

INTERNATIONAL FRAMEWORK FOR COURT EXCELLENCE

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GLOBAL MEASURES OF COURT PERFORMANCE

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Measure 5. Duration of Pretrial Custody

Definition

The average elapsed time criminal defendants who have not been convicted of crime are detained awaiting trial.

Purpose

Because the presumption of innocence is a universal principle, prolonged pretrial detention whereby criminal defendants are in effect punished before they are tried, should be the exception used sparingly. “Few rights are so broadly accepted in theory, but so commonly abused in practice,” writes Martin Schönleich in the Open Society Foundations’ 2014 publication, *Presumption of Guilt: The Global Overuse of Pretrial Detention*. “It is fair to say that the global overuse of detention is one of the most overlooked human rights crises of our time.”⁷⁶

Duration of Pretrial Custody is an easily understood measure that resonates with ordinary citizens⁷⁷ and policy reformers alike who worry about the injustices, as well the attendant financial burdens and societal costs, of prolonged and unjust pretrial detention.⁷⁸ It brings people together for joint work on improvements across institutional boundaries – the courts, law enforcement, jails, prosecution, and defense services.

Individuals in pretrial custody account for roughly one-third of all incarcerated individuals globally according to some estimates.⁷⁹ *Duration of Pretrial Custody* is a performance measure with the potential of having an outsized effect. It has drawn the attention not only of justice system insiders (judges, prosecutors and defense attorneys, and law enforcement and corrections officials) but also of many groups and individuals outside the formal justice systems who care about reducing crime, ensuring public safety, fighting poverty, reducing costs, making wise use of public resources, combating disease, promoting human rights, and making our legal systems more just. *Duration of Pretrial Custody* taps fundamental values such as equality

⁷⁶ Martin Schönleich (2014). *Presumption of Guilt: The Global Overuse of Pretrial Detention* (New York, NY: Open Society Foundations) at 1: accessed 19 July 2018 from <https://www.opensocietyfoundations.org/publications/presumption-guilt-global-overuse-pretrial-detention> (“*Presumption of Guilt*”).

⁷⁷ “The best indicators make intuitive sense to most people who hear about them. That means that they should be expressed in units with which most people are comfortable. For example, avoiding references to legal categories or stages of judicial proceedings and instead building indicators that speak about days in custody can help the wider public understand and use the indicators in their own conversations about safety and justice.” Vera Institute of Justice (2003). *Measuring Progress Toward Safety and Justice: A Global Guide to the Design of Performance Indicators Across the Justice Sector*. (New York, NY: Vera Institute), 12: accessed 19 July 2018 from https://storage.googleapis.com/vera-web-assets/downloads/Publications/measuring-progress-toward-safety-and-justice-a-global-guide-to-the-design-of-performance-indicators-across-the-justice-sector/legacy_downloads/207_404.pdf (“*Global Design of Performance Indicators*”).

⁷⁸ See, generally, *Presumption of Guilt* (cited in note 76); and Ram Subramanian et al. (2015). *Incarcerations Front Door: The Misuse of Jails in America* (New York, NY: Vera Institute of Justice): accessed 19 July 2018 at <http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/01/incarcerations-front-door-report.pdf>.

⁷⁹ *Presumption of Guilt* at 1 (cited in note 76).

and access to justice, as well as expedition and timeliness, embodied by the IFCE.⁸⁰ It is a measure with global reach that can become the rallying point of reform efforts that depend on justice system partners working together.

Prolonged unjust detention, the inequitable treatment of incarcerated pretrial defendants who are poor or belong to marginalized groups, and the staggering financial and social costs of jail and prison overcrowding are societal problems common throughout the world. Almost one third of the prisoners around the world are pretrial detainees and, collectively, the roughly 3.3 million pretrial defendants in custody *on any day* spend 660 million days in pretrial detention.⁸¹ This can be especially devastating for people living in poverty.

In Bangladesh, prisons are severely overcrowded and imprisonment simply means “locking away” defendants without offering prospects for rehabilitation or reintegration into society. Almost 70 percent of prisoners in Bangladesh are held in pretrial detention,⁸² a percentage equaled or exceeded by some regions and countries in South and Central America and Africa, according estimates by the World Bank (see Table 4).⁸³ While there are different ways of measuring the problem (e.g., percent of prisoners unsentenced, the number of pretrial detainees as a proportion of all prisoners or as a proportion of a country’s entire population, and as the average duration of pretrial custody), and considerable variations within and across countries, the extent of overuse of pretrial detention is staggering.⁸⁴

Table 4. Percent of Untried and Unsented Prison Inmates in Selected Regions and Countries in 2005

Country	Untried and Unsented Inmates (%)
England and Wales	34.9
United States	21.2
South Africa	27.0
Nigeria	64.3

⁸⁰ See supra Table 1, “Alignment of the Ten Core Court Values and Eleven Core Court Performance Measures of the *Global Measures*, in Part 1.

⁸¹ *Presumption of Guilt* at 1 (cited in note 76).

⁸² Deutsche Gesellschaft für Internationale Zusammenarbeit (2014) “Justice and prison reform for promoting human rights and preventing corruption.” Accessed 19 July 2018 at <https://www.giz.de/en/worldwide/15042.html>.

⁸³ Dory Reiling, Linn Hammergren & Adrian Di Giovanni (2007). *Justice Sector Assessments: A Handbook* (Washington, D.C.: The World Bank), 63-64 (“Reiling et al”): accessed 19 July 2018 at <http://documents.worldbank.org/curated/en/803711468338346161/pdf/437070WP0Box3210March0200701PUBLIC1.pdf>.

⁸⁴ For an informative overview of the extent of pretrial detention around the globe using different measures, see *Presumption of Guilt* at 15-27 (cited in note 76).

Honduras, Paraguay, and Uruguay	90.0
Dominican Republic, Haiti, Peru, and Venezuela	65.0 – 85.0
Argentina	89.0

Source: The World Bank

Many pretrial detainees are low-risk or moderate-risk defendants who are unlikely to commit other crimes and who can often be managed through supervision, monitoring, or other interventions in the community. Among low- and moderate-risk defendants, the length of pretrial detention is positively associated with the likelihood that pretrial detainees will reoffend.⁸⁵ Pretrial detention is associated with a greater likelihood that defendants who eventually come to trial will be sentenced to jail or prison instead of release and community supervision, as well as given longer sentences than other defendants who are similar in every known way except their pretrial release status. Prolonged pretrial detention can also have negative impacts on a nation’s public health. Evidence indicates that the risk of exposure of pretrial detainees as well as other detainees and prison guards to infectious diseases such as HIV and tuberculosis is heightened, particularly where prisons are overcrowded.⁸⁶

On September 25, 2015, the United Nations General Assembly adopted the Sustainable Development Goals (SDGs), officially known as “Transforming Our World: The 2030 Agenda for Sustainable Development.”⁸⁷ To measure the success of Goal 16, referred to as the “justice goal,”⁸⁸ the United Nations Statistical Commission working with an Inter-Agency and Expert Group on SDG Indicators,⁸⁹ recommended the provisional indicator, “percentage of

⁸⁵ Laura and John Arnold Foundation (2016). *Pretrial Criminal Justice Research: Research Brief*; accessed 19 July 2018 from http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf.

⁸⁶ Open Society Foundations (2011). *Improving health in pre-trial detention: Pilot Interventions and the Need for Evaluation*; accessed 19 July 2018 <https://www.opensocietyfoundations.org/fact-sheets/improving-health-pretrial-detention>.

⁸⁷ General Assembly resolution 70/1, *Transforming our World: the 2030 Agenda for Sustainable Development*, A/RES/70/1 (Sept. 25, 2015), p. 14, available from undocs.org/A/RES/70/1.

⁸⁸ Ingo Keilitz (2016). “The Trouble with Justice in the United Nations Sustainable Development Goals 2016 – 2030.” *William & Mary Policy Review*, Volume 7, Issue 1, 74-103.

⁸⁹ United Nations Statistical Commission. *Technical Report on the Process of the Development of an Indicator Framework for the Goals and Targets*. (New York: United Nations, March 6, 2015).

total detainees who have been held in detention for more than 12 months while awaiting sentencing or a final disposition of their case,”⁹⁰ a measure wholly consistent with Measure 5, *Duration of Pretrial Custody*. Commenting on the SDGs, Samantha Powers, the former U.S. Representative to the United Nations, noted that a variation of Measure 5 – unsentenced detainees as a percentage of the overall prison population — was “the only single agreed upon indicator to track progress on equal access justice.”⁹¹

Because it is clear, focused, and actionable, and because it is an easily understood indicator of an entrenched social problem, *Duration of Pretrial Custody* is a potential rallying point for reform and improvement efforts that can bring government, citizens, groups, and organizations together in what has been referred to as the “solution economy.” In such an economy, justice institutions, social enterprises, and businesses can collaborate to reduce the average duration of pretrial custody, thereby not only creating efficiencies in court case processing that may not only reduce the prison population, but also address a host of related social problems.⁹²

Methodology

Courts considering *Duration of Pretrial Custody* should review the methodology of Measure 4, *On-Time Case Processing*. From a methodological viewpoint, *Duration of Pretrial Custody* can be seen as a more finely-grained variant of *On-Time Case Processing*⁹³ insofar as it focuses on the time elapsed between two case processing milestones: the date a defendant in a criminal case is detained and taken into custody and the date of his or her trial. As suggested in the description of the Methodology of Measure 4, most of the information that is needed to make the calculations for this measure may be obtained from a court’s or a detention facility’s statistics, ideally available from automated case management systems. In the absence of systems in courts and prisons, the data for *Duration of Pretrial Custody* may need to be collected manually from a random sample or, in smaller jurisdictions, the entire population of detained defendants.

Much like the other measures of the *Global Measures*, successful development of *Duration of Pretrial Custody*, begins with establishing common definitions. As noted by Martin Schönreich, agreeing on the operational definitions of the criminal status of “pretrial detention” and the identity of “pretrial detainees” is not as easy as it might seem. Nomenclature may be confusing. He notes that in English-speaking countries alone, pretrial detainees may be referred to as “remand prisoners”, “remandees”, “awaiting trial detainees”, “untried prisoners”,

⁹⁰ *Id.*, at Annex 5: accessed 19 July 2018 from [https://sustainabledevelopment.un.org/content/documents/6754Technical%20report%20of%20the%20UNSC%20Bureau%20\(final\).pdf](https://sustainabledevelopment.un.org/content/documents/6754Technical%20report%20of%20the%20UNSC%20Bureau%20(final).pdf).

⁹¹ Samantha Powers (2016). “Remarks at the United Nations Event on Access to Legal Aid as Measure of Access to Justice.” New York City, February 24, 2016.

⁹² Ingo Keilitz & Harold Epineuse (2014). “A Solution Economy in Justice Reform.” Deloitte University Press: accessed 19 July 2018 from <https://www2.deloitte.com/insights/us/en/topics/social-impact/justice-reform-social-change.html>.

⁹³ In their 2007 review, the World Bank’s Dory Reiling, Linn Hammergren and Adrian Di Giovanni express this view noting that in “criminal cases, the rates of pretrial detention have been used as proxy indicators for delay.” Reiling et al at 63 (cited in note 83).

“unconvicted prisoners’, or “unsentenced prisoners’.⁹⁴ The definitional issues that need to be resolved are suggested by this excerpt of Schönteich’s exploration of the issues:

Persons popularly understood to be pretrial detainees can fall into one of four categories. In chronological order, according to the flow of the criminal justice process, the categories are: (i) detainees who have been formally charged and are awaiting the commencement of their trial; (ii) detainees whose trial has begun but has yet to conclude with a finding of guilt or innocence; (iii) detainees who have been convicted but not sentenced; and (iv) detainees who have been sentenced by a court of first instance but who have appealed against their sentence or are within the statutory time limit for doing so. In some countries, notably in common law jurisdictions, persons falling in the last category are not classified as pretrial detainees ...

Generally not included in the definition of pretrial detention are arrested persons or suspects who have not yet appeared in front of a judicial officer for a determination whether they should be released or detained awaiting trial (also known as “remanded in custody”). Also excluded from most countries’ count of the pretrial detention population are asylum seekers, undocumented migrants, and others held administratively.⁹⁵

Similar but more restricted than those for Measure 4, the requirements for *On-Time Case* include:

- 1) the identification and definition of the criminal case types involving pre-trial detention;
- 2) the operational definitions of the two case processing milestones, i.e., custody date and trial date; and,
- 3) the number of elapsed days between those two milestones.

Simple statistics describing the average (mean), median, range, and variance of the time defendants spend in pretrial custody can be computed across numerous variables and disaggregated by criminal case type, location and units of courts, and locus of detention (jails, prison, and police lock-ups), defendant characteristics (such as income level), type of prosecution and defense, and other factors.

As noted by the Vera Institute, divergence of the mean and median days of pretrial custody may be an indicator of inequality of treatment. For example, long pre-trial detention may be concentrated in a small proportion of the detained population, inflating the mean but not the median. When mean and median diverge, it is a signal to identify the characteristics of those defendants with long stays.⁹⁶

Depending on the ease or difficulty of acquiring the required data, calculations may include the mean and median days that defendants are in custody, the 90th and 99th percentile in days, as well as the number of defendants, percent of defendants, and cumulative percentage

⁹⁴ *Presumption of Guilt* at 12 (cited in note 76).

⁹⁵ *Id.*, footnotes omitted.

⁹⁶ *Global Design of Performance Indicators* at 28 (cited in note 77).

in various durations of pre-trial detention (e.g., 10 days or fewer, 11 – 25 days, 26 – 50 days, 51 – 100 days, more than 100 days).

Box 10: Formula for the Calculation of *Duration of Pretrial Custody*

$$\text{Average Duration of Pre-Trial Custody} = A/B$$

A = Total number of elapsed days spent by criminal defendants in pre-trial custody within a specified time period (e.g., year)

B = Total number of pre-trial criminal defendants

A 2015 report by the Open Society Foundations' Justice Initiative, *Strengthening Pretrial Justice: A Guide to Effective Use of Indicators*,⁹⁷ is a valuable guide for developing, refining, and deploying measures of pretrial detention such as *Duration of Pretrial Custody* to obtain a picture of how a pretrial justice system is performing and to identify both exemplary and problematic pretrial practices. In addition to notes on how to take the measure, the report describes the measure's strengths, weaknesses, disaggregated data, and ancillary uses.

Notes on Effective Use

Many jurisdictions face mandates to eliminate the overuse and misuse of pretrial detention, alleviate jail overcrowding, and address the myriad attendant societal problems. Ideally, a coalition of justice system partners should build the business architecture (e.g., identification of system success factors) and technical architecture (e.g., query and reporting application) to support continuous monitoring, analyzing and managing the performance of various partners using Measure 5. Justice system leaders and managers can be seen as responsive, and reap considerable political capital in their communities, simply by (a) establishing a baseline of the median number of days defendants spend in pretrial custody, and by (b) vowing to examine case processing and important pretrial issues (e.g., warrants, initial appearance/arraignment, plea agreements, bail decision making, pretrial services, and alternative sentencing) that, if addressed, might reduce the number of days defendants spend in jail before trial. If, in fact, the trend of *Duration of Pretrial Custody* is downward over time, it demonstrates that courts and their justice system partners are doing something to address injustice and alleviate jail overcrowding.

Relying on the clear, focused, and actionable measure such as *Duration of Pre-Trial Custody* to reduce pretrial detention provides the quintessential opportunity to measure not only timeliness and responsiveness, but also fundamental fairness, that depend on the combined and sustained efforts of courts, police, prosecution, defense and jails. Successfully implementing large-scale improvement initiatives that depend on the joint efforts across the justice system but that are not as focused often run into intractable justice system governance

⁹⁷ Open Society Justice Initiative (2015). *Strengthening Pretrial Justice: A Guide to Effective Use of Indicators* (New York, NY: Open Justice Foundations), 17–19: accessed 19 July 2018 from <https://www.opensocietyfoundations.org/sites/default/files/indicators-pretrial-eng-20160205.pdf>

issues that are impossible to tackle head-on. Consequently, important initiatives get diverted, unfocused, and little gets done.

Local ownership of the performance measurement effort is critical. Scholar Christopher E. Stone has advocated for the design and development of “active indicators” such as *Duration of Pretrial Custody* that are designed for use by officials of local institutions as management tools and distinguished from ones designed without the participation of local authorities. He argues that such active indicators and a bottoms-up approach “is not only possible and practical, but has the potential to engage citizens and domestic leaders enthusiastically in a creative and democratic construction of justice.”⁹⁸

⁹⁸ Christopher E. Stone (2015). “Problems of Power in the Design of Indicators of Safety and Justice in the Global South,” *Indicators in Development: Safety and Justice Series*, Program in Criminal Justice Policy and Management, Harvard Kennedy School of Government, 283-284: accessed April 11, 2017 from https://dash.harvard.edu/bitstream/handle/1/8160719/Stone_Indicators-ProblemsOfPower.pdf.