

# Guidance Note 5

## Pre-trial detention

### Summary

- Detainees held in pre-trial detention retain the status of unconvicted people. They should be held separately from convicted prisoners.
- The international human rights instruments stress the need for all processes which affect pre-trial detainees to be shaped within the framework of the presumption of innocence.
- Yet torture of suspects in police stations is common in some countries and pre-trial detainees are often held in the worst prison conditions, sometimes for long periods.
- In some countries pre-trial detainees constitute the majority of those in prison. Reducing the number of pre-trial detainees, improving the conditions in which they are held and ensuring their access to legal advice and opportunities to prepare for their trial are priorities when improving the human rights compliance of a penal system.
- Changes in police and prosecution procedure to speed up trials, the imposition of time limits on pre-trial detention, the development of low-cost legal services in co-operation with civil society, reviewing the legality of detainees' detention status and improvements in pre-trial detainees' living conditions are important reforms.

“ All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

— *Article Ten, United Nations International Covenant on Civil and Political Rights*

### Guidance Notes on Prison Reform

This guidance note is number five in a series designed to give practical help to those developing and delivering prison reform projects. All the guidance notes:

- are set within the international human rights framework
- apply in a variety of cultural and political environments
- propose solutions that are likely to be sustainable in a variety of socio-economic situations and do not involve a significant increase in resources
- take account of the realities of prison management

The production of these guidance documents on how to undertake prison reform projects is supported by the UK Foreign and Commonwealth Office.

## The special status of pre-trial prisoners

The use of pre-trial detention and the conditions under which pre-trial detainees are held are an important measure of human rights observance and adherence to the rule of law.

- Pre-trial prisoners are detained people yet they must be presumed innocent until found guilty. Their treatment should reflect their status.
- The international human rights instruments require that pre-trial detainees be held separately from convicted people, save in exceptional circumstances.
- Pre-trial detention should be used sparingly and there should be a presumption in favour of not holding suspects in detention pre-trial.
- The function of investigating the charges should be kept separate from the management of detention so that there can be no possibility of conditions of detention or treatment in detention being used as pressure to extract confessions.
- Pre-trial detainees must be informed of the grounds of their detention and their legal rights.
- Confidential access to legal advice and defence lawyers must be allowed and the detention decision should be challengeable at an early stage during the detention period and thereafter.

“ Everyone charged with a penal offence has the right to be presumed innocent until proved guilty.

Article 11 (1) of the Universal Declaration of Human Rights

*It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial.’*

Article 9 (3) of the International Covenant on Civil and Political Rights

*Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall help the necessity of detention under review.*

Principle 39 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

*Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings.*

Rule 6 of the UN Standard Minimum Rules for Non-Custodial Measures

*The application of pre-trial detention and its length should be reduced to the minimum compatible with the interests of justice.*

Recommendation No R (99) 22 concerning prison overcrowding and prison population inflation (Council of Europe 1999)

## General problems of pre-trial detention

### Size of pre-trial population

There are very wide differences between countries in their use of pre-trial detention. In some countries the most pressing prison reform issue is the high use of pre-trial detention. For example detention for defendants awaiting trial was virtually automatic in all countries of the former Soviet Union in Soviet times. Fundamental change was needed and has been a long process in some of these countries.

In some developing countries defendants are too poor to bail themselves out and resources to bring a case to trial in reasonable time are not available. The result is long years in prison waiting for a trial to start.

In some countries the judicial processes are so cumbersome that the trial process itself can take years. In many countries the resources to allow each pre-trial detainee an adequate defence are not available.

#### States with the highest proportions of pre-trial detainees in their prison populations

|    |                    |       |    |              |       |
|----|--------------------|-------|----|--------------|-------|
| 1  | Paraguay           | 92.7% | 14 | Uganda       | 65.7% |
| 2  | Haiti              | 83.5% | 15 | Madagascar   | 65.4% |
| 3  | Dominican Republic | 79.8% | 16 | Benin        | 64.5% |
| 4  | Honduras           | 78.5% | 17 | Nigeria      | 63.0% |
| 5  | Andorra            | 77%   | 18 | Libya        | 62.6% |
| 6  | Mozambique         | 72.9% | 19 | Bangladesh   | 60.3% |
| 7  | Uruguay            | 72.5% | 20 | Nepal        | 59.8% |
| 8  | India              | 70.4% | 21 | Burundi      | 59.4% |
| 9  | Ecuador            | 69.9% | 22 | Angola       | 58.9% |
| 10 | Peru               | 69.8  | 23 | Sao Tomé     | 58.5% |
| 11 | Mali               | 67.2% | 24 | Burkina Faso | 58.3% |
| 12 | Pakistan           | 66.1% | 25 | Guatemala    | 58.0% |
| 13 | Saudi Arabia       | 65.8% |    |              |       |

These statistics were taken from World Prison Brief Online at 7 October 2004. Statistics are not necessarily from the same year but represent the most recent figures available

### Length of pre-trial detention

Pre-trial detention can sometimes last for years with some detainees serving longer pre-trial than the possible sentence they could have been given for the offences with which they are charged. How long people are held in pre-trial detention depends on a number of factors:

- the speed of the police or prosecutor's investigation
- the capacity of the system to transport defendants from prison to court
- the workload in the courts and the resources available to conduct trials
- the availability of legal advice and public defenders for pre-trial detainees
- in certain circumstances, a concern of the defendant to postpone the trial as long as possible

## Conditions of pre-trial detention

Pre-trial detainees are often held in the worst detention conditions, sometimes with extreme overcrowding. Prosecution requirements can worsen their conditions of confinement as in some countries prosecutors can prohibit visits from family and friends. They can also require communication between detainees in the same prison to be prevented. A consequence of this requirement may be that communal activities are prohibited and detainees are in their cells 23 hours a day.

These prohibitions can also affect the conditions of the buildings. For example, in order to prevent communication between detainees the cell windows may be covered with shutters or grilles.

“*Despite previous recommendations by the CPT, at the time of the 2002 visit, the imposition of restrictions (supervised weekly visits limited to 30 minutes, withholding or monitoring of correspondence, prohibition of telephone calls) continued to lie within the sole discretion of the police, who had received no instructions on the circumstances under which such restrictions can be applied. Further, the courts do not consider separately the need for the police to impose restrictions though, as regards some matters, the decisions taken by the police can be reviewed by the courts on appeal. These restrictions, which were applied to the vast majority of remand prisoners, were particularly resented by prisoners in solitary confinement.*

CPT visit to Denmark 2002<sup>1</sup>

In some countries the use of force, sometimes amounting to torture, by investigating authorities such as the police is common in order to extract confessions.

“*Pre-trial detainees are particularly vulnerable to torture and ill-treatment. International standards provide rules for the interrogation of pre-trial detainees. No statement made as a result of torture can be invoked as evidence in any proceedings, except against a person accused of torture.*

OSCE, *Pre-Trial Detention in the OSCE Area* 1999<sup>2</sup>

This may be due to tradition, lack of training in other methods of detection, or lack of resources to carry out investigations. The consequence is that detainees may arrive in the pre-trial prison with injuries.

“*Prison health-care services can make a significant contribution to the prevention of ill-treatment of detained persons, through the systematic recording of injuries and, when appropriate, the provision of general information to the relevant authorities. The information gathered during the 2002 visit to Ireland indicates that the records made by prison doctors of injuries displayed by prisoners, including at the time of their admission to prison, were often imprecise; further, the statements of the prisoners concerned were very seldom noted down. In this connection, the CPT considers that the record drawn up following a medical examination of a newly admitted prisoner should contain:*

- i) an account of statements made by the person concerned which are relevant to the medical examination (including his description of his state of health and any allegations of ill-treatment),*
- ii) an account of objective medical findings based on a thorough examination, and*
- iii) the doctor's conclusions in the light of i) and ii)*

CPT visit to Ireland 2003<sup>3</sup>

## Reducing the number of pre-trial prisoners

The number of pre-trial detainees in a country is affected by several factors. The pre-trial prisons are filled by the actions of the police and the prosecution. The police arrest suspects who are then detained. Subsequently some of them will be convicted and sentenced to prison. If the police are judged by how many suspects they arrest rather than by their overall contribution to public safety they may spend their time arresting many small time offenders rather than looking for the perpetrators of serious crimes.

In countries where corruption is a factor, those with money will pay to avoid pre-trial detention and suspects with no money will be detained. In some countries transport to get defendants to court is only available to those who can pay and indigent defendants may stay in prison longer.

“ A bill aimed at easing conditions in the country’s overcrowded jails, which had been passed unanimously by the State Duma, was stopped in its tracks Wednesday when the upper house of parliament heeded the prosecutor general’s last-minute protest... Prosecutor General Vladimir Ustinov sent a letter to Federation Council Speaker Yegor Stroyev, urging him and his colleagues to block the bill’s passage. Ustinov’s deputy... came to the Federation Council to lobby in person, telling the session that the bill was «fraught with dangerous consequences for society.» The part of the bill that the prosecutors said they objected to would have shortened the amount of time a person can be held in jail during the pre-trial investigation to one year. Currently, investigators can, with the prosecutor general’s permission, hold a defendant up to 1½ years before the case goes to trial... Wednesday’s bill was expected to reduce the prison population by 200,000 to 300,000... Viktor Sheinis, a former deputy who sat on the Duma’s legislation and judicial reform committee, (said). «It’s easier for investigators if their hands are untied, if they can mete out severe punishments,» he said.

Sarah Karush, *Prosecutor’s Protest Stops Bill on Prisons 2001*<sup>4</sup>

Measures to reduce the number of those held pre-trial and to shorten the time spent in detention may well encounter opposition from powerful interests:

- the police do not like to see someone who has just been arrested and charged out on bail the next day
- the prosecutors sometimes see the time in pre-trial detention as a chance to carry on their investigations and perhaps extract a confession of guilt
- politicians in democratic countries may fear a lack of public understanding of the release of high-profile defendants or those known to a community or neighbourhood

Also, the pressure of extremely overcrowded pre-trial prison conditions may lead defendants to plead guilty just to get the process over with and get the chance to move to a better environment.

A most important factor is who makes the decision to detain a suspect. In the countries of the former Soviet Union the decision was made by the prosecutor. Reforms of the criminal procedure code in Russia since 2002 have removed this power from the prosecutor and given it to judges. The result has been a substantial reduction in the number of pre-trial detainees<sup>5</sup> from 282,000 in 2000 to 141,000 in August 2004.

**Imposing time limits on pre-trial detention.** In a number of countries, time-limits have been introduced requiring that a case comes to trial within a certain length of time. If it

does not do so and the prosecution cannot give strong reasons, the pre-trial detainee must be released from detention.

“ In Bulgaria in 1997 the Law of Amendments and Supplementary Regulations to the Criminal Procedure Code came into force. This introduced restrictions on pre-trial detention to one year for most crimes and two years for those accused of serious crimes. The grounds for remand in custody were restricted and in less than a year the numbers fell from 3,962 to 2, 973.

Penal Reform International, *Prison Populations* 1999<sup>6</sup>

**Prohibiting pre-trial detention for less serious crimes** unless the suspect is likely to run away, interfere with the witnesses or commit another crime.

**Shortening time before trial** by appointing more judges, speeding up the court process, arranging for courts to sit for longer hours.

“ In Kampala, Uganda, the government, with funding and technical assistance from foreign aid agencies, developed the “chain-linked program” in the Masaka Magisterial Area. The program was “developed to demonstrate the benefit of a greater integration and coordination of roles, functions and activities of the various components of Uganda’s criminal justice system.” Through a process of reviewing backlogged cases, the participants were able to identify the root causes of delay in the system and reduce the length of pre-trial detention.

In 1998, the court system in Uganda had an extreme backlog of criminal and civil cases. For example, in one court, during a nine-month period only one case was decided. Such egregious delays led to the appointment of a Case Management Committee with representatives from the police, probation, prosecution, the prisons and the judiciary. The Committee meetings were soon held on a monthly basis, as it immediately became apparent that poor communication was largely behind the lengthy court delays. Today, “the monthly meetings of the Case Management Committee in Masaka are well attended.” They run “according to a fixed schedule, minutes are prepared and distributed to all participants including the Advisory Board.” Together, the agency representatives devise solutions to court congestion and case backlogs.

Penal Reform International, *Good Practices* 2003<sup>7</sup>

**Reviewing the legality of the detention status of pre-trial prisoners.** In some jurisdictions a significant number of pre-trial prisoners are either being illegally held or are past the length of sentence they would have served if convicted. The legality of pre-trial detention can be checked by visiting judges, lawyers or by the prison personnel and the court asked to release those held longer than the law allows.

“ In Bihar, India, judicial officials periodically visit prisons to review cases and dispense rulings on the spot. These “camp courts” only handle matters involving “small time offenders”.

Prior to the camp courts, over 12,000 pre-trial prisoners were “lodged in various jails of Bihar, waiting to be tried for minor offences.” Many had been “languishing for more time than the sentences” when the local high court “directed jail authorities to organize camp courts in the State’s jails to hasten the disposal of minor cases.” ... “Judicial magistrates and executive magistrates of respective districts” preside over the camp courts. Before each session, a superintendent of the local prison submits a list of prisoners eligible to participate.



*The Bihar camp courts convene on the last Saturday of every month. The camp courts have been highly effective at reducing the backlog of “simple bailable criminal cases and other simple compoundable cases of criminal nature.” For example, at camp courts “held all over the state on [one] Saturday, at least 5,383 petty criminal cases were disposed of in a single day.*

Penal Reform International, *Good Practices* 2003<sup>8</sup>

## Pre-trial alternatives

If pre-trial detention is to be avoided whenever possible, measures need to be available to ensure that the defendant does not flee before the trial or try to influence the outcome of the trial improperly. Alternatives to pre-trial detention include the following:

**Bail:** the court releases the defendant, perhaps with some conditions that have to be obeyed. Sometimes bail is granted when sureties are provided. Money is paid to the court, which is lost if the defendant does not appear for the trial.

**Reporting to a police station:** suspects are given bail and required to report to a police station regularly. If they fail to do so they will be arrested and detained.

### ““ Alternatives to pre-trial detention in Slovenia

- *The court may bind the accused over not to abscond or leave his place of residence without the permission from the court.*
- *The court shall stipulate people and places which the accused must avoid.*
- *The court may decide that the accused must report regularly to a specified police station.*
- *The accused may be released on bail given by himself or by someone else.*
- *The court may order that the accused stays at home.*

Vivien Stern, *Developing alternatives to Prison in Central and Eastern Europe and Central Asia* 2002<sup>9</sup>

**Other measures** can include house arrest, preventing suspects from visiting certain areas or, in the case of juveniles, finding a person to take responsibility and act as guarantor.

## Ensuring access to lawyers

In pre-trial detention facilities, arrangements for confidential access to lawyers should be made. Many countries do not have the resources to ensure that every charged person has access to legal advice and is represented in court by a defence lawyer.

““ *The Integrated Bar of the Philippines, an organization of lawyers involved in providing legal assistance to the poor and vulnerable, has set up a National Center for Legal Aid that assists in the legal requirements of indigents.*  
*“Right now we have a pilot project funded by UNDP for jail decongestion in Quezon City and Pasig City that began last September and I am happy to say that as of today, we were able to release 42 from those two jails,” says Victoria Gonzalez-De Los Reyes, Senior Deputy Director for legal aid of the Bar Association. Some of the released were found to be innocent while the rest, she says, were already beyond the impossible penalty but spent several months in prison because of the delay in the administration of justice.*

UNDP, *New Judicial Reforms in Philippines Aim to Address Needs of Poor* 2004<sup>10</sup>

The gap can be filled by students or university law schools providing free advice and representation, or by paralegals.

“ The Paralegal Advisory Service is an innovative experiment in offering paralegal aid in criminal matters in Malawi and Benin. In Malawi, four NGOs work in partnership with the Malawi Prison and Police Services as well as the courts to offer legal education, advice and assistance in the prisons, police stations and courts, ie on the front-line of criminal justice. The scheme has been operating since May 2000 and involves 28 trained paralegals who cover 84% of the prison population and work in four police stations and four court centres. Results in the period May 2000 – March 2003 show the PAS had:

- conducted more than 900 legal literacy clinics (PLCs) educating almost 16,000 prisoners and attended by over 335 prison officers
- facilitated the release of over 1350 prisoners
- drawn the attention of the Director of Public Prosecutions, police and criminal registry to the plight of hundreds of homicide remand prisoners who had been waiting years for trial or committal for trial
- attended 13 traditional authorities hearings
- observed 91 capital trials

Penal Reform International, *Good Practices* 2003<sup>11</sup>

## References

- 1 *Report to the Government of Denmark on the visit to Denmark carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 28 January to 4 February 2002*, Strasbourg, September 2002
- 2 *Pre-trial detention in the OSCE area*, Organisation for Security and Co-operation in Europe, September 1999
- 3 *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture or Inhuman or Degrading Treatment or Punishment from 20 to 28 May 2002*, Strasbourg, September 2003
- 4 Sarah Karush, *Prosecutor's Protest Stops Bill on Prisons*, Moscow Times, 1 February 2001
- 5 Yuri Ivanovich Kalinin, *The Russian Penal System: Past, Present and Future*, International Centre for Prison Studies, London, 2002
- 6 Peter Vassilev, *Regulating Bulgaria's Prison Population*, Prison Populations, Measures to Reduce Overcrowding in Prisons, Information Pack 1, Penal Reform International 1999, p.2
- 7 *Good practices in reducing pre-trial detention*, Penal Reform International, December 2003
- 8 *ibid*
- 9 Vivien Stern, *Developing Alternatives to Prison in Central and Eastern Europe and Central Asia*, Constitutional and Legal Policy Institute, Budapest, 2002, pp. 29-31
- 10 *New Judicial Reforms in Philippines Aim to Address Needs of Poor*, CHOICES magazine, United Nations Development Programme, March 2004
- 11 Also see *Paralegal Aid Clinics: a handbook for paralegals working in prison*, www.penalreform.org, for models of how paralegals can work in countries where resources are scarce

**KING'S**  
*College*  
**LONDON**

**International Centre  
for Prison Studies**

**International Centre for Prison Studies**

School of Law  
King's College London  
26-29 Drury Lane  
London WC2B 5RL

Tel: +44 (0)20 7848 1922  
Fax: +44 (0)20 7848 1901  
Email: [icps@kcl.ac.uk](mailto:icps@kcl.ac.uk)  
[www.prisonstudies.org](http://www.prisonstudies.org)

© International Centre for Prison Studies, 2004



Foreign &  
Commonwealth Office  
London