report; the different use of terms is based partly on the different translations and interpretations that were used during interviews.

15. FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 12.

16. *Id.*

17. *Id.*

18. The Criminal Procedural Code in place at the time was Decree Law No. 10426 of August 23, 1972. FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 12; Interview with Jorge Richter Amallo, Attorney and Previous Member of Criminal Procedure Code Reform Team, in La Paz, Bolivia (May 22, 2012).

19. FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 13.

In Bolivia, these qualities resulted in both major procedural delays and violations of defendants' rights. Judges were responsible for most procedural aspects of the process, including investigation, the gathering of evidence, and sentencing. Excessive caseloads resulted in numerous delays, including the postponement of hearings and delays in issuing final decisions. Delays were compounded by the general absence of time limits and deadlines in criminal proceedings.

Criminal prosecutions were based largely on confessions made by the accused and written records prepared by the parties.[20] It was not uncommon for confessions to be extracted through the use of torture.[21] Defendants were left vulnerable because defense lawyers had such a limited role to play in the case and there was minimal, if any, contact between defense attorneys and defendants.[22] The defense attorney could only issue a written response to alleged facts and defendants frequently had no opportunity to view the record. Thus, defendants remained unaware of the record against them.[23] If a conviction resulted, the only avenue for appeal was to request revision of a particular precautionary measure (such as pretrial detention) through *habeas corpus*.[24]

Also under the inquisitorial system, people accused of criminal offenses were put into pretrial detention as a rule so that pretrial detention served, in effect, as an anticipated sentence.[25] Individuals with scarce economic resources and those who lacked political power were particularly vulnerable.[26]

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20. *Id.* at 13–14.

21. *Id.* at 13.

22. *Id.* at 14.

23. *Id.*

24. *Id.* at 13.

25. Mandatory sentencing systems were in place whereby individuals charged with medium or highly serious crimes were, in general, held in pretrial detention, and even in the case of less serious crimes the system favored broad use of pretrial detention. *See* MAURICIO DUCE J., CLAUDIO FUENTES M. & CRISTIÀN RIEGO R., THE IMPACT OF CRIMINAL PROCEDURE REFORM ON THE USE OF PRETRIAL DETENTION IN LATIN AMERICA, 3 n.9 (Mauricio Duce J. & Cristiàn Riego R. eds., 2009) [hereinafter CEJA INTRO REPORT], *available at* http://www.cejamericas.org/index.php/areas-de-trabajo/prision-preventiva-seccion/prision-preventiva-y-medidas-cautelares/productos/informes-situacion-de-prision-preventiva-en-america-latina/informes-comparativos (noting that under Bolivia's 1973 criminal procedure system there were "indefinite mandatory sentences for recidivists, habitual offenders, and professional criminals").

26. FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 14.

Often, detainees were held for longer periods than their sentences would have been had they been convicted and sentenced.[27]

As efforts to combat the manufacture, transport, and sale of drugs increased, so too did the number of individuals brought into the criminal justice system, and by extension, the number of people in pretrial detention. [28] In particular, the implementation of "Law 1008" (the Law on the Regime Applicable to Coca and Controlled Substances) contributed to an increased number of people in pretrial detention, given that pretrial detention was effectively mandatory for anyone arrested on this basis.[29]

2. Transitioning to the Adversarial System: Law 1970

A 1992 study by the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD), provided an important impetus to the beginnings of reform.[30] The report revealed several key flaws of Bolivia's criminal justice system including delays in the justice system; violation of the principle of prompt and timely justice; lack of compliance with constitutional guarantees; corruption; discrimination against disadvantaged sectors of society,

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27. *Id.* at 13.

28. *Id.* at 14.

29. *Id.* While a full discussion of Law 1008 is beyond the scope of this Report, in the case of crimes under Law 1008, pretrial detention was, in effect, mandatory. This Law, Bolivia's first national legislation on drugs, was implemented on July 19, 1988. The United States played a strong role in the drafting of this Code. *See* Diego Giacoman, *Drug Policy and the Prison Situation in Bolivia*, *in* SYSTEMS OVERLOAD—DRUG LAWS AND PRISONS IN LATIN AMERICA 21, 21–22 (2011), *available at* http://www.druglawreform.info/images/stories/documents/Systems_Overload/TNI-Systems_Overload-def.pdf (analyzing drug policy and prisons in Bolivia, the study made the following analysis of Law 1008: "its ambiguities and vagueness in several aspects have opened the way to excessive penalization . . . . In the criminal proceedings pursuant to Law 1008, the presumption of innocence is eviscerated by pre-trial detention, the issuance of arrest warrants for defendants who are in absentia, and the provisional registration of the assets of the persons involved. Law 1008 includes elements which in themselves violate constitutional and civil rights, and which, given the manner in which they are carried out, presuppose the systematic violation of human rights in the most vulnerable sectors of the population"). At the end of 2011, forty-five percent of pretrial detainees were detained for crimes related to Law 1008, making it one of the most common bases for pretrial detention. *See* FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 137.

30. FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 14.

including financial barriers that prevented access to justice for those without resources; weaknesses among judicial operators; and political interference that violated the principle of judicial independence.[31]

It was in the context of these findings that efforts towards a criminal reform process started. This process was also driven by the fact that by 1995, eighty percent of the incarcerated population of Bolivia was made up pretrial detainees, a figure that generated intense criticism.[32] On March 25, 1999, Bolivia enacted Law No. 1970 ("Law 1970").[33] Soon after, the Law of "Jubilee 2000," a criminal pardons law, was enacted.[34] In

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31. *Id.*

32. *Id.* at 15.

33. Codigo de Procedimiento Penal No. 1970, Ley del 25 de Marzo de 1999 [Criminal Procedure Code No. 1970, Law of Mar. 25, 1999] [hereinafter CPC 1970] (Susana Medina Day, trans.) (on file with author). The reform of Bolivia's criminal procedural code was part of a trend of reform throughout Latin America. The reforms were influenced by, and to some extent modeled after criminal procedural codes from both neighboring countries including Argentina, Chile, Costa Rica, El Salvador, Guatemala, and Paraguay as well as countries further afield including Germany and Italy. The reforms incorporated international human rights principles. Bolivian lawyers, several of whom the Crowley delegation met with, participated in the drafting process. There was also participation and influence from neighboring countries in Latin America, as well as international donor agencies, including the United States Agency for International Development ("USAID") and the German Technical Cooperation Agency ("GTZ"). *See* LETICIA LORENZO, THE IMPACT OF REFORM PROCESSES IN PREVENTIVE PRISON IN BOLIVIA 11 (Mauricio Duce J. & Cristián Riego R. eds., Adrian Althoff trans., 2012) (2009) [hereinafter CEJA BOLIVIA REPORT]. There has been some debate about the extent to which the reforms were a response to international pressure as opposed to originating from and being motivated by a domestic impetus. Roger Valverde Perez, a Bolivian lawyer, argues "[The] code was imported and didn't respond to the reality of Bolivia. Now we are adjusting the code to the reality in Bolivia." Interview with Dr. Roger Valverde Perez, Attorney, in La Paz, Bolivia (May 21, 2012). When discussing what motivated the reform, another lawyer said: "And this reform was part of a regional trend. Also, international organizations demanded a change of this nature." Interview with Jorge Richter Amallo, *supra* note 18. For further discussion and analysis of judicial reforms throughout Latin America, see LINN HAMMERGREN, ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA 27–54 (2007); Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617 (2007); Leonard L. Cavise, *The Transition from the Inquisitorial to the Accusatorial System of Trial Procedure: Why Some Latin American Lawyers Hesitate*, 53 WAYNE L. REV. 785 (2007); Jonathan L. Hafetz, *Pretrial Detention, Human Rights, and Judicial Reform in Latin America*, 26 FORDHAM INT'L L.J. 1754 (2002); Richard J. Wilson, *Supporting or Thwarting the Revolution? The Inter-American Human Rights System and Criminal Procedure Reform in Latin America*, 14 SW. J.L. & TRADE AM. 287.

34. FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 19.

combination, by 2001, these laws reduced the percentage of pretrial detainees within the incarcerated population to sixty-seven percent.[35]

Law 1970 created an adversarial system of justice, characterized by orality, the guarantee of rights and the principles of openness, immediacy, and the speedy and economic processing of cases, as well as the application of pretrial detention as an exceptional measure.[36] Together with new constitutional guarantees ensuring due process, the new system was designed to treat accused persons as subjects with rights.[37] Among the many new elements of the system were time limits at different stages of the criminal justice process;[38] expanded public participation through citizen judges;[39] delegation of criminal justice duties among different institutions;[40] greater participation of victims in the criminal justice process;[41] greater respect for cultural diversity[42] as well as a separate system to process cases involving indigenous persons;[43] and simplification of the process including alternatives to trial.[44]

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35. *Id.*

36. CEJA INTRO REPORT, *supra* note 25, at 13–14 ("The normative and procedural structure of adversarial systems is constructed on a specific mechanism of the exceptional use of protective measures. The procedure necessary for its legitimacy, the requirement of information that allows one to reach the conclusion that the prosecutor has a good case at this early stage, and the deliberation of the judge are based on the idea of protecting the process.").

37. These rights include the prohibition of a conviction without a final judgment in a public oral trial; the legitimacy of courts to be used to try individuals; the impartiality and independence of the judiciary; the rights guaranteed to the defendant; the presumption of innocence; the application of precautionary measures as an exceptional manner; the right to defense; the right to an interpreter; and equality. FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 20–25.

38. CPC 1970, *supra* note 33, arts. 113, 239.

39. *Id.* art. 52.

40. Crimes were to be investigated by the Public Ministry, an organ distinct from the judiciary, and investigation was to be conducted with objectivity and in accordance with the law. *Id.* arts. 73, 279. The Public Prosecutor was to direct the investigative police. *Id.* arts. 74, 297.

41. *Id.* arts. 11, 81, 382.

42. *See id.* art. 10. The right to translation and interpretation services for non-Spanish speaking defendants.

43. A discussion of the indigenous justice system is beyond the scope of this Report, but has been studied by legal scholars. *See, e.g.*, INTER-AM. COMM'N ON HUMAN RTS., ACCESS TO JUSTICE AND SOCIAL INCLUSION: THE ROAD TOWARDS STRENGTHENING DEMOCRACY IN BOLIVIA, OEA/Ser.L./V/II, doc. 34 (June 28, 2007); John L. Hammond,

Most significantly, reforms affecting pretrial detention were a core component of the new system: pretrial detention was to be an exceptional measure to be applied proportionately.[45] In cases of doubt, the measure most favorable to the accused was to be adopted.[46] Significantly, pretrial detention was to be imposed only when tied to one of two procedural purposes, namely ensuring the discovery of the truth and preventing the accused from fleeing or from obstructing the investigation.[47] Finally, limits were placed on the total duration of pretrial detention.[48]

When Law 1970 was first implemented, the reforms seemed at least partially successful with respect to their intended outcome:

> [P]retrial detention became the exception. This helped take a load off the penitentiary system. There was great expectation on the part of society that there would be no justice delays, there would be access and fast due process, and that there would be equality within the system. In a sense, they were advocates of the accusatorial system.[49]

This positive response and optimism, however, was short-lived and soon thereafter, "society liked it on paper only."[50] One result of the oral and public hearings, a central element of the adversarial system, was that society became more aware of the workings of the judiciary[51] and, in turn, more critical of a perceived "benefit to the accused more than the victims."[52] The popular perception was that "crime rates increased after the reform of the criminal procedure code," and people began to

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Indigenous Community Justice in the Bolivian Constitution of 2009, 33 HUM. RTS. Q. 649 (2011).

44. FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 24.

45. CPC 1970, *supra* note 33, arts. 7, 232.

46. *Id.*

47. *Id.* art. 221.

48. *Id.* art. 239(3).

49. Interview with Dr. Edwin Cocarico, Professor of Criminal Procedural Law and Criminal Forensic Practice, Catholic University of Bolivia "San Pablo," in La Paz, Bolivia (May 25, 2012).

50. *Id.*

51. CEJA BOLIVIA REPORT, *supra* note 33, at 30, 45.

52. Interview with Dr. Edwin Cocarico, *supra* note 49. Due to the procedural rights that CPC 1970 protected, "the public felt they were privileging the defense more than the victim." Interview with Jorge Richter Amallo, *supra* note 18.

ask why judges and prosecutors were not fighting crime.[53] The opinion spread that there was a causal relationship between the rights afforded in the new CPC and the increase in crime rates, despite the fact that empirical data did not support this.[54]

Prosecutors and judges complained that the new regulations included too many requirements for imposing pretrial detention,[55] and the time limits were viewed as being too generous to defendants,[56] thus privileging them over victims.[57] Although the new Code also set up "important victim defense programs," prosecutors did not promote them[58] resulting in the general view that the system did not do enough for victims.[59] These early critiques of the system contributed to later efforts to be "very tough on defendants."[60]

3. Responding to Popular Demands: Law 2494 and Law 007

The widespread belief that there was a causal relationship between increased rights for defendants and a criminal reform process that was too "complacent" towards the accused and the growth of crime contributed to citizen insecurity and led the

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53. Interview with Dr. Edwin Cocarico, *supra* note 49.

54. FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 26.

55. Prosecutors argued they were not given "enough time to produce evidence and thus, at the initial hearing the judge will give the defendant freedom." Interview with Dr. Edwin Cocarico, *supra* note 49. Judges, though, said that their hands were tied, and they could not "go above and beyond the laws." *Id.*

56. An analysis of criminal procedural codes in Latin America revealed the following:

> Paradoxically, when adversarial systems increase the speed and visibility of their decisions, they generate confusion because it seems that people are freed very quickly. This is due to the fact that the supervisory judge is mandated to hear preliminary arguments and render a decision regarding protective measures soon after arrest. This swift release of some defendants has generated the impression that those who are "captured" are immediately 'freed,' which undermines confidence in the system. The same occurs when defendants who are charged with minor offenses that do not carry a prison sentence are convicted very quickly or when alternative outcomes such as provisional suspension of the process are adopted. In many countries, this has led to the idea that the system works like a "revolving door."

CEJA INTRO REPORT, *supra* note 25, at 35.

57. Interview with Jorge Richter Amallo, *supra* note 18.

58. *Id.*

59. Interview with Anonymous Official, in La Paz, Bolivia (May 22, 2012) (acknowledging that "[t]hey were partially right because resources weren't used adequately for the victims").

60. *Id.*

pendulum to swing strongly in the opposite direction.[61] Other more deeply structural factors that contributed to crime were ignored in the public debate. Instead, these citizen security concerns were one factor that led to the passage of the National System of Citizen Security Law No. 2494 of August 4, 2003[62] which introduced significant changes with respect to the application of precautionary measures, including pretrial detention.[63]

Under this law, judges were given broader discretionary powers to determine flight risk and obstruction of process, which consequently widened discretion in imposing pretrial detention.[64]

Particularly problematic for due process protections was the incorporation of recidivism as grounds for the application of pretrial detention. Unlike the two limited purposes established in Law 1970 of 1999, recidivism is not related to process and is thus inconsistent with the purpose that pretrial detention is intended to serve.[65]

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61. *See* FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 26. *See also infra* Part III (discussing citizen security).

62. Law 2494 of August 4, 2003, Concerning the National System of Public Security.

63. "In 2002, two years after the New Criminal Procedure Code's ("NCPP") full implementation, "public insecurity" began to be associated directly with the precautionary measures regime, with the insinuation that the application of this regime was excessively lax and was the principal reason for insecurity and increasing crime. This would be reflected later in the Explanatory Introduction to Law 2494 Concerning the National System of Public Security..." CEJA BOLIVIA REPORT, *supra* note 33, at 45.

64. FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 27.

65. In a study analyzing legislation from several countries in Latin America that include "recidivism as a justification for pretrial detention or as a criterion for the judge to consider when evaluating the defendant's situation," the authors state that "[r]ecidivism is also linked to the notion of citizen security and is unrelated to the successful development of the criminal procedure." CEJA INTRO REPORT, *supra* note 25, at 12. They go on to express concern that:

> "These reasons clearly go beyond the protective logic and are a product of the effort that had to be made to combine the regulations on pretrial detention with various criminal-policy values in the system. Social alarm and recidivism are unrelated to ensuring the success of the criminal procedure from the perspective of making certain that the trial and investigation go forward and that the system provides a high-quality response. When social alarm is used to justify pretrial detention, there is really no danger to the development of the investigation or trial by the judicial agency. The issue at stake is instead the legitimacy of the system in the eyes of the people and is directly related to the phenomenon of citizen

Additional changes were made with the Law of Modifications to the Normative Criminal Legal System, No. 007 ("Law 007") of May 18, 2010.[66] The enactment of Law 007 was partially the result of dissatisfaction with the criminal justice system, as "[c]rime rates didn't decrease and so society asked the legislature to give more reforms."[67] Law 007 makes it easier to impose pretrial detention, and harder to be released,[68] and reduces defendants' rights.[69]

Law 007 incorporates the addition of recidivism, as established in Law 2494, as an independent ground upon which pretrial detention can be ordered.[70] Also based on Law 2494,

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security, which has led countries throughout the continent to respond to calls for more security and harsher responses to criminal activity but in no way guarantees the development of an oral trial." *Id.*

While Bolivia was not included in this aspect of the study, the same issues apply.

66. Ley de Modificaciones al Sistema Normativo Penal, Ley 007 (18 Mayo 2010) [Law of Amendments to the Criminal Normative System, Law 007 (May 18, 2010)] [hereinafter CPC 007] (Susana Medina Day, trans.) (on file with author); *see* FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 30.

67. Interview with Dr. Edwin Cocarico, *supra* note 49.

68. According to a 2011 Report by the United Nations Human Rights Council,

> "[M]ore than 70 percent of the prison population is in preventive detention. This percentage may reveal a long-standing practice of using preventive detention as a rule and not as an exception, which, combined with the weaknesses of the administration of criminal justice, is likely to cause frequent violations of the right to personal liberty. This trend, already seen in previous years, was aggravated in 2010 with the adoption of legislation that, on the one hand, increased the grounds for detention and its duration, and restricted the criteria required for its cessation, and on the other, prevented the possibility of applying alternative precautionary measures, as is available for crimes such as smuggling."

Rep. of the UN High Comm'r for Human Rights, Addendum on the activities of her office in the Plurinational State of Bolivia, ¶¶ 68–69, U.N. Doc. A/HRC/16/20/Add.2 (Feb. 2, 2011) [hereinafter UNHCHR Addendum].

69. *See* Interview with Dr. Teresa Ledezma, Professor of Criminal Law III, Catholic University of Bolivia "San Pablo," in La Paz, Bolivia (May 25, 2012) ("There is also the issue of citizen insecurity. This has led to harsher methods and measures of fighting crime and has affected the guarantees of defendant's rights."). One judge explained that "[j]ust to satisfy society, we've been adding more risks to the Code. This makes us have to keep arresting and detaining people . . . ." Interview with Margot Pérez Montaño, Examining Judge, in La Paz, Bolivia (May 24, 2012).

70. CPC 007 incorporates Law 2494's addition of the risk of recidivism as a basis for the application of precautionary measures, including pretrial detention. *See* Law 2494 *supra* note 62, art. 235(second). Precautionary measures, including pretrial detention, may also be applied when the defendant has been convicted through a final

Law 007 includes additional circumstances, including catch-all provisions, for determination of both flight risk and risk of obstruction, greatly expanding the possibility to impose pretrial detention.[71]

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judgment in Bolivia or abroad, if five years have not elapsed since the completion of the sentence. *Id.* Increasing social demand helped motivate this addition to the CPC:

> Although the risk of recidivism is not a trial-related concern but rather a prevention-related one, it was considered important to include a new article on this subject (Art. 235-bis. Recidivism Risk) in order to respond to a growing demand from society, nearly three years after the precautionary regime had become effective. The regulation establishes that the examining judge in each specific case shall evaluate the necessity of imposing a precautionary measure base on the defendant's recidivism (at the request of the prosecution). CEJA BOLIVIA REPORT, *supra* note 33, at 47; *see* Part II.A.2b.

71. These catch-all provisions cover "any other duly qualified circumstance that allows for the reasonable assumption that the defendant is at risk of flight" and "shall directly or indirectly obstruct the discovery of the truth." CPC 007, *supra* note 66, arts. 234–35. According to the CEJA Bolivia Report:

> The text of Art. 234, which established the possible factors to be considered in substantiating flight risk, had been interpreted by practitioners as a closed list of possibilities. It was also understood that all four extremes established in that article had to be present at the same time. [*In the original Art. 234, the factors for determining flight risk were: 1)If the defendant has no domicile or regular residence, or has no ties to family, business or work in the country; 2)If the defendant has the resources to leave the country or go into hiding; 3)If there is evidence that the defendant is making preparations to flee; 4)If the defendant's behavior during the current or a previous trial is such as to indicate his unwillingness to submit to it.*] Art. 234 was modified in three ways:
>
> (1) The factual conditions indicative of flight risk were increased.
>
> (2) It established the factual conditions as a simple listing and not a definitive one, leaving open the possibility of considering other factual circumstances that might indicate risk.
>
> (3) It was established that each of the factual circumstances is independent in the assessment of risk.
>
> Concerning the risk of trial obstruction, *[The factors for this risk originally set forth in Art. 235 were: 1) He [the defendant] would destroy, modify, conceal, suppress or falsify evidence; and 2) He would negatively influence the participants, witnesses or experts in order to benefit himself]* the modification was similar to that for flight risk. In order to cover more fully the factors for obstruction risk, modifications to Art. 235 were introduced as follows:
>
> (1) Increase the number of factual circumstances indicative of obstruction risk;
>
> (2) Allow any other circumstances indicative of obstruction risk to be evaluated;
>
> (3) Allow the judge also to qualify as an obstruction risk any prejudicial action on the part of the defendant carried out through the use of third parties;
>
> (4) Clearly establish that each of the factual circumstances is independent in the assessment of risk.
>
> CEJA BOLIVIA REPORT, *supra* note 33, at 47, nn.35–36.

Several other key changes shift the weight of the decision-making process in favor of increased use of pretrial detention. For example, the role of the victim is expanded in criminal proceedings,[72] with a specific right to request the imposition of pretrial detention even where the victim is not a complainant.[73] Further, judges are empowered to impose pretrial detention, even if it isn't requested.[74] Pretrial detention is easier to order through a procedure designed specifically for cases committed in *flagrante delicto*, but the language of the Code lacks clarity as to when this procedure should be applied.[75] Finally, very significantly, the limits on the length of time for which pretrial detention can be ordered have increased significantly.[76]

4. Assessment of the Reforms

The fundamental legal shift from an inquisitorial to adversarial system was intended to impact the entire criminal justice system and radically transform the roles of actors in the system. However, the transition was incomplete in many ways. For example, while the laws changed, the mentality of actors within the system did not change accordingly.[77] Even as

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72. CPC 007, *supra* note 66, art. 11 (stating that "[t]he victim, *alone or through legal counsel, whether the latter be private or state-provided,* may take part in criminal proceedings *even if he or she is not established as the complainant*") (emphasis added). The emphasized portion was added and part of the original provision was deleted in 2010.

73. *Id.* art. 233. Article 240 was also added allowing victims to make oral declarations regarding pretrial measures. *See id.* art. 240.

74. *See id.*, art. 235(third) ("The judge, upon consideration of the allegations and assessment of the evidence furnished by the parties, shall render a well-founded judgment and stipulate: (1) The inadmissibility of the application; (2) The application of the requested measure or measures; (3) The application of a measure or measures less severe than those requested; (4) *The application of a measure or measures more severe than those requested, and even pretrial detention.*") (emphasis added).

75. *See* CONSTITUTION OF THE PLURINATIONAL STATE OF BOLIVIA [CONSTITUTION] art. 23(4) (Bol.); *see also* CPC 007, *supra* note 66, tit. V.

76. CPC 007, *supra* note 66, art. 239. The cessation of pretrial detention occurs when eighteen months have passed without an indictment or thirty-six months without a sentence. Previously, under CPC 1970, the time limit was eighteen months without a sentence and twenty-four months without acquiring *res judicata*. *See* CPC 1970, *supra* note 33, art. 239. Furthermore, according to CPC 007, exceptions to cessation are made when the delay is attributable to the defendant's dilatory acts. *See* CPC 007, *supra* note 66, art. 239; *see also infra* Part II.A.5.

77. Interview with Dr. Roger Valverde Perez, *supra* note 33 ("There are many authorities who still have an inquisitorial mentality."); Interview with Enrique

foundational a principle as the presumption of innocence was not fully adopted, as reflected in the fact that "many authorities . . . still have an inquisitorial mentality."[78] This "inquisitorial mentality" affects individuals' behavior and, as a result, impacts those who move through the criminal justice system.[79]

Similarly, society has not fully understood or accepted the adversarial system. Part of the reason for this stems from the perception that the adversarial system is overly protective of the rights of the accused and of defendants and, as a consequence, that it fails to sufficiently protect society.[80] The view that the system will *either* protect the rights of the accused *or* society persists. One judge summarized the challenge by noting that "adapting to the new system is difficult because it is hard to sell to the people. People think criminals are being let out of prison easily. People also think there is no security in the cities and that there are a lot more criminals living among them."[81]

This popular sentiment, played out in the media and public discourse, has had a direct effect on pretrial detention rates.[82] Although reducing pretrial detention rates and, relatedly, minimizing delays in the justice system and thus reducing crime

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MacClean Soruco, Attorney and Former Professor and Litigation Instructor, La Paz, Bolivia (May 21, 2012) ("There is a lot of resistance to this new system.").

78. Interview with Dr. Roger Valverde Perez, *supra* note 33.

79. Interview with Reynaldo Imaña, Attorney and Former Director of the Implementation Team of the Criminal Reform Process in Bolivia, in La Paz, Bolivia (May 22, 2012) (explaining with respect to the trainings about oral hearings that were conducted with judges, that "they seemed to understand it while the training took place, but when they went back to their posts, they continued their inquisitorial practices," and further noting that "it is very difficult to reverse the inquisitorial mindset . . . These practices from the old system have lingered"); Interview with Dr. Teresa Ledezma, *supra* note 69 ("One concern is that it's easier for judges and prosecutors to carry over their old practices of the inquisitorial system and to continue practicing the inquisitorial model."). With respect to litigation courses that were offered following the transition, "[i]t is about teaching the values, not just technical skills. A whole change in the mindset is needed." Interview with Enrique MacClean Soruco, *supra* note 77.

80. Interview with Dr. Edwin Cocarico, *supra* note 49 ("[W]e need social support to make a real change from the inquisitorial to accusatorial system. The issue society takes with the accusatorial system is that they see it as advantageous to the accused and not to the victim. They view the accusatorial system as advocating on behalf of prisoners.").

81. Interview with Nelma Teresa Tito Araujo, President of the Second Criminal Court, Department of Justice, in Potosí, Bolivia (May 16, 2012). *See infra* Part III.

82. *See infra* Part III.

through the timely resolution of cases were motivating factors behind the reforms, the system in fact "readily allows people to be placed in pretrial detention."[83] As a result, the number of detainees has increased and led to further congestion and delays.[84]

On the one hand, the fact that pretrial detention has not decreased is at least partially attributable to the failure to fully implement elements of the adversarial system. For example, delays during various stages of the criminal justice process result in longer periods of pretrial detention, beyond the legal limit of three years.[85] In addition, challenges in the relationship between the prosecutor's office and the police accompanied the shift and impede their work.[86] And finally, continued prominence is given to written materials despite the fact that orality is a primary component of the new system.[87]

However, there are other factors to which high pretrial detention rates and, relatedly, problems in the criminal justice system, can be attributed. As one lawyer put it, "The problem is

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83. Interview with Ninoska Ayala Flores, Attorney and National Head, Training Program in Human Rights and the Culture of Peace, Training and Citizen Rights ("CDC"), in La Paz, Bolivia (May 23, 2012).

84. Interview with Dr. Ramiro E. López Guzmán, Appellate Judge, Criminal Division, in La Paz, Bolivia (May 24, 2012) ("Instead of bringing down the number of detainees, the number of detainees has risen . . . . If we look at statistics, from the passage of the criminal code of 1999 to today, the rates of pretrial detention have gone up.").

85. *Id.* (asserting that "[t]he investigative period should last six months but many pretrial detainees are there for much more than six months. The process establishes a minimum and a maximum period of pretrial detention, from eighteen months to three years. Obviously, you can see and if you have the opportunity with the examining judges, they have pretrial detainees longer than three years.").

86. Interview with Enrique MacClean Soruco, *supra* note 77 (explaining how the prosecutor has control over the investigation and its functional direction, which includes the authority to direct the police and seek disciplinary measures for non-compliance, however prosecutors face a lot of resistance from police officers in the compliance of their instructions); Interview with Margot Pérez Montaño, *supra* note 69 ("It's so common that prosecutors have problems with police, and vice-versa, and judges have problems with both of them."); Interview with Reynaldo Imaña, *supra* note 79 ("[T]hey have not been able to manage that police and prosecutors work together. This is still a weak point. The Public Ministry still has not developed strategy to ensure that these two actors work together. This has been the weakest point.").

87. Interview with Reynaldo Imaña, *supra* note 79 ("Where we have least success . . . is the investigative stage. The written aspect still dominates."); *see also infra* Part II(A)(4) (discussing the requirement that the accused disprove the request for pretrial detention through the submission of written documents).

much larger than the shift from inquisitorial to accusatorial."[88] Other factors, including the role of the media, lack of societal trust in the system, and lack of judicial independence, must not be overlooked.[89] Moreover, the structural and institutional changes that should have accompanied the transition were not enacted.[90] Similarly, trainings for actors in the criminal justice system were neither comprehensive nor sustained over a long enough period of time.[91]

B. *Current Legal Framework: Bolivia's Domestic and International Obligations*

Despite the reality of Bolivia's arbitrary and excessive use of pretrial detention highlighted in later sections,[92] on paper, Bolivia's laws contain numerous protections for accused individuals. In addition, Bolivia is a party to all of the core international human rights treaties,[93] as well as the binding American Convention on Human Rights.[94]

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88. Interview with Enrique MacClean Soruco, *supra* note 77.

89. *Id.* ("People only understand the justice system as the media presents. The media does not point out the structural reasons. It does not point out that trials are not public or are bureaucratic. That is why the judiciary has a very bad reputation in the country, people don't trust judges, that it has legitimate authority. Even though we had elections for judges, people did not see this as an improvement, they see it as another political influence on the judiciary. People don't trust the DAs and the prosecutors.").

90. Interview with Margot Pérez Montaño, *supra* note 69 ("Recently, we've been moving backwards . . . we've changed our system but not the infrastructure even though it's supposed to be completely different. Instead of improving, we're actually stuck. We haven't been able to progress the same way our colleagues in other countries have."); Interview with Jorge Richter Amallo, *supra* note 18 ("The problem is not the code, but the implementation. The institutions were not prepared to adopt such a big change.").

91. Interview with Marcelo Barrios Arancibia, Sentencing Judge, in Sucre, Bolivia (May 15, 2012) (discussing that while previously, trainings were held to change this mentality, "for the past three to four years, they [the State] are stepping back"); Interview with Silvia Salame Farjat, President of the Illustrious Bar Association of Chuquisaca, in Sucre, Bolivia (May 15, 2012) ("There was the switch to the accusatorial system, but they did not change the minds of the judges. Neither did they train the attorneys for this new system.").

92. *See infra* Part II (discussing how the practice differs from law, and the actual experience of pretrial detainees in Bolivia, in more detail).

93. *See, e.g.*, International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, A/RES/61/177 (ratified Dec. 17, 2008); Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 (ratified Nov. 16, 2009); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, 2220 U.N.T.S. 3

Moreover, Bolivia's Constitution must be interpreted in light of international obligations,[95] and criminal legislation also makes reference to international standards.[96] As a consequence, international protections—at the stages of arrest, detention, trial, and after trial—form a core component of the rights afforded to criminal defendants. This section will provide an overview of Bolivia's international obligations and review existing domestic protections with respect to pretrial detention.

1. Overview: Fundamental Protections for Criminally Accused Persons

The Bolivian Criminal Procedure Code ("the CPC") and the Constitution are the primary domestic laws addressing pretrial detention and related rights. The CPC and the

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(acceded Oct. 16, 2000); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (ratified June 26, 1990); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (ratified Apr. 12, 1999) [hereinafter Convention against Torture]; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (ratified June 8, 1990); International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (ratified Sept. 22, 1970); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (acceded Aug. 12, 1982) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (acceded Aug. 12, 1982) [hereinafter ICESCR].

94. Bolivia became party to the American Convention on Human Rights on June 20, 1979, which subsequently placed them under the auspice of both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. *See* Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]. The Inter-American Commission promotes human rights among members of the Organization of American States by investigating countries, preparing country reports, mediating disputes about human rights problems, and handling individual complaints submitted to the Commission *Id.* arts. 41, 46, 48, 51. Meanwhile, the Inter-American Court has the advisory power to interpret the American Convention as well as other treaties concerning the protection of human rights within the American states and the adjudicatory power to rule on cases of human rights violations referred to the Court. *Id.* arts. 61, 62, 64

95. *See* CONSTITUTION, *supra* note 75, art. 13(IV).

96. *See, e.g.*, CPC 1970, *supra* note 33, art. 1 (declaring that "[n]o individual shall be convicted unless a final judgment has been issued after having been heard in a public oral trial held pursuant to the Constitution, any international conventions and treaties in force, and this Code."); *id.* art. 5.

Constitution establish the basic principles of the legal process.[97] Both documents also establish fundamental legal protections for criminal defendants including the right to an impartial and independent judge,[98] the right to due process,[99] and in particular, the presumption of innocence which entails that the burden of proof lies with the accuser.[100] The Constitution further states that when there is any doubt in the application of a norm, the interpretation that favors the accused must govern any decision.[101]

The key international provisions establishing these fundamental protections are Article 10 of the Universal Declaration of Human Rights ("UDHR") and Article 14(1) of the International Covenant on Civil and Political Rights ("ICCPR").[102] ICCPR Article 14(1) provides a standard for a "fair and public hearing by a competent, independent and impartial tribunal established by law . . . ,"[103] as well as minimum guarantees[104] and the presumption of innocence.[105] These standards, binding on the Bolivian State and Bolivian

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97. *See* CONSTITUTION, *supra* note 75, art. 180(I) (highlighting key principles, including transparency, orality, promptness, immediacy and equalities of the parties); CPC 1970, *supra* note 33, art. 1.

98. *See* CONSTITUTION, *supra* note 75, art. 120(I) (the right to be heard by a "competent, independent and impartial jurisdictional authority"); *id.* art. 178(I) (establishing the principles of independence and impartiality); *see also* CPC 1970, *supra* note 33, art. 3.

99. *See* CONSTITUTION, *supra* note 75, art. 117(I) ("No person can be convicted without having been previously heard and judged in accordance to due process. No one shall be subjected to criminal sanction that has not been imposed by a competent judicial authority as an executed judgment."); CPC 1970, *supra* note 33, art. 1.

100. *See* CPC 1970, *supra* note 33, art. 6; *see also* CONSTITUTION, *supra* note 75, art. 116(I).

101. *See id.* ("During the process, in case of doubt regarding the application of a norm, the most favorable to the accused or processed shall govern.").

102. *See* Universal Declaration of Human Rights art. 10, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(111) (Dec. 10, 1948); ICCPR, *supra* note 93, art. 14(1).

103. ICCPR, *supra* note 93, art. 14(1). Additional protections are found in several regional documents; Organization of American States, American Declaration of the Rights and Duties of Man art. 26, O.A.S. Res. XXX, OEA/Ser.L/V/II.23 (May 12, 1948); Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 222; African Charter on Human and People's' Rights arts. 7(1), 26, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

104. *See* ICCPR, *supra* note 93, art. 14(3).

105. *See id.* art. 14(2).

judges, are supplemented by numerous international principles and declarations.[106]

The notion of judicial independence is especially important in Bolivia because of the dramatic change that Bolivia underwent during its transition from the inquisitorial to the adversarial system. Indeed, one non-binding set of principles on judicial independence, the Bangalore Principles of Judicial Conduct ("Bangalore Principles"), had been an inspiration for the drafting of Bolivia's own CPC.[107] Notwithstanding public opinion about the role of judges to provide security against perceived criminal threats, judges in the new system are called upon to be impartial arbiters.[108] The commentary to the Bangalore Principles highlights this potential tension, noting that:

> A case may excite public controversy with extensive media publicity, and the judge may find himself or herself in what may be described as the eye of the storm. Sometimes the weight of the publicity may tend considerably towards one desired result. However, in the exercise of the judicial function, the judge must be immune from the effects of such publicity. A judge must have no regard for whether the laws to be applied, or the litigants before the court, are popular or unpopular with the public, the media, government officials, or the judge's own friends or family. A judge must not be swayed by partisan interests, public clamour, or fear of criticism. Judicial independence encompasses independence from all forms of outside influence.[109]

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106. *See, e.g.*, Basic Principles on the Independence of the Judiciary, U.N. Doc. A/CONF.121/22/Rev.1 (1985) ("The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.").

107. *See* Bangalore Principles of Judicial Conduct of 2002, *reproduced in* Report of the Special Rapporteur on the Independence of Judges and Lawyers, Annex, U.N. Doc. E/CN.4/2003/65 (Jan. 10, 2003), *available at* http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf; *see also* Giuseppe Di Federico, *Judicial Accountability and Conduct: An Overview*, *in* JUDICIAL INDEPENDENCE IN TRANSITION 87, 96 n.20 (Anja Seibert-Fohr ed., 2012).

108. *See infra* Part III.

109. JUDICIAL INTEGRITY GRP., COMMENTARY ON THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT ¶ 28 (2007) [hereinafter BANGALORE COMMENTARY], *available at*

A report issued by the Inter-American Commission on Human Rights ("IACHR") on Citizen Security and Human Rights highlights the fragility of weighing this tension in favor of impartiality and notes how the scale often tips the other way in Latin America.[110]

2. Liberty and Detention

At the core of international human rights law is the right to liberty and security of person and protection against arbitrary arrest and detention.[111] Consequently, detentions can only be carried out by competent officials[112] and in accordance with the law.[113] The role of the judge is again paramount in assessing the lawfulness of detention.[114] Although international law provides for a range of situations under which a person can be detained before trial, the imposition of pretrial detention as a general rule is prohibited, and is incompatible with the right to liberty and the right to be presumed innocent.[115] Pretrial detention must be an exceptional measure and used as a "means of last resort."[116]

Bolivian law explicitly incorporates these standards. The Constitution protects against detention without legal

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http://www.coe.int/t/dghl/cooperation/ccje/textes/BangalorePrinciplesComments.pdf (construing the Bangalore Principles.

110. *See* INTER-AM. COMM'N H.R., REPORT ON CITIZEN SECURITY AND HUMAN RIGHTS', OEA/Ser.L/V/II, doc. 57 ¶ 159 (Dec. 31, 2009), *available at* http://scm.oas.org/pdfs/2010/CP25032E.pdf [hereinafter Citizen Security Report].

111. *See* ICCPR, *supra* note 93, art. 9(1) (codifying this fundamental right).

112. *See* Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, Principle 2, G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988) [hereinafter Body of Principles].

113. ICCPR, *supra* note 93, art. 9(1).

114. *See* Bangalore Commentary, *supra* note 109, ¶ 47 ("[A] judge should not deprive a person of his liberty except on such grounds and in accordance with such procedures as are established by law. Accordingly, a judicial order depriving a person of his liberty should not be made without an objective assessment of its necessity and reasonableness. Similarly, detention ordered in bad faith, or through neglect to apply the relevant law correctly, is arbitrary, as is committal for trial without an objective assessment of the relevant evidence.").

115. *See* ICCPR, *supra* note 93, arts. 9(1), 9(3), 14(2); *see also* Body of Principles, *supra* note 112, at Principle 39.

116. *See* United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), Principle 6, G.A. Res. 45/110, U.N. Doc. A/RES/45/110 (Dec. 14, 1990) [hereinafter Tokyo Rules].

foundation,[117] and the CPC requires that pretrial detention be applied as an exceptional measure, stating that "if there is any doubt as to the application of a precautionary measure or other provisions to restrict the defendant's rights or powers, that which is most favorable to the defendant shall be honored."[118]

Both the Constitution and the CPC protect the right to liberty and clearly articulate the narrow circumstances under which this right can be restricted. These circumstances relate to serving process related purposes and ensuring that the case progress through the system.[119] Pretrial detention can be imposed "when it is essential to ensure the discovery of the truth, the development of the process and the application of the law."[120] Furthermore, restrictions on personal liberty can only be imposed "for as long as they need to be applied,"[121] and pretrial detainees must be "treated as innocent individuals" and held in spaces physically separated from convicted prisoners[122] in a manner that minimizes the harm to the detained person.[123] The reason for this separation originates in the justification for pretrial detention, which is to serve procedural, as opposed to punitive purposes; given that pretrial detainees have, by definition, not yet been tried, any type of punitive treatment

117. *See* CONSTITUTION, *supra* note 75, art. 23(III) ("No one can be detained, apprehended, or deprived from freedom, unless in the cases and in accordance to the ways established by law. The execution of the order will require that it be issued by a competent authority and that it be in writing.").

118 . CPC 1970, *supra* note 33, art. 7 (concerning the application of "Precautionary and Restrictive Measures").

119. CONSTITUTION, *supra* note 75, art. 23(I) (stating the right to freedom and personal security); *see also* CPC 1970, *supra* note 33, art. 221.

120. *See* CONSTITUTION, *supra* note 75, art. 23(I); *see also* CPC 1970, *supra* note 33, art. 221. The CPC identifies circumstances under which pretrial detention cannot apply (private offenses, offenses not punishable by imprisonment, and offenses punishable by imprisonment with a legal maximum sentence of less than three years). *See id.* art. 232. In those cases only the measures provided for in Article 240 can be applied. *See id.* Moreover, pregnant women and nursing mothers of children under one year of age cannot be put in pretrial detention unless "no alternative measure is possible." *Id.*

121. CPC 1970, *supra* note 33, art. 221 ("Such measures shall be authorized through a well-founded court order, as regulated herein, and shall last only for as long as they need to be applied.").

122. *See id.* art. 237.

123. *See* CPC 007, *supra* note 66, art. 222 (stating that precautions must be taken, including minimizing the harm to a person's reputation).

would violate their due process rights.[124] The Bolivian government is responsible for the conditions under which detainees are held and for regularly monitoring and enforcing baseline standards.[125]

More specifically, pretrial restrictions on liberty are permissible under international law in limited circumstances.[126] Similarly, CPC Article 233 delineates the circumstances under which a judge may order pretrial detention: when there are "elements of sufficient conviction" with respect to the commission of the offense by the defendant in combination with "elements of sufficient conviction" that the defendant will "not submit to the procedure or shall obstruct the discovery of the truth."[127]

The law establishes the range of factors that a judge can evaluate to determine flight risk, including the following catch-all provision: "Any other duly qualified circumstance that allows for the reasonable assumption that the defendant is at risk of

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124. *See* CPC 1970, *supra* note 33, art. 237 (stating that pretrial detainees are considered innocent and are imprisoned solely for procedural criminal justice purposes).

125. An examination of the conditions of detention for detainees in Bolivia is beyond the scope of this Report; however, prison conditions must meet certain minimum standards prescribed under international law. *See generally* Convention Against Torture, *supra* note 93; ICCPR, *supra* note 93; Tokyo Rules, *supra* note 116; Body of Principles, *supra* note 112, Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977) (Aug. 30, 1955).

126. *See, e.g.*, ICCPR, *supra* note 93, art. 9(3) (discussing pretrial detention); Body of Principles, *supra* note 112, at Principle 39 (explaining that except in special cases, generally those charged with crimes are entitled to be released); Tokyo Rules, *supra* note 116, at Principle 6 (explaining that pretrial detention should be a last resort); *see also* American Convention, *supra* note 94, art. 7(5) (explaining that arrestees must be brought before a judge within a reasonable amount of time after their arrest).

127. CPC 007, *supra* note 66, art. 233 ("Once the formal charge has taken place, the judge may order that the defendant submit to pretrial detention at the well-founded request of the prosecutor or the victim, even if he has not been established as the complainant, when the following requirements are met: 1. The existence of elements of sufficient conviction to sustain that the accused is, with probability, the author or participated in the offense; 2. The existence of elements of sufficient conviction that the accused shall not submit to the procedure or shall obstruct the discovery of the truth."). *But see infra* Part II (discussing the disparity between the Bolivian law as written and how the criminal justice system works in practice).

flight."[128] The factors that a judge can evaluate to determine the risk of obstruction contain a similar provision: "Any other duly qualified circumstance that allows for the reasonable assumption that the defendant shall directly or indirectly obstruct the discovery of the truth."[129] Judges are also permitted to impose pretrial detention in cases of recidivism,[130] and the law provides the judge with flexibility to apply measures "more severe than

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128. *Id.* art. 234 (defining flight risk as "any circumstance that allows for the reasonable assumption that the defendant shall not submit to the procedure, seeking to escape prosecution. To decide on the existence of flight risk, a comprehensive assessment of existing circumstances shall be carried out, with special consideration given to the following: 1. Whether the defendant has a regular domicile or residence, or family, business or work established in the country; 2. Whether the defendant has the means to flee the country or remain hidden; 3. Whether there is evidence that the defendant is preparing to flee; 4. Whether the defendant's behavior during the process or a previous process indicates that he is not willing to submit to it; 5. The defendant's voluntary attitude towards the importance of recoverable damage; 6. Whether the defendant has been charged with the commission of another intentional offense or has received a sentence of imprisonment by a court in the first instance; 7. Whether an alternative outcome was applied to the defendant for an intentional offense; 8. Repeated or previous criminal activity; 9. Whether the defendant belongs to criminal associations or criminal organizations;10. Actual danger to society or to the victim or the complainant; and *11. Any other duly qualified circumstance that allows for the reasonable assumption that the defendant is at risk of flight*" (emphasis added)).

129. CPC 007, *supra* note 66, art. 235 with the Author's added emphasis, defines "risk of obstruction" as:

> [a]ny circumstance that allows for the reasonable assumption that the defendant's behavior shall hinder the discovery of truth. To decide on its existence, a comprehensive assessment of existing circumstances shall be carried out, with special consideration given to the following:
>
> 1. That the defendant might destroy, alter, conceal, remove, and/or falsify evidence;
>
> 2. That the defendant might negatively influence parties, witnesses or experts, so they provide false information or behave in a reluctant manner;
>
> 3. That the defendant might illegally or unlawfully influence Supreme Court justices, Plurinational Constitutional Court justices, and members, technical judges, citizen judges, prosecutors and/or officers and employees of the judiciary system.
>
> 4. That the defendant might induce others to perform the actions set out in paragraphs 1, 2 and 3 above.
>
> *5. Any other duly qualified circumstance that allows for the reasonable assumption that the defendant shall directly or indirectly obstruct the discovery of the truth* (emphasis added).

130. *See* Law 2494, *supra* note 62, art. 235(second) ("Precautionary measures, including pretrial detention, may also be applied when the defendant has been convicted through a final judgment in Bolivia or abroad, if five years have not elapsed since the completion of the sentence.").

those requested," by the prosecutor, including pretrial detention.[131]

In amendments made to the CPC in 2010, a new procedure is established for crimes that were committed in *flagrante delicto*.[132] If the case is accepted as one of *flagrante delicto*, the prosecutor can request pretrial detention even if only one of the two conditions set forth as preconditions for requesting pretrial detention are met: either "elements of sufficient conviction to hold that the defendant is, with probability, the author of, or a participant in an offense" *or* "elements of sufficient conviction to hold that the defendant shall not submit to the procedure or shall obstruct the discovery of the truth."[133] Furthermore, in

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131. CPC 007, *supra* note 66, art. 235(third) notes that "[t]he judge, upon consideration of the allegations and assessment of the evidence furnished by the parties, shall render a well-founded judgment and stipulate:

> 1) The inadmissibility of the application; 2) The application of the requested measure or measures; 3) The application of a measure or measures less severe than those requested; 4) The application of a measure or measures more severe than those requested, and even pretrial detention.

132. *See* CPC 1970, *supra* note 33, art. 230 (defining *flagrante delicto* as "when the perpetrator is caught in the act of committing or trying to commit a crime, or immediately after committing a crime while being pursued by law enforcement officers, the victim or witnesses to the crime").

133. *See* CPC 007, *supra* note 66, art. 233. To request pretrial detention in *flagrante delicto* cases, the procedure, with the Authors' added emphasis, is as follows:

> At an oral hearing, the examining judge shall hear the prosecutor, the defendant and the defendant's counsel and the victim or complainant, verify compliance with the conditions of application provided for in the Article above and decide on applying the procedure.
>
> If the judge accepts the application of the immediate procedure for *flagrante delicto*, at the hearing the prosecutor may:
>
> 1. Request the application of an alternative outcome, including the abbreviated procedure when the conditions set forth in this Code are met.
>
> 2. If complementary acts of investigation or evidence recovery be required, he shall request that the judge grant a term, as deemed necessary, not to exceed forty-five (45) days. The judge shall decide on the request of the prosecutor after the intervention of the victim and the defense;
>
> 3. If he deems that there be sufficient elements of probative evidence, he shall submit the charge and furnish the evidence at the hearing. The complainant may join the prosecutor's indictment or he himself may accuse the defendant at the hearing by furnishing his own evidence. The defendant shall be notified of the public indictment and the private indictment, if applicable, at the hearing and he shall have a maximum of five (5) days to submit any exculpatory evidence. Immediately after this term, the examining judge shall set the date and time of the pretrial hearing, which shall be held within three (3) days. However, upon a well-founded request of the defense,

such cases, the examining judge must grant this request, as long as the case is not one for which pretrial detention is categorically inapplicable.[134]

3. Right to Reasonable Duration of the Process

Bolivian law provides for clear timeframes with respect to the duration of the criminal justice process. These timeframes are rooted in international law, which provides that "[a]nyone 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."[135]

Arrestees are also entitled "[t]o be "tried without undue delay," although there is no precise time frame in these international standards.[136] Further, the necessity of ensuring timely access to process is heightened when individuals are held in pretrial detention. Domestic laws must therefore include strict time limits for the criminal process to ensure that justice delayed does not result in justice denied.[137]

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the judge may extend the deadline for submission of exculpatory evidence by up to forty-five (45) days.

4. Request the pretrial detention of the defendant when any of the conditions set forth in Article 233 of this Code are met, to ensure that the defendant appears at the trial. *The request cannot be denied by the examining judge, except in the event of inadmissibility of pretrial detention.*

Any decision the judge may render with respect to paragraphs 2 and 3 in accordance with the provisions set out in this Article shall not be subject to any appeal.

Id. art. 393(third).

134. *See* CPC 1970, *supra* note 33, art. 232 (listing exceptions to the application of pretrial detention). The role of the Examining Judges is related to the investigation and aspects of the preparatory stage, including the determination of the application of precautionary measures including pretrial detention in contrast to Trial Judges who have jurisdiction over the trials. *See* CPC 007, *supra* note 66, arts. 53–54.

135. ICCPR, *supra* note 93, art. 9(3) (listing minimal guarantees for criminal defendants).

136. ICCPR, *supra* note 93, art. 14(3)(c) (explaining the standards for criminal arrest); *see also* American Convention, *supra* note 94, art. 7(5) (referring to a reasonable time for proceedings).

137. *See* AMNESTY INT'L, FAIR TRIALS MANUAL 61–64 (1998)[hereinafter FAIR TRIALS MANUAL] (discussing the right to trial within a reasonable time).

The Bolivian Constitution decrees the principle of timely and prompt justice.[138] Similarly, the CPC establishes set time limits restricting the total duration of the criminal justice process. Of particular relevance to pretrial detainees, the CPC establishes that the criminal justice process will have a maximum duration of three years,[139] and that pretrial detention "shall cease" if eighteen months pass with no indictment, or thirty-six months pass with no sentence. [140] Exceptions to these enumerated limits include those cases where delays are "attributable to the defendant's dilatory acts."[141] However, the cessation of pretrial detention does not mean an end to the criminal justice process, as alternative measures (such as house arrest) can be ordered at this stage.[142]

The CPC also establishes time limits for the individual stages of the criminal justice process, from the preliminary investigation, which involves both police and prosecutors[143] to the preparatory stage, when there is a maximum of six months from when the defendant is notified of the charge against him. [144] However, extensions are granted under certain circumstances for both of these stages: in the case of the preliminary investigation, there is an exception to the ninety-day limit in the case of "complex investigations," [145] while the

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138. CONSTITUTION, *supra* note 75, art. 115(I) (guaranteeing justice that is plural, prompt, appropriate, gratuitous, transparent and without delay).

139. *See* CPC 1970, *supra* note 33, art. 133 (stating that the maximum time for the trial process is "three years from the first act of the proceedings").

140. CPC 007, *supra* note 66, art. 239 (stating limits on pretrial detention).

141. *Id.* (discussing exceptions to the limits on pretrial detention).

142 . *See id.* arts. 239, 240 (declaring that when "pretrial detention is inappropriate" a judge may order the defendant be put under house arrest, or impose other alternative measures).

143. *See id.* art. 300 (detailing that the police must complete the preliminary stage of the investigation within twenty days of the start of prevention, and subsequently deliver information and evidence to the prosecutor).

144. *See* CPC 1970, *supra* note 33, art. 134 ("the preparatory stage shall be completed within a maximum of six months from the start of the process . . . ."); CPC 007, *supra* note 66, art. 301 ("The term set out in Article 134 of this Code shall begin as of the last notification of the charge provided to the defendants.").

145. *See* CPC 007, *supra* note 66, art. 301 ("Upon receipt of police proceedings, the prosecutor shall analyze their content to: Order that the police proceedings be supplemented, setting a reasonable term not to exceed ninety (90) days, except for complex investigations, in which case the examining judge shall be notified of the extension.").

preparatory stage can be extended up to eighteen months.[146] In this same provision, the CPC also contains a requirement of periodic reporting by the prosecutor to the judge every three months as well as measures that the judge must take when the prosecutor does not present an accusation or other final request within the legal time limits.[147]

Bolivian law further contains provisions that impose repercussions for officials who are responsible for delays of justice. Officials are liable on disciplinary and criminal grounds if they are "negligent" in ensuring that deadlines are met,[148] and can be punished if found guilty of "malicious delay."[149] In accordance with international law, Bolivian officials should regularly monitor and enforce these time limits.[150]

4. Right to Defense

Equality between the prosecution and defense is also guaranteed by the CPC and the Constitution.[151] Related to this concept, defendants have the right to a defense attorney provided by the State if they cannot afford one.[152] This is

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146. *See* CPC 1970, *supra* note 33, art. 134 (articulating that "when the investigation is complex due to the events being linked to crimes committed by criminal organizations, the prosecutor may request that the investigating judge extend the preparatory stage up to a maximum term of eighteen months; this shall not entail an extension of the maximum term of the process").

147. *See id.* art. 134 ("The prosecutor shall inform the judge of the investigation's progress every three months.").

148. *See id.* art. 135 ("Failure to meet the deadlines established in this Code shall result in the negligent official's being subject to disciplinary and criminal liability.").

149. *See* CPC 007, *supra* note 66, art. 177(2) as amended by Law No. 1768 of 10 March 1997 ("The judicial or administrative official guilty of malicious delay shall be punished with the penalty established for the crime of refusal or delay of justice. Malicious delay is understood to be delay caused to accomplish any unlawful purpose.").

150. *See, e.g.*, United Nations, Econ. & Soc. Council, Comm. On Crime Prevention and Criminal Justice, Expert Group on Strengthening Access to Legal Aid in Criminal Justice Systems, Note by the Secretariat, U.N. Doc. E/CN.15/2012/17 (2012), Guideline 4) [hereinafter UN Legal Aid Principles] (describing the steps that States should take in order to "ensure that detained persons have prompt access to legal aid in conformity with the law").

151. CONSTITUTION, *supra* note 75, art. 119(1) (providing for the equal opportunity of parties); *id.* art. 180(I) (asserting that jurisdiction is based on "equality of the parties"). *See* CPC 1970, *supra* note 33, art. 12 ("The parties shall have equal opportunity to exercise their powers and rights throughout the process.")

152. *See* CPC 1970, *supra* note 33, art. 8 ("The defendant . . . shall be entitled to defend himself . . . ."); CONSTITUTION, *supra* note 75, art. 119 (articulating the right to

particularly important given that without access to legal representation, individuals are more likely to "be detained for longer periods of time and, if facing trial, will be convicted."[153]

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems provide a baseline on what legal aid should comprise.[154] Fundamentally, it must be "accessible, effective, sustainable and credible"[155] and based on the rule of law.[156] The Principles provide a specific guideline on "legal aid at the pretrial stage," an indication of the importance of the availability of legal aid at this stage of the process.[157]

5. Protections for Vulnerable Groups

Legal protections for the accused are especially vital for vulnerable criminal defendants who are poor, come from rural areas, or belong to indigenous groups, which is the case for the majority of the accused in Bolivia's criminal justice system.[158] This is because socioeconomic factors and linguistic barriers

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defense); CPC 1970, *supra* note 33, art. 9 (requiring that defense counsel be appointed by the court if necessary).

153. *See* U.N. Secretary-General, *Extreme Poverty and Human Rights: Rep. by the Secretary-General*, ¶ 13, U.N. Doc. A/66/265 (Aug. 4, 2011) [hereinafter *Extreme Poverty Report*] ("When persons living in poverty do not have access to legal representation . . . [t]here is a higher likelihood that they will . . . be detained for longer periods of time, and if facing trial, will be convicted.").

154. *See* UN Legal Aid Principles, *supra* note 150, para. 5 ("The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice . . . [aims] to strengthen access to legal aid in criminal justice systems.").

155. *See id.* para. 15 (asserting that States should enact "specific legislation and regulations and ensure that a comprehensive legal aid system is in place"). Additional guidelines provided by the UN Principles include the following: "States should ensure that effective legal aid is provided promptly at all stages of the criminal justice process"; "Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defence." *See id.* Principle 7 (describing these as ways to ensure that legal aid is "prompt and effective").

156. *See id.* Principle 1 ("[L]egal aid is a fundamental human right and an essential element of a functioning criminal justice system that is based on the rule of law . . . .").

157. *Id.* Guideline 4 (detailing guidelines that govern legal aid activities at the pretrial stage).

158. *See infra* Part IV.

limit the ability to obtain legal assistance, even where such assistance is available.[159]

The relationship between poverty, exclusion, and detention has been identified at the international level as a key priority for States to address in their criminal justice systems. [160] International law demands that laws are applied in a non-discriminatory manner,[161] and the Bolivian Constitution mirrors that standard, even including "economic or social condition" as a prohibited ground of discrimination.[162] The UN Principles underscore the responsibility of States to ensure that all persons, particularly those living in rural or remote areas, are provided with legal aid,[163] calling on States to "allocate the necessary human and financial resources to the legal aid system."[164] Moreover, States are required to ensure that financial resources reach target populations, and not fall into the hands of corrupt officials.[165] A 2011 UN report highlights the disempowerment of poor and excluded groups who come into contact with the State:

> In every country, developed or developing, historical social divisions and power structures ensure that the poorest and most excluded are at a constant disadvantage in their relations with State authorities. Asymmetries of power mean that persons living in poverty are unable to claim rights or protest their violation. They may face obstacles in communicating with authorities owing to illiteracy, lack of information or language barriers, a situation which is particularly

159. *See Extreme Poverty Report*, *supra* note 153, ¶ 13 ("Even when legal assistance is available, discrimination and linguistic barriers are powerful obstacles in the way of those seeking access to justice and redress.").

160. *See id.* ¶ 81(noting that detention has "extensive and long-lasting negative effects on person's living in poverty"); *see generally* Citizen Security Report, *supra* note 110 (explaining how poverty could lead to frequent detention).

161. ICCPR, *supra* note 93, art. 2(1).

162. CONSTITUTION, *supra* note 75, art. 14(II).

163. *See* UN Legal Aid Principles, *supra* note 150, Principle 10 ("States should also ensure that legal aid is provided to persons living in rural, remote and economically and socially disadvantaged areas and to persons who are members of economically and socially disadvantaged groups.").

164. *See id.* paragraph 15. Moreover, "States should ensure that professionals working for the national legal aid system possess the qualifications and training appropriate for the services they provide." *Id.* para. 64.

165. *See, e.g.*, United Nations Convention Against Corruption art. 11, Oct. 31, 2003, 2349 U.N.T.S. 41 [hereinafter UN Convention Against Corruption].

> acute for migrants, indigenous peoples, ethnic minorities and persons with disabilities. As a result, they are less likely to know and understand their rights and entitlements or to report infringements and abuses.[166]

II. *GAPS BETWEEN LAW AND PRACTICE*

As discussed above, the Bolivian legal system establishes legal protections that restrict the use of pretrial detention. The Bolivian Constitution and the CPC guarantee the right to freedom and articulate the narrow circumstances under which personal liberty can be restricted. This right of liberty is protected through a presumption of innocence and, in criminal proceedings, precautionary measures should be applied as the exception. Until it is proven through due process of law that an individual has violated the law, every individual must be treated as innocent and be guaranteed all the rights accorded an innocent person.

Despite these strong protections, individuals' rights are routinely violated in the Bolivian criminal justice system. As a result, pretrial detention is ordered when the legal requirements are *not* satisfied. There are multiple points throughout the criminal justice process when the interpretations that govern the process contradict the law, resulting in decisions that violate human rights guarantees. While the ways in which routine misapplication of the law lead to rights violations will be demonstrated below, the statistics on pretrial detention alone—eighty-four percent of those incarcerated are pretrial detainees [167] —demonstrate that it is not applied as an exception.[168]

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166. *Extreme Poverty Report*, *supra* note 153, ¶ 10.

167. FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 67.

168. Interview with Dr. Angel Arias Morales Fono, Judge and Member of the Commission of Pardons, in La Paz, Bolivia (May 24, 2012) ("The law on criminal procedure establishes that character of exceptionality. And there is a contradiction with what happens today in the prison . . . prisons are filled with pretrial detention detainees . . . yes there is contradiction in the application of the law.").

A. *Violations in Decision to Order Pretrial Detention*

1. Misapplication of the Law Stemming from Misinterpretation

Actors in the criminal justice system misinterpret the law that forms the very basis for the decision as to whether to order pretrial detention. The CPC provision that lays out the circumstances under which pretrial detention can be applied does not include an "and" or an "or" between the two enumerated provisions.[169] By not being explicit, the CPC lends itself to misinterpretation and resulting misapplication with respect to the most crucial element of the law. A reading of the CPC begs the question: can the judge order pretrial detention on the basis of the first provision alone—that is, evidence that the accused is the author of the offense—*or* is the judge required to *also* consider whether the evidence suggests the defendant's risk of flight or the likelihood that the defendant will obstruct justice? An interpretation aligned with the purposes that pretrial detention is intended to serve as well as legal protections as guaranteed in both Bolivian and international law suggest that both elements must be met. Even more definitively, the Bolivian Constitutional Court has recently established that the judge must consider both elements.[170] However, criminal justice actors routinely operate as if only the first provision must be considered. For example, according to the interpretation of one prosecutor: "The Code in 233 clearly states, that to request pretrial detention, it is sufficient that the Public Ministry demonstrate that there are indicators of commission [of the crime]—simply this requirement."[171] As a result of this misinterpretation and misapplication, the protections and guarantees of the CPC and the Constitution are breached.

Judges ignore the requirement that prosecutors must prove flight risk or obstruction of justice, and moreover, in deciding whether to order pretrial detention, they also consider the

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169. CPC 007, *supra* note 66, art. 233.

170. *See* Constitutional Sentence, 0339/2012, Santa Cruz, 18 June 2012, Record 00679-2012-02-AL. A further complicating factor is that the decision making process is different when the case is one of *flagrante delicto*. In these cases, only one element must be satisfied. *See* CPC 1970, *supra* note 33, art. 230; CPC 007, *supra* note 66, art. 393(third).

171. Interview with Prosecutor, in Beni, Bolivia (May 17, 2012).

severity of the crime, a factor that is not even enumerated in the law. As one NGO noted, "cases where judges only consider the severity of the crime and not flight risk and obstruction of justice" are "common" despite the fact that it is against the law to do so.[172] A lawyer who has practiced both as a victims' lawyer and a defense attorney stated: "The rules say that a defendant should not be held, no matter how much evidence there is against them, and no matter the severity of the crimes, if they are not a flight risk. But this does not happen."[173]

2. Violations of Procedural Goals of Pretrial Detention

a. Pretrial Hearing Used to Determine Guilt

"The mentality of actors in the judicial system is so outdated. They believe that an accused person has to suffer in jail and that he has to be punished."[174]

"There is no observance of the presumption of innocence principle … basically judges give preemptive judgments, they decide to convict people before the people are actually tried or sentenced… judges treat them as animals without holding investigations."[175]

"In my opinion, pretrial detention has turned into the anticipated sentence."[176]

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172. Vladimir Nilo Medina Choque, Officer, Training and Citizen Rights (CDC) [Capacitación y Derechos Ciudadanos], in La Paz, Bolivia (May 23, 2012); Interview with Reynaldo Imaña, *supra* note 79 ("I think we need to keep on working on the investigation phase, it has to be much more rigorous . . . There has to be more rigor in the conclusion that there is flight risk or obstruction of justice presented by the defendant. Now, there is more attention paid to the severity of the crime, rather than the danger of flight risk or obstruction of justice. Evidence is needed to justify flight and obstruction of justice. Gravity of crime is over-considered in assigning pretrial detention."); Interview with Joe Loney, Volunteer, Pastoral Penitenciaria, in Cochabamba, Bolivia (May 14, 2012) ("In reality [they] look at the seriousness of the offense."); Interview with Ramiro Orías Arredondo, Attorney & Executive Director, Fundación Construir, in La Paz, Bolivia (May 21, 2012) ("It shouldn't be that the gravity of the crime is considered in pretrial detention. It should only be determined by flight risk and obstruction of justice.").

173. Interview with Jerjes Justiniano Atalá, Private Attorney, in Santa Cruz, Bolivia (May 16, 2012).

174. Interview with Anonymous Detainee in El Abra Prison, in Cochabama, Bolivia (May 14, 2012).

175. Interview with Wilfredo Vasquez, Detainee and Delegate, Riberalta Carceleta, in Riberalta, Bolivia (May 16, 2012).

176. Interview with Jerjes Justiniano Atalá, *supra* note 173.

When judges order pretrial detention solely on the basis of evidence that the defendant committed the crime, they turn the pretrial hearing into the main trial. The distinct and sole purpose of the pretrial hearing is to determine whether pretrial detention should be ordered on the basis that the defendant is likely to flee or to obstruct justice, both of which would interfere with the criminal justice process.[177] On the other hand, the main trial is the platform to determine guilt or innocence.[178] And yet, "in pretrial detention hearings, lawyers try to bring up issues of family, employment, but evidence of guilt is the primary factor. It outweighs the other issues."[179] One Supreme Court justice said that the evidence standard in pretrial hearings is "subjective" and that "a judge looks at indicators of guilt, such as statements of the defendant, evidence presented by the prosecutor, whether there are witnesses placing the defendant at the scene,

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177. In an analysis of the criminal procedure reforms that countries throughout Latin America undertook starting in the 1990s, the Justice Studies Center of the Americas (El Centro de Estudios de Justicia de las Américas (CEJA)), in explaining two justifications for pretrial detention—flight risk and danger to the investigation or risk of obstruction—explains, with regard to flight risk that "the objective to be protected was the system's expectation of judging the defendant. If he or she were to flee, the criminal procedure could only continue up to the oral trial and even in countries in which one can be judged *in ausencia*, the sentence could not be executed." The analysis went on to say that "this raises issues related to the right to defense and has a high impact on the system's image and its legitimacy." Similarly, with regard to the second justification, in the case of "defendants who are thought to pose a threat to the investigation or who may obstruct and alter that process," this obstruction "could limit the system's effectiveness and thus the expectations of holding him or her responsible." CEJA INTRO REPORT, *supra* note 25, at 9. The reason that the codes provide different criteria upon which a judge can base his decision is so that the judge can "make a ruling based on the circumstances of the specific case and how well-established the defendant is in the country." *Id.* at 11.

178. Interview with Fernando Medina, Advisor, Embassy of Denmark, in La Paz, Bolivia (May 24, 2012) (remarking that: "In 2011 it seems we're still in 2001, and the causal factors for pretrial detention are outside the justice system, and it occurs when lawyers turn preliminary trials into the main trials. Instead of the new criminal procedure code protecting human rights the idea of presumption of innocence doesn't work. There is a seventy to eighty percent rate of pretrial detention. Pretrial detention has become the rule").

179. Interview with Anonymous Member of the Judiciary, in Santa Cruz, Bolivia (May 15, 2012). Indeed, "public opinion is . . . influenced by the press to think the hearing is the trial and sentence." Interview with Iris Justiniano, Examining Judge, in Santa Cruz, Bolivia (May 16, 2012). Often, "[t]hese initial hearings are treated like a trial—these should be dynamic and quick but they turn into hearings about guilt and innocence." Interview with Dr. Teresa Ledezma, *supra* note 69.

whether they were caught in the act or at the scene, etc."[180] As one official explained, the judges "let the hearing become a pretrial, starting to talk about the guilt or innocence of the accused when the purpose of the hearing is only to determine flight risk or obstruction of justice."[181]

As a result, pretrial detention serves as a sentence and accused individuals are punished before they have been convicted, much less sentenced.[182] Given that the purpose of pretrial detention is to ensure the defendant's presence at trial and that a determination as to the individual's guilt has not been made at this initial stage of the process, using pretrial detention as a punitive measure contradicts both the spirit and letter of the law.[183] While sentencing and imprisonment are obviously appropriate after a conviction, there is a tendency to conflate the concept of punishment for those who have been found guilty, through the criminal justice procedure, and those who are merely accused. As one official stated: "Pretrial detention is also being used for a pre-sentence."[184] One lawyer, recognizing the human rights violation inherent in such a practice, cautioned that pretrial detention "cannot be the anticipated punishment" and that "pretrial detention is a serious problem because it means violating constitutional rights because it's an innocent person."[185]

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180. Interview with Anonymous Member of the Judiciary, *supra* note 179.

181. Interview with Anonymous Official, in La Paz (May 25, 2012).

182. INTER AM. COMM'N ON HUMAN RTS., REPORT ON TERRORISM AND HUMAN RIGHTS, OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr. ¶ 223 (Oct. 20, 2002) ("The Commission has long emphasized the axiomatic nature of the presumption of innocence to criminal proceedings, and has called upon states to ensure that it is expressly provided for in their domestic laws. It is notable that this presumption can be considered violated where a person is held in connection with criminal charges for a prolonged period of time in preventative detention without proper justification, for the reason that such detention becomes a punitive rather than precautionary measure that is tantamount to anticipating a sentence.").

183. *See* Alon Harish & Alexis Shaw, *Man Forced to Work in Prison Sues Under Anti-Slavery Amendment*, ABC NEWS (Aug. 10, 2012), http://abcnews.go.com/US/man-alleging-prison-labor-violated-anti-slavery-amendment/story?id=16970464 (quoting Columbia Law School professor Jamal Greene, who stated that "[i]f you haven't been convicted at all, your pretrial detention is not a form of punishment.").

184. Interview with Anonymous Official, *supra* note 181.

185. Interview with Jorge Richter Amallo, *supra* note 18.

b. Recidivism as a Basis for Pretrial Detention

The fact that recidivism is grounds for ordering pretrial detention is another glaring example of a violation of the process related justification for pretrial detention.[186] First, ordering pretrial detention on this basis is inconsistent with the goal that pretrial detention is intended to serve: to ensure that the criminal justice process will progress by restricting the liberty of a defendant who is otherwise likely to flee or interfere with the discovery of the truth. Additionally, ordering pretrial detention based on past conduct violates the presumption of innocence by assuming that if an individual was previously convicted, he is also guilty of committing the crime for which he is currently accused. Further, this analysis of guilt and innocence should not even be considered at this stage of the process.[187]

In cases of recidivism, pretrial detention is, in practice, mandatory. If judges do not order pretrial detention, they face the danger of being detained themselves. As one judge said, "[i]f you see that there's somebody with a background, we have

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186. CPC 007, *supra* note 66, art. 234(8) (citing "repeated or previous criminal activity" as a grounds for determining flight risk). *See also supra* note 70 explaining that CPC 007 incorporates Law 2494's addition of the risk of recidivism as a basis for the application of precautionary measures, including pretrial detention. For a discussion of the risk of recidivism as grounds for pretrial detention and the types of evidence submitted to the court to demonstrate this risk, see FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 194–97.

187. The dangers of using recidivism as the basis for pretrial detention include the following:

> [W]hen reasons related to recidivism are incorporated either as an autonomous justification or as criteria that the judge is asked to consider when examining the issue of flight risk or obstruction of justice, the function of pretrial detention in the system goes beyond the strict logic of ensuring the success of the criminal process. The danger in this is the possibility that there will be a return to the logic associated with early sentencing or alarmist considerations. CEJA INTRO REPORT, *supra* note 25, at 13.

Furthermore, "when the questions to be asked are related to whether or not the crime produces alarm in the community or whether the defendant will commit more crimes, the judge must make a projection regarding future conduct that is eminently contrary to the right to be presumed innocent." *Id.* Speaking of the 2004 reform that added recidivism, one lawyer discussed the way in which this new law further restricted the rights of defendants:

> The criminal procedure code was good, and protected defendants but they added some articles in the last few years. For example, if a defendant repeats a crime he is ineligible for alternative measures. The 2004 and 2007 laws made the system worse and don't respect the fundamental rights of defendants. Interview with Silvia Salame Farjat, *supra* note 91.

to look into their records and if you don't put them into pretrial detention, they will detain us so we're really not a guaranteeing system anymore."[188] If prior crimes exist, "there's no discretion and we have to put them in pretrial detention for the citizen's safety."[189]

c. Length of Pretrial Detention Violates Procedural Purpose of Pretrial Detention

Finally, given the process related goals that pretrial detention is intended to serve, the time limits with respect to the maximum duration of pretrial detention are excessive.[190] This is especially true given that actors in the criminal justice system do not use these time periods to collect evidence, conduct investigations, or engage in other activities necessary to prepare for an oral trial.[191] As a result, pretrial detention fails to serve its intended process related purposes:

> The people in control are not using pretrial detention as it is intended. The law says the goal of pretrial detention is not to get in the way of the process, but to guarantee the presence of the accused in the process. Unfortunately those principles have not been applied well by the people who administer the justice system.[192]

Additionally, even if criminal justice actors were using the preparatory stage for its intended purpose, there is no practical purpose served by this extensive period of pretrial detention. These long periods are especially unreasonable in the case of

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188. Interview with Margot Pérez Montaño, *supra* note 69.

189. *Id.*

190. *See supra* Section I(B)(3); *see also* CEJA INTRO REPORT, *supra* note 25, at 16 (discussing restrictions on the duration of pretrial detention as stipulated in reformed criminal procedural codes in many Latin American countries: "The time periods allowed by reformed legislations are extensive if one takes into account the fact that the goal is to ensure that the defendant will appear at trial or protect the evidence (periods of 12, 18 and even 24 months are common)."). As a judge explained, "In legal terms . . . Article 221 of the CPC . . . talks about the reach of preventative measures. It indicates that it has a totally procedural character to ensure the finding out of the truth, the development of the process, and the application of the law." Interview with Dr. Angel Arias Morales Fono, *supra* note 168.

191. Interview with Enrique MacClean Soruco, *supra* note 77. During what should be the investigative stage of the criminal justice process, "[p]ublic defenders are not preparing defensive investigations." *Id.*; *see also infra* Part II(B)(2).

192. Interview with Ramiro Leonardo Iquise Pally, *supra* note 2.

minor crimes or *flagrante delicto* cases[193] when there is a minimal amount of evidence to be discovered and collected or the identity of the accused is clear and, given that the person was caught in the act, the evidence exists at the scene of the crime.[194]

3. Absence of Evidentiary Requirements

"This is illegal detention. All the prosecutor has to do is accuse you, he doesn't need evidence. The prosecutor can have no proof."[195]

Whether judges look to one or both factors listed in the CPC, they exercise excessive discretion and great subjectivity in their decision-making, without requiring supporting evidence from the prosecutor. As a result, the right to the presumption of innocence and other due process rights are violated; the burden of proof is reversed,[196] and pretrial detention is applied as the

193. CPC 1970, *supra* note 33, art. 230. One prosecutor suggested that in *flagrante delicto* cases, "you can finish the whole thing in six months. You can present the preliminary investigation, the charge, and the accusation all at the same time—once you present the charge, you can present the accusation almost immediately after." Interview with Sandro Fuertes Miranda, Prosecutor of the District of Potosí, in Potosí, Bolivia (May 16, 2012).

194. *See* CEJA INTRO REPORT, *supra* note 25, at 16 ("This problem is even more serious if we consider the fact that most of the crimes that the systems investigate with any level of effectiveness involve cases in which the person is caught in the act. In other words, the defendant's identity is clear, and most of the evidence is present at the time of the arrest.").

195. Interview with Anonymous Detainee of Cantumarca Prison Men's Unit, in Potosí, Bolivia (May 16, 2012).

196. Interview with Dr. Roger Valverde Perez, *supra* note 33 ("The law clearly says the burden is on the accuser . . . With the accusatorial, the burden of proof is on the prosecutor. Because of this, the defendant has the right but not the obligation to present proof. The obligation is on the prosecutor and the victim to bring evidence . . . It's the prosecution who has the obligation—the prosecution has the responsibility and not the judge. The judge should act on the evidence given by the prosecution . . . . [However, this is often reversed since] [t]he lack of tools by the Public Ministry means that the defendant has to show his innocence and show that he is not a flight risk for example."); Interview with Alain Nuñez Rojas, Judge, Supreme Court of the Department of Santa Cruz and Member, Commission for the Modification of the Criminal Procedure Code, in Santa Cruz, Bolivia (May 18, 2012) ("In many cases we have given the defendant the burden to prove his conditions including even his innocence, when that should be the prosecutor's job and that kind of behavior by the prosecutors is later ratified by the judges in their decisions. I think this is an error that is very habitually made.").

rule, as opposed to the exception.[197] As a result of the fact that actors in the system do not carry out their respective roles—judges do not require evidence from prosecutors to support their requests for pretrial detention and prosecutors fail to collect this evidence—illegal pretrial detention occurs, and more broadly, the legitimacy of the criminal justice system is undermined.[198]

From the outset, judges are "predisposed towards pretrial detention."[199] They have a "tendency" to order pretrial detention and in fact "almost always grant it."[200] This is partly because they believe that the accused are guilty: as one official stated, "judges have this idea that the accused are criminals and shouldn't be released from jail."[201]

Given that evidence is essentially not required and that a prosecutor's request for pretrial detention[202] will generally guarantee that an accused individual is placed in pretrial detention, the prosecutor has little if any incentive to gather and present evidence.[203] As a result of the lack of strict adherence to the CPC, detention is ordered on unsubstantiated grounds.[204]

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197. Interview with Anonymous Official, *supra* note 181 ("The worst thing that we have seen is that judges make a determination without evidence or any real examination of flight risk or obstruction of justice."); Interview with Ximena Lucía Mendizábal Hurtado, Examining Judge, in Sucre, Bolivia (May 15, 2012) (affirming the "need to train judges so that they will learn that pretrial detention is not the rule"). The following sentiment was repeated with regularity: "Pretrial detention is only an exception in the law, but not in reality." Interview with Jorge Richter Amallo, *supra* note 18. This was emphasized by another lawyer, who observed that "[i]n practice it works that way [that pretrial detention is the rule, not the exception], but legally it should not." Interview with Reynaldo Imaña, *supra* note 79.

198. Interview with Ramiro Leonardo Iquise Pally, *supra* note 2 ("The people who operate the justice system don't use the penal code well and the law of criminal execution and criminal procedure.").

199. Interview with Jorge Richter Amallo, *supra* note 18.

200. Interview with Vladimir Nilo Medina Choque, *supra* note 172. *See* FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 104 (stating that in a clear majority of pretrial hearings, pretrial detention is imposed, as opposed to the application of alternative measures).

201. Interview with Ramiro Llanos, *supra* note 1.

202. Interview with Vladimir Nilo Medina Choque, *supra* note 172 (noting that prosecutors almost always request pretrial detention and in fact, it is "very rare" for a prosecutor to not ask for pretrial detention). One examining judge went so far as to state that in trials for precautionary measures, "the prosecutor will ask for pretrial detention 100% of the time." Margot Pérez Montaño, *supra* note 69.

203. The impact of this reduced incentive is that "[u]nfortunately, the prosecutors go directly to charging and if they don't have sufficient elements of proof,

In addition, the term "elements" in the CPC[205] is overly broad and inclusive, lending itself to this discretion and resulting excessive application of pretrial detention. As a National Public Defender Service of Bolivia (El Servicio Nacional de Defensa Pública, or "SENADEP") lawyer explained, this term "allows too much judicial discretion or interpretation, [contributing to] a culture of presumption of guilt."[206] Another lawyer reiterated that "[a]nything now can be interpreted as either flight risk or obstruction of justice, which stands in opposition to and is contrary to the presumption of innocence."[207] When a prosecutor simply makes a statement such as: "I think that the accused will flee," judges are convinced.[208]

Additionally, flight risk is automatically assumed.[209] This is especially evident in areas of the country that border foreign countries, such as Beni, in the north of Bolivia, which borders Brazil: in the minds of judges, "Closeness to the Brazil border equals risk of flight . . . there is the presumption of risk of flight."[210]

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they still ask for pretrial detention." Interview with Ramiro Leonardo Iquise Pally, *supra* note 2. In the two months of pretrial hearing observations that Fundación Construir conducted, the percentage of instances in which the prosecutor presented evidence was very small—for example, while arguing for pretrial detention on the basis of flight risk in 102 cases, they presented evidence for this in only twenty-six percent of cases; in the case of obstruction of justice the figures were 75 and twelve percent, respectively. While evidence was always presented in cases when pretrial detention was requested on the basis of recidivism, the type of evidence presented was not in conformity with the CPC. *See* FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 189.

204. This is similar to the practice in Mexico, where "[p]retrial detention is being misused to punish accused persons, often only on the basis of police assumptions and suspicions of their guilt." LECUONA, *supra* note 11, at 17.

205. CPC 007, *supra* note 66, art. 233.

206. Interview with Dr. Juan Carlos Chaurara Ojopi, National Public Defender Service of Bolivia ("SENADEP"), in Guayaramerín, Bolivia (May 17, 2012). For a definition and explanation of SENADEP see *infra* Part IV.A.1.

207. Interview with Dr. Edwin Cocarico, *supra* note 49.

208. Interview with Anonymous Official, *supra* note 181.

209. CEJA BOLIVIA REPORT, *supra* note 33, at 42 ("Finally the Tribunal has also made reference to the impossibility of judges' basing their resolutions on mere assumptions about the risk of flight or obstruction in SC1635/2004-R, which noted that the circumstances foreseen in Arts. 234 and 235 of the CPC must be proven by the accuser: . . . *mere reference and presumption of risk of flight or obstruction not being sufficient, given that under Art 16 II and 6 of the CPC, the defendant is presumed innocent until proven guilty.*'").

210. Interview with Juan Carlos Chaurara Ojopi, *supra* note 206.

Judges themselves have an incentive to order pretrial detention because of State pressure, and in fact, criminal proceedings can be brought against judges who do not order pretrial detention.[211] According to "the policy of the State . . . pretrial detention should be given for all serious crimes. Judges should not give liberty to the accused and this has been established by people in all parts of the government."[212] More explicitly, the Public Ministry has issued a recommendation to prosecutors to "impose pretrial detention in all cases of serious crimes."[213] Compliance with this order is monitored through staff sent out by the government to report on judges: "If they suspect that there's a bad judgment for not having detained the person, they [the judge] can be accused."[214] Non-compliance can even result in punishment: one lawyer cited the case of two examining judges who were imprisoned because they did not order pretrial detention. He explained: "The other judges are now afraid. So when they want to release criminals, they need to think twice. The government through the Public Ministry can accuse judges and put them in prison. This explains why there are so many people in prison."[215]

4. Reversed Burden of Proof

"The defendant has to prove to the Court that he has a family, a job, and a home."
[Does this violate the presumption of innocence?]:
"According to our system, no."[216]

"We have this law [on the presumption of innocence], but because of the mentality and values, it is inverted. In Bolivia, the operator of the system thinks the

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211. Interview with Dr. Roger Valverde Perez, *supra* note 33.
212. *Id.*
213. *Id.*
214. Interview with Anonymous Judge in La Paz, Bolivia, (May 24, 2012).
215. Interview with Boris Wilson Arias Lopez, Law Clerk at Constitutional Court, in Sucre, Bolivia (May 15, 2012); Interview with Audalia Zurita Zelada, Attorney, in La Paz, Bolivia (May 22, 2012) ("The government puts pressure and even brings them [judges] to court if they fail to impose pretrial detention."); *see also* FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 222 (providing information on the criminal prosecution of judges and prosecutors who fail to adequately "punish" alleged criminals).
216. Interview with Sandro Fuertes Miranda, *supra* note 193.

defendant is guilty. There's more a presumption of culpability than innocence. It is against the law."[217]

In direct violation of the presumption of innocence and the fact that the burden of proof legally lies with the accuser, judges often order pretrial detention in the absence of any evidence to support the request or without providing the defense with an opportunity for rebuttal.[218] In other cases, judges explicitly reverse the burden, requiring defendants to prove that they are not a flight risk or will not obstruct justice.[219] Not only is the burden of proof reversed, but while judges require minimal if any evidence from prosecutors requesting pretrial detention, they demonstrate great rigidity in the evidentiary requirements that a defendant must furnish to prove that he is *not* a flight risk.

The CPC includes a range of factors that a judge can evaluate to determine flight risk.[220] However, in practice, judges tend to look only for proof of the first factor: "Whether the defendant has a regular domicile or residence, or family, business or work established in the country."[221] Further, rather than allowing the defendant to present different forms of evidence, a judge is "like a horse . . . with blinders" and is "inflexible" in examining anything other than a set of specific documents.[222] Again and again, interviewees explained that the

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217. Interview with Anonymous Attorney, in Potosí, Bolivia (May 16, 2012).

218. Interview with Abel Bikini Villamor, Detainee in Riberalta Prison, in Riberalta, Bolivia (May 16, 2012) (relating that at his pretrial hearing, he was not asked to produce anything. When his lawyer was called into the hearing, he did not say anything either. At the conclusion of the hearing, the judge ordered pretrial detention); Interview with Daniel Chavez Ortiz, Detainee in Riberalta Prison, in Riberalta, Bolivia (May 16, 2012) (explaining that at his first hearing, after the prosecutor requested pretrial detention, the judge, without asking him anything, ordered pretrial detention).

219. Interview with Dr. Teresa Ledezma, *supra* note 69 (explaining that the burden has fallen on the defendant to prove he is "not a flight risk or pose a risk of obstruction of justice").

220. CPC 007, *supra* note 66, art. 234.

221. *Id.* art. 234(1). "In the decisions made by judges, the judges themselves will often say that the defendant did not show proof of home or family and use that as a reason to give the defendant pretrial detention." Interview with Dr. Roger Valverde Perez, *supra* note 33.

222. Interview with Jorge Fernandez, Attorney, SENADEP, in Cochabamba, Bolivia (May 15, 2012). The complete reliance on written documents is also counter to the adversarial system and demonstrates that one of the most central aspects of the inquisitorial system—the reliance on written documents, as opposed to oral—has been retained in the criminal justice system despite reforms. *See infra* Part I.A.4.

decision to order pretrial detention rests entirely on the defendant's ability to furnish a collection of very specific documents to prove employment, home, family and good standing.[223] Judges neglect to apply the law in its entirety—for example, they do not seek evidence as to whether the defendant has the means to flee or is preparing to flee, elements that the CPC includes as factors suggestive of flight risk.[224]

One lawyer laid out the process as follows:

> When I say that the prosecutor has the burden of proof, the prosecution has to show the danger of flight risk or obstruction of justice. The prosecution should show a lack of home, job, family, or that the defendant can easily leave the country because he has a visa or often does leave or that the defendant can easily hurt witnesses . . . You should go to the place where the person lives and use that to prove he has no home. The accused under law does not have to bring proof of his home or other types of evidence. But, in reality, that is how it is.[225]

This practice also violates the provision of Bolivian law that allows for the restriction of liberty only when necessary to ensure truth discovery and, more broadly, "the development of the process."[226] The rigidity and formality that judges demonstrate with regard to acceptable forms of proof runs counter to the purpose for which these documents are sought. Consequently, pretrial detention is assigned not as a result of an analysis as to

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223. Interview with Margot Pérez Montaño, *supra* note 69 (explaining that the burden has shifted to defendants to prove that they have a job, a home, etc.); Interview with Jorge Fernandez, *supra* note 222 ("In pretrial hearings, the prosecutor is supposed to prove the basis with original papers, but the judge doesn't enforce this. The burden is effectively shifted to the defense."); Interview with Jorge Richter Amallo, *supra* note 18 ("In the accusatorial system, the prosecution has the burden of proof, but in practice the opposite occurs."); Interview with Nelma Teresa Tito Araujo, *supra* note 81 (explaining that while it is the responsibility of the prosecutors to provide proof, "that's not the case on the ground").

224. CPC 007, *supra* note 66, arts. 234(2)–(3).

225. Interview with Dr. Roger Valverde Perez, *supra* note 33.

226. CPC 1970, *supra* note 33, art. 221. *See* CONSTITUTION, *supra* note 75, art. 23(I) (providing for restrictions on liberty only "within the limits set forth by law"); Interview with Alain Nuñez Rojas, *supra* note 196 ("It doesn't do us any good to keep detaining people if they are never going to have a sentence. So the end goal of preventative detention is not to punish people . . . it's to make sure they get to the sentence and if they don't get to the sentence it's not useful to us.").

whether the accused is a flight risk or is likely to obstruct justice, but solely because he does not have, or is unable to procure, within the limited time available, the necessary documents.[227] In effect, the criminal justice system penalizes defendants by imposing stringent requirements that are not legally required and, from a practical standpoint, often impossible to satisfy.

a. Requirement to Prove Employment and Housing

Many individuals, even if they are employed, do not have the type of employment proof required because they are employed in the informal job sector.[228] For example, a SENADEP attorney explained: "Everyone should have work certification, but most people do not because they are informally employed."[229] Additionally, while the job certificate must contain a seal, in order to get this seal, "you have to show that you have contributed to the pension and the employer must be registered at the National Labor Ministry."[230] However, such pension plans often do not exist in the informal job sector. Similarly, with respect to proof of housing, most people do not have a copy of their lease.[231] Further, while both documents must be dated before the date of the alleged commission of the crime,[232] given that individuals do not have reason to have such documents in their possession, they are generally unable to meet this requirement.[233]

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227. Interview with Dr. Juan Carlos Chaurara Ojopi, *supra* note 206 (noting that "as a result of people not having papers, they get pretrial detention"); Interview with Nelma Teresa Tito Araujo, *supra* note 81 ("People don't have time to get all the papers. After the crime, they go to the judge and don't have an opportunity to collect their papers. The prosecutor should have to prove these things.").

228. Interview with Joe Loney, *supra* note 172 ("Seventy percent of people don't have formal jobs approved by the Labor Minister. A guy shows that he will be a carpenter's helper. The judge says no because he has no training and wasn't a carpenter's helper before.").

229. Interview with Dr. Juan Carlos Chaurara Ojopi, *supra* note 206.

230. *Id.*

231. *Id.* (noting that "[a]t the pretrial hearing, renters must present the lease contract that date[s from] before they were arrested").

232. *Id.* (describing the dating requirement: "[t]he job certificate must be dated before the commission of the crime in order for it to be useful at the pretrial hearing").

233 . Interview with Anonymous Detainee in Guayaramerín Prison, in Guayaramerín, Bolivia (May 17, 2012) (explaining that her certificates were rejected because they were dated after her arrest).

b. Time Restrictions

The time within which these documents must be collected proves to be an impossible hurdle for most individuals to overcome. In the case of *flagrante delicto* cases, these documents must be furnished within twenty-four hours.[234] In the words of one SENADEP attorney, "twenty-four hours is nothing,"[235] and "85% [of accused individuals] can't produce these documents for the first meeting with the judge. For flagrante cases, there is no chance to get the documents."[236] The fact that the police do not always allow the accused individual to call for assistance from family or defense attorneys upon arrest[237] makes it even more difficult, if not impossible, for an individual to gather the necessary documents in just twenty-four hours. While the accused has twenty days until the pretrial hearing in non-flagrante cases, this is still insufficient.[238]

c. Financial Costs

The financial cost of obtaining these documents is also a serious impediment, especially for the poor. One lawyer explained that "because of timing and because of poverty people usually don't have these elements. They don't deserve to be detained, [but] what can you do?"[239] In some cases, whether legitimately or not, obtaining these documents costs money. One detainee shared: "The lawyer told me he needed a certificate from immigration about travels in the past years, a certificate from work, and a certificate about the house. The lawyer said it would cost US$350."[240] There are also implications for corruption, given the incentive to procure falsified documents.[241]

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234. CONSTITUTION, *supra* note 75, art. 23(4).

235. Interview with Dr. Juan Carlos Chaurara Ojopi, *supra* note 206.

236. Interview with Attorneys, SENADEP, in Trinidad, Bolivia (May 15, 2012).

237. Interview with Jorge Fernandez, *supra* note 222 ("Sometimes the police don't allow a detained person to make a call, so we have to go to the police department and ask who is detained, etc.").

238. *See* CPC 007, *supra* note 66, art. 300.

239. Interview with Jorge Fernandez, *supra* note 222.

240. Interview with Anonymous Detainee in Palmasola Prison, in Santa Cruz, Bolivia (May 17, 2012).

241. *See infra* Section IV.C.

Further, while in some cases it is the inability to obtain documents that results in pretrial detention, in other cases, the poor do not in fact have a job or a home and it is this reality that prevents them from disproving an allegation of flight risk. Without analyzing whether these factors actually suggest that the defendant poses a flight risk, the decision to order pretrial detention is discriminatory.[242] That is, being homeless should not be used as a proxy for flight risk. One individual explained that:

> The poor are more likely to be placed in pretrial detention. Poor people are the most vulnerable because the way to not get pretrial detention is to have a good job with a family—a stable lifestyle. The poor are not in a normal stable situation with jobs and sometimes even a house.[243]

5. Cessation of Pretrial Detention

The CPC allows for the possibility of defendants to request a hearing for the cessation of pretrial detention if they are able to obtain evidence that detention is no longer warranted or if the legal time limits for their detention have expired.[244] However, under the first option, they are often unsuccessful because the documents that they produce as evidence are repeatedly rejected on grounds of minor details; furthermore, because of the passage of time between each of their cessation hearings, detainees often have to obtain and renew documents prior to each hearing.[245] In the case of

242. *Extreme Poverty Report*, *supra* note 153, ¶ 73 ("Often, States invoke grounds of public safety, health or security in an attempt to justify the restriction of human rights through penalization measures. However, human rights law establishes strict requirements for the imposition of limitations on individual rights. Any restriction on the enjoyment of human rights by those living in poverty must comply with several safeguards, including requirements that they be legally established, non-discriminatory and proportionate, and have a legitimate aim. The burden falls upon States to prove that a limitation imposed upon the enjoyment of rights by those living in poverty is in conformity with international human rights law.").

243. Interview with Dr. Maria Esther Padilla Sosa, Coordinator of Centro Juana Azurday, in Sucre, Bolivia (May 15, 2012); *see infra* Part IV.

244. CPC 007, *supra* note 66, art. 239.

245. Interview with Jose Geruiau Vaca Ortiz, Detainee in San Pedro Prison, in La Paz, Bolivia (May 25, 2012) (explaining that he has repeatedly been denied his request for cessation on the basis that his certificates had expired); Interview with Anonymous Detainee in Guayaramerín Prison, in Guayaramerín, Bolivia (May 17, 2012).

expired time limits, given that accused individuals often do not have any further contact with the criminal justice system after their initial pretrial hearing, they are often unable to even present their case for cessation, much less win their motions.[246] Furthermore, given the delays in the system, their cessation hearings are likely to be postponed, further extending the duration of pretrial detention.[247] Additionally, even if they succeed in their motions, this does not excuse or compensate for the fact that they should not have been detained in the first place, particularly on grounds of missing documents. Finally, while a successful request for cessation of pretrial detention results in the termination of pretrial detention, the judge can then apply alternative measures that continue to restrict the liberty of the accused.[248]

B. *Justice Delays: Continuing Violations After the Accused is Placed in Pretrial Detention*

"The main problem is the delay of justice. They don't follow the law. If they did I would be free. . . . Sometimes I wish I had a sentence so I could know when I could get out. With pretrial detention, there's no certainty . . . I am in detention without knowing until when."[249]

"People are still being held after the time limit for pretrial detention expired."[250]

"Justice that delays is justice that never arrives."[251]

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246. Interview with Juan Alberto Melgar Taborga, Detainee in Guayaramerín Prison, in Guayaramerín, Bolivia (May 17, 2012) (describing how after his initial court appearance soon after his arrest in October 2009, he "never again had contact with a prosecutor or judge."). When the Crowley delegation met this detainee in May, 2012, two years and seven months after his arrest and the start of his pretrial detention—beyond the eighteen month time limit for which he was eligible for the cessation of his pretrial detention—he remained in prison. *Id.* Another detainee who has been held in pretrial detention for more than three years after being arrested for robbery has not seen a judge since his initial hearing two days after being arrested. Interview with Anonymous Detainee in San Pedro Prison, La Paz, Bolivia (May 25, 2012).

247. One detainee who had been in pretrial detention for three years and nine months as of May 2012 recounted that he has presented cessation motions thirty times. However, only one hearing had taken place as a result of the fact that the others were suspended on the basis that the prosecutor or the judge was not present. Interview with Emitirco M Candori, Detainee in San Pedro Prison, La Paz, Bolivia (May 24, 2012).

248. *See* CPC 007, *supra* note 66, arts. 239–40.

249. Interview with Jose Geruiau Vaca Ortiz, *supra* note 245 (who had been detained for three years and seven months as of May 2012).

250. Interview with Anonymous Official, *supra* note 59.

Even after an individual is placed in pretrial detention, violations continue. As discussed above, the CPC limits the total duration of the criminal justice process[252] and also places limits on the amount of time an individual can be held in pretrial detention.[253] In addition, there are delineated time limits restricting the length of different stages of the criminal justice process.[254] However, even these limits do not ensure that a defendant will be released after three years or, more broadly, that his case will be extinguished or achieve some other type of finality. Given that extensions are requested and granted with frequency and that suspensions and other delays occur throughout the criminal justice process, these time limits, already excessive, are additionally extended well beyond three years. These factors only further exacerbate human rights violations, particularly the right to be tried without undue delay. In response to the three-year maximum cap on the duration of the process, a lawyer said that "[i]t takes much longer. The courts have invented more and more reasons why the process can take longer."[255]

Not only do delays needlessly extend the period of time that an accused individual is held in detention, they also impede the goals of criminal justice. When a case is unable to proceed and hearings are continually suspended, conviction and sentencing are delayed, potentially indefinitely. If an oral trial is ultimately never held, justice is not served for anyone and the criminal justice system has failed: defendants are neither acquitted nor convicted, victims receive no answers, and justice is not served.

1. Legal Ambiguities

The CPC's time limits are not absolute and the vagueness of the language describing the exceptions to these limits leaves

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251. Interview with Jerjes Justiniano Atalá, *supra* note 173, (describing a popular saying with respect to the manner in which the implementation of Law 1970 occurred).

252. CPC 1970, *supra* note 33, art. 133.

253. CPC 007, *supra* note 66, art. 239.

254. *See supra* notes 140–41, and accompanying text.

255. Interview with Arturo Yáñez Cortez, Attorney and Vice-President of the Illustrious Bar Association of Chuquisaca, in Sucre, Bolivia (May 14, 2012).

room for great discretion. First, an exception to the maximum duration of three years occurs "in cases of contempt of court."[256] Further, "grounds for suspension of the statute of limitations shall suspend the term of the procedure."[257] An exception to the cessation of pretrial detention is that the delay must not be "attributable to the defendant's dilatory acts."[258] Ambiguity about what acts on the part of the defendant might constitute grounds for these exceptions creates disincentive to mount a vigorous defense, given the lack of clarity as to what steps on the part of the defense might result in even longer durations of pretrial detention.[259] For example, despite the maximum ceilings placed on pretrial detention:

> "[I]f you use your resources that are set forth in the law, you are seen to be interfering. For example, if you appeal to a higher court, this will be seen as obstruction of justice by the defendant and because of this, the thirty six months is extended because the defendant does not merit liberty."[260]

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256. CPC 1970, *supra* note 33, art. 133.

257. *Id.*; Interview with Sandro Fuertes Miranda, *supra* note 193 (noting that under the law "[t]he time frame from arrest to sentence must be 3 years or less. But in article 133, there are many factors which can be used to extend the time because of delays"). It is by no means the case that the criminal proceeding will be declared extinct once it has passed the three year limit. For example, "[t]he court has said cases should extinguish because of surpassing [the] three year limit only if the delay is the fault of the State." Interview with Cesar Suarez Saavedra, Appellate Court Judge, in Santa Cruz, Bolivia (May 15, 2012).

258. CPC 007, *supra* note 66, art. 239.

259. *See* Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 27-Sept. 7, 1990, *Basic Principles on the Role of Lawyers,* art. 13, U.N. Doc A/CONF.144/28/Rev.1 (Sept. 7, 1990) (stating that the duties of lawyers towards their clients shall include: "(a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients; (b) Assisting clients in every appropriate way, and taking legal action to protect their interests").

260. Interview with Dr. Roger Valverde Perez, *supra* note 33. With respect to the three-year limit, "it used to be that after thirty-six months [the detained] would get bond. Now the Supreme Court says the time limits can be suspended. The upper limit for all to be done is suspended as well." Interview with Joe Loney, *supra* note 172. Interviewees discussed various ways in which the three-year limit can be extended. One lawyer mentioned that trial time itself does not count toward the three year limit and that the judge must verify when the clock on the three year period started and that "some days" don't count. Interview with Jorge Fernandez, *supra* note 222. The creation of additional accusations is another way for the process to be extended: "[I]f [the] time period allotted is about to finish, they will bring new accusations and new charges to

The fact that a maximum cap is placed on the duration of pretrial detention[261] reduces the incentive for criminal justice actors to take steps to ensure that the investigative stage will progress to the oral trial and thus undermines the criminal justice system.[262] These actors fail to investigate and pursue other activities aimed at truth discovery that justify the process related purpose of pretrial detention. Ironically, while the purpose of the preparatory stage during which the individual is held in pretrial detention is for the police to conduct an investigation under the prosecutor's direction, the fact that an accused individual is detained lessens the urgency of investigation. As one lawyer explained, "pretrial detention . . . is used as a tool for investigation, and, therefore, relaxes the investigation activities. Since the accused are already being held in pretrial detention those in charge don't really care about speeding things up."[263]

In fact, prosecutors even use pretrial detention as a substitute for investigation: when asked why prosecutors tend to request pretrial detention, one judge responded: "They're lazy. They don't want to investigate."[264] She explained that when she asks prosecutors what they have done in the course of the six-month investigative period, "Eighty percent of prosecutors have

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prolong [the] pretrial detention period." Interview with Reynaldo Imaña, *supra* note 79. Another lawyer pointed to Supreme Court jurisprudence according to which the three year period can be extended for certain crimes:

> For crimes against life, and state patrimony, there is no maximum duration for the process. For other crimes, the court held that the maximum duration which once was three years, could turn into ten years, because other things have to be accounted for, such as whether there are too many detainees, if there is flight risk, or whether there have been changes to the prosecutor or the defense attorney. And when you put all these things together, the process can just get drawn on, and on.

Interview with Audalia Zurita Zelada, *supra* note 215.

261. CPC 007, *supra* note 66, art. 239 (establishing an eighteen month limit if the person has not been indicted, and a three year limit if the person has not been sentenced).

262. Interview with Kathryn Ledebur, Andean Information Network, in Cochabamba, Bolivia (May 14, 2012) (explaining that both prosecutors and judges "want to let the three years run"); Interview with Alain Nuñez Rojas, *supra* note 196 ("[T]he people who have failed are the operators. The police don't really investigate. It's easy and comfortable for the prosecutor to have a case that's just sitting there and the judge doesn't pressure them to continue the process.").

263. Interview with Reynaldo Imaña, *supra* note 79.

264. Interview with Iris Justiniano, *supra* note 179.

nothing to show."[265] And yet, despite their failure to collect evidence, "the prosecutor wants the accused to go straight to trial."[266]

Defense attorneys similarly fail to fulfill their responsibilities and even advise their clients to wait out the maximum period[267]:

> The problem with the public defense is that it exists in paper but not in reality. The main strategy for the public defender is to wait and then negotiate pretrial detention with the prosecutor. They know they are not going to advance in the investigation, and they advise their clients to wait until the eighteen-month period expires. Public defenders litigate against time. Ironically, because there is an eighteen-month limit, very few defense attorneys are looking at the clock.[268]

In some cases, the accused individuals themselves have an incentive to keep their cases stagnant for three years. As one official explained,

> In the end it's almost convenient for them to have their hearings delayed so they can make cessation demands. Sometimes it's better for detainees to wait eighteen months without anything because they can ask for cessation . . . when the hearing date is approaching, detainees hide. The prisoners are also not saints, they have developed their own strategy, they also try to delay their case.[269]

The fact that pretrial detention results in the failure of all actors in the system to execute their duties points to serious failures within the criminal justice system.

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265. *Id.*

266. *Id.*

267. Interview with Daniel Chavez Ortiz, *supra* note 218 (revealing that his public defense attorney advised him to wait out the three years in pretrial detention at which time a request for release would be made).

268. Interview with Enrique MacClean Soruco, *supra* note 77.

269. Interview with Ramiro Llanos, *supra* note 1.

2. Negligence by Criminal Justice Actors

"The right to trial within a reasonable time does not depend on the accused requesting the authorities to expedite proceedings."[270]

While all institutional actors should be equally invested in protecting the integrity of the judicial system and ensuring compliance with the CPC by enforcing relevant time limits, this responsibility falls on the accused or his defense attorney. Where time limits have been exceeded and requests for cessation are brought, a judge explained that it is generally the defense attorney who brings a motion for cessation.[271] Further, as one lawyer explained, "[i]f you reach eighteen months, you need a diligent attorney to file cessation."[272] However, given human resource limitations, this is generally not an option.

Despite the requirement that prosecutors inform judges of the progress of the investigation every three months and that judges compel action if prosecutors fail to comply with time limits,[273] one judge revealed that while judges might notify the prosecutor and defense of the expiring time limits, "[i]n these cases, the detainee also has to push for it because otherwise, it will look like the judges are being partial."[274]

Indeed, as the delegate for the prisoners incarcerated at Mocoví prison explained, "those who insist get attention."[275] However, detainees are often unable to "insist" that their cases move forward because they are denied a meaningful defense.[276] When asked whether detainees are released when the prosecution doesn't bring an accusation in a timely manner,

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270. FAIR TRIALS MANUAL, *supra* note 137, at 116. *See* ICCPR, *supra* note 93, art. 14(3)(c) (establishing a right to trial without undue delay); American Convention, *supra* note 94, art. 8(1) (requiring that all trials are conducted "within a reasonable time").

271. Interview with Margot Pérez Montaño, *supra* note 69.

272. Interview with Enrique MacClean Soruco, *supra* note 77.

273. *See* CPC 1970, *supra* note 33, art. 134.

274. Interview with Margot Pérez Montaño, *supra* note 69 (discussing situations in which the defense attorney fails to bring an action for cessation because of negligence).

275. Interview with Marco Antonio Roque, Detainee and President of the Council of Delegates in Mocoví Prison, in Trinidad, Bolivia (May 18, 2012).

276. *See infra* Part IV.

detainees at Cantumarca Prison in Potosí responded, "No, all cases stay here."[277]

Even if it does not serve their interests to call attention to expiring pretrial detention periods, it is the responsibility of criminal justice actors to do so in the interests of upholding the criminal justice system. When they instead rely on the accused individual to initiate and advocate for cessation or other measures, they neglect to fulfill their own duty to uphold the law; given practical realities, their lack of action is likely to result in individuals being held in pretrial detention for longer than the legal limits.

3. Extensions

The right to trial without undue delay extends to individual stages of the criminal justice process.[278] Delays during the investigation stage and the trial itself can constitute undue delays that contribute to delays in reaching the ultimate stage of conviction and sentencing or acquittal.

Interviewees revealed that it is very common for prosecutors to request extensions throughout the criminal justice process.[279] Prosecutors' motivations for doing so are varied, and not always legitimate: a SENADEP attorney explained that "The prosecutor will always ask for time extensions because he is lazy and because the dockets are overcrowded and because it is a strategy so that the case can get buried, the trial will be delayed and there will be an *abreviado*."[280]

While the CPC allows for extensions both during the preliminary investigation and the preparatory stage, judges fail

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277. Interview with Detainees of Cantumarca Prison Men's Unit, in Potosí, Bolivia (May 16, 2012).

278. *See* ICCPR, *supra* note 93, art. 14(3)(c); Human Rights Committee General Comment 13, para. 10 (explaining that ICCPR art. 14(3)(c) "provides that the accused shall be tried without undue delay. This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place 'without undue delay.' To make this right effective, a procedure must be available in order to ensure that the trial will proceed 'without undue delay,' both in first instance and on appeal.").

279. Interview with Margot Pérez Montaño, *supra* note 69 (noting that prosecutors ask for extensions "ninety percent of the time").

280. Interview with Defense Attorneys, SENADEP, in Trinidad, Bolivia (May 15, 2012). An *abreviado* is similar to a guilty plea. Email interview with Yerko Ilijic Crosa, Human Rights Attorney (Apr. 5, 2013).

to examine whether the legal grounds warranting an extension exist and often do not require prosecutors to justify the basis for their requests.[281] When asked about the frequency with which judges grant extensions, a prosecutor responded, "In reality, since I started working here, I do not know of any times that the extension of pretrial detention has been denied by the judge."[282] Given the ease with which judges grant extensions and the fact that they grant them for a full eighteen months, there is little incentive for prosecutors to conduct timely investigations.

Furthermore, even extended time limits are not adhered to. When asked what the foremost problem in Bolivian criminal justice is, one interviewee explained that it was "lack of application of the law," namely that the six to eighteen month investigative limit is not observed.[283] As a result, the process does not progress to subsequent stages of the criminal justice process, truth discovery is delayed and, all the while, the accused individual remains in prison.

4. Practical Reasons for Time Delays

Even when attempts are made to comply with time limits, there are practical reasons for delays. As one judge explained, "it's impossible to get through the entire process in the time the law requires."[284] For example, backlogs prevent trials from being held within established time limits. One judge noted that "[t]his backlog affects pretrial detention because even though pretrial detention is only supposed to last for eighteen months maximum, currently the next open court dates are two years away."[285] It is worth noting that the liberty of prisoners remains restricted throughout these delays.

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281. Interview with Anonymous Official, *supra* note 181. For example, judges do not ask the prosecutor how long the investigation will take, nor do they set a date for the next hearing to set a time limit within which the investigation should completed. *Id.*

282. Interview with Prosecutor, *supra* note 171.

283. Interview with Anonymous Member of the Judiciary, *supra* note 179. This interviewee identified the high caseload that the prosecution carries as the primary reason for delays at this stage. *Id.*

284. Interview with Ximena Lucía Mendizábal Hurtado, *supra* note 197.

285. Interview with Cesar Suarez Saavedra, *supra* note 257. An additional barrier is that, for example in the case of Palmasola prison in Santa Cruz, an interviewee revealed that detainees have to pay fees associated with attending their hearings and have to pay police officers. Interview with Anonymous Official, *supra* note 181.

5. Motions

The filing of motions—sometimes filed for the specific purpose of delaying the criminal justice process—as well as delays in responses to these motions, also leads to delays in the criminal justice system and resulting pretrial detention periods that exceed legal limits.[286] The following scenario illustrates how these delays play out:

> According to law, the entire process should take only three years. But in many cases, we get to three years and we're only halfway through the process. The reasons include defendant's motions and the slow reaction time of the judiciary. Judges don't comply with deadlines. For example, I filed a motion in November 2011. The prosecutor didn't respond until January 12, 2012. The victim's lawyer responded by January 30th. Now, today [May 2012], we are still waiting for the judge's response. If the judicial system were faster, something you requested in November would get a response the same month.[287]

These filings are especially harmful when they interfere with or prevent an oral trial from occurring: "There are lawyers who try to make the process last longer than three years. This causes a situation where the person in pretrial detention never even appeared for a hearing. They presented all types of motions and objections."[288] Again, when an oral trial to establish criminal responsibility is never held, justice is not served for anyone —neither the accused, victims, nor society.

6. Suspensions

Repeated suspensions of hearings also result in delays. With each suspension, subsequent stages are delayed, triggering even further delays. As a result, legal and factual determinations are not made in a timely manner and ultimately, an accused person is held in pretrial detention for an even longer period of time,

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286. Interview with Dr. Maritza Suntura Juaniquina, Magistrate, Supreme Tribunal of Justice, in Santa Cruz, Bolivia (May 15, 2012).

287. Interview with Jerjes Justiniano Atalá, *supra* note 173.

288. Interview with Iris Justiniano, *supra* note 179.

potentially beyond legal limits.[289] Suspensions occur with great frequency—one NGO recalled a case that was suspended sixty-three times over the course of more than four years[290]—and for a variety of reasons.[291] Frequently, hearings are suspended due to the absence of parties.[292] Because of the large caseload carried by both defense attorneys and prosecutors and the large number of hearings over which judges preside, these actors are unable to attend to all of their cases.[293] For example, "some

289. The suspension of pretrial hearings results in delays in the preliminary investigation as well as remaining stages of the criminal justice process. *See* FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 166. While the maximum duration of the process is set at three years, the suspension of hearings contributes to the suspension of the clock. The vagueness of the language in the CPC regarding grounds for suspension contributes to ambiguity as well as violations of the law. CPC 1970, *supra* note 33, art. 133 .

290. Interview with Vladimir Nilo Medina Choque, *supra* note 172.

291. Relevant actors sometimes fail to appear at hearings because of the deficient notification system: "It is so common that a hearing is suspended because the victims and prosecutors aren't notified. This increases the length of time people help in pretrial detention and increases the uncertainty." Interview with Ninoska Ayala Flores, *supra* note 83. Similarly, an official noted that, "[w]e have noticed that the system of notification of parties is deficient. This causes the hearings to be cancelled." Interview with Anonymous Official, *supra* note 181.

292. The FUNDACIÓN CONSTRUIR REPORT report extensively documents suspensions. In their study, which was conducted over the course of almost two months, and involved observations of pretrial hearings in El Alto and La Paz (home to more than twenty percent of judicial activity in Bolivia), seventy-two percent of cases were suspended. *See* FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 161. The reasons for suspensions included the absence of relevant actors (the absence of the accused in thirty-four percent of cases, the absence of the prosecutor in thirty-three percent of cases, the absence of the defense attorney in eighteen percent of cases, the absence of the complainant in eight percent of cases and the absence of the judge in seven percent of cases). *See id.* at 164.

293. *See infra* Part IV(A); *see also* Interview with Vladimir Nilo Medina Choque, *supra* note 172; Interview with Susana Saavedra Badani, Attorney and Program Coordinator, Fundación Construir, in La Paz, Bolivia (May 21, 2012); Interview with Anonymous Official, *supra* note 181. Additionally, different interpretations exist among criminal justice actors as to whether the absence of certain actors legally justifies the suspension of hearings. One lawyer described the fact that prosecutors do not show up to trials and that cases are thus suspended as "terrible" and went on to say:

> It's not established in law that anything in the case should move forward without the prosecutor. It's not a cause for the suspension of the hearing unless the prosecution can show he's doing something and cannot show up. When the prosecution doesn't show up and the case is complicated, the judge doesn't dare hear the case without the prosecutor present. Today, I was at a hearing. The judge wanted to suspend it because the prosecutor didn't show up. The non-attendance of the prosecutor isn't set forth in the law as a reason to suspend a hearing but it's being applied that way.

Interview with Dr. Roger Valverde Perez, *supra* note 33.

prosecutors are given back to back trials and cannot be expected to be in two places at once. The prosecutor sometimes has 400 cases so the judge is understanding because the prosecutor can't be in two places at once."[294] Similarly, referencing the frequency with which prosecutors fail to appear at pretrial hearings, an attorney responded, "All the time, they don't make a schedule of their work."[295] Almost everyone in the Men's Unit of the Cantumarca Prison in Potosí raised their hand to indicate that the prosecutor had failed to appear at their hearing, sharing that "it happens all the time, and then the hearing is postponed ten to fifteen days."[296] As to why judges do not enforce the attendance of prosecutors, responsibility was placed on the "lack of judicial authority."[297] While "the judges in reality have obligations to punish the prosecutors for not showing up,"[298] they grant them leeway because of their heavy caseloads.

Defense attorneys are also often absent from hearings. An organization that advocates on behalf of victims shared that "many times we go to a hearing and the accused doesn't have a lawyer so the case can't proceed."[299] Another official explained that "sometimes they [defense attorneys] don't come to hearings because there are too many hearings and their schedule is too tight."[300]

It is not only lawyers and judges who fail to appear for hearings; the accused is often absent as well. The Constitutional Court of Bolivia has established that the defendant must be in attendance at the pretrial hearing.[301] The very justification for

294. Interview with Dr. Roxana Valverde, Professor of Criminal Law I and II, Catholic University of Bolivia "San Pablo," in La Paz, Bolivia (May 25, 2012).

295. Interview with Dr. Luis D. Lopez Rosales, Former National Director of Public Defenders, in Potosí, Bolivia (May 16, 2012).

296. Interview with Detainees of Cantumarca Prison Men's Unit, *supra* note 277.

297. Interview with Dr. Teresa Ledezma, *supra* note 69.

298. *Id.*

299. Interview with Kadir H. Alvarado & Jorge Cabral Berdecio, Jessika Borda Foundation of Assistance to Victims of Crime, in Santa Cruz, Bolivia (May 16, 2012).

300. Interview with Anonymous Official, *supra* note 181.

301. CEJA BOLIVIA REPORT, *supra* note 33, at 41 (explaining the Constitutional Court's decision in SC 760/2003-R, and noting that "[h]earings which provide for the application of precautionary measures require the presence of the defendant to ensure the right to a defense and the validity of immediacy and orality, which govern the new criminal procedure. Failure to do so results in injury to the right of defense and transgression of the principles of orality and immediacy. The defendant

pretrial detention – to ensure the presence of the accused at trial – is entirely defeated when an individual in pretrial detention fails to appear at a hearing. In reference to such absences, one official noted that: "it is incredible that the accused is not there, who is technically arrested and is being held in order to ensure his presence at the hearing."[302]

7. Lack of Enforcement of Time Limits

Finally, the failure to enforce time limits results in high rates of pretrial detention and extended durations of pretrial detention.[303] This is partially attributable to a faulty record keeping system. As one prison official explained in regard to whether a prison would make an attempt to contact a prosecutor once an individual had been in pretrial detention for more than three years: "we use a very archaic system—a handwritten register and archive—so unfortunately, no. It's almost like a century old."[304] A significant contributing factor to lack of enforcement is also the absence of repercussions for failure to comply with these time limits. While the CPC contains provisions ordering that "negligent officials" be subjected to disciplinary and criminal liability for failure to meet deadlines and that those guilty of "malicious delay" be punished for delays of justice,[305] given the lack of legal enforcement, the law fails to deter non-action. As one NGO explained, while disciplinary measures exist to hold judges, prosecutors and public defenders accountable, "For a case being delayed, there's not much of a consequence."[306]

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must be present at the hearing, as implied by Art. CPP 226, which states that the hearing should be at the disposal of the judge.").

302. Interview with Anonymous Official, *supra* note 181. One victims' organization noted that detainees sometimes deliberately avoid attending their hearings: "If the hearing doesn't benefit them, then they [the detainees] hide in the prison." Interview with Kadir H. Alvarado & Jorge Cabral Berdecio, *supra* note 299.

303. "The lack of clear, enforceable time limits is also a factor in high rates of pretrial detention following the commencement of formal criminal proceedings." OPEN SOC'Y JUSTICE INITIATIVE, IMPROVING PRETRIAL JUSTICE: THE ROLES OF LAWYERS AND PARALEGALS 33 (2012) (discussing the issue of pretrial detention worldwide). "Even where there are absolute statutory time limits, they may not be complied with in practice, nor be enforceable." *Id.*

304. Interview with Ramiro Llanos, *supra* note 1.

305. CPC 1970, *supra* note 33, arts. 135, 177.

306. Interview with Ramiro Orías Arredondo, *supra* note 172.

III. *CITIZEN SECURITY CONCERNS AND PRETRIAL DETENTION*

> *"[W]here there is media pressure or social pressure, there is always pretrial detention. There is one extreme case, a seventeen-year-old boy was arrested . . . for stealing a backpack. The judge said she wouldn't give pretrial detention just for a backpack. But she was forced to recuse herself because there was pressure from the prosecutor. The pressure was incredible, the parents of the group were in the courtroom screaming at the judge. The next judge gave pretrial detention. There are two types of pressure: media and social pressure – this happens such as in the case of the backpack or in homicide cases and this is related to citizen insecurity and the pressure that is put on the prosecutor and judge."*[307]

A. *Societal Perceptions of Citizen Security and Pretrial Detention*

The excessive application of pretrial detention is also influenced by "citizen security" concerns. Not only have these concerns resulted in changes to the law,[308] they continue to impact judicial decisions to impose pretrial detention, and they have instigated current legislative efforts that will likely further increase the use and duration of pretrial detention.[309]

There is a perception in many segments of Bolivian society of a direct causal relationship between the guarantee of procedural rights which restrict the use of pretrial detention and rising crime rates.[310] One lawyer explained, "[T]here is this conception that the respect for procedural guarantees and procedural due process increases crime."[311] Society fails to distinguish between an arrested individual and a convicted individual, instead assuming that anyone arrested is in fact

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307. Interview with Anonymous Official, *supra* note 181.

308. *See supra* Part I(A)(3).

309. Interview with Alain Nuñez Rojas, *supra* note 196 ("Unfortunately instead of advancing towards respect, we are thinking about going backwards to make a Code with measures that are much more harsh, even if they're also not just.")

310. *See, e.g.*, Interview with Enrique MacClean Soruco, *supra* note 77 ("[T]he perception is that the system is bad . . . because it gives rights to the accused.") An additional challenge is posed by the lack of reliable statistics. *See id.* ("It is very difficult to tell whether crime has risen or not, because no one keeps records. The police manipulate[] the data for [their] own interests. The National Bureau of Statistics does mostly economic [records]. NGO studies are sporadic.").

311. Interview with Reynaldo Imaña, *supra* note 79.

guilty.[312] As one lawyer explained, "Unfortunately we have a situation where people believe if someone is brought before a judge, they are probably the author of the crime."[313] Further, as one organization described, "Detainees sew their lips shut and tie themselves to the cross but the general population doesn't mobilize because the feeling is that they're bad people doing bad things."[314]

Relatedly, society fails to understand that the process-related reasons for pretrial detention are distinct from the punitive reasons for post-conviction imprisonment.[315] As a result of the failure to understand the requirement for a legal basis to justify pretrial detention, when judges do not order pretrial detention based on evidentiary requirements not being met, "the citizens say, 'Look! The police arrested someone and now the corrupt judge is letting them go.'"[316]

B. *Influence of Societal Views on Pretrial Detention Decisions*

While societal views in and of themselves are not necessarily detrimental to the protection of human rights, what is dangerous is that these societal concerns about citizen security and accompanying misunderstandings about the law affect judicial decisions to order pretrial detention.[317] The government

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312. *See id.* ("People in society now say that people who committed crimes are free."); *see also* OPEN SOC'Y FOUNDS., *supra* note 3, at 44 ("A lack of awareness can also lead to hostile attitudes toward pretrial detainees: many people assume that the arrested must be guilty and deserve to be mistreated.").

313. Interview with Jerjes Justiniano Atalá, *supra* note 173.

314. Interview with Kathryn Ledebur, *supra* note 262.

315. For a discussion of society's failure to distinguish procedural and punitive reasons for pretrial detention in Mexico, see LECUONA, *supra* note 11, at 13 ("In this atmosphere of insecurity, judges often opt to further limit the right to liberty of the accused in the name of protecting society against the threat they supposedly pose, and in spite of their right to be presumed innocent.").

316. Interview with Anonymous Official, *supra* note 59.

317. For a cross-regional analysis of criminal procedural reforms, see CEJA INTRO REPORT, *supra* note 25, at 43–44 ("[A]bove and beyond legal reforms, a social environment has developed in most countries in the region in which judges' decisions regarding pretrial detention are closely scrutinized. The perception of impunity inspired by the release of defendants who have been arrested and identified by witnesses and the growing climate of insecurity generated in part by the same phenomenon have placed a great deal of pressure on judges to apply pretrial detention independent of the real danger that the defendant may pose to the process. This climate of keen observation and criticism of investigative judges' decisions regarding

has prioritized satisfying society at the expense of ensuring due process and related human rights guarantees upon which the criminal justice depends for its legitimacy. Excessive weight is placed on satisfying citizen concerns about security and responding to society's demand for pretrial detention.[318] As one detainee stated, one reason pretrial detention rates in Bolivia are so high is because of "social pressure . . . the public opinion has the impression that the person is guilty,"[319] suggesting that societal pressure and beliefs tangibly affect the imposition of pretrial detention. As a result of "pressure from society or from the victim," judges order pretrial detention even when prosecutors and victims have not been able to "objectively show" the required evidence, and thus order pretrial detention "even without a legal basis."[320] While it might be natural for society to identify with victims rather than the accused,[321] on the other hand, in the words of one lawyer, "if you are in a government position you have a duty to guarantee the rights of all."[322] As this lawyer went on to say, "The greatest challenge of the reform is to change the mentality of the authorities in charge of the justice system and of society, and to acknowledge the rights of detainees while also preserving citizen security. In other words, to show that it is possible to both protect rights and preserve citizen security."[323] Currently, the authorities are failing

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pretrial detention generates different kinds of pressure, making factors external to the law take on an important role for the decision that is to be made in a specific case.").

318. For an analysis of a similar situation in Mexico, see LECUONA, *supra* note 11, at 17 ("With respect to the rights of victims, the authorities have begun to treat pretrial detention as preemptive punishment, in an attempt to convince victims and society at large that justice is being served. This use of pretrial detention—to satisfy a public demand for swift justice—comes dangerously close to acceding to public cries for revenge, offering as a spectacle the detention of a few to distract the public from the 97 percent of crimes in Mexico that remain unpunished.").

319. Interview with Detainees of Cantumarca Prison Men's Unit, *supra* note 277.

320. Interview with Dr. Roger Valverde Perez, *supra* note 33.

321. Society perceives a dichotomy between victims' rights and the rights of the accused. Specifically, the human rights of the accused, in the form of the procedural guarantees ensured by the CPC, are viewed as being in direct opposition with, and even contradictory to, victims' rights. Interview with Dr. Edwin Cocarico, *supra* note 49 ("Society doesn't care and won't until they stop identifying so much with the victims. Society identifies with the victim, not the accused.").

322. Interview with Reynaldo Imaña, *supra* note 79.

323. *Id.*

to meet this challenge at the expense of the rights of the accused and the guarantees as established in Bolivian law.

C. *The Role of the Media*

Pressure by the "sensationalist" press and media, among whom there exists "a sentiment of fear against criminality"[324] also impacts judicial decisions to order pretrial detention, thus seriously compromising judicial independence. One official has "observed that where there is media pressure or social pressure, there is always pretrial detention."[325] On the other hand, if there is a decision to not order pretrial detention, "the press will put their lights on."[326] As one judge described, "If the judge doesn't order pretrial detention, the prosecutor will go to the press and claim that the judge isn't doing his job or is part of the crime."[327]

D. *The Influence of Neighborhood Groups*

An even more dramatic example of the influence of societal concerns about crime on pretrial detention is the role that "highly organized groups of neighbors" play.[328] The range of activities that these groups, as well as less organized community groups, engage in include "go[ing] to the doors of hearings and protest[ing]"[329] as well as "social group marches or groups that ask for justice."[330] Their activities affect judicial decisions to impose pretrial detention, the duration of pretrial detention and even judicial decisions as to whether to grant a request for the cessation of pretrial detention.[331] Throughout Bolivia, there

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324. Interview with Boris Wilson Arias Lopez, *supra* note 215.

325. Interview with Anonymous Official, *supra* note 181. *See also* Interview with Alain Nuñez Rojas *supra* note 196 ("the judges are the face of the criminal justice system, so the television and papers are always focused on them. So that makes pretrial detention more important in the eyes of the judge because they have this scrutiny on them.")

326. Interview with Arturo Yáñez Cortez, *supra* note 255.

327. Interview with Ximena Lucía Mendizábal Hurtado, *supra* note 197.

328. Interview with Vladimir Nilo Medina Choque, *supra* note 172.

329. *Id.*

330. Interview with Dr. Ramiro E. López Guzmán, *supra* note 84.

331. One NGO explained that if judges were to follow the parameters of the law with regard to pretrial detention, the rate of cessation would be higher but factors such

are incidents in which "social pressure has influenced in some way that the judge takes a different type of decision."[332] While one judge explained that he does not allow these groups to physically enter the hearings, nevertheless, he admitted that "yes we do indirectly value that outcry and request from society in our resolutions of pretrial detention."[333] He went on to say that the marches and stoppages pressure judges to "not apply presumption of innocence" despite the legal guarantees to this right.[334] At times, judges give in to this pressure to the point that they do not enforce certain legal provisions because it is "easier" for them not to and "the community will protest and they don't want problems with the community. They're not strong enough to follow the law."[335]

Neighborhood groups even engage in violence: "In some cases, judges and prosecutors have been hurt and hit by the population for not having listened to the social outcry."[336] Sometimes, judges fear for their own lives:

> The population doesn't believe in justice, so they're becoming involved in things like lynching. They think justice is on the side of the criminal, that he'll be detained for eight hours and then let out. There's not a lot of credibility in the criminal justice system. So, the judge many times sees the situation to not use other [alternative] methods so they can please the population because if not they'll want to lynch him too.[337]

Judges also order pretrial detention to protect defendants. As one judge explained: "If we don't take into account the social outcry, there may be lynchings of the accused we released."[338] This judge shared an example of a case where a mayor was denounced for public corruption and, when pretrial detention was not ordered, the community lynched, burned and killed

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as "social pressure" influence decisions. *See* Interview with Vladimir Nilo Medina Choque, *supra* note 172.

332. Interview with Dr. Angel Arias Morales Fono, *supra* note 168.

333. Interview with Dr. Ramiro E. López Guzmán, *supra* note 84.

334. *See id.*

335. Interview with Anonymous Judge, in Bolivia (May 16, 2012).

336. Interview with Dr. Angel Arias Morales Fono, *supra* note 168.

337. Interview with Ramiro Leonardo Iquise Pally, *supra* note 2.

338. Interview with Dr. Ramiro E. López Guzmán, *supra* note 84.

him.[339] While obviously the safety of both judicial actors and the accused must be of paramount concern and measures to protect them should certainly be put into place, pretrial detention should not be the solution.

E. *Additional Impacts of Basing Pretrial Detention Decisions on Citizen Security Concerns*

1. The Rule of Law is Undermined When Societal Fears, Rather than Law, Drive the Criminal Justice System

When judges impose pretrial detention irrespective of whether the legal requirements are met, they fail to uphold the law and to protect human rights. By allowing external influences —whether in the form of neighborhood groups or more general societal or political pressure—to influence their decisions, judges compromise their judicial independence.[340]

Accused individuals directly suffer the resultant human rights violation of illegal detention. As one detainee in the Men's Unit at Cantumarca Prison in Potosí said, "Because of social pressure even if something is written in the law it's not applied. So there are many people here that don't belong here."[341]

Even more broadly, a violation against any one person poses a threat to a democratic and lawful society that, through its own national and international legal obligations, is obligated to guarantee the rights of all individuals. When external influences outside of, and even contrary to the law interfere with judicial decisions, and explicit legal protections for the accused are disregarded, the entire legal system is seriously undermined and the criminal justice process loses its legitimacy. While judicial decisions to order pretrial detention might momentarily

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339. *Id.*

340. One lawyer explained that it is difficult for the Public Ministry to remain objective, given that "society has their eyes on the prosecutor and the judge." Interview with Jorge Fernandez, *supra* note 222. In reference to alternatives to pretrial detention, such as release or release on bond, an NGO that works with prisoners explained, "Judges feel tremendous social pressure not to let people out or to allow bond." Interview with Joe Loney, *supra* note 172. *See also supra* notes 211-215 (discussing the explicit recommendations issued by the Public Ministry to order pretrial detention in certain situations).

341. Interview with Detainees of Cantumarca Prison Men's Unit, *supra* note 277.

satisfy the public demand for security, overriding legal protections ultimately undermines the judiciary as an institution as well as public confidence in the judiciary. When judges make decisions without an adequate legal basis, this undercuts societal trust and faith that they will operate within the confines of the law in other respects.[342] The government is responsible for guaranteeing the rights of all citizens and cannot sacrifice the rights of the accused because of citizen security concerns; their response to citizen security concerns must be consistent with their human rights obligations.[343]

2. Society is Not Safer as a Result of Widespread Use of Pretrial Detention

Excessive and arbitrary pretrial detention does not actually improve citizen security. By acting as though pretrial detention is a "solution," the government hides behind and neglects to address structural problems in the criminal justice system.

a. False Perceptions of Increased Safety

The practice of pretrial detention might make society *think* they are safer: in the words of one lawyer, "[s]ociety is calm if somebody is accused and is sent to jail. They feel secure."[344] The government even uses pretrial detention as a deliberate tactic to pacify society: "They put people in prison so people think they

342. *See* OPEN SOC'Y FOUNDS., *supra* note 3, at 22 ("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.").

343. *See* ICCPR, *supra* note 93. The ICCPR guarantees the following: "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant." *Id.* art. 1; *see also* Mauricio Duce & Rogelio Pérez Perdomo, *Citizen Security and Reform of the Criminal Justice System in Latin America*, *in* CRIME AND VIOLENCE IN LATIN AMERICA: CITIZEN SECURITY, DEMOCRACY, AND THE STATE 69, 89 (Hugo Frühling et al. eds., 2003). In their analysis of criminal reforms in the criminal justice systems in Latin America, the authors stated, "The great challenge is for the authorities, politicians, technical personnel, those participating in the system, and the population as a whole to understand what is at stake. The issue is not simply a problem of combating crime and increasing security, but rather one of respect for the human rights that are the basis for our civilization."

344. Interview with Dr. Teresa Ledezma, *supra* note 69.

can sleep better at night."[345] By *appearing* to respond to crime by readily ordering pretrial detention, the government garners good will: "These laws [regarding pretrial detention] are made to make people feel protected from the bad guys so they will think the laws are good."[346] The government has an incentive to increase citizen security to increase its own popularity, so "to say all criminals are in jail is a good thing for them."[347] Put another way, "[w]hat sells politically is putting suspects of crimes in jail."[348] Because "crime is seen as such a serious problem" and "society needs protection," judges operate with the understanding that "pretrial detention must be applied profusely."[349] In cases in which pretrial detention is not ordered, "there's a sense that the judge has allowed impunity."[350]

Given the deficiencies in the criminal justice system, including severe delays,[351] and the fact that a case is unlikely to proceed to either an acquittal or conviction and sentence, pretrial detention in effect serves as a substitute for a conviction and sentence that would be achieved in a functioning criminal justice system.[352] As one lawyer said: "In Bolivia all victims want pretrial detention. Unfortunately the system is very slow . . . Almost all cases take three to four years. Because of this delay, what victims want above all is for the defendant to be held in jail."[353]

b. Citizen Security is Not Improved

While justification for the changes to the CPC were made on the basis that they would increase citizen security, they have not.[354] Contrary to the belief that "harder laws and higher

345. Interview with Boris Wilson Arias Lopez, *supra* note 215.

346. Interview with Arturo Yáñez Cortez, *supra* note 255.

347. Interview with Anonymous Official, *supra* note 59.

348. Interview with Dr. Teresa Ledezma, *supra* note 69.

349. Interview with Dr. Roger Valverde Perez, *supra* note 33.

350. Interview with Jerjes Justiniano Atalá, *supra* note 173.

351. *See supra* Part II(B).

352. Interview with Alain Nuñez Rojas, *supra* note 196 ("We have people who at the beginning are being detained and then later don't have a trial, and that's where the system fails.").

353. Interview with Jerjes Justiniano Atalá, *supra* note 173.

354. This is evident in statistics collected by an NGO that has closely monitored pretrial detention practices. They found that "the level of complaints to the police has increased which is the opposite of what was expected under the harsher laws."

sentences would decrease crime," in fact, "the figures show that these harsher measures have not increased the security of Bolivian persons."[355] A link between increased use of pretrial detention and lower levels of crime has not been established. As one lawyer explained:

> It should be generally understood that the violation of these guarantees [the rights of the accused] and of the human rights of detainees is not, has not been and never will be an effective way to reduce crime. The violation of these guarantees has not reduced crime. The extreme harshness of the penal laws has also not been shown to be an effective way of reducing crime.[356]

For citizen security concerns to be addressed, there must be "a popularly administered justice system that actually holds criminals accountable"; however, "this is not happening in Bolivia."[357] In the absence of timely and effective investigations, trials, and ultimately convictions and sentences, there is no finding of guilt. As a result, the guilty continue to live in society and the innocent are imprisoned which certainly does not make for a safer society.

In fact, when individuals are detained, there is reduced incentive to move the case through the criminal justice system. This starts with the fact that investigations do not advance. For

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Interview with Ramiro Orías Arredondo, *supra* note 172. While statistics following the implementation of Law 007 in May 2010 are not yet readily available, the following statistics are telling, given that legal reforms, most relevantly Law 2494, provisions of which are incorporated into Law 007, were enacted prior to the enactment of Law 007: "The premise of the criminal counter-reform was that a criminal regime that was tougher and more punitive would lead to less crime. However, the number of crimes reported to the Bolivian Police—according to data from the Ministry of Government—has seen an increase of seventy percent between 2005 and 2010. According to a survey conducted by Latinobarómetro in 2010, fifty percent of Bolivians consider Bolivia a country where it is more unsafe to live every day. According to a survey conducted by the Latin American Project on Public Opinion ("LAPOP"), the average perception of citizen insecurity in Bolivia, at 48.7% is one of the four highest in Latin America." Ramiro Orías Arredondo, "*Leyes duras, penas altas y seguridad ciudadana*" [*Harsh Laws, High Penalties and Citizen Security*], PAGINA SIETE (Bol.) (Mar. 18, 2012), http://www.paginasiete.bo/2012-03-19/Opinion/Destacados/14Opi00219-03-12-P720120319LUN.aspx. Citizen confidence in the justice system stands below forty percent and citizen insecurity has increased seventy percent between 2005 and 2010. *See* FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 33–34.

355. Interview with Ramiro Orías Arredondo, *supra* note 172.

356. Interview with Reynaldo Imaña, *supra* note 79.

357. Interview with Audalia Zurita Zelada, *supra* note 215.

all practical purposes, "[w]hen the accused is in pretrial detention, the case is already closed."[358] That is, "prosecutors use pretrial detention to satisfy victims" and then "just abandon the case, then go to [the] victim, say the criminal is already in jail, but the victim doesn't know the process isn't over, not even the investigative phase."[359]

As a result, sentences are not issued: a victims' organization that works on behalf of women, while critical of the fact that it is difficult to prove the need for pretrial detention in cases that involve female victims of certain types of crimes, also acknowledged that "those who are detained stay in prison for more time than they should," and "[t]he real problem is the system takes too long and the prison is always full of people who are not sentenced."[360] This organization discussed the slow speed of the judicial process and the fact that "there is no judgment because the process is always longer than it should be."[361]

Following an investigation, the next step in the criminal justice process should involve a formal charge followed by an indictment. However, statistics demonstrate that a high percentage of cases never reach these stages. For example, only about one-third of cases for which a preliminary investigation is begun result in a formal charge.[362] Between 2008 and 2010, on average, the Public Ministry attended to between fifty-seven and sixty-one percent of these formal charges per year.[363] The number of formal charges that then resulted in indictments decreased by thirty-nine percent in that time period.[364] On

358. Interview with Jorge Richter Amallo, *supra* note 18.

359. *Id.*

360. Interview with Sylvia Ortiz, Attorney for the Defense of Women, Centro Juana Azurday, in Sucre, Bolivia (May 15, 2012). The relative difficulty of proving the need for pretrial detention in the case of domestic violence cases can be explained as follows: "An exception to the practice of excessive and arbitrary pretrial detention in Bolivia and other countries in Latin America and the Caribbean, including Mexico and Honduras, often occurs in the case of domestic violence cases in which judges are less likely to order pretrial detention for the alleged perpetrators of these crimes." Interview with Denise Tomasini-Joshi, Assistant Dean for Public Service, former Legal Officer, Open Society Justice Initiative, New York, New York (Apr. 3, 2013).

361. Interview with Martha Noya Laguna, Executive Director, Centro Juana Azurday, in Sucre, Bolivia (May 15, 2012).

362. *See* FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 94.

363. *Id.* at 101.

364. *Id.* at 118.

average, in 2012, seventy-five percent of cases for which an investigation was started by the prosecution remained pending or unfinished, seventeen percent were rejected and only in seven percent of the cases was a formal charge issued.[365] While on the one hand, a substantial number of cases are filed in court, as the case makes its way through the criminal process, these figures decrease considerably, such that the number of cases that result in sentences is of concern.[366]

And finally, the criminal justice process results in convictions and sentences at a worryingly low rate. In 2010, out of the 20,670 formal charges that were filed, 874 received final judgments, representing only four percent of the total number of formal charges.[367] This figure "is of great concern because we cannot speak of justice while the justice system does not guarantee a restorative timely response for victims, nor certainty for the accused."[368]

c. "School of Crime"

Finally, pretrial detention has the potential to increase crime by "creating" criminals, thus making society even less safe. Throughout interviews, the term "school of crime" [369] was repeatedly used to explain the phenomenon that pretrial detainees actually learn how to become criminals while imprisoned.[370] This is due first to State failure to separate convicted prisoners from pretrial detainees: While Bolivian law and international human rights law dictate that individuals in pretrial detention be separated from convicted prisoners,[371] in

365. *Id.* at 47.

366. *Id.* at 119.

367. *Id.*

368. *Id.*

369. *See* Interview with Pastoral Penitenciaria Worker, in Potosí, Bolivia (May 16, 2012) ("Prison is a crime school."); *see also* Reynaldo Imaña, *supra* note 79.

370. OPEN SOC'Y JUSTICE INITIATIVE, THE SOCIOECONOMIC IMPACT OF PRETRIAL DETENTION 19 (2011) ("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.").

371. CPC 1970, *supra* note 33, art. 237; ICCPR, *supra* note 93, art. 10(2)(a); American Convention, *supra* note 94, art. 5(4); Body of Principles, *supra* note 112, at 8; Council of Europe, Comm. of Ministers, Recommendation Rec(2006)2 of the Comm.

practice, the Bolivian State fails to do so.[372] As one lawyer noted, "The defendants live in prison with convicted prisoners . . . The pretrial detainee is sitting next door to a convicted prisoner but the law says they're supposed to be separate. The rate of criminality inevitably increases."[373]

Simply by occupying the same space as criminals, pretrial detainees learn criminal behavior. As one academic noted, "There is a feeling of citizen insecurity and there are more people detained. Everyone gets put in the same place regardless of the crime committed–there's no classification. It's infectious—it's a university of crime."[374] A judge similarly noted that "In reality, they [prisons] are universities of crime. A person ends up worse coming out of pretrial detention than they were coming in."[375]

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of Ministers to member states on the Eur. Prison Rules, at 18.8(a), 2006 O.J. (C952) (Jan. 11, 2006); Tokyo Rules, *supra* note 116, ¶ 8(b).

372. In their prison visits, the Crowley delegation observed that there was no separation between convicted and pretrial detainees. This observation was reinforced through information learned in interviews: one lawyer explained that while legally, there should be separation on the basis of age and status (pretrial detention vs. sentenced), this does not occur in practice because of the lack of infrastructure. Interview with Dr. Roger Valverde Perez, *supra* note 33. A judge similarly explained that, "[w]ithin our prisons, we don't have separate areas for pretrial and sentenced prisoners." Interview with Margot Pérez Montaño, *supra* note 69; Interview with Juan Carlos Octavio Pinto Quintanilla, National Director, SIFDE [Servicio Intercultural de Fortalecimiento Democratico, Tribual Supremo Electoral, Órgano Electoral Plurinacional], [Intercultural Service of Democratic Strengthening, Supreme Electoral Court, Plurinational Electoral Organ], in La Paz, Bolivia (May 22, 2012) (discussing the non-classification of detainees); Interview with María Angélica López Morales, Director of the Prison System of Chuquisaca, , in Sucre, Bolivia (May 17, 2012) (explaining that pretrial and sentenced prisoners are not separated).

373. Interview with Boris Wilson Arias Lopez, *supra* note 215. The Inter-American Commission on Human Rights ("IACHR") noted this regional trend: "[T]here is a direct relationship between the proper functioning of the prison system and the States' obligation to protect and ensure the human rights directly at stake in the policy on citizen security. Most prison institutions in the region are today a breeding ground for the violence with which the societies in the Hemisphere are coping." Citizen Security Report, *supra* note 110, ¶ 155. In a study examining torture in the context of pretrial detention, the following relevant findings were revealed: The failure to separate pretrial detainees from convicted prisoners can also augment the risk of inter-detainee violence. In many countries, a lack of specific remand facilities makes such a separation impossible. When mixed with convicted, long-term prisoners, pretrial detainees risk being exposed to a violent offender subculture. In some prisons, daily life is dominated by violence, abuse, drug addiction, and internal gang structures. OPEN SOC'Y FOUNDS., *supra* note 3, at 38.

374. Interview with Dr. Roxana Valverde, *supra* note 294.

375. Interview with Anonymous Judge, *supra* note 335.

This occurs because when pretrial detainees occupy the same space as convicted and sentenced criminals—often for extended periods of time, given the extensive duration of pretrial detention—the concept of criminality becomes normalized.[376] As one defense attorney explained, "Other inmates influence each other, including juveniles, and they start to think it's normal to commit crimes."[377] In addition, pretrial detainees learn criminal behavior from fellow detainees who have been convicted and sentenced. A representative of an NGO explained this phenomenon as follows: "Sometimes detainees are learning criminal ways from the sentenced prisoners—it's like a school. When really the purpose of pretrial detention is to guarantee the investigation."[378]

Yet another way in which prison can operate as a "school of crime" for pretrial detainees is as a result of learning criminal behavior through the criminal activity that occurs within prisons:[379]

> Pretrial detention does not guarantee that somebody will not engage in criminal activity such as narco-trafficking and car theft. This is because of the phenomenon of criminality within the prisons. Even if the law says that those in pretrial detention should be treated differently and separated from the sentenced, this doesn't actually occur.[380]

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376. *See* OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 370 ("[E]ntering 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.").

377. Interview with Attorney, SENADEP, in Riberalta (May 17, 2012).

378. Interview with Vladimir Nilo Medina Choque, *supra* note 172.

379. The way in which Bolivian prisons operate also affects this situation. While State authorities are in charge of security on the outer parameters of Bolivian prisons, inmates manage and operate the internal workings of the prisons themselves. While the specific details depend on the prison, in general, inmates elect delegates or "delegados" to manage such issues as security, the collection of payment for food, cells and beds, and prison dues. *See Photo Journal: Inside a Bolivian Jail*, BBC NEWS, http://news.bbc.co.uk/2/shared/spl/hi/picture_gallery/06/americas_inside_a_bolivian_jail/html/1.stm (last visited, Apr. 26, 2013).

380. Interview with Dr. Edwin Cocarico, *supra* note 49.

An additional issue arises as a result of the fact that children up to six years of age are allowed to live with their parents in prison and often continue to live there beyond age six.[381] These children, exposed to the criminal activity within prisons, are not only subjected to violence, they also learn this behavior.[382] When a child, unconnected to the criminal justice system except through a parent who is accused of committing a crime lives in prison and is directly exposed to convicted and sentenced individuals, he or she becomes schooled in criminal ways. The prison serves as a breeding ground for crime and can be the first step and trigger for a lifetime of criminal activity. This issue is even more stark in the case of children who are born in prison. One official noted this tragic phenomenon with regard to these children: "They are born in prison, and they will die in Chonchocoro."[383]

Juveniles in pretrial detention are also particularly vulnerable to influence by convicted and sentenced prisoners, especially because the State fails to separate them from adults[384]

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381. Ley de Ejecución y Supervisión [Law of Criminal Enforcement and Monitoring] Law No. 2298, 20 Dec. 2011, Artúcle 26, *available at* http://www.oas.org/juridico/spanish/gapeca_sp_docs_bol2.pdf; Gerardo Bustillos, *"Kids are at Home, With Parents, in Bolivia Prisons,"* JAKARTA GLOBE (Oct. 14, 2012), http://www.thejakartaglobe.com/international/kids-are-at-home-with-parents-in-bolivia-prisons/550114; Interview with Ninoska Ayala Flores, *supra* note 83.

382. UNHCHR Addendum, *supra* note 68, ¶ 72 ("OHCHR-Bolivia is also concerned about the presence of children of school age and adolescents living in prison with their parents deprived of liberty, or who in some cases may be themselves illegally detained with adults, being at risk of abuse and sexual exploitation."); Interview with Ninoska Ayala Flores, *supra* note 83; Interview with Juan Carlos Octavio Pinto Quintanilla, *supra* note 372.

383. Chonchocoro is the maximum-security prison in La Paz. *See* Interview with Ramiro Llanos, *supra* note 1 ("The parents don't want to leave their children at home with the fathers or to orphanages—they'd rather have their children close. If a child is with his father, there's a dual purpose—the child stays close and the child helps work. Sometimes, they use the kids to bring in drugs or alcohol so the children live in environments that harm them. . . . There are many cases of fathers raising their daughters in San Pedro and after the father is released, the girls will stay in jail or act as prostitutes.")

384. *See* Committee on the Rights of the Child, Concluding Observations: The Plurinational State of Bolivia ¶ 81, CRC/C/BOL/CO/4 (Oct. 16, 2009) ("The Committee welcomes the fact that present legislation sets the minimum age of criminal responsibility at 16 years, but is concerned at the fact that deprivation of liberty is not used as a measure of last resort and at the wide use of preventive detention for children between 16 and 18 years."). In response to whether juveniles are separated from adults in San Pedro Prison in La Paz: "There is no division, they are all mixed in." Interview

in contravention of its legal obligations.[385] As a result, "youth who are not criminal become criminals" and "the juveniles become criminals for the rest of their lives."[386] This sentiment was repeated elsewhere: "In Bolivia, people keep thinking that putting people in jail is good when in reality it's a university of delinquency. A lot of people in jail are teenagers."[387]

d. Use of Pretrial Detention to Mask Other Reasons for Citizen Insecurity

When the State uses pretrial detention as a tool to convince society that citizen security is being addressed, it essentially masks and neglects to address underlying structural issues that contribute to crime and to problems that prevent the criminal justice system from functioning efficiently. Rather than addressing these issues, the government uses pretrial detention to provide a veneer of justice that conceals other issues.[388]

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with Ninoska Ayala Flores, *supra* note 83. Regarding Qalauma, a juvenile detention facility in La Paz, Ms. Flores noted, "This is the only center of its kind in Bolivia and its objective is to separate children from other prisoners. This is the most vulnerable group." *Id.* On their follow-up trip to Bolivia in January, 2013 the Crowley delegation visited Qalauma and had the opportunity to meet with Roberto Simoncelli, Progetto Mondo Mlal; Colonel Deap Hugo Vila Aramayo, Director of Qalauma; Ruben Dario Lobatón Ortiz, Chief of Police Security at Qalauma; and José Colque, Agronomy Educator at Qalauma. It is worth noting that Qalauma is only for young men and that a comparable institution does not exist for young women.

385. CONSTITUTION, *supra* note 75, art. 23(II) ("The imposition of freedom-depriving measures to adolescents will be avoided. Every adolescent that is deprived of liberty will receive preferable attention by the judicial, administrative and law enforcing authorities. These shall assure at every moment the respect to its dignity and the reserve of its identity. The detention shall be completed in different facilities than those assigned for adults, taking into account the own needs of its age."); *see also* ICCPR, *supra* note 93, art. 10(2)(b); American Convention, *supra* note 94, art. 5(5); Tokyo Rules, *supra* note 116, ¶ 8(d); Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the Eur. Prison Rules, *supra* note 371, art. 18.8(c). *See also* United Nations Rules for the Protection of Juveniles Deprived of their Liberty, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules).

386. Interview with Padre Thomas Hermes, Pastoral Penitenciaria, in Potosí, Bolivia (May 16, 2012).

387. Interview with Angela Olivia Beltran Sandoval, Pastoral Penitenciaria, in Sucre, Bolivia (May 17, 2012).

388. A study conducted in Mexico observed: The government treats pretrial detention as preemptive punishment in an attempt to convince victims of crime and society at large that justicfe is being served. The use of pretrial detention to boost public confidence in the country's ability to maintain order is a smokescreen that hides the most important problem: the inability of criminal justice institutions to respond to

According to one analysis: "[a]ll we do is offer the public a solution that is not really a solution. They think the best way is to lock up the problem and that's why we have this inversion of pretrial detention not being the exception."[389]

For example, while the reforms to the CPC, including the expansion of crimes for which pretrial detention can be applied, were "responses to the feelings of State insecurity,"[390] they have failed to "address structural problems."[391] While some laws were enacted on the premise that they would increase safety, political motivations often lurked behind these efforts, and once laws were enacted, the State failed to fully implement them: "[t]he promises of such laws are just used by political parties for their re-election. They then do whatever they want, more or less."[392] Following the enactment of laws, accompanying changes such as institutional and structural reform that would have enabled the legal changes to take full effect were not put into place.[393] Instead, there was an over-reliance on the power of the law alone to improve the criminal justice system.[394] As one NGO noted, "[t]here have been too many changes in the laws but the institutions themselves haven't changed . . . [t]he deficiencies

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crime and the overwhelming reality that 97 percent of crimes committed go unpunished. LECUONA, *supra* note 11, at 12.

389. Interview with Dr. Edwin Cocarico, *supra* note 49.

390. Interview with Anonymous Official, *supra* note 181.

391. *Id.* Another lawyer stated, "The State just throws out laws willy-nilly to just scare the criminals. Bolivia doesn't have a strong institution." Interview with Marcelo Barrios Arancibia, *supra* note 91.

392. Interview with Arturo Yáñez Cortez, *supra* note 255.

393. Duce & Perdomo, *supra* note 343, at 85 ("The chances that reform will produce concrete improvements in citizen security depend on structural changes in the criminal justice system, on designing and implementing specific programs to achieve highly circumscribed objectives and on reorienting institutions within the new structure to address the specific objectives."). Also "member states are responsible vis-à-vis their citizenry to conduct effective plans and programs to prevent crime and violence, based on a strategy that involves state institutions in various sectors, ranging from the police and judicial system to methods of social, community or situational prevention, which institutions in the education, health, labor and other sectors are to conduct, engaging as well national and local governments." Citizen Security Report, *supra* note 110, Chapter IV: Citizen Security and Human Rights, ¶ 66.

394. Duce and Perdomo, *supra* note 343, at 85 ("The reform of rules alone does not necessarily increase efficiency, nor does it automatically translate into a significant improvement in citizen insecurity . . . ."). This issue has been highlighted as one affecting the reform of criminal justice systems in Latin America broadly: "Reform requires major efforts regarding implementation and substantial support from the community and political authorities." *Id.*

are blamed on the criminal procedure code and laws but in reality the laws were never enacted the way they were meant to be because the system was not prepared for the changes."[395] Similarly, a lawyer explained, "[t]he institutions were not prepared to adopt such a big change."[396]

As long as the State continues to use pretrial detention as the primary response to crime, meanwhile failing to examine other reasons for and solutions to crime, citizen security will not improve. One lawyer countered the idea that pretrial detention reduces crime by stating, "[y]ou can't fight crime with pretrial detention." [397] In using pretrial detention excessively and arbitrarily to respond to citizen security concerns, and by ignoring the root causes of crime, the State allows these factors to not only persist, but to intensify.

The State also meanwhile neglects to address other social justice and human rights issues. Left unaddressed, citizen security will not only not improve, but, as long as these other issues are neglected, it is likely to worsen. For example, poverty, including "the incapacity of the State to address the citizen's basic needs, the enormous gap between the rich and the poor and social exclusion" [398] is one major reason for increased crime. [399] Therefore "what will decrease crime is reducing poverty."[400] More specifically, another lawyer discussed the fact

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395. *See also* FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 221 ("Attempts to improve the capacities of criminal prosecution have focused on punitive and normative measures, which can be called 'punitive populism' and 'legal fetishism.' The fact that, according to the Justice Studies Center of America, Bolivia has one of the highest rates of prisoners who have not been convicted in the continent is no accident. It is a result of the fact that changes were introduced to the criminal system without institutional development or measures of implementation. Laws were changed, but institutions were not. Penalties were increased, without strengthening the criminal system.").

396. Interview with Jorge Richter Amallo, *supra* note 18.

397. Interview with Audalia Zurita Zelada, *supra* note 215.

398. Interview with Reynaldo Imaña, *supra* note 79.

399. Interview with Jorge Richter Amallo, *supra* note 18 ("The cases aren't always about crime but really about other issues, poverty, social breakdown, etc."); Interview with Audalia Zurita Zelada, *supra* note 215 ("The economic crisis has created an increase in the rate of crime."); Interview with Dr. Edwin Cocarico, *supra* note 49 ("There are structural issues related to politics and the economy that society does not realize.").

400. Interview with Anonymous Official, *supra* note 59 ("The criminal code doesn't prevent people from committing crime. The government incorrectly thinks that increasing sentences will decrease crime. What will decrease crime is reducing

that in order to fight crime, the State must create jobs and take other steps that will make citizens safer.[401] Another lawyer discussed the broader issues that must be addressed: "[t]he solution [to crime and fears about criminality] isn't the stricter laws, but to work on the social, cultural, education, and economic matters."[402] By not addressing poverty, the State allows one of the major underlying determinants of crime to continue to fester.

One reason the State has not addressed key problems in the justice system is because "the current government cares so little about the system of justice, and those appointed had no prior experience."[403] More specifically:

> I don't think that there ever was a party that was genuinely concerned with the judiciary. The judiciary is the orphan of the State, no one wants to take care of it, not even the lawyers because they benefit from all the flaws . . . Other people just see the judiciary as a tool. The political priority is not the judiciary . . . No one has genuine interest in the judiciary.[404]

F. *Counter-reforms*

The effects of citizen security concerns continue to influence efforts aimed at further restricting the rights of the accused and increasing the use of pretrial detention.[405] As one official explained, "Since 2010 there has been a hardening of positions. People think that the code is too protective of the accused."[406] A lawyer explained that currently "they are thinking of changing these precautionary measures so they can be stricter" and this would include a new criminal procedural

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poverty. The only thing increasing sentences will do is increase the amount of people in prison.").

401. Interview with Audalia Zurita Zelada, *supra* note 215.

402. Interview with Boris Wilson Arias Lopez, *supra* note 215.

403. Interview with Audalia Zurita Zelada, *supra* note 215.

404. Interview with Enrique MacClean Soruco, *supra* note 77.

405. Interview with Boris Wilson Arias Lopez, *supra* note 215 ("The media provokes and the law gets stricter and stricter. Now they are thinking of changing these precautionary measures so they can be stricter.").

406. Interview with Anonymous Official, *supra* note 59.

code.[407] Overall, these reforms would result in "significantly reducing due process rights that exist within the law."[408] As another lawyer explained, "Every time there is some serious incident, or someone is released from pretrial detention with an alternative measure, there is a move to make the law stricter."[409] For example, among other measures, counter-reforms that would further curtail defendants' rights by limiting the number of times a defendant can object and prohibiting the filing of certain motions, are currently under consideration.[410] It is deeply worrisome that these changes are being considered in light of the grave human rights violations already taking place under current laws.

IV. *HUMAN RESOURCES & POVERTY*

> *"I see a failure in the justice system, and in justice operators."*[411]

Serious underfunding of the criminal justice system, and in particular the system for indigent defense, stemming from the government's lack of prioritization of this sector, is a major factor impacting pretrial detention rates and broader due process protections in Bolivia. The lack of budgetary and other attention impacts the criminal justice system generally, and the situation of pretrial detention specifically, in three distinct but interrelated ways. First, public defense is severely inadequate, largely as a result of a poorly funded system and the attendant problems of lack of training. Second, persistent poverty results in a population that is unable to defend itself and for whom private defense is unaffordable and thus not an option. Third, further complicating each of the forgoing issues is the high level of corruption. Together, these factors result in persistent human

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407. Interview with Audalia Zurita Zelada, *supra* note 215 ("They [the government] have told the people that they are going to make precautionary measures stricter, justifying it as a means to increase citizen security."); Interview with Boris Wilson Arias Lopez, *supra* note 215.

408. Interview with Kathryn Ledebur, *supra* note 262.

409. Interview with Reynaldo Imaña, *supra* note 79.

410. Interview with Anonymous Member of the Judiciary, *supra* note 179.

411. Interview with Limbor Poral Seqouiz, Detainee and President of the Delegate's Council in San Pedro Prison, in La Paz, Bolivia (May 25, 2012).

rights violations and the inability of defendants to exercise the rights guaranteed under the Constitution and the CPC.

A. Insufficient Resources

1. Lack of Prioritization and Resource Allocation by the State

Bolivia's Constitution establishes a public defender system that obligates the State to provide for a defense attorney at no cost to defendants.[412] SENADEP is responsible for carrying out the constitutional mandate of providing indigent defense,[413] but lawyer and judge interviewees identified a lack of government prioritization resulting in insufficient resources to SENADEP[414] and as a result, a severe shortage of defense attorneys. Poor funding for legal aid severely limits the capacity of SENADEP and affects the criminal justice system more broadly.[415] Without State funding, SENADEP is dependent on funding from foreign donors, which amounts to seventy-six percent of its budget

412. *See supra* note 152.

413. The National Public Defender Service was established by Supreme Decree No. 23253 of 31 August 1992 as part of the Office of the Under-Secretary of Justice of the Ministry of the Interior, Migration, Justice and Social Defence, and was then converted by National Public Defender Service Act No. 2496 of 4 August 2003 into a body attached to the Ministry of Justice. Article 2 states that SENADEP's aim is to guarantee the inviolability of the right to a defense by providing criminal defense services to all accused persons who lack sufficient means and to those who have not designated a defense lawyer. Pursuant to Article 3, this defense service is to be provided starting from the first stage in criminal proceedings and continuing until a judgment has been handed down; it is also to be made available while such persons file and pursue the successive appeals provided for by law. CAT Report Mar. 5, 2012, ¶ 28–29. Committee against Torture, Consideration of reports submitted by States parties under article 19 of the Convention, Second period reports of States parties due in 2004, Plurinational State of Bolivia, 5 March 2012, CAT/C/BOL/2, para. 28–29.

414. SENADEP national officers asked the Justice Ministry for an increased budget but this request was rejected. *See* Interview with Dr. Epiphanio Quispe Conde, Director, SENADEP, in Trinidad, Bolivia (May 15, 2012). According to one official, "[t]he Danish cooperation council is providing financing for public defense in rural areas. The State is not interested in increasing their budget or providing services in this area—this is a very critical situation." Interview with Anonymous Official, *supra* note 181.

415. Asked what the biggest problems in the criminal justice system are, one factor that was mentioned is "resources (economic)." Interview with Jorge Fernandez, *supra* note 222.

according to one report,[416] to stay operational.[417] Problems arise when foreign funding is cut.[418]

The result is very low salaries for public defenders, particularly in comparison to what they could be earning elsewhere.[419] The average salary of a public defender is between 3000 and 3500 Bolivianos (US$420–$490) a month.[420] A judge in Sucre explained: "There is a [public defense] office of three to four attorneys. Every year, the Supreme Court chooses six or seven attorneys to be public defenders, but they don't get paid."[421] Low salary also reduces the motivation for lawyers to become public defenders[422] and contributes to the high turnover rate.[423] In the words of one foreign funder: "For public defenders it's impossible to hold up under the pressure, the cases, the salary."[424] As the director of SENADEP explained:

> There's too much turnover. The disadvantage is that after two years, they will be offered better jobs and then the new person comes in and has to be trained all over again because they have no work experience. It's

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416. According to statistics gathered by Fundación Construir, the annual budget for SENADEP is Bs.8,172,204 (approximately US$1,175,000). About seventy-six percent of this budget comes from international donors. FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 61.

417. According to the national director of SENADEP, in 2012, the Danish Embassy provided two million Bolivianos (approximately US$287,380) in support of SENADEP, mostly to strengthen the organization and extend its presence in rural areas. Interview with Justo Salazar Rodas, National Director of SENADEP, in La Paz, Bolivia (May 22, 2012).

418. For example, "[b]efore public defenders had funding from Canada, now they don't, making them even more overworked." Interview with Kathryn Ledebur, *supra* note 262.

419. In the words of one SENADEP attorney, "Before coming to SENADEP I was earning a salary twice the amount than I am earning here." Interview with Dr. Alberto Andrado Dorado, Attorney, SENADEP, in Trinidad, Bolivia (May 15, 2012).

420. Interview with Fernando Medina, *supra* note 178; Interview with Dr. Luis D. Lopez Rosales, *supra* note 295.

421. Interview with Marcelo Barrios Arancibia, *supra* note 91.

422. Interview with Dr. Luis D. Lopez Rosales, *supra* note 295 ("Now, in Bolivia, public defenders get Bs.3,000 [approximately US$430] per month. Another professional would get twice that. For that reason, not a lot of people want to be public defenders. An attorney in his own office would make double.").

423. Saying that the salaries in Bolivia for defense attorneys and prosecutors "are ridiculous," one lawyer explained that as a result of low pay, "the ones that are left aren't good. The best left, though some stayed because they love their country." Interview with Silvia Salame Farjat, *supra* note 91.

424. Interview with Fernando Medina, *supra* note 178.

> all because the salary is so low. If the salary was the same as at other public ministries, they would likely stay.[425]

Lack of motivation also stems from the fact that lawyers often work at SENADEP in order to better position themselves to secure employment at the prosecutor's office or in the judiciary, rather than because they are committed to defense work. Even the national director of SENADEP recognizes that a job at SENADEP is seen to function as a "school" for attorneys to learn about the criminal justice system: "They learn and then they go," he lamented.[426]

SENADEP attorneys themselves expressed this view. One attorney in the SENADEP office in Trinidad explained, "I came to SENADEP because I wanted to start a professional career."[427] Although the salary is "too low," he hopes to move into an administrative career track.[428] Working at SENADEP was also characterized as a "trampoline" or a "stepping stone."[429] Finally, because there is no job performance evaluation,[430] motivation to provide a zealous defense is further reduced. Lawyers recognized that this is "bad for the clients."[431]

It is not only SENADEP that is grossly underfunded—the same is true for the prosecution.[432] Lack of motivation and high turnover rates there prevent the criminal justice system from operating at its best.[433] The result is both inexperienced prosecutors and delays caused by inefficient handover. As one

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425. Interview with Justo Salazar Rodas, *supra* note 417.

426. *Id.*

427. Interview with Dr. Alberto Andrado Dorado, *supra* note 419.

428. *Id.*

429. In Trinidad, lawyers at SENADEP said working there is the equivalent of a Master's Degree which can open future job opportunities. Specifically because of the four year minimum legal experience required as a prerequisite for a job at the Public Ministry, work experience at SENADEP makes you "well-suited." The regional director of SENADEP prior to the current director (as of May 2012) went on to become a prosecutor. Interview with Defense Attorneys, SENADEP, *supra* note 280.

430. The evaluation is based on reports written and submitted to the regional office and points received for working at SENADEP. *Id.*

431. Interview with Dr. Luis D. Lopez Rosales, *supra* note 295.

432. Interview with Joe Loney, *supra* note 172 ("The prosecutor's office is underfunded."). Prosecutors' caseloads are high because "there's not enough money to employ more prosecutors." Interview with Sandro Fuertes Miranda, *supra* note 193.

433. In describing the prosecutors: "They have very little capacity. This is obvious to us in the trainings." Interview with Anonymous Official, *supra* note 181.

judge noted, "[t]here are always changes happening within the prosecutor's department . . . The one who is leaving must have an inventory of cases to give to the new attorney, but this causes a lot of delay."[434] Those who receive training move on to other careers—one estimate was that only ten percent of people trained as prosecutors remain in that position.[435] One judge criticized prosecutors as being "not professional, not objective, and [that they] don't comply with the laws and constitutional rights. They're handpicked, without experience, with political objectives. That's the reality today."[436]

2. Inadequate Capacity

> *"Everyday SENADEP gets two more cases to investigate so once somebody is put in pretrial detention, no investigation takes place because of the caseload."*[437]
>
> *"There are not enough judges and there are too many cases for the judges."*[438]

Because the budget allocated to criminal defense is so low, there is a sheer absence of a sufficient number of defense attorneys.[439] This is particularly stark in more remote areas of the country.[440] Without enough lawyers, attention to individual clients suffers. At the most basic level, defense attorneys do not

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434. Interview with Margot Pérez Montaño, *supra* note 69.

435. Interview with Dr. Teresa Ledezma, *supra* note 69.

436. Interview with Fernando Orellana Medina and Iris Justiniano, Examining Judges, in Santa Cruz, Bolivia (May 16, 2012).

437. Interview with Attorney, SENADEP, *supra* note 377.

438. Interview with Sandro Fuertes Miranda, *supra* note 193.

439. The number of public defenders who provide free legal assistance to persons nationwide is sixty-six. This figure remained the same throughout the period of analysis by Fundación Construir (between 2008 and 2011). *See* FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 54. Further, there are a large number of interim officials serving as, for example, prosecutors and defense attorneys. For example, the national director of SENADEP with whom the Crowley delegation met, had been "interim" since 2009. Interview with Justo Salazar Rodas, *supra* note 417. Given their interim status, these individuals are unable to make certain decisions. Interview with Kathryn Ledebur, *supra* note 262.

440. The number of defenders and their distribution in different departments has not changed in recent years. La Paz, with the greatest number of defenders, continues to have the lowest caseload per public defender in relation to Beni, Pando and Tarija, which are the departments with the lowest number of public defenders in Bolivia. For example, the caseload per defender in La Paz is 265; in Beni, the number is 508. *See* FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 57.

go to prisons to meet with their clients, and thus cannot work on a strategy to best represent them.[441] Furthermore, they are unable to attend hearings, leaving their clients defenseless at a critical stage of the criminal justice process.[442] A defense attorney spoke of the challenges that he faces: "I go into jails, people beg for help, I want to help people but can't help everyone with their paperwork."[443] The lack of capacity affects defendants at every stage of the process, even immediately following arrest when police sometimes prevent the arrested individuals from making calls, thus depriving them of their right to a defense attorney at the earliest stage of the process.[444] As a result, many detainees are left without legal aid, less able to counter arguments proffered to impose pretrial detention, more likely to be treated in a way that is unfair or unequal and, ultimately, more likely to be placed in pretrial detention.

The absence of an attorney can have an especially strong impact at the pretrial hearing. Although by law the burden of proof falls on the prosecutor to prove that pretrial detention is necessary, in practice, a defendant is required to show that he is not a flight risk or will not obstruct justice.[445] Without the legal assistance of a defense lawyer, a person charged with a crime is likely to be placed in pretrial detention, affecting his subsequent defense at trial: "when in prison, the defendant won't see his lawyer as frequently and cannot follow the evidence against him. It works to his disadvantage."[446]

However, even having a defense attorney does not guarantee quality legal defense.[447] While the government is obligated not only to provide defense, but *quality* legal assistance,[448] in Bolivia public defense is often of poor quality,[449]

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441. Interview with Enrique MacClean Soruco, *supra* note 77 ("What the inmates tell me is that public defenders rarely go to jail, and rarely coordinate defense strategy.").

442. *See id.*

443. Interview with Jorge Fernandez, *supra* note 222.

444. *Id.*

445. *See supra* Part II(A)(4).

446. Interview with Marcelo Barrios Arancibia, *supra* note 91.

447. "The public defenders who are chosen are mostly junior attorneys, so it's not a good thing for the defendants." *Id.*

448. *Extreme Poverty Report*, *supra* note 153, ¶ 82(c) ("Access to legal representation is of utmost importance and underpins all forms of penalization of persons living in poverty. States shall ensure quality legal aid for the poorest segments

and in some cases described as "really bad."[450] A frustrated detainee described her experience:

> The defense attorneys never explain to us our rights. In the hearings, they only speak to the judges. They don't explain anything to the client. For example, one of those [accused women] could have been given an alternative measure because she was in the middle of breastfeeding her child but she was put in pretrial detention. They don't do enough investigations into the alternatives or other ways of helping us. It's easier for them to send us here.[451]

It is not uncommon for defense lawyers to not even attempt to provide a defense at pretrial hearings.[452] Lawyers explained that defense attorneys "don't know enough"[453] and that "[public defenders] are young lawyers without experience and will surely lose their cases."[454] It is defendants who suffer the repercussions when legal aid is ineffective as a result of the diminished quality and capacity of legal defense attorneys.[455]

It is not only the defense that lacks capacity. There is also a serious dearth of prosecutors[456] and judges[457] and this problem

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of society, not only for criminal proceedings but also with respect to issues which are particularly relevant for persons living in poverty, such as social benefit appeals, eviction and child protection procedures.").

449. Interview with Detainees of Cantumarca Prison Men's Unit, *supra* note 277.

450. Interview with Detainees of Cantumarca Prison Women's Unit; FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 214.

451. *Id.*

452. As one detainee explained, at his first pretrial hearing, "the prosecutor asked for pretrial detention, the judge accepted this request and the defense attorney said nothing." Interview with Abel Bikini Villamor, Detainee in Riberalta Prison, in Riberalta, Bolivia (May 16, 2012).

453. Interview with Anonymous Criminal Attorney, in Sucre, Bolivia (May 14, 2012).

454. Interview with Silvia Salame Farjat, *supra* note 91.

455. Interview with Justo Salazar Rodas, *supra* note 417.

456. There are no longer career prosecutors but rather prosecutors elected in the interim, who are transitory. Interview with Anonymous Official, *supra* note 181. In the period analyzed in their study (2008–11), Fundación Construir found that there was an average national increase of two percent in the number of prosecutors, which is insufficient, considering that the number of cases in the same period increased thirteen and one half percent. *See* FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 49. The data demonstrates that the increase in cases has been significant—the national average in the number of cases per prosecutor has increased from 165 to 179 between 2008 and 2012, representing an 8.5% percent increase. *Id.* at 51.

is particularly acute in remote areas.[458] As a result, these officials are often unable to fulfill even their most basic duties.[459] One official went so far as to describe the lack of capacity as well as the lack of institutionalization of the careers of all actors in the criminal justice system as constituting a "structural crisis."[460]

3. Lack of Training

Whereas the quality of defense can be at least partially addressed by training, the lack of funding dedicated to training prevents improvement.[461] Without comprehensive and sustained

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457. According to 2010 statistics, the number of examining judges nationwide was 52. The population at that time was about 5.5 million persons which means that each judge was responsible for approximately 106,000 persons. FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 42. Interview with Dr. Jose Ayaviri Siles, Criminal Enforcement Judge [Juez de Ejecucion Penal], in La Paz, Bolivia (May 24, 2012) ("It's almost impossible [for judges] to devote enough resources to each [case]."); Interview with Margot Pérez Montaño, *supra* note 69 (noting that with the number of cases, "there are too many hearings here for them all to be heard. It is excessive.").

458. FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 49 (With respect to the distribution of prosecutors between capital cities and provinces, the central cities (La Paz/El Alto, Cochabamba and Santa Cruz) have more than sixty percent of the total number of prosecutors); FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 50. In 2011, the total number of prosecutors was 424, with 312 prosecutors assigned to capital cities and 112 assigned to provinces. FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 46. Of the total number of examining judges, the following capitals contained the highest numbers: Santa Cruz (14), La Paz (10), Cochabamba (7), and El Alto (5). The remaining capitals had either two or three such judges. With respect to caseload, in 2010, judges in the departments of Cochabamba and Santa Cruz were responsible for more than an average of 3,000 cases each; examining judges in three departments were responsible for more than 2,500 cases each; judges in four departments for more than 1,000 cases each; only in Potosí was the average caseload below 1,000.

459. *See* Interview with Jorge Richter Amallo, *supra* note 18; Interview with Vladimir Nilo Medina Choque, *supra* note 172; Interview with Sandro Fuertes Miranda, *supra* note 193; Interview with Criminal Lawyer, in Sucre, Bolivia (May 14, 2012); Interview with Joe Loney, *supra* note 172; Interview with Cesar Suarez Saavedra, *supra* note 257; Interview with Jerjes Justiniano Atalá, *supra* note 173. Given the caseload that judges carry, "From a practical perspective, it is impossible for a judge to act with promptness and the attention to detail and caution merited in each decision made with respect to the application of precautionary measures." FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 47.

460. Interview with Anonymous Official, *supra* note 181. A lawyer agreed, stating: "Fundamentally, we don't have institutionality of judicial power. This applies to the Public Ministry, the judicial power, the police." Interview with Dr. Roger Valverde Perez, *supra* note 33.

461. Interview with Cesar Suarez Saavedra, *supra* note 257 ("In the first few three to five years after the new code went into effect, few cases were brought. That caseload was used to determine the budget by the Consejo de la Judicatura [Judicial Council].

training, judges, prosecutors, and defense attorneys are unable to perform to the best of their abilities, thereby impacting the quality of the criminal justice system and, more broadly, pretrial detention.

In general, in the words of one lawyer, "trainings almost never happen now."[462] When the Crowley delegation asked one SENADEP attorney if he had received any training, he responded: "No, none at all. I had a trial my first day of work."[463] The SENADEP office in Trinidad revealed that the SENADEP national officers do not offer capacity building.[464] The absence of training in the face of substantial reforms in the criminal justice system—reforms both to the CPC and the Penal Code—is especially problematic. Due to limited staff in the Trinidad office, [465] conducting trainings in individual offices would significantly detract from the time available to work with clients. [466] As a result of this "deficient" training, public defenders "don't present evidence to show the defendant is not a flight risk or does not present a risk of obstructing justice."[467] The lack of training thus affects the imposition of pretrial detention.

The prosecutor's office has not fared much better; the termination of foreign funding from the Spanish cooperation in 2009 resulted in the end of training for prosecutors by the Public Ministry Training Institute (Instituto de Capacitación de Ministerio Público).[468]

4. System-Wide Impact of Limited Funding

The absence of other personnel resources and tools also contributes to systemic problems. For example, there are no

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Even though caseload has increased, the budget still reflects the previous low caseload. Prosecutors are bringing more cases now.").

462. Interview with Jorge Richter Amallo, *supra* note 18.

463. Interview with Jorge Fernandez, *supra* note 222.

464. *See* Interview with Dr. Alberto Andrado Dorado, *supra* note 419.

465. At the time that the Crowley delegation visited in May 2012, the office of SENADEP in Trinidad in the department of Beni was composed of one director, one defense attorney, one attorney advisor, and one executive administrator for a population of approximately 160,000 persons. *See Id.*

466. *Id.*

467. Interview with Anonymous Official, *supra* note 181.

468. *Id.*

court recorders in Bolivia. The NGO Pastoral Penitenciaria explained that the "judge or legal reporters usually have a tape recorder. [Hearings] have to be transcribed, which can take two months or more."[469] Even at the investigation stage, the lack of resources is palpable. For example, "there is only one office that can do forensic investigations so they need to send this evidence to La Paz."[470] Further, basic systems—including a registry of information about detainees from the date when they were detained to monitor the maximum duration of their legal detention—are neither utilized nor maintained. As a result, officials operate based on incomplete or inaccurate information, contributing to illegal pretrial detention when individuals are detained for longer than allowed by law. In the words of one detainee, "The big thing here is, 'I can't find your name in the system.' That happens with the public defenders a lot, you go to them and give them your name to find out about your case and they can't find anything."[471] As an NGO explained, "There's a system whereby prosecutors should register each case and its progress but it's not enforced well."[472] Furthermore, "There's no consequence if the prosecutor doesn't register the information,"[473] thus further reducing the incentive to follow such procedures.

B. *Poverty and Pretrial Detention*

> *"If you have money you'll be released, if you don't you'll be put in pretrial detention."*[474]
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> *"The people that are detained are the poorest people."*[475]
>
> *"Yes there are people who are more vulnerable – for example the poor families. For them sadly there is no justice."*[476]

469. Interview with Joe Loney, *supra* note 172.

470. Interview with Angela Olivia Beltran Sandoval, *supra* note 387.

471. Interview with Morris Brown, Detainee in Palmasola Prison, in Santa Cruz, Bolivia (May 17, 2012).

472. Interview with Susana Saavedra Badani, *supra* note 293.

473. Interview with Ramiro Orías Arredondo, *supra* note 172.

474. Interview with Ramiro Llanos, *supra* note 1.

475. Interview with Reynaldo Imaña, *supra* note 79.

476. Interview with Ricardo Jaimes G, Pastoral Penitenciaria, in Potosí, Bolivia (May 16, 2012).

1. Vulnerability and Access to Defense

Pretrial detention laws, policies, and practices impact the poor differently such that they are more likely to be detained in the first place, to be held in detention for longer, and to experience the effects of pretrial detention in a manner that is particularly intense and long-lasting. Discriminatory treatment of the poor violates equality and non-discrimination provisions under Bolivian law as well as international human rights law.[477]

While the many structural limitations discussed above, especially those affecting the defense,[478] have a direct impact on the right of all detainees to a fair proceeding,[479] given the strong correlation between poverty and pretrial detention, the poor are disproportionately impacted.

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477. *Extreme Poverty Report*, *supra* note 153, ¶ 18 ("Discrimination is prohibited on a number of enumerated grounds, including economic and social status as implied in the phrase 'other status,' which is included as a ground of discrimination in the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights."); ICCPR, *supra* note 93, art. 2 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); *id.* art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); ICESCR, *supra* note 93, at art. 2.2 ("The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

478. The principle of "equality of arms" in the criminal process is not adequately reflected in the Bolivian system, since the number of SENADEP officials is limited particularly in comparison to the number of resources available in the Office of the Public Ministry. *See* FUNDACIÓN CONSTRUIR REPORT, *supra* note 7, at 54; *see also* Interview with Fernando Medina, *supra* note 178 ("It is hard for someone who feels their rights are being violated to find justice. How can the State ensure that due process and the sentence are completed?").

479. *Extreme Poverty Report*, *supra* note 153 ("The inability to access competent, comprehensive legal assistance presents a serious threat to the human rights of persons living in poverty. Without adequate representation or advice individuals are more likely to be convicted. While in detention they have no accessible means of protesting infringements of their rights, such as unsafe or unsanitary conditions, physical or mental abuse or lengthy delays, and there is a higher likelihood that they will be requested to pay bribes, which they will experience difficulties in paying.").

A number of different factors contribute to the fact that the poor make up a disproportionate percentage of the pretrial detainee population.[480] First, they tend to be at a disadvantage with respect to knowledge of the criminal justice system and how to navigate it, given low levels of education, low literacy rates, and in the case of indigenous persons, the fact that their first language is not Spanish, but rather an indigenous language such as Quechua or Aymara, and that the legal system, despite its legal obligation to do so,[481] fails to provide for interpretation and translation.[482] Given these factors, these individuals are at a

480. Viceministerio de Justicia y Derechos Humanos [Deputy Minister of Justice & Human Rights], Plan Nacional de Acción de Derechos Humanos Bolivia Para Vivir Bien 2009-2013 [National Plan of Action of Human Rights of Bolivia to Live Well 2009-2013] 166 (Dec. 2008), *available at* http://www.derechoshumanosbolivia.org/archivos/biblioteca/PNADH%20FINAL.pdf ("More than 70% of the prison population consists of indigenous persons or persons living in poverty or those with scarce resources. These statistics point to the essence of the system of the deprivation of liberty, which is the criminalization of poverty and the situation of the indigenous and a clear violation of the principle of equality before the law."); OPEN SOC'Y JUSTICE INITIATIVE, PUNISHING THE POOR: EXPLORING MEASURES IN SOCIAL POLICE THAT PENALISE, SEGREGATE, CONTROL OR UNDERMINE THE AUTONOMY OF PEOPLE LIVING IN POVERTY 4 (Oct. 25, 2011), *available at* http://www.opensocietyfoundations.org/sites/default/files/goldston-pretrial-20111027.pdf ("[P]ersons living in poverty come into contact with the criminal justice system with disproportionately high frequency—leading to the excessive arrest, detention, and imprisonment of the poorest and most vulnerable. Bail conditions are often onerous, legal assistance is often absent or difficult to come by, and the personal costs to detainees are high in terms of health and even torture."); OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 370, at 4 ("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.").

481. For non-Spanish speakers, translation and interpretation must be provided by the court. *See* CPC 1970, *supra* note 33, art. 10 ("A defendant who does not understand Spanish . . . shall be entitled to choose a translator . . . to assist him in all acts necessary for his defense."); CONSTITUTION, *supra* note 75, art. 120(II) (providing that "[a]ll persons subject to a legal proceeding" shall be assisted by an interpreter when necessary).

482. Interview with Marco Antonio Roque, *supra* note 275 ("Many people come from rural areas and don't understand the legal system; they have no idea about what justice is."); Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development 12, U.N. Doc A/HRC/8/4 (May 13, 2008) (by Leandro Despouy) ("The most serious obstacles barring access to justice for the very poor include: (a) their indigent condition; (b) illiteracy or lack of education and information; (c) the complexity of procedures; (d) mistrust, not to say fear, stemming from their

significant disadvantage upon entering the criminal justice system and are generally unable to defend themselves. Officials and detainees alike recognized that "Most of the people here are here . . . because they are poor."[483] This is consistent with patterns both internationally and regionally.[484]

Being unable to defend themselves,[485] the poor are dependent on legal aid, which, as discussed above, is largely nonexistent. Even where they do exist, legal aid services are not always free.[486] Either due to fees or because of corruption, "you

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experience of the justice system, either because they frequently find themselves in the position of accused, or because their own complaints are turned against them; (e) the slow pace of justice, despite the fact that their petitions often relate to very sensitive aspects of life (such as return of children) which need to be dealt with rapidly; and (f) in many countries, the fact that they are not allowed to be accompanied or represented by support organizations which could also bring criminal indemnification proceedings."). A discussion of the particular ways in which indigenous persons are affected by pretrial detention practices is beyond the scope of this report but is particularly relevant in Bolivia where, according to a 2009 report by the Special Rapporteur on the Rights of Indigenous Peoples at the time, Rodolfo Stavenhagen, sixty-two percent of the Bolivain population at the time consisted of indigenous persons. A/HRC/11/11, 18 February 2009, p. 2, *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.11.pdf.

483. Interview with Detainees of Cantumarca Prison Men's Unit, *supra* note 277.

484. *See* OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 370, at 22 ("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."); LECUONA, *supra* note 11, at 17 ("Pretrial detention is often disproportionately imposed on the most disadvantaged and vulnerable members of society, such as the poor or disabled or ethnic minorities. Faced with rising public pressure to deal effectively with crime and insecurity, Mexico's criminal justice system and policymakers are seeking out not the perpetrators of crimes, but those whom it can most easily punish.").

485. A lawyer explained: "Most of the people in pretrial detention are men and poor because they don't have money to pay for an attorney, and they don't know how to defend themselves in the process." Interview with Boris Wilson Arias Lopez, *supra* note 215.

486. Not only are defendants denied access to free legal services, but they are also forced to pay for additional services including for the intervention of the judge as well as to make payments to the prisons for their incarceration. Interview with Ramiro Llanos, *supra* note 1 ("There are also cases where people have to pay to stay in jail, and pay for the judge's intervention—in some facilities the inmates pay 300 or 500 Bolivianos [approximately US$43–45] for the rent of their cell to other inmates. Defendants have to pay for trial, for a judge's intervention—the law doesn't allow it but it happens. There is a law that says you can't charge someone for access to the justice system. It's like one dollar a week—the average per trial price—but if you're held there for years, it's a lot of money. The sentencing judge will decide how much money will be owed as a fine before release."); Interview with Juan Carlos Octavio Pinto Quintanilla, *supra* note 372 ("In order to go into any of the sections in San Pedro, you must pay an

need money to pay functionaries."[487] According to numerous people with whom the Crowley delegation spoke, "[t]he actors in many ways will do their work only when people pay in some way."[488] The only remaining option—to hire a private attorney—is not a realistic option given their inability to afford it.[489]

As a result, individuals who are poor or otherwise vulnerable, including women, fare worse in a number of ways,[490] including being more likely to be placed in pretrial detention and to then be detained for longer periods of time than those who are not poor. For example, as one lawyer noted: "[T]hey

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entrance free, less than a quarter—between 50 to 100 Bolivianos. If you cannot afford it, you pay with work. This is a rule made by the inmates and this finances the internal economic movement within the jail.").

487. In response to a question about whether detainees have contact with their lawyers once they are in pretrial detention, one detainee stated, "If you pay your lawyer you can see them as often as you like." Interview with Detainees of Cantumarca Prison Men's Unit, *supra* note 277; *see also* Interview with Pastoral Penitenciaria, in Sucre, Bolivia (May 17, 2012).

488. Interview with Jorge Richter Amallo, *supra* note 18.

489. As one lawyer said, "If someone can afford a defense attorney, it's very unlikely they would be in pretrial detention." Interview with Ivan Lima, Private Attorney, in La Paz, Bolivia (May 21, 2012); *see also* Interview with Jorge Richter Amallo, *supra* note 18 ("Fees for private defense lawyers are generally charged per stage of the process, but not necessarily. There are two ways of charging a criminal client. The Bar Association gives out a fee sheet which sets the minimum fee. Because before, a lot of attorneys charged under the limit and stole clients from each other.").

490. While a discussion of the impact of detention on other vulnerable groups including women is beyond the scope of this Report, a report issued by the Bolivian Office of the Ombudsperson in March 2013, based on a series of questionnaires, focus groups, and interviews of women in prison reveals that only twenty-four percent of women deprived of liberty have received a sentence. The report discusses the wide range of rights violations that women in prison face as well as violence that occurs among and towards women in prison. *Bolivia: Situación de los Derechos de las Mujeres Privadas de Libertad [Bolivia: The Situation of the Rights of Women Deprived of Liberty]*, Defensoría del Pueblo [The Ombudsperson's Office], La Paz, Bolivia, 2013 (on file with author). *See* United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), U.N. Doc. A/C.3/65/L.5 (Oct. 6, 2010) regarding specific standards with respect to women prisoners. *See also* Global Campaign for Pretrial Justice Latin American Region, "Women and Pretrial Detention: Individuals presumed innocent suffering punishment and abuse," http://www.redjusticiaprevia.com/portal/images/stories/red_mujeres_prision_ingles_060513.pdf; For increased attention to this topic, note University of Chicago Law School Expert Group Meeting with the UN Special Rapporteur on Violence against Women, Its Causes and Consequences, Ms. Rashida Manjoo, May 14, 2013 in which the author participated.

[poor or indigenous persons] are the ones that stay longer in the prisons."[491]

2. Impacts of Pretrial Detention on the Poor and Poverty

By focusing on pretrial detention as the "solution" to crime and citizen insecurity,[492] the government fails to address the underlying causes of crime. Prime among these is the need to alleviate poverty, as well as investment in institution building and education.[493] The money that the government directs to the cost of incarceration[494] is money diverted away from fulfilling the economic, social and cultural rights that they are obligated to ensure.[495]

Because Bolivian prisons house a much greater number of prisoners than capacity allows, and since prisons provide limited food and medical care, it could be argued that the State's costs

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491. Interview with Juan Carlos Octavio Pinto Quintanilla, *supra* note 372.

492. *See supra* Part III.

493. Poverty restricts the right of people to fully enjoy their human rights. A full discussion of the links between poverty and human rights is beyond the scope of this Report. However, most international bodies have recognized that the condition of poverty goes beyond poverty in income or economic wealth. The CESCR has defined poverty as "a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights." Comm. On Economic, Social and Cultural Rights, Distr. General, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights, ¶ 8, U.N. Doc. E/C.12/2001/10 (May 10, 2001). For a fuller discussion, see Elisabeth Wickeri, *No Justice, No Peace: Conflict, Socio-Economic Rights, and the New Constitution in Nepal*, 2 DREXEL L. REV. 427, 455–57 (2010).

494. "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)." *See* OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 370, at 35; *see also* Interview with Dr. Roxana Valverde, *supra* note 294 ("Pretrial detention represents a large burden and high cost on the State.").

495. *See* OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 370, at 36 ("Every dollar or peso a government spends on incarceration is a dollar or peso that cannot be spent on healthcare or policing or education . . . . Excessive pretrial detention—especially for persons charged with minor, non-violent offenses—is costly and restricts States' ability to invest in socioeconomic development."). *Id.*; *see also Extreme Poverty Report*, *supra* note 153, ¶ 4 ("[W]hile poverty may not in itself be a violation of human rights, often States' actions or omissions that cause, exacerbate or perpetuate poverty amount to violations of human rights. In this context, penalization measures represent a serious threat to States' observance of their human rights obligations.").

to house its inmates are somewhat limited. In fact prisoners sometimes purchase necessary supplies for the police and other prison staff:

> The inmates' organizations are the ones who purchase the mattress and beds and showers for the policemen. They also have their own visiting records – they buy the notebooks for the visitors to sign. In some cases, the administration of the guards demand from inmates that inmates lend them computers so that they can do their administrative work because they don't have their own tools.[496]

However, costs are passed on to inmates and their families: "[B]y 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."[497]

As a result, pretrial detention worsens families' socioeconomic situations, sinking them deeper into poverty and perpetuating the cycle of poverty.[498] One reason for this is because families lose the income of the person who is detained.[499] This impact is felt even after his release because people with criminal records—even those who are not

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496. Interview with Juan Carlos Octavio Pinto Quintanilla, *supra* note 372.

497. OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 370, at 35.

498. *See id.* ("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."); *see also* Interview with Elvira Alvarez Alá, Founder, Vida Nueva, in La Paz, Bolivia (May 24, 2012) (Pretrial detention also takes a severe emotional toll on families: "Sometimes, the family says, 'I can't keep going with this. I need to take on another part of my life' . . . . Detainees are abandoned for economic reasons."); Interview with Pastoral Penitenciaria, in Sucre, Bolivia (May 17, 2012) ("If you go to prison the first impact is that it breaks the family."); Interview with Detainees and President of the Council of Delegates, Mocovi Prison, in Trinidad, Bolivia (May 18, 2012) ("Their families start to forget about them.").

499. *See* Schönteich, *supra* note 4, at 11, 22 ("Detention, like incarceration, disproportionately affects individuals and families living in poverty. When an income-producing parent is detained, the family must adjust to the loss of that income. The impact can be 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.").

convicted—have a harder time finding work.[500] Not only do families have to pay for some of the living expenses for their family member in detention, including basic necessities that the government fails to provide,[501] but they also often have to pay any fees, including bribes,[502] associated with the legal defense and appeals processes.[503] Additional costs associated with maintaining contact with the detainee while he is imprisoned involve taking time off from work or school, as well as bus or fuel fare to and from the prison, to make these visits possible.[504]

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500. The economic and social costs of detention and incarceration can be devastating for persons living in poverty. *See* Interview with Dr. Roger Valverde Perez, *supra* note 33 ("When someone is deprived of liberty, he loses access to family, friends, job, etc. The public and private institutions don't accept someone with a criminal record as an employee."); *Extreme Poverty Report*, *supra* note 153, ¶ 68 ("Detention not only means a temporary loss of income, but also often leads to the loss of employment, particularly where individuals are employed in the informal sector, and a criminal record creates an additional obstacle to finding employment."); *id.* ¶ 71 ("Those who are poor and vulnerable are therefore likely to leave detention disproportionately disadvantaged financially, physically and personally. After their release they will have depleted assets, reduced employment opportunities, limited access to social benefits and severed community ties and family relationships, and will be subject to added social stigmatization and exclusion, diminishing even further their prospects of escaping poverty."); OPEN SOC'Y JUSTICE INITIATIVE, *supra note* 370, at 28 ("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. . . . 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.").

501. *See* Interview with Dr. Roxana Valverde, *supra* note 294 ("[T]he detainee can only have one meal a day. This doesn't even account for the children living in jails so the meals have to be divided even more for them."); OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 370, at 30 ("In developing countries, authorities often fail to provide basic necessities, so detainees must pay for food, water, clothing, and bedding.").

502. *See* OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 370, at 31 ("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."); *see also infra* Part IV.C.

503. *See Extreme Poverty Report*, *supra* note 153, ¶ 69 ("Families are forced to use their limited income or sell assets to pay for bail, legal assistance, access to goods and services within penal facilities (e.g., food or telephone usage), or travel to visit the detainee.").

504. *See id.* ("Children's education is also often disrupted when their parents are detained. In this context, detention represents a serious threat to the financial stability of the detainee's whole family and serves to perpetuate the cycle of poverty."); *see also* OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 370, at 28–29 ("For every pretrial detainee

Finally, rampant overcrowding, inadequate healthcare facilities, and grossly subpar services in prisons also have health consequences for detainees and potentially for the families to whom they return.[505]

C. *Corruption*

"Here, money is law, the law is money.
The lawyer said that if you can give me 8,000 dollars,
I can fix everything with the judge and the prosecutor."[506]

"Things don't move if you don't pay a bribe."[507]

Corruption is a critical problem in the Bolivian criminal justice system and impacts the overuse of pretrial detention. The poor are especially vulnerable to persistent corruption.[508] Bolivia has joined international efforts to combat corruption[509] and

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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.").

505. *See Extreme Poverty Report*, *supra* note 153, ¶ 70 ("Detention and incarceration can also have serious health implications for the poorest and most vulnerable, who are likely to be subject to the worst treatment and conditions, including overcrowded cells, inadequate hygiene facilities, rampant disease transmission and inadequate health care. In some cases, overcrowding in prisons can have such a severe effect on detainees that the conditions may even amount to a form of cruel and inhuman treatment.").

506. Interview with Matthew Anthony, Detainee, Palmasola Prison, in Santa Cruz, Bolivia (May 17, 2012).

507. Interview with Marco Antonio Roque, *supra* note 275.

508. *See Extreme Poverty Report*, *supra* note 153, ¶ 13 ("There is a higher likelihood that they [persons living in poverty] will be detrimentally affected by corruption or asked to pay bribes . . . ."); *see also* Interview with Detainees of Cantumarca Prison Men's Unit, *supra* note 277.

509. For example, Bolivia is a party to the Inter-American Convention against Corruption (Ratified 1/23/97). The Convention applies:

> "to the following acts of corruption: a. The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions; b. The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any

Bolivia's own Constitution contains several provisions addressing corruption.[510] A separate law on corruption—Law 004—defines corruption as:

> [T]he solicitation or acceptance, the offering or direct or indirect granting, of a public servant, a natural person or entity, domestic or foreign, of any article of monetary value or other benefits, such as gifts, favors, promises or advantages for himself herself or another person or entity, in exchange for the act or omission of any act that affects the interests of the State.[511]

Despite these obligations, corruption in the judicial system was a recurring theme in interviews conducted by the Crowley delegation.[512] Sentiments regarding corruption were expressed

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> act or omission in the performance of his public functions; c. Any act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party[.]"

Organization of American States, Inter-American Convention against Corruption, Mar. 29, 1996, S. Treaty Doc. No. 105-39, O.A.S.T.S. No. B-58, 35 I.L.M. 724, 729 (1996), *available at* http://www.oas.org/juridico/english/sigs/b-58.html. Similarly, according to the United Nations Convention against Corruption, Ratified by Bolivia 5 Dec 2005, Article 15:

> Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: *(a)* The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; *(b)* The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties. UN Convention against Corruption, *supra* note 165.

510. CONSTITUTION, *supra* note 75, art. 108(8) ("The following are the duties of Bolivian males and females: . . . To report and fight against all of the acts of corruption."); *see id.* art. 123 ("The law only stipulates with regards to the future and will not have a retroactive effect, except . . . in corruption matters, to investigate, process and sanction the crimes committed by public servants against the interests of the State."); *see id.* art. 231(5) ("The functions of the Attorney General of the State are, besides those established by the Constitution and the law: . . . To request the maximum executive authority of public entities the trial of the male or female public servants who, for negligence or corruption, cause damage to the patrimony of the State.").

511. Law of the Fight Against Corruption, Illicit Enrichment and Investigation of Fortunes, Law "Marcelo Quiroga Santa Cruz" No. 004, art. 2, 31 March 2010 (Bol.).

512. Interview with Joe Loney, *supra* note 172 (emphasizing the "high levels of corruption); Interview with Vladimir Nilo Medina Choque, *supra* note 172 ("The rate of corruption in the Bolivian justice system is very high."); Interview with Ninoska Ayala Flores, *supra* note 83 ("Corruption is a widespread problem.").

by detainees, judges, lawyers, prosecutors, and others. For example, the system was described as "a sea of corruption"[513] and as being "permeated by corruption."[514] A range of actors were implicated, including judges,[515] prosecutors,[516] defense attorneys,[517] the police,[518] and prison guards.[519] One detainee characterized the system as follows: "The Bolivian justice system is very corrupt. Their philosophy in the prison is that you're not judged by your crime, but by your class."[520]

Interviewees identified insufficient funding and resulting low salaries as contributing to the prevalence of corruption throughout the system. One official pointed out, "there is corruption among the police. The average salary is what a maid makes – 200 [Bolivianos] or less a month. There is no access to training – they mostly come from rural areas with little formal education . . . [This] doesn't justify corruption but there are reasons why police look for other ways to get money."[521]

Corruption was also identified by interviewees as prevalent throughout different stages of the criminal justice process, and

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513. Interview with Ramiro Llanos, *supra* note 1.

514. Interview with Kathryn Ledebur, *supra* note 262.

515. Interview with Vladimir Nilo Medina Choque, *supra* note 172 ("One judge was also caught red handed for taking bribes."). Another lawyer also identified judges as being corrupt. Interview with Audalia Zurita Zelada, *supra* note 215.

516. Interview with Judge, in Bolivia (May 16, 2012) ("The law says one thing but the results can be different. The other side can pay the prosecution or the judge."); *see also* Interview with Emitireo M Candori, Detainee in San Pedro Prison, La Paz, Bolivia (May 24, 2012). Another lawyer explained that one reason for the excessive application of pretrial detention is because "[i]t is very easy to bribe a judge or prosecutor to get a favorable result." Interview with Jerjes Justiniano Atalá, *supra* note 173.

517. Interview with Matthew Anthony, Detainee, Palmasola Prison, in Santa Cruz, Bolivia (May 17, 2012).

518. *See* Interview with Michael Klode, Coordination Assistant, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) [German Soc'y for Int'l Coop.], in La Paz, Bolivia (May 24, 2012) (stating that "[c]orruption involves prosecutors and the police"); *see also* Interview with Enrique MacClean Soruco, *supra* note 77 ("[W]orking in the prisons is an opportunity to get bribes [for the police that work in prisons].").

519. Interview with Iblin Fores V., Pastoral Penitenciaria, in Potosí, Bolivia (May 16, 2012).

520. Interview with Limbor Poral Seqouiz, *supra* note 411.

521. Interview with Anonymous Official, *supra* note 59. Another lawyer, when asked whether low pay invites corruption responded: "Of course! I'm not saying the ones who get less money should steal but it is one more reason for corruption." Interview with Silvia Salame Farjat, *supra* note 91.

as having a particular impact on pretrial detention. As a representative of the Public Ministry explained, "There is corruption in assigning pretrial detention."[522] Being unable to pay bribes, the poor are more likely to be placed in pretrial detention in the first place. As one detainee expressed, "The corruption in judges is eighty or ninety percent. If you have money you're not here."[523] One interviewee explained that in some cases "victims pay the prosecutors who will then contact the judge. Last year for example, three prosecutors were arrested being caught taking bribes."[524] In other cases, bribes go directly to judges and others who work in the courts, such as those in charge of managing evidence.[525]

Bribes are sometimes paid by victims to ensure that judges will assign pretrial detention when they otherwise would not.[526] In other cases, the accused pay judges to not order pretrial detention, resulting in a bidding war between opposing sides.[527] The bribe-paying system has become more organized and sophisticated, taking the shape of networks consisting of law firms that have been formed to pay off judges.[528] One detainee described that while prosecutors and judges do not necessarily directly ask for money, there is a "brokering" system whereby particular inmates are designated as point persons for judges.[529] In some instances the prosecutors themselves request bribes.[530] Further, while there are prosecutors and judges who cannot be bribed, "you can pay a lawyer to switch the judge or prosecutor,"[531] thus finding a way to engage in corruption.

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522. Interview with a Representative of the Public Ministry, in La Paz, Bolivia (May 22, 2012).

523. Interview with Detainees of Cantumarca Prison Men's Unit, *supra* note 277.

524. Interview with Vladimir Nilo Medina Choque, *supra* note 172.

525. *Id.* ("Bribing judges and prosecutors and people who are working at the trial level. For example, the custodian of evidence.")

526. *Id.* (Explaining, "It's either way. Whatever the victim wants."). As one judge explained: "The system we have now with people held in pretrial detention has become a mechanism for victims to engage in extortion activities too." Interview with Margot Pérez Montaño, *supra* note 69.

527. Interview with Vladimir Nilo Medina Choque, *supra* note 172.

528. *Id.* ("There are networks that have been formed to pay off the judges. They are made up of law firms and judges.").

529. Interview with Limbor Poral Seqouiz, *supra* note 411.

530. *See* Interview with Detainees, El Abra Prison, in Cochabamba, Bolivia (May 14, 2012) ("The prosecutor asked for money.").

531. *See* Interview with Limbor Poral Seqouiz, *supra* note 411.

One detainee in Potosí argued that one of the primary reasons Bolivia has one of the highest rates of pretrial detention in the world is because judges and prosecutors are only paid bribes by victims when they assign pretrial detention, but not when they order alternatives to pretrial detention.[532] On the other hand, one lawyer explained that in the case of defendants who are alleged narco-traffickers, who can afford to hire private lawyers "whose specialty or skill is bribery," the exact opposite outcomes result. That is, they are released even before an oral trial commences and given alternative measures that poorer defendants who are unable to pay bribes are not likely to be assigned.[533] Even the fear of being suspected of taking bribes affects judicial decisions: as one lawyer suggested, "judges haven't decreased the level of pretrial detention significantly because if they do the view is that they're being bribed if they don't have enough guilty verdicts."[534]

Bribe taking also occurs at the stage of release from pretrial detention. A detainee in Riberalta described how his motion for cessation of pretrial detention was denied, despite having been detained for the legal limit of three years. He was told that the motion would be granted if he paid: "[T]he judges don't respect that regulation [the cessation of pretrial detention after three years without a sentence], because they want from us, they demand from us, that we pay them . . . "[535] Another example was shared by a South African detainee in Palmasola prison in Santa Cruz:

> My lawyer says he'll get me out. I need to pay US$1500 now and another US$2000 when I get out. The lawyer says the money is to pay for documents to be released – to set up a marriage with a Bolivian woman, to get a job certificate, to get a housing certificate. . . . Once

532. Interview with Detainees of Cantumarca Prison Men's Unit, *supra* note 277.

533. *See* Interview with Juan Carlos Octavio Pinto Quintanilla, *supra* note 372. While Article 240 of CPC 007 allows for alternative measures to be ordered under certain circumstances, for a crime such as narco-trafficking, which likely carries a sentence of greater than three years, without the influence of bribes or other corrupt practices, it is likely that pretrial detention would be considered the appropriate measure.

534. Interview with Kathryn Ledebur, *supra* note 262.

535. Interview with Wilfredo Vasquez, Detainee and Delegate, Riberalta Carceleta, in Riberalta, Bolivia (May 16, 2012).

> the money is paid, it should be twenty days until I am released.[536]

Another example, shared by a volunteer with the Pastoral Penitenciaria, provides the perspective of the vastly different outcomes that are reached based on whether accused individuals engage and participate in corruption:

> The most impressionable thing in my thirteen years of volunteer work in the Pastoral was those four people that were apprehended on the bus on the way from La Paz . . . The three people had been given fifty kilos of cocaine in a carafe, and the woman from San Borja had been given a small package . . . She said she didn't know what was in the package, it could be because she's someone that doesn't have many resources and is ignorant . . . She came to Riberalta to be seen because she had cancer and she came to get an operation . . . She was paid 500 bolivianos to take the package, and she took the money, it was welcome because she was coming here to Riberalta to be seen by a doctor. The four of them go to jail. I heard a lawyer [saying] . . . "4000 [bolivianos] each and in a month they're out of jail." He distributed the money that he's going to give to the secretaries, judges, and all that. Look at the justice that goes to some corrupt people, the ones who had fifty kilos were freed . . . and the woman with three hundred and fifty grams of cocaine got twelve years of prison . . . There's a lot of injustice, considering that poor people are there, and the rich people don't even step at the door of the jail. They have good lawyers and they get out . . . with friends, influence, and money, buying the authorities.[537]

CONCLUSION

The Crowley delegation's research and interviews with individuals in Bolivia demonstrate that the excessive and arbitrary use of pretrial detention is an issue of grave concern. The combination of legal reforms that have made it easier for

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536. Interview with Morris Brown, *supra* note 471.

537. Interview with Maricruz "Pincha" Morales, Pastoral Penitenciaria, in Riberalta, Bolivia (May 16, 2012).

individuals to be detained and to be detained for longer periods of time in combination with the lack of respect for laws that protect individuals demonstrates the need for stricter application of existing laws as well as monitoring and advocacy to prevent the passing of laws that will further restrict rights. In addition, concerns about citizen security, while themselves legitimate, cannot be used to justify pretrial detention, particularly when increased use of pretrial detention does not make society safer. And finally, the human resource limitations that contribute to this practice must be addressed. It is all too easy and all too common for the government and for society to both ignore and judge individuals who are brought into the criminal justice system; efforts must be made to ensure full human rights guarantees for all individuals who come into contact with the criminal justice system and those in pretrial detention. They must not be "left to rot."

RECOMMENDATIONS

The Bolivian government must reduce the excessive and arbitrary use of pretrial detention. Pretrial detention should only be ordered in limited circumstances as an exceptional measure and for the shortest period of time possible when no reasonable alternative can address genuine risk of flight or obstruction of justice. Towards this end, the Bolivian government must ensure that legal rights, including increased protections for persons accused of committing crimes, many of which were enacted as Bolivia underwent a transition from the inquisitorial to adversarial system of law, are protected in practice.

The following are recommendations directed at the government to enforce existing laws as well as to enact legal and other reforms. Recommendations are also directed at the international community and non-governmental organizations (NGOs) and civil society to advocate for such enforcement and enactment.

I. LEGAL

A. EXISTING LAW

The government of Bolivia should establish an independent oversight body comprised of qualified and independent members to monitor hearings and periodically review judicial decisions to ensure compliance with and enforcement of the following CPC provisions:

- *Basis for pretrial detention: ensure that judges*
    - Apply CPC Article 233 in its totality: at the pretrial hearing, the judge must place the burden of proof squarely on the prosecution to present evidence that the accused committed the crime *and* that the accused "shall not submit to the procedure or shall obstruct the discovery of the truth."
    - Enforce CPC articles 234 and 235 in their entirety by considering a range of factors to decide whether pretrial detention is necessary. This analysis should be a holistic one as opposed to a narrow consideration of whether the accused can furnish documents such as a lease and work certificate, requirements that have a particularly harmful effect on the poor. The judge should only order pretrial detention when the prosecution proves the need for detention through specific and demonstrable evidence.
    - Do not use the gravity of the alleged crime as the only basis for pretrial detention.
    - Use pretrial hearings for their stated purpose: that is, to determine whether pretrial detention is necessary, rather than to determine the culpability of the accused.
    - Ensure that pretrial detention serves the procedural purpose for which it is intended: the "discovery of the truth" and the progression of the case to subsequent stages of the criminal justice process.

- *Pretrial detention decision:* The independent monitoring body should review decisions and ensure that judges explain the specific reasons that underlie a decision to order pretrial detention and the length of detention. The length should be based on the time required to bring the preparatory phase of the criminal investigation forward.
- *Extensions:* The CPC Article 134 requirement that prosecutors inform judges of the progress of their investigation every three months must be enforced. When prosecutors request extensions, judges must enforce the requirement that they present evidence to prove the need for these extensions, taking into account whether they used the preparatory and preliminary phases of the investigation for the purposes for which they are intended (including the collection of evidence, investigative activities and preparation of a defense strategy, including regular meetings with defendants). When judges grant extensions, they should base the length of the extension on the individual circumstances of the case; the default should not be a full extension.
- *Repercussions for non-compliance:*
    - The government should establish repercussions for judges, prosecutors, defense lawyers and detainees who do not appear at hearings and thus cause hearings to be suspended (in the case of detainees, they should assess who is responsible for their absence).
    - The new body should ensure that "negligent officials" are subject to disciplinary and criminal liability for failing to meet deadlines (as required by CPC Article 135) and that officials guilty of "malicious delay" are punished (as laid out in CPC Article 177(2)).
    - The body should investigate and expose the system of punitive measures imposed by the Public Ministry on prosecutors and judges for not requesting and ordering, respectively, pretrial detention or for not adequately "punishing"

accused individuals. This interference with judicial independence should be eliminated.

B. LEGAL REFORMS

- *Revisions to specific CPC provisions*
  - Include an "and" between the two enumerated provisions of CPC Article 233 to provide clarity about the requirements for pretrial detention and to reflect a recent Constitutional Court decision. The revised provision should read:

    > "Once the formal charge has taken place, the judge may order that the defendant submit to pretrial detention at the well-founded request of the prosecutor or the victim, even if he has not been established as the complainant, when the following requirements are met: the existence of elements of sufficient conviction to sustain that the accused is, with probability, the author or participated in the offense *and* the existence of elements of sufficient conviction that the accused shall not submit to the procedure or shall obstruct the discovery of the truth."
  - Include specific language about what constitutes grounds for (1) extensions of the preliminary investigation (CPC Article 301) and the preparatory stage (CPC Article 134); (2) exceptions to the three-year maximum duration of the criminal justice process (CPC Article 133); and (3) exceptions to the cessation of pretrial detention (CPC Article 239).
  - Remove recidivism as an independent ground for pretrial detention.
  - Reduce the time limits for the length of pretrial detention and the maximum duration of the criminal justice process.
- *Alternatives to pretrial detention:* Expand the range of available alternatives to pretrial detention under Article 240. Trainings should encourage defense lawyers to

advocate for and judges to consider these alternatives, particularly in the case of individuals accused of non-violent offenses if flight risk or obstruction of the investigation can still be reasonably avoided. In all cases, the prosecutor must establish why alternative measures would be insufficient to guarantee that the process will proceed. Additional alternatives to pretrial detention may include a sworn promise by the defendant to attend court hearings, periodic reporting to a court or other authority as a condition of remaining free pending trial, and different types of surveillance.

- *Pretrial services program:* Study and consider the adoption of a pretrial services program, looking for guidance to UMECA (La Unidad de Medidas Cautelares para Adolescentes or the Unit of Precautionary Measures for Adolescents) in the State of Morelos in Mexico which created Latin America's first such program. UMECA evaluates individual cases and proposes release and supervision alternatives to detention based on a risk-assessment report of detainees, based on interviews and background information.[538]
- *Prevent the enactment of legal reforms that will increase pretrial detention:* Monitor developments that are currently underway that would make pretrial detention even more widespread and mobilize to prevent these changes from being made.

II. INCREASED COLLECTION AND TRANSPARENCY OF DATA

The Bolivian government, under the leadership of the Prison System [Regimen Penitenciario], should:

- *Record-keeping:* Create a centralized, national system that records a prisoner's date of entry into pretrial detention and put into place an alert system based on these records

538. *See* OPEN SOC'Y FOUNDS., THE GLOBAL CAMPAIGN FOR PRETRIAL JUSTICE: IMPROVING PRETRIAL JUSTICE IN MEXICO, http://www.opensocietyfoundations.org/sites/default/files/Factsheet%20PTD%20Mexico%20022013.pdf (last visited, Apr. 26, 2013).

to notify relevant judicial authorities when the legal limits for pretrial detention are about to expire: eighteen months without an indictment; thirty-six months without a sentence; no longer than the legal minimum of the penalty for the most serious offense being tried; or three years total.

- *Basic statistics and information:*
    - Regularly collect and publish official statistics on their pretrial detention policies, practices, and population.
    - Routinely collect and disseminate statistics on critical aspects of the criminal justice system including: the number of people in pretrial detention, the length of pretrial detention periods, crime rates, and the number of formal charges, indictments and sentences.
- *Documentation:* Document the socioeconomic impact of pretrial detention on families and communities by conducting surveys that demonstrate the over-representation of poor and marginalized communities in detention.

III. CAPACITY BUILDING

To ensure that actors in the criminal justice system are aware of the rights of persons accused of committing crimes, the government must commit to increasing the number of judges, prosecutors, and SENADEP lawyers in the system, as well as increasing their capacity. Further, detainees and their families should be made aware of their rights in order to be better able to protect and advocate for themselves.

A. INCREASE AND IMPROVE CAPACITY IN THE CRIMINAL JUSTICE SYSTEM

- *Increase the number of judges, prosecutors and SENADEP lawyers:*

  - The government must increase the number of judges, prosecutors, and SENADEP lawyers, particularly in remote areas of Bolivia. In particular, it should allocate sufficient resources to SENADEP to comply with their national and international obligations to ensure that accused individuals are guaranteed the right to legal advice and assistance from the earliest stages of the criminal justice process (including at police stations and during police interviews) and to guarantee the principle of "equality of arms" between the prosecution and defense. This will also contribute to reducing the disproportionately high percentage of poor people in pretrial detention.
  - *Necessary funding:* Foreign governments and funders should maintain or increase funding to SENADEP to ensure sufficient numbers of lawyers are available. They should also fund trainings to ensure that these lawyers provide quality defense. Bilateral cooperation programs should focus on increasing the capacity of the judiciary and the defense in order to have a real and meaningful impact on the criminal justice system and the disproportionately high number of pretrial detainees in Bolivian prisons.
- *Expand capacity of the system:* Recruit and train paralegals to address the shortage of SENADEP lawyers.[539] These paralegals can provide legal aid, particularly at the initial stages of the criminal justice process, and thus help to reduce the number of people who are arbitrarily and unnecessarily put in pretrial detention. They can also

539. Countries including Bangladesh, Malawi and Sierra Leone have put into place paralegal programs to address problems associated with pretrial detention. *See* OPEN SOC'Y FOUNDS., IMPROVING PRETRIAL JUSTICE: THE ROLE OF LAWYERS AND PARALEGALS, http://www.opensocietyfoundations.org/sites/default/files/improving-pretrial-justice-20120416.pdf (last visited Apr. 26, 2013) and UN Legal Aid Principles, *supra* note 150, which recognize paralegals as legal aid providers.

review the date that individuals were put in pretrial detention to monitor when pretrial detention terms will expire.

- *Trainings for current actors:* Conduct trainings aimed at judges, prosecutors and defense lawyers on key provisions of the CPC that impact pretrial detention. These trainings should emphasize both technical skills and the foundational principles and values underlying the adversarial system. Key principles include the presumption of innocence, the use of pretrial detention as an exceptional measure, and other due process rights.
- *System of review for defense lawyers:* Put into place job performance evaluations for SENADEP lawyers to increase motivation to provide effective and quality defense. This also complements CPC provisions that provide punitive measures for judges and prosecutors who are in non-compliance with the Code. Because many lawyers use SENADEP as a stepping stone for positions with the prosecutor or judiciary, encourage the Public Ministry and the judiciary to base their hiring decisions on these evaluations.
- *Address corruption within the system:*
    - Document the extent of corruption in the criminal justice system and increase oversight, particularly at those stages of the system that are most vulnerable to corruption.
    - Increase efforts to align practices with Bolivia's legal obligations with respect to corruption (the Constitution, Law 004, the United Nations Convention against Corruption, and the Inter-American Convention against Corruption).
    - Punish officials found guilty of engaging in corrupt practices.

B. INCREASE CAPACITY OUTSIDE THE CRIMINAL JUSTICE SYSTEM

- *Expand access to information for ordinary Bolivians as well as pretrial detainees:*
    - NGOs and other civil society actors should create

"know-your-rights" materials and disseminate them through outreach efforts and trainings both in community settings and inside prisons. Pastoral Penitenciaria and "Training and Citizen Rights" (CDC) are particularly well placed to conduct these trainings. These materials will provide individuals with the knowledge and advocacy skills and tools they need to navigate through the criminal justice system if they or their family members are arrested. They should contain the following information:

(1) The legal purpose of pretrial detention, including the fact that pretrial detention is different from a post-conviction sentence and therefore must not serve as punishment;

(2) The legal time limits of pretrial detention;

(3) The legal requirements that must be satisfied to legitimize the use of pretrial detention. In particular, materials should stress the fact that the prosecutor must prove the need for pretrial detention through evidence and that defendants are *not* required to prove that they should *not* be detained.

- *Outreach to vulnerable groups:* A particular emphasis should be placed on outreach to vulnerable groups including poor communities, indigenous communities (in their native languages) and women.
- *Outreach to impact society-wide understanding of the criminal process:*
    - These materials should aim to correct misunderstandings about the criminal justice system that form the basis for societal pressure on judges to impose pretrial detention. They should be aimed at helping to reframe the mentality of the citizenry by showing that the criminal justice system must operate based on principles of due process.
    - Outreach should also be directed at neighborhood groups to address citizen security

concerns through joint meetings between members of these groups, the police, and the judiciary to discuss how citizen security can be addressed in a way that does not rely on pretrial detention.

- Bring a human face to the experiences of pretrial detainees through a radio program – "detainee voices"[540] – that brings the personal stories of pretrial detainees to the public to better inform society about pretrial detention and human rights abuses.

- *Advocacy around society problems:* NGOs and civil society should
  - Demand increased transparency about data such as the number of pretrial detainees and the number of formal charges, indictments and sentences. Based on this data, they should expose the fact that high rates of pretrial detention do not increase citizen security, particularly given the extremely low rate of cases that reach the final stages of the criminal justice process.
  - Redirect advocacy to focus on demanding that the criminal justice system functions and that cases progress to indictment, conviction and sentence or acquittal.
  - Put increased pressure on the State to address societal problems underlying crime, particularly issues related to poverty, in order that the State fulfills their obligation to address poverty. They should advocate for greater attention and investment in poverty reducing steps such as institution building, education and social services and monitor the development of the post-2015 generation of the Millennium Development Goals. This advocacy should join efforts currently underway to include rule of law and access to justice, which would contribute to sustainable

540. As part of their follow-up advocacy work, members of the Crowley delegation created a "detainee voices" script based on the experiences that interviewed detainees shared. Please contact the author if interested in obtaining a copy of this script.

development, poverty reduction and improved citizen security, in these MDGs.

IV. CONDITIONS OF DETENTION

- *Separation:* Separate pretrial detainees from convicted and sentenced individuals, women from men, and juveniles from the adult population in conformity with both Bolivian and international law.
- *Basic necessities:* Provide detained persons with basic necessities (mattresses, nutritious food, water, clothing, toiletries medical care, and medication) free of charge, in particular to avoid the gap in conditions for different individuals based on their ability to pay. Provide additional rations and medical care to pregnant women.
- *Rights of children:* Put measures in place so that children who live with their parents in prison can live as normalized a life as possible by attending school and engaging in other activities.
- *Independent monitoring system:* Independent monitoring bodies should carry out regular visits to prisons to ensure that conditions are aligned with requirements under Bolivian and international law.
- *Complaints mechanism:* Put into place mechanisms for detainees to report abuses and seek redress without putting themselves in danger.

ANNEX 1: FEBRUARY 2012 ITINERARY

Preliminary Trip by Aya Fujimura-Fanselow to La Paz and Cochabamba, Bolivia

Friday, February 10, 2012: La Paz

Ramiro Orías Arredondo, Attorney and Executive Director, Fundación Construir

Susana Saavedra Badani, Attorney and Program Coordinator,

Fundación Construir

Yerko Ilijic Crosa, Human Rights Attorney

Enrique MacClean Soruco, Attorney and Former Professor and Litigation Instructor

Sunday, February 12, 2012: La Paz

César Quiroga Soria, Attorney, Consortium of Lawyers

Jean Friedman-Rudovsky, Journalist

Noah Friedman-Rudovsky, Photographer

Monday, February 13, 2012: La Paz

Juan Manuel Arbona, Associate Professor, Bryn Mawr College, Pennsylvania, United States

Ivan Lima, Attorney, Lima and Associates

Pamela Delgadillo, Attorney

Rogelio Mayta, Attorney

Dr. Kathia Saucedo Paz, Technical Coordinator, Project of Support to the Reform Process, German Society for International Cooperation [Deutsche Gesellschaft für Internationale Zusammenarbeit] (GIZ)

Tuesday, February 14, 2012: La Paz

César Quiroga Soria Gretzel Brozovich, and Sergio Molina, Attorneys, Consortium of Lawyers

Dr. Eduardo Rodriguez Veltzé, Dean of the Faculty of Law and Political Science and *Ana Paola Lorberg Romero*,

Coordinator of Academic Pedagogy, Catholic University of Bolivia San Pablo

Janaina Coutinho, Coordinator of Women, Gender Observatory

Jacob Tamm, Political Section, Delegation of the European Union to Bolivia

Wednesday, February 15, 2012: La Paz

Rosaly Ledezma, Attorney, Consultant on judicial reforms

Rommer Raña, Human Rights Unit, Police Department

Jorge López Arenas, Former Director General, Bolivian Prison System

Adriana Montenegro, Filmmaker and Director, Indómita

Thursday, February 16, 2012: Cochabamba

Jim Schultz, Founder and Executive Director, The Democracy Center

Representatives, Pastoral Penitenciaria

Friday, February 17, 2012: La Paz

Elvira Alvarez Alá, Founder, Vida Nueva

Maria del Carmen Michel and *Ana Ibañez*, Representatives, Pastoral Penitenciaria

Detainees, Miraflores Women's Prison

ANNEX II: MAY 2012 ITINERARY

Crowley Delegation Fact-Finding Trip to Cochabamba, Guayaramerín, La Paz, Potosí, Riberalta, Santa Cruz, Sucre, and Trinidad, Bolivia

Cochabamba and Santa Cruz Team Itinerary, May 14-17, 2012

Monday, May 14, 2012: Cochabamba

Kathryn Ledebur, Director, Andean Information Network

Joe Loney, Volunteer, Pastoral Penitenciaria

Detainees, El Abra Prison

Tuesday, May 15, 2012: Cochabamba and Santa Cruz

Dr. Jorge Fernandez, Attorney, National Public Defender Service of Bolivia [SENADEP], Cochabamba

Anonymous Member of the Judiciary, Santa Cruz

Cesar Suarez Saavedra, Appellate Court Judge, Santa Cruz

Doctor Maritza Suntura Juaniquina, Magistrate, Supreme Tribunal of Justice, Santa Cruz

Wednesday, May 16, 2012: Santa Cruz

Fernando Orellana Medina and *Iris Justiniano*, Examining Judges

Kadir H. Alvarado Justiniano and *Jorge Cabral Berdecio*, Attorneys, The Jessika Borda Foundation of Assistance to Victims of Crime

Jerjes Justiniano Atalá, Private Attorney

Maria Rosa Valencia P, Municipal Director of Gender and Generational Affairs, Municipal Ombudsman for Children and Adolescents

Thursday, May 17, 2012: Santa Cruz

Palmasola Prison

Anonymous, Detainee

Matthew Anthony, Detainee

Morris Brown, Detainee

Victor Henry Hall, Detainee

Observation of pretrial hearing, courtroom of Fernando Orellana Medina, Examining Judge

Friday, May 18, 2012: Santa Cruz

Alain Nuñez Rojas, Judge, Supreme Court of the Department of Santa Cruz, and Member, Commission for the Modification of the Criminal Procedure Code

Sucre and Potosí Team Itinerary, May 14-17, 2012

Monday, May 14, 2012: Sucre

Arturo Yáñez Cortez, Attorney and Vice-President, Illustrious Bar Association of Chuquisaca

Anonymous Criminal Attorney

Tuesday, May 15, 2012: Sucre

Centro Juana Azurday

Martha Noya Laguna, Executive Director

Sylvia Ortiz, Attorney for the Defense of Women

Dr. Maria Esther Padilla Sosa, Coordinator

Ximena Lucía Mendizábal Hurtado, Examining Judge

Marcelo Barrios Arancibia, Sentencing Judge

Silvia Salame Farjat, Attorney and President, Illustrious Bar Association of Chuquisaca

Boris Wilson Arias Lopez, Law Clerk, Constitutional Court

Wednesday, May 16, 2012: Potosí

Pastoral Penitenciaria

Padre Thomas Hermes, Representative

Iblin Flores V., Representative

Laura Vivion Calle Bustillos, Representative

Ricardo Jaimes G, Representative

Nelma Teresa Tito Araujom, President, Second Criminal Court, Department of Justice

Dr. Luis D. Lopez Rosales, Former National Director of Public Defenders

Anonymous Judge

Sandro Fuertes Miranda, Prosecutor

Cantumarka Prison

Detainees, Women's Unit

Detainees, Men's Unit

Thursday, May 17, 2012: Sucre

María Angélica López Morales, Director, Prison System of Chuquisaca

Pastoral Penitenciaria

Angela Olivia Beltran Sandoval, Representative

Maria Consuelo Cuéllar, Representative

Guayaramerín, Riberalta, and Trinidad Team Itinerary, May 15-18, 2012

Tuesday, May 15, 2012: Trinidad

SENADEP

Dr. Epiphanio Quispe Conde, Director

Dr. Alberto Andrado Dorado, Attorney

Dra. Marta Bascopé Mendieta, Attorney

Dr. Marcelo Illanes Saavedra, Attorney

Dr. Edwin Vaca Arce, Director, Penitentiary Regimen, Department of Beni

Observation of pretrial hearing, Trinidad courtroom

Wednesday, May 16, 2012: Riberalta

Maricruz "Pincha" Morales, Representative, Pastoral Penitenciaria

Riberalta Carceleta

Daniel Chavez Ortiz, Detainee

Klisman Ruiz Pena, Detainee

Wilfredo Vasquez, Detainee

Abel Bikini Villamor, Detainee

Thursday, May 17, 2012: Guayaramerín and Riberalta

Anonymous Prosecutor

Dr. Jesus Martinez Subirana, Attorney, SENADEP, Riberalta

Guayaramerín Carceleta

Anonymous, Detainee

Juan Alberto Melgar Taborga, Detainee

Dr. Juan Carlos Chaurara Ojopi, Attorney, SENADEP, Guayaramerín

Friday, May 18, 2012: Trinidad

Mocoví Carceleta

Anonymous, Detainee

Gaspar Alpire Barizo, Detainee

Marco Antonio Roque, Detainee

La Paz Itinerary, May 21-25, 2012

Monday, May 21, 2012

Ramiro Orías Arredondo, Attorney and Executive Director, Fundación Construir

Susana Saavedra Badani, Attorney and Program Coordinator, Fundación Construir

Representatives, Pastoral Penitenciaria

Ivan Lima, Attorney, "Lima and Associates"

Roger Valverde Perez, Attorney

Tuesday, May 22, 2012

Anonymous Official

Jorge Richter Amallo, Attorney and Former Member, Criminal Procedure Code Reform Team

Lic. Blanca Laguna de Vera, Office of the Ombudsman

Anonymous Representative, Public Ministry

Audalia Zurita Zelada, Attorney

Reynaldo Imaña, Attorney and Former Director, Implementation Team of the Criminal Reform Process in Bolivia

Justo Salazar Rodas, National Director, SENADEP

Juan Carlos Octavio Pinto Quintanilla, National Director, SIFDE [Servicio Intercultural de Fortalecimiento Democratico, Tribual Supremo Electoral, Órgano Electoral Plurinacional], [Intercultural Service of Democratic Strengthening, Supreme Electoral Court, Plurinational Electoral Organ]

Wednesday, May 23, 2012

Enrique MacClean Soruco, Attorney and Former Professor and Litigation Instructor

Representatives, Embassy of the United States of America

Vladimir Nilo Medina Choque, Officer, Training and Citizen Rights [Capacitación y Derechos Ciudadanos] (CDC)

Ninoska Ayala Flores, Attorney and National Head, Training Program in Human Rights and the Culture of Peace, Training and Citizen Rights [Capacitación y Derechos Ciudadanos] (CDC)

Ramiro Llanos, Director General, Bolivian Prison System

Thursday, May 24, 2012

Ramiro Leonardo Iquise Pally, National Program Manager of People Deprived of Liberty and the Program of Disabilities, Office of the Ombudsman

Dr. Ramiro E. López Guzmán, President, Third Criminal Court, Department of La Paz

Dr. Angel Arias Morales Fono, Judge and Member, Commission of Pardons

Fernando Medina, Advisor, Embassy of Denmark

Michael Klode, Coordination Assistant, GIZ

Eva María Otero Dorado, Representative, Democratic Governance Program and Gender, Embassy of Spain

Åsa Maria Wallendahl, Representative, Section of Cooperation, Delegation of the European Union in Bolivia

Dr. Jose Ayaviri Siles, Criminal Enforcement Judge

Elvira Alvarez Alá, Founder, Vida Nueva

Anonymous Judge

Margot Pérez Montaño, Examining Judge

San Pedro Prison

Dr. Oscar Benabides, Detainee and Delegate of Palomar

Emitireo M Candori, Detainee

Renato Aro Lopez, Detainee

Friday, May 25, 2012

Anonymous Official

Faculty of Law and Political Science, Catholic University of Bolivia San Pablo

Dr. Eduardo Rodriguez Veltzé, Dean of the Faculty of Law and Political Science

Dr. Edwin Cocarico, Professor of Criminal Procedural Law and Criminal Forensic Practice

Dr. Roxana Valverde, Professor of Criminal Law I and II

Dr. Teresa Ledezma, Professor of Criminal Law III

San Pedro Prison

Anonymous, Detainee

Jose Geruiau Vaca Ortiz, Detainee

Limbor Poral Seqouiz, Detainee and President of the Delegate's Council

Miraflores Women's Prison

Maria, Detainee

Theresa, Detainee

ANNEX III: JANUARY 2013 ITINERARY

Follow-Up Advocacy and Presentation Trip to La Paz and Sucre, Bolivia by Zohra Ahmed, Stephanie DiFazio, Aya Fujimura-Fanselow, Zachary Hudson, Jeffrey Severson

Tuesday, January 14, 2013: La Paz

Ramiro Orías Arredondo, Attorney and Executive Director, Fundación Construir

Susana Saavedra Badani, Attorney and Program Coordinator, Fundación Construir

Yerko Ilijic Crosa, Human Rights Lawyer

Wednesday, January 15, 2013: Sucre

Boris Wilson Arias Lopez, Law Clerk, Constitutional Court

Crowley Delegation Presentation of Report Findings, Illustrious Bar Association of Chuquisaca

Thursday, January 16, 2013: Sucre and La Paz

Crowley Delegation radio interview, Radio Loyola Fides Sucre

Fundación Construir, Roundtable Discussion with NGOs

Ana Baza, Fundación La Paz

Jénnifer Guachalla Escóbar, Specialist in Human Rights, Office of the High Commissioner for Human Rights in Bolivia

Ana Ibañez, Pastoral Penitenciaria

Eddy Jimenez, Fundación La Paz

Yana Rojas, Defensa de Niños y Niñas Internacional Sección Bolivia [Defense for Children International, Bolivia Section]

Friday, January 17, 2013: La Paz

Margot Pérez Montaño, Examining Judge and observation of pretrial hearing

Qalauma Detention Facility, Viacha

Colonel Deap Hugo Vila Aramayo, Director

José Colque, Agronomy Educator

Ruben Dario Lobatón Ortiz, Chief of Police Security

Roberto Simoncelli, Representative, Progetto Mondo Mlal