

DETAINEES ON STAGE: ACHIEVEMENTS AND CHALLENGES OF THE NEWLY-IMPLEMENTED CUSTODY HEARINGS IN SÃO PAULO STATE COURTS

Thiago Nascimento dos Reis *

I. Introduction

Brazil's 1988 Constitution and the international commitments it has since undertaken clearly attempt to establish a break with its authoritarian past. Despite the inspiring rhetoric, the reality reveals systematic violations in several critical areas, among which pretrial proceedings stand out. Over 250,000 individuals are in pretrial detention in Brazil (41% of its prison population). Further, entrenched patterns of state-sponsored violence in investigative stages are still pervasive.¹

To address these challenges, Brazil started to provide judicial oversight of arrests through hearings in February 2015, in line with international standards. The pilot project occurred in the state courts of the city of São Paulo. Judicial review that used to be solely written (reviewing police investigation files and criminal records) and without mandatory prior intervention by the defense, now includes a hearing within 24 hours of the arrest where judges must assess the legality of the arrest, the necessity of pretrial detention and other precautionary measures, as well as whether the suspect suffered police violence.

This case study analyzes the practice of São Paulo courts with custody hearings in light of Inter-American human rights standards. The approach is essentially qualitative and involved: (i) observing 160 hearings (with 202 suspects) for four weeks between December 2015 and March 2016; (ii) one-hour interviews of 17 relevant judicial actors (nine judges, five public defenders and three prosecutors); and (iii) informal discussions with virtually all relevant judicial actors in corridors and courtrooms.² The universe of hearings excludes arrests (a) carried out based on warrants, (b) occurring on Fridays, Saturdays and days before holidays, (c) for crimes against life or domestic violence, and (d) where suspects were released upon payment of bail at the police station.

II. Inter-American human rights standards on pretrial detention and judicial review of arrests

Pretrial detention

Pretrial detention refers to the period of deprivation of liberty of a suspect prior to a final judgment.³ Pretrial detention must be exceptional, meaning that, as a rule, individuals must remain in freedom during judicial proceedings.⁴ This exceptionality is premised on the right to presumption of innocence – Article 8.2 of the American Convention on Human Rights (“ACHR”) – which ensures that suspects will only be considered guilty – and treated as such – after being convicted in final instance in proceedings in which due process was respected.⁵

Preliminary evidence. “To order and maintain measures such as pretrial detention, there must be sufficient evidence that permits the reasonable supposition that the individual subjected to trial has taken part in the unlawful act under investigation.”⁶

* JSD Candidate, Stanford Law School. For further details, corroborating data and references consult the full version.

¹ DEPEN, *Levantamento Nacional de Informações Penitenciárias* 13 (June 2014). For a recent report on abuses related to pretrial detention in Brazil, see A/HRC/27/48/Add.3, ¶¶ 100 and 138 (June 30, 2014). For an updated report about torture, A/HRC/31/57/Add.4 (Jan. 29, 2016).

² The observation of hearings took place on December 14-18, 2015, January 18-22, 2016, and March 9-23, 2016.

³ Inter-American Commission on Human Rights (“IACHR”), *Informe sobre el uso de la prisión preventiva en las Américas*, ¶ 37 (Dec. 30, 2013) (“Informe”).

⁴ Inter-American Court of Human Rights (“IACtHR”), *Herrera Espinoza et al. v. Ecuador*, No. 316, ¶¶ 146 and 148 (Sept. 1, 2016).

⁵ *Informe*, ¶ 132.

⁶ IACtHR, *Norín Catrimán et al. v. Chile*, No. 279, ¶ 311(b) (May 29, 2014).

Legitimate grounds. Pretrial detention shall only be applied to counter procedural risks (risk of hindering the investigation and flight risk).⁷ The prevention of future offenses and the provision of swift justice are not considered legitimate grounds. The elements used to assess the existence of legitimate pretrial risks must be reasonably related to them, consistent with suspects' rights and analyzed on a case-by-case basis. Judges thus cannot justify pretrial risks solely based on the type of crime, a suspect's dangerousness, indications of guilt, or a suspect's criminal records.⁸

Necessity. Pretrial detention shall only be imposed when less restrictive precautionary measures are insufficient. The mere legal availability of non-custodial alternatives is insufficient. To prevent these measures from being subject to institutional and public distrust, States must allocate the financial resources necessary to make them operational, implement training programs and supervise their results.⁹

Proportionality. Proportionality's 'actual' dimension requires a rational relationship between the measure and the purpose sought, so that the sacrifice inherent in the restriction of liberty is not excessive compared to its advantages.¹⁰ Pretrial detention will fail the 'prospective' dimension of proportionality if it is imposed to suspects accused of crimes not punished with imprisonment or when circumstances suggest that the likely sentence will either be suspended or determine only non-custodial punishments.

Reasonableness. Once the period considered reasonable expires, the State must release the suspect regardless of the persistence of procedural risks. States must process cases involving detained individuals with greater promptness, as well as assure them the periodic review of their detention.¹¹

Reasoned decision. Decisions adopting or maintaining pretrial detention must provide justifications that allow an assessment of whether the measure complies with the abovementioned criteria.¹²

Prompt in-person judicial review of arrests

Article 7.5 of the ACHR provides that any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.

Promptness. The IACtHR has not established a fixed maximum term for the judicial control of arrests. However, it often refers to the position of its European peer, which equates the word "promptly" to "immediately" and considers that its flexibility should be limited.¹³ The IACtHR's case law suggests that delays of two or three days are acceptable,¹⁴ position that has been expressly taken by the IACHR.¹⁵

Reviewing authority. The review of arrests by state agents not empowered to carry out judicial functions (*e.g.*, prosecutors, police chiefs and court staff) or failing due process guarantees (*e.g.*, military judges) is insufficient.¹⁶

"Before a judge". The review must be conducted in person. Failure to bring a suspect to the judge's presence will not be remedied by making the suspect available to the judge, placing him or her in the judge's custody or notifying the judge of the detention.¹⁷

⁷ *Informe*, ¶ 143. See ¶¶ 10 and 11 for factors that may be used to assess these risks.

⁸ *Norín Catrimán*, ¶ 352 and *Pollo Rivera et al. v. Peru*, No. 319, ¶ 183 (Oct. 21, 2016).

⁹ *Informe*, ¶ 238.

¹⁰ *Id.* ¶¶ 161 and 163.

¹¹ *Id.* ¶¶ 165-172, 202-203 and 208. See IACtHR, *Argüelles et al. v. Argentina*, No. 288, ¶¶ 125 (Nov. 20, 2014).

¹² IACtHR, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, No. 170, ¶¶ 107 and 118 (Nov. 21, 2007).

¹³ IACtHR, *Yvon Neptune v. Haiti*, No. 180, ¶ 107 (May 6, 2008).

¹⁴ Compare IACtHR, *Cabrera García and Montiel Flores v. Mexico*, No. 220, ¶¶ 97 and 102 (Nov. 26, 2010) with *López Álvarez v. Honduras*, No. 141, ¶¶ 54(11) and 91 (Feb. 1, 2006).

¹⁵ IACHR, OEA/Ser.L/V/II.116 doc. 5 rev. 1 corr. ¶ 122 (Oct. 22, 2002).

¹⁶ IACtHR, *Acosta Calderón v. Ecuador*, No. 129, ¶ 80 (June 24, 2005) (prosecutor); *Cantoral Benavides v. Peru*, No. 69, ¶¶ 75-76 (Aug. 18, 2000) (military judge); *López Álvarez*, ¶¶ 89-91 (court's secretary).

¹⁷ Respectively, IACtHR, *Pollo Rivera*, ¶ 106, *Vélez Loor*, ¶ 109, and *Tibi v. Ecuador*, No. 114, ¶ 118 (Sept. 7, 2004).

Procedure. The authority must “[h]ear the detained person personally and evaluate all the explanations that the latter provides, in order to decide whether to proceed to release him or to maintain the deprivation of liberty.”¹⁸ Further, the review must effectively control the lawfulness of the police activity.¹⁹

III. Brazilian framework on pretrial detention

The current position of the Supreme Court (“STF”) determines that individuals shall not start serving their sentence before a conviction by an appellate court.²⁰ Until then, judges can restrict suspects’ rights only by applying precautionary measures. The most severe precautionary measure is pretrial detention.²¹

The process for ordering pretrial detention involves three steps: (i) the judge must preliminarily evaluate if there is proof that the crime occurred and whether there is sufficient evidence of the suspect’s involvement;²² (ii) if that is the case, the judge must decide whether the suspect poses a legally prescribed pretrial risk; (iii) in case the judge deems non-custodial precautionary measures insufficient and the alleged crime is eligible for pretrial detention, the judge will order the incarceration in a reasoned decision.²³

Judges must demonstrate that suspects present a risk to the enforcement of the criminal law, to the criminal investigation or to the public or economic order.²⁴ Risk to the public or economic order is not statutorily defined and is usually interpreted as the risk of committing crimes. Against the IACtHR’s precedents, the STF considers that pretrial detention can be ordered to counter suspects’ dangerousness. The STF only objects to judges justifying suspects’ dangerousness based on abstract reasons.

Judges must apply alternatives to pretrial detention and release suspects whenever such restrictions are sufficient to curb the risks identified.²⁵ Replicating constitutional provisions, the Criminal Procedure Code (“CPP”) prohibits judges from setting bail to suspects accused of, *inter alia*, drug trafficking and heinous crimes.²⁶ Bail setting must take into consideration the suspect’s financial conditions.²⁷ House arrest can be ordered in substitution to pretrial detention in certain cases.²⁸

Pretrial detention can only be applied in proceedings related to intentional crimes punished by a maximum prison term higher than four years and to cases of recidivism in intentional crimes.²⁹ The STF declared unconstitutional the prohibition against the release of suspects accused of drug trafficking for being a blanket restriction.³⁰ However, some prosecutors and judges continue to refer to such provision arguing that the constitutional case lacked *erga omnes* effects.

¹⁸ Espinoza Gonzáles v. Peru, No. 289, ¶ 129 (Nov. 20, 2014).

¹⁹ Bayarri v. Argentina, No. 187, ¶ 67 and 92 (Oct. 30, 2008).

²⁰ Habeas Corpus 126,292, Feb. 17, 2016; Declaratory Complaints of Constitutionality 43 and 44, Oct. 5, 2016.

²¹ Pretrial detention can be implemented in Brazil through two mechanisms. *Temporary detention*: during the investigative phase, judges can order the detention of suspects investigated for certain serious crimes to protect the investigation or to prevent flight for five or 30 days (renewable once), depending on the nature of the crime. *Preventive detention*: before or after formal charges are accepted, judges can order the detention of suspects accused of certain crimes to counter procedural risks or risks to the public or economic order, without a predetermined final term. The legal analysis herein will be restricted to preventive detention and the term “pretrial detention” shall refer exclusively to preventive detention.

²² CPP, Art. 312, second part.

²³ CPP, Art. 315.

²⁴ CPP, Art. 312, first part.

²⁵ CPP, Art. 282, ¶ 6. The CPP specifies as non-custodial measures: monetary bail, periodic appearance in court to report activities, prohibition to attend certain places, to contact certain persons and to leave the court’s county, night and weekend home retreat, suspension of public function or economic activity, electronic monitoring and house arrest.

²⁶ Constitution, Art. 5, LII-LIV; CPP, Art. 323.

²⁷ CPP, Art. 325, ¶ 1. IACtHR, Andrade Salmón v. Bolivia, No. 330, ¶¶ 114 (Dec. 1, 2016).

²⁸ CPP, Art. 318.

²⁹ CPP, Art. 313, I and II.

³⁰ STF, Habeas Corpus 104,339, May 10, 2012 (declaring Article 44 of the Toxics Law unconstitutional).

There is neither a maximum legal term for pretrial detention nor a pre-established interval for periodic review. Judges must, however, revoke or substitute precautionary measures whenever their justification ceases to exist. Cases with detained suspects have shorter procedural terms and must be processed with priority.³¹ Counsels can request the review of a pretrial detention order either directly to the judge responsible for the case or to the Court of Appeals, as a habeas corpus.

Pretrial detainees must be separated from convicted ones.³² Despite that, conditions in Brazilian pretrial detention centers are overall deplorable (*e.g.*, the detainees/capacity ratio in São Paulo is 2.19).³³

IV. Incorporation of the international standard of prompt in-person judicial review of arrests

As part of its transition to democracy, Brazil ratified both the ACHR and the ICCPR in 1992, accepted the contentious jurisdiction of the IACtHR in 2002 for acts committed after December 1998, and adhered to the individual petitions mechanism of the UN Human Rights Committee in 2009.³⁴ Brazil has long thus been under international obligations to assure suspects the right to a prompt in-person judicial review of arrests. Because the STF interprets both treaties as being above federal law and below the Constitution, such right is already part of the Brazilian legal system even if the CPP does not provide it.³⁵

At the same time, both domestic and international organizations have repeatedly denounced the excessive use of pretrial detention and the persistence of extrajudicial executions, torture and disproportionate use of force by law enforcement agents.³⁶ Non-compliance with Article 7.5 of the ACHR and Article 9.3 of the ICCPR is perceived as a core contributing factor to these violations.

Before the introduction of custody hearings, the judicial review of arrests was exclusively paper-based. Police authorities sent the detention's report to the judge, who would decide, without any personal contact with the suspect, whether the arrest had been legal and if precautionary measures were necessary.³⁷ In São Paulo, judges would review the arrests regardless of whether counsels had presented a defense and would send them a copy of the decision so that they could petition to have it modified. The legal term for a suspect's first appearance in court was 60 days, but even this term was systematically disrespected.³⁸

A set of precedents of the Superior Court of Justice ("STJ") established that delays in the judicial review of arrests were mere procedural irregularities that would not justify detentions being revoked.³⁹

Regarding allegations of violence by state agents, suspects who were not released at the police station would only be able to make such complaints days or weeks later. Moreover, suspects could not present their allegations directly to an independent and impartial authority empowered to trigger investigations.

In midst of a growing awareness of the widespread nature of abuses related to pretrial detention and police violence, Senate Bill 554/2011 (now Bill 6,620/2016) was introduced in Congress in September 2011 proposing to reform the CPP to determine that suspects must be brought before a judge within 24 hours of their arrest. Despite the support of civil society⁴⁰ and public defenders, the bill has not become law yet.⁴¹

In light of the legislative debate's slow pace, the National Council of Justice ("CNJ") (supervisory body within the Brazilian Judiciary) started to sign agreements with state and federal courts in February

³¹ CPP, Arts. 10, 46 and 429, I and II.

³² CPP, Art. 300; Law 7,210/1984, Art. 84.

³³ Secretaria de Administração Penitenciária: www.sap.sp.gov.br/uni-prisionais/cdp.html (last visited on 4.14.2017).

³⁴ Respectively, Executive Decrees 678/1992, 592/1992 and 4,463/2002, and Legislative Decree 311/2009.

³⁵ STF, Extraordinary Appeal 349,703, Dec. 3, 2008.

³⁶ See *supra* note 1.

³⁷ CPP, Art. 306, § 1.

³⁸ CPP, Art. 400. Instituto Terra, Trabalho e Cidadania and Pastoral Carcerária Nacional, *Tecer Justiça: Presas e Presos Provisórios da Cidade de São Paulo* 50 (May 2012).

³⁹ STJ, Habeas Corpus 40,142, 41,768, 42,061, 45,007 and 51,866.

⁴⁰ Rede Justiça Criminal, *Audiência de custódia: o que é e porque é necessária*, INFORMATIVO JUSTIÇA CRIMINAL 5 (2013); and IBCCRIM, *Editorial* 252 BOLETIM (Nov. 2013).

⁴¹ In December 2016, the House of Representatives attached the bill to the Bill 8,045/2010, which proposes a comprehensive reform of the CPP. The maneuver is likely to delay the deliberation around the custody hearings.

2015 to progressively implement a prompt in-person judicial review of arrests. In August 2015, the STF determined that the regulation of custody hearings by the Court of Appeals of São Paulo without a congressional reform of the CPP was constitutional.⁴² In September 2015, the STF ordered state and federal courts to introduce the hearings within 90 days in order to tackle the prison overcrowding crisis.⁴³ After being initially regulated by state-level ordinances, the CNJ published a comprehensive federal set of rules on custody hearings (“CNJ Resolution 213”) in December 2015.⁴⁴

V. The dynamics of a custody hearing

Individuals can be arrested in Brazil without a court order in situations of *flagrante delicto*, which occur when the suspect is: (i) caught in the criminal act; (ii) caught just after committing it; (iii) chased right after in suspicious circumstances that allow to presume he or she to be the offender; or (iv) found right after with objects that allow to presume he or she to be the offender.⁴⁵

The police chief can set bail for offenses punished by a maximum prison term equal to or lower than four years.⁴⁶ If bail is set and is posted by the suspect, the person is released at the police station and the case is referred to a judge for ratification. If the police chief is barred from or is unwilling to set bail, or the suspect is unable to post it, the case files are referred to the court for a custody hearing in the following day.

Suspects generally remain incarcerated at the police station during the day of their arrest, being only brought to court the following day. Suspects arrive at court between 10 a.m. and 4 p.m. From the initial arrest in São Paulo to the moment when suspects are released or sent to a pretrial detention center, detainees are not offered a shower, clothes, footwear, nor treatment of non-lethal injuries.⁴⁷ Military police officers are responsible for the security of custody hearings. The standard in São Paulo is to keep suspects always handcuffed. Judges attribute this practice to the insufficiency of security personnel, the intense flow of suspects and their proximity to judicial actors.

For the hearing, suspects are escorted from the court’s detention facility to the area with courtrooms. They consult briefly with counsels in the corridor outside the courtrooms.⁴⁸ Police officers stay only a few feet away from counsels and suspects. Counsels use the interview to explain the purpose of the custody hearing to suspects, to gather information to tailor the pleading and to instruct them about how to behave in the hearing. Counsels also ask suspects if they suffered violence and whether they want to denounce it.⁴⁹

The judge must explain the purpose of the custody hearing to suspects, inform them of their right to remain silent, inquire about the circumstances of the arrest, question them about torture and mistreatment and verify suspects’ personal conditions to evaluate whether to release them, with or without precautionary measure.⁵⁰ The questioning regarding torture and mistreatment must be aimed at gathering information about perpetrators and witnesses, estimated places, dates and times of the facts and their description.⁵¹

After the judge, the prosecution and then the defense may question the suspect about the same general topics. In sequence, the parties plead orally without submitting written petitions. They may submit documents supporting their pleadings. Most prosecutors always request pretrial detention in cases of serious

⁴² STF, Direct Complaint of Unconstitutionality 5,240, Aug. 20, 2015.

⁴³ STF, Precautionary Measure in the Claim of Noncompliance with Fundamental Precept 347, Sept. 9, 2015.

⁴⁴ Resolution 213 contains proceedings for imposing and monitoring non-custodial precautionary measures (“Protocol I”) and for hearing, recording and processing torture and other CIDT claims (“Protocol II”).

⁴⁵ CPP, Art. 302. Hearings for warrant-based arrests still do not take place in São Paulo.

⁴⁶ CPP, Art. 322.

⁴⁷ Judge B.

⁴⁸ In this research’s sample of 202 suspects, 158 were represented by public defenders (78.2%), 40 by private lawyers (19.8%) and four by *ad hoc* lawyers (2%).

⁴⁹ These functions were explained by Public Defenders Q and N.

⁵⁰ Synthesis of judges’ questioning protocol in custody hearings according to CNJ Resolution 213, Art. 8.

⁵¹ CNJ Resolution 213, Art. 11, ¶ 2 and Protocol II, § 4.

crimes not considered by them to be situations of revocation.⁵² The task of asking suspects about police violence is typically left to counsels.

Judges then decide suspects' pretrial status. Three outcomes are possible: (i) revocation of the detention, if it was illegal; (ii) provisional release with or without precautionary measures; or (iii) pretrial detention, or its substitution by house arrest. If the suspect declares that he or she was victim of violence or the judge considers that there are indications that this occurred, the judge is required to record the information and determine the appropriate steps to investigate it and to protect the victim and witnesses.⁵³ When suspects show signs of social vulnerability, judges shall refer them to the network of social services.⁵⁴

VI. Innovations of custody hearings improve the judicial review of arrests

Custody hearings present three main innovations that improve the judicial review of arrests: (a) judges can better evaluate suspects' personal conditions; (b) suspects may offer their version of the facts directly to judges; and (c) counsels' and prosecutors' roles are enhanced by their personal contact with suspects and by the assurance that counsels will always present a defense before a decision is reached.⁵⁵ These innovations "knocked the paper barrier down"⁵⁶ and added information to the pretrial decision-making, what led to less pretrial detention orders (VII.a.i), more revocations of illegal detentions (VII.a.ii) and a bail setting more responsive to the financial capacity of suspects (VII.a.iii). Despite the improvement, a series of practices are preventing custody hearings' features from being fully exploited.

a. *Greater visibility of suspects' personal conditions*

i. Socially vulnerable

Judicial actors can better evaluate in hearings whether suspects are socially vulnerable based on their answers and on their demeanor, appearance and even body odor. Some judges delve into relevant personal information absent from or superficial in police files (e.g., drug addiction). Other times, counsels ask suspects in hearings about information they obtained from them beforehand. A person's appearance further helps to identify socially vulnerable suspects as some of them appear in court with torn and dirty clothes, barefoot, and presenting signs of hangover or withdrawal syndrome. Suspects sometimes exhibit strong body odor, which might indicate that they are homeless.⁵⁷

In order for custody hearings to fulfill their potential to reveal personal conditions not ascertainable through an exclusively paper-based review, judges must question suspects about them. Despite the overall

⁵² In this research's sample, prosecutors pleaded for pretrial release in only 3 of the 59 cases of robbery and in 2 of the 47 cases of drug trafficking. They requested pretrial detention in 55 and 34 of the cases, respectively, of robbery and trafficking.

⁵³ CNJ Resolution 213, Art. 11, opening paragraph and ¶ 4.

⁵⁴ CNJ Resolution 213, Art. 9, ¶ 2. In São Paulo, judges refer socially vulnerable suspects to the Center of Penal Alternatives and Social Inclusion (CEAPIS), entity inside the court. From February 24, 2015, to February 28, 2017, judges referred 3,130 individuals to the CEAPIS in São Paulo.

⁵⁵ Judge E explained that the comparison between his/her experience in custody hearings and his/her experience as a judge on duty in weekends and holidays (when the analysis does not include a hearing) made it clear for him/her that the reform substantially improved the review of arrests.

⁵⁶ Judge F. Public Defender O said that the hearings "humanized the criminal procedure by bringing individuals' face and smell to court."

⁵⁷ 28 of the 201 suspects whose hearings I observed said that they were homeless (the hearing of one suspect was held *in absentia*). This figure attests to the overrepresentation of homeless individuals in custody hearings in São Paulo. Although homeless people, either in streets or shelters, represent 0.13% of the city's total population (15,905 out of approximately 12 million), they accounted for 13.9% of the suspects in this research's sample. Fundação Instituto de Pesquisas Econômicas, *Censo da População em Situação de Rua da Cidade de São Paulo* (2015).

enthusiasm with the hearings, many judges keep their interaction with suspects to the minimum possible, only questioning them for one or two minutes about home address, occupation and criminal records.⁵⁸

Hearing I

Revocation

Bruno was arrested for drug trafficking. The police found with him two portions of crack, R\$ 40 (USD 13), an empty tube and a lighter. He was very thin, wearing a surgical mask due to tuberculosis and exhibited a strong odor. During the hearing, he affirmed to be homeless, illiterate and heavily addicted to crack. Visibly bothered by the shallow evidence supporting Bruno's detention, the prosecutor pleaded for its revocation affirming that Bruno "is in a situation of social vulnerability both in terms of health and of economic condition, as he is a street dweller. (...) It is unlikely that in a city like São Paulo, where all drug sale spots are already divided by criminal organizations, someone in charge of such an organization would attribute the responsibility of selling drugs to a person like the suspect, given that he is clearly a drug user who would not be able to possess these substances without consuming them." Bruno's detention was revoked.⁵⁹

ii. Mentally ill

Custody hearings offer judges a unique opportunity to identify individuals who clearly or potentially have mental illness. A judge didactically framed the impact of hearings on this regard in the following way:

"As soon as the hearings started, I was a little shocked because I was receiving many suspects that clearly had mental disorders and when I analyzed the police statements of their detention there wasn't even a word about such condition. Exchanging a couple of words with them, just by noticing if they understood or not what I was saying, it was possible to see that the person wasn't normal. I obviously can't tap the gavel, I'm not a psychiatrist, but we can have some perception. (...) What'll happen if you keep this person incarcerated? You'll insert this person in a prison system that has rules, an entire code that differs from ours. For instance, if the person has a problem of discipline, problem with hygiene, problem to comply with what's agreed on that cell, there'll be a series of consequences, battery, etc. (...) This kind of information wouldn't arrive to the judge because the first contact with the suspect would happen further on, in the best scenario in one month."⁶⁰

iii. Suspects who are essential to the care of others

Personal contact with suspects allows judges to better evaluate whether they are essential to the care of others. Judges are less inclined to impose bail or will impose reduced amounts to suspects whose income is central to their families' livelihood. Suspects essential to the care of minors or of persons with disabilities are more likely to be released.

Hearing II **Provisional release despite being a case in which pretrial detention tends to be imposed**

Artur was arrested for drug trafficking. He was serving a prison sentence for robbery in the open regime. Despite the low amount of drugs seized, Artur's criminal records and the serious nature of drug trafficking suggested that it was unlikely that he would be released. At the hearing, however, the judge asked if Artur had children, to what he replied with a desolate tone: "My mother is my daughter, sir, because she has a mental disorder. She is crazy, she walks in the streets, she pees in the bed. Only God knows what I go

⁵⁸ In this research's sample of hearings, judges asked about home address, occupation and criminal records, respectively, to 98%, 92% and 83.6% of the suspects. Questions about other personal conditions of suspects were much less frequent: with whom they live (61.7%), if they have children (56.7%), marital status (53.7%), substance abuse (46.3%), income (42.5%) and level of schooling (31.8%).

⁵⁹ Suspects' names were changed to preserve their identity.

⁶⁰ Judge B.

through.” The judge decided: “I don’t release anyone who is serving a sentence, but because you’re saying that you’re taking care of your mother I’ll release you as an exception.”

iv. Bandidos (“thugs”)

Judges and prosecutors reported that by analyzing suspects’ demeanor and traits they can determine whether suspects are professional criminals or non-dangerous individuals, who were wrongly arrested or sporadically breached the law due to less objectionable motives.⁶¹ According to these actors, *bandidos* are usually more articulated when answering questions, they offer standard answers to certain questions (for instance that they work in a car wash or with their parents), they refer to crimes by Articles of the Criminal Code (e.g., 157 for robbery) or the Toxics Law (e.g., 33 for drug trafficking) and they keep their head down. Visible tattoos are also probably taken as an indicator of *bandidagem*.

It is unclear whether judges’ attempt to evaluate suspects’ dangerousness by their demeanor and traits leads, in the overall, to milder or harsher outcomes. Apart from doubts about the overall effect on the pretrial detention rate, judges’ deliberate approach of using stereotypes of dangerous individuals to review detentions raises serious concerns that decisions are now being charged with prejudice.⁶²

b. *Possibility for some suspects to tell their version of the story directly to the decision-maker*

While in the former system judges could only access suspects’ version of the alleged facts by reading the report of the declarations they had given at the police station, custody hearings allow suspects to present their version directly to the ultimate pretrial decision-maker. With the caveats that many suspects may prefer to remain silent and that some practices are restricting their possibility to present their version in court, judges sometimes consider it important to hear it, particularly in borderline cases, where the evidence available in the police files seems thin or contradictory.

Hearing III

Revocation

Caio was arrested for allegedly trafficking drugs in the plaza underneath the Museum of Art of São Paulo, where he slept and sold his handcraft work. The police officers found three small bags with marihuana in his possession. Caio denied the accusation and explained that if the criminal organization PCC (Primeiro Comando da Capital) would find out that someone unrelated to it is trafficking drugs, “there is no talk, they break a leg, an arm.” Caio said that the police officers had seen him taking money from a friend to buy food, not receiving payment for drugs. All judicial actors agreed that his detention had been illegal.

c. *Enhanced roles of counsels and prosecutors*

The former system did not assure suspects an immediate contact with counsels and prosecutors or a mandatory prior defense. The judge would review an arrest regardless of whether the counsel had presented a defense, public defenders would meet their clients weeks after the arrest, and prosecutors would only meet suspects months later for judgment. Custody hearings innovate thus by causing prosecutors and counsels to establish personal contact with suspects before pleading, and by guaranteeing a prior defense.

Counsels

⁶¹ Judges C, D, E and F and Prosecutors J, K and L.

⁶² In this sense, suspects’ skin color might have become decisive (or more decisive) after custody hearings. The assessment of this effect would require, however, a longitudinal analysis that goes beyond the scope of this case study.

As might be expected, the requirement of mandatory prior defense leads, in general, to better outcomes for suspects. Moreover, the immediate contact with suspects allows counsels to tailor their defenses to the particular conditions of their clients and to instruct them about how to behave in court.⁶³

Hearing IV

Investigation flaws

Vinicius and Mateus were arrested for drug trafficking. The police narrative was that patrolling officers found eight cocaine tubes with Vinicius, who informally confessed the crime and indicated a house where more drugs could be found. The police broke into the indicated house, where Mateus was sleeping, and found 315 portions of cocaine and 22 of marihuana. The public defender requested the judge to revoke Vinicius's detention as the police files did not contain proof of the eight cocaine tubes allegedly found with him. The judge was immediately persuaded by the argument, revoked Vinicius' detention and expressly acknowledged that he had not identified the flaw when reading the police files.

Prosecutors

Prosecutors' personal contact with suspects in hearings allows them to better evaluate whether individuals are socially vulnerable, mentally ill or essential to the care of others, as well as the plausibility of their version of the facts. Prosecutors frankly acknowledged that they would probably request a harsher outcome in some cases if there was no hearing. When prosecutors decide not to plead for pretrial detention they may be directly affecting the outcome of a hearing because most judges consider that they cannot order pretrial detention when neither the prosecutor nor the police chief requested it. Furthermore, judges tend to decide in line with the prosecutorial pleading (this happened in 177 of the 199 cases I observed).⁶⁴

VII. Custody hearings and compliance with Inter-American human rights standards

The introduction of a prompt in-person judicial review of arrests helped São Paulo courts to overall increase their compliance with Inter-American human rights standards. The data gathered indicate that hearings reduced the pretrial detention rate, enhanced the identification of illegal detentions, made bail setting more responsive to material equality and improved the exposure of police violence. These positive effects should not, however, overshadow the necessity of significant improvements in pretrial proceedings.

a. *Pretrial detention and non-custodial precautionary measures*

i. Reduction in the pretrial detention rate

Official data demonstrate that 53.6% of all 18,418 suspects who were afforded a custody hearing in the city of São Paulo until March 15, 2016, were put in pretrial detention.⁶⁵ The comparison of this figure with the 61.3% rate found in a 2012 study indicates a relevant decrease.⁶⁶ The lack both of comparable data from the period before the introduction of custody hearings in São Paulo and of a control group prevents us, however, from drawing causal inference between hearings and the pretrial detention rate.

Leaving causal inference aside, three factors support the contention that custody hearings lowered the pretrial detention rate in São Paulo: (i) limitations of the universe of the 53.6% rate suggest that the

⁶³ The repeated close interaction among judicial actors has also affected decisions. Public Defender Q explained that sometimes defenders will obtain milder results as a result of the good relationship with prosecutors and judges.

⁶⁴ Judges imposed outcomes that were milder than the ones pleaded by prosecutors in 21 cases (10.6%).

⁶⁵ Secretaria de Administração Penitenciária de São Paulo, *Relatório Audiências de Custódia – Março 2016* ("SAP Report").

⁶⁶ Instituto Sou da Paz and Associação pela Reforma Prisional, *Monitorando a Aplicação da Lei das Cautelares e o Uso da Prisão Provisória nas Cidades do Rio de Janeiro e São Paulo* 10 (2014) ("Sou da Paz/ARP Report").

overall rate (considering the arrests that did not lead to a hearing) would be even inferior;⁶⁷ (ii) the observation of hearings identified features exclusive to the in-person review of arrests that can reduce pretrial detention rates (section VI); and (iii) interviews corroborated such finding.⁶⁸

The reduction in pretrial detention rates in a context where such measure is non-exceptional represents, in itself, improved compliance with the ACHR. For the reasons explained in *iv* and *v* below, pretrial detention orders in São Paulo are generally inconsistent with Articles 7 and 8.2 of the ACHR.

ii. Enhanced identification of illegal detentions

Data show that São Paulo judges revoked 6.2% of the detentions reviewed in custody hearings until March 15, 2016.⁶⁹ A study from 2012 indicated a revocation rate of 1.1%.⁷⁰ Despite the differences in the universes, the analysis of these figures under conservative assumptions supports the hypothesis that the overall revocation rate in São Paulo increased after the hearings. Thus, many suspects who are currently having their detentions revoked would suffer precautionary measures if a hearing was not assured.⁷¹

Accordingly, suspects' presence in court allows a better evaluation of their personal conditions and an opportunity for them to offer their version of the facts, inputs that may lead judges to revoke detentions. Mandatory prior defense causes judges now to be exposed to arguments about the illegality of detentions before deciding. Lastly, prosecutors may be sensitized by suspects' social vulnerability and version of the facts and plead for revocation in cases where their standard pleading would normally be harsher.

iii. Bail setting more responsive to material equality

Custody hearings present features that tend to reduce the amount of suspects being incarcerated due to poverty,⁷² what increases compliance with the rights to non-discrimination and to equal protection. In the previous exclusively paper-based system, suspects' incapacity to post bail due to poverty would not be as evident to judges and the dismissal of bail would depend on specific requests. By better exposing individuals' socioeconomic conditions to judicial actors, custody hearings have caused: 1. prosecutors in São Paulo either to decline to request or to request reduced amounts of bail; 2. counsels to argue about bail before a decision is reached; and 3. judges' decisions to be better informed and consequently fairer.

iv. Across-the-board reliance on non-procedural risks as grounds for pretrial detention

⁶⁷ The universe of the pretrial detention rate of after the introduction of custody hearings does not include two sets of suspects encompassed by the figure from the previous regime: suspects released at the police station after posting bail and the majority of suspects arrested on Fridays, Saturdays and days before holidays.

⁶⁸ For instance, Judge D said that he/she had participated in experiments where police files of a detention were given to a group of judges to decide whether to put the suspect in pretrial detention. In sequence, the video recording of the custody hearing was presented and the judges were asked again if they would put the person in pretrial detention. The amount of judges who decided to keep the suspect detained was considerably lower after seeing the video.

⁶⁹ SAP Report, *supra* note 65.

⁷⁰ Sou da Paz/ARP Report, *supra* note 66, at 17.

⁷¹ The improved identification of illegal detentions assumes even more importance considering that: (i) 47.6% of the decisions of revocation in custody hearings in São Paulo until March 15, 2016, were taken in drug trafficking cases; (ii) 71.1% of the suspects accused of drug trafficking were put in pretrial detention in São Paulo in the period; and (iii) some judges consider that for drug trafficking there are only two possible outcomes: revocation or pretrial detention (VII.a.iv.2 below). SAP Report, *supra* note 65.

⁷² Judges released 14 suspects conditioned to bail out of 202 suspects whose hearings I observed (6.9%). This represented 18.2% of the provisional releases (14 out of 77 individuals). Judge E stated that he/she rarely sets bail because almost everyone appearing in custody hearings is poor ("99%").

Despite the reduction in the pretrial detention rate, over half of the suspects appearing in court in São Paulo are still being sent to pretrial detention (53.6%).⁷³ The argument that the pretrial detention rate is not excessive because the suspects who are being incarcerated actually present legitimate pretrial risks that cannot be curbed by less restrictive measures cannot be sustained in São Paulo. Decision-making patterns reveal that the controlling justification of pretrial detention orders is inconsistent with Inter-American human rights standards.

1. Pervasiveness of public order concerns

I was able to access the written decision of 96 of the 100 cases observed where suspects were put in pretrial detention. All 96 written decisions accessed mentioned the protection of the public order as grounds for keeping individuals in jail. 74 decisions included at least one of the other two legal grounds for pretrial detention (flight risk and risk of procedural hindrance).⁷⁴ Despite the relevant share of decisions mentioning these procedural grounds, interviews with judicial actors dismissed their importance.

All nine judges interviewed stated that the vast majority of their decisions are taken based on concerns with safeguarding the public order. Procedural risks were generally qualified as secondary, accessory and rarely decisive.⁷⁵ Prosecutors explained that although they often mention all legal grounds for pretrial detention in the end of their pleadings, the justification considered by them as likely to be accepted by judges is the protection of the public order.⁷⁶ Public defenders were unanimous about the controlling nature of public order concerns in custody hearings.

Judges tend to assess flight risk by evidence on the suspect's ties to the community, such as permanent home address or legal occupation. Because this information is usually provided orally by them at the police station or in the hearing, judges hesitate to decide based on assessments of flight risk. Further, even when counsels present documents attesting the suspects' ties to the community, judges will hardly set them free if their release is perceived as a risk to the public order.

Although undefined and potentially over-encompassing, judges have mostly interpreted "protection of the public order" as avoidance of future crimes. The interviews were enlightening as to judges' perception about the conflict between the use of pretrial detention to avoid crimes and suspects' right to be presumed innocent. As one judge explained:

"Suspects appearing in custody hearings were caught in the criminal act so they cannot be said to enjoy an absolute presumption of innocence because there are strong elements against them. As a principle, the right to be presumed innocent must be balanced against other principles, and the principle on the other side of the scale is the protection of public safety."⁷⁷

When asked about how pretrial detention protects the public order, some prosecutors and judges mentioned not only the avoidance of crimes, but also the anticipation of punishment because society expects suspects not to be released.⁷⁸ As one judge explained:

"Imagine a person that doesn't have any criminal records but that committed a rape yesterday and is coming here today. If there are elements indicating that the person committed the rape, he'll hardly be set free. It'd be a slap in society's face to release such a person, and also the penalty is very high. Let's keep this person detained until we can ascertain what happened."⁷⁹

The controlling nature of concerns with the public order becomes even more evident in light of the finding that the two core case-specific factors that guide pretrial decisions (crime nature and criminal

⁷³ SAP Report, *supra* note 65.

⁷⁴ 54 decisions mentioned both grounds, 12 mentioned flight risk and eight mentioned risk of procedural hindrance.

⁷⁵ Judge E explained that flight risk tends not to be the focus of custody hearings because suspects are generally poor.

⁷⁶ Prosecutors J, L and Y.

⁷⁷ Judge G.

⁷⁸ Prosecutor Z explained that prosecutors' impetus to secure high pretrial detention rates derives partially from their beliefs that criminal cases suffer from excessive delays and that the correctional system is lenient.

⁷⁹ Judge D.

records) are related to the assessment of suspects' dangerousness and of whether they should be punished immediately (public order rationales).

2. Crime severity

The probability of a pretrial detention order in São Paulo varies significantly depending on the type of crime. For instance, while three out of 10 individuals accused of aggravated theft will be put in pretrial detention, 86.8% and 71.1% of the suspects caught in the criminal act accused of, respectively, robbery and drug trafficking will have such fate.⁸⁰ Apart from the disregard for suspects' presumption of innocence, the blanket imposition of pretrial detention – either due to legal provisions⁸¹ or to judges' personal beliefs – violates suspects' right to an individualized assessment.

Along with the abstract severity of crimes, decisions in custody hearings are strongly influenced by specific elements of the accusation. Although assuring individualization, judges' reliance on concrete factors still abridge suspects' presumption of innocence.

The decisive role of crime severity in pretrial decisions reinforces the finding that public order concerns control the outcome of custody hearings. While suspects accused of minor crimes are not seen as threats (except those with criminal records), suspects accused of serious crimes are perceived as dangerous. Similarly, in case of serious offenses, some judges consider it necessary to immediately answer society's expectations of justice by incarcerating suspects, concern that is not present with such intensity when the crime is non-serious.⁸²

Either revocation or pretrial detention

Two judges affirmed, respectively, that in cases of drug trafficking and of drug trafficking and robbery there were only two possible outcomes: revocation or pretrial detention. In their words: "I'm very strict with drug trafficking because I consider it to be an extremely serious crime. I don't grant provisional release." and "You observed some of my hearings so you must've noticed that I don't grant provisional release for robbery and that I don't grant provisional release for drug trafficking. It's a matter of conviction for each judge. For me it works this way."⁸³

3. Criminal records

The second factor that determines the outcome of hearings is a suspect's criminal records.⁸⁴ Judges resort to suspects' previous interactions with the criminal justice system to evaluate their risk of offending. The term 'criminal records' encompasses not only final convictions, but also appealed convictions, ongoing cases, previous arrests and proceedings in juvenile courts. Strongest weight is given to criminal records that would entail recidivism if individuals were convicted of the accused crime.⁸⁵

Hearing V

Different decisions for co-suspects

Anderson, Ronaldo and Erick were arrested accused of aggravated theft for stealing a car. Anderson did not have any criminal records. Ronaldo had already served prison time but his punishment had extinguished

⁸⁰ SAP Report, *supra* note 65.

⁸¹ IACtHR, *Pollo Rivera*, ¶ 125, and *Suárez Rosero v. Ecuador*, No. 35, ¶ 98 (Nov. 12, 1997).

⁸² The argument that the type of crime strongly influences decisions in custody hearings was not tested by a quantitative study that controlled for potential confounding variables.

⁸³ Judges A and B. Judges C, D, E, F, G and H said that they granted pretrial release to suspects accused of robbery and drug trafficking under certain circumstances (especially if they were not recidivating).

⁸⁴ In the observation of hearings, I obtained clear information about the recidivism of 188 suspects: 52 were recidivating and 136 were not. While judges put 69.2% of the suspects who were recidivating in pretrial detention, only 44.9% of those who were not recidivating had this fate.

⁸⁵ Judges face the challenge of having restricted access to criminal records from other jurisdictions or juvenile courts.

more than five years prior to the new detention, making him technically primary. Erick had left prison less than one year before and consequently would incur in recidivism if he were convicted of the new crime. Expressly relying on the suspects' disparate criminal records, the judge put only Erick in pretrial detention and said that he was giving a chance to Ronaldo.

Hearing VI “I was the one who released you the last time, right?”

Fábio was arrested for allegedly breaking the window of a car to steal goods. As soon as he entered the courtroom, the judge asked: “I was the one who released you the last time, right?”. Fábio nodded. Asked about substance abuse, Fábio said that he used “crack, cocaine, *cachaça*, everything.” He had already been convicted seven times and had appeared before the same judge for a similar crime a week earlier. Despite the defense argument that Fábio's arrests were related to his social vulnerability, the judge put him in pretrial detention.

v. Flawed system of non-custodial precautionary measures

Despite the legal availability, judges still cannot use electronic monitoring in São Paulo.⁸⁶ The alternative measures most used in São Paulo are the periodic appearance in court to report activities (69 times in this research's sample of 202 suspects), the prohibition to leave the court's county (39 times) and the night home retreat (30 times).⁸⁷ The enforcement of the two latter measures requires compliance mechanisms. Practice reveals, however, that violations of these conditions will only be detected if police officers approach suspects for an autonomous reason.⁸⁸ Enforcement flaws are also linked to judges' resistance to use house arrest, which was applied to only four suspects in São Paulo until March 15, 2016.⁸⁹

b. *Fight against violations of suspects' personal integrity*

Article 5.2 of the ACHR prohibits torture and other CIDT. It entails a *jus cogens* obligation that persists even under the most difficult circumstances.⁹⁰ Beyond Article 5.2, “any use of force that is not strictly necessary owing to the behavior of the person detained constitutes an affront on human dignity,” in violation of Article 5.1.⁹¹ The right to access to justice derives from Articles 1.1, 8.1 and 25 of the ACHR.⁹²

Until February 28, 2017, 2,700 of the 41,287 suspects that appeared in a custody hearing in São Paulo (7%) reported police violence.⁹³ Apart from suspects' statements, the visual element helps judges to decide whether to open investigations. The case below exemplifies the phenomenon that hearings expect to expose.

Hearing VII Torture recorded

Ricardo was arrested accused of stealing a can of paint from a construction site and subsequently threatening private guards with a knife. Vítor, one of the guards, was also a security agent at a youth detention center. Vítor immobilized Ricardo and took him to the police station, where Ricardo reported that Vítor had tortured him and recorded it with a cellphone. The police chief accessed the media of Vítor's cellphone and found a video where he kicked Ricardo's face and stepped on his chest while questioning about the alleged theft. Vítor was arrested at the police station. Before the hearing of this case, while I was observing a hearing

⁸⁶ Prosecutor L told us that there was no expectation for when electronic monitoring would become available.

⁸⁷ In total, judges imposed 160 precautionary measures (including bail 14 times) to 73 suspects in this research's sample.

⁸⁸ Judge E suggested the adoption of police supervision by sampling to improve compliance with these measures.

⁸⁹ SAP Report, *supra* note 65.

⁹⁰ IACtHR, *Espinoza González*, ¶ 141. The Constitution enshrines an absolute prohibition of torture in Article 5, III.

⁹¹ IACtHR, *Espinoza González*, ¶ 141.

⁹² IACtHR, *Tenorio Roca et al. v. Peru*, No. 314, ¶ 237 (June 22, 2016).

⁹³ Conselho Nacional de Justiça, *Dados Estatísticos*: www.cnj.jus.br/sistema-carcerario-e-execucao-penal/audiencia-de-custodia/mapa-da-implantacao-da-audiencia-de-custodia-no-brasil (last visited on 4.14.2017). In this research's sample, 32 individuals reported violence (15.9%). 23 of them accused state agents and nine accused non-state agents.

in the courtroom adjacent to the one where Ricardo and Vítor would be brought, I overheard when the judge and other judicial actors watched the video. It was possible to identify questioning, screams, crying and laughter. At the hearing, Ricardo reported that Vítor had handcuffed him with his hands in his back and had given him “a lot of kicks, shocks, hits with the gun,” even causing him to urinate in his pants. Ricardo’s public defender asked the judge to revoke his detention arguing that it had been based on illegal evidence, *i.e.*, informal confession obtained through torture. Vítor’s lawyer claimed that his conduct should rather be qualified as an intense questioning. Both were put in pretrial detention.

i. Hurdles impairing the initiation of investigations into potential abuses

Some structural aspects and judicial practices are preventing allegations of violence from being voiced and investigations based on plausible allegations from being initiated. These flaws are feeding the dark figure of state-sponsored violence and systematically breaching the ACHR.

Flawed questioning. 13 of the 14 judges whose hearings I observed either did not ask about police violence⁹⁴ or asked so in an insufficient way, for being limited to one generic question.⁹⁵ Such behavior fosters underreporting and is inconsistent with judges’ express duty to question suspects about abuses in custody hearings.⁹⁶ Beyond that, judges sometimes rebut suspects’ allegations with aggressive questioning, occasionally suggesting that the violence was necessary to prevent them from escaping or that it was in self-defense.

Constant presence of Military Police officers. Officers of the Military Police (entity most accused of abuses in São Paulo) escort suspects before, during and after custody hearings, including during their interview with counsel and during the questioning about police violence in the hearing. This practice involuntarily or deliberately intimidates suspects, who may fear retaliation.

Excessively restrictive criteria to open investigations. Judges sometimes decide not to open investigations when they consider that suspects behave in a manner perceived as atypical of victims of abuses or when they say that they would not be able to identify the alleged perpetrators. Generalizations about the demeanor of victims of violence ignore, however, that “[t]orture survivors may have difficulty recounting the specific details of the torture for several important reasons.”⁹⁷

ii. Still-born investigations

If custody hearings improved the identification of allegations of police violence, the absolute ineffectiveness of investigations triggered after them is eliminating hearings’ potential to fight abuses.

When the judge opens an investigation into police violence in São Paulo, the proceeding triggered is a preliminary inquiry. After receiving the medical report,⁹⁸ the judge refers – at the prosecution’s request – the inquiry to the comptroller’s office of the law enforcement division accused. This entity conducts some investigative steps and refers the proceeding back to the judge asking for the inquiry to be closed. The prosecutor concurs and a criminal investigation (*inquérito policial*) is not even opened. Challenges all over these steps are contributing for the “glaring shipwreck” of these investigations, as qualified by one judge.⁹⁹

⁹⁴ Information about questioning of police violence was accurately coded in the hearings of 128 suspects. Judges did not ask about it to 104 of these individuals (81.3%).

⁹⁵ Judges F, G and H acknowledged that they only questioned about violence if suspects presented signs of violence (bruises, wounds, blood, hobbling) or if the police report mentioned it. Although Judges B, D and E said in interviews that they had the policy of always questioning suspects about violence, the observation of their hearings revealed that such questioning was restricted, as a rule, to one generic question (*e.g.*, “was there any problem in your detention?”).

⁹⁶ CNJ Resolution 213, Art. 8, VI.

⁹⁷ UN Office of the High Commissioner for Human Rights, *Istanbul Protocol*, ¶ 142, U.N. Doc. HR/P/PT/8/Rev.1. (2004).

⁹⁸ Public Defender O said that the examinations lack a psychological evaluation and cannot identify internal injuries.

⁹⁹ Judge I. Public Defenders N, O and P argued that the existence of a preliminary inquiry in investigations into police violence attests the institutional unwillingness to fight these abuses and the tendency to discredit suspects’ complaints.

Delegation of investigations to the polices. The investigation of allegations of violence by the comptroller's office of the police accused is at odds with international standards that require investigators of allegations of torture to be independent of any suspected perpetrators and the institutions or agencies they may serve.¹⁰⁰ Unsurprisingly, hardly any of the inquiries in São Paulo can be said to meet the obligation of due diligence in investigations, as they are marked by delays and flawed evidence-gathering.¹⁰¹

Proceedings in military courts. Preliminary inquiries triggered after allegations of police violence tend to lead at most to criminal proceedings for battery before military courts when the entity accused is the Military Police.¹⁰² Nonetheless, such practice is inconsistent with the right to a competent tribunal (ACHR, Art. 8.1) as the IACtHR has repeatedly established that the military jurisdiction must be reserved for acts committed by active soldiers that "threaten the juridical rights of the military order itself."¹⁰³

Prosecutors' share of guilt. Despite their constitutional duty to exercise the external control of police activities,¹⁰⁴ prosecutors in São Paulo do not question suspects about police violence, do not request the opening of investigations and systematically concur with the polices' conclusion that investigations should be dismissed.¹⁰⁵ A prosecutor frankly acknowledged that prosecutors' passive approach derives to some extent from the institution's culture of being condescending with abuses.¹⁰⁶

Negligence towards non-state violence

States obligation to investigate violations remain "whosoever the agent to whom the violation may eventually be attributed, even private individuals."¹⁰⁷ Custody hearings' stated goals did not encompass, however, combatting violence by non-state actors against suspects, and judges and prosecutors have not demonstrated interest in identifying such cases. That despite the recurrence of allegations of lynching, disproportionate use of force by victims and private guards, and even violence by other detainees.¹⁰⁸

c. Due process rights in the judicial review of arrests

i. Right to interpretation

Article 8.2(a) of the ACHR assures defendants the right to be assisted by a translator or interpreter without charges. Persons with disabilities must also be guaranteed free sign language interpretation.¹⁰⁹ The provision of interpretation in pretrial hearings makes suspects aware of the allegations and their rights and allows them to offer elements to reduce pretrial risks. It is also essential for reporting violence, as "the information being conveyed is often too important to risk an incomplete understanding."¹¹⁰

Despite its importance, the provision of interpretation is selective and inadequate in São Paulo.¹¹¹ While Spanish-speaking suspects are not afforded translation,¹¹² hearings of English-speaking suspects will

¹⁰⁰ *Istanbul Protocol*, ¶ 82. See also, IACtHR, *Quispialaya Vilcapoma v. Peru*, No. 308, ¶ 163 (Nov. 23, 2015).

¹⁰¹ Judge I.

¹⁰² Judges F and I.

¹⁰³ *Tenorio Roca*, ¶ 194. See IACtHR, *Rodríguez Vera et al. v. Colombia*, No. 287, footnote 692. (Nov. 14, 2014).

¹⁰⁴ Constitution, Art. 129, VII. São Paulo's Complementary Law 734/1993 replicates this duty in its Art. 103, XIII.

¹⁰⁵ Judges D, G and H and Public Defenders N, O and P qualified prosecutors' approach as omissive and passive. "It's as if the suspect didn't have enough dignity to be in the position of victim." Public Defender O.

¹⁰⁶ Prosecutor L.

¹⁰⁷ IACtHR, *Velásquez Paiz et al. v. Guatemala*, No. 307, ¶ 143 (Nov. 19, 2015).

¹⁰⁸ Nine suspects in this research's sample alleged violence by non-state agents: four by the population, two by victims, two by private security guards and one by other inmates.

¹⁰⁹ Convention on the Rights of Persons with Disabilities, Arts. 13 and 21(b).

¹¹⁰ *Istanbul Protocol*, ¶ 150. Judges A, B, G and I acknowledged that the lack of interpretation was a serious hurdle.

¹¹¹ Beyond the lack of translation, Public Defender O raised the concern that foreigners were subject to some level of xenophobia in hearings and that their chances of release were lower than those of nationals.

¹¹² Judges share the belief that the similarities between Portuguese and Spanish dismiss the need of translation. As a default practice, however, the lack of translation risks putting some Spanish-speaking suspects in disadvantage towards nationals.

involve unofficial translation by other actors in court.¹¹³ There is no guarantee of interpretation for individuals who speak other languages¹¹⁴ and for suspects with sensory impairments.¹¹⁵

ii. Treatment inconsistent with suspects' presumption of innocence

The right to presumption of innocence forbids the State from treating suspects as guilty. It not only prevents arbitrary pretrial detentions, but also prohibits the judge from showing a preconceived belief that the accused is guilty and state officials from issuing statements indicating that before society.¹¹⁶ In violation to such standards, the verbal treatment afforded to suspects by judges and prosecutors in custody hearings in São Paulo is often premised on the assumption that those are guilty of unproven allegations.¹¹⁷

Hearing VIII “Your business is the properties of others”

Lucas was arrested for allegedly stealing a spare tire. He had already been convicted multiple times for property crimes. The judge released Lucas and added: “So you like to commit a theft, isn’t it right? Your business is the properties of others.” Lucas said that he had already been involved with theft but that he was working at the moment. The judge replied ironically: “Yes, I can see how much you’re working... I’m giving you a chance, you got involved in too many crimes already. You’re doing everything to go back to prison, you’re searching for it.”

iii. Free and private interview with counsel

Article 8.2(d) of the ACHR protects everyone’s right to communicate freely and privately with counsel. Brazilian laws replicate these standards.¹¹⁸ Despite that, suspects’ interview with counsel before hearings in São Paulo is marked by the lack of privacy as police officers stay only a few feet away. Since interviews are conducted in the corridor outside courtrooms, judicial actors who are passing may listen to confidential information. In addition, judges sometimes rush counsels to finish interviews that last longer than the usual one to five minutes.¹¹⁹ The lack of privacy may hinder suspects from fully exposing to counsels information that could assist in their defense. Moreover, the interference of officers beyond visual surveillance fosters underreporting of police violence due to fear of retaliation.

VIII. Recommendations

1. *Prompt in-person judicial review of arrests.* Reform the CPP to include custody hearings in line with international standards regarding the prompt in-person judicial review of arrests. Strive to universalize them in state and federal jurisdictions, with special regard to inner cities, arrests subject to review by judges on duty, warrant-based arrests and review of arrests of hospitalized suspects.

¹¹³ I was the translator in the hearing of a Nigerian man accused of drug trafficking and could understand how challenging it is to convey all the relevant information without the adequate training.

¹¹⁴ Public Defender N reported that once he represented a Tanzanian man that spoke only the local language. The judge conducted the hearing without interacting with the suspect and put him in pretrial detention. The State could solve the lack of translation in some instances if it assured suspects the right to information on consular assistance.

¹¹⁵ Public Defender M recollected one of his/her hearings where an illiterate deaf suspect accused of drug trafficking was neither questioned in writing nor afforded interpretation. The judge revoked the detention.

¹¹⁶ IACtHR, Ruano Torres v. El Salvador, No. 303, ¶ 127 (Oct. 5, 2015).

¹¹⁷ The following statements exemplify this inadequate verbal treatment: “what you did is very serious”, “you committed a violent crime”, “you’ve offended too many times already” or “if you do it again I won’t release you.”

¹¹⁸ ACHR, Art. 8.2(d); Complementary Law 80/1994, Art. 128, VI (public defenders’ right); Law 8,906/1994, Art. 7, III (lawyers’ right); Law 7,210/1984, Art. 41, IX (detainees’ right); CNJ Resolution 213, Art. 6 (custody hearings in Brazil); and Joint Provision 3/2015 of the Court of Appeals of São Paulo, Art. 5 (custody hearings in São Paulo).

¹¹⁹ Public Defender P.

2. *Pretrial detention grounds.* Eliminate the risk to the public or economic order from Article 312 of the CPP, restricting pretrial detention to suspects who pose procedural risks: flight risk (“guarantee the enforcement of the criminal law”) and risk of procedural hindrance (“for the convenience of the criminal investigation”). Refrain from ordering pretrial detention to incapacitate dangerous individuals (prevention of crimes) or to anticipate an expected punishment (provision of swift justice).
3. *Individualized assessment.* Repeal the prohibition against pretrial release for suspects accused of drug trafficking (Toxics Law, Article 44). Ensure that the prohibition against setting bail for individuals accused of certain crimes (e.g., heinous crimes) does not lead automatically to pretrial detention. Abstain from adopting the blanket policy of denying release to whole categories of suspects.
4. *Decisive factors.* Refrain from justifying pretrial detention on the seriousness of the alleged facts, the severity of the expected punishment and the suspect’s criminal records in themselves. When using specific elements of a suspect’s criminal records to evaluate procedural risks, abstain from referring to appealed convictions, to on-going investigations and proceedings, to previous arrests and custody hearings or to final convictions for which the purifying period has already elapsed.
5. *Non-custodial precautionary measures.* Introduce electronic monitoring and restrict its use to suspects who would otherwise be denied pretrial release. Grant house arrest to individuals who meet the legal conditions regardless of an evaluation of public order risks and consider requiring proof of those conditions *ex post*. Develop mechanisms to enforce non-custodial measures, such as supervision by sampling. Impose measures that are compatible with suspects’ reality, especially regarding bail setting.
6. *Questioning.* Ensure that judges question suspects about personal conditions in detail. Prevent the hearing’s video recording from following the main criminal proceeding and ensure that judges allow suspects to present their version of the facts in court. Ensure that judges question them about police violence systematically, in detail and in a non-confrontational fashion. Create a security escort for custody hearings unrelated to the Civil or Military Police and properly inform suspects of that.
7. *Investigations of police violence.* Create a special unit to investigate allegations of police violence composed by impartial and independent individuals. Abolish the delegation of investigations to the comptroller’s office of the police accused. Ensure that judicial proceedings for police violence are not opened solely in military courts. Ensure that judges use criteria to decide whether to initiate investigations that are not based on imprecise assumptions about the expected behavior of victims of violence.
8. *Prosecutors’ role in fighting police violence.* Ensure that prosecutors exercise their duty of external control of police activities (Constitution, Article 129, VII) by questioning suspects about violence in a non-confrontational fashion, by requesting judges to open investigations into such allegations, by challenging flawed investigations and by bringing charges in non-military courts when proper.
9. *Violence by non-state actors.* Amend protocols to combat violence by non-state actors, for instance by requiring judges to question suspects about it and, when allegations are minimally substantiated, to either ask whether they want to file a complaint or open an investigation (depending on the nature of the alleged violence).
10. *Due process guarantees.* Provide professional interpretation to foreign suspects and suspects with sensory impairments, for instance by notifying those of their right to consular assistance, by preparing a list with interpreters and by ensuring that police stations expeditiously communicate the arrest of an individual who needs interpretation. Assure suspects the right to consult freely and privately with counsel, for instance by adapting facilities with glass windows that allow security personnel to stay out of earshot. Afford suspects a verbal treatment that is respectful and consistent with their status as presumed innocents.
11. *Non-discrimination and dignified treatment.* Refrain from deciding cases based on stereotypes of dangerous individuals (*bandidos*). Ensure that judicial actors are respectful towards and mindful of the specific vulnerabilities of homeless people, women, foreigners, persons with disabilities and LGBT people who interact with the criminal justice system. Adapt facilities and protocols to assure suspects a dignified treatment until their release or incarceration, including at least the provision of food, clothes, footwear, shower, access to restrooms and treatment of injuries.