

The legitimate use of pre-trial detention aims to safeguard the integrity of the criminal justice process, including to prevent suspects from absconding or tampering with evidence before trial, pending trial or appeal, and from committing further crimes. However, the right to liberty and the presumption of innocence require that liberty awaiting trial should be the rule and detention the exception. Article 9 of the ICCPR provides that pre-trial detention should not be the general rule for those awaiting trial and that release should be subject to guarantees to appear when needed for the purposes of criminal proceedings.¹ Pre-trial detention, therefore, should be used as a last resort, for the shortest time possible, and only for the most serious offences.² Related violations include freedom from arbitrary arrest or detention,³ the right to a fair and public trial,⁴ without due delay⁵ and the right to be presumed innocent.⁶

JUSTIFICATIONS

Lawful use of pre-trial detention is governed by the principles of necessity, proportionality and reasonableness. Detention is to be based on a reasonable suspicion and substantively determined on an individual basis taking into account all circumstances with respect to the legitimate aims mentioned above. When considering whether pre-trial detention is warranted, judges must assess the seriousness and nature of the alleged offence, the strength of the evidence, the likely sentence if convicted and the personal circumstances of the accused.⁷ Relatedly, any instance of detention must be subject to a regular review and to the right of the detainee to be brought to trial within a reasonable time.⁸ Where detention is no longer justified, the accused must be released, otherwise the detention is rendered to be arbitrary.⁹ Competent authority: the decision to impose pre-trial detention can only be conferred to a judicial authority. Judges must stipulate a maximum duration of detention as part of their decision.⁹

ALTERNATIVES & SOLUTIONS

Non-custodial alternatives are to be considered and, where appropriate, implemented as early as possible.¹¹ Possible alternatives to pre-trial detention include: bail; reporting requirements; supervision; residence; restrictions; surrender of travel documents; financial or other guarantees.

Beyond alternatives, solutions to excessive use of pre-trial detention include but are not limited to decriminalising petty crimes, enshrining time limits on a person's detention, ensuring that accused persons are able to access legal aid and monitoring places of detention. Access to and the presence of legal and health professionals are key safeguards against abuse and demonstrably vital in improving the transparency of detention processes. Proper registration and documentation of pre-trial detention are also important.

EXCESSIVE USE: CAUSES & COSTS

Excessive use of pre-trial detention is a problem in many legal systems around the world.¹² This results from a number of factors including: where the risk of

absconding is interpreted (unduly) broadly; where there is a lack of means for financial guarantees; where criminal justice processes are confession-based; the lack of legal assistance; its over-use with respect to petty crimes; ineffective (i.e. ill-trained, ill-equipped etc.) law enforcement authorities; where there are a lack of alternatives; where there are delays in judicial system due to organizational capacity (e.g. distances, available judges); corruption.¹³ Excessive pre-trial detention affects the individual, state and society. For the individual, it might amount to a violation of his right to liberty (arbitrary detention) and will expose to an increased risk of ill-treatment. Often, it leads to loss of employment and, in turn, livelihood not just for an individual but also dependent family and community. Overcrowding increases levels of tension in relations between staff and inmates and among inmates, which may result in physical ill-treatment by staff and inter-prisoner violence. Relatedly, overcrowding also puts increased strain on the prison system to provide for basic needs such as food, medicine, and facilities, leading to sub-standard conditions of detention. It also carries a public health hazard as it increases the risk of contagious disease being spread. Further, for the authorities, it will place additional, unnecessary strain who, in turn, cannot ensure humane conditions, safety and security and resocialisation. For the society, excessive use of pre-trial detention represents a strain on family ties, an unjustified financial burden and increases the risk of recidivism.

MOREOVER

- Investigative capacity: it is imperative to enable law enforcement authorities to conduct investigations in a timely and effective manner in order to avoid undue delays and to avoid over-reliance on confessions.
- Defence preparation: pre-trial detention 'lessens a suspect's possibilities of defence, particularly when the person is poor and cannot rely on a defence counsel or support to obtain evidence in his favour'.¹⁴
- Access to the outside world: pre-trial detainees must be allowed, 'under necessary supervision, to communicate with their family and friends at regular intervals'.¹⁵ Restrictions cannot be total.
- Segregation: to protect their presumption of innocence, pre-trial detainees must also be segregated from convicted prisoners. Solitary confinement should however not be used as a general rule, given its harms and potential use as a coercive tool.¹⁶
- Redress: Those subjected to unlawful or arbitrary arrest or detention are entitled to effective remedies and reparations.¹⁷
- The right to trial within a reasonable time: There is no specific time limit of what amounts to arbitrary or unlawful. Reasonable time is a matter of assessment on a case-by-case basis. Considerations of resources for criminal justice administration and delays in evidence gathering were not found to be legitimate justifications in one case.¹⁸ International bodies have however provided guidance on outer limits in some cases.¹⁹

REFERENCES

¹ See also UN General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, General Assembly, 9 December 1988, A/RES/43/173, Principles 36-39.

² United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) 1990, rule 6.2.

³ ICCPR, Article 9 (1); African Charter on Human and Peoples' Rights, 1981, Article 6; UNSRT, Report on Mission to Georgia, A/HRC/31/57/Add.3, 1 December 2015, para. 111.

⁴ ICCPR, Article 14 (1); African Charter on Human and Peoples' Rights, 1981, Article 7.

⁵ ICCPR, Article 14 (3) (c).

⁶ ICCPR, Article 14 (2).

⁷ Report prepared by the Secretariat, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders (1990) A/CONF.144/28/Rev.1 p 158

⁸ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 (ECHR), Article 5(1)(3); Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 7(1)(d); Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, Article 7(5).

⁹ UN, Working Group on Arbitrary Detention, Annual Report presented to the Human Rights Council, A/HRC/7/4, para. 72.

¹⁰ ECHR, 'Guide on Article 5 of the Convention: Right to Liberty and Security' (2012); UN Human Rights Committee (HRC), Communication No 1547/2007, Munarbek Torobekov v Kyrgyzstan, 27 October 2011, CCPR/C/103/D/1547/2007, para. 6.3; UN HRC, Comm No. 1369/2005, Felix Kulov, 26 July 2010, CCPR/C/D/1369/2005.

¹¹ Tokyo Rules, para. 6.2; HRC, Griffiths v. Australia, Comm No 1973/2010, 21 October 2014, CCPR/C/112/D/1973/2010, para 7.2; UNSPT, Eighth annual report, CAT/C/54/2, para. 89; UNCAT on alternatives: CAT/C/BHR/CO/2-3; CAT/C/NAM/CO/; CAT/C/ARM/CO/4; CAT/C/MNG/CO/2; CAT/C/PHL/CO/3; A/HRC/31/57/Add.3.

¹² Open Society Foundations (OSF), Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk, 24 June 2011, p. 22; see also World Prison Brief.

¹³ OAS, Inter-American Commission on Human Rights, Report on the Use of Pretrial Detention in the Americas, OEA/Ser.L/V/II.Doc. 46/1330 December 2013, para. 50.

¹⁴ SPT, Report on Paraguay, 7 June 2010, CAT/OP/PRY/1, para. 64; see also Principle 9 of United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of their Liberty to Bring Proceedings before a Court, A/HRC/30/37, 6 July 2015, para. 25; Luanda Guidelines, Article 4.D.

¹⁵ UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), General Assembly, 8 January 2016, A/RES/70/175, Rule 58(1).

¹⁶ UN, Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Interim Report, A/66/268,

published on August 5, 2011, para. 73: While physical and social segregation may be necessary in some circumstances during criminal investigations, the practice of solitary confinement during pretrial detention creates a de facto situation of psychological pressure which can influence detainees to make confessions or statements against others and undermines the integrity of the investigation. When solitary confinement is used intentionally during pretrial detention as a technique for the purpose of obtaining information or a confession, it amounts to torture as defined in article 1 or to cruel, inhuman or degrading treatment or punishment under article 16 of the Convention against Torture, and to a breach of article 7 of the International Covenant on Civil and Political Rights.

¹⁷ HRC General Comment 35, para. 49; See also Principle 15 of United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of their Liberty to Bring Proceedings before a Court, A/HRC/30/37, 6 July 2015, para. 25; Luanda Guidelines, Article 38.

¹⁸ N. Fillastre v. Bolivia, 5 November 1991, 336/1988, A/47/40, p. 306, para. 6.5.

¹⁹ While there is no specific time limit to what is excessive, the Human Rights Committee and Working Group on Arbitrary Detention have found violations in cases where the individual was detained for two and a half years, six years, and seven years prior to execution of the judgment. See respectively HRC, Raymond Griffiths v. Australia, Comm. No. 1973/2010, adoption of views, Oct. 21, 2014, CCPR/C/112/D/1973/2010; HRC, Medjounne v. Algeria, Comm. No. 1297/2004, Jul. 14, 2006, CCPR/C/87/D/1297/2004; HRC, Taright, et al v. Algeria, Comm. No. 1085/2002, Mar. 15, 2006, CCPR/C/86/D/1177/2003; See also, A. Perkins v. Jamaica, 19 March 1998, Comm. No.733/1997, A/53/40, (vol. II), p. 210, para. 11.3 (1 year and 9 months); F. Kone v. Senegal, 21 October 1994, Comm. No. 386/1989, A/50/40 (vol. II), p. 8, para. 8.6 (4 years and 4 months without trial date); L. Shalto v. Trinidad and Tobago, 4 April 1995, Comm. No. 447/1991, A/50/40 (vol. II), p. 19, para. 7.2 (almost 4 years between ruling for retrial and its commencement).