

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

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Abstract. In compliance with its obligations under the American Convention on Human Rights and the International Covenant on Civil and Political Rights, Brazil started to provide an in-person judicial review of arrests in 2015. Judicial review that used to be solely written and without mandatory prior intervention by the defense, now includes a hearing within 24 hours 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 state courts (pioneering jurisdiction) with bail hearings through an essentially qualitative approach that involved observing 160 hearings and interviewing 17 judicial actors for four weeks between December 2015 and March 2016. Despite the multiple and significant challenges, the findings herein support the conclusion that bail hearings improved pretrial proceedings' compliance with Inter-American human rights standards. On personal liberty, bail hearings help to abbreviate illegal or unnecessary detentions by: (a) assuring the immediate judicial review of arrests; (b) improving the assessment of suspects' personal conditions; (c) allowing them to provide their version of the facts directly to the judge; and (d) guaranteeing a mandatory prior defense. The hearings fell short, however, of making pretrial detention exceptional due to a systematic disregard for suspects' right to presumption of innocence. Regarding access to justice for violations of personal integrity, bail hearings provide an opportunity for suspects to denounce abuses to an impartial and independent agent empowered to trigger investigations, as well as transparency to visible signs of violence. Nonetheless, hurdles are partially undermining hearings' ability to expose violence: (i) flawed questioning about police violence; (ii) constant presence of Military Police officers; and (iii) excessively restrictive criteria to trigger investigations. As for subsequent investigations, interviewees were unanimous about their absolute ineffectiveness. Institutional acquiescence and flaws in evidence-gathering are preventing the hundreds of proceedings initiated from ascertaining the veracity of allegations and from holding perpetrators liable. In view of this diagnosis, this case study offers 11 recommendations for improving the legal structure underlying bail hearings and the culture of relevant judicial actors.

Keywords. Bail Hearings, Inter-American Human Rights System, Brazilian Criminal Procedure, Criminal Justice, Law and Society

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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).¹ Further, entrenched patterns of state-sponsored violence in investigative stages are still pervasive.²

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 bail 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 (see Annex for chart used for coding the hearings); (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.³ The universe of hearings excludes arrests (a) carried out based on warrants, (b) occurring on Fridays, Saturdays

¹ DEPEN, *Levantamento Nacional de Informações Penitenciárias* 13 (June 2014). The large amount of pretrial detainees is a core contributing factor to the country's mass incarceration: 299.7 prisoners per 100,000 inhabitants in June 2014 (fivefold increase since 1990). *Id.* at 15-16 and Brazilian Institute of Geography and Statistics. Brazil has the fourth highest incarceration rate among the 50 most populous countries. United Nations Population Division combined with World Prison Brief/Institute for Criminal Policy Research. For a recent report on abuses related to pretrial detention in Brazil, see Human Rights Council, A/HRC/27/48/Add.3, ¶¶ 100 and 138 (June 30, 2014).

² See the synthesis in Inter-American Commission on Human Rights ("IACHR"), Cosme Rosa Genoveva, Evandro de Oliveira *et al.* ("Favela Nova Brasília") v. Brazil, Report No. 141/11 (Oct. 11, 2011). The persistence of torture and mistreatment by law enforcement agents in Brazil is evident from the: (i) brutality exposed in the reports of excessive use of lethal force; (ii) 990 police violence and 1,925 torture complaints received by crime reporting hotlines in 2015 (Secretaria de Direitos Humanos, *Balanço das Denúncias de Violações de Direitos Humanos* 30); (iii) 8,279 allegations of violence recorded in hearings until January 2017 (see *infra* note 148); and (iv) plenty of anecdotal evidence conveyed by the media. For an updated report about torture, see Human Rights Council, A/HRC/31/57/Add.4 (Jan. 29, 2016).

³ Hearings were not randomly selected as neither hearings' schedules nor the amount of hearings expected for a given day are known in advance, but an effort was made to vary among courtrooms. The observation took place from December 14 to 18, 2015, from January 18 to 22, 2016, and from March 9 to 23, 2016. 12 judges are responsible for the bail hearings in São Paulo. The two judges (A and B) interviewed on January 19, 2016, were not conducting hearings anymore as of March 2016. Seven of the 12 judges active at the hearings in March 2016 were interviewed (C on March 18; D, E and F on March 22; and G, H and I on March 23). Three of the six prosecutors in charge of the hearings as of March 2016 were interviewed (J on March 17, K on March 18, and L on March 20). As to public defenders, the four ones assigned to the unit of judicial proceedings related to police investigations are the ones permanently responsible for representing suspects in bail hearings. They are helped by two public defenders who are borrowed from other units. All four permanent public defenders active in March 2016 were interviewed (M and N on March 14; O on March 15; and P on March 16), as well as one borrowed public defender (Q on March 10). References will also be made to informal chats with Public Defender Y (on December 15, 2015) and with Prosecutor Z (on December 16, 2015). Formal interviews were recorded after written authorization and promise of confidentiality.

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.⁴

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

*Pretrial detention*⁵

Pretrial detention refers to the period of deprivation of liberty of a suspect prior to a final judgment.⁶ It encompasses the incarceration of suspects before formal charges, of defendants before trial, and of defendants convicted by non-final judgments. Pretrial detention must be exceptional, meaning that, as a rule, individuals must remain in freedom during judicial proceedings.⁷ This exceptionality is premised on the right to presumption of innocence – Article 8.2 of the American Convention on Human Rights (“ACHR”)⁸ – which ensures that suspects will only be considered guilty – and treated as such⁹ – after being convicted in final instance in proceedings in which due process was respected.¹⁰

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. (...) [T]he suspicion must be founded on specific facts; that is, not on mere conjectures or abstract intuitions.”¹¹

⁴ Suspects arrested in São Paulo accused of crimes against life (homicide, abortion, infanticide and assistance to suicide) and domestic violence started to be afforded a hearing in May 2016. As the data collection occurred until March 2016, the findings herein do not extend to the in-person judicial review of those detentions. Bail hearings are still not being held in weekends and holidays for suspects arrested on Fridays, Saturdays or days before holidays. Detentions that occur in these days are subject to a written review by the judge on duty. See *infra* note 133.

⁵ The focus on standards about pretrial detention is justified by the severity of the measure and the extension of the abuses related to it. However, these standards extend, to a greater or lesser degree, to other precautionary measures. See the application of some of these standards to the precautionary measures of *arraigo* (restriction of freedom of movement) and bail in Inter-American Court of Human Rights (“IACtHR”), *Andrade Salmón v. Bolivia*, No. 330, ¶¶ 103-150 (Dec. 1, 2016).

⁶ IACHR, *Informe sobre el uso de la prisión preventiva en las Américas*, ¶ 37 (Dec. 30, 2013) (“*Informe*”). The overview of the Inter-American standards on pretrial detention presented here is primarily based on the *Informe* and on subsequent case law of the IACtHR.

⁷ For an example of non-exceptional imposition of pretrial detention, see IACtHR, *Herrera Espinoza et al. v. Ecuador*, No. 316, ¶¶ 146 and 148 (Sept. 1, 2016).

⁸ American Declaration of the Rights and Duties of Man (“ADRDM”), Art. 26; Universal Declaration of Human Rights, Art. 11.1; Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”); Art. 6.2, International Covenant on Civil and Political Rights (“ICCPR”), Art. 14.2; and African Charter on Human and People’s Rights, Art. 7.1(b).

⁹ Convicted and accused detainees must be separated. ACHR, Art. 5.4. In addition, the Mandela Rules specify a special regime for the incarceration of non-convicted prisoners. G.A. Res. 70/175, Rules 111-120 (Jan. 8, 2016).

¹⁰ *Informe*, ¶ 132. Requiring certainty before treating suspects as guilty derives from criminal law’s strong rejection of false positives. As synthesized in the famous common law formulation: “Better that ten guilty persons escape than that one innocent suffer.” 4 WILLIAM BLACKSTONE, COMMENTARIES *358.

¹¹ IACtHR, *Norín Catrimán et al. v. Chile*, No. 279, ¶ 311(b) (May 29, 2014). The IACtHR considered that Chilean courts’ mere reference to confidential testimonies, without specifying probative elements linking six of the alleged victims to criminal acts, failed to satisfy the State’s obligation to provide preliminary evidence of wrongdoing in pretrial detention orders. *Id.* ¶¶ 320, 335 and 350.

Legitimate grounds. Pretrial detention shall only be applied to counter procedural risks (risk of hindering the investigation and flight risk).¹² The prevention of future offenses and the provision of swift justice are not considered legitimate grounds,¹³ as they violate suspects' presumption of innocence.¹⁴ 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.¹⁵

Necessity. Pretrial detention shall only be imposed when less restrictive precautionary measures are insufficient. The mere legal availability of non-custodial alternatives is insufficient as judges may end up imposing pretrial detention if these alternatives are not materially available. 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.¹⁶

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.¹⁷ 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. The assessment of whether the duration of pretrial detention is reasonable must consider the benefits to be expected from it and the harm being imposed on a legally innocent person. 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.¹⁸

Reasoned decision. Decisions adopting or maintaining pretrial detention must provide justifications that allow an assessment of whether the measure complies with the abovementioned criteria, showing "clearly that the arguments of the parties have been duly taken into account and the body of evidence [has been] examined rigorously."¹⁹

¹² *Informe*, ¶ 143. See ¶¶ 10 and 11 for factors that may be used to assess these risks. The restriction of pretrial detention to cases of procedural risks extends to extraditions. IACtHR, *Wong Ho Wing v. Peru*, No. 297, ¶ 251 (June 30, 2015).

¹³ In contrast, the European Court of Human Rights ("ECtHR") considers that pretrial detention can be used to prevent a series of other risks. See ECtHR, *Buzadji v. the Republic of Moldova*, No. 23755/07, ¶ 88 (July 5, 2016).

¹⁴ "[I]n cases relating to pre-trial detention, (...) the deprivation of the accused's liberty cannot be founded on general or special preventive objectives that can be attributed to the punishment." IACtHR, *Wong Ho Wing*, ¶ 250. Criticizing incapacitation goals in the criminal procedure, see Yoav Sapir, *Against Prevention? A Response to Harcourt's Against Prediction on Actuarial and Clinical Predictions and the Faults of Incapacitation*, LAW & SOCIAL INQUIRY 260 (2008).

¹⁵ In *Norín Catrimán*, the IACtHR rejected the "number of offenses investigated", the "severity of the punishment", the "seriousness of the offense investigated" and the "accused's personal history" as criteria to evaluate if the suspect's pretrial risks justify detention. ¶ 352. See *Pollo Rivera et al. v. Peru*, No. 319, ¶ 183 (Oct. 21, 2016).

¹⁶ *Informe*, ¶ 238. Non-compliance with alternative measures shall not lead automatically to incarceration. *Id.* ¶ 231.

¹⁷ *Id.* ¶¶ 161 and 163.

¹⁸ *Id.* ¶¶ 165-172, 202-203 and 208. See IACtHR, *Argüelles et al. v. Argentina*, No. 288, ¶¶ 125, 135-136 (Nov. 20, 2014), and *Pollo Rivera*, ¶ 184. Differently from the ICCPR (Article 9.5), the ACHR does not provide a specific right to compensation in case of unlawful detentions. The IACHR has interpreted though that the obligation to remedy violations arising from ACHR's Article 1.1 extends to unlawful pretrial detention orders. *Informe*, ¶¶ 217-220.

¹⁹ IACtHR, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, No. 170, ¶¶ 107 and 118 (Nov. 21, 2007). "The mere listing of all the standards that could be applicable does not meet the requirement of sufficient justification." *Vélez Lóor v. Panama*, No. 218, ¶¶ 116 and 118 (Nov. 23, 2010).

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.²⁰ It aims to avoid arbitrary or unlawful detentions, given that, under the rule of law, the judge must ensure the detainee's rights, authorize precautionary measures and ensure that a person is treated according to the presumption of innocence.²¹

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.²² The IACtHR's case law suggests that delays of two or three days are acceptable,²³ position that has been expressly taken by the IACHR.^{24,25,26}

²⁰ Similarly, ADRDM, Art. 25.3, ECHR, Art. 5.3, and ICCPR, Art. 9.3. Even detentions determined by warrant and carried out in the presence of a judge are subject to Article 7.5. *Chaparro Álvarez*, ¶¶ 63 and 85. States can temporarily suspend this right under a state of emergency, but their specific actions must be proportionate. IACtHR, *J. v. Peru*, No. 275, ¶ 144 (Nov. 27, 2013). Civilians detained during armed conflicts are entitled to this right (Fourth Geneva Convention, Art. 78). IACHR, *Coard et al. v. United States*, Report No. 109/99, ¶ 55 (Sept. 29, 1999). Article 7.5 is also applicable to detentions due to irregular migratory status. IACtHR, *Nadege Dorzema et al. v. Dominican Republic*, No. 251, ¶ 136 (Oct. 24, 2012).

²¹ *Herrera Espinoza*, ¶ 158. The IACHR qualified this right as “[t]he single most important protection of the rights of a detainee.” OEA/Ser.L/V/II.111 doc. 21 rev. ¶ 21 (Apr. 6, 2001). For a review of the standards of the Human Rights Committee (“HRC”) about the in-person judicial review of arrests applied to the Brazilian context, see Layla Medina, *Indefinite Detention, Deadly Conditions: How Brazil's Notorious Criminal Justice System Violates the International Covenant on Civil and Political Rights*, Comment, 31 AM. U. INT'L L. REV. 593 (2016).

²² IACtHR, *Yvon Neptune v. Haiti*, No. 180, ¶ 107 (May 6, 2008). See ECtHR, *Brogan and Others v. the United Kingdom*, 145-B, ¶¶ 59-62 (Nov. 29, 1988).

²³ While the Court already rejected delays of 66 and 57 days (*Herrera Espinoza*, ¶ 160), 36 days (*Castillo Petruzzi et al. v. Peru*, No. 52, ¶ 111 (May 30, 1999)), at least a month (*Galindo Cárdenas et al. v. Peru*, No. 301, ¶¶ 180 and 203 (Oct. 2, 2015), and *Espinoza Gonzáles v. Peru*, No. 289, ¶ 132 (Nov. 20, 2014)), 26 days (*Chaparro Álvarez*, ¶¶ 83 and 86), at least 15 days (*J.*, ¶ 144), a week (*Bayarri v. Argentina*, No. 187, ¶ 66 (Oct. 30, 2008)), or even four days (*Cabrera García and Montiel Flores v. Mexico*, No. 220, ¶¶ 97 and 102 (Nov. 26, 2010)), it accepted a delay of two days in *López Álvarez v. Honduras*, No. 141, ¶¶ 54(11) and 91 (Feb. 1, 2006). In *Expelled Dominicans and Haitians*, the victims' detention lasted less than 48 hours (maximum term in the Dominican Republic). The IACtHR found, however, a violation of Article 7.5 because the termination of their detention derived not from their release in Dominican territory, but from their expulsion from the country without judicial oversight. *Expelled Dominicans and Haitians v. Dominican Republic*, No. 282, ¶ 372 (Aug. 28, 2014).

²⁴ IACHR, OEA/Ser.L/V/II.116 doc. 5 rev. 1 corr., ¶ 122 (Oct. 22, 2002); IACHR, *Desmond McKenzie et al. v. Jamaica*, Report No. 41/00, ¶¶ 248-251 (Apr. 13, 2000). The IACHR already stated that the review must be carried out “as soon as possible” (*Coard*, ¶ 57) and that the delay “may not exceed the time needed for transportation.” *Rodolfo Robles Espinoza and Sons v. Peru*, Report No. 20/99, ¶ 129 (Feb. 23, 1999). See HRC, *Paul Kelly v. Jamaica*, U.N. Doc. CCPR/C/41/D/253/1987 (Apr. 9, 1991) (Mr. Bertil Wennegren, individual opinion).

²⁵ The standard of up to two or three days is in line with the practice of 27 of the 34 other OAS Member States (terms range from six to 72 hours). International Human Rights Clinic, Harvard Law School, *Brazil's Bail Hearings Project in Context: The Right to Prompt In-person Judicial Review of Arrests Across OAS Member States* 9-19 (Oct. 2015). The IACtHR's approach in *Artavia Murillo* of searching a regional consensus when interpreting the ACHR reinforces the conclusion derived from its case law that the promptness prong in Article 7.5 generally tolerates delays of two or three days. *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, No. 257, ¶ 256 (Nov. 28, 2012).

²⁶ The IACtHR has suggested that the standard for promptness in the judicial review of arrests must be stricter when minors are involved. *Landaeta Mejías Brothers et al. v. Venezuela*, No. 281, ¶¶ 176-178 (Aug. 27, 2014).

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.²⁷

“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.²⁸

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.”²⁹ Further, the review must be effective in “controlling the lawfulness of the actions taken by the police officials,” what includes initiating, “*ex officio* and immediately, an impartial, independent and meticulous investigation” whenever there are indications of cruel, inhuman or degrading treatments (“CIDT”).³⁰

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.³¹ Until then, judges can restrict suspects’ rights only by applying precautionary measures intended to eliminate certain legally prescribed risks. The most severe precautionary measure is pretrial detention.

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.³² *Preventive detention*: before or after

²⁷ 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). See IACHR, *Manríquez v. Mexico*, Report No. 2/99, ¶¶ 44-45 (Feb. 23, 1999) (insufficiency of review by police chief and prosecutor).

²⁸ Respectively, IACtHR, *Pollo Rivera*, ¶ 106, *Vélez Loor*, ¶ 109, and *Tibi v. Ecuador*, No. 114, ¶ 118 (Sept. 7, 2004).
²⁹ *Espinoza González*, ¶ 129.

³⁰ *Bayarri*, ¶¶ 67 and 92. See also IACtHR, *Bueno Alves v. Argentina*, No. 164, ¶ 111 (May 11, 2007).

³¹ In 2009, the STF decided that the sentence should only be enforced after the conviction becomes final, because up to such moment the defendant cannot be considered guilty (Constitution, Article 5, LVII). As a result, defendants were entitled to exhaust all appeals available before start serving their sentence, what includes the special appeal to the STJ and the extraordinary appeal to the STF. *Habeas Corpus 84,078*, Feb. 5, 2009. In February 2016, seven years later, the STF went back to its pre-2009 position in a 7-4 judgment deciding that the defendant should start serving the sentence after the conviction by an appellate court, even if subsequent appeals are available. *Habeas Corpus 126,292*, Feb. 17, 2016. This position was maintained in the 6-5 judgment of the Preliminary Injunction in the Declaratory Complaints of Constitutionality 43 and 44, Oct. 5, 2016. In November 10, 2016, the STF attributed “general repercussion” to such position, meaning that lower courts are formally bound by it. The research did not identify instances where the bodies of the Inter-American Human Rights System (“IAHRS”) analyzed if the provisional enforcement of non-final convictions violates the ACHR, but the IACHR already stated that “a person is innocent until proven guilty in a final judicial decision.” *Dayra María Levoyer Jiménez v. Ecuador*, Report 66/01, ¶ 100 (June 14, 2001). Even if IAHRS’ bodies do not interpret Article 8.2 of the ACHR as preventing the enforcement of convictions before final judgments, it could be argued that Article 29(b) of the ACHR prohibits Brazil from retroceding its human rights protection in situations where the domestic safeguards go beyond international standards. See IACtHR, “*Five Pensioners*” v. Peru, No. 98, ¶¶ 101-103 (Feb. 28, 2003), and *Yatama v. Nicaragua*, No. 127, ¶¶ 203-205 (June 25, 2005).

³² Law 7,960/1989. The temporary detention shall be of 30 days (renewable once) in case of crimes qualified as heinous or equated to heinous (torture, drug trafficking and terrorism). Law 8,072/1990, Art. 2, ¶ 4.

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.³³ Given this case study's focus on bail hearings – mechanism aimed at evaluating the necessity of converting *flagrante delicto* detentions into preventive detentions –, the legal analysis herein will be restricted to preventive detention and the term “pretrial detention” shall refer exclusively to preventive detention.

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;³⁴ (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,³⁵ demonstrating the proportionality of the measure.

The period spent by suspects in pretrial detention must be computed towards a future prison sentence.³⁶ Suspects will be entitled to compensation only if pretrial detention was illegal or arbitrary.³⁷

Authorizing grounds. Judges must demonstrate that suspects present a risk to the enforcement of the criminal law (flight risk), to the criminal investigation (risk of procedural hindrance) or to the public or economic order.³⁸ Risk to the public or economic order is not statutorily defined and is usually interpreted as the risk of committing crimes.³⁹ Against the IACtHR's precedents, the STF considers that pretrial detention can be ordered to counter suspects' dangerousness in order to protect the public order.⁴⁰ The STF only objects to judges justifying suspects' dangerousness based on abstract reasons.⁴¹

Non-custodial precautionary measures. Judges must apply alternatives to pretrial detention and release suspects whenever such restrictions are sufficient to curb the risks identified.⁴² The

³³ Código de Processo Penal (“CPP”) [Criminal Procedure Code], Arts. 311-316.

³⁴ CPP, Art. 312, second part. See *supra* note 11 for relevant Inter-American standards.

³⁵ CPP, Art. 315. See *supra* note 19 for relevant Inter-American standards.

³⁶ Código Penal (“CP”) [Penal Code], Art. 42.

³⁷ STF, Appeal to the Plenary on the Extraordinary Appeal 939,966, Mar. 3, 2016.

³⁸ CPP, Art. 312, first part.

³⁹ In *Norín Catrimán*, the IACtHR refused to rule that the Chilean provision authorizing pretrial detention on the grounds of “danger to the security of society” violated, in itself, Article 2 of the ACHR. ¶ 364. The provision was not considered *per se* arbitrary as it could be interpreted as risk of procedural hindrance and flight risk. ¶ 364. Interestingly, the very breadth of “danger to the security of society” that allows judges to interpret it as procedural legitimate risks may breach the ACHR for being an unpredictable restriction to personal liberty. *Galindo Cárdenas*, ¶ 198.

⁴⁰ The STF upheld in 2016 at least 25 pretrial detention orders grounded exclusively on the protection of the public order due to suspects' dangerousness. Habeas Corpus 125,144, 128,650, 128,779, 130,708, 131,221, 131,225, 131,240, 131,804, 131,905, 132,543, 133,133, 134,132, 134,444, 134,635, 135,393, 135,418, 136,045, 136,080, 136,255, 136,298, 136,778, 137,359, 137,365, 138,120 and 138,251.

⁴¹ In 2016, the STF granted at least 16 habeas corpus to revoke pretrial detention orders grounded on the abstract severity of crimes. Habeas Corpus 120,530, 121,854, 123,441, 127,962, 128,195, 129,351, 130,780, 130,916, 131,002, 132,233, 133,670, 134,069, 134,104, 134,382, 135,250 and 136,784. Only Justice Marco Aurélio has gone further to also reject the use of specific elements of charges. Habeas Corpus 124,000 and 127,729.

⁴² CPP, Art. 282, ¶ 6. Precautionary measures can only be applied to crimes punished with prison. *Id.* Art. 283, ¶ 1.

Criminal Procedure Code (“CPP”) specifies as non-custodial measures:⁴³ 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.⁴⁴ Replicating constitutional provisions, the CPP prohibits judges from setting bail to suspects accused of, *inter alia*, torture, drug trafficking and heinous crimes.⁴⁵ Depending on the financial conditions of the suspect, the bail may be waived, reduced by up to two-thirds or increased by up to 1,000 times.⁴⁶ House arrest can be ordered in substitution to pretrial detention when the suspect is older than 80 years of age, seriously ill, indispensable to the special care of person younger than six years of age or with deficiency, pregnant, a woman with child under the age of 12, and a man if he is the only responsible for the care of child under the age of 12.⁴⁷

Eligibility and proportionality. Pretrial detention can only be applied in proceedings related to intentional crimes punished by a maximum prison term higher than four years⁴⁸ and to cases of recidivism in intentional crimes.^{49,50} When suspects fall under the eligibility criteria, judges must still perform a concrete assessment of prospective proportionality as the imposition of pretrial detention may be disproportionate to the likely punishment. The STF declared unconstitutional the prohibition against the release of suspects accused of drug trafficking for being a blanket

⁴³ CPP, Art. 319. Also, all released suspects must attend procedural stages when summoned, obtain judicial authorization to change home and inform where to be found if planning to stay away from their home for more than eight days (CPP, Arts. 327 and 328).

⁴⁴ These measures were introduced by Law 12,403/2011, which reformed the CPP to make pretrial detention exceptional. Challenges prevent, however, many of them from being effective alternatives in São Paulo (see VII.a.v).

⁴⁵ Constitution, Art. 5, LII-LIV; CPP, Art. 323. In order not to be a blanket imposition of pretrial detention, this provision should be read as authorizing pretrial release subject to non-custodial measures other than monetary bail.

⁴⁶ CPP, Art. 325, ¶ 1. This rule is consistent with the Inter-American standard that requires bail setting to be responsive to material equality. *Informe, supra* note 6, ¶ 236. IACtHR, *Andrade Salmón*, ¶ 114. See in VII.a.iii how bail hearings improved bail setting in São Paulo.

⁴⁷ CPP, Art. 318. The three last situations were added by Law 13,257/2016. Even after proof of those conditions, judges may deny house arrest if incarceration is imperative. STJ, Appeal on Habeas Corpus 73,643, Sept. 20, 2016.

⁴⁸ Crimes eligible for pretrial detention relevant for this case study: drug trafficking (five to 15 years in prison), rape (six to 10 years), robbery (four to 10 years), aggravated receipt of stolen property (three to eight years), aggravated theft (two to eight years), false identity (up to six years) and fraud (one to five years). Crimes not eligible for pretrial detention in the absence of recidivism that are relevant for this case study: non-aggravated receipt of stolen property (one to four years), non-aggravated theft (one to four years), solicitation of sex to children (one to three years), drunk driving (six months to three years) and unlicensed driving (six months to one year).

⁴⁹ CPP, Art. 313, I and II. An individual will be recidivating if, at the moment of the new crime, the sentence for a previous final conviction did not end being served more than five years before (purifying period). CP, Arts. 63 and 64, I. Pretrial detention can also be ordered if there is doubt about the suspect’s identity – until it is clarified – and in cases of domestic or family violence – as an urgent protective measure. CPP, Art. 313, III and sole paragraph.

⁵⁰ Suspects accused of crimes punished by a maximum prison term of up to four years, and not in recidivism in intentional crimes, are unlikely to be imprisoned if convicted due to three milder alternatives. *Open regime*: the defendant convicted to a prison term of up to four years and not recidivating may serve the sentence in open regime from the beginning (see *infra* note 182). *Substitution for non-custodial punishments*: the defendant convicted to a prison term of up to four years for a non-violent crime and not recidivating in intentional crimes may have the sentence substituted by non-custodial punishments. *Conditional suspension of the punishment*: the defendant convicted to a prison term of up to two years may have the punishment suspended for two to four years subject to conditions, as long as he or she is neither recidivating in intentional crimes nor eligible for non-custodial punishments.

restriction.⁵¹ However, some prosecutors and judges continue to refer to such provision arguing that the constitutional case lacked *erga omnes* effects.

Reasonableness and periodic review. There is neither a maximum legal term for pretrial detention nor a pre-established interval for periodic review. Judges also do not determine an initial term for the measure. Judges must, however, revoke or substitute precautionary measures whenever their justification ceases to exist. The STF further determines that pretrial detention must be revoked when its duration is unreasonable due to unjustified delays in the case.⁵² Cases with detained suspects have shorter procedural terms and must be processed with priority.⁵³ 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.

Human rights of pretrial detainees. Pretrial detainees must be separated from detainees convicted by a final decision.⁵⁴ Regardless of compliance with this and other obligations related to the custody of pretrial detainees, it is important to mention that the conditions in Brazilian pretrial detention centers are overall deplorable.⁵⁵ Brazil's levels of prison overcrowding are largely to blame for this, well illustrated by the ratio of 2.19 detainees/capacity in São Paulo pretrial detention centers.⁵⁶

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 United Nations Human Rights

⁵¹ STF, Habeas Corpus 104,339, May 10, 2012 (declaring Article 44 of the Toxics Law unconstitutional). Congress repealed in 2007 the blanket prohibition of pretrial release for individuals detained red-handed for heinous crimes (Law 8,072/1990, Art. 2, ¶ 1). The IACtHR held Ecuador liable three times due to a blanket prohibition of pretrial release for suspects accused of drug offenses. *Herrera Espinoza*, ¶ 149, *Acosta Calderón*, ¶ 135, and *Suárez Rosero v. Ecuador*, No. 35, ¶ 98 (Nov. 12, 1997). The IACtHR rejected similar provisions in Peru for suspects accused of terrorism (*Pollo Rivera*, ¶ 125) and in Honduras for suspects accused of crimes punished by prison terms higher than five years (*López Álvarez*, ¶ 81).

⁵² Based on this understanding, the STF released in recent years defendants who stayed incarcerated without a first instance conviction for six years and nine months (Habeas Corpus 124,707, Nov. 3, 2015), six years and five months (Habeas Corpus 119,365, Apr. 29, 2014) and five years and five months (Habeas Corpus 115,963, June 11, 2013).

⁵³ CPP, Arts. 10 (10 instead of 30 days for the police to conclude the investigation), 46 (five instead of 15 days for the prosecution to bring charges after the police concludes the investigation) and 429, I and II (preference for judgment).

⁵⁴ CPP, Art. 300; Law 7,210/1984, Art. 84. Pretrial detainees holding a university degree are entitled to segregation from the general pretrial detainees. CPP, Art. 295, VII. This benefit is currently being challenged before the STF under the argument that it is discriminatory. Claim of Noncompliance with Fundamental Precept 334 (filed Mar. 9, 2015).

⁵⁵ The STF recently acknowledged the “unconstitutional state of affairs” of the Brazilian penitentiary system by finding that “the majority of the detainees is subject to the following conditions: prison overcrowding, torture, killings, sexual violence, filthy and insalubrious cells, proliferation of infectious and contagious diseases, indigestible food, lack of potable water, of basic hygiene products, of access to judicial assistance, to education, to health, and to work, as well as broad control of criminal organizations, insufficiency of control over time served, and discrimination on the grounds of social status, race, gender and sexual orientation.” Precautionary Measure in the Claim of Noncompliance with Fundamental Precept 347, Sept. 9, 2015 (Marco Aurélio, J.).

⁵⁶ As of April 11, 2017, the seven pretrial detention centers in the city of São Paulo incarcerated 10,318 detainees despite their total design capacity being limited to 4,701 detainees. The centers' specific ratios were 0.62, 2.15, 2.20, 2.22, 2.42, 2.82 and 3.03. Secretaria de Administração Penitenciária: www.sap.sp.gov.br/uni-prisionais/cdp.html (last visited on April 14, 2017).

Committee in 2009.⁵⁷ Brazil has long thus been under international obligations to assure suspects the right to a prompt in-person judicial review of arrests (ACHR, Article 7.5, and ICCPR, Article 9.3). 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 (a federal law) does not provide it.⁵⁸

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 – who usually remain unaccountable due to ineffective investigations.⁵⁹ 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.

Judicial review of arrests before bail hearings

Before the introduction of bail 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.⁶⁰ 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.⁶¹

A set of precedents of the Superior Court of Justice ("STJ") established that delays in analyzing the necessity to convert arrests into pretrial detentions were mere procedural irregularities that would not justify detentions being revoked.⁶² As a consequence, the same system that did not require suspects to be brought before judges also tolerated delays in the judicial review of detentions.

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, after visitation from family members or counsels, moment when signs of abuses could have already faded. Moreover, suspects could not present their allegations directly to an independent and impartial authority empowered to secure their rights and trigger investigations.

Introduction of bail hearings

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

⁵⁷ Respectively, Executive Decrees 678/1992, 592/1992 and 4,463/2002, and Legislative Decree 311/2009.

⁵⁸ STF, Extraordinary Appeal 349,703, Dec. 3, 2008 (striking down provisions of federal laws that prescribed debtors' detention as a means of enforcing civil obligations due to the specific prohibitions of the ACHR and the ICCPR).

⁵⁹ See *supra* notes 1 and 2.

⁶⁰ CPP, Art. 306, ¶ 1. Up to 24 hours after the arrest, the *flagrante* detention statement shall be forwarded to the competent judge and, if the detainee does not inform the name of his or her lawyer, to the Public Defender's Office.

⁶¹ CPP, Art. 400. A 2012 research indicated that the average period between the arrest and the first appearance in court was 109.2 days for men and 135.7 days for women in the city of São Paulo. Instituto Terra, Trabalho e Cidadania and Pastoral Carcerária Nacional, *Tecer Justiça: Presas e Presos Provisórios da Cidade de São Paulo* 50 (May 2012).

⁶² STJ, Habeas Corpus 45,007, Mar. 20, 2014 (upholding the judicial review of an arrest 65 days later), 40,142, Dec. 13, 2013 (22 days of delay), 41,768, June 5, 2014 (21 days of delay), 51,866, Nov. 4, 2014 (12 days of delay), 42,061, Apr. 3, 2014 (7 days of delay). The STJ is the top court within the Brazilian ordinary civil system and as such has jurisdiction to analyze appeals against decisions of state or federal courts of appeals raising the argument that they violated federal law or interpreted federal law differently from another court of appeals.

Congress in September 2011 with the proposal of reforming the CPP to determine that suspects must be brought before a judge within 24 hours of their arrest. Despite the strong support of civil society⁶³ and public defenders, the bill has not become law yet⁶⁴ due to opposition from associations of judges, prosecutors and police chiefs, which have advocated to dismissing or softening the reform.

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 2015 to progressively implement a prompt in-person judicial review of arrests (Bail Hearings Project).⁶⁵

In August 2015, the STF determined that the regulation of bail hearings by the Court of Appeals of São Paulo (Joint Provision 3/2015) without a congressional reform of the CPP was constitutional.⁶⁶ 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.⁶⁷ As of October 2015, all 26 Brazilian states and the Federal District had started to implement them, mostly in the capital cities.⁶⁸ After being initially regulated by state-level ordinances, the CNJ published a comprehensive federal set of rules on bail hearings ("CNJ Resolution 213") in December 2015.⁶⁹

Bail hearings aim at enhancing compliance with suspects' rights by: (i) improving the assessment of the legality of arrests and the necessity of precautionary measures, in special pretrial detention; (ii) facilitating the identification and investigation of police violence, ultimately bringing justice to tortured and assaulted individuals and discouraging future abuses; and (iii) assuring the prompt judicial review of all detentions.⁷⁰ In view of the multiple limitations of the

⁶³ Rede Justiça Criminal, *Audiência de custódia: o que é e porque é necessária*, INFORMATIVO JUSTIÇA CRIMINAL 5 (2013) (includes a report prepared by the Human Rights Watch and a letter of support from the Latin American entities that form the Red Regional para la Justicia Previa al Juicio); and IBCCRIM, *Editorial* 252 BOLETIM (Nov. 2013).

⁶⁴ After years without relevant updates, the bill gained momentum in 2015 with STF's and CNJ's actions and was approved in the Senate in the end of November 2016. The approved text authorizes bail hearings to be held, exceptionally, through videoconference and prescribes that the 24-hour term may be extended to 72 hours in case of practical difficulties or even to five days in cases involving criminal organizations. Holding hearings through videoconference raises serious concerns in light of ACHR's requirement that the hearing must be in person, in special due to the increased risk of intimidating suspects not to report police violence. The authorization to extend the term to 72 hours will probably only be consistent with the ACHR if it is restricted to truly exceptional situations. On the other hand, extending the term to five days contravenes the position of the IAHR's bodies regarding the promptness requirement in ACHR's Article 7.5 (see *supra* note 23). In December 2016, the House of Representatives attached the bill on bail hearings to the Bill 8,045/2010, which proposes a comprehensive reform of the CPP. The maneuver is likely to delay even more the congressional deliberation around the introduction of bail hearings in the CPP.

⁶⁵ A synthesis of the project prepared for its presentation to the OAS, including an explanation in English by Chief Justice Lewandowski, is available on: www.youtube.com/watch?v=NZWeCO8TxGY (last visited on April 14, 2017).

⁶⁶ STF, Direct Complaint of Unconstitutionality 5,240, Aug. 20, 2015 (the STF dismissed the claim that the Court of Appeals of São Paulo had usurped Congress's exclusive lawmaking authority to enact norms of procedural nature by finding that bail hearings are already part of the Brazilian legal system due to the provisions of the ACHR and the ICCPR).

⁶⁷ STF, Precautionary Measure in the Claim of Noncompliance with Fundamental Precept 347, Sept. 9, 2015.

⁶⁸ Jorge Vasconcellos, *DF completa ciclo de implantação das audiências de custódia no país*, CNJ, Oct. 10, 2015.

⁶⁹ An association of judges attacked the resolution on grounds similar to those raised against the rules of the Court of Appeals of São Paulo, *supra* note 66. The STF denied standing to the plaintiff. Direct Complaint of Unconstitutionality 5,448, Feb. 2, 2016. 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").

⁷⁰ CNJ, AUDIÊNCIA DE CUSTÓDIA 11 (2016).

previous system, it was perceived that only a new procedural dynamic could bring about material change to suspects' rights.

V. The dynamics of a bail hearing

Arrest and formalization

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.⁷¹

At the police station, the police chief will preliminarily ascertain the legality of the arrest. The police chief is required to hear the officers responsible for the arrest, the witnesses and the suspect to decide whether to formalize the detention.⁷² Preliminary investigative steps such as chemical tests of seized substances and recognition of suspects are also performed at this stage, as well as their medical examination.

The police chief can set bail for offenses punished by a maximum prison term equal to or lower than four years.⁷³ 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 bail hearing in the following day.⁷⁴

If the suspect is severely ill or exceptional circumstances make it impossible to bring him or her before a judge within 24 hours, the hearing shall be performed as soon as possible.⁷⁵ Nonetheless, hearings in São Paulo of hospitalized suspects are held *in absentia* ("ghost hearings") and these suspects are usually not afforded a new hearing after recovery.⁷⁶

⁷¹ CPP, Art. 302. In line with the IACtHR (*Chaparro Álvarez*), the CNJ requires a hearing for individuals detained based on warrants. Resolution 213, Art. 13. Hearings for warrant-based arrests still do not take place in São Paulo. Judge F stated that there was no reason to hold hearings in such circumstances because their purpose would be strictly to control the actions of the police, and police abuses usually happen in the early stages of investigations, not in the advanced procedural phases in which warrant-based arrests take place.

⁷² CPP, Art. 304. The CNJ instructs judges to consider as indications of torture or other CIDT, situations when, *inter alia*, suspects were kept *incommunicado*, in an unofficial or secret place, or in escort vehicles for longer than the necessary for their direct transportation, or when they were blindfolded, hooded, muzzled, handcuffed without justification or subject to other physical constraint, or were deprived of their clothes. Resolution 213, Protocol II, § 1.

⁷³ CPP, Art. 322. This rule was the most effective measure to reduce pretrial detention among those introduced by the Law 12,403/2011 (comprehensive reform of the CPP to make pretrial detention exceptional). 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* 14 (2014) ("Sou da Paz/ARP Report").

⁷⁴ The amount of suspects brought to court in a given day varies significantly depending on the police activity of the day before. In São Paulo, from June 1, 2015, to March 15, 2016, the minimum and the maximum amount of suspects afforded a hearing in a single day were, respectively, 42 on August 10, 2015, and 155 on February 26, 2016. The mean of the 182 days with hearings in that period was 86 suspects. Secretaria de Administração Penitenciária de São Paulo, *Relatório Audiências de Custódia – Março 2016* ("SAP Report").

⁷⁵ CNJ Resolution 213, Art. 1, ¶ 4.

⁷⁶ Judges H and I. Judge H acknowledged that holding bail hearings for hospitalized individuals after their recovery was particularly important to assess whether the injuries arose from police misconduct. The IACHR found Jamaica liable under ACHR's Article 7.5 when it failed to promptly bring a suspect before a judge after his release from the hospital. *Desmond McKenzie*, ¶ 252.

Custody in court

Suspects generally remain incarcerated at the police station during the day of their arrest, being only brought to court the following day.⁷⁷

Suspects arrive at court between 10 a.m. and 4 p.m. Judges decide the order of hearings and usually group them by crime, giving preference to individuals accused of less serious offenses, who have higher chances of release.⁷⁸ Counsels do not have access to a schedule of hearings. Suspects are randomly assigned to one of the six courtrooms. A public defender and a judge mentioned though that sometimes private lawyers attempt to interfere with the court's registry to have their cases heard by judges perceived to be more lenient.⁷⁹

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.⁸⁰ The provision of food at the court for suspects awaiting a hearing is irregular.⁸¹ Police officers responsible for the security of bail hearings are members of the Military Police. They are specifically assigned to bail hearings and never work simultaneously with patrolling.⁸²

*Interview with counsel*⁸³

For the hearing, suspects are escorted from the court's detention facility to the area with courtrooms. They consult briefly (one to five minutes) with counsels in the corridor outside the courtrooms.⁸⁴ Co-suspects without lawyers are represented, as a rule, by a sole public defender and their interview is performed jointly.⁸⁵ Police officers stay only a few feet away from counsels and suspects, what means that a private consultation is not guaranteed.⁸⁶

Counsels use the interview to explain the purpose of the bail hearing to suspects and to gather information about their personal conditions and their version of the alleged facts to tailor the defense pleading. Counsels also instruct them about how to behave in the hearing in order to

⁷⁷ The practice in São Paulo of bringing suspects to a hearing until the end of the day following the arrest inevitably causes some individuals to stay detained without judicial oversight for more than 24 hours, but for less than 48 hours.

⁷⁸ This case management practice confirms the strong weight given to the type of crime in decisions about pretrial detention in bail hearings, as argued in VII.a.iv.2 below.

⁷⁹ Public Defender Q and Judge H.

⁸⁰ Judge B.

⁸¹ Public Defender Y. For similar findings on a national scale and recommendations to address the issue, see Ministério da Justiça and DEPEN, *Implementação das Audiências de Custódia no Brasil: Análise de Experiências e Recomendações de Aprimoramento* 37-38 and 63 (2016) ("MJ General Report on Bail Hearings").

⁸² Protocol II, § 1, ¶ IV. See VII.b.i for a critique against having military police officers in charge of the safety of bail hearings, notwithstanding the exclusion of officers simultaneously on patrolling duty.

⁸³ 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 (bail hearings in Brazil); and Joint Provision 3/2015 of the Court of Appeals of São Paulo, Art. 5 (bail hearings in São Paulo).

⁸⁴ Suspects who do not hire private lawyers are assisted by public defenders. In case there are not enough public defenders, judges will appoint *ad hoc* lawyers who are available in court. 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%). A study with 588 suspects who were afforded a bail hearing in São Paulo found similar rates. Instituto de Defesa do Direito de Defesa, *Monitoramento das Audiências de Custódia em São Paulo* 18 (2016) ("IDDD Report").

⁸⁵ Public Defender N explained that when a public defender is assisting two or more suspects and he or she identifies a conflict in their defense, he or she will split their representation with other public defenders.

⁸⁶ See in VII.c.iii how the practice in São Paulo regarding consultation with counsel breaches suspects' due process rights.

increase their chances of release.⁸⁷ Public defenders further ask suspects for contact information of relatives or acquaintances that should be contacted in case of pretrial detention or to help with bail. Lastly, counsels ask suspects if they suffered violence and whether they want to denounce it.⁸⁸

Questioning by judge

The judge must explain the purpose of the bail 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 – through questioning and visual observation – to evaluate whether to release them, with or without precautionary measure, as well as to refer them to social services.⁸⁹

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. The CNJ requires judges to repeat questions if necessary, formulate simple, open and non-threatening questions, prioritize listening, be respectful to suspects' gender and sexual orientation, and respect the limits of the victim of torture.⁹⁰

Judges in São Paulo tend to adopt a particular approach in questioning depending on their concern for finishing bail hearings fast, on their perception of the hearings' utility, and, invariably, on their empathy with suspects. Despite the diversity, the observation of hearings identified the alarming trend of some judges conducting hearings in all haste (*a toque de caixa*), without following all legal steps. That ultimately undermines relevant part of hearings' *raison d'être* and reveals both the preset nature of most decisions and the unwillingness to create an environment where abuses are preliminarily identified.⁹¹

The CNJ requires judges to ensure that the suspect is not handcuffed, except in cases of resistance or well-founded fear of flight or danger, being the exceptionality justified in writing.⁹² 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.⁹³

⁸⁷ See in VI.b how the practice of making the hearing's video recording available in the main criminal proceeding is leading public defenders to instruct suspects to remain silent in hearings not to risk impairing their defense afterwards.

⁸⁸ These functions were explained by Public Defenders Q and N. See *infra* note 239.

⁸⁹ Synthesis of judges' questioning protocol in bail hearings according to CNJ Resolution 213, Art. 8.

⁹⁰ CNJ Resolution 213, Art. 11, ¶ 2, and Protocol II, § 4.

⁹¹ Specific behaviors supporting this finding are: (i) limited questioning about personal conditions (see VI.a.i below); (ii) restrictive approach towards questioning about the alleged facts (VI.b); (iii) inexistent or insufficient questioning about police violence (VII.b.i); (iv) attribution of decisive weight to the charges when deciding about pretrial detention (VII.a.iv); (v) verbal treatment inconsistent with suspects' status as presumed innocents (VII.c.ii); (vi) rushing counsels to finish their already brief interviews (VII.c.iii); and (vii) no reference to specific arguments of the parties in written decisions. See also MJ General Report on Bail Hearings, *supra* note 81, at 48 (cautioning against judges' practice of preparing decisions before hearings).

⁹² CNJ Resolution 213, Art. 8, ¶ 2, applying STF's Binding Statement 11 (Aug. 13, 2008) to bail hearings.

⁹³ As justified in written decisions and corroborated in interviews with judges. Judge G further argued that the prohibition against the use of handcuffs was reasonable in jury trials but not in hearings with professional judges because only the perception of lay jurors about whether defendants are guilty could be affected by the use of handcuffs. Judge E argued that the use of handcuffs was not indiscriminate because he/she would ask the police officers to remove them in some specific circumstances – such as those of an old suspect or an injured person. Despite this disclaimer, the observation revealed that three female suspects older than 50 years of age were kept handcuffed during their hearings (one of them was accused of adulterating her car plate and the other two of selling false parking tickets). See

Prosecution and defense

After the judge, the prosecution and then the defense may question the suspect about the same general topics (personal conditions, police violence and circumstances of the arrest). In sequence, the parties plead orally without submitting written petitions. They may submit documents supporting their pleadings, such as those that demonstrate the suspect's ties to the community.⁹⁴

Prosecutors in São Paulo neither ask suspects if they suffered police violence when judges fail to do so nor request investigations to be opened when suspects make such accusations. Most prosecutors always request pretrial detention in cases of serious crimes (such as robbery and drug trafficking) not considered by them to be situations of revocation.⁹⁵

Counsels use this moment to ask suspects about personal conditions and facts related to the accusation considered as potentially helpful. In São Paulo, the task of asking suspects about whether they suffered police violence is typically left to counsels. The defense pleading is often structured in subsidiary claims, *e.g.*, revocation, if not, provisional release, if not, substitution of pretrial detention by house arrest.⁹⁶

Decision and review

Judges then decide suspects' pretrial status. Four outcomes are possible: (i) revocation of the detention, if it was illegal; (ii) provisional release without precautionary measures; (iii) provisional release with non-custodial precautionary measures, including bail; or (iv) 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.⁹⁷

When suspects are not put in pretrial detention and show signs of social vulnerability, such as substance abuse, mental illness or homelessness, the judge shall refer them to the network of social services available – respecting the voluntariness principle. These services include job search, inclusion in shelters, provision of clothing, transportation after the hearing, psychiatric care and treatment for addiction.⁹⁸

also the IDDD Report, *supra* note 84, at 49, and the MJ General Report on Bail Hearings, *supra* note 81, at 46. Also against CNJ's standards (Protocol II, § 2, ¶ VI), police officers are always bearing firearms.

⁹⁴ Examples of documents submitted are a suspect's work card, statement of enrollment in university, house electricity bill, affidavit of employer and birth certificates of young children.

⁹⁵ 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.

⁹⁶ Hearing 8 below presents an interesting three-tiered pleading by a public defender.

⁹⁷ CNJ Resolution 213, Art. 11, opening paragraph and ¶ 4. See VII.b for the steps following the opening of an inquiry.

⁹⁸ 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. Judicial actors explained that the CEAPIS suffers from severe lack of resources to perform an effective job. As exemplified by Public Defender P, many suspects who are released leave the courthouse barefoot because there are not enough flip-flops. For more details about the CEAPIS, see IDDD Report, *supra* note 84, at 20-21 and 61-64.

After the counsel's pleading, the judge briefly announces the decision orally.⁹⁹ In the few minutes that the judge uses to finish adapting his or her template to the case's written decision, the counsel usually explains the hearing's outcome and the subsequent steps to the suspect. The decision is printed and signed by the prosecutor, counsel and suspect, although the latter is not given time to read it. Decisions are not read to illiterate suspects.

Suspects whose detentions are revoked and those released without bail are set free in the same day (often some hours after the hearing). Individuals who are released conditioned on bail can recover their freedom the same day if they are capable to post the amount before 6 p.m. Suspects denied release stay incarcerated indefinitely without periodic review of their detention.^{100,101}

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

Bail 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.¹⁰² These innovations "knocked the paper barrier down"¹⁰³ 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 bail hearings' features from being fully exploited.

⁹⁹ Judges rarely explain the grounds of their decisions orally and at most attribute them to the severity of the crimes or to suspects' criminal records, or say that they are giving suspects a chance. Judge H said that if he/she were to explain the decision to suspects, they would inevitably start questioning it and the result would be overstressing the duration of hearings. Moreover, some judges do not turn to suspects to announce the decision, what further attests their unwillingness to interact with them. The IDDD Report found that judges did not communicate the decision directly to suspects in 31% of the cases observed, *supra* note 84, at 47. For similar findings on a national scale, see MJ General Report on Bail Hearings, *supra* note 81, at 43-44.

¹⁰⁰ Petitions asking the review of pretrial detention orders either to the judges who issued them or to the Court of Appeals are generally unsuccessful. Public Defender Q explained that the Court of Appeals tends to sustain decisions taken in bail hearings based on the argument that judges had personal contact with suspects and thus are in a better position to decide about their pretrial status. Habeas Corpus to the Court of Appeals and, subsequently, to the STJ take on average nine to 11 weeks to be processed. Instituto de Defesa do Direito de Defesa, *Liberdade em Foco: Redução do uso abusivo da prisão provisória na cidade de São Paulo* 56 (2016) ("IDDD General Report on Pretrial Detention"). For this reason, Public Defender N said that the defense usually fights for a preliminary injunction in a habeas corpus, which is decided within days or in a few weeks.

¹⁰¹ See additional details of the underlying structure and dynamics of bail hearings in São Paulo in the IDDD Report, *supra* note 84, at 14-24.

¹⁰² Judge E explained that the comparison between his/her experience in bail 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.

¹⁰³ Judge F ("the reform personified the exercise of the jurisdictional activity by changing the criminal procedure to treat people like people, not like numbers"). Public Defender O said that the hearings "humanized the criminal procedure by bringing individuals' face and smell to court."

a. *Greater visibility of suspects' personal conditions*

Before bail hearings, judges would only take data from police investigation files and suspects' criminal records into consideration. Investigation files contain suspects' answers about personal information (such as substance abuse and level of schooling) and their version of the facts, unless they exercise the right to remain silent. However, this information is often inaccurate, for instance, because suspects tend not to admit to being homeless. Other times, relevant information such as mental illnesses and pregnancy are not reported. Lastly, some relevant factors about a person's socioeconomic conditions simply cannot be properly conveyed on paper, such as demeanor, clothing and odor.¹⁰⁴ While items (i), (ii) and (iii) demonstrate how the greater visibility of personal conditions improves the review of arrests, item (iv) explores the worrying practice of analyzing suspects' dangerousness using *bandido* stereotypes.

i. Socially vulnerable

The face-to-face interaction between suspects and judges in bail hearings brought into courtrooms the social reality of those targeted by criminal enforcement. Individuals that before would only appear in court several months after their arrest – presented bathed and in jumpsuits – are now appearing before judges in the very conditions in which they were arrested.

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. Suspects tend to be more candid in bail hearings than at the police station about conditions such as unemployment and homelessness because many fear at the police station that these facts may count against them, a fear that is debunked by counsels before hearings.¹⁰⁵ 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.

¹⁰⁴ "I had the experience of getting to know the society here in São Paulo, see what is misery, what is a serious crime, what is a violent person that needs to be segregated, what is a mentally ill person, what is... Well, separate the wheat from the chaff." Judge D.

¹⁰⁵ 28 of the 201 suspects (13.9%) whose hearings I observed said that they were homeless (the hearing of one suspect was held *in absentia*). 11 of them were accused of drug trafficking, nine of aggravated theft, four of non-aggravated theft and three of robbery. 22 of them were released (12 detentions revoked and 10 releases subject to precautionary measures other than bail) and six were kept detained (21.4%). 16 of the 22 homeless suspects released were referred to social services. The IDDD Report identified that 49 of the 544 suspects of their sample for whom this information was coded were homeless (9%). The pretrial detention rate was substantially higher than in our sample: 61.2%. *Supra* note 84, at 34. The lack of data broken down by crimes, as well as of information about potential confounding variables, prevents a conclusion about whether homelessness affects the likelihood of pretrial detention. These figures do attest, however, to the overrepresentation of homeless individuals in bail 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 our sample. Fundação Instituto de Pesquisas Econômicas, *Censo da População em Situação de Rua da Cidade de São Paulo* (2015). Such overrepresentation reinforces the link between socioeconomic vulnerability and criminal justice and calls for serious reforms in the network of social services for homeless people.

Hearing 1

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.¹⁰⁶

Hearing 2

Provisional release

Gabriel was arrested for drug trafficking and confessed the offense before the judge. He said with a desolate semblance that he started living in "the squares and streets of life" after his dearest person (mother) died in 1999. Gabriel explained that public shelters for homeless people were not a good alternative, as "everyone must wake up at 5 or 6 a.m., the shower is cold and the food indigestible." He explained that he was an alcoholic and that he had already tried to treat himself four times. Gabriel was shaking his hands (possibly due to alcohol withdrawal) and exhibiting a strong odor. The judge released Gabriel without bail and asked whether there was something he could do to ease his life. Gabriel replied: "Honestly, just wish me luck."¹⁰⁷

Hearing 3

No setting of bail

Leonardo was arrested for aggravated theft for allegedly pickpocketing a cellphone in a train station. He said that he worked informally with tire repair, earning one minimum wage per month (R\$ 880, USD 280). Leonardo had two sons, one of whom was "special" (with intellectual disability). He received an additional minimum wage as social security benefit for his son's disability. Leonardo confessed the offense and said that he had committed it to pay the rent, as he was being evicted. The judge released him without bail.¹⁰⁸

Hearing 4

Theft of meat

Alberto was arrested for trying to steal six pounds of meat. He had already served prison time for property crimes. Alberto was unemployed, working with informal scavenging and living in the

¹⁰⁶ Suspects' names were changed to preserve their identity. Whenever possible, it will be informed for how long suspects stayed in pretrial detention, if they were convicted and other relevant information available up to April 14, 2017. Dates will omit days to preserve suspects' identity. Bruno was arrested and released due to the revocation of his detention in March 2016. Despite the revocation, the prosecution brought charges against him. The judge accepted the charges in November. In February 2017, the judge decided that Bruno's conduct could not be qualified as trafficking as the amount of drugs seized was compatible with his allegation of personal use and forwarded the files to the Special Criminal Court (in charge of processing minor offenses, such as illegal possession of drugs). Judgment is pending.

¹⁰⁷ Gabriel was arrested and released in March 2016 subject to monthly appearance in court to report activities. The judge convicted Gabriel in February 2017 and sentenced him to five years in prison, starting in the closed regime (see *infra* note 182 for a brief explanation of prison regimes in the Brazilian correctional system), and to a fine of 17 minimum wages (USD 4,590).

¹⁰⁸ Leonardo was arrested and released in March 2016 subject to monthly appearance in court to report activities, prohibition to leave the county without authorization and night home retreat. The judgment has not been scheduled yet.

street with his wife and five children. He used to work with pest control but as it required going to customers' homes, no one would give him a job knowing of his convictions. The judge released Alberto without bail and told him that it is extremely hard to consummate a food theft as there are cameras everywhere. Alberto replied: "I know, but when you are in need and your son says he is hungry, you lose your mind."¹⁰⁹

Judges' lack of interaction with suspects

In order for bail 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 enthusiasm with bail 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. Questions about other personal conditions were much less frequent in the sample of hearings observed for this research (Chart 1).¹¹⁰ Two justifications given for such practice are the heavy caseload and the confidence that counsels will ask suspects about relevant personal conditions.

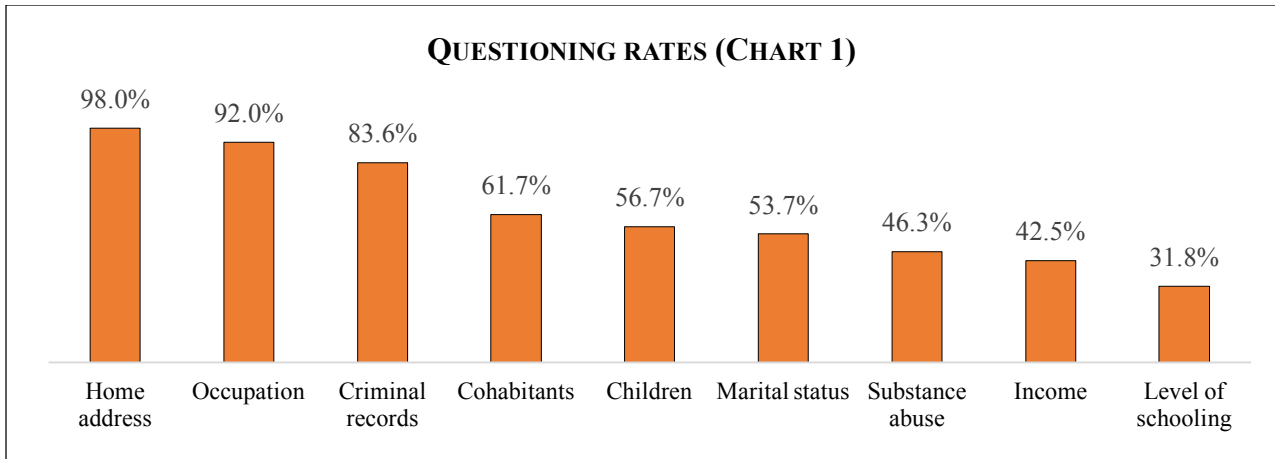
The fact though that some judges are able to question suspects in detail and still perform almost 20 hearings in busy days demonstrates that the argument about caseload is probably not a valid one.

The practice of relying on counsels for questioning eliminates hearings' purpose to approximate judges to suspects and neglects that counsels have very limited time to interview them. If bail hearings are to increase fairness, judges should always inquire at least about drug addiction, health and mental health, pregnancy, occupation and salary, level of schooling, living conditions and family structure.¹¹¹

¹⁰⁹ Alberto was arrested and released in March 2016 subject to bimonthly appearance in court to report activities and prohibition to leave the county for more than 10 days without authorization. Alberto was convicted in December to four years and 20 days in prison, starting in the closed regime, and to a fine of 1/30 of the minimum wage (USD 9). The judge allowed him to appeal the conviction in freedom.

¹¹⁰ The questioning rates in Chart 1 of home address, occupation, cohabitants, children, marital status, substance abuse and level of schooling were calculated based on the hearings of 201 suspects. The questioning rates of criminal records and income were calculated based on the hearings of, respectively, 128 and 179 suspects (those that did not say that were unemployed). The IDDD Report found the following questioning rates: home address (84.2%), occupation (83.7%), drug abuse (81%), criminal records (72.8%), cohabitants (49.5%), children or dependents (37.2%), marital status (29.9%), level of schooling (25.5%) and income (23.6%). That study also revealed that judges did not ask about pregnancy in any of the hearings of women observed. *Supra* note 84, at 41.

¹¹¹ On a visit on September 16, 2016, Judge H explained that the CNJ had distributed to judges a sheet with a set of basic information that should always be recorded. The sheet contains the following fields: name, language, telephone, occupation, marital status (single, married, separated, widowed), LGBT (yes or no), color (white, brown (*parda*), black, yellow), level of schooling (middle school, high school, university), dependent persons (younger than six years of age, others), serious illness (HIV, tuberculosis, hepatitis, Hansen's disease, diabetes, mental illness, others), use of essential medicine, sign of disability (physical, hearing, intellectual, multiple) and chemical dependency (yes or no).



Transgender suspects

The in-person review provided by bail hearings also makes it easier to determine whether a suspect identifies as transgender. During the course of this research, I only saw one hearing with transgender suspects and did not address this topic in depth in interviews, so I cannot assess how the increased visibility of transgender suspects might affect the review of detentions. However, the statement of the judge after this hearing indicates that there is a level of prejudice vis-à-vis this minority group.¹¹²

Hearing 5

“Transvestites are rowdy”

Juliana and Brenda (social names) were arrested for robbery. They were transgender and sex workers. The police report indicated that Juliana and Brenda took a taxi and robbed the taxi driver’s cellphone by applying a choke and threatening him with a knife. After leaving the taxi, they were surprised by the police. At the hearing, the suspects reported a conflicting version, saying that they had taken the taxi and agreed to pay the ride with oral sex but, upon arrival at the destination, the driver demanded intercourse, which they refused. The suspects claimed that the driver then threatened them with a knife, moment when they disarmed him and, taking advantage of the opportunity, left the cab with his cellphone. The judge ordered pretrial detention and said after the hearing that, although the suspects’ version was plausible, the fact that “transvestites are rowdy” could not be ignored.¹¹³

ii. Mentally ill

Bail 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:

¹¹² Public Defender Y said that it had been an achievement to convince judges to refer to transgender suspects by their social name. A study conducted in São Paulo involved the observation of hearings of eight transgender suspects, four of whom were not called by judges by their social name. IDDD Report, *supra* note 84, at 29. Public Defender N reported that he had already witnessed judges mocking each other for conducting hearings with transgender suspects.

¹¹³ Juliana and Brenda were arrested and put in pretrial detention in December 2015. They were convicted in June 2016 and sentenced to six years and eight months (Juliana) and to five years and seven months (Brenda) in prison, both starting in the closed regime. Brenda’s sentence was slightly lower due to her young age, 18 years old. The Court of Appeals dismissed their appeal in February 2017.

serving a sentence, but because you're saying that you're taking care of your mother I'll release you as an exception."¹¹⁶

Women and bail hearings

From February 24, 2015, to March 15, 2016, 8.2% of the suspects afforded a bail hearing in São Paulo were women. While women were most accused of aggravated theft (31.2%), drug trafficking (28.6%) and robbery (14%), men were most accused of robbery (31.2%), drug trafficking (21.3%) and aggravated theft (19%) (Chart 2).^{117,118}

Except for drug trafficking – where the probabilities of incarceration were similar (69.6% for women and 71.2% for men) –, women were considerably less likely to be sent to pretrial detention (overall: 37.8%; robbery: 73.9%; and aggravated theft: 17%) compared to men (overall: 55%; robbery: 87.3%; and aggravated theft: 31.4%).¹¹⁹ Two hypotheses might explain this disparity: (i) judges consider that women pose less pretrial risks because the accusations and/or their criminal records are less severe (gender-neutral hypothesis);¹²⁰ and/or (ii) judges weigh in specific aspects of women's interaction with criminal justice, for instance, that many of them are pushed to criminality by gender oppression, that prison is a greater hardship for pregnant women, or that women tend to be essential to care of others more often than men (gender-related hypothesis).

While there might be truth in either hypotheses, the observation of hearings suggested that counsels' gender-related arguments face strong resistance from judges and prosecutors, regardless of whether the latter are men or women.¹²¹ This was especially true in drug trafficking cases, as exemplified by Hearings 8 and 9 below.

Regarding the authorization of house arrest for pregnant women, for those essential to the care of person younger than six years of age or with disability, and for women with child under the age of 12, the requirement of proof of such conditions significantly hinders this alternative from being granted in bail hearings, as exemplified by Hearings 8 and 9. To avoid false negatives, a possibility would be to condition the maintenance of the house arrest to the presentation of proof within a certain term after the hearing, instead of requiring it *ex ante*. Moreover, judges should not require proof of requirements that are not legally prescribed (*e.g.*, the argument used by the judge in Hearing 8 to deny the review request).

¹¹⁶ Artur was arrested and released in March 2016 subject to monthly appearance in court to report activities, prohibition to leave the county for more than 10 days without authorization and night home retreat. The judgment has not been scheduled yet. Artur was arrested again for drug trafficking and put in pretrial detention in August 2016 and sentenced in December 2016 to seven years and 11 months in prison, starting in the closed regime, and to a fine of 26 minimum wages (7,100 USD). The judge did not allow him to appeal the conviction in freedom. The appeal is pending.

¹¹⁷ SAP Report, *supra* note 74. I separated men and women to calculate these rates manually by reading the names of all 18,418 suspects who were afforded a bail hearing in the city of São Paulo until March 15, 2016. As such, it was impossible to identify transgender suspects. The dubious names had their gender checked on the proceedings' files, when publicly available. The very few suspects with dubious names whose proceedings were confidential had their gender determined by brief researches on online search engines and social medias.

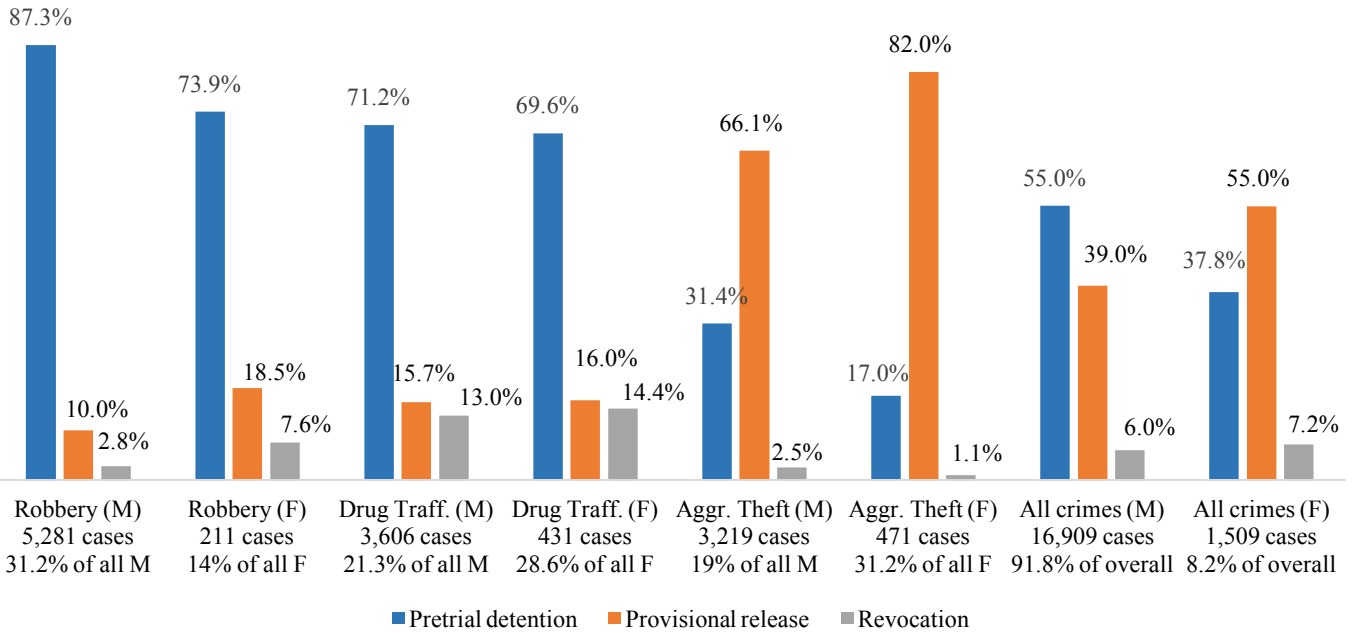
¹¹⁸ A study with 5,319 suspects who were afforded a bail hearing in the city of Rio de Janeiro until September 18, 2016, found that 7.1% were women (378 suspects): 38.6% of whom were accused of theft, 28.8% of a drug offense and 11.6% of robbery. Defensoria Pública do Estado do Rio de Janeiro, *Relatório: Um ano de audiência de custódia no Rio de Janeiro 19 and 28 (2016)* ("DPRJ Report").

¹¹⁹ SAP Report, *supra* note 74. 31.2% of the women who appeared for a bail hearing in the city of Rio de Janeiro during the project's first year were put in pretrial detention. DPRJ Report, *supra* note 118, at 19.

¹²⁰ See in VII.a.iv how judges rely strongly on these factors to decide suspects' pretrial status in bail hearings.

¹²¹ Reinforced by the findings of the MJ General Report on Bail Hearings, *supra* note 81, at 46.

COMPARISON BETWEEN BAIL HEARINGS OF MEN AND WOMEN (CHART 2)



Source: Report of the Public Safety Secretariat of the state of São Paulo on bail hearings held in the city until March 15, 2016

Hearing 8 Women and drug trafficking (1)

Sofia was arrested for drug trafficking for attempting to enter the pretrial detention center where her partner was detained with a condom in her intimate parts containing 40 grams of cocaine. Before the hearing, the public defender mentioned that Sofia’s case was illustrative of gender oppression as women are subject to violence if they do not smuggle drugs to their detained partners. The prosecutor replied that Sofia should have left the relationship and found another boyfriend if she was being threatened. At the hearing, the public defender made a sophisticated three-tiered argument. She first asked the detention to be revoked arguing that the drugs had been found in an illegal intimate search.¹²² Alternatively, she requested Sofia’s release as she could not be considered dangerous because the crime was not violent and Sofia would have committed it to buy diapers to her four-month baby. Lastly, in case the decision was of pretrial detention, she requested its substitution by house arrest given that Sofia had a son under the age of 12. The judge put Sofia in pretrial detention and disclaimed that he could review the decision upon submission of proof of her son’s age. The public defender submitted the child’s birth certificate days later but

¹²² The state of São Paulo enacted Law 15,552/2014 prohibiting intimate searches of visitors in prisons in August 2014. The prohibition is aligned with the IACtHR’s finding that intimate searches of inmates are sexual violence and torture, in violation of Article 5.2 of the ACHR and of the Inter-American Convention to Prevent and Punish Torture. IACtHR, Miguel Castro Castro Prison v. Peru, No. 160, ¶¶ 309-313 (Nov. 25, 2006). However, as the law requires specific regulations for its implementation and such guidelines have not been issued yet, judges hesitate to apply the prohibition in individual cases, as explained by the public defender responsible for Sofia’s case.

the judge sustained his decision claiming that there was no document proving that no one else apart from Sofia could take care of the baby.¹²³

Hearing 9 Women and drug trafficking (2)

Mariana was arrested for drug trafficking. Police officers found with her cocaine, crack and marihuana, two cellphones and R\$ 310 (USD 98). Mariana said that she lived alone with her four children (4, 9, 12 and 16 years old) and that she was unemployed, working sporadically as a diarist domestic maid. Despite the public defender's request to have pretrial detention substituted by house arrest in case she was not released, the judge decided to keep her detained. After Mariana left the courtroom, the judge said: "it's tough, when it's a man, no one says anything and he stays incarcerated, while if it's a woman, these things are raised, that she has children, etc." The judge instructed the public defender to submit the children's birth certificates. 10 days later, after the public defender did so, the judge released Mariana.¹²⁴

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.¹²⁵ 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*.¹²⁶

It is unclear whether judges' attempt to evaluate suspects' dangerousness by their demeanor and traits leads, in the overall, to milder or harsher outcomes. While judges may release some suspects not seen by them as *bandidos* who would probably end up in pretrial detention if such demeanor assessment was not conducted (see Hearing 11 below), the opposite scenario – individuals who would probably be released if such *bandido* assessment was not conducted – is equally plausible.

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.¹²⁷

¹²³ Sofia was arrested and put in pretrial detention in March 2016. Sofia filed a habeas corpus, but the Court of Appeals denied the preliminary injunction in April 2016. She was convicted in May 2016 and sentenced to two years and 11 months in prison (starting in the semi-open regime), which were substituted by community service, and a fine of one minimum wage (R\$ 1,000, USD 317). Pretrial detention was disproportionate to the sentence she received.

¹²⁴ Mariana was arrested and put in pretrial detention in January 2016 and released in February 2016. The judge convicted Mariana in March 2017 and sentenced her to two years and six months in prison, starting in the semi-open regime, and to a fine of 8.3 minimum wages (USD 2,250). The judge allowed her to appeal the conviction in freedom.

¹²⁵ Judges C, D, E and F and Prosecutors J, K and L. The importance attributed to the assessment of dangerousness through *bandido* stereotypes corroborates the finding in VII.a.iv that decisions in bail hearings revolve around whether suspects present a risk to the public order, mostly understood as the risk of committing crimes.

¹²⁶ See IDDD Report, *supra* note 84, at 42.

¹²⁷ In this sense, suspects' skin color might have become decisive (or more decisive) after bail hearings. The assessment of this effect would require, however, a longitudinal analysis that goes beyond the scope of this case study. Cross-sectionally, and not controlling for potential confounding variables, I was able to both code the suspects' skin color in

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,¹³¹ bail 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 12

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.¹³²

Hearing 13

Provisional release

Guilherme was arrested for using a false identity. He was initially taken to the police station for the illegal possession of a gun. Guilherme was about to be released (because the gun was fake) when the police officers realized that he had provided a false name by checking his ID, and arrested him for false identity. As the detention happened on a Saturday, it was reviewed by the judge on duty (no hearing), who put him in pretrial detention. Guilherme was brought to court days later for a judicial reanalysis.¹³³ According to him, he left a party in the Anhangabaú Valley drugged with LSD, he was not possessing a fake gun and he did not remember having given a false name at the police station. The judge reversed the pretrial detention order.¹³⁴

¹³¹ Public Defender N stated that sometimes police officers do not give detainees the opportunity to speak at the police station about the alleged facts and just give them papers to sign after hours of detention. In these cases, the bail hearing may be the first moment when suspects will be allowed to offer their version of the alleged facts.

¹³² Caio was arrested and released due to the revocation of his detention in March 2016. Despite the revocation, the prosecution brought charges. The judge has not decided yet if she will accept the charges and initiate a formal criminal proceeding against Caio. For another example where the suspect's version influenced the decision to revoke the detention, see IDDD Report, *supra* note 84, at 43.

¹³³ Exceptionally, suspects who are put in pretrial detention by the judge on duty will have their case reanalyzed in a hearing days after the arrest. According to Judge A, the criterion that the supervising judge uses to decide which cases will be reanalyzed is unclear. For a similar finding, see IDDD Report, *supra* note 84, at 45-46. Only 42 of the 497 suspects who were brought to a hearing for a reanalysis in São Paulo until March 15, 2016, were kept detained. This suggests that the supervising judge will only select for a reanalysis those suspects that he considers as likely to be released. Resolution 740/2016 of the Court of Appeals of São Paulo determined that hearings in weekends and holidays will begin only on August 12, 2017.

¹³⁴ Guilherme was arrested and released in December 2015 subject to bimonthly appearance in court to report activities and prohibition to leave the county for more than 10 days without authorization. The judgment is scheduled for May 2017. Guilherme was arrested for robbery and put in pretrial detention in April 2016. He was convicted for the robbery charge in February 2017 and was sentenced to six years and three months of prison, starting in the closed regime, and to a fine of half the minimum wage (USD 105). The judge did not allow Guilherme to appeal the conviction in freedom.

Practices that prevent suspects from offering their version in hearings

Two practices might limit suspects in presenting their version directly to judges: (i) judges often do not ask suspects about the facts and occasionally even do not allow prosecutors and defenders to inquire about what occurred or cut suspects off when they try to address these issues; and (ii) because video recordings of hearings are being attached to the main judicial proceedings, public defenders are instructing suspects to remain silent.¹³⁵

Judges' restrictive approach derives from regulations that prevent them from asking suspects about the merits of a case because bail hearings are not aimed at determining whether suspects are guilty of the alleged crime. This blanket rule ignores, however, that a preliminary analysis of merits is required to decide (a) whether the arrest was illegal (revocation) and (b) whether there is sufficient proof that the crime occurred and sufficient evidence of the suspect's involvement in the crime (pretrial detention). Therefore, questioning in bail hearings about the alleged facts should be allowed – and even encouraged – to evaluate these two thresholds.

Public defenders are concerned about having the hearing's video attached to the main proceeding because suspects' statements at this stage (when the charges are still somehow indeterminate and there is no time to establish a defense strategy) may impair their formal defense afterwards. As a result, they instruct many suspects to remain silent.¹³⁶ To increase the number of cases where suspects will be advised to contest the alleged facts before the judge, video recordings of hearings should be kept separate from the main proceeding.¹³⁷

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. Bail hearings innovate thus by causing prosecutors and counsels to establish personal contact with suspects before their pleadings, and by guaranteeing that counsels always present their defense before a judicial decision is reached.

¹³⁵ Information about questioning related to the alleged facts was coded in the hearings of 128 suspects. In 82 of them (64.1%), none of the judicial actors asked suspects about it. Judges proactively asked it to only 27 suspects (21.1%). Counsels or prosecutors were the ones who started questioning suspects about the facts in 19 instances (14.8%). The IDDD Report found that judges neither asked suspects about specific facts of the accusation nor gave them the opportunity to talk generally about it in 80% of the cases. *Supra* note 84, at 42. A report of one day of observation of hearings in the city of Rio de Janeiro also revealed concerns about judges' restrictive approach towards questions related to the alleged facts. Pedro Abramovay, *Banalidade do réu: um dia de observação das audiências de custódia*, JOTA, July 19, 2016.

¹³⁶ Public Defenders Q and N.

¹³⁷ Law 11,719/2008 reformed the criminal procedure to determine that the defendant's interrogation should be its last step. After the prosecution presents its case and the defendant produces evidence, he or she will be able to better decide the strategy for the interrogation. As bail hearings add a judicial interrogation before formal charges are even brought, the goal of the 2008 reform would be hindered if judges of the main proceeding could access those statements. Judge F considered the practice of attaching the video recording to the main proceeding the greatest flaw of bail hearings. Differently, Judge G stated that it is unclear whether such practice could actually harm suspects' interests because the heavy caseload made it unlikely that judges would watch bail hearings' videos before deciding. Judge I said that the decision to watch the video should be left to the discretion of the judge of the main proceeding. See also MJ General Report on Bail Hearings, *supra* note 81, at 57.

Counsels

As might be expected, the guarantee of a mandatory prior defense leads, in general, to better outcomes for suspects. Moreover, the immediate contact with suspects allows counsels to tailor the defense to the particular conditions of their clients and to instruct them about how to behave in court.¹³⁸ Lastly, the intense flow of hearings causes public defenders to be highly specialized and thus better qualified.¹³⁹ The following examples illustrate, respectively, how the mandatory prior defense can be decisive and the type of instruction that counsels can give to suspects to increase their chances of release.

Hearing 14 **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,¹⁴⁰ 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.¹⁴¹

Hearing 15 **Instructions for hearings**

Adriana was arrested for drug trafficking. Police officers reported that after 30 minutes observing Adriana's drug-selling behavior they approached her and found six cocaine tubes, five marihuana parcels and R\$ 140 (USD 44). The public defender argued that the amount of drugs and money seized was insufficient to incriminate her as a trafficker. The judge ordered pretrial detention. After the hearing, the public defender explained to me that Adriana had told him/her in the preparatory interview that the police had seized R\$ 300 instead of R\$ 140 and that he/she had advised Adriana

¹³⁸ Defenders apparently do not instruct suspects to avoid behaving in ways considered as stereotypical of *bandidos* (see VI.a.iv). Reasons for that may be the time constraints or lack of privacy in the prior interview or the belief that such advice would be ineffective.

¹³⁹ The repeated close interaction among judicial actors afforded by bail hearings also affected pretrial decisions. As explained by Public Defender Q – and confirmed by the observation of hearings – sometimes public defenders will obtain milder results for their clients as a result of the good relationship developed with prosecutors and judges. Indeed, public defenders and prosecutors tend to argue all cases being held in the same courtroom each day, and they all have colleagues with whom they prefer to interact. On the other hand, as cautioned by the MJ General Report on Bail Hearings, the lack of rotation of prosecutors and public defenders among courtrooms could negatively affect suspects by allowing personal relationships to prevail over the particular circumstances of cases. *Supra* note 81, at 38 and 65.

¹⁴⁰ This case illustrates the recurrent practice of law enforcement agents of invading homes without a search warrant based on the arguments that the resident consented or that a permanent crime is being committed inside the residence (most commonly, illegal storage of drugs). The STJ recently endorsed the latter argument in the Special Appeal 1,630,094, Nov. 11, 2016. Further research on the incidence, contours, constitutionality and conventionality of this investigative technique is necessary.

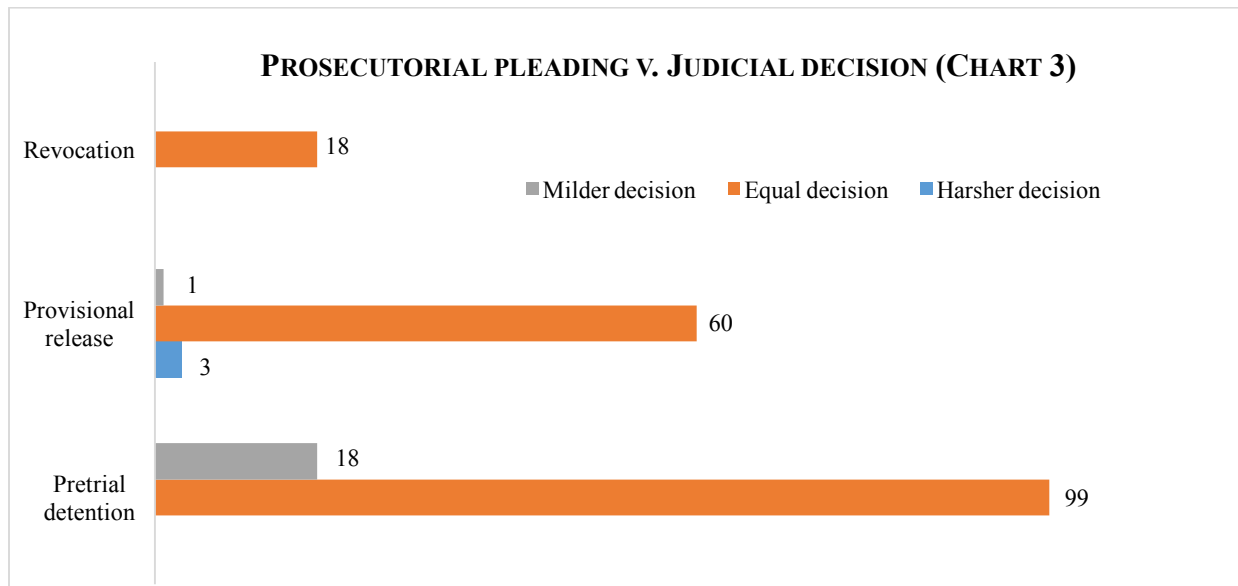
¹⁴¹ The bail hearing of Vinicius and Mateus occurred in January 2016. Mateus, who was put in pretrial detention, filed a habeas corpus, but the Court of Appeals denied the preliminary injunction in February and finally dismissed it in May 2016. A week later, both defendants were acquitted and Mateus was released. Mateus stayed in pretrial detention from January to May 2016. The prosecution appealed the acquittal of Mateus and the Court of Appeals dismissed the appeal in April 2017.

not to raise the difference in the hearing because it would be easier to argue that she was not a trafficker considering less money seized.¹⁴²

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.¹⁴³ Prosecutors frankly acknowledged that they would probably request a harsher outcome in some cases if there was no hearing. Hearings 1 and 12 – where prosecutors requested the revocation of detentions – exemplify how the features of bail hearings impact their pleadings.

When prosecutors decide not to plead for pretrial detention they may be directly affecting the outcome of a bail hearing because most judges consider that the proceeding's adversarial nature prevents them from ordering 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) (Chart 3).^{144,145} Hearing 16 below illustrates how prosecutors' pleadings can be decisive.



¹⁴² Adriana was arrested and put in pretrial detention in December 2015. She was granted pretrial release in December 2016 and the judgment is scheduled for May 2017. Public Defender P explained that the amount of money seized reported in police files sometimes differs from the amount reported by suspects. That suggests a practice of embezzlement of money seized in arrests.

¹⁴³ It is unclear how prosecutors' alleged capacity to identify dangerous suspects by their demeanor and traits (*bandido* assessment) affects their pleadings, in the overall. Nonetheless, such approach opens space (or gives more space) to prejudiced pleadings.

¹⁴⁴ These figures were calculated considering the three core outcomes (pretrial detention, provisional release and revocation). I could not code this information for three suspects because the judge considered their arrests to be so outrageous that he/she decided right away, without giving prosecutors and counsels the opportunity to plead (one decision of revocation and two of provisional release without precautionary measures).

¹⁴⁵ The IDDD Report found identity between the decision and the prosecutorial pleading in 460 of the 588 cases observed (78.2%) (it is unclear whether this calculation considered only the three core outcomes or included also differences regarding bail amount or other non-custodial precautionary measures). *Supra* note 84, at 48-49.

Hearing 16 Provisional release only because the prosecutor did not request pretrial detention

Diego was arrested for drunk driving and for driving without a license. He was also accused of battery for having bitten a police officer during the arrest. Diego was serving a prison sentence in the open regime for robbery. The prosecutor requested his release with bail. The judge said that Diego was only being released because the prosecutor had not requested pretrial detention. The judge would have otherwise kept Diego incarcerated as the alleged crimes were serious and his criminal records were unfavorable.¹⁴⁶

VII. Bail 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 additional and significant improvements in pretrial proceedings. While the reform made São Paulo courts formally compliant with ACHR's Article 7.5 in cases where a bail hearing is afforded,¹⁴⁷ many hurdles are impairing material compliance with such provision (effectiveness of the judicial control) and affecting suspects' rights to personal liberty, access to justice in relation to personal integrity and fair trial.

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 bail hearing in the city of São Paulo from February 24, 2015, to March 15, 2016, were put in pretrial detention.¹⁴⁸ The comparison of this figure with the 61.3% rate found in a 2012 study indicates a relevant decrease.¹⁴⁹ The lack both of comparable data from the period before the introduction of bail hearings in São Paulo¹⁵⁰ and of a control group (*e.g.*, a jurisdiction where hearings were not

¹⁴⁶ Diego was arrested and released in March 2016 subject to monthly appearance in court to report activities and night home retreat. Judgment is pending.

¹⁴⁷ In line with the IACtHR's case law on Article 7.5, bail hearings assure an *in-person* review of the detention by a *judge immediately* after the arrest. A set of hearings that do not meet the in-person requirement of Article 7.5 refers to the case of hospitalized suspects, as the judicial review is held *in absentia* in these situations ("ghost hearings"). See *supra* note 76.

¹⁴⁸ SAP Report, *supra* note 74. Similarly to São Paulo's rate, 54.1% of the individuals afforded a bail hearing in the country until January 2017, were kept incarcerated. 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 April 14, 2017).

¹⁴⁹ Sou da Paz/ARP Report, *supra* note 73, at 10.

¹⁵⁰ The universe of the pretrial detention rate of after the introduction of bail 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 (as explained in note 133).

implemented yet) prevents us, however, from drawing causal inference between hearings and the pretrial detention rate.

Leaving causal inference aside, three factors support the contention that bail hearings lowered the pretrial detention rate in São Paulo: (i) limitations of the universe of the 53.6% rate suggest that the overall rate (considering the arrests that did not lead to a hearing) would be even inferior;¹⁵¹ (ii) the observation of hearings identified features exclusive to the in-person review of arrests that can reduce pretrial detention rates (as explained in section VI);¹⁵² and (iii) interviews corroborated that hearings lowered the rate in São Paulo.¹⁵³

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 because they rely on grounds unauthorized by the IAHRs and are not the least restrictive precautionary measures. By avoiding many suspects from being subject to such arbitrariness, bail hearings represent an important step in fighting pretrial detention abuses.

ii. Enhanced identification of illegal detentions

Bail hearings enhanced the identification of illegal detentions in São Paulo and consequently increased the release of suspects unlawfully detained, improving compliance with international standards that prohibit illegal and arbitrary arrests¹⁵⁴ and with the constitutional right to have an illegal detention immediately revoked (Article 5, LXV).

Data show that São Paulo judges revoked 6.2% of the detentions reviewed in bail hearings until March 15, 2016.¹⁵⁵ A study from 2012 indicated a revocation rate of 1.1%.¹⁵⁶ Despite the

¹⁵¹ Due to the differences identified in note 150, the overall pretrial detention rate comparable to the 61.3% of the previous regime is not exactly 53.6%. The following steps were used to estimate the overall pretrial detention rate after the introduction of bail hearings in São Paulo: 1. Excluding the 497 suspects who had their detentions initially reviewed by a judge on duty, the pretrial detention rate in bail hearings is 54.9% (8,838 out of 17,921); 2. According to statistics of the Public Safety Secretariat of the state of São Paulo, 30,746 suspects were arrested in *flagrante delicto* in the city of São Paulo between May 2015 and February 2016 (months when bail hearings were fully operational and about which I have full data). Comparing this figure with the official data on bail hearings, I found that 50% of the suspects arrested in the same period received a bail hearing and did not have their detentions initially reviewed by a judge on duty (15,465 suspects); and 3. Assuming a very conservative scenario where (i) an equal amount of individuals are arrested every day, (ii) an equal amount of suspects are released after posting bail at the police station every day, and (iii) judges on duty always order pretrial detention for suspects who did not post bail at the police station, the overall pretrial detention rate would be 47.6%, substantially lower than 61.3%.

¹⁵² Along with the finding that bail hearings improved compliance with the obligation that pretrial detention must be exceptional, the specific reasons responsible for such effect also increased compliance with the right to a fair trial (ACHR, Art. 8). Despite the persistent challenges, the possibility for some suspects to offer their version of the facts directly to the judge (VI.b above) and the introduction of a mandatory prior technical defense – after personal contact between suspects and counsels (VI.c) – represent important steps in enhancing their right to a defense. Moreover, speaking more generally to the administration of justice, suspects' presence in court improves the information available for prosecutors to tailor their pleadings and for judges to decide cases (VI.a).

¹⁵³ 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 bail 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.

¹⁵⁴ For the difference between illegal and arbitrary arrests, see IACtHR, *Wong Ho Wing*, ¶¶ 237-238.

¹⁵⁵ SAP Report, *supra* note 74.

¹⁵⁶ Sou da Paz/ARP Report, *supra* note 73, at 17.

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.¹⁵⁷ That implies that many suspects who are currently having their detentions revoked would suffer precautionary measures if a hearing was not assured, including pretrial detention.¹⁵⁸

As explained in section VI, 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 when police files lack persuasive preliminary evidence of wrongdoing. Mandatory prior defense improves the chances of revocation as judges are now 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.¹⁵⁹

iii. Bail setting more responsive to material equality

Article 1.1 of the ACHR requires States to protect rights without discrimination due to economic status. Article 24 extends such guarantee to rights prescribed domestically beyond the ACHR's roster.¹⁶⁰

The right not to be put in pretrial detention when non-custodial precautionary measures are sufficient is a corollary of the right to presumption of innocence (ACHR, Article 8.2) and a right expressly granted by the CPP.¹⁶¹ As a result, judges cannot treat suspects worse because of their economic status when deciding whether alternatives to prison are sufficient to counter pretrial risks. Accordingly, Articles 325.1 and 326 of the CPP instruct judges to consider suspects' economic situation when setting bail.¹⁶²

Bail hearings present features that tend to reduce the amount of suspects being incarcerated due to poverty,^{163,164} what increases compliance with the rights to non-discrimination and to equal

¹⁵⁷ Due to the differences identified in note 150, the overall revocation rate comparable to the 1.1% of the previous regime is not exactly 6.2%. Using steps 1 and 2 explained in note 151 and assuming a very conservative scenario where judges on duty did not revoke any detention, the overall revocation rate after hearings would be 3.05%.

¹⁵⁸ The improved identification of illegal detentions assumes even more importance considering that: (i) 47.6% of the decisions of revocation in bail 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 74.

¹⁵⁹ Hearings 1, 8, 12, 14, 15, 23 and 26 illustrate how these features of the in-person judicial review improve the identification of illegal detentions. The debate is positively shaped even when judges do not accept the arguments for revocation.

¹⁶⁰ For the difference between these provisions, see IACtHR, *Flor Freire v. Ecuador*, No. 315, ¶ 112 (Aug. 31, 2016).

¹⁶¹ See *supra* note 46.

¹⁶² STF, Habeas Corpus 129,474, Sept. 22, 2015 (“the defendant’s economic situation is the main element to be considered when determining the bail amount”).

¹⁶³ 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). The bail amounts ranged from R\$ 260 to 5,000 (USD 83 to 1,587) and the mean was R\$ 1,250 (USD 397). Judge E stated that he/she rarely sets bail because almost everyone appearing in bail hearings is poor (“99%”). The IDDD Report found that judges imposed bail on 8.8% of the cases in its sample (52, assuming that such information was coded for the 588 suspects included in the study). Judges determined up to two minimum wages (R\$ 1,580, USD 500) in 46 of those cases. *Supra* note 84, at 56.

¹⁶⁴ Data from bail hearings held in São Paulo until March 15, 2016, show that judges set bail in 9.7% of the cases. SAP Report, *supra* note 74. A study from 2012 indicated an incidence of bail of 19.1%, considering only suspects that

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.¹⁶⁵ By better exposing individuals' socioeconomic conditions to judicial actors, bail 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.¹⁶⁶

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

Despite the reduction in the pretrial detention rate, the fact that over half of the suspects appearing in court in São Paulo are still being sent to pretrial detention (53.6%) indicates that the reform has not yet achieved its purpose: make pretrial detention exceptional, as required by the IAHRs.^{167,168}

Accordingly, judges who experienced the transition explained that suspects' appearance in court did not change, as a rule, the cases in which they order pretrial detention.¹⁶⁹ Public defenders are confident about the reduction,¹⁷⁰ but conscious that most cases are being decided the same way.

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 measures¹⁷¹ 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.

could be afforded a bail hearing in the current regime, *i.e.*, those who were not released at the police station after posting bail. However, the differences in the universes (*supra* note 150) and the fact that I do not have enough information to test the hypothesis of reduction in the use of bail under conservative assumptions – as I could do with the pretrial detention and revocation rates (*supra* notes 151 and 157) – prevents us from reliably comparing these figures.

¹⁶⁵ Only between September 2015 and December 2016, the STJ revoked bail and released at least 24 defendants due to poverty after they had spent between 12 days and one year and two months in jail. Habeas Corpus 324,118, 327,586, 328,465, 329,196, 329,464, 331,007, 333,166, 334,005, 337,399, 337,520, 345,353, 348,146, 349,233, 350,847, 352,040, 353,167, 362,907, 363,511, 370,098 and 371,867, and Appeals on Habeas Corpus 55,124, 63,700, 73,854 and 76,689.

¹⁶⁶ Hearings 2, 3, 4 and 29 illustrate how an in-person judicial review can make the bail setting more responsive to material equality. Public Defender P explained that the reduction in the use of bail after bail hearings was attested by the subsequent reduction in the amount of habeas corpus that he/she was filing to request the dismissal of bail when suspects fail to post it. The MJ General Report on Bail Hearings cautions against generalizations to other jurisdictions as data indicate that the use of bail increased in Minas Gerais after bail hearings. *Supra* note 81, at 48.

¹⁶⁷ The chances of pretrial detention would increase if we excluded suspects who are ineligible for this measure. Accordingly, 65.9% of all 13,222 suspects accused of drug trafficking, robbery or aggravated theft (which are always within the eligibility criteria) who appeared for a hearing in São Paulo until March 15, 2016, were kept incarcerated.

¹⁶⁸ The pretrial detention rate arising from bail hearings held in the city of Rio de Janeiro during the project's first year was substantially higher, 64.5% (this rate considers suspects both within and outside the eligibility criteria for pretrial detention). DPRJ, *supra* note 118, at 6.

¹⁶⁹ Judges A and B.

¹⁷⁰ For instance, Public Defender M, who has been working with the judicial review of detentions for over a decade, said that the introduction of bail hearings was the most promising reform he/she had witnessed.

¹⁷¹ Judge D stated that the pretrial detention rate of 50% was adequate and that judges would create "social chaos" if they released more suspects. Judge H concurred with this opinion but acknowledged that it "is hard to know for real what would happen..."

1. Pervasiveness of public order concerns

The research unveiled that decisions in bail hearings are mostly determined by the analysis of whether suspects pose a risk to the public order. As a rule, judges simply say in hearings whether suspects are being released or not, without specifying the legal grounds for pretrial detention. The finding that decisions are justified on the risk to the public order derives from the content-analysis of written decisions, the interviews with judicial actors, the unreliability of elements regarding flight risk and the identification of the core case-specific factors that guide decisions.

Written decisions. I was able to access the written decision of 96 of the 100 cases observed where suspects were put in pretrial detention.¹⁷² All 96 written decisions accessed mentioned the protection of the public order as grounds for keeping individuals in jail.¹⁷³ 74 decisions included at least one of the other two legal grounds for pretrial detention (flight risk and risk of procedural hindrance).¹⁷⁴ Despite the relevant share of decisions mentioning these procedural grounds, interviews with judicial actors dismissed their importance.

Interviews. 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.¹⁷⁵ 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.¹⁷⁶ Public defenders were unanimous about the controlling nature of public order concerns in bail hearings.

Evidence of flight risk. 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.¹⁷⁷

¹⁷² 94 of these decisions were available online because their proceedings are public. I also had access, in the end of the hearings, to the written decisions of two of the six cases of pretrial detention whose proceedings are confidential.

¹⁷³ The following excerpts of written decisions illustrate how pretrial detention is used to protect the public order: "The crime of robbery is extremely serious, violent and has caused repudiation and enormous insecurity to the laborious and orderly community, reason why it is necessary to maintain the detention." "The suspect's behavior – who has had criminal records, is in recidivism of intentional crimes (nine criminal convictions) and is currently on the run – demonstrates that her liberty generates insecurity in the population, which is exposed to individuals that, whenever in liberty, reoffend."

¹⁷⁴ 54 decisions mentioned both grounds, 12 mentioned flight risk and eight mentioned risk of procedural hindrance. The IDDD General Report on Pretrial Detention also found that a relevant percentage of pretrial detention orders mention procedural risks in addition to the protection of the public order. *Supra* note 100, at 59.

¹⁷⁵ Judge E explained that flight risk tends not to be the focus of bail hearings because suspects are generally poor ("we don't have international *bandidos*, they are all poor; they aren't going to another state; they're not taking a flight to go hide in Switzerland; they can be easily found by the police, even if they stay on the run for a while").

¹⁷⁶ Prosecutors J, L and Y.

¹⁷⁷ Public Defenders N and P identified the following general patterns: (i) if the judge believes that the suspect's release will risk the public order and the suspect did not offer proof of ties to the community, the written decision will justify pretrial detention both on the risk to the public order and on procedural risks; (ii) if the judge believes that the suspect's release will risk the public order and the suspect offered proof of ties to the community, the written decision will justify pretrial detention on the risk to the public order and will disclaim that proof of ties to the community does not bar the imposition of pretrial detention (Hearing 17); and (iii) if the judge believes that the suspect's release will not risk the public order, the judge will release him or her regardless of whether proof of ties to the community was

Hearing 17 Documental proof as insufficient to dismiss pretrial detention

Cristiano was arrested for allegedly robbing a person's cellphone, aggravated by the assistance of a minor. Cristiano's private lawyer presented an electricity bill attesting that he had permanent home and also his work card proving that he was working in a dentist office. The judge decided for pretrial detention and justified it on the risk that Cristiano presented to the public order, as the alleged facts were serious.¹⁷⁸

Although undefined and potentially over-encompassing, judges have mostly interpreted "protection of the public order" as avoidance of future crimes.¹⁷⁹ 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 bail 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."¹⁸⁰

Selective compliance with international human rights law

The introduction of bail hearings and the systematic justification of pretrial detention on the risk to the public order indicate a worrying, selective compliance with international human rights law. All judicial actors involved with bail hearings are aware that the reform is making Brazil compliant with the ACHR. However, no one spontaneously mentioned, either in hearings or in interviews, the prohibition established by the bodies of the IAHRS against using pretrial detention for incapacitation purposes. Public defenders and judges refer solely to the parameters of the STF, which allow the use of pretrial detention to contain dangerous suspects as long as the decision is not justified by abstract arguments. This approach confirms the inclination of Brazilian authorities to resort selectively to the interpretation given by human rights bodies to provisions of international treaties.¹⁸¹

presented. Judge B acknowledged that he/she would rather have better information about a suspect's dangerousness, specifically more reliable criminal records, than more precise information about his or her ties to the community.

¹⁷⁸ Cristiano was arrested and put in pretrial detention in December 2015. He was convicted in April 2016 to five years and four months in prison, starting in the open regime, and to a fine of 13/30 of the minimum wage (USD 121). The judge decided for a milder prison regime because the crime did not result in harm to the victim and Cristiano did not have criminal records, demonstrated to have solid ties to the community and confessed the offense. Pretrial detention was disproportionate to the sentence he received.

¹⁷⁹ This interpretation of "protection of the public order" is the one most compatible with the CPP's structure as its general clause about the risks that precautionary measures should target (Art. 282, I) prescribes only flight risk, risk of procedural hindrance and risk of committing crimes.

¹⁸⁰ Judge G. Mitigation of the right to be presumed innocent in the name of judicial effectiveness and public safety is present in the recent shift in the STF's case law to allow convictions issued by appellate courts to be enforced despite the availability of appeals to higher courts. Habeas Corpus 126,292, *supra* note 31, ¶¶ 18-30 (Barroso, J., concurring). While applying this reasoning to situations where appellate courts decided that defendants are guilty is already doubtful, using pretrial detention as a measure of public safety even before formal charges are filed represents a striking reversal of the criminal procedure's logic.

¹⁸¹ André de Carvalho Ramos, *Pluralidade das ordens jurídicas: uma nova perspectiva na relação entre o Direito Internacional e o Direito Constitucional*, 106/107 R. FAC. DIR. UNIV. SÃO PAULO 497, 511 (2011-2012). In extreme

Pretrial detention as anticipation of punishment

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.¹⁸² 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.”¹⁸³

Decisive case-specific factors. The controlling nature of concerns with the public order becomes even more evident in light of the finding that the two core factors that guide pretrial decisions (crime nature and criminal records) are related to the assessment of suspects’ dangerousness and of whether they should be punished immediately (public order rationales). The interviews strongly supported the finding that the joint analysis of the crime nature and criminal records decides most cases:

Public defender: “Evidence of that is that many judges have the written decision ready even before suspects are brought to the courtroom. (...) Indeed, the core elements that judges always consider are the abstract severity of the crime and criminal records.”¹⁸⁴

cases, national courts’ approach of neglecting the interpretation given by international human rights bodies to treaties will lead to outright breaches of binding international decisions. A clear example of that is Brazil’s resistance to comply with the IACtHR’s decision in *Gomes Lund*, where it declared that the Brazilian amnesty law for crimes committed during the dictatorship violates the ACHR. *Id.* at 513, 518-519. Public Defenders Q and O confirmed that, as a rule, international case law is not used in criminal cases and, along with Public Defender P, stated that arguments of that sort probably would not persuade judges. For that reason, Public Defender P said that the only way to reduce reliance on public order risks in pretrial detention orders would be by repealing CPP’s provision that authorizes it. Public Defender O endorsed the “absolute exclusion of the possibility to justify pretrial detention on the public order.”

¹⁸² 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. Judge G said that it would be sinful to justify pretrial detention this way. In Brazil, judges must decide sentences from ranges of prison terms for each crime (indeterminate sentencing). The correctional system for individuals sentenced to prison operates in three stages: closed regime, semi-open regime (work during the day and prison in the night) and open regime (non-custodial punishments only). As a rule, after serving a sixth of the sentence in the closed regime the person becomes eligible to advance to the semi-open regime (two or three fifths of the sentence if the crime is heinous, depending on recidivism). After serving a sixth of the remaining sentence in the semi-open regime, the person becomes eligible to advance to the open regime. The STF recently decided that judges are prohibited from keeping detainees in the closed regime due to absence of spots in the semi-open regime (Binding Statement 56, June 29, 2016). Prosecutors’ reference to impunity relates to their perception that serving only one sixth of the sentence in the closed regime is not sufficiently harsh.

¹⁸³ Judge D. Judge H added that in cases where the chances of conviction are very high, it could be better for suspects to serve their likely sentence right away (because the period spent in pretrial detention counts towards a future prison sentence) instead of waiting for trial in freedom and then being incarcerated years later, moment when their lives could be reestablished.

¹⁸⁴ Public Defender O. Accordingly, Public Defender M said that most bail hearings “function in autopilot”, that “decisions are taken using a table basically” and that “the exceptions exist to prove the rule”.

Prosecutor: “Many times the crime isn’t committed with violence or serious threat, for example a theft, but we request pretrial detention due to the persistence. For instance, the individual who was recently set free and comes back.”¹⁸⁵

Judge: “Crime severity together with this subjective factor [criminal records] are always what justifies the decision. That doesn’t mean, however, that a person accused of a light crime, such as theft, but with extreme criminal records won’t be incarcerated.”¹⁸⁶

2. Crime severity¹⁸⁷

Abstract severity. The probability of a pretrial detention order in São Paulo varies significantly depending on the type of crime. The comparison among the three most recurrent crimes that are always eligible for pretrial detention reveals the strong weight that the type of crime plays in decisions. 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 (Chart 4).^{188,189} Apart from the disregard for suspects’ presumption of innocence, the blanket imposition of pretrial detention – either due to legal provisions¹⁹⁰ or to judges’ personal beliefs – violates suspects’ right to an individualized assessment.¹⁹¹

Concrete elements. Along with the abstract severity of crimes, decisions in bail hearings are strongly influenced by specific elements of the accusation. Some aspects recurrently mentioned by judges in oral and written decisions as reasons for pretrial detention are the use of weapons in robberies, the amount and diversity of drugs in trafficking cases, the value of properties stolen in thefts, the age and gender of victims, premeditation, the involvement of minors, and the multiplicity of agents. Although assuring individualization, judges’ reliance on concrete factors still abridge suspects’ presumption of innocence.¹⁹²

Link between crime severity and protection of the public order. The decisive role of crime severity in pretrial decisions reinforces the finding that public order concerns control the outcome of bail hearings. While suspects accused of minor crimes are not seen as threats (except those with

¹⁸⁵ Prosecutor J.

¹⁸⁶ Judge D.

¹⁸⁷ The notion of crime severity, considered either in abstract or in concrete, should not be seen as an objective measure shared by all judges to rank crimes. Instead, judges tend to mix legal elements (*e.g.*, the punishment prescribed) with subjective assessments when ranking crimes, what leads to different perceptions about the severity of certain crimes.

¹⁸⁸ SAP Report, *supra* note 74. Also, 45 of the 69 suspects accused of sexual crimes were put in pretrial detention (65.2%). In contrast, only 16.8% and 19.6% of the individuals accused of, respectively, non-aggravated theft and receipt of stolen property were put in pretrial detention (Chart 4). For these last two percentages, bear in mind that suspects accused of non-aggravated theft or non-aggravated receipt of stolen property who are not incurring in recidivism (unknown figure) are not even eligible for pretrial detention, because these crimes are punished with maximum prison terms of up to four years (see *supra* note 48).

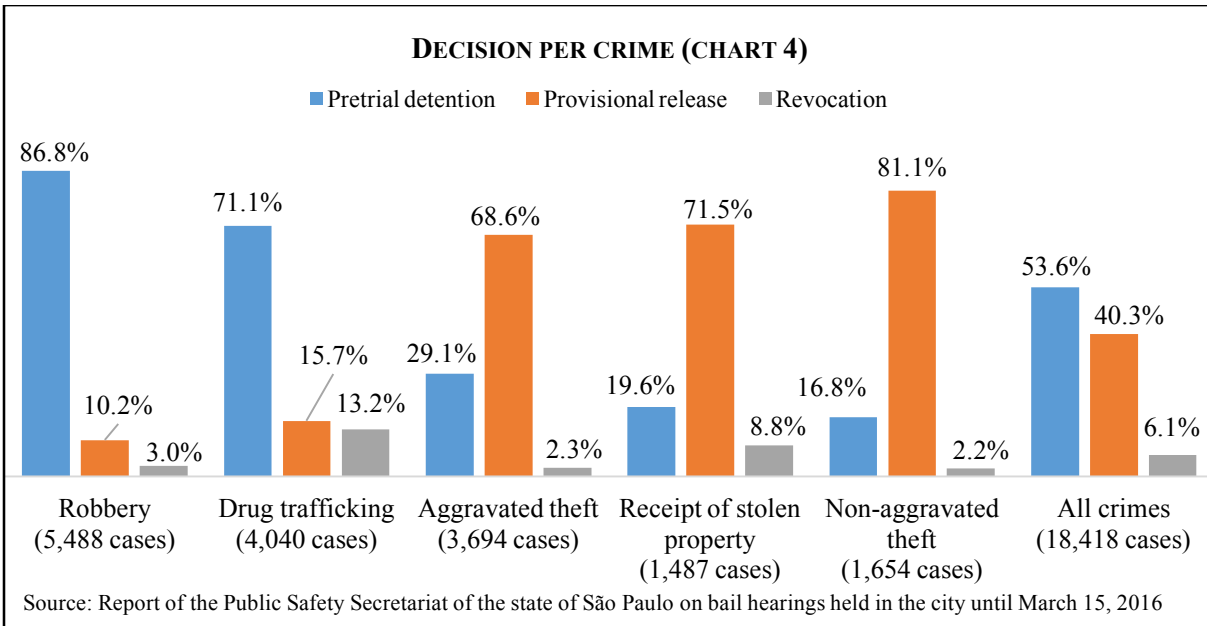
¹⁸⁹ Data from the first year of bail hearings in the city of Rio de Janeiro corroborate the finding that the type of crime plays a decisive role in the outcome of the judicial review. While only 32.6% of the suspects accused of theft (simple or aggravated) were kept detained, 92.7% and 68.6% of those accused of, respectively, robbery and drug offenses were put in pretrial detention. DPRJ, *supra* note 118, at 26.

¹⁹⁰ See *supra* note 51 for Inter-American case law on the impermissibility of blanket prohibitions of pretrial release.

¹⁹¹ See *supra* note 78 for a case management practice that corroborates the decisive influence of crime type.

¹⁹² Indeed, Judge C said that different rates of pretrial detention by type of crime can be attributed to the specific circumstances of the accusations. According to him/her, cases of drug trafficking and robbery tend to have elements of severity, while cases of theft usually involve things of low value.

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.^{193,194}



Hearing 18

Severity of drug trafficking

Pedro was arrested accused of drug trafficking. The amount of drugs attributed to him was significant: 72 tubes with cocaine, 61 small packages with marijuana and eight small flasks with *lança-perfume* (ethyl chloride for inhalation). In the written decision, the judge sustained that although Pedro had never been convicted, his release would endanger the public order due to the harmful consequences of drug trafficking. The judge added that the constitutional prohibition to set bail for suspects accused of drug trafficking reinforced the need for pretrial detention.^{195,196}

¹⁹³ Judges may use crime severity to demonstrate non-procedural risks, for instance, by arguing that suspects accused of a violent robbery could hinder the proceeding by threatening victims or witnesses. Notwithstanding, the research found that judges generally refer to the type of crime or to its specific circumstances to demonstrate a risk to the public order.

¹⁹⁴ The argument that the type of crime strongly influences decisions in bail hearings was not tested by a quantitative study that controlled for potential confounding variables.

¹⁹⁵ I had access to 28 pretrial detention orders related to the drug trafficking cases of our sample of hearings. 13 of them mentioned either the prohibition of monetary bail in trafficking cases (constitutional provision/ CPP provision) or the prohibition of pretrial release of the Toxics Law, or both, as arguments to put individuals in pretrial detention.

¹⁹⁶ Pedro was arrested and put in pretrial detention in December 2015. He was convicted in June 2016 and sentenced to one year and eight months in prison, starting in the closed regime. He appealed the conviction and filed a habeas corpus requesting to appeal the conviction in freedom. The appeal is pending. As for the habeas corpus, the Court of Appeals denied the preliminary injunction in June and finally dismissed it in August. The defense filed a habeas corpus in the STJ against this decision. The STJ granted the injunction in September and confirmed it in November 2016.

Hearing 19 Request for provisional release as the crime of fraud is not violent

Giovana was arrested accused of fraud and false identity. Despite the crimes' eligibility for pretrial detention, the prosecutor requested her release: "Considering the nature of the crime, which wasn't committed with violence or serious threat, and also taking into account that she doesn't have criminal records, I request the provisional release with bail, given the economic nature of the offense."¹⁹⁷

Hearing 20 Specific circumstances of violence

Gustavo was arrested accused of robbing a truck filled with beer packs. His version was that he agreed to take the truck to a certain place for R\$ 200 (USD 63), but that he did not know that it was stolen. The judge decided for pretrial detention. The written decision stated: "The crime was committed using serious threat, implemented using a firearm, by many agents, and involving the deprivation of liberty of two victims."¹⁹⁸

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, depending on the judge's understanding about whether there were elements proving the crime. 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. If I consider the case to be a 28 [Article of the Toxics Law that refers to drug users], I revoke the detention;" 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."¹⁹⁹

Crime severity and prospective proportionality

A judge argued that reliance on the nature of the alleged crime assures that the precautionary measure will be proportionate to the expected punishment.²⁰⁰ Indeed, the type of crime plays a legitimate role in deciding suspects' pretrial status in two ways: (i) by determining the eligibility of the case to pretrial detention in the absence of recidivism (only crimes punished by a maximum prison term higher than four years); and (ii) by eliminating pretrial detention from the set of precautionary measures applicable when incarceration is unlikely to be the expected punishment in light of the case's circumstances. Judges should refrain, however, from relying on the severity of the alleged crime to determine that detention is the only precautionary measure suitable.²⁰¹

¹⁹⁷ It was impossible to check updates because the proceeding is confidential.

¹⁹⁸ Gustavo was arrested and put in pretrial detention in December 2015. The prosecution proposed the suspension of the proceeding subject to bimonthly appearance in court to report activities, prohibition to leave the county for more than 15 days without authorization and prohibition to attend popular festivals with large crowds, bars, nightclubs, gambling houses or the like. Gustavo accepted the proposal and the judge suspended the proceeding in March 2016. Pretrial detention was disproportionate to the proceeding's outcome.

¹⁹⁹ 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).

²⁰⁰ Judge D.

²⁰¹ The practice of attributing decisive weight to the charges exacerbates false positives (suspects who are kept incarcerated but that did not offend) as law enforcement officers might face pervasive incentives to increase the number of detentions. Accordingly, Prosecutor L and Public Defender Q expressed concerns about a policy that the Public Safety Secretariat allegedly implemented in São Paulo determining a goal of detentions for each police station,

3. Criminal records

The second factor that determines the outcome of hearings is a suspect's criminal records.²⁰² 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, on-going 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.²⁰³ Milder records such as previous arrests tend to be decisive when multiple. Judges are also concerned with the proximity in time of criminal records, since more recent incidents are considered evidence of current dangerousness. Lastly, the severity of the crime underlying the criminal record is important.²⁰⁴

Cases with multiple suspects such as Hearings 21 and 22 provide clear examples of how criminal records play a strong role in bail hearings, as co-suspects are usually accused of having the same level of participation in crimes. The influence of criminal records is also apparent in most one-suspect cases, such as Hearings 23.

Hearing 21

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 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.²⁰⁵

which would have pushed officers to conduct mass operations against low-level offenders (in special homeless people and drug users) or even to fabricate crimes. As both a serious crime and an easily fabricated one, drug trafficking illustrates well the risk of deciding for pretrial detention based on the severity of the alleged crime.

²⁰² 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. A study conducted with 300 suspects who had criminal records (concept that included convictions and on-going cases) and 269 suspects who did not have criminal records found that 88.7% of the suspects with criminal records were put in pretrial detention after a bail hearing in São Paulo. The pretrial detention rate considering all suspects was 61%. IDDD Report, *supra* note 84, at 51 and 55.

²⁰³ Suspects who have never been convicted are "primary" and suspects who have ended serving a sentence more than five years earlier are "technically primary" (suspects in both categories are not recidivating). Despite the recent shift in the STF's case law to authorize the enforcement of criminal convictions by appellate courts (*supra* note 31), the concept of recidivism is still restricted to final criminal sentences, *i.e.*, sentences that cannot be appealed anymore.

²⁰⁴ Judges face the challenge of having restricted access to criminal records from other jurisdictions or juvenile courts.

²⁰⁵ They were arrested in December 2015. Anderson and Ronaldo were released subject to monthly appearance in court to report activities and night home retreat. The judge stayed the proceeding regarding Anderson after unsuccessful attempts to notify him of the charges. Erick and Ronaldo were convicted in June 2016. Erick was sentenced to eight months in the semi-open regime and Ronaldo to community service for eight months. The proceeding resumed for Anderson in November 2016. He was convicted in March 2017 and sentenced to eight months in prison (starting in the open regime), which were substituted by community service for the same period, and to a fine of a tenth of the minimum wage (USD 27).

Hearing 22 Different non-custodial precautionary measures

Daniel and Rafael were arrested for allegedly trying to steal a truck battery evaluated in R\$ 270 (USD 86). Daniel had never been arrested before. Rafael had recently served two sentences for robbery. The prosecutor did not request pretrial detention stating that it would be disproportionate to the alleged crime’s lack of violence or serious threat. The judge released both suspects subject to periodic appearance in court and, due to the difference in their criminal records, added the harsher measure of night home retreat only to Rafael.²⁰⁶

Hearing 23 “If you hadn’t been convicted before, I would send you to a clinic”

Lorena was arrested for drug trafficking with 47 portions of crack and R\$ 80 (USD 25) in a drug sales point. The public defender argued that the amount of drugs found with Lorena was compatible with her personal use. The judge put Lorena in pretrial detention saying: “I don’t even now what to say to you. The problem is that you were already arrested for robbery and drug trafficking. If you hadn’t been convicted before, I would send you to a clinic for treatment.” Lorena had left prison two days before the hearing to finish serving her prison sentence in the open regime.²⁰⁷

A lighter type of criminal record that often plays a crucial role is the so-called “recidivism in bail hearings.”²⁰⁸ The fact that an individual was already released in a bail hearing – “given a chance” in the words of some judicial actors – and is brought once again before a judge is interpreted as indicative of a high risk of offending.²⁰⁹ The use of on-going proceedings as decisive factors to incapacitate suspects inevitably breaches, however, their right to be presumed innocent.

Hearing 24 “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.²¹⁰

Hearing 25 Insufficiency of non-custodial precautionary measures

Sérgio was arrested for drug trafficking after the police chased his motorcycle, stopped him and found 17 cocaine capsules and six marihuana portions. Sérgio had been released subject to non-custodial measures in a bail hearing three months earlier. The judge ordered pretrial detention and

²⁰⁶ Daniel and Rafael were arrested and released in March 2016. The judgment has not been scheduled yet.

²⁰⁷ Lorena was arrested and put in pretrial detention in March 2016. She was convicted in July and sentenced to seven years in prison, starting in the closed regime, and to a fine of 23 minimum wages (USD 6,425). Lorena’s appeal is pending and the judge did not allow her to appeal the conviction in freedom.

²⁰⁸ The DPRJ Report found that 2.8% of the suspects appeared more than once to a bail hearing during the project’s first year in the city of Rio de Janeiro. *Supra* note 118, at 8.

²⁰⁹ For a similar finding, see MJ General Report on Bail Hearings, *supra* note 81, at 48.

²¹⁰ Fábio was arrested and put in pretrial detention in March 2016. Fábio was convicted in June 2016 and sentenced to two years and four months in prison, starting in the closed regime. His appeal to reduce the sentence was dismissed in March 2017. The judge acquitted Fábio in January 2017 for the charge related to his other bail hearing.

explained in the written decision that incarceration was necessary because the alternative measures related to his previous release had not been effective, clearly assuming that Sérgio was guilty of the new accusation.²¹¹

Predictive power of crime severity and criminal records

Reliance on crime severity and criminal records to predict suspects' dangerousness is justified by the allegedly high predictive power of these factors. In São Paulo, these predictions are not based, however, on statistics on recidivism.²¹² Judges' different approaches regarding the cases in which pretrial detention is applicable reinforce the lack of objectivity of these predictions. Even if São Paulo judges were capable to predict crimes with the precision of sophisticated actuarial tools (70%),²¹³ the 30% of false positives would still recommend the use of less restrictive precautionary measures to curb pretrial risks.

v. Flawed system of non-custodial precautionary measures

The exceptionality of pretrial detention is closely related to the existence of a well-functioning system of non-custodial precautionary measures. If these measures are not available or are perceived as ineffective, judges will resort to pretrial detention more often.²¹⁴ The practice in São Paulo reveals flaws in the availability and enforcement of alternative measures.²¹⁵

Despite the legal availability, judges still cannot use electronic monitoring in São Paulo.²¹⁶ Public defenders have expressed both optimism towards its potential to lower the pretrial detention rate and concerns that it might expand control over individuals that would otherwise be under a milder regime.²¹⁷ Judges explained, in general, that they would be willing to release a share of the

²¹¹ Sérgio was arrested and put in pretrial detention in December 2015. He filed a habeas corpus, which was denied preliminary injunction in February and dismissed in March 2016. He was convicted in April 2016 and sentenced to two years in prison, starting in the semi-open regime, and to a fine of 6.7 minimum wages (USD 1,870). The judge did not allow Sérgio to appeal the conviction in freedom. His appeal is pending. Sérgio was also convicted in April in the proceeding related to his other arrest for drug trafficking. He was sentenced to two years and six months in prison, starting in the closed regime, and to a fine of 8.3 minimum wages (USD 2,320). The Court of Appeals dismissed his appeal to this conviction in October 2016.

²¹² Disregarding critiques against risk assessments (either clinical or actuarial) in freedom/incarceration decisions, studies indicate that actuarial methods are superior than clinical ones due to higher predictive validity and increased uniformity and consistency. Edward E. Rhine, Joan Petersilia, and Kevin R. Reitz, *The Future of Parole Release: A Ten-Point Reform Plan*, in *CRIME AND JUSTICE: REINVENTING AMERICAN CRIMINAL JUSTICE* 46 (Michael Tonry ed., 2017).

²¹³ *Id.* citing Don Andrews, James Bonta, and J. Stephen Wormith, *Level of Service/Case Management Inventory (LS/CMI): An Offender Assessment System: User's Manual*, Multi-Health Systems, Inc. (2014).

²¹⁴ Judge E said that the imposition of house arrest and home retreat without enforcement mechanisms risked discrediting the Judiciary because suspects soon realize that those are ineffective precautionary measures.

²¹⁵ Beyond these structural challenges, the research revealed that judges in São Paulo sometimes impose non-custodial measures that are inconsistent with suspects' reality, for instance, night home retreat to homeless suspects (twice in our sample). Reinforcing this finding on a national level, see MJ General Report on Bail Hearings, *supra* note 81, at 51.

²¹⁶ On a visit on September 16, 2016, Prosecutor L told us that there was no expectation for when the Public Safety Secretariat would make electronic monitoring available.

²¹⁷ Public Defenders M and P. The CNJ anticipates this risk and determines that judges must apply electronic monitoring only to suspects that would otherwise be denied pretrial release. Resolution 213, Protocol I, § 3.1.V.a). For an argument in favor of using electronic monitoring in substitution of monetary bail to address flight risk of non-

suspects because the fear of detection due to the monitoring would discourage them from offending.²¹⁸

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 without authorization (39 times) and the night home retreat (30 times).^{219,220} 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.²²¹

Enforcement flaws are also linked to judges' resistance to use house arrest, alternative that was applied to only four suspects in São Paulo until March 15, 2016.²²² Given that house arrest is restricted to suspects who would otherwise be put in pretrial detention (risky individuals), judges hesitate to grant it in the absence of reliable enforcement mechanisms, such as electronic monitoring.²²³

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.²²⁴ 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 5.1.²²⁵ The right to access to justice derives from Articles 1.1, 8.1 and 25 of the ACHR, and requires that everything necessary is done, within a reasonable

dangerous suspects in the United States, see Samuel Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L. J. 1118 (2014).

²¹⁸ Judges' belief that electronic monitoring would lower pretrial detention rates due to its capacity to prevent suspects from offending reinforces the finding that judges use pretrial detention mostly to protect the public order (VII.a.iv).

²¹⁹ In total, judges imposed 160 precautionary measures (including bail 14 times) to 73 suspects in our sample. The obligation of periodic appearance in court was monthly in 40 cases, bimonthly in 19 cases, trimonthly in four cases and unspecified in six cases. Suspects were prohibited to leave the court's county without authorization for more than eight days in two cases, 10 days in 21 cases, 15 days in four cases, 20 days in one case, 30 days in one case, and unspecified in 10 cases. Night home retreat was imposed between 10 p.m. and 6 a.m. to 25 suspects and in different periods to five suspects. Judges extended the home retreat to weekends in two cases. The other precautionary measures that judges used in our sample were: prohibition to attend bars and nightclubs (two cases), prohibition to leave the country (two cases), passport seizure (two cases), prohibition to make contact with the alleged victim and prohibition to return to her house (both applied once in a case of domestic violence).

²²⁰ The IDDD Report found that 60.7% of the 280 alternative measures in its sample were periodic appearance in court, 18.6% were prohibition to leave the court's county and 18.2% were home retreat. *Supra* note 84, at 57.

²²¹ Judge E suggested the adoption of police supervision by sampling to improve compliance with these measures.

²²² SAP Report, *supra* note 74.

²²³ Despite these challenges, Public Defender P explained that bail hearings had the positive effect of creating a space where defenders can instruct individuals about how to comply with non-custodial precautionary measures, what generally led to increased compliance (except for drug users and homeless people).

²²⁴ IACtHR, *Espinoza González*, ¶ 141. The Brazilian Constitution enshrines an absolute prohibition of torture in Article 5, III.

²²⁵ IACtHR, *Espinoza González*, ¶ 184. Beyond the acts of torture, the IACtHR found a violation of Article 5.1 due to the battery suffered by the victim from police officers to force her into their vehicle, including a blow to the back of her head. See also *J.*, ¶ 363.

time, to know the truth, and to investigate, prosecute and punish, as appropriate, those eventually found responsible.²²⁶

The prompt in-person judicial review of arrests aims both at improving violence reporting – as an opportunity is given for suspects to report abuses to an impartial and independent agent – and at increasing investigations’ effectiveness – as the immediate assessment of signs of violence avoids the loss of evidence.²²⁷

Until February 28, 2017, 2,700 of the 41,287 suspects that appeared in a bail hearing in São Paulo (7%) reported police violence.²²⁸ Apart from suspects’ statements, the visual element helps judges to decide whether to initiate investigations. The cases below exemplify the phenomenon that bail hearings expect to expose. Although Hearing 26 refers to an off-duty conduct, the case suggests how torture is still practiced by law enforcement officers.

Hearing 26

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.²²⁹ 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 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.²³⁰

²²⁶ IACtHR, Tenorio Roca *et al.* v. Peru, No. 314, ¶ 237 (June 22, 2016). Article 8 of the Inter-American Convention to Prevent and Punish Torture enhances the obligation to investigate allegations of torture or other CIDT.

²²⁷ Judge F and Public Defender M stressed that performing medical examinations at courthouses, away from police stations, was one of the features of bail hearings that improved the fight against abuses because it assured more independent medical reports. See *infra* note 251 for challenges of medical examinations in São Paulo.

²²⁸ *Supra* note 148. This figure refers to the amount of hearings where the judge considered that there was sufficient preliminary evidence to trigger an investigation. For the reasons analyzed in this section, such figure probably underestimates the amount of suspects that raised plausible allegations of violence. In our sample of 201 suspects (such information was not coded for one individual whose hearing was held *in absentia*), 32 individuals reported violence (15.9%). 23 of them accused state agents and nine accused non-state agents. The IDDD Report found that 141 of the 588 suspects in its sample alleged violence (24%), *supra* note 84, at 68.

²²⁹ The hypothesis that this case attests to the pervasive practice of torture by law enforcement agents becomes stronger in light of the precautionary measure recently determined by the IACHR requiring Brazil to protect the life and personal integrity of juveniles deprived of liberty in a youth detention center in the city of São Paulo. Adolescents Deprived of Liberty at the Center for Socio-Educational Services for Adolescents (CASA), PM 302/15 (July 21, 2016).

²³⁰ Ricardo and Vítor were arrested and put in pretrial detention in December 2015. Both Ricardo and Vítor filed a habeas corpus requesting to await trial in freedom. The Court of Appeals granted the preliminary injunctions and released them subject to alternative precautionary measures in January 2016. The injunctions were confirmed in February 2016. The judgment is scheduled for June 2017.

Hearing 27

Violence throughout detention

Samuel was arrested for drug trafficking. The public defender questioned him about police violence and he reported that the police officers grabbed him by the neck and hit his back a lot with their hands. He explained that the officers circulated with him in the car assaulting and pressuring him to hand over drugs. Samuel added that he received knee strikes at the police station while hearing that he should stay quiet. The judge opened an investigation.

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.²³¹ These flaws are feeding the dark figure of state-sponsored violence and systematically breaching the ACHR.²³²

Flawed questioning. 13 of the 14 judges whose hearings I observed either did not ask about police violence²³³ or asked so in an insufficient way, for being limited to one generic question.²³⁴ Such behavior fosters underreporting and is inconsistent with judges' express duty to question suspects about abuses in bail hearings.²³⁵ 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.²³⁶ "Because of the nature of torture cases and the trauma individuals suffer as a result, often including a devastating sense of powerlessness, it is particularly important to show sensitivity to the alleged torture victim."²³⁷

²³¹ Although combatting these challenges will not eliminate the dark figure of police violence, it will reduce the disparity between the amount of suspects who report it in hearings and that of detainees who report it to public defenders afterwards in jails. Public Defender O stated that such disparity is significant.

²³² The lack of interpretation is an additional challenge that hinders foreign suspects and suspects with sensory impairments from reporting violence. The next section analyzes this challenge.

²³³ 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%). This rate was 57.8% in the IDDD Report, *supra* note 84, at 67.

²³⁴ 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?").

²³⁵ CNJ Resolution 213, Art. 8, VI.

²³⁶ For a similar finding, see Ministério da Justiça and DEPEN, *Audiências de Custódia e Prevenção à Tortura: Análise das Práticas Institucionais e Recomendações de Aprimoramento* 39-41, 46-47 (2016) "MJ Report on Torture and Bail Hearings".

²³⁷ UN Office of the High Commissioner for Human Rights, *Istanbul Protocol*, ¶ 88, U.N. Doc. HR/P/PT/8/Rev.1. (2004). Check also ¶¶ 93 and 133. The Istanbul Protocol will be used because: (i) it is the main international document for standards on investigating and documenting torture and other CIDT; (ii) CNJ's Resolution 213 states that its rules considered the Istanbul Protocol; and (iii) the IACtHR has extensively relied on it to tailor reparations, to interpret States' obligation of due diligence when investigating human rights violations, to assess the evidence presented and to determine whether States' acts breached the ACHR (at least the following 17 merits decisions used the Istanbul Protocol: Gutiérrez Soler, Baldeón García, Bayarri, González *et al.*, Fernández Ortega *et al.*, Rosendo Cantú *et al.*, Vélez Lóor, Cabrera García and Montiel Flores, Lysias Fleury *et al.*, Mendoza *et al.*, García Lucero *et al.*, J., Veliz Franco *et al.*, Landaeta Mejías Brothers *et al.*, Rodríguez Vera *et al.*, Espinoza Gonzáles, and Herrera Espinoza).

Justification given by judges for not asking about police violence

Judges explained that they do not ask suspects about police violence because counsels already perform this task in hearings of individuals who reported abuses to them beforehand.²³⁸ By discharging themselves from the duty to inquire suspects about police violence, judges are inevitably increasing the number of false negatives because (a) many private counsels are unaware that this is their task and (b) sometimes counsels will not be able to raise the issue in hearings because suspects chose not to report violence due to fear of retaliation or unwillingness to further interact with the criminal justice system.²³⁹

Constant presence of Military Police officers. Officers of the Military Police (entity most accused of abuses in São Paulo)²⁴⁰ escort suspects before, during and after bail 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.²⁴¹

Deliberate intimidation

One public defender said that a police officer once pointed his gun towards the suspect in the corridor when he/she was interviewing him about police violence.²⁴² Another public defender reported that suspects were denying police violence in a very standardized fashion, what suggested that they were being advised about how to answer these questions.²⁴³ Indeed, public defenders said that suspects sometimes tell them that the police officers expressly warned them not to denounce violence.

Hearing 28

Involuntary intimidation

Jonathan was arrested accused of robbing a motorcycle. After neither the judge nor the prosecutor asked about police violence, Jonathan's private lawyer questioned whether the police had assaulted him. Jonathan answered "yes, they took me to a place..." and looked with an intimidated face to the police officer who was standing by the courtroom door. The judge asked about bruises. Jonathan said that his knees and back were hurting, but that he thought there were no visible wounds. The judge did not open an investigation. This case illustrates how the mere presence of police officers with uniforms equal to the ones used by many of the officers accused of battery and

²³⁸ Hearings 27, 28, 29 and 31 illustrate how the questioning about police violence depends on counsels' initiative.

²³⁹ Public Defenders N and P. Public Defender P explained that he/she asked in the prior interview if suspects wanted to raise the allegation of violence in the hearing only in instances where he/she anticipated that they would be released because, according to the public defender, retaliation is more likely when they are set free (jail guards are not members of the Military or Civil Polices).

²⁴⁰ The IDDD Report found that the Military Police was the entity accused in 40 of the 53 cases observed (75%) where suspects complained about violence by law enforcement agents and information about the alleged perpetrator was coded. *Supra* note 84, at 69. This figure was 86.3% in the city of Rio de Janeiro during the first year of bail hearings (the alleged perpetrators included Military Police officers in 903 of the 1046 cases where suspects alleged violence by law enforcement agents). DPRJ, *supra* note 118, at 26.

²⁴¹ For a national account of the problem, see MJ Report on Torture and Bail Hearings, *supra* note 236, at 45. While the lack of privacy in the prior interview violates ACHR's Article 8.2(d), the presence of Military Police officers throughout the proceeding is inconsistent with the concerns of the Istanbul Protocol with both protecting victims from intimidation and not endangering them. ¶¶ 95, 135 and 124-125. See also IACtHR, *Vélez Loor*, ¶ 236.

²⁴² Public Defender P.

²⁴³ Public Defender Q.

torture may intimidate suspects. Public defenders confirmed that suspects occasionally look at police officers before answering these questions.²⁴⁴

Police officers' solidarity²⁴⁵

Multiple police officers tend to attend hearings of law enforcement agents. Four officers were in two hearings observed (one of them was Hearing 26). The only possible interpretation for such practice – which was confirmed by public defenders – is that police officers expect to pressure judges to release suspects.²⁴⁶

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 – *i.e.*, when they are not outspoken and straight-forward about the violence suffered²⁴⁷ – or when they say that they would not be able to identify the alleged perpetrators.²⁴⁸ 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.”²⁴⁹

Hearing 29

Homelessness and police brutality

Douglas was accused of stealing ornaments from a cemetery. He appeared in court barefoot, exhaling a strong odor and with clothes much bigger than his size. He had been homeless for four years and a crack user for 10. After the public defender asked about violence, Douglas explained that two guards had assaulted him, given him shocks and kicked him in the belly. The judge asked whether he could identify the offenders and Douglas answered no. The judge did not open an investigation.

²⁴⁴ Judge H suggested creating a specific escort unit for bail hearings, unrelated to the polices, as a measure to prevent suspects from being/feeling intimidated. See also MJ General Report on Bail Hearings, *supra* note 81, at 37.

²⁴⁵ This finding fits the broader pattern frequently pointed out that Brazilian polices are very protective of their members in investigations of abuses, ultimately fostering impunity. See *Favela Nova Brasília*, *supra* note 2, ¶ 72.

²⁴⁶ On a visit on September 16, 2016, I observed hearings with many (two to six) military police trainees (wearing a different vest). Although reasonable to have them attending bail hearings as part of their training, allowing the courtroom to be full with officers invariably intimidates suspects to report violence.

²⁴⁷ A report of one day of observation of hearings in the city of Rio de Janeiro expressed the concern that judges tend to disregard suspects' allegations of police violence or to only take them seriously in evident cases (such as those of suspects with visible injuries). Pedro Abramovay, *Banalidade do réu: um dia de observação das audiências de custódia*, JOTA, July 19, 2016. See also IDDD Report, *supra* note 84, at 74-75.

²⁴⁸ I was able to obtain information on whether the judge triggered an investigation in 21 of the 23 cases of our sample where suspects raised allegations of police violence. Judges opened an investigation in 12 of these 21 cases. Five of the nine suspects who made allegations of police violence that did not lead to an investigation also said that they would not be able to identify the perpetrators. Judge E said that he/she used to ask if the person would be able to identify the perpetrator to evaluate whether there were sufficient elements for a future investigation. Differently, Judges C and F said that the suspect's capacity to identify the perpetrator did not dictate whether they opened or not investigations. The IDDD Report found that judges triggered an investigation in 90 of the 141 cases where suspects alleged violence by state or non-state agents. *Supra* note 84, at 68.

²⁴⁹ R. F. Mollica and Y. Caspi-Yavin, *Overview: the assessment and diagnosis of torture events and symptoms*, in *TORTURE AND ITS CONSEQUENCES: CURRENT TREATMENT APPROACHES* 38, 38-55 (M. Başoglu ed., 1992), *cited in Istanbul Protocol*, ¶ 142. In *Cabrera García*, the IACtHR referred to the Istanbul Protocol to dismiss Mexico's allegations that the victim's testimony should not be given much weight due to inconsistencies. ¶ 113.

ii. Still-born investigations

If bail hearings improved the identification of allegations of police violence, the absolute ineffectiveness of investigations triggered after them is eliminating hearings' potential to fight abuses. These investigations fit the very pattern rejected by the IACtHR since *Velásquez Rodríguez*, existing “simply as a formality, preordained to be fruitless.”²⁵⁰ More than not improving the *status quo*, flawed investigations legitimize discourses that deny police 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,²⁵¹ 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.²⁵²

*Delegation of investigations to the polices.*²⁵³ 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.”²⁵⁴ 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 (some accused individuals are interrogated by telephone and alleged victims are not heard).²⁵⁵

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.²⁵⁶ Nonetheless, such practice is inconsistent with the right to

²⁵⁰ IACtHR, *Velásquez Rodríguez v. Honduras*, No. 4, ¶ 177 (July 29, 1988). 28 years later, *Tenorio Roca*, ¶ 176.

²⁵¹ Public Defenders O and P reported that the medical examination of alleged victims of violence in São Paulo does not encompass a psychological evaluation. Given the scientific acknowledgement that “the extreme nature of the torture event is powerful enough on its own to produce mental and emotional consequences” (*Istanbul Protocol*, ¶ 234), the lack or insufficiency of a psychological examination violate the State's obligation to “take all the actions and make all the inquiries required” to elucidate truth. IACtHR, *Velásquez Paiz et al. v. Guatemala*, No. 307, ¶ 143 (Nov. 19, 2015). In *J.*, the IACtHR criticized Peru for not having provided a psychological examination of the victim. ¶ 332. Public Defender O said also that medical examinations in São Paulo are incapable of identifying internal injuries and that medical reports do not contain injuries' probable dates. See *Istanbul Protocol*, ¶ 183. For challenges of medical examinations on a national level, see MJ Report on Torture and Bail Hearings, *supra* note 236, at 48-49.

²⁵² 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. That because allegations of violence between random citizens lead straight to criminal investigations, even though their level of evidence is usually equivalent to that of the complaints of suspects in bail hearings.

²⁵³ Standard policy throughout Brazil as denounced by the MJ Report on Torture and Bail Hearings, *supra* note 236, at 54.

²⁵⁴ *Istanbul Protocol*, ¶ 82. See also, IACtHR, *Quispialaya Vilcapoma v. Peru*, No. 308, ¶ 163 (Nov. 23, 2015).

²⁵⁵ Judge I. In light of the failure of this model, the Court of Appeals of São Paulo was considering setting up a Civil Police station at the court, next to the bail hearings (a specialized “torture police station”), which would be responsible for investigating all cases arising from the hearings. The MJ Report on Torture and Bail Hearings recommended this reform as a national policy, *supra* note 236, at 60.

²⁵⁶ Judges F and I. For a similar finding, see MJ Report on Torture and Bail Hearings, *supra* note 236, at 55 and 61.

a competent tribunal (ACHR, Article 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.”²⁵⁷ Human rights violations such as torture and the disproportionate use of force by state agents go well-beyond harming the Military’s hierarchy and discipline.^{258,259}

Prosecutors’ share of guilt. Despite their constitutional duty to exercise the external control of police activities,²⁶⁰ 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.²⁶¹ A prosecutor frankly acknowledged that prosecutors’ resistance in making bail hearings an environment favorable to the identification of police violence derives to some extent from the institution’s culture of being condescending with abuses.²⁶²

Negligence towards non-state violence

States obligation to investigate human rights violations remain “whosoever the agent to whom the violation may eventually be attributed, even private individuals, because if their acts are not investigated correctly, they would, to a certain extent, be aided by the public authorities.”²⁶³ Bail 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, as illustrated by Hearing 33 and by the following cases.²⁶⁴

²⁵⁷ *Tenorio Roca*, ¶ 194. The Court held Peru liable for having analyzed forced disappearances in proceedings before military courts because these acts are related to facts and crimes that are never connected to the military discipline or mission. *Id.* ¶ 197. See IACtHR, *Rodríguez Vera et al. v. Colombia*, No. 287, footnote 692. (Nov. 14, 2014).

²⁵⁸ The rule that requires human rights violations to be investigated in the ordinary jurisdiction is “based not on the seriousness of the violations, but rather on their very nature and on the rights protected.” *Tenorio Roca*, ¶ 196. Consequently, ordinary courts should analyze all the spectrum of alleged violations of the right to personal integrity by military personnel – regardless of their seriousness.

²⁵⁹ The IACtHR already indicated that the right to a competent tribunal would not be violated if effective proceedings were initiated in ordinary courts in parallel to proceedings in military courts. *Tarazona Arrieta et al. v. Peru*, No. 286, ¶¶ 108-110 (Oct. 15, 2014).

²⁶⁰ Constitution, Art. 129, VII. São Paulo’s Complementary Law 734/1993 replicates this duty in its Art. 103, XIII.

²⁶¹ 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. On a visit on September 16, 2016, Public Defender M informed us that since our last visit in March prosecutors had started to ask regular investigations to be initiated when the medical report is positive. This change represents a relevant progress. Notwithstanding, the acceptance by prosecutors of the results of investigations performed by the comptroller’s offices of polices in all other cases is still incompatible with their constitutional role as guardians of fundamental rights. See also MJ Report on Torture and Bail Hearings, *supra* note 236, at 54.

²⁶² Prosecutor L. Prosecutor K sustained that prosecutors’ passive behavior regarding allegations of police violence derives from their lack of experience with bail hearings. This justification becomes less persuasive when one recalls that the Public Prosecutor’s Office has long had a specialized unit in São Paulo in charge of receiving and processing claims of police violence (GECEP).

²⁶³ *Velásquez Paiz*, ¶ 143. The IACtHR has interpreted Article 1.1 of the ACHR as inclusive of the obligation to effectively investigate violations committed by private parties since *Velásquez Rodríguez*, ¶ 176.

²⁶⁴ Nine suspects in our sample alleged violence by non-state agents: four by the population, two by victims, two by private security guards and one by other inmates. The IDDD Report identified six cases in its sample where suspects alleged to have suffered violence by non-state actors, *supra* note 84, at 69. Many judicial actors justify their lack of

Hearing 30

Violence by the population

Carlos was arrested for allegedly attempting to rob a cellphone. He was contained and heavily assaulted by a group of people who were nearby. He appeared at the hearing showing lynching signs, with one eye seriously hurt, with torn clothes and dirty with blood. The public defender asked the judge to open an investigation into both the violence and the potential negligence from the police. The judge put Carlos in pretrial detention and did not open an investigation.

Hearing 31

Violence by private security guards

Paula was arrested accused of stealing a cellphone in the subway. Asked by the public defender about violence, Paula explained crying that she had been assaulted by subway security guards even though she was pregnant. She also reported that they threatened to shoot her in the head. The judge released Paula and instructed her to file a criminal complaint against the guards if she felt like doing so.

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.²⁶⁵ Persons with disabilities must also be guaranteed free sign language interpretation.²⁶⁶ These are countervailing measures aimed at reducing disadvantages of individuals that would not otherwise enjoy the same opportunity for justice of non-disadvantaged ones.²⁶⁷ Accordingly, the CPP requires the interrogation of suspects who do not speak Portuguese and of illiterate, deaf or mute suspects to be conducted through an interpreter.²⁶⁸

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. Interpretation also

action after these allegations on the fact that most of the crimes allegedly committed by non-state agents against suspects are minor battery or threat, which require the victim's complaint before an investigation can be triggered (*crimes de ação penal pública condicionada à representação da vítima*). Nonetheless, in order to actively fight this serious phenomenon, judges and prosecutors should take the opportunity in bail hearings to question if suspects want to make a complaint in cases where the allegations are minimally substantiated and forward it to the police.

²⁶⁵ Also, ICCPR, Art. 14.3(f), ECHR, Art. 6.3(e), and International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Art. 18.3(f) (still not signed by Brazil).

²⁶⁶ Convention on the Rights of Persons with Disabilities, Arts. 13 and 21(b). See, Committee on the Rights of Persons with Disabilities, General Comment No. 2, ¶ 37 (May 22, 2014); and Committee on the Elimination of All Forms of Discrimination against Women, R. P. B. v. The Philippines, Comm. No. 34/2011 (Mar. 12, 2014), ¶ 8.7.

²⁶⁷ IACtHR, The Right to Information on Consular Assistance, Advisory Opinion OC-16/99, ¶¶ 119-120 (Oct. 1, 1999). States must assure this right in all stages of the oral proceeding. HRC, General Comment No. 32, ¶ 40 (Aug. 23, 2007).

²⁶⁸ CPP, Arts. 193 and 192, sole paragraph, respectively. The law does not assure an interpreter to literate deaf or mute defendants. The judge shall present the questions to the deaf in writing and he or she shall answer them orally. The judge shall ask the questions to the mute orally and he or she shall answer them in writing. The judge shall present the questions to the deaf-mute in writing and he or she shall answer them the same way. *Id.* Art. 192, I-III. STF, Habeas Corpus 74,019-7, Aug. 13, 1996 (reasoning that the interrogation of a deaf-mute defendant in writing had been in accordance with the CPP because the defendant was literate). The substitution of interpretation by written questioning in criminal cases of literate, deaf or mute defendants raises serious doubts over Brazil's compliance with its international obligation of non-discrimination.

ensures that suspects will be adequately informed of the decision so that they can understand subsequent steps and comply with release conditions. Lastly, interpretation is essential for reporting violence, as “the information being conveyed is often too important to risk an incomplete understanding.”²⁶⁹

Despite its importance, the provision of interpretation is selective and inadequate in São Paulo.²⁷⁰ While Spanish-speaking suspects are not afforded translation,²⁷¹ hearings of English-speaking suspects will involve unofficial translation by other actors in court.²⁷² There is no guarantee of interpretation for individuals who speak other languages²⁷³ and for suspects with sensory impairments.²⁷⁴

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

²⁶⁹ *Istanbul Protocol*, ¶ 150. Judges A, B, G and I acknowledged that the lack of interpretation was a serious challenge that needed to be addressed. Judge I added though that the cost to assure interpretation in bail hearings could be prohibitive. Judges D, E, F and H considered the provision of professional interpretation to be non-essential but that an effort should be done to communicate with suspects who need interpretation. Judge D suggested questioning the person in writing and using an online website to help with the translation. Judge E said that interpretation “would be a plus, but its lack isn’t an obstacle.” Judge F explained that the bail hearing is not meant to be an interrogation and that in general it is possible to find someone at the court to translate.

²⁷⁰ The IDDD Report corroborates the finding that the lack of translation for foreigners is a serious challenge of bail hearings in São Paulo, *supra* note 84, at 35 and 75. 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.

²⁷¹ Judges share the belief that the similarities between Portuguese and Spanish dismiss the need of translation. Indeed, the HRC considered that if the “accused is sufficiently proficient in the court’s language, it is not required to ascertain whether it would be preferable for the accused to express himself in a language other than the court language.” HRC, *Dominique Guesdon v. France*, U.N. Doc. CCPR/C/39/D/219/1986, ¶ 10.3 (Aug. 23, 1990). While in three of the four hearings of Spanish-speaking suspects that I observed they were able to properly communicate in Portuguese, in the fourth case, other judicial actors (including the police officer) and the individual’s co-suspect had to collectively translate the questions and answers. Thus, as a default practice, the lack of translation risks putting some Spanish-speaking suspects in disadvantage towards nationals.

²⁷² 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. Concerns with translation by non-professionals are particularly acute in interrogations about police violence. *Istanbul Protocol*, ¶ 151. Judge F said that he/she used to be the translator in hearings of English-speaking suspects and that he/she could also translate hearings in French.

²⁷³ 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 ultimately put him in pretrial detention. Confronted with the lack of translation, the judge said that it was not his/her problem. Public Defender O recollected the hearing of a Greek suspect who was not afforded translation and was put 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. Notwithstanding, Judge A explained that that does not happen in São Paulo as a rule. The STF already acknowledged that the failure to assure this right breaches the Vienna Convention on Consular Relations. STF, Extradition 1,126, Oct. 22, 2009. See also, IACtHR, *Advisory Opinion 16/99*, ¶ 3, *Opinion*. The MJ General Report on Bail Hearings recommends the coordination with embassies and consulates as a measure to assure translation for foreign suspects, *supra* note 81, at 65.

²⁷⁴ 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.

preconceived belief that the accused is guilty and state officials from issuing statements indicating that before society.²⁷⁵

The verbal treatment afforded to suspects by judges and prosecutors in bail hearings in São Paulo is often premised on the assumption that those are guilty of unproven allegations.²⁷⁶ Even though judges disclaim that the hearing is not a judgment on the merits and prosecutors and judges are not making statements to the press, the practice of repeatedly referring to suspects as guilty is inconsistent with Article 8.2 of the ACHR as it inevitably leads suspects to somehow believe that judicial actors see them as guilty.^{277,278}

Hearing 32 “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.”²⁷⁹

Hearing 33 “You wouldn’t like if this was done to your children”

Rodrigo was arrested accused of offering money to two children in exchange for sex. The police files reported that he made an offer to a 13-year-old girl who passed by his car. The girl told her mother what had happened, including the plate number of the man’s car. The girl’s mother contacted the police, which found the car hours later with Rodrigo inside it without his pants. At the police station, a similar accusation surfaced against him. Rodrigo would also have offered money to a nine-year-old boy in exchange for sex that same day. After putting Rodrigo in pretrial detention, the judge reprimanded him by saying that what he had done was very serious and that he would not like if someone did that to his children. In the written decision, the judge overlooked the proceeding’s pretrial nature and repeatedly affirmed that Rodrigo had committed the alleged crime: “The public order is threatened with his release as he does not have decency and attacks an adolescent and a child, concrete facts that by themselves already generate social unrest.” Also, when asked by the judge whether he had suffered police violence, Rodrigo answered that the other detainees in jail had assaulted him. The judge did not take any measures regarding this allegation.²⁸⁰

²⁷⁵ IACtHR, Ruano Torres v. El Salvador, No. 303, ¶ 127 (Oct. 5, 2015).

²⁷⁶ 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.”

²⁷⁷ Public Defender Q said that hearings’ video recordings should be watched in order to identify cases where the behavior of judges had been abusive towards suspects. The body competent to do so would be the CNJ.

²⁷⁸ This inadequate treatment is linked to judges’ reliance on the protection of the public order to justify pretrial detention because such reasoning gives strong weight to the accusation, as analyzed in VII.a.iv above.

²⁷⁹ This case also illustrates the practice of some judges to be disrespectful towards suspects, reprimanding them in a manner that would be inadequate even if judges were actually convicting them. For a similar finding on a national scale, see MJ General Report on Bail Hearings, *supra* note 81, at 45. Lucas was arrested and released in March 2016 subject to monthly appearance in court to report activities, prohibition to leave the county for more than 10 days without authorization and night home retreat. Lucas was sentenced in February 2017 and convicted to one year in prison, starting in the closed regime, and to a fine of a third of the minimum wage (USD 90). His appeal is pending and the judge did not allow him to appeal in freedom.

²⁸⁰ The only information publicly available about Rodrigo’s case is that he was convicted and appealed the sentence.

Hearing 34

“When you aren’t in prison, you’re robbing”

Luís was allegedly robbing two victims with a gun when police officers arrived and exchanged fire with him. He was hit in the buttocks and subsequently detained. He had left prison less than a year earlier to finish serving a prison sentence for robbery in the open regime. The judge decided for pretrial detention and reprehended Luís by saying: “For you there’re only two options, you’re either in prison or robbing. When you aren’t in prison, you’re robbing.”²⁸¹

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. A pretrial detainee must “have adequate opportunities, infrastructure and time to (...) consult with his or her attorney with total confidentiality and without delay, interception or censure.”²⁸² Brazilian laws replicate these standards.²⁸³

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, being it perfectly possible for them to overhear the consultation.²⁸⁴ 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.²⁸⁵

The lack of privacy may hinder suspects from fully exposing to counsels information that could assist in their defense. Moreover, counsels are unable to properly instruct their clients and must abbreviate interviews at the risk of being pressured by judges. On top of that, the interference of officers beyond visual surveillance fosters underreporting of police violence due to fear of retaliation.

VIII. Conclusion

The state courts of the city of São Paulo were the first in Brazil to introduce a prompt in-person judicial review of arrests through bail hearings. Despite the multiple and significant challenges, the findings herein support the conclusion that bail hearings improved pretrial proceedings’ compliance with Inter-American human rights standards.

On personal liberty, bail hearings help to abbreviate illegal or unnecessary detentions by assuring the immediate judicial review of arrests. Further, the hearings innovate by (a) improving the assessment of suspects’ personal conditions, (b) allowing them to provide their version directly to the judge, (c) guaranteeing a mandatory prior defense and (d) assuring suspects an in-person

²⁸¹ Luís was arrested and put in pretrial detention in December 2015. He was convicted in April 2016 and sentenced to four years and two months in prison, starting in the closed regime, and to a fine of a third of the minimum wage (USD 90). Luís did not appeal the conviction.

²⁸² *Informe*, *supra* note 6, ¶ 261 referring to the Mandela Rules, *supra* note 9, ¶ 93, G.A. Res. 43/173, principle 18 (Dec. 9, 1988), and U.N. Doc. A/CONF.144/28/Rev.1, at 118 (Aug. 27, 1990), principle 8.

²⁸³ See *supra* note 83.

²⁸⁴ The IDDD Report (São Paulo), *supra* note 84, at 15, and the MJ General Report on Bail Hearings (national), *supra* note 81, at 45, identified similar practices. The IACtHR found violations of Article 8.2(d) due to the lack of privacy in counsel-defendant communications in *Suárez Rosero*, ¶¶ 34(h), 79 and 83; *Castillo Petruzzi*, ¶¶ 136(g) and 148; *Cantoral Benavides*, ¶¶ 63(p), 127-128; *Lori Berenson Mejía v. Peru*, No. 119, ¶¶ 88(27) and 167-168 (Nov. 25, 2004); and *J.*, ¶ 206.

²⁸⁵ Public Defender P. I was informed on a visit on September 16, 2016, that hearings would soon start to be held on renewed installations, where counsels would be able to confer privately with suspects.

contact with counsels and prosecutors. These features have led to (1) less pretrial detention orders (what also helps with the prison overcrowding), (2) more revocations of illegal detentions and (3) a bail setting more responsive to suspects' financial conditions. Beyond that, bail hearings pushed the reality of those targeted by criminal enforcement into courtrooms, unveiling the intrinsic connection between social vulnerability and criminal justice.

The hearings fell short, however, of making pretrial detention exceptional in São Paulo. Systematic disregard for the right to presumption of innocence persists due to the following core challenges: (i) CPP's authorization of pretrial detention to protect the public order; (ii) judges' and prosecutors' belief that pretrial detention can be used to incapacitate dangerous individuals (rationale supported by the STF) or to anticipate an expected punishment; (iii) judges' strong reliance on the accusation (abstract type of crime or specific elements of the accusation) and criminal records to decide a suspect's pretrial status; and (iv) the unavailability or ineffectiveness of non-custodial precautionary measures.

Regarding access to justice for violations of personal integrity, bail hearings provide an opportunity for suspects to denounce abuses to an impartial and independent agent empowered to trigger investigations, as well as transparency to visible signs of violence. Nonetheless, hurdles are partially undermining hearings' ability to expose violence: (v) flawed questioning about police violence; (vi) constant presence of Military Police officers; and (vii) excessively restrictive criteria to trigger investigations. As to investigations, the expressions "glaring shipwreck" and "the hearings' Achilles heel" could not define them more precisely.²⁸⁶ Specific flaws contributing to the ineffectiveness of the investigations are: (viii) their delegation to the comptroller's offices of polices; (ix) the initiation of criminal proceedings exclusively in military courts; and (x) prosecutors' passive approach. Lastly, (xi) hearings' protocols are not adapted to counter violence by non-state actors.

Overall, bail hearings have also improved compliance with the right to a defense due to features (a) to (d) above. Despite the progress, (xii) interferences with the right to communicate freely and privately with counsel and (xiii) the lack of interpretation for foreign suspects and for suspects with sensory impairments hinder hearings' potentials. Moreover, (xiv) the verbal treatment afforded by judges and prosecutors to suspects in bail hearings is often inconsistent with their status as presumed innocents.

IX. Recommendations

The recommendations below arise from the account of achievements and challenges of bail hearings in the state courts of the city of São Paulo and should function as guidelines for reforms on a national scale, while accounting for the particularities of each jurisdiction.²⁸⁷ The recommendations target the legal structure underlying bail hearings and the legal culture of relevant judicial actors. Their implementation requires joint action from all branches of government and aims at strengthening the compliance of pretrial proceedings with Inter-American human rights standards.

²⁸⁶ Judge I.

²⁸⁷ The MJ General Report on Bail Hearings cautioned against generalizations about bail hearings' successes and failures throughout Brazil due to the relevant differences among local practices. *Supra* note 81, at 26.

1. *Prompt in-person judicial review of arrests.* Reform the CPP to include bail 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.
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 bail 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 bail 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.

ANNEX – CODING VARIABLES FOR HEARINGS

General information						
Detainee		Judge	Prosecutor	Lawyer/Public Defender	Proceeding number	Alleged crime
M/F	Age	Color/ethnicity (my assessment/ specified if other source)	Nationality (* translation)	Right to remain silent about facts Y/N/NA – not asked	Appearance (wounds/flip-flops, barefoot, without shoelaces/clean clothes, dirty, torn, neat/beard and hair cut or not/visible tattoos/strong odor/police officers with plastic gloves/use of scent spray/surgical mask)	
Questions asked by judges (NA – not asked/* – spontaneous answer/PI – police investigation if the info was obtained in police files)						
Marital status	Children	Cohabitants	Education	Occupation	Formal (** if my evaluation)	Income
Residence (HL – homeless)	Serious health problem	Psychiatric problem	Drug/alcohol abuse	Treatment history	Records	Records in juvenile justice
Knew cops who detained	Violence in approach	Taken straight to police station	Right to silence in police station	Violence in police station	Violence pop./ victim/detainees	Reference to Criminal Code arts.
Prosecutor and defense questions						
Prosecutor				Defense		

Prosecutor and defense manifestations						
Version of facts by Prosecutor/police files	Arguments of prosecutor (* if judge referred to it)	Version of facts by defense/detainee	Arguments of defense (* if judge referred to it)			
Prosecutor request		Defense request		Submission of documental proof	Request about all of violence or ref CEAPIS	
Decision (oral)						
Communication of decision to detainee: direct/through counsel	Decision (PD/PR/ Illegal)	Ground for PD/conditions of PR		Relation decision/prosecutor	Measure about allegation of violence/CEAPIS	B
Guarantee of public order (explicit)		Flight risk/guarantee enforcement (explicit)		Risk of hindrance of investigation (explicit)		
General comments about hearing						