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Fair Trial International EU Pre-trial detention

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I would like to start with a figure: roughly one in every four prisoners in Europe today is detained on remand - that is before final conviction. This is a consequence of the quasi systematic use of pre-trial detention in a number of European countries. This figure is confirmed by the Green Paper on detention, launched by the European Commission last June, which reveals that almost 25% of people held in EU prisons today are pre-trial detainees.

In the course of my work, I have always underlined that the pre-trial detention of persons suspected of an offence shall be the exception rather than the norm.

In this context, I would like to outline six aspects which require reflection and action.

(1) Respecting the principle of presumption of innocence

This is the basic rule. Pre-trial detainees have not been tried at all or are waiting for the review of an earlier sentence. As their guilt is not established, they are in principle to be regarded as innocent. Pre-trial detention should only be applied when it is absolutely necessary.

We have to bear in mind that pre-trial detention can have harsh consequences for the individuals concerned: pre-trial detainees may lose their jobs, be forced to sell their possessions, and be evicted from their homes. Even if the detainee in the end is found innocent, the mere fact that he or she has been in prison tends to be stigmatising. The principles of both the presumption of innocence and the presumption in favour of liberty are therefore of utmost importance.

(2) Avoiding long periods of pre-trial detention

Another concern is the duration of pre-trial detention. Some states have not established a legal maximum length of pre-trial detention. Others allow such detention for excessive periods such as up to four years. As a result, a person can spend years in prison without being tried, or can even be found not guilty after that. Examples of cases brought to the Strasbourg Court where pre-trial detention has lasted between four and six years are unfortunately not uncommon.

(3) Putting an end to ill-treatment

A recent study underlined that pre-trial detainees face a greater risk of torture. Systemic factors leading to torture and other ill-treatment of pre-trial detainees include malfunctioning and under-resourced criminal justice systems, inadequate detention facilities, and lack of safeguards, independent monitoring and complaint mechanisms.

(4) Improving prison conditions

I have witnessed first-hand that conditions in remand prisons in many cases are sub-standard. Overcrowding is common and often even the basic rule that pre-trial detainees should be kept separate from convicts is not respected. The situation of these detainees is further aggravated by the indeterminate duration of their detention and uncertainty about the outcome of the proceedings.

(5) Developing alternatives to the pre-trial detention

It is surprising that governments have not done more to circumvent the use of pre-trial detention in spite of the fact that the prison system is both expensive and overburdened in many European countries. There are more humane and effective alternatives to pre-trial detention which would be suitable in many cases. Too little use has been made of non-custodial supervision measures, such as house arrest or release on bail.

(6) Paying attention to vulnerable groups

Another point that needs particular mention is how the system of pre-trial detention works in reality vis-à-vis members of particularly vulnerable groups such as juvenile offenders or migrants. Non-nationals represent 21% of the EU's prison population. They are more likely to be detained than nationals because they are seen as a greater flight risk than national defendants.

The Council of Europe has developed some useful standards in this area. The most important instrument is the Recommendation (2006)¹³ of the Committee of Ministers to member states on the use of remand in custody. This text contains detailed rules on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse. The Recommendation emphasises the particular need to ensure that persons remanded in custody are able to prepare their defence and to maintain their family relationships, and that they are also not held in conditions incompatible with their legal status, which is based on the presumption of innocence.

The work of the European Committee for the Prevention of Torture (CPT), which has unrestricted access to all places of detention, has reinforced these standards. Its aim is to improve the protection of persons deprived of their liberty and prevent incidents of torture from taking place.

The case-law of the European Court of Human Rights is also of particular importance. Article 5 of the European Convention on Human Rights states that prolonged pre-trial detention must be regularly reviewed and will only be justifiable in exceptional circumstances. The factors laid down in the case-law on Article 5 include the need to preserve evidence, protect witnesses and ensure the accused does not abscond. Moreover, pre-trial detention should be ordered by a judicial authority after a critical assessment of the absolute need for such a decision – and the reasons should be spelled out. I know that this is not always respected in reality. I have seen in several

countries that court decisions do not always provide sufficient information as to the reasons justifying the detention.

In numerous judgments the European Court found violations of Article 5 of the Convention, notably on account of unlawful detention and excessive length of pre-trial detention. There is still a continuous flow of similar applications to the Court. About 11% of the Court's violation judgments relate to Article 5.

When reforming their criminal justice systems, European states should pay attention and give effect to these standards. In particular, judgments issued by the European Court may have important consequences on the architecture of the justice system.

Let me conclude by underlining what states should do in order to tackle the problems revealed by the Court's judgments – they should:

- ensure a clear legislative framework governing pre-trial detention;
- ensure that adequate alternatives to deprivation of liberty are provided by the legislation and that these alternatives are duly considered before resorting to deprivation of liberty;
- implement domestic legislation in line with the Convention requirements and with due account to the Court's case-law, in particular with regard to relevant and sufficient reasons for ordering pre-trial detention and for its extension;
- ensure judicial review of the lawfulness and length of pre-trial detention in respect of every person detained on remand.

This would be a first step towards reducing the use of pre-trial detention in Europe today.