



The FIACAT's position paper on abusive pre-trial detention

1. What is pre-trial detention?

The Luanda Guidelines of the African Commission on Human and Peoples' Rights¹ define pre-trial detention as "*the period of detention ordered by a judicial authority pending trial*". It is therefore the deprivation of liberty of a person suspected of having committed a misdemeanour or a crime, before he or she has been tried.

It should be recalled that the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) protect the right to liberty and security of the person² and the presumption of innocence³. Pre-trial detention applies to a person presumed innocent and represents a violation of his or her right to liberty and security - it is therefore an exceptional measure⁴ of "last resort"⁵ that must be strictly regulated. It can only be decided and implemented in cases previously determined by law, if necessary and in the absence of any other alternative. In order to be legal, pre-trial detention must also respect the procedural safeguards surrounding it. These safeguards relate, in particular, to the competence of the authority ordering detention, the motivation of the detention and the legal time limits to be respected.

2. When does pre-trial detention become abusive?

Pre-trial detention becomes abusive when the rules governing it are not or no longer complied with, in particular when: legal time limits are not respected, orders are adopted outside the grounds provided for by law, court decisions (ordering detention or the prolongation of detention) are not motivated, the authority that took the decision is not competent, or the person concerned has not been notified of the decision. The rules surrounding pre-trial detention vary from State to State, so cases of abusive pre-trial detention will also vary from State to State.

In a cooperative approach with the authorities and in accordance with national procedures and local practice, the FIACAT retains a certain amount of flexibility with regards to the terminology used to describe pre-trial detention as abusive, as long as it is understood that there is a violation

¹ [Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa](#) (Luanda Guidelines) adopted by the African Commission on Human and Peoples' Rights at its 55th ordinary session in Luanda, Angola, 28 April to 12 May 2014.

² Article 3 of the [UDHR](#) "*Everyone has the right to life, liberty and security of person.*" and article 9 of the [ICCPR](#) "*1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. 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, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*"

³ Article 11§1 of the [UDHR](#) "*(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.*" And Article 14 § 2 of the [ICCPR](#) "*2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*"

⁴ Article 9 of the [ICCPR](#) "*It shall not be the general rule that persons awaiting trial shall be detained in custody*"

⁵ [United Nations Standard Minimum Rules for Non-custodial Measures \(The Tokyo Rules\)](#), Resolution 45/110 of 14 December 1990

of the rules that govern pre-trial detention. Thus, it can be described as "unjustified", "abusive", "unlawful", "arbitrary", etc., adjectives whose definitions may, to a certain extent, overlap. The FIACAT is aware that these terms are not synonymous and for the sake of greater clarity, it nevertheless wishes to define each of them:

- Unlawful detention: Detention which is contrary to the law, i.e. national law (jurisdiction, motivation, time limit, etc.) and which entitles the person to release and reparation in accordance with Article 9(4) and (5) of the ICCPR.
- Arbitrary detention: Detention whether or not in accordance with national law, which is contrary to international human rights obligations and commitments, in particular Article 9 of the ICCPR⁶.
- Unjustified detention: Detention that is not properly motivated, i.e. outside the grounds for pre-trial detention or in the absence of motivation.
- Abusive detention: Detention that goes beyond the framework provided by law and/or is used in a systematic manner, thus undermining the principle of the presumption of innocence.

3. In what way does this issue fall within the FIACAT's mandate?

Monitoring the treatment of people arrested, detained or imprisoned is an integral part of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)⁷.

Furthermore, abusive pre-trial detention is intrinsically linked to dysfunction in the administration of justice, such as the lack of independence of the judicial system, the lack of qualified and ongoing training of staff, systemic corruption, lack of resources and insufficient rights of defence, including difficulty of access to a lawyer. It also stems from a lack of synergy between actors in the criminal justice chain.

Moreover, the effects of abusive pre-trial detention contribute to an overburdening of criminal justice systems, and thus lead to severe prison overcrowding. Prison overcrowding contravenes the right of prisoners to be treated with humanity and respect for the inherent dignity of the human person, as protected by Article 10(1) of the ICCPR. Due to the deplorable material conditions in which detainees are forced to live⁸, many international and regional mechanisms recognise that prison overcrowding leads to a violation of the right to not be subjected to torture or cruel, inhuman or degrading treatment or punishment.

⁶ Thus, in its [General comment n°35 on article 9 of the ICCPR](#), the Human Rights Committee explains “*An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.*”

⁷ Article 11 of the [UNCAT](#) “*Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.*”

Article 16 of the [UNCAT](#) “*Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.*”

⁸ [Report of the High Commissioner for Human Rights on Human rights implication of overincarceration and overcrowding](#), A/HRC/30/19 para 4, 15 and 16

Finally, abusive pre-trial detention has profound socio-economic impacts on detainees, their families and communities.

4. How does the FIACAT propose to fight against abusive pre-trial detention?

The FIACAT and the ACATs are involved in the monitoring of places of detention. They are committed to bringing cases of abusive pre-trial detention to the attention of the competent authorities. In addition, they promote and monitor the implementation of States' obligations under international and regional law, and encourage States to honour the commitments that they have made before international and regional organisations for the promotion and protection of human rights. These actions focus on two main aspects.

a) Controlling the use of pre-trial detention

Persons who are subject to pre-trial detention, or orders for the extension of their pre-trial detention, have the right to challenge the lawfulness of their detention at any time and may seek their immediate release in the event of an unlawful detention⁹. The FIACAT and the ACATs strive to ensure that the adage "liberty is the rule, detention the exception" is respected. To this end, they ensure compliance with the rules governing pre-trial detention by interviewing detainees awaiting trial, to make sure that the procedure and time limits have been respected. If this is not the case, the ACAT's referring lawyers intervene to rectify the situation and obtain a court decision. This court decision may even lead to the release of the detainee, either provisionally or de jure.

The FIACAT and the ACATs also advocate for a revision of national legislation before the competent authorities in order to incorporate international norms and standards, improve synergy between the actors of the penal chain, and for the introduction of alternative measures to detention (such as judicial control, house arrest, electronic bracelets, etc.) that are intended to end the systematic use of pre-trial detention.

b) Specific conditions of detention for detainees awaiting trial

Beyond the judicial procedure, which must strictly regulate the use of pre-trial detention and its execution, the binding provisions of the International Covenant on Civil and Political Rights, the Nelson Mandela Rules¹⁰ and the Luanda Guidelines provide that specific conditions of detention must apply to detainees awaiting trial. Within the framework of their actions, the FIACAT and the ACATs therefore ensure that these provisions are respected.

These instruments stipulate, among other things, that detainees awaiting trial must be held in detention centres recognised as such, and as close as possible to their homes or communities. Pre-trial detainees must be separated from convicted prisoners, just as women must be separated from men, and adults from minors¹¹. They should also be informed of the availability of legal services, be able to communicate regularly with their lawyer in a confidential manner and be able to contact and receive visits from their family and relatives. They should also have access to recreational services, vocational training and fairly paid work.

⁹ Article 9 paragraph 4 of the [ICCPR](#) "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

¹⁰ [Revised Standard Minimum Rules for the Treatment of Prisoners](#) (The Nelson Mandela Rules), adopted by the United Nations General Assembly on 17th December 2016

¹¹ Article 10 paragraph 2 and 3 of the [ICCPR](#) "2) (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status."