



Pre-trial detention

Addressing risk factors to prevent torture and ill-treatment

‘Long periods of pre-trial custody contribute to overcrowding in prisons, exacerbating the existing problems as regards conditions and relations between the detainees and staff; they also add to the burden on the courts. From the standpoint of preventing ill-treatment, this raises serious concerns for a system already showing signs of stress.’

(UN Subcommittee on Prevention of Torture)¹

1. Definition and context

Remand prisoners are detained during criminal investigations and pending trial. Pre-trial detention is not a sanction, but a measure to safeguard a criminal procedure.

At any one time, an estimated 3.2 million people are behind bars awaiting trial, accounting for 30 per cent of the total prison population worldwide. In some countries, pre-trial detainees reportedly constitute the majority of the prison population, and in some settings even over 90 per cent of detainees.² They are legally presumed innocent until proven guilty but may be held in conditions that are worse than those for convicted prisoners and sometimes for years on end.

Pre-trial detention undermines the chance of a fair trial and the presumption of innocence. It increases the risk of a confession or statement being coerced by torture or ill-treatment and ‘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’.³

Alongside the general risk of violence from guards and fellow prisoners, high rates of pre-trial detention also contribute to widespread prison overcrowding, exacerbating poor prison conditions and heightening the risk of torture and ill-treatment.⁴

2. What are the main standards?

Because of its severe and often irreversible negative effects, international law requires that pre-trial detention should be the exception rather than the rule.

Pre-trial detention is only legitimate where there is a reasonable suspicion of the person having committed the offence, and where detention is necessary and proportionate to prevent them from absconding, committing another offence, or interfering with the course of justice during pending procedures. This means that pre-trial detention is not legitimate where these objectives can be achieved through other, less intrusive measures. Alternative measures include bail, seizure of travel documents, the condition to appear before the court as and when required and/or not to interfere with witnesses, periodic reporting to police or other authorities, electronic monitoring, or curfews.

Both the UN Standard Minimum Rules for Non-custodial Measures (the ‘Tokyo Rules’) and the UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the ‘Bangkok Rules’) encourage criminal justice systems to provide a wide range of non-custodial measures to avoid the unnecessary use of imprisonment. However, the absence of alternatives and shortcomings in their implementation have been reported by international⁵ and regional⁶

1. UN Subcommittee on Prevention of Torture (SPT), Report on Benin, 11 March 2011, CAT/OP/BEN/1, para.158.

2. Report of the United Nations High Commissioner for Human Rights, *Human rights implications of overincarceration and overcrowding*, 10 August 2015, A/HRC/30/19, with reference to CAT/C/TGO/CO/2, para. 12, www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/QSJI.pdf and A/HRC/25/71, para. 33.

3. UN Subcommittee on Prevention of Torture (SPT), Report on Paraguay, 7 June 2010, CAT/OP/PRY/1, para.64.

4. Report of the United Nations High Commissioner for Human Rights, *Human rights implications of overincarceration and overcrowding*, 10 August 2015, A/HRC/30/19.

5. See UN Subcommittee on Torture, Report on Brazil, 5 July 2012, CAT/OP/BRA/1, para. 96; UN Human Rights Committee, Concluding observations on the initial report of Angola, 29 April 2013, CCPR/C/AGO/CO/1, para. 19; Report of the UN Special Rapporteur on torture, Mission to Ghana, 5 March 2014, A/HRC/25/60/Add.1, para. 84; and UN Committee against Torture, Consideration of reports submitted by States parties under article 19 of the Convention, 20 January 2011, CAT/C/KHM/CO/2, para. 19.

6. See European Committee for the Prevention of Torture, Visit to Slovak Republic 24 September to 3 October 2013, 25 November 2014, CPT/Inf (2014) 29, para. 33.

bodies, and identified as a significant contributor to overincarceration and overcrowding.⁷

A range of standards linked to arrest and pre-trial detention are safeguards in their own right, while at the same time protecting arrestees and remand prisoners from torture and other ill-treatment. These include: protection against arbitrary arrest; prompt information about the reasons for arrest and detention; prompt registration of the arrest including precise information about the reasons; identity of the law enforcement officials and the place of detention; prompt access to a judge; habeas corpus; trial without delay; presumption of innocence; separation of pre-trial detainees from convicted prisoners; regular review of the legality of pre-trial detention; and access to the outside world, including access to independent doctors and family visits.

Main references

- International Covenant on Civil and Political Rights (1966), Articles 9 and 14
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988)
- UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012)
- UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) (1990)
- Revised UN Standard Minimum Rules for the Treatment of Prisoners (1955) – Section C – Prisoners under arrest or awaiting trial, Rules 111-120⁸
- UN Basic Principles on the Role of Lawyers (1990)
- UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules) (2010), Rules 57 et seq
- UN International Convention for the Protection of All Persons from Enforced Disappearance (for registration/ documentation) (2007)
- European Convention on Human Rights, Articles 5 and 6
- American Convention on Human Rights, Articles 7 and 8
- Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas African Charter of Human People's Rights (Banjul Charter), Articles 6 and 7
- African Commission on Human and Peoples' Rights, Guidelines for Pre-Trial Detention⁹

7. See Report of the United Nations High Commissioner for Human Rights, *Human rights implications of overincarceration and overcrowding*, 10 August 2015, A/HRC/30/19, para. 39.

8. The revised United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), adopted by the UN Commission on Crime Prevention and Criminal Justice on 22 May 2015, endorsed by the Economic and Social Council on 9 September 2015, E/RES/2015/20 and adopted by UN General Assembly Third Committee on 5 November 2015, A/C.3/70/L.3 (at the time of printing this Resolution was pending adoption by the plenary of the UN General Assembly.)

9. Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, adopted by the African Commission on Human and Peoples' Rights (the Commission) during its 55th Ordinary Session in Luanda, Angola, from 28 April to 12 May 2014. http://www.achpr.org/files/special-mechanisms/prisons-and-conditions-of-detention/guidelines_arrest_police_custody_detention.pdf <accessed 3 December 2015>.

10. Decision of the Constitutional Council of Kazakhstan, 13 April 2012 # 2. Full text (in Russian) available at: [http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/asi/kaz/kaz-2012-3-001?f=templates\\$fn=document-frame.htm\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/asi/kaz/kaz-2012-3-001?f=templates$fn=document-frame.htm$3.0) <accessed 17 November 2015>.

11. See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Use of terms, lit. (a), adopted by General Assembly resolution 43/173 of 9 December 1988.

3. Types and situations of risk

3.1. Insufficient safeguards during arrest

The moment of arrest is a particularly dangerous situation in the context of torture and ill-treatment as law enforcement officials may coerce a statement or confession in order to justify the arrest, before the arrestee has had a chance to seek legal representation.

Most occurrences of torture take place during police detention prior to a detainee's appearance before a judge. In many jurisdictions, this risk is exacerbated by the long periods for which an arrestee can be held at a police station without being brought before a judge, and by provisions preventing access to a lawyer during the first day(s) after arrest.

Kazakhstan: Moment of arrest

In March 2012, the Constitutional Council of Kazakhstan had to rule on the interpretation of Article 16 (2) of the Constitution, according to which a person may only be detained for a period of 72 hours before being brought before a judge. There had been differing opinions on what triggers the start of this time period, with the prevailing interpretation being that it should start from the arrival of the suspect in a detention centre or the registration of the detainee. However, such an interpretation would mean that authorities could determine – and manipulate – access to safeguards, by delaying the transfer or registration of the arrestee and thereby undermining their protection. In part based on a submission by Penal Reform International Central Asia, the Constitutional Council established¹⁰ that 'arrest' refers to the moment when a person is apprehended.¹¹

Lack of information about the nature and cause of the charges, in a language the arrestee understands, further reduces their ability to withstand pressure and coercion, and increases the risk of an infringement of the right to silence.

International standards require that anyone who is arrested should be informed at the time of his arrest of the reason for his apprehension and be promptly informed of any charges against him.¹² Being able to inform family or legal representatives constitutes another important safeguard. The revised Standard Minimum Rules state that every prisoner ‘has the right and shall be given the ability and means to inform immediately his or her family, or any other person designated as a contact person, about his or her imprisonment’, and about his or her transfer to another institution.¹³

What could monitoring bodies check?

- How is the court notified after the arrest?
- How is the moment of arrest defined in law and interpreted in practice?
- What is the time limit prescribed by law for the suspect to be brought before a judge? What activates this time limit?
- Is practice in conformity with the law?
- When and how are arrestees informed about the nature and cause of the charges against them, and of their right to silence? Do they have the right and opportunity to inform their family or a legal representative?
- How long can arrestees be held at a police station?
- Can interrogations take place without the presence of a legal counsel?
- Is audio- or video recording in place in order to monitor and prevent ill-treatment during interrogations?¹⁴
- Does a medical examination take place regularly, in particular upon arrival at a pre-detention facility following arrest and interrogation at a police station or facility?
- Does the law prescribe the quashing of evidence obtained under torture or ill-treatment? How are such allegations dealt with by courts in practice?

3.2. Systemic factors in law enforcement

Lack of forensic methodology or training in crime investigation techniques both increase the risk of law enforcement officials resorting to torture and ill-treatment in order to close an investigation with a confession.

At the same time, the investigating agencies/police are often under considerable pressure to ‘deliver results’ and

systems of appraisal for law enforcement officials may act as an incentive for officers to use unlawful methods of investigation if they focus only on the number of crimes ‘solved’.

‘Another result of the malfunctioning of the administration of justice system, which is detrimental to human rights, is that it generates pressure on the police to “resolve cases” by means other than careful and objective investigations – this temptation increases further, when the success of individual policemen and -women is measured exclusively on the basis of the number of cases they “resolve”. Contrary what many believe, in my assessment, it is not so much “political” torture that is problematic – it is the everyday extortions of confessions from so-called “ordinary” criminal suspects.’ (UN Special Rapporteur on Torture)¹⁵

Reviewing the criteria of appraisals, as well as improving investigation techniques, has the potential to reduce the incidence of abuse by reducing one of the underlying motives which can prompt law enforcement officials to resort to torture and ill-treatment in the first place.

What could monitoring bodies check?

- What forensic methods are available to law enforcement other than interrogation?
- Are law enforcement officials sufficiently trained in investigation techniques?
- What percentage of convictions is based on confessions?
- What is the system of and criteria for appraisal for law enforcement? Does it only consider the number of crimes handed to prosecution?

3.3. Excessive use and length of pre-trial detention

Beside other human rights concerns, the excessive and prolonged use of pre-trial detention in many countries contributes to overcrowding, which in turn frequently results in conditions of detention amounting to torture or ill-treatment.¹⁶

“ The Subcommittee continues to be bemused by the complacency which seems to surround the routine use of pretrial detention for prolonged periods and the resulting chronic overcrowding, and all

12. Principle 10, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Rule 119 (1) of the revised Standard Minimum Rules.

13. Revised Standard Minimum Rules, Rule 68.

14. See PRI/APT, ‘Video recording in police custody’ Factsheet, in *Detention Monitoring Tool*, 2nd edition, 2015.

15. Statement by Manfred Nowak, Special Rapporteur on Torture, at the 18th session of the Commission on Crime Prevention and Criminal Justice, 24 April 2009, Vienna. Available at: www.unodc.org/unodc/en/frontpage/un-human-rights-rapporteur-denounces-torture.html <accessed 30 September 2013>

16. See, for example, UN Subcommittee on Prevention of Torture, Eighth Annual Report, 26 March 2015, CAT/C/54/2, para. 77; or National Consultative Commission for the Promotion and Protection of Human Rights (CNCPPDH), Algeria, submission to UN Human Rights Council resolution 24/12 on ‘Human rights in the administration of justice, including juvenile justice’, 2014. (In French) www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/CNCPPDH_Algeria.pdf <accessed 3 December 2015>.

its associated problems. (...) Rather than wait for the Subcommittee to come and recommend the obvious —such as, that the use of pretrial detention be used as the last resort, and only for the most serious offences or where there are serious risks that can only be mitigated by the use of pretrial detention—there is no reason why States parties should not embark on such strategies immediately, thus giving life to their obligation to prevent torture.” (SPT)¹⁷

What could monitoring bodies check?

- What is the proportion of pre-trial detainees compared to convicted prisoners in the country?
- Is the principle of last resort for pre-trial detention enshrined in national legislation, and how is it applied in practice?
- What non-custodial alternatives to pre-trial detention are enshrined in criminal procedural laws?
- Do decisions indicate due consideration of necessity and proportionality or are they schematic and based on standard text modules?
- Are prosecutors/judges/magistrates required to consider non-custodial measures as a priority?
- Is pre-trial detention mandatory for certain offences?
- For which offences is bail applicable, if at all?
- What are the formal requirements/procedures for submitting a request for bail?
- How many requests for bail (percentage) are granted compared to pre-trial detention orders imposed?
- Are denials of bail reasoned, on what grounds, and is there a remedy available?
- Is pre-trial detention reviewed regularly, and by whom? Are the principles of necessity and proportionality reviewed thoroughly?
- How many judges are responsible for reviewing pre-trial detention, what is their capacity, and how are they trained?
- Is data available on the duration from arrest to indictment, to the start of the trial and to the verdict?
- Is a maximum time limit for pre-trial detention enshrined in law, and (how) is it enforced in practice?
- Is a remedy available to complain in case of an infringement of the right to trial without delay? What are the consequences if such a complaint is successful?

- Is the duration of pre-trial detention included in the calculation of a prison sentence handed down subsequently?
- Is data available both on the percentage of acquittals following pre-trial detention and on acquittals where non-custodial alternatives were applied?
- Is compensation granted if pre-trial detention is found to be illegitimate?

3.4. Risks during transfer to the detention facility

Transport from the place of arrest to the police station, from the initial place of detention to another facility, and from detention to court, are also situations of particular risk. Reports include ill-treatment in a (police) vehicle or even being taken to a remote place and tortured there.

“ In April, police officers drove Bakary J [a Gambian national], whose deportation had been stopped, to an empty warehouse in Vienna where he was handcuffed, kicked, beaten and threatened with a mock execution. The officers later took him to a hospital and told staff that he had been injured while attempting to escape, and he was eventually returned to a detention centre. Neither the police officers nor medical staff at the hospital reported the events, and criminal investigations were not initiated until Bakary J’s wife made a complaint. According to medical documentation, Bakary J’s skull was fractured in several places and he had several bruises.”

(Amnesty International, Annual Report on Austria 2007)

Conditions experienced by detainees during transport may also give rise to concerns about inhumane or degrading treatment. This might include crowded vehicles, inadequate temperature and ventilation and lack of consideration for hygiene. The UK inspection body, for instance, has reported that during transports ‘only a few adult prisoners were offered a “comfort break” to use a toilet. Instead prisoners were offered a liquid absorbing gel-bag to use in their tiny cell while the van was on the move’.¹⁸

There are few standards that prescribe safeguards to prevent torture and ill-treatment during the transport of detainees, and safeguards in place for police stations

17. UN Subcommittee on Prevention of Torture (SPT), Fourth Annual Report, para. 52 on ‘Overcrowding and Pre-trial Detention’, 11 February 2011, CAT/C/46/2. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2F46%2F2&Lang=en <accessed 17 November 2015>.

18. HM Inspectorate of Prisons, UK, *A thematic review by HM Inspectorate of Prisons, Transfers and escorts within the criminal justice system*, December 2014, p5.

and detention centres, such as video cameras, are also typically absent during this period.

The Standard Minimum Rules for the Treatment of Prisoners require for transports to take place in conveyances with adequate ventilation or light, prohibit ‘unnecessary physical hardship’, and require that proper safeguards during transport are adopted to protect prisoners from insult, curiosity and publicity in any form.¹⁹ Audio-visual recording in police vans may provide an important safeguard against ill-treatment.²⁰

What could monitoring bodies check?

- Are detainees taken directly to the initial place of detention without delay?
- Do transfers from one detaining agency to another have to be based on a judicial order?
- Are records kept of transfers of prisoners, the law enforcement officials involved, the time of departure and of arrival at the subsequent place of detention?
- Are authorities responsible for the place of detention required to certify that the prisoner arrived without injuries?
- Are any means of surveillance or inspection in place to supervise actions of law enforcement during transport?
- What are the conditions of transport? Are vehicles overcrowded? Do they take place in an overheated or cold vehicle? How long do transports take and is there an opportunity to use a washroom for longer transports?

3.5. Deficiencies in documentation of arrest and detention

Cases of unacknowledged detention are a particularly high-risk situation with regard to torture and other ill-treatment, as are enforced disappearance and arbitrary detention. Moreover, where there is no centralised register or case file system, authorities are unable to effectively monitor the length of time spent in pre-trial detention or ensure its regular review. Inadequate file management, lost files and poor communication between criminal justice actors can mean that authorities simply do not have accurate knowledge about who is due to be released.²¹

International standards on adequate and accurate record-keeping of arrest and detention, and the requirement to hold detainees in places officially recognised as places of detention, seek to address these risks.

19. Revised Standard Minimum Rules, Rule 73 (2).

20. See recommendation of the European Committee for the Prevention of Torture (CPT) in the comparable context of deportations, *CPT Standards*, CPT/Inf/E (2002) 1 – Rev. 2011, page 82, para. 44. Available at: www.cpt.coe.int/en/documents/eng-standards.pdf. <accessed 30 September 2013>.

21. Report of the United Nations High Commissioner for Human Rights, *Human rights implications of overincarceration and overcrowding*, 10 August 2015, A/HRC/30/19, para. 35.

22. Article 17 (3), International Convention for the Protection of All Persons from Enforced Disappearance; revised Standard Minimum Rules, Rule 7.

23. *Ibid.*

24. Article 17 (3), International Convention for the Protection of All Persons from Enforced Disappearance.

25. Revised Standard Minimum Rules, Rule 6.

26. Principle 12, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the revised Standard Minimum Rules enshrine the obligation to record precise information on every detainee's identity; the reasons for, responsible authority, date and time of arrest; time (day and hour) at which the arrested person is taken to a place of custody as well as day and time of release and any transfer; first appearance before a judicial or other authority; identity of the law enforcement officials concerned and precise information concerning the place of custody; as well as any visible injuries and complaints about prior ill-treatment.²² It is also required that such records are communicated to the detained person, or his/her counsel.²³ The UN International Convention for the Protection of All Persons from Enforced Disappearance has enshrined additional requirements of record-keeping: the authority responsible for supervising the deprivation of liberty; elements relating to the state of health of the person deprived of liberty; and in case of release or transfer, the destination and the authority responsible for the transfer.²⁴

The revised Standard Minimum Rules specify that a standardised prisoner file management system should be kept in every place where persons are imprisoned, and may be an electronic database or a registration book with numbered and signed pages. They further require that procedures should be in place to ensure a secure audit trail and to prevent unauthorised access to or modification of any information contained in the system.²⁵ The records should be subject to review by appropriate authorities and external oversight.²⁶

In order to avoid this safeguard being undermined by a multitude of different records preventing adequate scrutiny, it is recommended that a single and comprehensive custody record should be kept.

What could monitoring bodies check?

- Is there a requirement by law to keep a record of arrest and detention?
- What data is documented? Reasons for and time of arrest; first appearance before a judicial or other authority; identity of the law enforcement officials involved; precise information concerning the place of custody; authority responsible for supervising the deprivation of liberty; state of health of the detainee; date and time of release; date, time, destination and authority responsible for transfer?

- Who is in charge of the proper recording of this information? Is there any authority responsible for supervising and surveying record-keeping?
- Is proper record-keeping observed in practice?
- What are the consequences for inadequate documentation by law enforcement officials/ prison administration?
- Does a single, comprehensive register exist or does a patchwork of different records undermine its value?
- Where is this information kept (electronic database or records, registration book with numbered pages) and how is it linked to a nationwide register of persons deprived of their liberty?
- Is there a secure audit trail and are there measures to prevent unauthorised access to or modification of any information contained in the system?
- Who has access to the register? Do the detainee and his counsel have access to his/her records? Are there external oversight mechanisms?
- What is the system of case management between different stakeholders involved (detention facility, prosecutor/magistrate, court)?
- For how long is the register kept?

3.6. Inadequate conditions in pre-trial detention

Remand prisoners may initially be held in police custody before being transferred to a penitentiary pre-trial facility.

When in police custody, remand prisoners are held by the same institution that is tasked with the investigation of their alleged offence and which may well be under pressure to 'deliver results'. Suspects are often interrogated without the presence of a lawyer or any independent monitor, providing officials with ample opportunity to exert pressure, including through ill-treatment.

In many countries pre-trial detainees are confined in police cells for prolonged periods, even though police stations are not equipped with the facilities, infrastructure, personnel or budget necessary to accommodate people for longer periods of time. As a consequence, pre-trial detainees are often held in conditions worse than those experienced by convicted prisoners. Police cells may be overcrowded to such an extent that it amounts to cruel, inhuman or degrading treatment or punishment, in particular when suspects are kept in police custody for extended periods.

Following transfer to a detention facility, the lack of separation between prisoners awaiting trial and convicted prisoners is a serious cause for concern. Pursuant to

international law, these categories of prisoners have to be held in separate facilities or in separate sections of the same facility.²⁷

Given that pre-trial detainees are presumed to be innocent, and may not even have been charged at this stage, pre-trial detention must not assume the characteristics of a prison sentence. The revised Standard Minimum Rules emphasise that unconvicted prisoners are presumed to be innocent and should be treated as such, and that they should 'benefit from a special regime'.²⁸ This includes accommodation 'singly in separate rooms, with the reservation of different local custom in respect of the climate', the ability to have their food procured at their own expense from the outside, being allowed to wear their own clothing, being offered the opportunity to but not required to work, and access to treatment by their own doctor, although 'at their own expense'.²⁹

What could monitoring bodies check?

- Are interrogations audio- or video-recorded?
- What are the conditions in police custody (cell size, ventilation, food, healthcare, outdoor exercise, access to activities)?
- How long are persons detained at police stations before being transferred to a pre-trial detention facility?
- Are remand prisoners transferred to/held in specific types of detention?
- Are they separated from convicted prisoners?
- Do conditions in pre-trial detention assume the nature of a sentence?

3.7. Lack of access to the outside world

When prisoners are held incommunicado for days, weeks or months there is an increased risk of abuse occurring and going undetected. Access by detainees to the outside world, such as visits by relatives and others concerned about their well-being, is a key safeguard against abuse, and against enforced disappearances. Visitors can learn about the condition of detainees and are able to intervene on their behalf.

The revised Standard Minimum Rules require that detainees are allowed, 'under necessary supervision, to communicate with their family and friends at regular intervals' by correspondence as well as by receiving visits, and where available by telecommunication, electronic, digital and other means.³⁰

Access to doctors, in particular to independent physicians, is particularly important in order to detect and document injuries, providing the evidence necessary for

27. Article 10 of the International Covenant on Civil and Political Rights, Principle 8 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Rule 112 (1) of the revised Standard Minimum Rules.

28. Revised Standard Minimum Rules, Rule 111.

29. Revised Standard Minimum Rules, Rules 112-118.

30. Revised Standard Minimum Rules, Rule 58.

an effective complaint, and to prevent impunity. To this end, prisoners should have a right to be examined by a doctor of their choice.³¹

“ The Human Rights Committee has emphasised the need ‘to have suspects examined by an independent doctor as soon as they are arrested, after each period of questioning and before they are brought before the examining magistrate or released.’ ”³²

For foreign nationals, contact with the diplomatic or consular representation constitutes an important safeguard, in particular as they may not have family contacts they can resort to, and lack knowledge of the local language and legal system.³³

Regulations introducing delays in the notification of relatives, as well as legal and practical barriers hindering prisoners’ access to the outside world, should be examined particularly thoroughly.

What could monitoring bodies check?

- Is there a requirement by law to notify a family member and/or a legal representative of the arrest?
- Who is responsible for this notification, and at what point in time after the arrest?
- When and how can remand prisoners contact their family/lawyer? Is there a cost to prisoners to exercise this right?
- Do independent doctors have access to the place of detention?
- Are foreign nationals informed about and given the opportunity to contact their diplomatic or consular representation?

3.8. Lack of access to legal representation

Access to lawyers is not only a key safeguard for a fair trial, but also for the prevention of torture and ill-treatment. However, in order for this safeguard to be efficient, pre-trial detainees need to be able to

communicate with a counsel of their own choosing³⁴ – without delay, interception or censorship and in full confidentiality.³⁵ If staff presence is claimed to be required for security reasons, consultations may be within sight, but not within hearing, of prison staff.³⁶

Furthermore, access of detainees to legal documents and the right to keep them in their possession, required by Rule 53 of the revised Standard Minimum Rules, is an essential element of access to remedies.³⁷ The revised Standard Minimum Rules also require that untried prisoners be provided with writing material for the preparation of documents related to their defence, including confidential instructions for their legal adviser or legal aid provider.³⁸

Alongside legal counsel for criminal proceedings, pre-trial detainees must also have access to legal representation in order to exercise their right to complain and appeal effectively in case of torture or other ill-treatment or non-adherence to safeguards on conditions in detention.³⁹ Access to a legal adviser should not require the detainee or the lawyer to disclose the reason for consultation as this would invalidate the safeguard.

What could monitoring bodies check?

- Are remand prisoners notified of their right to contact a legal adviser? In which language(s) and which formats?
- What is the maximum delay provided for in law before an arrestee must be granted contact with a legal representative? Is this observed in practice?
- How long is the delay between a remand prisoner expressing the wish to contact his/ her legal adviser and actual access being granted?
- Does communication with legal counsel take place without interception or censorship and in full confidentiality?
- Do remand prisoners and their legal representatives have access to all relevant legal documents? How is this access exercised in practice?
- Can remand prisoners keep legal documents in their cell or somewhere else where they can access them?
- Do prisoners have to disclose a reason for wanting to see their legal representative?

31. Rule 118 of the revised Standard Minimum Rules state that ‘An untried prisoner shall be allowed to be visited and treated by his or her own doctor or dentist if there are reasonable grounds for the application and he or she is able to pay any expenses incurred’.

32. UN Human Rights Committee, Concluding observations on Switzerland, 1996, CCPR/C/79 Add. 70.

33. Revised Standard Minimum Rules, Rule 62.

34. Article 14 (3b), International Covenant on Civil and Political Rights (ICCPR), revised Standard Minimum Rules, Rule 120 (1) and 61 (4).

35. Principle 22, UN Basic Principles on the Role of Lawyers, revised Standard Minimum Rules, Rule 120 (1) and 61 (4).

36. Revised Standard Minimum Rules, Rule 120 (1) and 61 (4).

37. UN Human Rights Committee, General Comment No. 3 on Article 14; Rule 23(6) of the European Prison Rules.

38. Revised Standard Minimum Rules, Rule 120 (2).

39. Revised Standard Minimum Rules, Rule 61.

3.9. Lack of access to legal aid

Most legal systems are too complex for detainees to represent themselves and many prisoners, coming from poor and marginalised backgrounds, are unable to afford a lawyer. Access to legal aid is a precondition for them to have access to legal representation.

A legal aid system⁴⁰ needs to be available,⁴¹ accessible and effective.⁴² The revised Standard Minimum Rules require that untried prisoners are assigned a legal adviser if they do not have one of their own choice in 'all cases where the interests of justice so require and without payment' if they do not have sufficient means.⁴³

Access to legal aid requires, first of all, that detainees are aware of the availability of legal aid schemes. The revised Standard Minimum Rules require that detainees are informed upon admission about their rights and that this should cover access to legal advice, including through legal aid schemes. This information must be made available 'in the most commonly used languages', with interpretation if the detainee does not understand any of these languages, orally in case of illiteracy, and in a manner appropriate to their needs for prisoners with sensory disabilities.⁴⁴

In order to be accessible, the detainee must be provided with 'adequate opportunity, time and facilities to be visited by and to communicate and consult with a legal adviser of their own choice or a legal aid provider, without delay, interception or censorship and in full confidentiality, on any legal matter, in conformity with applicable domestic law'.

Furthermore, the effectiveness of legal aid requires an avenue to challenge the denial of legal aid.⁴⁵ The revised Standard Minimum Rules provide that denial of access to a legal adviser shall be subject to independent review without delay.⁴⁶

In cases where detainees do not speak the local language, the prison administration should facilitate access to the services of an independent and competent interpreter.⁴⁷

What could monitoring bodies check?

- Are remand prisoners notified of their right to apply for legal aid? When, how and by whom is this information provided?
- For which procedures and under what circumstances is legal aid available? Does the legal aid system include: complaints against torture and ill-treatment;

complaints against conditions of detention or treatment in breach of national/international standards; submissions or motions for non-custodial alternatives such as bail?

- Are legal aid providers available and accessible in practice?
- What is the delay between an application for legal aid and a legal aid provider having actual access to the remand prisoner?
- What professional training do legal aid providers undergo, and what is their ethical code? Are they independent?
- What is the income test applied for eligibility for a legal aid scheme and what evidence is it based on? Do the criteria discriminate against certain groups, eg. based on gender or social status?
- Are statistics available on the number of cases in which legal aid is granted and denied?
- Is there a possibility to challenge the denial of access to legal aid?

3.10. Discrimination against certain groups

Certain groups of prisoners may be at higher risk of being on remand, often as a result of discrimination in the criminal justice system. For example, Indigenous peoples, racial and ethnic minorities tend to be overrepresented amongst pre-trial detainees. Foreign nationals are frequently presumed to pose a higher risk of absconding, and subject to the increasing criminalisation of migration.

“Where pre-trial detention is ultimately linked to bail, poverty and social marginalization appear to disproportionately affect the prospects of persons chosen to be released pending trial. Bail courts base their decision whether to release an accused person also on his or her “roots in the community”. People having stable residence, stable employment and financial situation, or being able to make a cash

40. States employ different models for the provision of legal aid. These may involve public defenders, private lawyers, contract lawyers, pro bono schemes, bar associations, paralegals and others.

41. Article 14 ICCPR (3) (d): (...) to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

42. Revised Standard Minimum Rules, Rule 61 (3); Principle 2, UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (states should 'ensure a comprehensive legal aid system is in place that is accessible, effective, sustainable and credible'; Principle 12 (ensure that legal aid providers are able to carry out their work effectively); Principle 7 (provides for prompt and effective provision of legal aid 'at all stages of the criminal process' and 'unhindered access to legal aid providers for detained persons.').

43. Revised Standard Minimum Rules, Rule 119 (1).

44. Revised Standard Minimum Rules, Rules 54 (b) and 55.

45. Principle 9 (Remedies and safeguards), UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2012.

46. Revised Standard Minimum Rules, Rule 119 (1).

47. Revised Standard Minimum Rules, Rule 61 (2).

48. Working Group on Arbitrary Detention, Report to the Commission on Human Rights, 12 December 2005, UN-Doc. E/CN.4/2006/7, para. 66.

deposit or post a bond as guarantee for appearance at trial are considered as well-rooted. These criteria of course are often difficult to meet for homeless, drug users, (...or) the chronically unemployed (...) who thus find themselves in detention before and pending trial when less socially disadvantaged persons can prepare their defence at liberty. ”

(UN Working Group on Arbitrary Detention)⁴⁸

Women often end up in pre-trial detention due to a lack of gender-specific alternatives, hindering equal access to non-custodial measures and making them more vulnerable to imprisonment. Usually the same criteria are applied to men and women in decisions relating to pre-trial detention. Even where non-custodial alternatives to pre-trial detention are in place, they tend not to be gender-sensitive. For example, where bail requires regular reporting to authorities, transport to the respective police station or court must be affordable and feasible for women, and not jeopardise their caretaking responsibilities.

What could monitoring bodies check?

- Are disaggregated statistics (gender, nationality etc) available in order to assess discriminatory application of pre-trial detention in comparison to bail and other alternatives?
- Are the available non-custodial alternatives to pre-trial detention gender-sensitive and age-appropriate?
- How much is the surety for bail and how is it calculated? Is the cost of a surety proportional to the alleged offence and does it avoid discrimination based on social status (wealth)?
- What are the alternatives for children (up to age 18)? Are they child-sensitive and which actors are involved in decision-taking?

3.11. Inadequate safeguards against corruption

The pre-trial phase of the criminal justice process is also particularly prone to corruption, as this stage of a criminal procedure is characterised by less scrutiny and a particular power imbalance between the arrestee and law enforcement officials.

“ Corrupt and malfunctioning criminal justice systems are a root cause of torture and ill-treatment of detainees, many of whom spend years in pre-trial detention on the basis of forced confessions, often for periods far exceeding their likely sentence. ”

(Special Rapporteur on Torture)⁴⁹

In many countries, arrest or freedom are dependent on a person's ability to pay bribes. Access to rights, such as notifying the family of the arrest or communicating with a lawyer, may also depend on bribe money. This risk is exacerbated if arrest and detention are not registered promptly and accurately.

Example: Indonesia

Abdul was 22 when he was arrested and detained in 2008 for buying a packet of marijuana. They stripped him and began beating him, offering to stop (...) if he paid them \$1,000. He was held without charge for the next 50 days, during which he was told that for another \$10,000 he could obtain release. Abdul's mother had to pay the police \$500 to prevent them from inflating the charge against her son. She then had to pay the prosecutors \$2,000 to have them reduce their sentence request. She also had to pay court officials a \$200 appointment fee so that her son could meet with the judge.⁵⁰

What could monitoring bodies check?

- What safeguards are in place to prevent corruption amongst police officers, prison staff and prison administrations?
- What are the consequences for law enforcement officials who withhold prisoners' rights in order to extort bribes from prisoners or their families?
- Does the prevailing system of salaries and wages make it more likely that officers may be susceptible to bribes?
- Do detainees have to pay to have access to services that should be provided free of charge (eg. healthcare)?

49. Statement by Manfred Nowak, Special Rapporteur on Torture at the 18th session of the Commission on Crime Prevention and Criminal Justice, 24 April 2009, Vienna. Available at: <http://www.unodc.org/unodc/en/frontpage/un-human-rights-rapporteur-denounces-torture.html> <accessed 30 September 2013>

50. Open Society Justice Initiative, *Pretrial Detention and Corruption* from The Global Campaign for Pre-trial Justice, October 2012.

- Is there an unofficial system of privileges among detainees?
- Do vulnerable groups or persons have to pay to access certain services, or are they treated equally to others?

4. What can monitoring bodies do?

Monitoring bodies should acknowledge the direct relevance of concerns relating to pre-trial detention for their mandate. They should seek to detect and address systemic deficiencies that contribute to excessive and prolonged use of pre-trial detention, and thereby to torture and ill-treatment.

In countries with a high ratio of pre-trial detainees, monitoring bodies may want to consider a comprehensive assessment and thematic report.

Various risk factors relevant to pre-trial detention relate to the broader administration of justice in a given country and to stakeholders beyond the prison administration, prison staff and ministries responsible for prisons. While interviews with detainees remain an important source of knowledge, an assessment of pre-trial detention will require information to be gathered from a multitude of stakeholders, some of them not traditionally interviewed by monitoring bodies. These may include Ministries of Justice, prosecutors, judges, magistrates, lawyers' associations, legal aid providers or trade unions of police officers and prison guards.

Penal Reform International and the Association for the Prevention of Torture (APT) would like to thank Andrea Huber for drafting this paper.

This paper has been produced under Penal Reform International's project *Strengthening Institutions and Building Civil Society Capacity to Combat Torture in 9 CIS Countries*, in partnership with the Association for the Prevention of Torture and with the financial assistance of the European Instrument for Democracy and Human Rights (EIDHR).

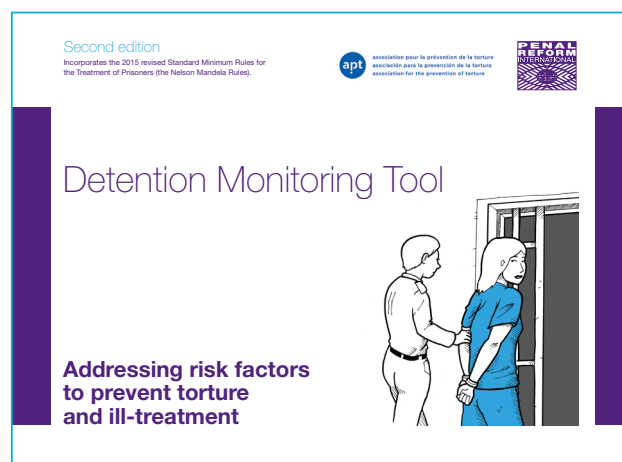
The reprint and update of this paper to incorporate the 2015 revised Standard Minimum Rules for the treatment of prisoners (the Nelson Mandela Rules) was made possible by the financial assistance of the UK Government.

The contents of this document are the sole responsibility of Penal Reform International and can in no circumstances be regarded as reflecting the position of the European Union or the UK Government.

Second edition © Penal Reform International 2015. First published in 2013.

This Factsheet is part of PRI/APT's Detention Monitoring Tool, which aims to provide analysis and practical guidance to help monitoring bodies, including National Preventive Mechanisms, to fulfil their preventive mandate as effectively as possible when visiting police facilities or prisons. All resources in the tool are also available online at www.penalreform.org and www.appt.ch.

This publication may be freely reviewed, abstracted, reproduced and translated, in part or in whole, but not for sale or for use in conjunction with commercial purposes. Any changes to the text of this publication must be approved by Penal Reform International. Due credit must be given to Penal Reform International and to this publication. Enquiries about reproduction or translation should be addressed to publications@penalreform.org.



Penal Reform International (PRI) is an independent non-governmental organisation that develops and promotes fair, effective and proportionate responses to criminal justice problems worldwide.

We promote alternatives to prison which support the rehabilitation of offenders, and promote the right of detainees to fair and humane treatment. We campaign for the prevention of torture and the abolition of the death penalty, and we work to ensure just and appropriate responses to children and women who come into contact with the law.

We currently have programmes in the Middle East and North Africa, Sub-Saharan Africa, Eastern Europe, Central Asia and the South Caucasus, and work with partners in South Asia.

To receive our monthly e-newsletter, please sign up at www.penalreform.org/keep-informed.

**Penal Reform International
Head Office**

60-62 Commercial Street
London E1 6LT
United Kingdom

Telephone: +44 (0) 20 7247 6515
Email: info@penalreform.org
Web: www.penalreform.org
Twitter: @PenalReformInt

**Association for the
Prevention of Torture**

PO Box 137
CH-1211 Geneva 19
Switzerland

Telephone: +41 (22) 919 21 70
Email: apt@apt.ch
Web: www.apt.ch
Twitter: @apt_geneva